NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 11-7120

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN B. LESESNE,
APPELLANT,

V.

JOHN DOE, OFFICER, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, AND HENRY R. LESANSKY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—Plaintiff below and appellant here is John B. Lesesne. Defendants named in the complaint who appeared below are Health Services Administrator Henry R. Lesansky, the Department of Corrections of the District of Columbia, and the District of Columbia. Officers John Doe and Captain David Holmes were named as defendants in the complaint but were not served and did not appear below. The notice of appeal lists only the District of Columbia Department of Corrections as an appellee. This Court appointed Sean Andrussier as *amicus curiae* in support of the appellant.

B. *Ruling under review*.—Lesesne appeals from the district court's September 30, 2011, unpublished order (Wilkins, J.) dismissing the case.

C. *Related cases*.—This case has not been before this Court or any other court except the court below. Government counsel is not aware of any related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Rules

GLOSSARY

Amicus Br.	Amicus Curiae Brief
JA	Joint Appendix
MPD	Metropolitan Police Department
PBr.	Plaintiff's *pro se* brief on appeal filed December 5, 2011
P.G. Hospital	Prince George's Hospital Center
PLRA	Prison Litigation Reform Act
RD	Record Document

JURISDICTIONAL STATEMENT

The district court had jurisdiction of plaintiff's constitutional claim under 28 U.S.C. §§ 1331 and 1343(a)(3) and supplemental jurisdiction over his common-law claim under 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1291. Plaintiff timely noted an appeal on October 17, 2011, from the September 30, 2011, final judgment.

STATEMENT OF THE ISSUES

1. Although the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") applies only to a plaintiff imprisoned at the time he files his lawsuit, did the plaintiff's failure to contest that the PLRA applied to his suit in response to the defendants' invocation of the PLRA, which led the district court to apply the PLRA in dismissing the suit, forfeit any objections to its application?

2. Should the Court affirm the district court's decision dismissing plaintiff's local-law claim because plaintiff has abandoned that claim on appeal and, in any event, he failed to state an actionable local-law claim and failed to comply with the District of Columbia's notice-of-claim requirement under D.C. Code § 12-309?

STATEMENT OF THE CASE

Pro se plaintiff John Lesesne filed this action challenging his medical treatment and conditions of confinement while confined by the District's Department of Corrections in two different hospitals and at the District of Columbia Jail. The district

court (Wilkins, J.) granted summary judgment on the constitutional claims based on plaintiff's failure to exhaust administrative remedies as required by the PLRA, 42 U.S.C. § 1997e(a), and dismissed his common law claim for failure to state a claim. Joint Appendix ("JA") 126.

STATEMENT OF FACTS

1. The Allegations.

Plaintiff's version of the facts is gleaned from his complaint, his opposition to the District's dispositive motion in the district court, his proposed amended complaint, and related filings. *See Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004) (construing together *pro se* plaintiff's complaint and response to motion to dismiss).

Plaintiff was shot in the lower abdomen during an altercation in the community on March 30, 2008, and, as a result, suffered neurological damage to his leg. Complaint ¶¶ 10, 12, 18, JA10. A District of Columbia ambulance transported him to Prince George's Hospital Center ("P.G. Hospital") for treatment, where he had surgery. Complaint ¶¶ 11-12, JA10; Record Document ("RD") 13 at 7. He was under arrest, in the custody of the Metropolitan Police Department ("MPD"), and two MPD officers initially guarded him at the hospital 24 hours a day and kept his wrist and damaged leg cuffed to his bed. Complaint ¶¶ 13-14, JA10. Within 48 hours, he was placed in the pretrial custody of the Department of Corrections and, thereafter, two

armed correctional officers guarded him at the hospital and continued cuffing his wrist and the ankle of his damaged leg. Complaint ¶¶ 15-16, JA10.

Due to the neurological damage to plaintiff's leg, doctors prescribed physical and occupational therapies, including that plaintiff walk the hallway in the hospital. Complaint ¶¶ 18-19, JA 10-11. The correctional officers guarding him at the hospital refused to allow him to perform such therapy, even after the prescribed medical treatment was faxed to Department of Corrections administrators. Complaint ¶ 20, JA11. Despite knowledge of the neurological injury and the prescribed physical therapy, the officers kept him in cuffs, restraining movement of his injured leg, and denied him the prescribed therapy. RD 13 at 9.[1]

On April 8, 2008, the hospital discharged plaintiff to the custody of the Department of Corrections. Complaint ¶ 21, JA11. In the hospital parking lot, he was required to walk in full restraints from a wheelchair to the transport wagon. Complaint ¶ 21, JA12; RD 13 at 9-10. In his subsequent proposed amended complaint, plaintiff claimed he was "sadistically" forced to walk in cuffs to the transport "parked on [the] other side of parking lot." JA 76. As Corrections personnel attempted to lift him into the wagon, plaintiff fell; he was then placed in a police cruiser and driven to the District's Jail, where he was taken to the infirmary. JA 76-77.

[1] The District argued that there were legitimate penological and safety reasons for not allowing plaintiff to walk the hospital hallways, and asserted that plaintiff had been permitted to walk around his room. RD 14 at 5; RD 23 at 4.

During transport and upon arrival at the Jail, however, plaintiff had suffered a pulmonary embolism and exhibited signs of cardiac arrest, so he was immediately taken from the Jail to the Greater Southeast Community Hospital. Complaint ¶ 21, JA 11; JA 54, 77. At that hospital, Corrections personnel continued to guard him and cuff his damaged leg despite knowledge of the neurological damage. Complaint ¶ 21, JA 11.

Plaintiff was discharged from Greater Southeast on April 21, 2008, and transferred again to the Jail. Complaint ¶ 22, JA11-12. Jail personnel deliberately failed to provide medical treatment as prescribed by the hospital personnel. Complaint ¶ 22, JA 11-12. Specifically, Jail personnel did not give him prescribed medications, including an anticoagulant, or change his bandages or clean his gunshot wound and surgical incision, so his wounds became infected. Complaint ¶ 23, JA 12. As a result of the defendants' actions, he suffered from muscular atrophy, pulmonary embolisms, and a severe staph infection. Proposed Amended Complaint ¶ 70, JA 84.

Plaintiff was released from the Jail on pre-trial release on April 25, 2008. Complaint ¶¶ 23-24, JA 12; RD 28 at 3, 8; RD 28-1 at 2 ¶ 7, JA 100.[2]

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[2] According to the record, plaintiff was re-incarcerated at the Jail by October 8, 2010, when he mailed a motion asking for a temporary stay of proceedings until his release. He later informed the court of his October 26, 2010, release. RD 16, 21.

2. Proceedings Below.

Plaintiff filed his *pro se* complaint in this action on March 30, 2010. JA 7. In his complaint, plaintiff alleged that the District of Columbia and its Department of Corrections agents were deliberately indifferent to his serious medical needs and allowed the wanton infliction of pain, in violation of his rights under the Eighth Amendment and the Due Process Clause of the Constitution. Complaint ¶¶ 27-31, 34-35, JA 13-15.[3] He claimed he suffered long-term and permanent injuries as a result of the actions and inactions of Department of Corrections personnel. Complaint ¶ 25, JA 12. Plaintiff also claimed "intentional infliction of pain and emotional distress" under the common law. Complaint ¶¶ 36-42, JA16-18. Plaintiff also fleetingly claimed that unnamed officers deprived him of his Fourth Amendment right to be free from unreasonable seizures and excessive force, and detained him without due process, apparently because he was, allegedly, not timely arraigned. Complaint ¶¶ 24, 32, JA 12, 14; Proposed Amended Complaint ¶ 59, JA 81.

[3] Although Lesesne also invoked the Fourteenth Amendment, that amendment does not apply directly to the District. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

Plaintiff named as defendants the District of Columbia, its Department of Corrections, Health Services Administrator Henry Lesansky, Captain David Holmes, and Officers John Doe, all in their individual capacities. JA 7, 9.[4]

Plaintiff filed a form application to proceed without prepayment of fees in which he checked "No" in response to the question, "Are you currently incarcerated?" JA 20. The district court granted that application. JA 2.

The District and Mr. Lesansky (collectively hereafter, "the District") moved to dismiss or, in the alternative, for summary judgment arguing, *inter alia*, that plaintiff's constitutional claims were barred because plaintiff had failed to exhaust his available administrative remedies at the Jail, as required by the PLRA, 42 U.S.C. § 1997e(a). RD 9 at 21-24. The District submitted the Department of Corrections Program Statement establishing Inmate Grievance Procedures as well as the affidavit of a Corrections official attesting that plaintiff did not submit any grievance appeal in 2008. JA 31, 33.

The District further argued that plaintiff's common-law claims are barred by D.C. Code § 12-309, which requires pre-suit notice "of the approximate time, place, cause, and circumstances of the injury or damage" for certain claims, because his

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[4] The Department of Corrections is a *non sui juris* subordinate government agency. D.C. Code § 24-211.01; *Agbaraji v. Aldridge*, 836 A.2d 567, 569 n.1 (D.C. 2003). The District construes the complaint against the Department as a complaint against the District itself, which was named in the complaint and appeared below.

letter purportedly providing the necessary notice did not identify where the incidents causing his injuries occurred and did not identify the specific date that he was "cuffed for the entirety of a 24 hour day." RD 9 at 15-19; JA 25; RD 14 at 5-6. In any event, the District argued, the complaint failed to state an actionable claim of intentional infliction of emotional distress. RD 14 at 7.

Plaintiff filed a lengthy opposition to the motion, arguing, *inter alia*, that he had filed an adequate § 12-309 notice. RD 13 at 9. He further argued that he had adequately stated constitutional and common-law claims. RD 13 at 7, 9-11. His opposition included details about his confinement not contained in the complaint, for example that the officers kept him in cuffs restraining movement of his injured leg, and denied him his prescribed therapy, despite knowledge of his neurological injury and the prescribed physical therapy. RD 13 at 9. He did not contest that the PLRA applied to his suit, but argued that "special circumstances" justified his failure to exhaust administrative remedies. RD 13 at 3. These supposedly special circumstances were that his administrative remedy was "non-existent" because the grievance forms were not available to him when he was receiving medical treatment outside the Jail, especially considering that he was sedated and in intensive care, and the forms were not even available to him after his transfer to the Jail since, before his release from the Jail, he was at court every day during business hours. RD 13 at 3, 13.

Plaintiff moved to file an amended complaint and lodged the proposed amended complaint with the court. JA 3, 67. The amended complaint added some factual details, for example that, at the hospital, corrections officials kept his wrist and ankle cuffed 24 hours a day "without consideration for eating, relieving himself, or affecting hygiene," and defendants denied him his prescribed physical therapy thereby causing a post-operative pulmonary embolism. JA 72-73. He also elaborated about his fall in the parking lot, alleging that he was "sadistically" forced to walk in wrist, waist, and ankle cuffs to the transport "parked on [the] other side of parking lot," despite officers' knowledge of his weakened state and despite a medical order to transfer him in a wheelchair. JA 76. Plaintiff also alleged that he asked for grievance forms, apparently at the Jail, but no form was provided by Corrections personnel. JA 80. The proposed amended complaint did not list any local-law claim, as had the initial complaint. JA 67-89.

The District opposed plaintiff's request to file an amended complaint, asserting that the proposed amended complaint suffered from the same defects as the initial complaint. RD 23.

The court issued an order for defendants to address plaintiff's allegation of practical inability to file a grievance, and whether there was a "special circumstances" exception to the exhaustion requirement. JA 97.

In his reply to the District's opposition to his motion to file an amended complaint, filed on the same day as the court's order, plaintiff argued that exhaustion is not required under the PLRA when a prisoner cannot exhaust because he is transferred or otherwise absent from a correctional institution. RD 25 at 3-4. He claimed that exhaustion was not required for a prisoner who was "first hospitalized, then involved in hearings, then transferred during the 15 days he had to file a grievance." RD 25 at 3-4.

In response to the court's order, the District argued that there were no special circumstances here because plaintiff had access to administrative remedies at the Jail. RD 28. First, the alleged failure to provide plaintiff a grievance form did not excuse his failure to exhaust administrative remedies because inmates are not required to use the pre-printed form but may use plain paper. RD 28 at 2-3. The Inmate Grievance Procedures provide that if the printed form "cannot be obtained, an inmate . . . may submit his . . . grievance on standard, letter size paper." JA 38; RD 28 at 3. Second, plaintiff had an adequate opportunity to file a grievance at the Jail even if he was at court everyday during business hours. RD 28 at 3. The District submitted an affidavit from the grievance coordinator at the Jail explaining that plaintiff had access to the inmate grievance box on his unit at the Jail, and had about an hour's opportunity to put a grievance in that box each evening after he returned from court on April 22 and 23, about six hours to do so on April 24,and about thirteen minutes to do so on April 25,

between his return from court and his release. JA 101-02; RD 28 at 3-4. Third, plaintiff had submitted a sick call request on April 24, requesting to be seen by a doctor, demonstrating he had access to paper and could have submitted a grievance, because the sick call box and grievance box are in close proximity and the procedures are nearly identical. JA 100-01; RD 28 at 4.

Accordingly, the District argued, a first-step grievance had been available to plaintiff but he had failed to take the opportunity to use it. Plaintiff had failed to exhaust "such administrative remedies as are available" under the PLRA, 42 U.S.C. § 1997e(a). RD 28 at 4-5. The District asserted that plaintiff was not "required to exhaust all of the [appellate] steps of the inmate grievance procedure," because "the steps beyond the first steps were not 'available' to plaintiff because [he] was released before he would have [had] the opportunity to further pursue a grievance." RD 28 at 4. "However, plaintiff could have filed an inmate grievance during his four days at the D.C. Jail, but failed to do so." RD 28 at 4. Accordingly, there were no special circumstances excusing plaintiff's failure to comply with the PLRA. RD 28 at 5-6.

Plaintiff responded that there were disputed facts because the grievance coordinator's affidavit "misrepresents the fact that intake units are lock-down units restricting movement." JA 111. Further, he argued that he had to file a sick call slip requesting medical treatment before he could file a grievance about the denial of such treatment. JA 110.

The court granted summary judgment on plaintiff's federal claims for failure to exhaust available administrative remedies as required by the PLRA, noting that plaintiff was able to access and file sick call forms while he was at the Jail, and therefore could have filed an inmate grievance. JA 126. The court dismissed the local-law claim of intentional infliction of emotional distress under Fed. R. Civ. P. 12(b)(6) because there was no showing that prison officials acted in a manner sufficiently extreme or outrageous to satisfy this claim. JA 126. The court denied leave to file an amended complaint because the proposed amendment was futile as it had the same defects as the initial complaint. A39.

3. Proceedings In This Court.

Plaintiff filed a 22-page *pro se* brief in this Court December 5, 2011, ("PBr.") and a motion to vacate the judgment below on December 21, 2011. The Court deferred consideration of the motion to vacate pending briefing. January 3, 2012 Order. Plaintiff filed a subsequent amended motion to vacate on January 23, 2012.

In his brief, plaintiff listed as an issue whether the district court validly dismissed his claim for intentional infliction of emotional distress, PBr. 8, but he did not develop any argument in support of this issue.

The District filed a brief arguing that the Court should affirm dismissal of the federal claims for failure to exhaust administrative remedies under the PLRA, and should dismiss the local-law claims either because plaintiff had forfeited those claims

or because he failed to state a claim and/or failed to file an adequate § 12-309 letter. March 12, 2012, Brief for District of Columbia Appellees, at 13-23. The District noted in a footnote in its brief that, in cases in which the issue has been properly raised, some courts have held that the PLRA exhaustion requirement does not apply to a plaintiff who is no longer "confined in any jail, prison, or other correctional facility" at the time the action is "brought." *Id.* at 16 n.7. The District noted that the record reflects that plaintiff was released pretrial from the Jail on April 25, 2008, but did not show whether he was released to the community or another correctional facility such as a halfway house. *Id.* Moreover, plaintiff had not argued that the PLRA does not apply to this case by reason of his release from the Jail and had therefore forfeited the argument. *Id.* This was especially so here considering that the exhaustion issue was decided on summary judgment, and plaintiff failed to raise the issue or make the necessary factual record as to his confinement status when he filed his complaint. *Id.*

The Court then appointed an *amicus curiae* "to present arguments in favor of the appellant," July 12, 2012 Order, and set the case for re-briefing. "Although not otherwise limited, the parties and amicus curiae are directed to address in their briefs whether a person no longer incarcerated must exhaust administrative remedies pursuant to the [PLRA], prior to filing a complaint relating to the conditions of incarceration." July 12, 2012, Order. The Court referred plaintiff's motions to vacate

to the merits panel. One judge noted that she would refer to the merits panel only plaintiff's constitutional claims. July 12, 2012, Order.

In an October 3, 2012, filing, plaintiff indicated that he would adopt *amicus curiae*'s brief in this Court, which was filed on November 6, 2012.

STANDARD OF REVIEW

The Court reviews grants of summary judgment and dismissals for failure to state a claim *de novo*. *Douglas v. Donovan*, 559 F.3d 549, 551 (D.C. Cir. 2009); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009). The question of whether plaintiff's notice to the District complied with D.C. Code § 12-309 is one of law reviewed *de novo*. *Wharton v. District of Columbia*, 666 A.2d 1227, 1230 (D.C. 1995).

SUMMARY OF ARGUMENT

1. The District of Columbia agrees with the *amicus curiae* that the PLRA exhaustion requirement does not apply to a plaintiff who is not a prisoner at the time he files his lawsuit. Nevertheless, the Court should affirm the judgment below because plaintiff forfeited any argument that the exhaustion requirement did not apply to him by not raising it below. Plaintiff similarly forfeited related arguments that he had no available grievance remedy under the circumstances of his confinement and release by not raising them below.

The District carried the initial responsibility to inform the district court of the basis for its summary judgment motion, and to raise the defense of PLRA exhaustion, and did so here. But the burden then shifted to plaintiff to demonstrate why the District was not entitled to judgment, either because there was a defect in the District's legal reasoning or a material disputed fact. It is well-settled that issues and legal theories not asserted at the district court level ordinarily will not be heard on appeal. This rule applies with equal force to *pro se* litigants. Here, plaintiff simply did not raise the issues below that he now pursues on appeal. It is of no moment that the application to proceed without payment of costs reflected that plaintiff was not incarcerated. The burden was on plaintiff to bring that fact to the court's attention, and not require the court to root around in the record for relevant facts.

There are no exceptional circumstances here requiring waiver from this forfeiture rule. A party's failure to pursue one of several available lines of argument does not present exceptional circumstances, even when the party is *pro se*.

2. Plaintiff has forfeited any local-law claim because he does not develop any argument concerning that claim in his brief. Moreover, the local-law claim is omitted from his proposed amended complaint below.

In any event, the district court properly dismissed the local-law claim for failure to state a claim. The tort of intentional infliction of emotional distress requires a showing of conduct "so outrageous in character, and so extreme in degree, as to go

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." The alleged facts here—keeping plaintiff cuffed to a hospital bed for security purposes, accidently allowing him to fall while transferring him from a wheelchair to a transport vehicle, and failing to change his bandages and administer medication at the Jail—are not sufficiently outrageous to state such a claim.

In addition, dismissal of the local-law claim was proper based on plaintiff's failure to comply with the mandatory notice provisions of D.C. Code § 12-309. Plaintiff's notice-of-claim letter here failed to provide notice of the approximate time or place of the injury, but rather refers generally to a "period of incarceration" in hospitals and the Jail over a month-long timeframe, and fails to explain the specific date or location of any particular incident. Under binding precedent, it is insufficient.

ARGUMENT

I. The Court Should Affirm The Judgment On The Federal Claims Because Plaintiff Forfeited Any Objection To Application Of The PLRA That He Makes On Appeal.

The District agrees with plaintiff and *amicus curiae*, whose brief plaintiff adopts, that the PLRA exhaustion requirement applies only to people who are incarcerated at the time they file suit. As *amicus* explains, both the language of the exhaustion requirement under 42 U.S.C. § 1997e(a) (applicable to an "action" "brought . . . by a prisoner confined in any jail, prison, or other correctional facility")

and the legislative history show that the law applies only to prisoners confined when they file their complaint. Amicus Curiae Brief ("Amicus Br.") 17-27.

Nevertheless, the Court should affirm the district court's decision dismissing the federal claims for failure to exhaust under the PLRA because plaintiff did not preserve the objections to that decision he makes on appeal. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal."); *Gaviria v. Reynolds*, 476 F.3d 940, 946 (D.C. Cir. 2007) (applying *Air Florida* to *pro se* litigant's constitutional claim); *Horowitz v. Peace Corps*, 428 F.3d 271, 282 (D.C. Cir. 2005) (same).

Here, the District filed its motion to dismiss or for summary affirmance, raising the defense of failure to exhaust under the PLRA and attaching the Department of Corrections grievance procedures and an affidavit from an official that plaintiff had not filed any grievance appeal. JA 31, 33. In response to the court's request for further briefing, the District submitted another affidavit that plaintiff had not filed any grievance. JA 99. The District's filings triggered plaintiff's burden to answer with his own legal arguments and supporting evidence. Plaintiff did not meet that obligation.

The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record and affidavits, if any, entitling it to judgment. *Celotex Corp. v. Catrett*,

477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c). The District did so here by filing its motion raising the defense of PLRA exhaustion and the supplemental briefing requested by the court, and submitting both the grievance procedures and the affidavit that Lesesne had not filed any grievance. JA 22, 33, 99.

The burden then shifted to plaintiff to demonstrate why the District was not entitled to judgment, either because there was a key fact defeating the District's position, such as that he was not incarcerated, or a flaw in the District's legal reasoning. *Celotex*, 477 U.S. at 324; *Bush v. District of Columbia*, 595 F.3d 384, 386 (D.C. Cir. 2010); *Air Florida, Inc.*, 750 F.2d at 1078; *see* Fed. R. Civ. P. 56(e). "It will not suffice to make that argument for the first time on appeal." *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). Although "review of the grant of summary judgment is *de novo*, this [C]ourt reviews only those arguments that were made in the district court, absent exceptional circumstances." *Id.* at 547. Plaintiff here thus could not wait until briefing on appeal (much less the second round of briefing) to raise relevant facts and legal arguments. Had plaintiff timely raised the issue, he would have given the district court fair opportunity to consider it; instead, the district court apparently took as conceded that the PLRA applied to the suit. JA 97, 126.

It is true that plaintiff's application to proceed without prepayment of costs filed with his initial complaint had noted that he was not then incarcerated. JA 20. But

plaintiff failed to bring that fact to the district court's attention when opposing summary judgment and did not make the legal argument that the PLRA did not apply to him for this reason. The burden was on plaintiff to raise the issue and bring the relevant facts to the court's attention because "judges 'are not like pigs, hunting for truffles buried in briefs' or the record." *Potter*, 558 F.3d at 553 (Williams, J., concurring) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). "To avert the need for such digging" and hunting, the district court's Local Rule 7(h) requires that an opposition to a summary judgment motion must include a "concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement." *Id.* at 552-53. Plaintiff failed to comply with Local Rule 7(h), or otherwise draw to the court's attention that he was not incarcerated when he filed suit and the PLRA did not apply for that reason.

It is also true, as *amicus curiae* explains, that this Court can forgive forfeitures in particular when necessary to ensure that a statute is properly construed on an antecedent and dispositive point. Amicus Br. 29-32. But that does not aid plaintiff, because his forfeiture went to an antecedent *factual* issue. The district court had no need to consider whether the PLRA is properly applied to those no longer incarcerated because he never argued that it should not apply because he was not incarcerated.

Plaintiff also forfeited, by not raising them below, the related claims raised for the first time on appeal that he had no "available" administrative remedies to exhaust because of issues related to the 15 day timeframe for filing grievances at the Jail. Amicus Br. 32-40; *see* 42 U.S.C. § 1997(e) ("No action shall be brought ... until such administrative remedies *as are available* are exhausted" (emphasis added)); *Malik v. District of Columbia*, 574 F.3d 781, 785 (D.C. Cir. 2009) (the PLRA exhaustion requirement does not apply in a case where there is no administrative process to exhaust). Plaintiff claims he had no available administrative remedy for his grievance concerning his treatment at P.G. Hospital because more than 15 days had lapsed between the onset of his claim there and his transfer to the Jail (where the grievance procedure applied). Amicus Br. 34-36; JA 33, 39 (inmate grievance procedures apply to persons housed in correctional facilities operated under the authority of the Department of Corrections; grievances must be filed within 15 days of the incident precipitating the grievance). He further claims that the grievance procedure was not fully available to him at the Jail for any grievance because he was released less than 15 days after his transfer there. Amicus Br. 36-41.

The closest plaintiff came to this argument was in his reply to the District's opposition to his motion to file an amended complaint, in which he argued that exhaustion is not required under the PLRA when a prisoner cannot exhaust because he is transferred or otherwise absent from the correctional institution. RD 25 at 3-4. He

did not clearly raise the issue then, but even assuming he did, he failed to do so at the appropriate time: in opposition to the District's motion for summary judgment, or at least in his motion to file an amended complaint.

The Court in its discretion may choose not to apply the forfeiture rule in "exceptional circumstances." *Flynn v. Comm'r*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001). A party's failure to pursue one of several available lines of argument does not, however, present exceptional circumstances. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004). Nor is plaintiff's *pro se* status such an exceptional circumstance. "At least where a litigant is seeking a monetary award," as here, the litigant's *pro se* status does not "necessarily justif[y] special consideration." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983). "While . . . a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." *Id.* at 1194; *see also Horowitz v. Peace Corps*, 428 F.3d at 282 (finding no compelling reason why *pro se* litigant did not present issues regarding constitutional claim in district court, and therefore disallowing those claims on appeal); *Hall v. Clinton*, 285

F.3d 74, 83 n.8 (D.C. Cir. 2002) (noting that Court was "precluded from considering" assertion that *pro se* litigant did not raise below).[5]

The Court should affirm the judgment as to the federal claims based on plaintiff's forfeiture of the arguments he raises on appeal.[6]

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[5] In his original *pro se* brief, plaintiff renewed the argument made below that he could not file a grievance at the Jail because he was absent at court hearings and unable to use the grievance system. PBr. 14-15. Plaintiff does not pursue this specific argument in the current briefing and has therefore abandoned it. In any event, this argument fails because, as the district court explained, "the undisputed evidence shows that Plaintiff was able to access and file sick call forms [while he was confined to the Jail], and thus he could have filed an inmate grievance but failed to do so." JA 126.

[6] Plaintiff has also abandoned his Fourth Amendment claim. He did not mention that claim in his *pro se* brief and indeed stated that he was "held under probable cause." PBr. 14. *Amicus curiae* does not reference any Fourth Amendment claim. In any event, the record is devoid of factual allegations sufficient to support a Fourth Amendment claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Even "a *pro se* complainant must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct.'" *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 682 (D.C. Cir. 2009) (quoting *Iqbal*). "[B]ald assertions" and "legal conclusions" are insufficient. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

Further, the record below reflects that plaintiff pleaded guilty to a criminal offense in the criminal case against him. RD 23 at 7. Thus, he has no Fourth Amendment claim concerning his arrest and detention under *Heck v. Humphrey*, 512 U.S. 477 (1994) (prohibiting an individual from recovering damages in a civil rights action for an allegedly unlawful conviction or confinement where there has not been a favorable termination of the criminal case on appeal or in a collateral action).

In addition, the Court should affirm the dismissal of the case as to defendant Henry Lesansky. There are no specific factual allegations in the record concerning Mr. Lesansky other than a sentence in plaintiff's opposition to the District's dispositive motion, RD 13 at 13, that Lesansky was "grossly negligent in the managing of subordinates who[] violated plaintiff rights." This is inadequate to state a

II. The Court Should Affirm The Dismissal Of Plaintiff's Local-Law Claim Because Plaintiff Has Abandoned That Claim On Appeal, Or Because Plaintiff Failed To State An Actionable Claim And/Or Failed To Comply With § 12-309.

1. Plaintiff has abandoned his local-law claim. First, that claim was omitted from his proposed amended complaint in the district court. JA 67. Second, in his original *pro se* brief in this Court, he listed as an issue whether the district court validly dismissed his claim for intentional infliction of emotional distress, PBr. 8, but did not develop any argument in support of this issue. Third, upon re-briefing, the *amicus curiae* does not address the local-law claim at all, and plaintiff adopted the *amicus*'s brief. Accordingly, there is no question that plaintiff has abandoned any challenge to the dismissal of the local claim. *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) (issues listed in statement of issues but not briefed are forfeited); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 786, 790 n.16 (D.C. Cir.1973) (where appellant offers "no argument whatever" in support of certain issues on appeal, the Court will decline to consider them).

2. In any event, the district court properly dismissed plaintiff's common-law claim of intentional infliction of emotional distress for failure to state an actionable claim. JA 126.

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claim under *Iqbal* and *Twombly.* Moreover, Lesansky is not referenced in the notice of appeal. JA 128.

The tort of intentional infliction of emotional distress "consists of (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1045 (D.C. 2007) (internal quotations omitted). The tort requires a showing of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *District of Columbia v. Tulin*, 994 A.2d 788, 800-01 (D.C. 2010). To show such extreme and outrageous conduct, it "is not enough that the defendant has acted with an intent that is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." *Graham v. Ford*, 604 N.W.2d 713, 716 (Mich. 1999). Indeed, intentional infliction of emotional distress has been characterized as the "tort of outrage." *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 336 (D.C. Cir. 2003).

Here, plaintiff's allegations below—that defendants kept him cuffed to his hospital bed for security purposes and allowed him to fall while transferring him from a wheelchair to a transport vehicle—are not sufficiently extreme or outrageous as to state such a claim of intentional infliction of emotional distress. *See Jones v. Muskegon County*, 625 F.3d 935, 948 (6th Cir. 2010) (deficiencies in the medical care

provided prisoner did not rise to the level of extreme and outrageous conduct to state claim of intentional infliction of emotional distress, even if conduct showed deliberate indifference to serious medical needs). Similarly, the alleged failure to change plaintiff's bandages or give him medication for four days at the jail, when he admits he was in court most of the time, is not so unreasonable as to be regarded as extreme and outrageous.

Moreover, as the District argued below, RD 9 at 23, plaintiff never elaborated on his emotional state, separate and apart from his physical injuries like the pulmonary embolism and infection, other than conclusory statements that he suffered severe emotional distress. Complaint ¶¶ 36-42, JA 16-18. Especially after *Iqbal* and *Twombly*, this conclusory allegation of emotional harm is insufficient to state a claim of intentional infliction of emotional distress. *See Lyles v. Micenko*, 404 F. Supp. 2d 182, 187 (D.D.C. 2005) (mere allegations or conclusory statements that plaintiff suffered "severe emotional distress" inadequate to state claim of intentional infliction of emotional distress).

3. In addition, plaintiff's notice of claim letter under D.C. Code § 12-309 was inadequate to preserve any local-law claim, as the District explained below. RD 9 at 15-19; JA 25.

Under D.C. Code § 12-309 an "action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six

months after the injury or damage was sustained, the claimant . . . has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage." Strict compliance with § 12-309's requirement that timely notice be given to the District is mandatory, although greater liberality is appropriate with respect to the content of the notice. *Wharton*, 666 A.2d at 1230. Nevertheless, omitting a required element of notice—approximate time, place, cause, or circumstances of the injury—is fatal. *Kirkland v. District of Columbia*, 70 F.3d 629, 632 (D.C. Cir. 1995); *Winters v. District of Columbia*, 595 A.2d 960, 961 (D.C. 1991).

Plaintiff's letter failed to provide the requisite notice of both the approximate time and the place of the injury. JA 25. The letter refers generally to a "period of incarceration" as well as a discharge from a hospital, a transfer to the Jail,[7] and then a readmission to a hospital, and also refers generally to a period of time from March 30 through April 30, 2008. JA 25. But the letter does not specifically tie any alleged wrongdoing with any date or location. It describes plaintiff collapsing when being transferred "from hospital" to transport vehicle, but does not identify the hospital or explain the location or date of that incident. JA 25. Further, the letter refers to

[7] The letter refers to the District of Columbia Detention Facility, which is also known as the Jail.

plaintiff being cuffed for "the entirety of a 24 hour day," but does not specify where or on which day this occurred. JA 25.

At the bottom of the letter, plaintiff indicated that he would be forwarding "documentation" from "P.G. Community" and "Greater Southeast." JA 25. Assuming these were references to hospitals, plaintiff could have been treated at those hospitals for his injuries; indicating he had records from those hospitals did not mean the alleged injuries occurred there. Simply listing the hospitals was inadequate to explain the time, cause, and circumstances of any injury at those locations.

Accordingly, the letter was inadequate to preserve the local-law claim under § 12-309. *See Hunter v. District of Columbia*, 943 F.2d 69, 73 (D.C. Cir. 1991) (§ 12-309 notice inadequate where it alleged that plaintiff was beaten by police officers but gave neither the approximate time nor the place of the injury); *Worthy v. District of Columbia*, 601 A.2d 581, 582 (D.C. 1991) (notice inadequate where it alleged that plaintiff allegedly stepped into uncovered manhole but made no mention of place of injury); *Winters*, 595 A.2d at 961 (same where notice alleged that accident occurred at "District of Columbia Jail in Lorton, Virginia on or about March 7, 1984" because date was uncertain and particular correctional facility at issue was uncertain); *Cason v. D.C. Dep't of Corrections*, 477 F. Supp. 2d 141 (D.D.C. 2007) (same where *pro se* notice alleged that inmate suffered eye injury but failed to state the place, cause and circumstances of injury).

At the very least, the letter is defective as to plaintiff's claim regarding his medical treatment at the Jail. The letter mentions the plaintiff being denied physical therapy because he was cuffed to his hospital bed, and describes his fall or collapse while being transferred from a wheelchair to a transport vehicle, but makes no reference whatsoever to his medical treatment at the Jail, or the failure to administer medication or change his bandages there, or anywhere. JA 25. That portion of plaintiff's claim is completely omitted from the letter.

Accordingly, the letter was inadequate to preserve any local-law claim.[8]

CONCLUSION

The Court should affirm the judgment below.

[8] To the extent plaintiff's claim of "intentional infliction of pain" can be construed as a claim of battery, the claim is beyond the statute of limitations and any remand would be futile for this reason (as well as the notice-of-claim bar). D.C. Code § 12-301(4) (one-year limitations period for assault and battery); *Hunter*, 943 F.2d at 72 (one-year statute of limitations applies when wrongdoing underlying claim of intentional infliction of emotional distress is assault and battery).

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CERTIFICATE OF SERVICE

I certify that on December 6, 2012, I mailed, first-class postage prepaid, a copy of this brief to the *pro se* appellant at:

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,799 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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