DESIGNATED FOR DISPOSITION WITHOUT 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*.—The plaintiff below and appellant here is John B. Lesesne. The 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. There are no amici.

B. *Ruling under review*.—Lesesne appeals from the district court's September 30, 2011, unpublished order (Wilkins, J.) dismissing the case.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

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Statutes

GLOSSARY

A	Appendix to Brief for Plaintiff-Appellant
MPD	Metropolitan Police Department
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. Did the trial court properly grant summary judgment to the defendants on plaintiff's federal claims related to the medical care he received in the custody of the District of Columbia Department of Corrections based on his failure to exhaust administrative remedies as required by the Prison Litigation Reform Act ("PLRA")?

2. Did the district court properly dismiss the plaintiff's local law claim for failure to state a claim and for failure to comply with the District's notice of claim requirement under D.C. Code § 12-309?

STATEMENT OF THE CASE

Plaintiff John Lesesne filed this action challenging his medical treatment and conditions of confinement while confined by the 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. Appendix to Brief for Plaintiff-Appellant ("A") 38.[1]

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, 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, A11. 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, A11; 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 and kept his wrist and damaged leg cuffed to the bed railings 24 hours a day. Complaint ¶¶ 13-14, A11. Within 48 hours, he was placed in the pretrial custody of the Department of Corrections and, thereafter, two

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[1] Page references to the appendix are to the page numbers inserted by the Court's electronic filing system at the top of the unnumbered pages submitted by the *pro se* plaintiff-appellant.

armed correctional officers guarded him at the hospital and continued cuffing his wrist and the ankle of his damaged leg. Complaint ¶¶ 15-16, A11.

Due to the neurological damage to his leg, doctors prescribed physical and occupational therapies, including that plaintiff walk the hallway in the hospital. Complaint ¶¶ 18-19, A11-12. 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, A12. 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 13.[2]

On April 8, 2008, the hospital discharged plaintiff to the custody of the Department of Corrections. Complaint ¶ 21, A12. In the hospital parking lot, he was required to walk in full restraints from a wheelchair to the transport wagon. Complaint ¶ 21, A12; 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." RD 22 at 10. As Corrections personnel attempted

[2] 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.

to lift him into the wagon, plaintiff fell to the ground; he was then placed in a police cruiser and driven to the D.C. Jail. RD 22 at 10.

During transport, plaintiff 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, A12; RD 13 at 12; RD 13-2 at 8; RD 22 at 11; Appellant's Brief 11. At that hospital, Corrections personnel continued to guard him and cuff his damaged leg despite knowledge of the neurological damage. Complaint ¶ 21, A12.

Plaintiff was discharged from Greater Southeast on April 21, 2008, and transferred to the D.C. Jail. Complaint ¶ 22, A12-13. Jail personnel deliberately failed to provide medical treatment as prescribed by the hospital personnel. Complaint ¶ 22, A12-13. 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, A13; A22 at 13. As a result of the defendants' actions, he suffered from muscular atrophy, pulmonary embolisms, and a severe staph infection. RD 22 at 18.

Plaintiff was released from the Jail on pre-trial release on April 25, 2008. Complaint ¶¶ 23-24, A13; RD 28 at 3, 8; RD 28-1 at 2 ¶ 7.[3]

2. Proceedings below.

Plaintiff filed his *pro se* complaint in this action on March 30, 2010. A8. 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, A14-16.[4] He claimed he suffered long-term and permanent injuries as a result of the actions and inactions of Department of Corrections personnel. Complaint ¶ 25, A13. Plaintiff also claimed "intentional infliction of pain and emotional distress" under the common law. Complaint ¶¶ 36-42, A17-19. Plaintiff also fleetingly claimed that he was not timely arraigned or indicted, and was subjected to an unreasonable seizure and excessive force in violation of the Fourth Amendment. Complaint ¶¶ 24, 32, A13, 15; RD 22 at 15.

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[3] 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.

[4] Although Lesesne invoked the Fourteenth Amendment in his complaint, that amendment does not apply directly to the District, though its equal protection component applies through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (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. A8.[5]

The District and Mr. Lesansky moved to dismiss or, in the alternative, for summary judgment arguing, *inter alia*, that the 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. RD 9-3. In addition, the District argued that the facts in the complaint did not state an actionable constitutional claim. RD 9 at 2, 21-24.

The District further argued that plaintiff's common law claims were 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 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; RD 9-1; RD 14 at 5-6. In any event, the District argued, the complaint failed to state an actionable claim of

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[5] 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.

intentional infliction of emotional distress. RD 14 at 4, 7. The use of restraints at the hospital, the accidental fall getting into the transport van, and the failure to change his bandages at the Jail stated a claim of negligence, not a constitutional claim or a claim of intentional infliction of emotional distress. RD 14 at 4, 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 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 the prescribed therapy, despite knowledge of his neurological injury and the prescribed physical therapy. RD 13 at 13. He also 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 he was at court every day during business hours before he was released from the Jail. RD 13 at 3, 13; RD 28 at 2.

Plaintiff moved to file an amended complaint and lodged the proposed amended complaint with the court. RD 17, 22. 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 the defendants denied him the prescribed physical therapy thereby causing a post-operative pulmonary embolism. RD 22 at 6-7. 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 knowledge of his weakened state and despite a medical order to transfer him in a wheelchair. RD 22 at 10. Plaintiff also alleged that he asked for grievance forms, apparently at the Jail, but no form was provided by Department of Corrections personnel. RD 22 at 14 ¶ 55. The proposed amended complaint did not list the local law claims, as had the initial complaint. RD 22.

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 the 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. RD 24.

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." RD 9-3 at 6; 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, and (before his release) April 25, 2008, and had about six hours to do so on April 24, 2008. 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. RD 28 at 4; RD 28-1 at 2.

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." RD 29 at 4. Further, he noted that he filed a sick call slip requesting medical treatment before he could file a grievance about the denial of such treatment. RD 29 at 3.

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. A38. 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. A39. 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.

Plaintiff filed a dispositive motion to vacate and for reversal in this Court. The Court deferred consideration of the motion pending receipt of the briefs. January 3, 2012 Order.

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

The district court properly granted summary judgment on the federal claims based on plaintiff's failure to exhaust the available administrative remedy at the District of Columbia Jail as required by the PLRA. The PLRA requires prisoners to

exhaust administrative remedies before seeking judicial redress for all prison circumstances or occurrences. The undisputed evidence shows that plaintiff was able to access and file sick call forms at the Jail and thus could have similarly filed an inmate grievance form while he was confined at the Jail but failed to do so.

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 bandage 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 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.

ARGUMENT

I. The Court Should Affirm The Judgment On The Federal Claims Based On Plaintiff's Failure To Exhaust Administrative Remedies Under The PLRA.

The record supports the district court's conclusion on summary judgment that plaintiff failed to exhaust his administrative remedies as required by the PLRA. 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81 (2006); *Jackson v. District of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001). The PLRA provides in relevant part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). This provision requires prisoners to exhaust administrative remedies before seeking judicial redress for all "prison circumstances or occurrences." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The PLRA requires timely and "proper" exhaustion of all available administrative remedies in order to promote the purposes of the PLRA—to allow corrections officials the time and an opportunity to resolve complaints and to correct their own errors internally before facing federal litigation, and to "reduce the quantity and improve the quality of prisoner suits." *Woodford*, 548 U.S. at 93-94 (citing *Nussle*, 534 U.S. at 525).

Plaintiff argued for the first time in his amended motion for summary reversal (filed in this Court on January 23, 2012) that the exhaustion requirement did not apply during the time he was confined to a hospital because 1) the language of 42 U.S.C. § 1997e(a) does not extend to hospitals, and 2) the Department of Corrections inmate grievance procedures apply only to persons housed in correctional facilities operated under the authority of the Department of Corrections. Motion 2-3; *see* Department of Corrections Program Statement re Inmate Grievance Procedures, A21 (applicable to "persons housed in correctional facilities operated under the authority of" the Department of Corrections). He similarly argues in his brief that the PLRA does not apply to the P.G. Hospital because it is not a correctional facility under that statute. Br. 13-14. Because he did not raise this issue below at an appropriate time, he has forfeited it. *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.").[6]

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[6] The closest plaintiff came 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.

Moreover, the District did not argue below, and does not contend on appeal, that plaintiff should have filed a grievance while he was hospitalized. *Cf. 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). Rather, the District contends that, once plaintiff was at the Jail, he had to file a grievance with respect to the conditions of his confinement by the Department of Corrections at the hospitals before he could file a lawsuit challenging those conditions. The exhaustion requirement applies to a "prisoner confined in any jail, prison, or other correctional facility," as he was at the time when he should have pursued available grievance procedures. Further, the PLRA exhaustion requirement applies to actions "with respect to prison conditions." He challenges the manner in which Department of Corrections guards kept him in custody as a prisoner at the hospital, cuffed and unable to participate in physical therapy. Complaint ¶¶ 20-21, A12. Moreover, he challenged, at least in part, his treatment while at the Jail. Complaint ¶ 22, A12-13. Thus his claim is "with respect to" prison conditions, and the PLRA exhaustion

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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.*

requirement applies. *Porter v. Nussle*, 534 U.S. at 532 (PLRA's exhaustion requirement applies "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong").

In his brief, plaintiff renews 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. Br. 14-15. 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." A38. Thus he failed to exhaust an administrative remedy available to him at the Jail. Plaintiff's brief fails to rebut this point.[7]

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[7] 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." *E.g.*, *Norton v. The City of Marietta*, 432 F.3d 1145, 1149-50 (10th Cir. 2005). The record reflects that plaintiff was released pretrial from the Jail on April 25, 2008, Complaint ¶¶ 23-24, A13; RD 28 at 3, 8; RD 28-1 at 2 ¶ 7, but it does not show whether he was released to the community or another correctional facility such as a halfway house. Moreover, plaintiff has not argued that the PLRA does not apply to this case by reason of his release from the Jail and he has therefore forfeited this argument as well. *See Air Florida, Inc.*, 750 F.2d at 1078. This is 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.

The Court should affirm the judgment as to the federal claims on this ground.[8]

II. The Court Should Affirm The Dismissal Of Plaintiff's Local Law Claim For Failure To State A Claim And/Or Based On His Inadequate § 12-309 Letter, Or Because Plaintiff Forfeited This Claim On Appeal.

1. The court properly dismissed plaintiff's common law claim of intentional infliction of emotional distress for failure to state an actionable claim. A38.

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*

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[8] Plaintiff does not mention his Fourth Amendment claim on appeal and has therefore forfeited that claim too. Indeed, he asserts that he was "held under probable cause." Br. 14. In any event, the record is devoid of factual allegations to support such a 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 concerning Mr. Lesansky other than a sentence in the plaintiff's opposition to the District's dispositive motion, RD 13 at 13, that he was "grossly negligent in the managing of subordinates who[] violated plaintiff rights." This is inadequate to state a claim under *Iqbal* and *Twombly.* Moreover, Lesansky is not referenced in the notice of appeal, and plaintiff does not address any claim against Lesansky in his brief.

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 (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).

Plaintiff's brief lists as an issue whether the district court validly dismissed the claim for intentional infliction of emotional distress. Br. 8. However, he does not develop any argument in this regard and discusses only his physical injuries in the Eighth Amendment context, not any separate emotional distress. Accordingly, he has forfeited any challenge to the dismissal of the local law claim. *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) (issues listed in statement of issues but not briefed are forfeited). Moreover, plaintiff omitted the local law claim from his proposed amended complaint below. RD 22.

In any event, plaintiff's allegations below, keeping him cuffed to a hospital bed for security purposes and accidently allowing 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 bandage 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, A17-19. Under *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).

2. 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; RD 9-1 at 1.

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. RD 9-1 at 1. The letter refers generally to a "period of incarceration" as well as a discharge from a hospital, a transfer to the Jail,[9] and then a readmission to a hospital, and also refers generally to a period of time from March

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

30 through April 30, 2008. RD 9-1 at 1. 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. RD 9-1 at 1. Further, the letter refers to plaintiff being cuffed for "the entirety of a 24 hour day," but does not specify where or on which day this occurred. RD 9-1 at 1.

At the bottom of the letter, plaintiff indicated that he would be forwarding "documentation" from "P.G. Community" and "Greater Southeast." 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 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 a 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. RD 9-1 at 1. That portion of plaintiff's claim is completely omitted from the letter.

Accordingly, the letter was inadequate to preserve any local law claim.[10]

[10] 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. 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).

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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March 2012

CERTIFICATE OF SERVICE

I certify that on March 12, 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 5,956 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.

/s/ Mary L. Wilson
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