IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE NATIONAL FEDERATION OF THE BLIND OF VIRGINIA, et al. Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, et al. Defendants.	)	Case No.: 3:23-cv-127

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT VITALCORE'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Patrick K. Burns, Esq. (Bar No. 80188)
Gloria R. Cannon, Esq. (Bar No. 98572)
GORDON REES SCULLY MANSUKHANI, LLP
Counsel for Defendant VitalCore Health Strategies
1101 King Street, Suite 520
Alexandria, VA 22314
T: (202) 370-8003
F: (202) 800-2999
E: pburns@grsm.com
E: gcannon@grsm.com

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Exhibit A: Plaintiff's Correspondence Responding to Request for Certified Expert Opinion, dated April 3, 2023.

PRELIMINARY STATEMENT

Defendant, VitalCore Health Strategies ("VitalCore"), by counsel, submits this Memorandum of Points and Authorities in support of its Motion to Dismiss the Complaint of Plaintiffs, The National Federation of the Blind of Virginia, Nacarlo Antonio Courtney, William Hajacos, Michael McCann, Wilbert Rogers, Kevin Muhammad Shabazz, Patrick Shaw, and William Stravitz ("Plaintiffs"), and states as follows:[1]

SUMMARY OF ARGUMENT

Plaintiffs in this matter attempt a dartboard pleading approach to hold VitalCore, along with eighteen other Defendants, responsible for their alleged injuries. Indeed, their approach is telling as insufficient facts are set forth connecting VitalCore to any alleged wrongdoing. The Complaint should be dismissed in its entirety as Plaintiffs' allegations fall well-short of the federal pleading requirements.

Despite a complete absence of factual support, Plaintiffs assert a litany of claims against VitalCore: (1): Violation of the Eighth Amendment and 42 U.S.C. § 1983 as to Plaintiff Nacarlo Courtney, against VitalCore and seven other Defendants (Count VII); (2): Violation of the Eighth Amendment and 42 U.S.C. § 1983 as to Plaintiff William Stravitz, against VitalCore and seven other Defendants (Count VIII); (3) Negligence as to Plaintiff Nacarlo Courtney, against VitalCore and two other Defendants (Count XI); (4) Negligence as to Plaintiff William Stravitz, against VitalCore and four other Defendants (Count XII).

[1]VitalCore incorporates by reference the arguments set forth in Defendant, Pranay Gupta, M.D.'s Motion to Dismiss (ECF No. 42), along with any motions to dismiss submitted by other Defendants subsequent to this filing, as if fully set forth herein.

Plaintiffs' Complaint fails for numerous reasons. Most notably, Plaintiffs' claims are wholly deficient because Plaintiffs assert their substantive legal allegations as if every alleged act of wrongdoing applies identically as to all Defendants.

Throughout the Complaint, Plaintiffs do little to distinguish any of the Defendants and repeatedly group them together—shotgun style. Firstly, Plaintiffs improperly bring two § 1983 claims against Defendant VitalCore, a private corporation, under a theory of *respondeat superior* (Counts VII and VIII). Secondly, and fatally for Plaintiffs, the Complaint improperly pleads medical malpractice as negligence, and Plaintiffs themselves subsequently fail to comply with Virginia's expert certification requirement, for claims brought under the Virginia Medical Malpractice Act (Counts XI and XII). Finally, the factual allegations contained within the Complaint do not themselves establish support for the claims that Plaintiffs have alleged. Accordingly, as detailed more fully below, Plaintiffs' Complaint should be dismissed in its entirety as to Defendant VitalCore.

FACTUAL BACKGROUND

The Parties

Plaintiffs filed their Complaint against eighteen Defendants: the Virginia Department of Corrections ("VDOC"); Harold Clarke, Director of VDOC; Bany Marano, ADA Coordinator of VDOC; Kevin Punturi, Acting Warden of Greensville Correctional Center ("Greensville"); Darrell Miller, Warden of Deerfield Correctional Center ("Deerfield"); Lane Talbott, ADA Coordinator at Greensville; Lakeisha Shaw, ADA Coordinator at Deerfield (collectively, with the preceding Defendants, "VDOC Defendants"); Larry Edmonds, former Warden of Greensville; Tammy Williams, former Warden of Deerfield; Armor Correctional Health Services, Inc. ("Armor"); VitalCore Health Strategies ("VitalCore"); Vincent Gore, M.D.; Alvin Harris, M.D.; Nurse

Cynthia Lester; Pranay Gupta, M.D., Officer D. Smith, and the Virginia Information Technologies Agency ("VITA"). Compl. ¶ 4. Plaintiffs consist of The National Federation of the Blind of Virginia, Nacarlo Antonio Courtney, William Hajacos, Michael McCann, Wilbert Rogers, Kevin Muhammad Shabazz, Patrick Shaw, and William Stravitz. Compl. ¶ 1.

Regarding Defendant Vitalcore, Plaintiffs Nacarlo Courtney and William Stravitz allege that Defendant VitalCore is liable under the doctrine of *respondeat superior* for the actions of their employees and/or agents. *Id*. ¶ 363, 370. Specifically, Plaintiffs' allege Defendant VitalCore is the employer and or principal of the Defendant medical professional: Vincent Gore, M.D., Alvin Harris, M.D., Cynthia Lester, and Pranay Gupta, M.D. Compl. ¶ 363. While is it not specified in the "Parties" section as to whether Defendant Lester or Gupta are agents of VitalCore (¶ 73-74), certain subsequent allegations provide that such Defendants are "employees and/or agents" of "Armor or VitalCore."[2] *Id.*

Plaintiff Nacarlo Courtney alleges that Defendants Vincent Gore, M.D.; Alvin Harris, M.D.; Nurse Cynthia Lester; Pranay Gupta, M.D. acted negligently in their medical care of Mr. Courtney for his keratoconus, a degenerative eye disease and that their treatment of Mr. Courtney constituted a violation of his Eighth Amendment rights. *Id*. ¶ 324-332, 361-367. Similarly, Plaintiff William Stravitz further alleges that Defendants Vincent Gore, M.D.; Alvin Harris, M.D.; Nurse Cynthia Lester; Pranay Gupta, M.D. acted negligently in their medical care of Mr. Stravitz for his cataracts and that their treatment of Mr. Stravitz constituted a violation of his Eighth Amendment rights. *Id*. ¶ 333-343, 368-374.

Plaintiff Nacarlo Courtney's Medical Care

[2] Due to the similarity in the allegations against the medical care providers in this matter, the allegations brought against Nurse Cynthia Lester and Pranay Gupta, M.D. are not substantively addressed. However, the arguments as to Alvin Harris, M.D. and Vincent Gore, M.D. apply equally to Nurse Cynthia Lester and Pranay Gupta, M.D.

Plaintiff Nacarlo Courtney is currently in the custody of Defendant VDOC and is housed at Greensville Correctional Center. *Id.* ¶ 11. While incarcerated at a previous facility, Sussex II, Mr. Courtney developed keratoconus, a condition that causes his corneas to thin and bulge into a cone shape, resulting in loss of vision and sensitivity to light. *Id.* ¶ 217.

In November 2021, Mr. Courtney was transferred from Sussex II to Greensville. On November 30, 2021, Mr. Courtney was seen by an unnamed medical provider at the Greensville infirmary who recommended Mr. Courtney use a sodium chloride solution to insert his contact lenses and contact lens solution to clean his contacts. *Id.* ¶ 227. On December 22, 2021, the medical provider referred Mr. Courtney to the Ophthalmology Department at VCU. *Id.* ¶ 228. Due to pain in his eyes on April 29, 2022, Mr. Courtney requested medical assistance. On May 6, 2022, Defendant Dr. Gore admitted Mr. Courtney to the infirmary where he remained until May 20, 2022. On May 9, 2022, Mr. Courtney saw Benjamin Goldman, M.D., at VCU Ophthalmology and was diagnosed with "progressive keratoconus" in both eyes. *Id.* ¶ 362. Dr. Goldman recommended that Mr. Courtney receive artificial tears and gel lubricant for his eyes. On July 12, 2022, Mr. Courtney visited William Benson, M.D., at VCU Ophthalmology, who scheduled Mr. Courtney for a follow-up visit for a right contact lens fitting. *Id.* ¶ 234. On July 20, 2022, Mr. Courtney saw Lenna Wallcer, M.D., at VCU Ophthalmology who fitted him for contact lenses and prescribed contact lens cleaning solution and 0.9% sodium chloride solution to use before inserting the contacts into his eyes.

Mr. Courtney alleges that Defendant Dr. Gore denied Mr. Courtney the contact lens cleaning solution he was prescribed. Mr. Courtney further alleges that Defendants VDOC, Edmonds, Punturi, Talbott, Armor, VitalCore, and Dr. Gore have failed to ensure that he has regular appointments and medical treatments with the ophthalmologists at VCU who treat his

keratoconus. Mr. Courtney further alleges that Dr. Gore is responsible for the denial of his requests for accommodations, which include requests for sunglasses, a maximum-size television, wireless headphones, and a Blu-Ray DVD player. Compl. ¶ 176.

Plaintiff William Stravitz's Medical Care

Plaintiff William Stravitz is currently in the custody of Defendant VDOC and is housed at Deerfield Correctional Center. *Id*. ¶ 45. Mr. Stravitz was diagnosed with cataracts in Fall 2021, while in VDOC custody. *Id*. ¶ 239. In March 2022, Mr. Stravitz had a follow-up appointment, during which Defendant Dr. Gupta verified the cataracts and recommended surgery to completely remove them, likely restoring Mr. Stravitz vision. *Id*. ¶ 240.

Mr. Stravitz alleges that since March 2022 he has made one written request and multiple verbal requests to schedule the surgery and Defendants VDOC, Miller, Armor, VitalCore, Dr. Harris, and Nurse Lester have failed to get him the surgery. *Id*. Mr. Stravitz further alleges Defendants VDOC, Miller, Armor, VitalCore, and Dr. Harris have failed to provide Mr. Stravitz glasses while he waits for surgery. *Id*. ¶ 246. Mr. Stravitz is concerned that he will become less valuable as a library employee as his vision worsens. *Id*. ¶ 161. Currently, Mr. Stravtiz purportedly must rely on dim light and a book light to read his incoming mail. *Id*. ¶ 118. Soon, he may need to utilize the Prison's Caregiver system which provides him with another inmate to read his incoming mail. *Id.*

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for failure to state a claim upon which relief can be granted. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint." *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2021) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986)). The motion should be granted, and thus the

complaint dismissed, unless the complaint "states a plausible claim for relief." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Although all factual allegations in a complaint are assumed to be true at the initial pleading phase, the Court need not accept inferences unsupported by the facts set out in the complaint or legal conclusions cast in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant has acted unlawfully. *Id.* at 662. This standard requires more than "a sheer possibility that defendant has acted unlawfully." *Id.* In addition, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should…be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558.

ARGUMENT

I. PLAINTIFF NACARLO COURTNEY'S EIGHTH AMENDMENT AND 42 U.S.C. § 1983 CLAIM (COUNT VII) AGAINST DEFENDANT VITALCORE FAILS AS A MATTER OF LAW

A. Plaintiff improperly brings a § 1983 claim against Defendant VitalCore, a private corporation, under a theory of *respondeat superior*

Plaintiff, Nacarlo Courtney's claim is based on a theory of *respondeat superior*, which cannot provide a basis for recovery against a private corporation in a § 1983 action. A private corporation is liable under § 1983 only when an official policy or custom of the corporation causes the alleged deprivation of rights. *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 728 (4th Cir. 1999). A policy is not an abstract concept; a plaintiff must allege a written policy or official custom is the cause of the violation of his or her rights. *Brondas v. Corizon Health, Inc.*, 2015 WL 3491130, at *5 (W.D. Va. June 3, 2015) (dismissing Plaintiff's § 1983 claim for failure to state a

claim because she did not allege prison medical care providers had any official policy which resulted in her alleged injuries).[3]

"Policy or custom liability can arise in four instances: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that 'manifest[s] deliberate indifference to the rights of citizens'; or (4) through a practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law." *Washington v. Brooks,* 2022 WL 89171, at *1 (E.D. Va. Jan. 7, 2022) (Hudson, J.) (citing *Lytle v. Doyle,* 326 F.3d 462, 471 (4th Cir. 2003) (citations omitted). Even a single action taken by a decisionmaker can constitute a policy. However, the key inquiry is whether "the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id*. (citing *Hunter v. Town of Mocksville,* 897 F.3d 538, 554–55 (4th Cir. 2018). "When a subordinate official's decisions are subject to review by someone else, the subordinate official's decisions cannot be considered policy." *Id.* (citing *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). In *Washington v. Brooks*, a prisoner brought a § 1983 claim against Armor, the medical service provider for the correctional facility, based on actions taken by the medical director of the correctional institution (Sussex II). 2022 WL 89171, at *1. In 2022, this Court held such allegation was not a sufficient basis for a claim against Armor, stating "discretionary decisions must be final in that they are "not constrained by policies not of that official's making" and not "subject to review by the municipality's authorized policymakers." *Id.* (citations omitted). This Court reasoned that because

[3] Two unpublished Fourth Circuit opinions directly address the issue of § 1983 liability of an entity contracted to provide inmate medical services: *Clark v. Maryland Dept. of Pub. Safety & Corr. Services*, 316 F. App'x 279 (4th Cir. 2009); *Harrison v. Oakley*, 2008 WL 7836410 (D. Md. June 25, 2008) aff'd, 328 F. App'x 847 (4th Cir. 2009) (dismissing two corporations contracted to provide inmate medical services in the absence of any allegation that official policies or customs of the corporations caused the alleged constitutional violations).

the medical director's decisions were constrained by VDOC and Armor's policies, the medical director was not the final decision maker. *Id.*

Taking it a step further, this Court explained that the medical director's actions could likewise not constitute a "custom or usage with the force of law," because the inadequate treatment (mainly a delay in treatment) was not pervasive enough to establish a custom. *Id.* The complained of treatment in *Washington v. Brooks* was a delay in treating a toe ulcer and in scheduling the plaintiff's endocrinologist appointment. *Id.* The delay occurred only twice: "once from December 2018 until August 2019, and again from November 2019 until January 2021." *Id.* at *9.

Here, Plaintiff alleges VitalCore is responsible for the actions of Dr. Gore under a theory of *respondeat superior*. Compl. ¶ 71. VitalCore is a private corporation and thus, *respondeat superior* cannot provide a basis for recovery under a § 1983 claim absent a showing that the complained of actions are a result of a policy, custom, or procedure. Plaintiff fails to allege that any official, written policy or custom of the treating providers or VitalCore caused the alleged violation of his constitutional rights here. Even assuming this argument could be made, Plaintiff Nacarlo Courtney complains of the medical care he received from Dr. Gore, the medical director at Greensville Correctional Institution. Dr. Gore's actions are certainly constrained by the policies of VDOC and VitalCore and thus, he cannot be considered, in the words of this Court, a "final decisionmaker."

Considering the argument that Dr. Gore's actions constitute a custom, the facts in the Complaint suggest that the conduct which Mr. Courtney complains of occurred in a limited number of circumstances. In fact, Plaintiff cites only one instance in which Mr. Courtney was denied prescription contact lens cleaning solution by Dr. Gore in August, 2022. Compl. ¶ 236. This is more than sufficient grounds for dismissal of Plaintiff's claim, but for the sake of thoroughness, it

should be noted that Plaintiff also fails to allege facts sufficient to meet the two-prong test to establish a § 1983 claim.

To support an Eighth Amendment claim, a prisoner must properly allege facts that "demonstrate a deliberate indifference to a serious medical need." *Caudill v. Sw. Virginia Reg'l Jail Auth.*, 2023 WL 1219176 (W.D. Va. Jan. 31, 2023). The deliberate indifference standard is very high and mere negligence falls short of meeting this standard. *Id.* For a medical need to be considered serious in these claims, the risk of harm usually must amount to a risk of "loss of life or permanent disability, or a condition for which lack of treatment perpetuates severe pain." *Id.* at *12-13.

Here, the facts do not demonstrate any deliberate indifference to Mr. Courtney's serious medical needs. In fact, there is evidence that Mr. Courtney was treated by multiple providers at Greensville. Mr. Courtney was even admitted to the infirmary by Dr. Gore for nearly the entire month of May 2022. Compl. ¶ 230-33. Mr. Courtney was sent for multiple follow ups at VCU Ophthalmology where he saw three separate treating providers: Benjamin Goldman, M.D., William Benson, M.D., and Lenna Wallcer, M.D. Compl. ¶ 232-35. These facts fall short of establishing deliberate indifference to Mr. Courtney's medical care. Further, the medical care which Mr. Courtney has alleged he did not receive: a contact lens replacement, prescription contact lens solution, and accommodations- cannot be considered a serious medical need. None of these things could result in a permanent disability or severe pain. Accordingly, Count VII should be dismissed.

II. PLAINTIFF WILLIAM STRAVITZ'S EIGHTH AMENDMENT AND 42 U.S.C. § 1983 CLAIM (COUNT VIII) AGAINST DEFENDANT VITALCORE FAILS AS A MATTER OF LAW

A. Plaintiff improperly brings a § 1983 claim against Defendant VitalCore, a private corporation, under a theory of *respondeat superior*

Plaintiff, William Stravitz's claim is based on a theory of *respondeat superior*, which cannot provide a basis for recovery against a private corporation in a § 1983 action unless it is based on an official policy or custom. Again, even a single action taken by a "decisionmaker" can constitute a policy. Here, Plaintiff alleges VitalCore is responsible for the actions of Dr. Harris under a theory of *respondeat superior*. Compl. ¶ 72. Plaintiff fails to allege that any official, written policy or custom of the treating providers or VitalCore caused the alleged violation of his constitutional rights here. Further, Plaintiff William Stravitz complains of the medical care he received from Dr. Harris, the medical director at Deerfield Correctional Institution. Dr. Harris's actions are constrained by the policies of VDOC and VitalCore and thus, he cannot be considered a "final decisionmaker."

As detailed above, an action must occur multiple times to be considered a custom. The facts in the Complaint suggest that the conduct which Mr. Stravitz complains of occurred in a limited number of circumstances. Plaintiff cites two instances in which he missed appointments with the ophthalmologist, Defendant Dr. Gupta, in August 2022 and September 2022, but Plaintiff fails to even specifically attribute these actions to Dr. Harris. Compl. ¶ 242-43. Regardless, as this Court made clear in *Washington v. Brooks*, two instances of allegedly inadequate medical care do not rise to the level of an established custom. 2021 U.S. Dist. LEXIS 207146, *1-11 (E.D. Va. 2021).

Additionally, the facts alleged in the Complaint do not support a theory that VitalCore or Dr. Harris acted in deliberate indifference to Mr. Stravitz's serious medical needs. Plaintiff actually alleges facts that suggest either VDOC or Dr. Gupta are the cause of the delay in Mr. Stravitz surgery. Plaintiff alleges, "Mr. Stravitz was scheduled to see Defendant Dr. Gupta on August 9, 2022, but VDOC failed to give him a COVID-19 PCR test and, as a result, Defendant Dr. Gupta

refused to see Mr. Stravitz." Compl. ¶ 242. Further, Plaintiffs allege, "On September 20, 2022, Deerfield officials administered a COVID-19 PCR test to Mr. Stravitz, and he tested negative, but VDOC did not take him to see Defendant Dr. Gupta." Compl. ¶ 243. Additionally, cataract surgery is not a serious medical need. While delaying the surgery will worsen the cataracts, having the surgery will restore eyesight to its state prior to the development of cataracts so there is no 'permanent disability,' or 'severe pain' associated with delay. These facts fall short of establishing deliberate indifference to Mr. Stravitz's serious medical needs and Count VIII should be dismissed.

III. PLAINTIFF NACARLO COURTNEY'S NEGLIGENCE CLAIM (COUNT XI) AGAINST DEFENDANT VITALCORE FAILS AS A MATTER OF LAW

A. Plaintiff improperly pleads medical malpractice as negligence

Plaintiff Nacarlo Courtney improperly brings an action for negligence rather than medical malpractice against Defendant VitalCore. The entire basis for Mr. Courtney's claim is the provision of medical services, which makes it an action that sounds in medical malpractice.

As set forth in an opinion issued by the Alexandria Division of this Court, "under Virginia law, all tort claims based on the provision of health care services against health care providers are considered malpractice claims and are governed by the Virginia Medical Malpractice Act. West's V.C.A. § 8.01–581.1." *Gedrich v. Fairfax Cnty. Dep't of Fam. Servs.*, 282 F. Supp. 2d 439 (E.D. Va. 2003). Where the basis of a claim is the insufficiency of medical care a plaintiff received, it must be brought pursuant to the Virginia Medical Malpractice Act ("VMMA"). *Id.* This claim may not be pled as simple negligence. *Washington v. Brooks*, 2021 U.S. Dist. LEXIS 207146, *1-11 (E.D. Va. 2021) (dismissing Plaintiff's complaint for failure to state a claim where Plaintiff failed to allege any act of negligence that fell outside of the scope of medical malpractice).

Plaintiff Nacarlo Courtney alleges, "Defendants had, among other duties, duties to exercise reasonable care with regard to the provision of medical care to Mr. Courtney, including prompt medical care for his keratoconus, a degenerative eye disease." Compl. ¶ 362. Mr. Courtney further alleges that Defendants failed to "treat him in accordance with recognized and acceptable standards of medical care, health care, nursing care, and treatment." Compl. ¶ 364. It is apparent based on the allegations that this claim is based on the provision of medical services by Dr. Gore, a treating physician and agent of VitalCore, a company which provides health care services. In *Washington v. Brooks*, the Alexandria Division of the U.S. District Court for the Eastern District of Virginia held that all of the allegations (denial of access to and delays in receiving medical care) fell within the scope of medical malpractice. *Id.* at 9. The court accordingly dismissed the Plaintiff's negligence action for failure to state a claim. *Id.* at 11. Thus, this Court should dismiss the claim at bar, Count XI, for failure to state a claim against Defendant VitalCore.

B. Plaintiff fails to set forth sufficient facts to assert a claim

"To prevail in an action for professional malpractice under the Virginia Medical Malpractice Act, a plaintiff must: (1) establish the standard of care; (2) demonstrate that the defendant's actions breached the standard of care; and (3) prove that the defendant's breach was the proximate cause of the plaintiff's injuries." *Washington v. Brooks*, 2021 U.S. Dist. LEXIS 207146, *1-11 (E.D. Va. 2021) (citing Va. Code § 8.01–581.1).

Here, Plaintiff Nacarlo Courtney alleges that Defendants failed to treat him in line with "acceptable standards of medical care," without specifying what those standards are. Compl. ¶ 364. Plaintiff further fails to allege facts that establish a breach of the standard of care. The only factual allegations that can be attributed specifically to Dr. Gore include (1) denial of accommodations, including a television, wireless headphones, and a Blu-Ray player; (2) that Dr.

Gore admitted Mr. Courtney "to the infirmary for his own safety;" and (3) that Dr. Gore denied Mr. Courtney a "contact lens cleaning solution" prescribed by Dr. Walker. Compl ¶¶ 176, 235-236. Of these, the only factual allegation that could remotely be considered to enter the realm of medical malpractice is the denial of contact lens solution. However, this is a prescription medication. In a correctional setting, the administration of prescription medications is highly regulated. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (addressing medication in correctional facility). Without asserting a standard of care or clearly asserting the context in which this medication was denied, Plaintiff falls short of alleging facts to sufficiently state a claim for medical malpractice. Thus, Count XI should be dismissed.

C. Plaintiff has not complied with Virginia's expert certification requirement for a medical malpractice action[4]

Plaintiffs Nacarlo Courtney and William Stravitz improperly argue that they do not have to comply with the expert certification requirement of medical malpractice claims. Va. Code § 8.01–20.1, which provides in relevant part:

> Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the

[4]The argument raised by Plaintiff William Stravitz's Memorandum in Opposition to Motion to Dismiss on Behalf of Defendant Pranay Gupta, M.D. is likewise inapplicable to the instant action. In support of their position, Plaintiff cites *Andes v. United States*, yet another Federal Tort Claims Act ("FTCA") case. No. 1:19CV00005, 17 (W.D. Va. Jul. 10, 2020). Plaintiff incorrectly interprets *Andes v. United States* to argue that the relevant inquiry is whether Virginia's expert certification requirement conflicts with the federal rules. *Andes v. United States* makes clear "the Virginia statute does not impose a pleading requirement, so it does not implicate Federal Rules 8 or 12." Id. at *17. Instead, the relevant inquiry is whether Rule 11(b) answers the same question as Va. Code Ann. § 8.01-20.1. Va. Code Ann. § 8.01-20.1 simply asks whether expert opinion testimony is required to adjudicate issues outside a fact finder's common knowledge. It does not attempt to supersede Rule 11(b). Further, *Andes v. United States* did not reach the question of whether Va. Code Ann. § 8.01-20.1 is a procedural or substantive law. Va. Code Ann. § 8.01-20.1 is state substantive law as expert opinion affects the substance of the case. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

> plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The statute continues, "If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, **the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice**." *Id.* (emphasis added).

In response to a written request by Defendants to attest that Plaintiffs Nacarlo Courtney and William Stravitz obtained the required expert certification, Plaintiffs cited two Federal Tort Claims Act cases in which federal substantive law applied and thus the claimant was relieved of the requirement. *See* Plaintiffs' correspondence regarding expert certification, attached as **Exhibit A**; *See also Pledger v. Lynch,* 5 F. 4th 511 (4th Cir. 2021); *Zupko v. United States,* No. 20-2157, 2022 WL 256343 (4th Cir. Jan. 26, 2022).

Contrary to Plaintiffs' assertions, the case law upon which the rely is inapplicable as no FTCA allegations are set forth in their Complaint, and, regardless, an FTCA claim against a private business such as VitalCore is procedurally improper. Defendant VitalCore is a private corporation that provides medical services to prisons, and thus, the only appropriate action Plaintiffs can bring is an action for medical malpractice. In *Pledger v. Lynch,* the Plaintiff was held in federal prison and thus properly brought an FTCA claim. 5 F. 4th 511 (4th Cir. 2021). Similarly, the Plaintiff in *Zupko v. United States* was held in a federal correctional facility and brought an FTCA claim. (4th Cir. Jan. 26, 2022).

Here, both Plaintiffs Nacarlo Courtney and William Stravitz are being held in state correctional facilities and are bringing state law claims against the facility and the private parties involved in their medical care. The case at bar is clearly distinguishable as a state law claim and thus, Va.Code Ann. § 8.01–20.1 applies. Just last year, this Court dismissed an incarcerated Plaintiff's medical malpractice claim due to a failure to comply with the state law expert certification requirement. *Whittaker v. O'Sullivan,* 2022 WL 3215007, at *1 (E.D. Va. Aug. 9, 2022).

In a footnote, Plaintiffs appear to present the alternative argument that these alleged acts of negligence lie within the range of the jury's common knowledge and thus an expert certification is not required. *See* **Exhibit A**.

However, where "a plaintiff calls into question a quintessential professional medical judgment, the matter can be resolved only by reference to expert opinion testimony." *Parker v. United States,* 475 F. Supp. 2d 594, 597 (E.D. Va.), aff'd, 251 F. App'x 818 (4th Cir. 2007) (citing *Callahan v. Cho,* 437 F. Supp. 2d 557 (E.D. Va. 2006). A task that requires a license or requires professionals to work within the parameters of a license is more than a "relatively simple task" and goes beyond the jury's common knowledge. *Brondas v. Corizon Health, Inc.,* 2015 WL 3491130, at *8 (W.D. Va. June 3, 2015) (holding that a Plaintiff failed to meet the expert certification requirement for her medical malpractice claim against a prison medical provider based on a claim of failure to administer medication). "This exception, as the Supreme Court of Virginia has noted, applies only in 'rare instances' because only rarely do the alleged acts of medical negligence fall within the range of a jury's or fact finder's common knowledge and experience." *Parker v. United States,* 475 F. Supp. 2d 594, 597 (E.D. Va.) (citing *Beverly Enterprises–Virginia v. Nichols,* 247 Va. 264, 267(1994).

Plaintiff Courtney alleges that the failure to schedule routine eye exams, provide accommodations, and provide a prescription contact lens solution to Mr. Courtney constitutes a breach of the standard of care. Prescribing contact lens solution and approving accommodations for prisoners are tasks that require a license and fall beyond the common knowledge of a jury. By the nature of his allegations, Plaintiff Courtney calls into question Dr. Gore's medical judgment. Thus, he is required to have met the expert certification requirement. Having failed to do so, this Court should dismiss Count XI as to Defendant VitalCore.

IV. PLAINTIFF WILLIAM STRAVTIZ'S NEGLIGENCE CLAIM (COUNT XII) AGAINST DEFENDANT VITALCORE FAILS AS A MATTER OF LAW

A. Plaintiff fails to set forth sufficient facts to assert a negligence claim

Plaintiff William Stravitz also improperly brings an action for negligence rather than medical malpractice against Defendant VitalCore because the entire basis for Mr. Stravitz's claim is the provision of medical services. Such an action sounds in medical malpractice.

As mentioned above, where the basis of a claim is the insufficiency of medical care Plaintiff Stravitz received, that claim must be brought pursuant to the Virginia Medical Malpractice Act ("VMMA"). The claim may not be pled as simple negligence. *Washington v. Brooks*, 2021 U.S. Dist. LEXIS 207146, *1-11 (E.D. Va. 2021).

Plaintiff William Stravitz alleges "Defendants had, among other duties, duties to exercise reasonable care with regard to the provision of medical care to Mr. Stravitz, including prompt medical care and treatment for his cataracts." Compl. ¶ 369. Plaintiff goes on to allege that Defendants failed to "treat him in accordance with recognized and acceptable standards of medical care, health care, nursing care, and treatment." Compl. ¶ 371. Clearly, this claim is based on the provision of medical services by Dr. Harris, a treating physician and VitalCore, a company with

provides health care services. Accordingly, this Court should dismiss the claim at bar, Count XII, for failure to state a claim against Defendant VitalCore.

B. Plaintiff improperly pleads medical malpractice as negligence.

"To prevail in an action for professional malpractice under the Virginia Medical Malpractice Act, a plaintiff must: (1) establish the standard of care; (2) demonstrate that the defendant's actions breached the standard of care; and (3) prove that the defendant's breach was the proximate cause of the plaintiff's injuries." *Washington v. Brooks*, 2021 U.S. Dist. LEXIS 207146, *1-11 (E.D. Va. 2021) (citing Va. Code § 8.01–581.1).

Here, Plaintiff William Stravitz alleges that Defendants failed to treat him in line with "acceptable standards of medical care," without specifying what those standards are. Compl. ¶ 371. Plaintiff further fails to allege facts that establish a breach of the standard of care. **No factual allegations contained in the Complaint pertaining to Mr. Stravitz medical care are alleged against either Defendants VitalCore or Alvin Harris, M.D. individually.** The only two allegations that cite these Defendants allege that VitalCore and Dr. Harris, among several other Defendants, have not scheduled Mr. Stravitz cataract surgery or provided him with prescription eyeglasses. Compl. ¶ 245-46. Without asserting a standard of care, or how Defendants breached that standard of care, Plaintiff falls short of alleging facts that amount to medical malpractice. Thus, Count XII should be dismissed.

C. Plaintiff has not complied with Virginia's expert certification requirement for a medical malpractice action.

As mentioned above, Plaintiffs Nacarlo Courtney and William Stravitz improperly argue that they do not have to comply with the expert certification requirement of medical malpractice claims. Va.Code Ann. § 8.01–20.1.

Plaintiffs argue that they do not have to comply with this requirement based on two Federal Tort Claims Act ("FTCA") claim cases in which federal law governed and the requirement did not apply. *See* **Exhibit A**; *See also Pledger v. Lynch,* 5 F. 4th 511 (4th Cir. 2021); *Zupko v. United States,* No. 20-2157, 2022 WL 256343 (4th Cir. Jan. 26, 2022). As discussed, Plaintiffs are being held in state correctional facilities and are bringing state law claims against the facility and the private parties involved in their medical care and thus, Va.Code Ann. § 8.01–20.1 applies. *Whittaker v. O'Sullivan,* 2022 WL 3215007, at *1 (E.D. Va. Aug. 9, 2022).

Addressing the alternative argument presented by Plaintiffs in a footnote, that these alleged acts of negligence lie within the range of the jury's common knowledge, this is a rare exception that does not apply in the instant case. *See Parker v. United States,* 475 F. Supp. 2d 594, 597 (E.D. Va.) (holding same); *Beverly Enterprises–Virginia v. Nichols,* 247 Va. 264, 267(1994) (same).

Plaintiff, William Stravitz alleges that the failure to schedule his cataract surgery with Dr. Gupta and provide him with prescription glasses in the meantime constitutes a breach of the standard of care. Compl. ¶ 341. Putting aside the fact that Plaintiff attributes the responsibility of scheduling his surgery to 8 different Defendants, prescription eyeglasses are a medical device that must be prescribed by a licensed physician. Tasks that require a person to act within the bounds of a medical license go beyond the jury's common knowledge and thus require expert opinion. *Brondas v. Corizon Health, Inc.*, 2015 WL 3491130, at *8 (W.D. Va. June 3, 2015). By the nature of his allegations, Plaintiff calls into question Dr. Harris's medical judgment. Thus, Plaintiff is required to have met the expert certification requirement. Having failed to do so, this Court should dismiss Count XII as to Defendant VitalCore.

V. PLAINTIFF WILLIAM STRAVTIZ AND PLAINTIFF NACARLO COURTNEY'S CLAIMS (COUNTS VII, VIII, XI, AND XII) AGAINST DEFENDANT VITALCORE FAIL AS A MATTER OF LAW BECAUSE THE COMPLAINT LACKS SUFFICIENT SPECIFICITY

A. Plaintiff Nacarlo Courtney's claim for violation of his Eighth Amendment rights and § 1983 fails to state a claim by lumping together Defendants

Plaintiff uses a blanket reference to "Defendants" in this count. Further, when not using the term "Defendants," Plaintiff resorts to merely listing several of the Defendants in an attempt to maneuver around this glaring pleading deficiency. Compl. ¶ 325-32.

Courts generally have established a safeguard against pleadings that lump all defendants together, as if every action of one applies to all. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Raub v. Bowen*, this Court dismissed a claim that lacked sufficient specificity because "no other Defendant can be expected to know whether the claim is against him or her." 960 F.Supp.2d 602, 616 (E.D.Va. 2013); *see also Marcantonio v. Dudzinski*, 155 F.Supp.3d 619, 626 (W.D. Va. 2015) (citations omitted) ("In the Fourth Circuit and elsewhere, courts have interpreted *Twombly* and *Iqbal* to mean that generic or general allegations about the conduct of 'defendants,' without more, fail to state a claim.").

In Count VII, Plaintiff Nacarlo Courtney lumped eight Defendants together and makes blanket references to failures to provide medical care by these Defendants. Compl. ¶ 325-32. Throughout the Complaint, factual allegations pertaining to Mr. Courtney's medical care comparably lump Defendants together. For example, Plaintiff alleges "Mr. Courtney's eyesight has worsened during this period of time in which Defendants VDOC, Edmonds, Punturi, Talbott, Armor, VitalCore, and Dr. Gore have failed to ensure that he has regular appointments and medical treatment for his eyes, leading to physical pain from his increasingly bulging, swollen eyes, infection, and significant emotional distress." Compl. ¶ 238.

Plaintiff's manner of pleading places Defendant VitalCore at a distinct disadvantage in this litigation. "Where it is possible to connect a particular defendant, or at least a subset of defendants, to specific acts of wrongdoing, a plaintiff must do so." *J.A. v. Miranda*, 2017 WL 3840026, at *3

(D. Md., September 1, 2017) (Denying Defendants' motion to dismiss where Plaintiff was the victim of a 'group beat down' and thus, reasonably unable to identify individual harms caused by each defendant) (citing *Hyung Seok Koh v. Graf*, 2013 WL 5348326, at *5 (N.D.Ill., September 24, 2013). This Court, therefore, should dismiss Count VII as to Defendant VitalCore.

B. Plaintiff William Stravitz fails to state a claim for violation of his Eighth Amendment rights and § 1983 by lumping together Defendants (Count VII)

Similarly to Plaintiff Nacarlo Courtney's claim in Count VII, Plaintiff William Stravitz uses blanket references to "Defendants" in Count VIII. As stated above, this manner of pleading amounts to a failure to state a claim against any individual Defendant. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Marcantonio v. Dudzinski*, 155 F.Supp.3d 619, 626 (W.D. Va. 2015); *J.A. v. Miranda*, 2017 WL 3840026, at *3 (D. Md., September 1, 2017).

In Count VIII, Plaintiff William Stravitz has lumped 8 Defendants together. Compl. ¶ 333-43. To an even greater degree than with the factual allegations alleged by Mr. Courtney, Plaintiff William Stravitz amalgamates Defendants throughout the Complaint. **No factual allegations contained in the Complaint pertaining to Mr. Stravitz medical care are specifically alleged against either VitalCore or their employee, Alvin Harris, M.D.** For example, Plaintiff alleges, "Defendants VDOC, Miller, Armor, VitalCore, Dr. Harris, and Nurse Lester still have not scheduled Mr. Stravitz's follow-up appointment with Dr. Gupta or otherwise taken any action to get him medically necessary surgery for his cataracts." Compl. ¶ 245. A second allegation states, "Defendants VDOC, Miller, Armor, VitalCore, and Dr. Harris refuse to provide Mr. Stravitz with eyeglasses because they claim they are not worth getting because Mr. Stravitz is going to get surgery." Compl. ¶ 246. The Complaint contains merely these two factual allegations with respect to Dr. Harris's care of Mr. Stravitz, in which Plaintiff has lumped six and five other defendants with VitalCore, respectively.

Plaintiff's manner of pleading places Defendant VitalCore at a distinct disadvantage in this litigation and this Court should accordingly dismiss Count VIII.

C. Plaintiff Nacarlo Courtney fails to state a claim for negligence by lumping together Defendants (Count XI)

In a manner that is nearly identical to Plaintiff Nacarlo Courtney's claim for violation of the Eighth Amendment and 42 U.S.C. § 1983, Plaintiff Nacarlo Courtney's negligence claim merely provides blanket references to "Defendants." Compl. ¶ 362-67. As noted above, this pleading practice fails to state a claim. The same factual allegations which lump numerous Defendants together provide the basis for both of Mr. Courtney's claims against VitalCore. Accordingly, this Court should dismiss Count XI as to Defendant VitalCore.

D. Plaintiff William Stravitz fails to state a claim for negligence by lumping together Defendants (Count XII)

Similarly to Plaintiff William Stravitz's claim for violation of the Eighth Amendment and 42 U.S.C. § 1983, Mr. Stravitz's negligence claim merely provides blanket references to "Defendants." Compl. ¶ 369-74. This manner of pleading is insufficient to state a claim. Plaintiff William Stravitz has not alleged a single factual allegation against Defendant VitalCore or a single factual allegation that is specific to Dr. Harris's medical care. Accordingly, this Court should dismiss Count XII as to Defendant VitalCore.

CONCLUSION

Plaintiffs' Complaint fails to properly plead any plausible claim against VitalCore, it fails to set forth facts sufficient to support any of its claims, and Plaintiffs have not complied with Virginia's expert certification requirement. Accordingly, Defendant VitalCore Health Strategies respectfully requests this Court grant its Motion, dismissing all allegations against VitalCore with prejudice, and any further relief it deems fair and just.

Dated: April 14, 2023

Respectfully submitted,

/s/ *Patrick K. Burns*

Patrick K. Burns, Esq. (Bar No. 80188)
Gloria R. Cannon, Esq. (Bar No. 98572)
GORDON REES SCULLY MANSUKHANI, LLP
1101 King Street, Suite 520
Alexandria, VA 22314
T: (202) 370-8003
F: (202) 800-2999
E: pburns@grsm.com

Counsel for Defendant VitalCore

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, I electronically filed the foregoing Memorandum of Points and Authority in Support of Defendant VitalCore's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send email notification of such filing to the attorneys of records.

/s/ *Patrick K. Burns*
Patrick K. Burns