

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**BAHSID MCLEAN,**

**Plaintiff,**

**v.**

**9:20-CV-1115  
(TJM/TWD)**

**AMY FERGUSON, CARL J. KOENIGSMANN,  
WAYNE VISALLI, and WILLIAM FENNESSEY,**

**Defendants.**

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**THOMAS J. McAVOY,  
Senior United States District Judge**

**DECISION and ORDER**

**I. INTRODUCTION**

This *pro se* action brought pursuant to 42 U.S.C. § 1983 was referred to the Hon. Thérèse W. Dancks, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Previously, the Court reviewed the amended complaint in accordance with 28 U.S.C. § 1915, and found Plaintiff's state law medical malpractice, negligence, and Eighth Amendment deliberate indifference claims against Amy Ferguson ("Ferguson"), Carl J. Koenigsmann ("Koenigsmann"), Wayne Visalli ("Visalli"), and William Fennessey ("Fennessey") (collectively "Defendants") survived initial review and required a response. (Dkt. No. 20).<sup>1</sup> Rather than answering, Defendants have

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<sup>1</sup>The amended complaint also asserted claims against a defendant named "Nurse Rowick." However, those claims were dismissed without prejudice on August 16, 2021, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. (Dkt. No. 43.)

moved to dismiss the amended complaint for failure to state a claim and for lack of subject matter jurisdiction. (Dkt. No. 23 (involving just Ferguson); Dkt. No. 41 (involving Koenigsmann, Visalli, and Fennessey)). These motions were referred to Judge Dancks for a Report-Recommendation. In her November 5, 2021 Order and Report-Recommendation, Judge Dancks recommends that Defendant Ferguson's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction (Dkt. No. 23) be granted without prejudice and with leave to amend only the Eighth Amendment claim, and that Defendants Visalli, Koenigsmann, and Fennessey's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction (Dkt. No. 41) be granted without prejudice and with leave to amend only the Eighth Amendment claims. No objections to the recommendations have been filed, and the time to do so has expired.

## II. DISCUSSION

After examining the record, this Court has determined that the Order and Report-Recommendation not subject to attack for plain error or manifest injustice.

## III. CONCLUSION

Accordingly, the Court **ACCEPTS** and **ADOPTS** the Order and Report-Recommendation (Dkt. No. 47) for the reasons stated therein. Therefore, it is hereby

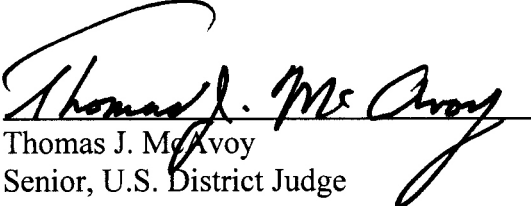
**ORDERED** that Defendant Ferguson's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction (Dkt. No. 23) is **GRANTED WITHOUT PREJUDICE** and **WITH LEAVE TO AMEND only the Eighth Amendment claim**; and it is further

**ORDERED** that Defendants Visalli, Koenigsmann, and Fennessey's motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction (Dkt. No. 41) is **GRANTED WITHOUT PREJUDICE** and **WITH LEAVE TO AMEND only the Eighth Amendment claims**; and it is further

**ORDERED** that Plaintiff is **GRANTED** thirty (30) days from the date of this Decision and Order in which to file an amended complaint that complies with this Decision and Order - that is, to amend the Eighth Amendment claims against the Defendants. Plaintiff is advised that an amended pleading supersedes in all respects the prior pleading, and thus an amended pleading must allege all allegations in support of the amended pleading. If Plaintiff fails to file such an amended complaint within thirty (30) days, this case will be closed without any further action by the Court.

**IT IS SO ORDERED.**

Dated: January 26, 2022  
Binghamton, New York

  
Thomas J. McAvoy  
Senior, U.S. District Judge