IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA A. BREJCAK, ADMIN. OF THE ESTATE OF VIRGINIA MARGARET BREJCAK a/k/a VIRGINIA BREJCAK, deceased, on behalf of Decedent's Heirs at Law and Next of Kin	:	CIVIL ACTION
	:	
	:	NO. 03-4688
v.	:	
COUNTY OF BUCKS, MICHAEL FITZPATRICK, et al.	:	

ORDER

AND NOW, this day of , 2005, it is hereby ORDERED that the Motion of Louis Brandt, D.O. for Summary Judgment against Barbara A. Brejcak, Admin. of the Estate of Virginia Margaret Brejcak a/k/a Virginia Brejcak, deceased, on behalf of decedent's heirs at law and next of kin, is GRANTED and Summary Judgment is entered in favor of Louis Brandt, D.O. on all claims in the Third Amended Complaint.

_____
THE HONORABLE MICHAEL M. BAYLSON
JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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MOTION OF LOUIS BRANDT, D.O. FOR SUMMARY JUDGMENT
AGAINST THE PLAINTIFF

Louis Brandt, D.O. ("Dr. Brandt") respectfully requests that his motion for summary judgment against Barbara A. Brejcak ("Brejcak"), Administrator of the Estate of Virginia Margaret Brejcak a/k/a Virginia Brejcak, deceased ("the decedent or Virginia Brejcak"), on behalf of decedent's heirs and law and next of kin, be granted and states in support thereof the following:

1. Brejcak, has filed a third amended complaint against Dr. Brandt, a physician, employed part-time by Bucks County to provide medical care on certain days of the week to inmates at the Bucks County Prison, Gordon Ehrlecher ("Ehrlecher"), Director of the Bucks County Department of Health, Joan Crowe, R.N. ("Crowe"), Medical Director of the Bucks County Correctional Facility, Howard Gubernick ("Gubernick") Director of the Bucks County Department of Corrections, Willis Morton ("Morton"), Warden of the Bucks County Correctional Facility, Jay Allen Nesbitt ("Nesbitt"), prior Warden of Bucks County Correctional Facility and Dr. Donald Davis ("Davis") employed by Bucks County to provide medical care to inmates at the Bucks County Correctional Facility, Lewis Polk, M.D. ("Polk"), Medical Director of the Bucks County Health Department, Michael Fitzpatrick ("Fitzpatrick"), then Bucks County Commissioner, Charles Martin ("Martin"), County commissioner of Bucks County, Sandra Miller ("Miller"), Commissioner of Bucks County and Diamond Drugs, Inc. ("Diamond Drugs") contending that they provided inadequate medical care to the decedent while she served a

sentence in the Bucks County Correctional Facility ("BCCF"). See Exhibit "A", third amended complaint.

2. Diamond Drugs, Inc. has settled the claim with Brejcak.

3. Brejcak bases her claim against Dr. Brandt solely upon 42 U.S.C. §1983 and the Eighth Amendment to the United States Constitution. Brejcak has not presented in her third amended complaint any common law medical malpractice claim. Instead, she takes what essentially constitutes a medical malpractice claim and dresses it up as a constitutional tort under the guise of deliberate indifference to a serious medical need.

4. To survive a motion for summary judgment on her deliberate indifference claim Brejcak must produce sufficient evidence to establish that Dr. Brandt knew that his conduct or omissions presented a substantial risk of harm to Virginia Brejcak.

5. The record fails to establish this. Insufficient evidence to support a jury verdict on this issue appears in the record. Dr. Brandt's deposition testimony and his verification, attached hereto as Exhibit "B", shows that at all times he believed he provided quality care to the decedent.

6. Bucks County Prison officials incarcerated Virginia Brejcak between July 21, 2001 and the date of her death on December 25, 2001. During that time period nurses at the Bucks County Prison saw her 32 times. A nurse practitioner saw her 3 times. Physicians saw her 15 times. See summary of medical records attached hereto as Exhibit "C".

7. Brejcak presents a disagreement with the medical care received by the decedent. This fails to constitute deliberate indifference to a serious medical need.

8. Dr. Brandt incorporates by reference as if set forth herein in full his brief in support of his motion for summary judgment.

WHEREFORE, Louis Brandt, D.O. respectfully requests that judgment be entered in his favor and against Barbara A. Brejcak, Administrator of the Estate of Virginia Margaret Brejcak a/k/a Virginia Brejcak, deceased, on behalf of decedent's heirs and law and next of kin on all

counts in the third amended complaint.

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: /S/ ALAN S. GOLD
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendant,
Louis Brandt, D.O.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA A. BREJCAK, ADMIN. OF THE ESTATE OF VIRGINIA MARGARET BREJCAK a/k/a VIRGINIA BREJCAK, deceased, on behalf of Decedent's Heirs at Law and Next of Kin	:	CIVIL ACTION
	:	NO. 03-4688
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STATEMENT OF UNCONTESTED FACTS OF LOUIS BRANDT, D.O.
IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

1. Virginia Brejcak ("the decedent"), was incarcerated at the Bucks County Correctional Facility ("BCCF") beginning July 20, 2001 and ending on December 25, 2001, when she died.

2. The decedent had been incarcerated at other times at the BCCF.

3. Her last incarceration, which began on July 21, 2001, resulted from her violations of her probation for convictions of drug use. The Court sentenced her to 6 to 23 months. Settlement memorandum of plaintiff.

4. During the incarceration that began July 21, 2001, Virginia Brejcak first sought medical care by going to sick call on July 30, 2001. At that time she only complained about constipation. Joan Crowe, R.N. ("Crowe"), a nurse and the Medical Director of BCCF, gave her milk-of-magnesia. See treatment chronology, Exhibit "C"; medical records, Exhibit "D" progress notes July 30, 2001.

5. On August 4, 2001, Virginia Brejcak again reported to sick call complaining of constipation. Crowe again ordered milk-of-magnesia. See Exhibit "C" treatment chronology; Exhibit "D" medical records August 4, 2001, progress notes and order sheet.

6. An August 8, 2001, entry on the order sheet shows Darvocet being prescribed for migraines and medicine being prescribed for acne and the ordering of a blood test for liver function studies. Exhibit "C" treatment chronology; Exhibit "D" medical records, order sheet

August 8, 2001.

7. On August 9, 2001, the decedent had blood drawn for liver function test by Nurse Turner. Exhibit "C" treatment chronology; Exhibit "D" medical records, progress notes August 9, 2001.

8. On August 14, 2001, the nursing staff entered an order for additional milk-of-magnesia for August 14, 2001. Exhibit "C" treatment chronology; Exhibit "D" medical records.

9. On August 15, 2001, the progress notes of Louis Brandt, D.O. ("Dr. Brandt") reflect the results from the liver function tests. The progress notes also indicate that a liver function test should occur in three months. Exhibit "C"; Exhibit "D", order sheet 8/15/01.

10. On August 29, 2001, the decedent complained of chronic constipation and asked for milk-of-magnesia as needed. She also complained of hemorrhoids, bleeding and polyps. She also asked to see an ob/gyn. Exhibit "C"; Exhibit "D", progress notes 8/29/01

11. An order sheet dated August 29, 2001, indicates milk-of-magnesia for that night. Exhibit "C"; Exhibit "D", order sheet 8/29/01.

12. An order sheet of September 4, 2001, shows milk-of-magnesia prescribed nightly for three weeks. It also shows Medimucil ordered for three weeks. It also contains a referral to the ob/gyn nurse. Exhibit "C"; Exhibit "D", order sheet 8/29/01.

13. Progress note of September 11, 2001 show another examination by a nurse. The progress notes indicate that the decedent complained of polyps and hemorrhoids. No other complaints appear. Exhibit "C"; Exhibit "D", progress notes 9/11/01.

14. Progress note for September 17, 2001 show that the decedent appeared at sick call for her annual gynecological check up. She expressed concern about a lump on her left breast. She indicated that she had a cyst on the left part of her brain and that she had previously had a MRI. She denies having any surgery. She indicates that she took Darvocet for pain in her head. She identified a prior crack cocaine habit. She also reported many psychological hospitalizations in the 1980's. Exhibit "C"; Exhibit "D", progress notes 9/17/01.

15. On September 17, 2001, Crowe, a nurse and the medical director at BCCF, referred the decedent for a mammogram. Exhibit "C"; Exhibit "D", referral of September 17, 2001.

16. A nurse practitioner, Bonnie Giordano ("Giordano") entered an order on September 17, 2001, for a mammogram and pap test. Exhibit "C"; Exhibit "D", order sheet of 9/17/01.

17. On September 24, 2001, the decedent presented to sick call and indicated that she had been taking Darvocet 100mg every day for her migraine. The nurse notified Dr. Brandt. This constitutes the first knowledge that Dr. Brandt had of the decedent during her incarceration that began on July 21, 2001. Exhibit "C"; Exhibit "D", progress note 9/24/01.

18. On September 29, 2001, the decedent presented to sick call with a bruised and swollen right wrist. She indicated that she slammed it against the wall because she was angry. The nurse gave her ice. The nurse noted that she exhibited threatening speech and fragmented thinking. The nurse referred her to the mental health nurse. Exhibit "C"; Exhibit "D", 9/29/01 progress notes.

19. On October 1, 2001, Dr. Brandt examined the decedent for the second time. She indicated to him that she had a cyst on her brain and she had previously had an MRI. Dr. Brandt noted that the medical records from Pottstown Hospital for a July, 2000 brain scan should be procured. See Exhibit "C"; Exhibit "D", progress notes 10/1/01, order sheet 10/1/01.

20. On October 1, 2001, Dr. Kieve, a psychiatrist, ordered Zynexa for the decedent. Dr. Kieve also directed that if the decedent refuses the medication to give Haldol 5mg every four hours as needed for severe agitation. See Exhibit "C"; Exhibit "D", order sheet 10/1/01.

21. Progress notes of the decedent for October 1, 2001 show that the nurses checked the decedent before being into a four point restraint. All the restraints were secure with positive flow to hands and feet. The nurse noted that the decedent seemed quite agitated, screaming and threatening. She had no shortness of breath. The nurse gave the decedent 2mg of Haldol in her

right thigh. Exhibit "C"; Exhibit "D", progress notes 10/1/01.

22. On October 4, 2001, Virginia Brejcak appeared in the dispensary demanding that her requests be honored or that she be taken back to her cell. The nurse noted that her anxiety level had escalated. Exhibit "C"; Exhibit "D", progress notes 10/4/01.

23. On October 5, 2001, the decedent was referred to Bonnie Giordano, a nurse practitioner, for a boil. Exhibit "C"; Exhibit "D", progress notes 10/5/01.

24. On October 6, 2001, the decedent appeared at sick call and was screaming and using obscenities and demanding her Darvocet for her migraines. Nurse Crowe noted that her demeanor did not appear appropriate for migraines and that she needed to be referred to a physician for review. Exhibit "C"; Exhibit "D", progress notes 10/6/01.

25. On October 7, 2001, Dr. Brandt reviewed the progress notes of 10/6/01 and prescribed Excedrine for the migraines. Exhibit "C"; Exhibit "D", progress notes 10/7/01.

26. On October 7, 2001, Dr. Brandt diagnosed the decedent with vulva vaginitis and prescribed hot soaks and further follow up with Bonnie Giordano. On the same date Dr. Brandt entered an order discontinuing the Darvocet, prescribed Excedrine and an ES migraine formula to be taken daily for three months. He also prescribed hot compresses to the vulva for one week. Exhibit "C"; Exhibit "D", order sheet 10/7/01; progress notes 10/7/01.

27. Progress notes appear for October 8, 2001 which shows sick a call visit by the decedent. Dr. Byrne, a psychiatrist, noted that the decedent was a 42 year old white female well known from previous incarcerations at the BCCF. Her last psychiatric evaluation had occurred on August 20, 2000. She had a long history of bipolar disorder with psychiatric hospitalizations, the most recent one in 1999. She had last left the BCCF in January, 2001 having refused all psychiatric medications since August, 2000. She quickly turned to cocaine. She received hospitalization and treatment at Riverside but returned to cocaine afterwards. Her thinking had become increasingly disorganized since late September, 2001. She refused all medications and treatments for her psychiatric problems. She was very hostile and irritable. She denied suicidal

and homicidal ideation. Her insight and judgment were poor. She had a bipolar disorder with a recent episode. She had a history of poly substance abuse. She refused an anti-mood stabilizer. A consultation occurred with the county correctional mental health services regarding possible commitment to a mental hospital. Exhibit "C"; Exhibit "D", progress notes 10/8/01.

28. An order of October 8, 2001, directed that Zybrexa and Haldol be discontinued. It directed Haldol 2 mg for severe agitation. Exhibit "C"; Exhibit "D", order sheet of 10/8/01.

29. On October 9, 2001, a nurse noted that at sick call Virginia Brejcak exhibited periods of sustained and intense agitation including yelling, cursing and talking to herself. The decedent refused all psychiatric medications. Dr. Byrne had ordered an IM injection of Haldol for situations in which decedent became extremely agitated. Staff had reported that the decedent had periods of sustained agitation. The nurse reported that she had extreme agitation during some contacts with her. She still refused to take her anti-psychotic medication. The decedent demonstrated severe agitation and paranoia although she had responded positively to medications during past psychiatric hospitalizations. Her non-compliance with medication continued as a significant problem. Crowe instructed the staff to notify CMHS and/or dispensary if and when the staff feels that the decedent's behavior has reached an excessive and sustained level. At that point all staff needed to coordinate the best plan of action to address the situation and the well being of the decedent. Exhibit "C"; Exhibit "D", progress notes 10/9/01.

30. On October 15, 2001, Giordano, the nurse practitioner for gynecological problems, examined Virginia Brejcak. She observed a developed pustule on the right labia majora and also on the right upper inner thigh. Giordano indicated that the area should be treated with anti-bacterial soap, with warm moist heat to the lesions and neosporin. Giordano noted the possibility of the need for a surgical consult. Her order sheet reflected these recommendations. Exhibit "C"; Exhibit "D", progress notes 10/15/01; order sheet 10/15/01.

31. On October 17, 2001, Virginia Brejcak appeared at sick call demanding a Hepatitis C test. Exhibit "C"; Exhibit "D", progress notes 10/17/01.

32. On October 18, 2001, the decedent came to the dispensary to have an examination of the cyst on her right inner thigh. The nurse noted that the cyst had gotten smaller and that there was no drainage. It looked like it had drained. The decedent became belligerent. The guards escorted her out of the dispensary. Exhibit "C"; Exhibit "D", progress notes 10/18/01.

33. On October 19, 2001, the decedent came to sick call. She refused to go to Doylestown Hospital for her mammogram and refused to sign a refusal. She left the dispensary angry and hollering. Exhibit "C"; Exhibit "D", progress notes 10/19/01.

34. On October 25, 2001, a nurse checked the decedent's rash. The decedent indicated that she was using hydrocortisone cream. The decedent denied problems with cysts. Exhibit "C"; Exhibit "D", progress note 10/25/01.

35. On October 25, 2001, a nurse examined the decedent when she appeared at the sick call list. The note indicates that the nurse had to look at the area from a distance because the inmate is on red lock. Exhibit "C"; Exhibit "D", progress note 10/25/01.

36. On October 26, 2001, the inmate came to sick call with complaints of pain and tenderness at the left rib area and sacral area. The area was reddened and scabbed. The buttocks had multiple redness and scabbed areas. It appeared to be a localized skin infections. The nurse indicated that she would refer the patient to Dr. Brandt for an examination on Monday. The nurse instructed the decedent not to scratch. Virginia Brejcak appeared willing to follow this instruction. Exhibit "C"; Exhibit "D", progress notes 10/26/01.

37. On October 29, 2001, Dr. Brandt examined the decedent. He noted possible boils over her arms, back and buttocks. He ordered that she receive Keflex for 10 days. He also prescribed Neosporin cream for the boils for 10 days. Exhibit "C"; Exhibit "D", progress notes 10/29/01, order sheet 10/29/01.

38. On November 2, 2001, the decedent appeared at sick call complaining of a sty on her eye lid and a sore oozing from her left arm area. The area appeared red and oozing. Exhibit "C"; Exhibit "D", progress notes 11/2/01.

39. On November 3, 2001, the nurse checked the wound under the left arm. She noted an abscessed area opened 5 ml. The decedent stated that she picked it open. The nurse applied a triple AB and a band-aid. Exhibit "C"; Exhibit "D", progress notes 11/3/01.

40. On November 12, 2001, Virginia Brejcak went to the in house ob/gyn clinic. At that time she complained about her right buttock lesions worsening but indicated that her right thigh and right labia lesions had healed. An examination by Giordano showed that the labia lesions had healed and that the right upper thigh lesion had healed. Giordano indicated that on the buttocks there were two pustules at the top and a crack of the buttocks with a 4 to 6 cm warm induradon. There were multiple dry healed scars on the buttocks. Exhibit "C"; Exhibit "D", progress notes 11/12/01.

41. On November 12, 2001, a member of the medical staff while passing out medicine on the module housing of the decedent heard and saw the decedent yelling "I had a seizure, I wet my pants." She tried to talk to the decedent but she kept yelling and was very agitated. The decedent refused seizure medicine. Seizure activity was not seen. The medical staff placed the decedent on medical watch. Exhibit "C"; Exhibit "D", progress note 11/12/01.

42. On November 12, 2001, the nursing staff receives a telephone call from a correctional officer states that the decedent had vomited and had a bump on her head. The nurse went to the decedent's cell and saw a small lump on the side of decedent's head. She gave her ice. The decedent slapped it out of the way and started screaming and yelling obscenities. The nurse lacked the ability to check the pupils of the eyes of the decedent. The decedent call the nurse a "fucking bitch" and told her "to get the fuck out of her cell" and called her a "fucking cunt". She used these phrases many times. The nurse left the cell and placed the inmate on sick call evaluation for the next day. Exhibit "C"; Exhibit "D", progress notes 11/12/01.

43. On November 13, 2001, the nurses saw the decedent at sick call after alleged seizure activity the day before. The nurse noted a lump in the left octipal area. The decedent continued with rapid fire speech and tears. The nurse noted that Dr. Brandt was to evaluate the

decedent the next morning. The nurse notes sores on the buttocks scratched open. They did not look like the previous abscess. The decedent was also to see Dr. Brandt for that. Exhibit "C"; Exhibit "D", 11/13/01.

44. On November 14, 2001, the decedent appeared at sick call for an evaluation by Dr. Brandt. Dr. Brandt noted that she had a psychotic episode and appeared very angry and agitated. An officer had to remove her from the clinic. Exhibit "C"; Exhibit "D", progress notes, 11/14/01.

45. On November 16, 2001, Dr. Brandt again examined Virginia Brejcak. She indicated that she fell on her head. Dr. Brandt found nothing wrong with her. Her eyes were negative for any problems. The fundo scope test was negative. The decedent demanded Darvocet. When Dr. Brandt refused Virginia Brejcak became angry. He concluded that the wound on the buttocks was self inflicted. He cultured it and indicated that he would follow up with culture results. He entered an order directing a follow up with results from the lab tests from the culture taken from the buttocks. Exhibits "C" and "D", progress notes, 11/16/01; order sheet 11/16/01.

46. On November 19, 2001, Dr. Brandt examined Virginia Brejcak again. He ordered Bactrium. Dr. Brandt directed that Dr. Davis see Virginia Brejcak from now on. Exhibit "C"; Exhibit "D", order sheet and progress notes 11/19/01.

47. On November 20, 2001, Dr. Troppaner examined the decedent. See Exhibits "C" and "D", progress notes 11/20/01.

48. On November 20, 2001, Donald Davis, D.O. ("Dr. Davis") examined Virginia Brejcak and diagnosed her with MRSA. He ordered Naldecon for her sinuses. Decedent complained of runny sinuses. Dr. Davis indicated that he intended to examine the decedent weekly. Exhibit "C"; Exhibit "D", order sheet 11/20/01.

49. On November 20, 2001, nurses from BCCF contained Dr. Brandt at home and obtained a verbal order from him for Actifed to treat the sinus condition for the decedent.

Exhibit “C”; Exhibit “D”, order sheet 11/20/01.

50. On November 21, 2001, Dr. Brandt discontinued the Actifed. Exhibit “C”; Exhibit “D”, order sheet 11/21/01.

51. On November 23, 2001, a nurse drew blood from Virginia Brejcak to test for Hepatitis A, B and C. The nurse noted that the sores on the buttocks were still draining. The decedent refused Rifampin but agreed to continue to take Bactrim. Exhibit “C”; Exhibit “D”, progress notes 11/23/01.

52. On November 27, 2001, a nurse was called to A Module, where prison officials had assigned the decedent, in response to prison officers who believed that the inmate had suffered a seizure. According to the nurse, the decedent had a seizure witnessed by other inmates. She lost control of her bowel and bladder and hit her head. She had a lump on her left forehead. She was awake and aware and had no memory of the seizure. Exhibit “C”; Exhibit “D”, progress notes 11/27/01.

53. On November 28, 2001 a nurse saw Virginia Brejcak at the dispensary at the request of a correctional officer because she had complained of a terrible headache. She refused medication. The nurse advised her to keep her appointment with the physician. She stated that she understood the necessity of this. She left the dispensary at her own request. Exhibit “C”; Exhibit “D”, progress notes 11/28/01.

54. On November 29, 2001, Dr. Davis saw Virginia Brejcak. He found her extremely belligerent. He indicated that she needed a transfer to a psychiatric facility. He also indicated that she needed continued isolation secondary to MRSA. He stated in an order sheet that she refused all medications and would not sign an AMA form. Exhibit “C”; Exhibit “D”, order sheet of 11/29/01.

55. On December 4, 2001, Dr. Davis examined Virginia Brejcak. He indicated that the abscess areas on her buttocks had healed without her being compliant with her medications. She agreed to take the anti-seizure medications, Dilantin and Phenobarbital. Dr. Davis

discontinued medical isolation and ordered that she be checked weekly. He also issued an order for Phenobarbital and for the Dilantin. Exhibit "C"; Exhibit "D", order sheet and progress notes 12/4/01.

56. On December 11, 2001, Dr. Davis examined Virginia Brejcak. She complained of headaches. He noted that the MRSA infection had resolved totally. He ordered Dilantin and Phenobarbital levels to be taken. He ordered Naldecon for three weeks and a skull x-ray. Exhibit "C"; Exhibit "D", progress note and order sheet 12/11/01.

57. On December 12, 2001, nurses drew blood for Dilantin levels and Phenobarbital levels. Exhibit "C"; Exhibit "D", progress note 12/11/01.

58. On December 17, 2001, medical staff completed the x-ray of the decedent's skull. Exhibit "C"; Exhibit "D", progress notes 12/17/01.

59. On December 18, 2001, Dr. Davis examined the decedent. He observed that she took the Dilantin. She refused to take the Phenobarbital. Dr. Davis discontinued the Phenobarbital. He increased the Dilantin. He ordered a recheck of the Dilantin level for January 16, 2002. Exhibit "C"; Exhibit "D", progress notes and order sheet 12/18/01.

60. On December 25, 2001, correctional officers found Virginia Brejcak lying on the floor of her cell in a prone position. She had seizure like moments to the body. Her slacks were wet and covered with vomit. An ambulance was called. She was transported to Doylestown Hospital Emergency Room. Exhibit "C"; Exhibit "D", progress notes 12/25/01.

61. At no time did Dr. Brandt act in any supervisory position in the medical department of the BCCF or in any other medical department of BCCF. Exhibit "B", verification of Dr. Brandt, paragraph 1.

62. Dr. Brandt's contract of employment with BCCF did not provide for him to train anyone or to engage in any supervisory activities of any kind. The contract indicated that he had to provide medical care only to inmates at the BCCF on the days assigned to him. Exhibit "B", paragraph 2.

63. At no time did Dr. Brandt have the position of Medical Director of BCCF. Exhibit "B", paragraph 3.

64. At no time did Dr. Brandt have supervisory control or authority over any doctor at BCCF, including Dr. Davis. Exhibit "B", paragraph 4.

65. Dr. Brandt consulted with Dr. Byrne, the psychiatrist at the BCCF. He asked that Dr. Byrne transfer Virginia Brejcak to a mental health facility or involuntarily commit her. Dr. Byrne refused. She indicated that there was not basis to do either. Dr. Brandt reasonably concluded that he could do nothing further concerning transferring Virginia Brejcak to a mental health facility. He reasonably concluded that he lacked the ability to involuntarily commit her in the face of Dr. Byrne's professional opinion that no basis existed for such a position. Exhibit "B", paragraph 5.

66. At all times Dr. Brandt subjectively believed that he had provided quality care to Virginia Brejcak. Exhibit "B", paragraph 6.

67. At no time did Dr. Brandt believe that the actions he took or failed to take presented a substantial risk of harm to Virginia Brejcak. Exhibit "B", paragraph 7.

68. At no time did Dr. Brandt believe that Dr. Davis' prescription of Naldecon to Virginia Brejcak presented a substantial risk of harm to her. Exhibit "B", paragraph 8.

69. At no time did Dr. Brandt believe that he had the ability or authority to overrule Dr. Davis' medical decisions concerning Virginia Brejcak, including the prescription of Naldecon to her. Exhibit "B", paragraph 9.

70. At no time did Dr. Brandt have the authority to train nurses at the BCCF. Exhibit "B", paragraph 10.

71. At no time did Dr. Brandt have the authority to train any medical staff or any staff at the BCCF. Exhibit "B", paragraph 11.

72. At no time did Dr. Brandt's responsibilities include the training of any staff at the BCCF, including prison guards and nurses. Exhibit "B", paragraph 12.

73. At all times relevant to the claims of Virginia Brejcak, Dr. Brandt reported to Joan Crowe as his supervisor. Exhibit "B", paragraph 14.

74. Nurse Crowe functioned as the supervisor of the dispensary at BCCF from October, 2001 to the present. Exhibit "E", deposition of Crowe, Part I, page 8.

75. On many occasions the decedent would come to the dispensary and would not be able to be seen because of her inappropriate behavior. Her psychiatric problems caused this behavior. Exhibit "E", deposition of Crowe, page 113.

76. Dr. Davis and Crowe had a long discussion about the decedent needing psychiatric help. Dr. Davis referred the decedent to the mental health unit at BCCF. Dr. Byrne of that unit came over to talk to Dr. Davis and Crowe about the decedent. Dr. Byrne, a psychiatrist, told Crowe and Dr. Davis that she could not involuntarily commit the decedent because she was not a threat to herself or others. Crowe told Dr. Byrne that she disagreed with her. Crowe and Dr. Davis felt that the decedent should go to Norristown State Hospital. When Dr. Byrne disagreed Crowe and Davis believe that they could do nothing else. Exhibit "E", deposition of Crowe, pages 113-115.

77. The Lenape Foundation employed Dr. Byrne. The Lenape Foundation had a contract with Bucks County concerning making decisions for involuntary commitment of individuals in Bucks County. Dr. Byrne would have made the decision as to whether or not Virginia Brejcak should be involuntarily committed regardless of who submitted the involuntary commitment petition. Exhibit "H", page 97.

78. Virginia Brejcak refused her bipolar medication as soon as she arrived at BCCF. Exhibit "E", page 122.

79. Crowe attributed Virginia Brejcak's unwillingness to take her MRSA medication to Virginia Brejcak suffering from mental illness and not taking the medication for that mental illness. Exhibit "E", page 123.

80. Crowe had many conversations with the decedent to try and convince her to take

her medications. Exhibit "E", page 128.

81. Dr. Davis told Crowe after the death of the decedent that he had no knowledge that Naldecon had PPA in it. Exhibit "E", page 155.

82. In 2001, Crowe viewed Naldecon as a routine drug. She had received no information concerning it being dangerous. She posted nothing on the bulletin board next to where the medications are kept at BCCF. That constitutes the location where she posted information about drugs concerning any warnings relating to them. Exhibit "E", pages 149, 150 and 155.

83. In the past Diamond Drug Co. had notified BCCF when a drug was taken off the market. Diamond had done this by telephone. It had not notified the prison prior to the death of the decedent of any problems with Naldecon. Exhibit "E", pages 155 and 157.

84. BCCF relies on Diamond and has always relied on Diamond to advise it of any danger concerning the medication it supplied. Exhibit "E", page 161.

85. Before Dr. Byrne indicated that the decedent could not be removed from BCCF Crowe had told her that the decedent was harder and harder to take care of because the decedent refused to take her medication. Crowe told Dr. Byrne that they could not bring her down to the dispensary because every time nurses brought her down she would be belligerent, angry and loud. Dr. Byrne responded that nothing could be done about this. Crowe took this as a "don't even bother" to try to commit the decedent. Exhibit "E", pages 168-169.

86. Every time the decedent or anyone observing her reported seizure activity by the decedent a nurse or physician examined the decedent. Exhibit "E", page 201.

87. A nurse from BCCF referred the decedent to BCCF's mental health department when she was initially screened in July, 2001. Exhibit "E", page 204.

88. Virginia Brejcak refused Naldecon on November 29, 2001. Exhibit "E", page 478.

89. The last day that Virginia Brejcak took Naldecon was on December 23, 2001.

Exhibit “E”, page 477.

90. At all times in 2001, Dr. Polk the medical director of Bucks County would have been responsible for supervising Dr. Davis at BCCF. Deposition of Gordian V. Ehrlecher, Exhibit “F”, page 52.

91. Dr. Brandt had no supervisory authority over Crowe or Dr. Davis. Exhibit “F”, page 90.

92. Dr. Davis wrote in his progress note for the decedent on November 29, 2001, that he felt that the decedent needed to go to a psychiatric facility. After he wrote the note he contacted Dr. Brandt and said that they needed to get the decedent admitted to a psychiatric facility. Dr. Brandt contacted Dr. Byrne, a psychiatrist. Dr. Brandt did not have ability to admit a patient to psychiatric facilities. He needed the approval of the psychiatrist at BCCF who was Dr. Byrne. Exhibit “G”, deposition of Donald Davis, D.O., page 42.

93. Dr. Davis believed that Virginia Brejcak had an involuntary commitment hearing. He believed that she was going to be committed. Exhibit “G”, deposition of Donald Davis, D.O., pages 45-46.

94. When Dr. Davis later found out that Virginia Brejcak was not to be involuntarily committed and was not to be transferred to a psychiatric facility he had no power to do anything. He found out that she was not going to be transferred to a psychiatric facility before she died. Exhibit “G”, page 50.

95. In September or October, 2001, a meeting occurred between Dr. Davis, Dr. Byrne and Crowe to discuss the decedent needing a psychiatric commitment. The meeting took place in Crowe’s office. From that point on Dr. Byrne took over concerning the decision to commit Virginia Brejcak or to transfer her to a psychiatric facility. Exhibit “G”, pages 51 and 52.

96. Dr. Davis never ordered an MRI or CAT scan of Virginia Brejcak’s brain because her history of epilepsy did not justify either test. Her psychiatric condition prevented an MRI or CAT scan. She would need to be medically controlled by a psychiatrist because she could have

either test. Exhibit "G", pages 58 and 59.

97. After Dr. Davis took primary responsibility for the care of the decedent he had her checked weekly for her seizure disorder. Exhibit "G", page 57.

98. Dr. Davis never came to the conclusion that Virginia Brejcak's seizures had started to occur more frequently. Exhibit "G", page 93.

99. Dr. Davis ordered Naldecon for Virginia Brejcak because of her sinusitis. Exhibit "G", page 99.

100. Dr. Davis never saw a warning from either the manufacturer or Diamond Drug Co. that Naldecon had potential fatal side effects. Exhibit "G", page 102.

101. Dr. Davis had seen information about Naldecon in the Wall Street Journal prior to November 20, 2001, that indicated that the PPA in Naldecon was under suspicion for causing TIA or CVA. Dr. Davis assumed that the manufacturer had taken PPA out of the Naldecon. Exhibit "G", page 103.

102. Dr. Davis did not learn that Naldecon had PPA in it until after the decedent's death. Exhibit "G", page 105.

103. Dr. Davis told Virginia Brejcak that it was his opinion that she needed admission to an in-patient psychiatric facility. Virginia Brejcak was lucid during the conversation and understood it. She indicated that she did not want any psychiatric hospitalization. Exhibit "G", page 116.

104. Dr. Davis had complete responsibility for the medical care for Virginia Brejcak after November 19, 2001. Exhibit "G", page 143.

105. Dr. Davis believes that Virginia Brejcak received the highest quality of care during her incarceration at BCCF. Exhibit "G", page 144.

106. Dr. Davis believed that Virginia Brejcak's seizures were not controlled after November 19, 2001, after he became her primary physician because she refused to take her medication. Exhibit "G", page 178.

107. Dr. Davis' progress note in Virginia Brejcak's medical records dated December 11, 2001 states that the MRSA was 100% resolved. He states that he knew this because there was no redness or drainage. Her skin was intact. He removed her from medical isolation. Exhibit "G", page 193.

108. In 2001, Dr. Brandt worked 12 to 16 hours a week at the BCCF prison as a physician. Exhibit "H", page 16.

109. Dr. Brandt did not choose which prisoners to see at sick call. The nurses examined the prisoners first and referred prisoners to him whom they believed he needed to treat. Exhibit "H", page 19.

110. Dr. Brandt indicates that Virginia Brejcak had a psychotic or bipolar episode virtually every time he saw her. Exhibit "H", page 64.

111. Dr. Brandt saw Virginia Brejcak for the first time during her last incarceration on August 15, 2001. He analyzed the results of her liver function test. The results showed only slight elevation. He had ordered the test because she had chronic Hepatitis. Exhibit "H", page 67.

112. Dr. Brandt next saw the decedent on October 1, 2001. The decedent claimed that she had a brain cyst. He ordered the records from Pottstown where she said that she had an MRI in July, 2000. He never received the records. He placed an order in the chart to obtain the records. Roxeanne Bentz, RN ("Bentz") countersigned the orders. Bentz would have directed the clerk to get the records. Exhibit "H", page 67.

113. Dr. Brandt had ordered the MRI report to see if Virginia Brejcak had a brain cyst. If she had one he would have sent her to a neurologist. Exhibit "H", page 70.

114. Dr. Brandt next saw Virginia Brejcak on October 7, 2001. Virginia Brejcak demanded Darvocet for migraines and acted abusively toward him. Dr. Brandt ordered Excedrine for her instead. She also complained about a rash around her vulva. He ordered Erythromycin and hot soaks. He also directed a follow up by the ob/gyn nurse practitioner.

Exhibit “H”, page 73.

115. Dr. Brandt next saw Virginia Brejcak on October 29, 2001. Virginia Brejcak had boils on her arms, back and buttocks. He prescribed Keflex. He was concerned that she may have MRSA. Exhibit “H”, page 74.

116. Dr. Brandt next saw Virginia Brejcak on November 14, 2001. He evaluated her boils. Virginia Brejcak became psychotic. A correctional officer had to remove her. Dr. Brandt could not evaluate her. Exhibit “H”, page 74.

117. Dr. Brandt next saw Virginia Brejcak on November 16, 2001. She claimed that she had fallen on her head and against demanded Darvocet. Dr. Brandt refused. He believed that she had self inflicted wounds on her buttocks. He cultured her to make sure that she did not have MRSA. He did not order a neurological consult because the problem stemmed from her failure to take the Dilantin and Phenobarbital. He had prescribed these drugs from the beginning of her incarceration. Her blood levels suggested that she had taken only one days worth out of seven. Exhibit “H”, page 75.

118. Dr. Brandt next saw Virginia Brejcak on November 19, 2001. She presented with the same problems that she had mentioned on November 16, 2001. Her latest liver function test indicated a very slight elevation. This indicated the absence of infection. Exhibit “H”, page 76.

119. After November 20, 2001, Dr. Davis assumed control for all medical care of Virginia Brejcak. Exhibit “H”, page 79.

120. Dr. Brandt knew that Naldecon had PPA in it and that there was an FDA warning that PPA could cause strokes in young women. He was not concerned about a risk to Virginia Brejcak because he believed that she would only be taking it for a short period of time. He believed that a patient had to take Naldecon for three to six months for there to be a stroke risk. He was also not concerned because Virginia Brejcak seldom took her medication. He also did not discontinue the Naldecon because Dr. Davis had ordered the Naldecon. Dr. Brandt believed that he had no authority to overrule Dr. Davis and to revoke his order especially when he thought

there was no danger to Virginia Brejcak. Exhibit "H", pages 89 and 140.

121. Dr. Brandt transferred Virginia Brejcak to Dr. Davis as of November 20, 2001 because he was getting nowhere with Virginia Brejcak and he thought that Dr. Davis might do better. Exhibit "H", page 94.

122. Dr. Brandt indicated that Virginia Brejcak would not have benefitted from Vanconycin based on her lab test. The best drug for curing her MRSA was Bactrim. Dr. Brandt prescribed that drug and cured her MRSA. Exhibit "H", page 95.

123. Dr. Brandt discussed having Virginia Brejcak committed with Crowe about five times. Dr. Brandt consistently ordered psychiatric consults for Virginia Brejcak. This resulted in Dr. Byrne seeing her several times. Dr. Brandt suggested to Dr. Byrne that Virginia Brejcak be committed but Dr. Byrne told him that she would have to hold a 301 hearing and that she would not because Virginia Brejcak was not "Norristown material". Dr. Brandt asked her to reconsider but she refused. Exhibit "H", page 97.

124. Dr. Brandt believed that there was nothing to do for Virginia Brejcak's seizures except to provide Phenobarbital and Dilantin. Exhibit "H", page 128.

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: /S/ ALAN S. GOLD
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of defendant Louis Brandt, D.O.'s Brief in support of his Motion for Summary Judgment via First Class Regular Mail on this date to the following individuals:

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DATE: June 8, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA A. BREJCAK, ADMIN. OF THE ESTATE OF VIRGINIA MARGARET BREJCAK a/k/a VIRGINIA BREJCAK, deceased, on behalf of Decedent's Heirs at Law and Next of Kin	:	CIVIL ACTION
	:	
	:	NO. 03-4688
v.	:	
COUNTY OF BUCKS, MICHAEL FITZPATRICK, et al.	:	

BRIEF OF LOUIS BRANDT, D.O. IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT AGAINST THE PLAINTIFF

I. INTRODUCTION

Barbara A. Brejcak ("Brejcak"), Administrator of the Estate of Virginia Margaret Brejcak a/k/a Virginia Brejcak, deceased ("the decedent or Virginia Brejcak"), has filed a third amended complaint against Louis Brandt, D.O. ("Dr. Brandt"), a physician, employed part-time by Bucks County to provide medical care on certain days of the week to inmates at the Bucks County Prison, Gordon Ehrlecher ("Ehrlecher"), Director of the Bucks County Department of Health, Joan Crowe, R.N. ("Crowe"), Medical Director of the Bucks County Correctional Facility, Howard Gubernick ("Gubernick") Director of the Bucks County Department of Corrections, Willis Morton ("Morton"), Warden of the Bucks County Correctional Facility, Jay Allen Nesbitt ("Nesbitt"), prior Warden of Bucks County Correctional Facility and Dr. Donald Davis ("Davis") employed by Bucks County to provide medical care to inmates at the Bucks County Correctional Facility, Lewis Polk, M.D. ("Polk"), Medical Director of Bucks County Health Department, Michael Fitzpatrick ("Fitzpatrick"), then a Bucks County commissioner, Charles Martin ("Martin"), County Commissioner of Bucks County, Sandra Miller ("Miller"), Commissioner of Bucks County and Diamond Drugs, Inc. ("Diamond Drugs") contending that they provided inadequate medical care to the decedent while she served a sentence for a crime she committed in the Bucks County Correctional Facility ("BCCF"). See Exhibit "A", third amended complaint.

Brejcak has consciously chosen not to proceed with a medical malpractice claim based

upon the law of the Commonwealth of Pennsylvania. Instead, she relies solely upon 42 U.S.C. §1983 to bring a claim against Dr. Brandt based on deliberate indifference to a serious medical need. Brejcak only produces evidence of medical malpractice. She has dressed up a medical malpractice claim under the disguise of a deliberate indifference claim. It fails to suffer even a cursory examination, let alone a sustained one.

In order to survive a motion for summary judgment based on deliberate indifference Brejcak must point to sufficient evidence to support a jury verdict on the issue of whether Dr. Brandt knew that his conduct presented a substantial risk of harm to Virginia Brejcak. To do this Brejcak must produce evidence beyond her claim that Dr. Brandt was deliberately indifferent. She must produce some evidence that Dr. Brandt knew or was aware of the risk to the decedent. Butler v. County of Bucks, 2005 U.S. Dist. LEXIS 4197 (E.D. Pa. March 18, 2005) * 16. Brejcak has failed to do this. The undisputed record shows that Virginia Brejcak received constant care during the time period of her last incarceration at BCCF between July 21, 2001 and December 25, 2001. The nurses at the prison saw her 32 times during this time period. A nurse practitioner saw her 3 times during this time period. Physicians saw her 15 times during this time period. See summary of the medical records Exhibit "C" and the medical records Exhibit "D".

Dr. Brandt at all times believed he was providing quality care to her. At no time did he know that anything he did presented a substantial risk of harm to her. Exhibit "B", paragraphs 6 and 7. He transferred her care to another doctor, Dr. Davis, when he thought that Dr. Davis might be more effective in treating her. Exhibit "H", page 97. He referred her to a psychiatrist for mental health care. Exhibit "H", page 97.

II. PROCEDURAL HISTORY

Brejcak has filed three amended complaints. In none of them did she ever present a medical malpractice claim against any of the defendants, including Dr. Brandt. Instead she has relied exclusively upon 42 U.S.C. §1983 and the Eighth Amendment of the United States

Constitution.

The discovery time period mandated by the Court has expired. Diamond Drugs has settled Brejcak's claim against it.[1]

III. STATEMENT OF THE FACTS

Dr. Brandt incorporates herein as his statement of facts the statement of undisputed facts that he has submitted to the Court under separate cover as is required by the Court's procedures.

IV. ARGUMENT

A. Standard To Be Utilized In Determining Motions For Summary Judgment.

In 1986 the Supreme Court of the United States radically changed the standard for summary judgment and in effect issued a directive to district courts to be more assertive in using this procedural tool to eliminate cases prior to trial. As the Supreme Court indicated in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) once the party seeking summary judgment has pointed out to the court the absence of a fact issue:

> ...its opponent must do more than simply show that there is a metaphysical doubt as to the material facts...In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial'...where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'. 475 U.S. at 586-87.

Summary judgment must be granted unless the evidence construed in favor of the non-moving party is sufficient for a reasonable jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 243, 249-50 (1986). Granting summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

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[1] Dr. Brandt's counsel has requested a copy of the release relating to Brejcak and Diamond Drug from counsel for Diamond Drug. Counsel has not provided it. Dr. Brandt reserves the right to amend his motion for summary judgment to include a claim that the release ends the litigation against him.

The United States Court of Appeals for the Third Circuit in Williams v. Borough of West Chester, Pa., 891 F.2d 458 (3d Cir. 1989) recognized this drastic change in the standard for summary judgment when it stated:

> Since the Supreme Court decided its summary judgment trilogy, appellate courts have increasingly been called upon to engage in difficult line-drawing exercises to determine whether a non-moving party has adduced sufficient evidence to defeat a motion for summary judgment. Id. at 459.

The Court in that case was faced with a situation where the plaintiff had established a dispute as to a genuine issue of material fact. Yet, the Court of Appeals upheld the district court's granting of summary judgment for the defendants. The Court stated that although a dispute had been established, plaintiff had failed to show that he could produce sufficient evidence to support a jury verdict in his favor. In that case the plaintiff claimed that the decedent had committed suicide while in the custody of the West Chester police. The decedent had previously been in the custody of the West Chester police on prior occasions. A police sergeant of the West Chester police testified at his deposition that the decedent's suicidal tendencies were widely known at the West Chester police department. The specific defendants who were charged with not taking appropriate precautions to prevent decedent's suicide denied knowing of the tendencies. No direct evidence was established that they did know of his suicidal tendencies. The defendant officers had served on a squad that had recorded the bizarre behavior of the decedent. The Court indicated that the question was whether given the propensity of human beings to talk about bizarre behavior, a reasonable jury could find that the defendant officers knew about decedent's suicidal tendencies and whether the jury could find that they acted with deliberate indifference to the decedent's psychological condition by not following the West Chester's police's normal policy regarding belt removal.

The United States Court of Appeals for the Third Circuit held that although the case was extremely close it had to conclude that no reasonable jury could so find. The Court indicated that circumstantial evidence could not support the plaintiff's case concerning a constitutional

violation. Judge Becker writing for the Court concluded:

> Although the line we draw today is, as I have said, not easy to place, the line must be drawn somewhere, and somewhere that adequately protects the salutary policies underlying Rule 56. Of course the right to present one's claims to a jury provides competing, no less important policies to be considered, but the upshot of the Supreme Court's summary judgment trilogy is the former must not be sacrificed entirely to the latter. The old scintilla rule, although it would make cases like this one far easier to decide, did just that. I concede, as I must, that plaintiffs have adduced some circumstantial evidence tending to show deliberate indifference. However, because the line we must draw depends entirely on context and differences in degree, 'some evidence is not necessarily enough to survive summary judgment. Id. at 891 F.2d at 466 (Emphasis added).

Brejcak has failed to meet this burden. She has not submitted sufficient evidence to support a jury verdict in her favor on the issue of deliberate indifference on which she has the burden of proof to establish her claim based on 42 U.S.C. §1983. She has not shown that Dr. Brandt acted with deliberate indifference to the serious medical needs of Virginia Brejcak. She has not shown that Dr. Brandt possessed subjective knowledge that he created a substantial risk of harm to Virginia Brejcak.

Brejcak attacks the quality and appropriateness of the medical care Dr. Brandt provided. As a matter of law this fails to show deliberate indifference. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988).

Expert testimony fails to establish a claim pursuant to 42 U.S.C. §1983 as a matter of law. See Estate of Cole by Pardue v. Fromm, 94 F.3d 254 (7th Cir. 1986)(Fact finder cannot infer subjective knowledge by a physician of a substantial risk based on expert testimony. The witness would conflict with the defendant physician's subjective medical judgment).

B. Brejcak Has Failed To Submit Sufficient Evidence To Support A Jury Verdict In Her Favor Concerning Her Claim Pursuant To 42 U.S.C. §1983 Against Dr. Brandt Because She Has Not Presented Sufficient Evidence To Establish That Dr. Brandt Acted With Subjective Knowledge That His Conduct Or Omissions Presented A Substantial Risk Of Harm To Virginia Brejcak.

The United States Supreme Court in Estelle v. Gamble, 429 U.S. 97 (1976) has set forth the elements of a cause of action brought by a prisoner pursuant to 42 U.S.C. §1983 raising allegations of the infliction of cruel and unusual punishment based on medical care. In upholding summary judgment in favor of the defendant/doctor in that case the Supreme Court stated:

> It suffices to note that the primary concern of the drafters was to prescribe 'tortures' and other 'barbarous methods of punishment'... it is safe to affirm that punishments of tortures...and all others in the same line of unnecessary cruelty, are forbidden by that amendment...We therefore conclude that deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'. (citations omitted.)

Id. at 102-104.

Examples of the "unnecessary and wanton infliction of pain", which constitute deliberate indifference provided by the Supreme Court consists of the following:

> ...doctors choosing the easier and less efficacious treatment of throwing away the prisoner's ear and stitching the stump may be attributable to deliberate indifference... rather than an exercise of professional judgment...injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction ...prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon. (citations omitted.)

Id. at 104 f.n. 10.

In Estelle v. Gamble, supra, the United States Supreme Court rejected a Constitutional claim based on medical malpractice, stating:

> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute an 'unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'. Thus a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment. Id. at 106.

The United States Supreme Court has most recently defined the deliberate indifferent standard in its opinion in Farmer v. Brennan, supra, 114 S.Ct. 1970 (1994). According to the Supreme Court, deliberate indifference requires a showing that prison medical staff were "subjectively" aware of a substantial risk of harm to the prisoner. Justice Souter, writing for the majority, stated:

> We reject [the] invitation to adopt an objective test for deliberate indifference. We hold...that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety...The official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 114 S.Ct. at 1979. (Emphasis added).

In Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) the United States Court of Appeals for the Third Circuit placed the following interpretation upon Farmer, supra:

> To be liable on a deliberate indifference claim a...prison official must both know of and disregard an excessive risk to inmate health or safety. The...element of deliberate indifference is subjective, not objective...meaning that the official must actually be aware of the existence of the excessive risk; it is not sufficient that the official should have been aware. However, subjective knowledge on the part of the official can be proved by circumstantial evidence to the effect that the excessive risk was so obvious that the individual must have known of the risk. Finally, a defendant can rebut the prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite level of knowledge or awareness of the risk, or that, although he did not know of the risk, he took reasonable steps to prevent the harm from occurring. 256 F.3d at 133.

Accord, Woloszyn v. County of Lawrence, et al., 396 F.3d 314 (3d Cir. 2005).

To survive a motion for summary judgment based on a failure to establish sufficient evidence of deliberate indifference Brejcak must point to some evidence beyond her raw claim that Dr. Brandt was deliberately indifferent or put it another way some evidence that Dr. Brandt knew or was aware of the risk to Virginia Brejcak. Singletary v. Pennsylvania Department of Corrections, 266 F.3d 186, 192 n. 2 (3d Cir. 2002); Butler v. County of Bucks, 2005 U.S. Dist.

LEXIS 4197 (E.D. Pa. 2005) * 16 * 17.

In the context of a deliberate indifference claim based on the failure to provide adequate medical care the United States Court of Appeals has repeatedly held that negligence or medical malpractice without some more culpable state of mind never constitutes deliberate indifference. Singletary, supra, 266 F.3d at 192 n. 2; Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999)(a prisoner's claim of negligent diagnose or treatment do not rise to the level of deliberate indifference); Bednar v. County of Schuylkill, 29 F.Supp. 2d 250, 253 (E.D. Pa. 1998)(a doctor's decision not to order specific forms of diagnostic treatment, an x-ray for example, constitutes medical judgment which never supports a cause of action based on deliberate indifference to a serious medical need); Bednar, supra, 29 F.Supp. 2d at 253.

A prisoner's right to medical care fails to extend to the type of medical care which the prisoner personally desires. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979). Prisoner complaints regarding the quality or appropriateness of medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988).

Thus, under Farmer, supra, and the case interpreting it, Brejcak must show that Dr. Brandt knew that he would cause harm to the decedent by means of the treatment he provided to her or failed to provide to her. An examination of the record in this case, including the medical records of the decedent, establish that Brejcak has insufficient evidence to support a jury verdict on the issue of Dr. Brandt having subjective knowledge that any conduct he engaged in or failed to engage in would cause harm to Virginia Brejcak.

Brejcak presents four different claims of deliberate indifference against Dr. Brandt. This brief will deal with each claim in separate subsections below for the convenience of the Court.

1. Dr. Brandt's Treatment Of The Seizures Of Virginia Brejcak Do Not Support A Claim Of Deliberate Indifference.

At no time did Dr. Brandt believe that his treatment of the seizures of Virginia Brejcak created a substantial risk of harm to her. Brejcak has insufficient evidence to support a jury

verdict on this issue. Dr. Brandt has produced sufficient evidence to demonstrate that he did not have the requisite level of knowledge or awareness of the risk. Even if he did know of the risk, which he did not, he took reasonable steps to prevent that harm from occurring.

Every time the decedent or anyone observing her reported seizure activity by the decedent a nurse or physician examined the decedent. Exhibit "E", page 201. Dr. Brandt did not chose which prisoners to see at sick call. The nurses examined the prisoners first and referred prisoners to him whom they believed he needed to treat. Exhibit "H", page 19.

When Dr. Brandt saw the decedent on October 1, 2001 the decedent claimed she had a brain cyst. He ordered the records from Pottstown Hospital where she said that she had an MRI in July, 2000. He placed an order in the chart to obtain the records. He never obtained the records. Exhibit "H", page 67.

Dr. Brandt had ordered the MRI report to see if Virginia Brejcak had a brain cyst. Exhibit "H", page 67. Dr. Brandt prescribed Phenobarbital and Dilantin for Virginia Brejcak's seizure. Dr. Brandt believed that there was nothing to do for Virginia Brejcak's seizure except to provide Phenobarbital and Dilantin. Exhibit "H", page 128. Crowe had many conversations with the decedent to try and convince the decedent to take her medications. Exhibit "E", page 128.

Dr. Brandt referred the decedent to a psychologist and psychiatrist on many occasions. Exhibit "G", page 42. Dr. Brandt provided what he believed to be appropriate treatment for seizures. Exhibit "B".

Brejcak concedes that the decedent received treatment for seizures but challenges the quality of it. Essentially, she outlines a disagreement with the medical care provided.

A disagreement between Brejcak and Dr. Brandt concerning the appropriate treatment for the seizures fails to produce sufficient evidence that Dr. Brandt acted with the culpable state of mind required for deliberate indifference to a serious medical need pursuant to 42 U.S.C. §1983 and the Eighth Amendment of the United States Constitution. It does not supply the necessary

evidence to show the subjective knowledge by Dr. Brandt required for deliberate indifference to a serious medical need. See Douglas v. Stanwick, 93 F.Supp. 2d 320, 325 (W.D. N.Y. 2000)(difference in opinion between physicians concerning appropriate medical care for inmate fails to show deliberate indifference).

In Snipes v. DeTella, 95 F.3d 586 at 590 (7th Cir. 1996) cert. den., 519 U.S. 1126 (1997) the United States Court of Appeals for the Seventh Circuit concluded:

> Physicians will disagree about whether a particular course of treatment is appropriate, or even if treatment is appropriate at all, but a disagreement in treatment alone will not support a constitutional violation.

The United States Court of Appeals for the Eighth Circuit in Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989) reached the same conclusion stating:

> A difference of opinion whether between an inmate and a physician or between physicians, does not give rise to an Eighth Amendment violation.

Even differing medical opinions among prison doctors does not support a claim of cruel and unusual punishment based on deliberate indifference to a serious medical need. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) cert. den., 450 U.S. 1041 (1981). While evidence of disagreements between outside doctors and prison doctors might be sufficient to overcome a summary judgment motion in a medical malpractice action even if proven such evidence fails to demonstrate deliberate indifference to a serious medical need. Sanders v. Vigil, 917 F.2d 28, 1990 W.L. 160964 *2 (9th Cir. 1990). Accord, Cruz v. Ward, 558 F.2d 658, 662 (2nd Cir. 1977)(it is to be expected that prison physicians should sometimes disagree with the opinions of the hospital staff) cert. den., 434 U.S. 1018 (1978). In Gardner v. Zaunbrecher, No. 95-CV-1543, 1996 W.L. 507072 *2 (N.D. N.Y. Sept. 4, 1996) the Court held that a disagreement among an inmate's physicians over a proper course of treatment did not show conscious or callous indifference to a serious medical need. Even gross negligence fails to support a cause of action pursuant to 42 U.S.C. §1983. Wilson v. Seiter, 501 U.S. 294 (1991).

In Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999) plaintiff, the estate of an inmate,

contended that while confined in prison the inmate received inadequate medical care for decubitus ulcers. The estate contended that these ulcers ultimately caused the inmate's death. The Court of Appeals concluded that the district court correctly granted summary judgment for the defendant physicians based on there being inadequate evidence to show subjective knowledge that their conduct presented a serious risk of harm to the plaintiff.

One of the defendant physicians transferred the decedent to a nearby non-prison hospital for consultation and treatment by a local surgeon, Dr. Wright. Upon the decedent's return to the prison hospital the defendant/physician did not follow Dr. Wright's recommendations that the decedent be transferred to another facility for physical therapy. Instead, the defendant/physician ordered that the decedent be kept out of bed as much as possible and that the nurses move his extremities. The Court of Appeals concluded that even though the defendant physician did not follow Dr. Wright's recommendations this suggested nothing more than a mere difference of opinion as to the appropriate method of treatment under the circumstances.

Brejcak at most has shown negligence, if that. Negligence never supports a cause of action pursuant to 42 U.S.C. §1983. Daniels v. Williams, 474 U.S. 327 (1986). Even gross negligence fails to support a cause of action pursuant to 42 U.S.C. §1983. Wilson v. Seiter, 501 U.S. 294 (1991).

The majority of federal courts to consider the issue have concluded that as long as prison authorities provide some treatment to an inmate even if that treatment constitutes inappropriate care, the required subjective state of mind fails to exist to impose liability upon the healthcare professionals involved.

In Holly v. Rapone, 476 F.Supp. 226 (E.D. Pa. 1979), Senior Judge Davis held:

> Denying plaintiff's Eighth Amendment claim I remain consistent with the ruling '[W]here the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim'. Roach v. Kligman, 412 F.Supp. 421, 525 (E.D. Pa. 1976). Quoting approvingly in Norris v. Frame, supra, 585 F.2d at 1185.

Id. at 231.

In Smith v. Marcantonio, 910 F.2d 500 (8th Cir. 1990) plaintiff, an inmate, alleged that prison officials violated his constitutional rights by engaging in conduct deliberately indifferent to his serious medical needs in violation of the Eighth Amendment of the United States Constitution. According to the plaintiff he needed more pain killing medication than Bowers, the prison doctor, was willing to dispense. The plaintiff also disagreed with the frequency of his bandage changes. He blamed Dr. Bowers for a one week delay in his first check up at the University Hospital. The United States Court of Appeals for the Eighth Circuit held that the plaintiff had failed to state a cause of action:

> Because Smith's complaints represent nothing more than mere disagreement with the course of his medical treatment, he has failed to state an eighth amendment claim of deliberate indifference. Id. at 910 F.2d at 502.

Even indifference during an examination fails to defeat a motion for summary judgment. In Burgess v. Garvin, 2003 U.S. Dist. LEXIS 14419, 9-12 (D.N.Y. 2003) an inmate complained pursuant to 42 U.S.C. §1983 that a physician at a correctional facility was totally indifferent at his first examination in that he simply glanced at the prisoner's knee without actually holding the leg or feeling around the knee to see if anything was out of place, did not look at his medical records and brushed off his request to see an orthopedist. Plaintiff described the defendant physician to be very indifferent and asserted that he just does a lot of writing.

The Court granted summary judgment for the physician holding that this type of evidence failed to support a claim of deliberate indifference to a serious medical need. That analysis applies to the case now before this Court and requires the granting of summary judgment in favor of Dr. Brandt.

Mere verbal threats and harassment never support a cause of action based on the Eighth Amendment and the Fourteenth Amendment.[2] See e.g., Ivey v. Wilson, 832 F.2d 950, 954-55 (6th Cir. 1987); McFadden v. Lucas, 713 F.2d 143, 146 (5th Cir. 1983); Gaut v. Sunn, 810 F.2d

[2] No evidence exists of verbal threats and harassment by Dr. Brandt.

923, 925 (9th Cir. 1997); Collins v. Cundy, 603 F.2d 825, 927 (10th Cir. 1979)(allegation that sheriff laughed and threatened to hang prisoner did not state claim under §1983). This is because "not every unpleasant experience one may endure while incarcerated constitutes cruel and unusual punishment" Ivey, supra, 832 F.2d at 954.

Brejcak's contentions as to seizure treatment relate to negligence only. To establish this ask how if the conduct set forth by Brejcak constitutes deliberate indifference by Dr. Brandt it differs in any way from a garden variety negligence claim. It does not. Brejcak asks this Court to eliminate the deliberate indifference requirement or to so substantially modify it as to render it another form of negligence. The Supreme Court of the United States in Daniels, supra and in Wilson, supra, has forbidden what Brejcak requests.

2. Brejcak Has Insufficient Evidence To Support A Jury Verdict On The Issue Of Dr. Brandt Engaging In Deliberate Indifference To The Serious Psychiatric Needs Of The Decedent Because Dr. Brandt Referred The Decedent To A Psychiatrist And A Psychologist And Attempted To Have The Decedent Transferred To A Mental Health Facility And He Could Not Do This Because The Psychiatrist Refused To Act Upon His Recommendation.

At no time did Dr. Brandt believe that his conduct concerning the psychiatric condition of the decedent presented a substantial risk of harm to her. At all times he had thought that he had done everything he could to provide appropriate psychiatric conduct to her and to have her transferred to a psychiatric facility. Exhibit "B", paragraph 5.

Dr. Brandt consulted with Dr. Byrne, the psychiatrist at the BCCF. He asked that Dr. Byrne transfer Virginia Brejcak to a mental health facility or involuntarily commit her. Dr. Byrne refused. She indicated that there was not basis to do either. Dr. Brandt reasonably concluded that he could do nothing further concerning transferring Virginia Brejcak to a mental health facility. He reasonably concluded that he lacked the ability to involuntarily commit her in the face of Dr. Byrne's professional opinion that no basis existed for such a position. Exhibit "B", paragraph 5. At all times Dr. Brandt subjectively believed that he had provided quality care to Virginia Brejcak. Exhibit "B", paragraph 6. At no time did Dr. Brandt believe that the actions

he took or failed to take presented a substantial risk of harm to Virginia Brejcak. Exhibit "B", paragraph 7.

Dr. Brandt discussed having Virginia Brejcak committed with Crowe about five times. Dr. Brandt consistently ordered psychiatric consults for Virginia Brejcak. This resulted in Dr. Byrne seeing her several times. Dr. Brandt suggested to Dr. Byrne that Virginia Brejcak be committed but Dr. Byrne told him that she would have to hold a 301 hearing and that she would not because Virginia Brejcak was not "Norristown material". Dr. Brandt asked her to reconsider but she refused. Exhibit "H", page 97.

Dr. Brandt transferred Virginia Brejcak to Dr. Davis as of November 20, 2001 because he was frustrated that he had been ineffective in convincing her to take her medicine. His attempt to have her transferred to as psychiatric facility had failed. He thought that Dr. Davis might do better in treating her. Exhibit "H", page 94. Dr. Brandt left no reasonable stone unturned.

Dr. Brandt had no ability or obligation to overrule the decisions of the psychiatrists and psychologists treating Virginia Brejcak. His failure to do this does not constitute deliberate indifference.

Progress notes by Dr. Byrne, a psychiatrist, appear for October 8, 2001 which shows sick a call visit by the decedent. Dr. Byrne noted that the decedent was a 42 year old white female well known from previous incarcerations at the BCCF. Her last psychiatric evaluation had occurred on August 20, 2000. She had a long history of bipolar disorder with psychiatric hospitalizations, the most recent one in 1999. She had last left the BCCF in January, 2001 having refused all psychiatric medications since August, 2000. She quickly turned to cocaine. She received hospitalization and treatment at Riverside but returned to cocaine afterwards. Her thinking had become increasingly disorganized since late September, 2001. She refused all medications and treatments for her psychiatric problems. She was very hostile and irritable. She denied suicidal and homicidal ideation. Her insight and judgment were poor. She had a bipolar disorder with a recent episode. She had a history of poly substance abuse. She refused an anti-

mood stabilizer. A consultation occurred with the county correctional mental health services regarding possible commitment to a mental hospital. Exhibit "C"; Exhibit "D", progress notes 10/8/01.

This note by Dr. Byrne shows that Dr. Byrne knew of the condition of the decedent yet she concluded that no basis existed for either an involuntary commitment or transfer to a psychiatric hospital.

Dr. Davis and Crowe also attempted without success to have the decedent transferred to a psychiatric institution. On November 29, 2001, Dr. Davis saw Virginia Brejcak. He found her extremely belligerent. He indicated that she needed a transfer to a psychiatric facility. He also indicated that she needed continued isolation secondary to MRSA. He stated in an order sheet that she refused all medications. Exhibit "C"; Exhibit "D", order sheet of 11/29/01.

Dr. Davis and Crowe had a long discussion about the decedent needing psychiatric help. Dr. Davis referred the decedent to the mental health unit at BCCF. Dr. Byrne of that unit came over to talk to Dr. Davis and Crowe about the decedent. Dr. Byrne, told Crowe and Dr. Davis that she could not involuntarily commit the decedent because she was not a threat to herself or others. Crowe told Dr. Byrne that she disagreed with her. Crowe and Dr. Davis felt that the decedent should go to Norristown State Hospital. When Dr. Byrne disagreed Crowe and Davis believe that they could do nothing else. Exhibit "E", deposition of Crowe, pages 113-115.

The Lenape Foundation employed Dr. Byrne. The Lenape Foundation had a contract with Bucks County concerning making decisions for involuntary commitment of individuals in Bucks County. Dr. Byrne would have made the decision as to whether or not Virginia Brejcak should be involuntarily committed regardless of who submitted the involuntary commitment petition. Exhibit "H", page 97.

Virginia Brejcak refused her bipolar medication as soon as she arrived at BCCF. Exhibit "E", page 122. Crowe attributed Virginia Brejcak's unwillingness to take her MRSA medication to Virginia Brejcak suffering from mental illness and not taking the medication for that mental

illness. Exhibit "E", page 123. Crowe had many conversations with the decedent to try and convince her to take her medications. Exhibit "E", page 128.

Before Dr. Byrne indicated that the decedent could not be removed from BCCF Crowe had told her that the decedent was harder and harder to take care of because the decedent refused to take her medication. Crowe told Dr. Byrne that they could not bring her down to the dispensary because every time the nurses brought her down she would be belligerent, angry and loud. Dr. Byrne responded that nothing could be done about this. Crowe took this as "don't even bother" to try to commit the decedent. Exhibit "E", pages 168-169.

Dr. Davis believed that Virginia Brejcak had an involuntary commitment hearing. He believed that she was going to be committed. Exhibit "G", deposition of Donald Davis, D.O., pages 45-46. When Dr. Davis later found out that Virginia Brejcak was not to be involuntarily committed and was not to be transferred to a psychiatric facility he had no power to do anything. He found out that she was not going to be transferred to a psychiatric facility before she died. Exhibit "G", page 50.

Dr. Davis told Virginia Brejcak that it was his opinion that she needed admission to an in-patient psychiatric facility. Virginia Brejcak was lucid during the conversation and understood it. She indicated that she did not want any psychiatric hospitalization. Exhibit "G", page 116.

In the face of decedent's refusal to consent to psychiatric hospitalization, Dr. Brandt had no ability to transfer her unless an involuntary commitment occurred. He consulted the appropriate psychiatric. That psychiatrist refused to act. Dr. Davis and Crowe consulted that same psychiatrist. She again refused to act.

Brejcak received constant care for her psychiatric condition. Dr. Brandt provided recommendations and referrals to psychiatrists and psychologists for her. Dr. Brandt even transferred her to another doctor in the hopes that this would improve the ability to treat her. This conduct fails to constitute deliberate indifference. No evidence of such indifference exists. Dr. Brandt did not have the culpable state of mind required. He did not know that his conduct

presented a substantial risk of harm to the decedent.

At the most Brejcak has established sufficient evidence to support a cause of action based on common law negligence pursuant to the law of the Commonwealth of Pennsylvania. Negligence fails to support a cause of action based on 42 U.S.C. §1983. Daniels v. Williams, 474 U.S. 327 (1986). Even gross negligence fails to support a claim based on 42 U.S.C. §1983 arising from deliberate indifference to as serious medical need. Wilson v. Seiter, 501 U.S. 294 (1991). The United States Court of Appeals for the Third Circuit has repeatedly concluded that challenges to the quality or appropriateness of care fail to support a jury verdict in favor of deliberate indifference to a serious medical need and require the granting of summary judgment. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988).

The United States Court of Appeals for the Third Circuit has stated that where a plaintiff has received some medical care inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim. Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978). Accord, Hussmann v. Knauer, 2005 U.S. Dist. LEXIS 2779 (E.D. Pa. 2005).

3. Brejcak Has Failed To Submit Sufficient Evidence To Support A Jury Verdict In Her Favor In The Issue Of Dr. Brandt Acting In A Deliberately Indifferent Manner To The Infection Known As MRSA.

The decedent at some point developed an infection known as MRSA (methacillin-resistant staph aureus). No dispute exists that Dr. Brandt and Dr. Davis treated the condition successfully. Brejcak only asserts that they should have diagnosed it earlier and cured it earlier then they did. This constitutes an allegation of negligence since it relates to a diagnosis and to the type of treatment provided. Brejcak concedes that the decedent received treatment. She disputes the nature of the treatment. She contends that he should have ordered a culture sooner

than he did. She challenges his use of diagnostic testing.

On October 5, 2001, the decedent was referred to Bonnie Giordano, a nurse practitioner, for a boil. Exhibit "C"; Exhibit "D", progress notes 10/5/01. On October 7, 2001, Dr. Brandt diagnosed the decedent with vulva vaginitis and prescribed hot soaks and further follow up with Bonnie Giordano. On the same date Dr. Brandt entered an order discontinuing the Darvocet, prescribed Excedrine and an ES migraine formula to be taken daily for three months. He also prescribed hot compresses to the vulva for one week. Exhibit "C"; Exhibit "D", order sheet 10/7/01; progress notes 10/7/01.

On October 15, 2001, Giordano, the nurse practitioner for gynecological problems, examined Virginia Brejcak. She observed a developed pustule on the right labia majora and also on the right upper inner thigh. Giordano indicated that the area should be treated with anti-bacterial soap, with warm moist heat to the lesions and neosporin. Giordano noted the possibility of the need for a surgical consult. Her order sheet reflected these recommendations. Exhibit "C"; Exhibit "D", progress notes 10/15/01; order sheet 10/15/01. On October 18, 2001, the decedent came to the dispensary to have an examination of the cyst on her right inner thigh. The nurse noted that the cyst had gotten smaller and that there was no drainage. It looked like it had drained. The decedent became belligerent. The guards escorted her out of the dispensary. Exhibit "C"; Exhibit "D", progress notes 10/18/01.

On October 25, 2001, a nurse checked the decedent's rash. The decedent indicated that she was using hydrocortisone cream. The decedent denied problems with cysts. Exhibit "C"; Exhibit "D", progress note 10/25/01.

On October 26, 2001, the inmate came to sick call with complaints of pain and tenderness at the left rib area and sacral area. The area was reddened and scabbed. The buttocks had multiple redness and scabbed areas. It appeared to be a localized skin infections. The nurse indicated that she would refer the patient to Dr. Brandt for an examination on Monday. The nurse instructed the decedent not to scratch. Virginia Brejcak appeared willing to follow this

instruction. Exhibit "C"; Exhibit "D", progress notes 10/26/01.

On October 29, 2001, Dr. Brandt examined the decedent. He noted possible boils over her arms, back and buttocks. He ordered that she receive Keflex for 10 days. He also prescribed Neosporin cream for the boils for 10 days. Exhibit "C"; Exhibit "D", progress notes 10/29/01, order sheet 10/29/01.

On November 2, 2001, the decedent appeared at sick call complaining of a sty on her eye lid and a sore oozing from her left arm area. The area appeared red and oozing. Exhibit "C"; Exhibit "D", progress notes 11/2/01.

On November 3, 2001, the nurse checked the wound under the left arm. She noted an abscessed area opened 5 ml. The decedent stated that she picked it open. The nurse applied a triple AB and a band-aid. Exhibit "C"; Exhibit "D", progress notes 11/3/01.

On November 12, 2001, Virginia Brejcak went to the in house ob/gyn clinic. At that time she complained about her right buttock lesions worsening but indicated that her right thigh and right labia lesions had healed. An examination by Giordano showed that the labia lesions had healed and that the right upper thigh lesion had healed. Giordano indicated that on the buttocks there were two pustules at the top and a crack of the buttocks with a 4 to 6 cm warm induradon. There were multiple dry healed scars on the buttocks. Exhibit "C"; Exhibit "D", progress notes 11/12/01.

On November 14, 2001, the decedent appeared at sick call for an evaluation by Dr. Brandt. Dr. Brandt noted that she had a psychotic episode and appeared very angry and agitated. An officer had to remove her from the clinic. Exhibit "C"; Exhibit "D", progress notes, 11/14/01.

On November 16, 2001, Dr. Brandt again examined Virginia Brejcak. She indicated that she fell on her head. Dr. Brandt found nothing wrong with her. Her eyes were negative for any problems. The fundo scope test was negative. The decedent demanded Darvocet. When Dr. Brandt refused Virginia Brejcak became angry. He concluded that the wound on the buttocks

was self inflicted. He cultured it and indicated that he would follow up with culture results. He entered an order directing a follow up with results from the lab tests from the culture taken from the buttocks. Exhibits "C" and "D", progress notes, 11/16/01; order sheet 11/16/01.

On November 19, 2001, Dr. Brandt examined Virginia Brejcak again. He ordered Bactrium. Dr. Brandt directed that Dr. Davis see Virginia Brejcak from now on. Exhibit "C"; Exhibit "D", order sheet and progress notes 11/19/01.

On November 20, 2001, Donald Davis, D.O. ("Dr. Davis") examined Virginia Brejcak and diagnosed her with MRSA. He ordered Naldecon for her sinuses. Decedent complained of runny sinuses. Dr. Davis indicated that he intended to examine the decedent weekly. Exhibit "C"; Exhibit "D", order sheet 11/20/01.

On November 23, 2001, a nurse drew blood from Virginia Brejcak to test for Hepatitis A, B and C. The nurse noted that the sores on the buttocks were still draining. The decedent refused Rifampin but agreed to continue to take Bactrim. Exhibit "C"; Exhibit "D", progress notes 11/23/01.

On December 4, 2001, Dr. Davis examined Virginia Brejcak. He indicated that the abscess areas on her buttocks had healed without her being compliant with her medications. She agreed to take the anti-seizure medications, Dilantin and Phenobarbital. Dr. Davis discontinued medical isolation and ordered that she be checked weekly. He also issued an order for Phenobarbital and for the Dilantin. Exhibit "C"; Exhibit "D", order sheet and progress notes 12/4/01.

The decedent continually refused to take her MRSA medication. Crowe attributed Virginia Brejcak's unwillingness to take her MRSA medication to Virginia Brejcak suffering from mental illness and not taking the medication for that mental illness. Exhibit "E", page 123. Crowe had many conversations with the decedent to try and convince her to take her medications. Exhibit "E", page 128.

Dr. Davis' progress note in Virginia Brejcak's medical records dated December 11, 2001

states that the MRSA was 100% resolved. He states that he knew this because there was no redness or drainage. Her skin was intact. He removed her from medical isolation. Exhibit "G", page 193.

Dr. Brandt indicated that Virginia Brejcak would not have benefitted from Vanconycin based on her lab test. The best drug for curing her MRSA was Bactrim. Dr. Brandt prescribed that drug and cured her MRSA. Exhibit "H", page 95.

A failure to diagnose properly or to order specific tests constitutes negligence and never supports a cause of action based on deliberate indifference to a serious medical need. In Estelle v. Gamble, 429 U.S. 97, 105-07 (1976) the Supreme Court of the United States held that the failure to order x-rays never supported a cause of action based on 42 U.S.C. §1983. In Bedner, supra, 29 F.Supp. 2d at 253 the Court held that a prisoner's claim of negligent diagnosis or treatment never rose to the level of deliberate indifference.

In Rodriguez v. Joyce, 693 F.Supp. 1250 (D.Me. 1988), the court granted a motion for summary judgment where the plaintiff alleged a failure to diagnose properly. In that case, the plaintiff, a prisoner, asserted that he injured his finger while playing volleyball. When he sought medical treatment from employees of the prison, where he served as an inmate, he received aspirin for the pain. The medical personnel at the prison never took an x-ray. The plaintiff contended that he had fractured his finger. He maintained that the failure of the medical personnel at the prison to take the x-ray resulted in his receiving inadequate medical care. The court, in granting the motion for summary judgment, stated:

> But, as the Supreme Court clearly stated in Estelle, merely questioning the form of medical treatment does not constitute a cognizable section 1983 claim. Plaintiff has alleged nothing more than negligent diagnosis. A decision whether or not to order an x-ray 'is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measure, does not represent cruel and unusual punishment.' Estelle, (citation omitted.) This is quite apt in the context here, where the claim involves only a mere injury to a finger joint. The failure of the nurses to order an x-ray of plaintiff's injured finger is not cruel and unusual punishment. Our holding here is consonant with the approach towards preventing section 1983 from becoming a

> national state tort claims act administered in the federal courts. Quoting Estate of Bailey v. County of York, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

Id. at 693 F.Supp. at 1253.

That analysis applies here and requires the granting of the motion for summary judgment of Dr. Brandt. Brejcak complains of the diagnosis of Dr. Brandt. She alleges Dr. Brandt should have ordered certain tests including a culture. This constitutes a classic decision relating to diagnosis and medical judgment. This type of claim stems strictly from negligence, not deliberate indifference.

In Johnson v. Moyer, 2005 U.S. Dist. LEXIS 765 (E.D.Pa. January 28, 2005) Judge Kaufman granted summary judgment to Dr. Moyer where the plaintiff made allegations of inadequate treatment. In that case plaintiff, a pro se inmate, contended that Dr. Moyer had failed to diagnose the problem with his knees and had performed two knee taps without anesthesia in a deliberate attempt to inflict pain upon him. The Court in granting summary judgment concluded that although Dr. Moyer's chosen course of treatment ultimately proved ineffective and he misdiagnosed the plaintiff's injuries his actions were taken pursuant to his medical judgment and could not constitute the basis of an Eighth Amendment claim. The Court concluded that since Dr. Moyer performed two knee taps on the plaintiff and recommended treatment including the use of Motrin and ace bandage he had provided treatment. The Court found no evidence that he refused treatment or that he had some knowledge of the severity of plaintiff's injuries but intentionally chose not to treat it.

The same analysis applies here. Dr. Brandt provided treatment. No evidence exists to show that he chose not to treat the decedent's condition appropriately. No indication exists that he knew that the plaintiff had MRSA prior to his diagnosing it.

In Lindsay v. Dunlavey, 177 F.Supp. 2d 398 (E.D. Pa. 2001) the Court dismissed a claim in a factual situation somewhat similar to that now before this Court. In Lindsay a prisoner was struck in the jaw by another inmate and taken to a physician's assistant, Amoh, within the prison

for treatment. Id. at 400. Amoh gave the prisoner cotton to stop the bleeding in his mouth and some pain medication. Id. Repeatedly, the prisoner returned to Amoh due to pain, swelling and continued bleeding in his jaw. Id. at 400-01. Amoh refused to order an x-ray and continually told the prisoner that his jaw would simply take time to heal. Lindsay, 177 F.Supp. 2d at 401. Finally, over a week after the assault the prisoner was transferred to another facility where an x-ray was ordered and the prisoner was diagnosed with a broken jaw which required surgery. Id. The Court in that case dismissed the prisoner's Eighth Amendment claim reasoning that the prisoner could not make an argument of deliberate indifference because he has consistently received some form of treatment from Amoh. Id. at 402-03.

The same analysis applies here. As Judge Kaufman stated in Johnson v. Moyer, supra:

> ...In sum, however ineffective or cursory the doctors' treatments of Plaintiff prove, this Court is constrained by cases repeatedly emphasizing that the Eighth Amendment is not a tool to second guess a particular course of medical treatment. When a plaintiff receives some medical care, the Court is not permitted to scrutinize the adequacy or propriety of that care; such a claim sounds in medical malpractice, not constitutional law. * 16.

In Espinal v. Coughlin, 1999 W.L. 387435 (S.D.N.Y. 1999) the district court upheld the dismissal of several prison doctors who treated knee problems conservatively with medication and diagnostic tests finding only a difference of opinion about the appropriateness of surgery. In the same case, at 2002 W.L. 1045 (S.D.N.Y. 2002), the Court granted summary judgment to the remaining prison doctors. The court held that an Eighth Amendment claim was not presented and granted summary judgment. The facts showed a three year delay from the prisoner's complaint about his knee until reconstructive surgery was performed. In the meantime he received a conservative course of treatment. The Court held that only a disagreement existed.

In Kulp v. Konigsmann, 2000 U.S. Dist. LEXIS 10168 (D.N.Y. 2000) the Court granted summary judgment in favor of medical providers in a claim brought by an inmate in a factual situation similar to the one now before this Court. In that case the inmate, Kulp, alleged in his complaint deliberate indifference to his medical needs, specifically that his need for surgery

following a December, 1998 injury to his right knee was ignored or disregarded until December 14, 1999 and that he was denied pain medication needed to alleviate pain associated with his knee injury. After an incident involving prison guards in late 1998 Kulp complained of pain in his right knee. The day after the altercation an x-ray was taken of his right knee. The report indicated that the configuration of the knee was within normal limits.

During January, February and March, 1999, Kulp was seen by either a doctor or other medical staff at Green Haven where he was confined and complained of knee pain during at least some of these visits. On February 2, 1999, he was seen by Dr. Fein who noted some soft tissue swelling of the inside part of Kulp's knee and reviewed him for an orthopedic surgery consultation. Kulp alleges that it was not until March 2 he was seen by a doctor. He experienced intense pain in his right knee and difficulty walking.

The parties agree that Kulp did see a doctor on March 2 and was seen again in mid-March. On March 16, Kulp was given a cane so he could avoid placing weight on his knee. An MRI was ordered and taken on April 5. It showed a small knee joint effusion in Kulp's right knee.

On April 19, Dr. Bendheim noted continuing swelling but concluded that there was no medical need for surgery at that time. In late April, 1999, after the MRI report, Kulp was seen at Green Haven's orthopedic clinic by Dr. Schwartz who recommended arthroscopic knee surgery. CPS, a private corporation in charge of providing medical services for the inmates at Greenhaven, reviewed the recommendation for surgery and on June 8, 1999 denied it based on lack of medical necessity. CPS explained that it was unable to pre-certify this request because there was no documented evidence of a medical condition that warranted an invasive procedure prior to attempts of more conservative means of treatment and evaluation.

On November 3, 1999, after Kulp finished his course of medical treatment with no improvement, an orthopedic surgeon consultant renewed the recommendation for an arthroscopy and advised that it be done. On December 14, the procedure was performed on Kulp's right

knee.

In support of their motion for summary judgment the medical defendants produced two experts who argued that the treatment provided was appropriate. The Court concluded that where a dispute concerns not the absence of help but the choice of certain course of treatment and where the evidence is mere disagreement with considered medical judgment, the court would not second guess the doctors. Deliberate indifference requires more than mere negligence a delay in providing necessary medical treatment may in some instances constitute deliberate indifference according to the court. But most courts reserve such a classification for cases in which, for example, officials deliberately delayed care as a form of punishment, ignored a life threatening and fast generating condition for three days or delayed major surgery for over two years. The Court concluded that no such circumstances were present before it. Consequently, the Court granted the motion for summary judgment.

Here, Dr. Brandt did not defy the recommendations of anyone. He provided appropriate treatment. He attempted at all times to address the needs of the decedent.

4. Brejcak Has Insufficient Evidence To Support A Jury Verdict In Her Favor On The Issue Of Dr. Brandt Acting With Deliberate Indifference By Not Overruling The Prescription of Naldecon By Dr. Davis When Dr. Brandt Had No Authority Over Dr. Davis, Had No Ability To Overrule His Order And Did Not Believe That Dr. Davis Had Acted Improperly In Prescribing Naldecon.

After November 20, 2001, Dr. Davis assumed control for all medical care of Virginia Brejcak. Exhibit "H", page 79. Dr. Brandt transferred Virginia Brejcak to Dr. Davis as of November 20, 2001 because he was getting nowhere with Virginia Brejcak and he thought that Dr. Davis might do better. Exhibit "H", page 94.Dr. Brandt knew that Naldecon had PPA in it and that there was an FDA warning that PPA could cause strokes in young women. He was not concerned about a risk to Virginia Brejcak because he believed that she would only be taking it for a short period of time. He believed that a patient had to take Naldecon for three to six months for there to be a stroke risk. He was also not concerned because Virginia Brejcak seldom took

her medication. He also did not discontinue the Naldecon because Dr. Davis had ordered the Naldecon. Dr. Brandt believed that he had no authority to overrule Dr. Davis and to revoke his order especially when he thought there was no danger to Virginia Brejcak. Exhibit "H", pages 89 and 140.

At no time did Dr. Brandt believe that Dr. Davis' prescription of Naldecon to Virginia Brejcak presented a substantial risk of harm to her. Exhibit "B", paragraph 8. At no time did Dr. Brandt believe that he had the ability or authority to overrule Dr. Davis' medical decisions concerning Virginia Brejcak, including the prescription of Naldecon to her. Exhibit "B", paragraph 9.

Dr. Davis ordered Naldecon for Virginia Brejcak because of her sinusitis. Exhibit "G", page 99. Dr. Davis never saw a warning from either the manufacturer or Diamond Drug Co. that Naldecon had potential fatal side effects. Exhibit "G", page 102.

Dr. Davis had seen information about Naldecon in the Wall Street Journal prior to November 20, 2001, that indicated that the PPA in Naldecon was under suspicion for causing TIA or CVA. Dr. Davis assumed that the manufacturer had taken PPA out of the Naldecon. Exhibit "G", page 103. Dr. Davis did not learn that Naldecon had PPA in it until after the decedent's death. Exhibit "G", page 105.

At all times in 2001, Dr. Polk the medical director of Bucks County would have been responsible for supervising Dr. Davis at BCCF. Deposition of Gordian V. Ehrlecher, Exhibit "F", page 52. Dr. Brandt had no supervisory authority over Dr. Davis. Exhibit "F", page 90.

Brejcak asserts that Dr. Brandt should have interfered with the medical care of Dr. Davis and overruled the prescription of Naldecon. Dr. Brandt had no authority over Dr. Davis. They both functioned as equals. Dr. Brandt has transferred the care of the decedent to Dr. Davis prior to Dr. Davis' prescribing Naldecon. Dr. Brandt did not prescribe the Naldecon. Dr. Davis did. Dr. Brandt believed that it presented no danger because he thought that Dr. Davis would only prescribe it for a fairly short period of time. He also knew that the decedent was not compliant

with her medications. In fact, there were many days that she did not take the Naldecon. Dr. Brandt did not believe that the Naldecon presented a substantial risk of harm to the decedent. No evidence exists that he did believe this. He had no authority to overrule Dr. Davis. He saw no danger.

Brejcak attempts to take a negligence case and turn it into a deliberate indifference claim. She cannot be permitted to do this. If she thought she had a medical malpractice claim, she should have brought it. She and her counsel made the decision not to. They cannot avoid this decision now by asking the Court to disregard the requirements for establishing deliberate indifference to a serious medical need imposed by the Supreme Court of the United States in Farmer v. Brennan, 114 S.Ct. 1970 (1994) and Estelle v. Gamble, 429 U.S. 97 (1976) and by the United States Court of Appeals for the Third Circuit in Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979). Prisoner complaints regarding the quality or appropriateness of medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988).

Brejcak attempts to impose liability upon Dr. Brandt for the actions of Dr. Davis. No respondeat superior liability ever exists pursuant to 42 U.S.C. §1983. The United States Court of Appeals for the Third Circuit has repeatedly concluded that no respondeat superior liability exists under any circumstances pursuant to 42 U.S.C. §1983. See Rode v. Dellariprete, 845 F.2d 1195 (3d Cir. 1988); Robinson v. City of Pittsburgh, 120 F.3d 1285 (3d Cir. 1997).

B. The Proposed Expert Testimony Submitted By Brejcak Fails To Support A Claim Pursuant To 42 U.S.C. §1983.

Brejcak may contend that her proposed expert testimony supports a jury verdict in her favor on the issue of deliberate indifference by Dr. Brandt. As a matter of law this constitutes legal error. In Estate of Cole by Pardue v. Fromm, 94 F.3d 254 (7th Cir.) the United States Court of Appeals for the Seventh Circuit concluded that it could not permit the fact finder to infer

subjective knowledge by a physician of a substantial risk that the plaintiff would harm himself based on expert testimony that the risk was obvious because this would conflict with the defendant physician's subjective medical judgment evidenced by her diagnosis. Id. at 261.

Here, permitting the jury to infer subjective knowledge of a substantial risk without expert testimony conflicts with the subjective medical judgment of Dr. Brandt.

Only two of the multitude of expert reports submitted by Brejcak relate to Dr. Brandt; the report submitted by Robert L. Perkel, M.D. and the reports submitted by Robert B. Greifinger, M.D. Dr. Perkel's report refers to Dr. Brandt's conduct as grossly negligent. There is no indication that he used the deliberate indifferent standard. Consequently, his opinions fail to support any claim against Dr. Brandt since the Supreme Court of the United States in Wilson v. Sieter has rejected gross negligence as the standard of culpability required.

Dr. Greifinger does indicate that Dr. Brandt's conduct rises to the level of deliberate indifference to a serious medical need. But he never indicates what standard he uses to reach that conclusion. There is no statement in the expert report which supports the conclusion that Dr. Greifinger utilized the correct standard for deliberate indifference.

The vast majority of federal courts to consider the issue have rejected the use of expert reports such as those submitted by Dr. Perkel and Dr. Greifinger here as evidence in a deliberate indifference case. In Woods v. Lecureux, 110 F.2d 1215, 1221 (6th Cir. 1997) the United States Court of Appeals for the Sixth Circuit found no abuse of discretion by a district court excluding the testimony of a expert in a claim brought pursuant to 42 U.S.C. §1983 from testifying upon the defendant's deliberate indifference. The Court held testimony presented by the plaintiff's expert relating to deliberate indifference depended on the defendant's state of mind. By expressing the opinion that the defendant was deliberately indifferent the expert gave the false impression that he knew the answer to the inquiry. . For a witness to stack inference upon inference and then state an opinion regarding the ultimate issue is unhelpful to the trier of fact. The Court also relied upon the expert's failure to define deliberate indifference. That analysis

applies here and precludes the Court's reliance upon the expert testimony submitted by Brejcak.

In Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994) cert. den., 513 U.S. 1111 (1995) in a §1983 municipal liability case, the plaintiff's expert witness testified that the Detroit's Police Department was grossly negligent in its training of its officers and its gross negligence was comparable to deliberate indifference. 25 F.3d 1342, 1353. The witness then defined deliberate indifference as "conscious knowledge of something and not doing anything about it". Id. at n. 12. Overturning a jury verdict for the plaintiff, the Court of Appeals held that the district court erred by admitting this testimony. The Court stated that deliberate indifference is a legal term and that it is the responsibility of the Court not testifying witnesses to define legal terms. Id.

In Gold v. City of Miami, 151 F.3d 1346, 1352 (11th Cir. 1998) the plaintiff presented expert testimony on the need for training and supervision in two areas that should have been obvious to the City and indicating that the City was deliberately indifferent in not responding. The Court concluded that an expert's conclusory testimony does not control the court's legal analysis of whether any need to train or supervise was obvious enough to trigger municipal liability without evidence of any prior incidents putting the municipality on notice of the need.

In Owens v. City of Ft. Lauderdale, 174 F.Supp. 2d, 1298, 1314 (D. Fla. 2001) the Court held that a plaintiff's expert's conclusory determination that the amount and type of force used by defendants to restrain the plaintiff was objectively unreasonable and violated accepted police practice was insufficient to overcome the summary judgment motion of the hospital. See Cottrell v. Caldwell, 85 F.3d 1480, 1491 (11th Cir. 1996) holding that a similar opinion by an expert was conclusory in noting that Farmer, supra, 511 U.S. at 837-38 requires "a great deal more of the plaintiff than showing the defendants violated generally accepted customs and practices".

In Dimitris v. Lancaster County Prison Board, 2002 U.S. Dist. LEXIS 11280 (E.D. Pa. 2002) the plaintiff sought damages pursuant to 42 U.S.C. §1983 because of the death by suicide of the decedent while in prison. The plaintiff submitted the report of an expert, Dr. Richard B. Saul, who indicated with a reasonable medical certainty that the prison was negligent in

providing an appropriate level of medically necessary treatment for the decedent. This was done in response to a motion for summary judgment by the defendant. Dr. Saul then drew the legal conclusion that the defendant's failures constituted deliberate indifference to the decedent's needs and safety. The Court held that the expert's first conclusion did not support his second. The prison and its officials made choices which in hindsight appear wrong but what it is important is according to the court they made choices. The Court granted summary judgment. That analysis applies here.

C. Brejcak Must Show That It Is Not Enough For Brejcak To Show That Dr. Brandt Should Have Known That His Conduct Presented A Serious Risk Of Harm.

Brejcak may argue that Dr. Brandt should have known that his conduct presented a substantial risk of harm to the decedent. This fails to constitute the standard. Federal courts to consider the issue have rejected the should have known standard.

In Muhammad v. Schwartz, Civil Action No. 96-CV-6027 (E.D. Pa. 1996), Judge Van Antwerpen granted a motion to dismiss a prisoner's complaint based on 42 U.S.C. § 1983 alleging inappropriate medical care. Judge Van Antwerpen held that the complaint failed to state that the defendant physician knew that his treatment presented a substantial risk of harm to the prisoner. Judge Van Antwerpen stated that:

> Without alleging actual knowledge, any reference to obviousness, via the medical records available or what the doctor 'should have known' is unavailing.

See Exhibit "I".

Based on Muhammad, supra, Brejcak has failed to allege the required intent.

In Outterbridge v. Commonwealth of Pennsylvania Department of Corrections, et al., Civil Action No. 00-1541 (E.D. Pa. June 7, 2000), Judge Buckwalter of the United States District Court for the Eastern District of Pennsylvania found averments far more specific then those contained in the third amended complaint of Brejcak insufficient to support a cause of action pursuant to 42 U.S.C. §1983. In Outterbridge, the plaintiff asserted that various physicians and

physician assistants caused the death of an inmate by providing inappropriate medical care and ignoring his symptoms which anyone should have known threatened his life. The complaint went on in great detail indicating that the test results showed that the inmate faced imminent danger of death. According to the complaint the physicians and physician assistants looked at the test results and simply refused to act upon them. The Court concluded that this failed to state a cause of action pursuant to 42 U.S.C. §1983 as a matter of law because the plaintiff refused to allege that the physicians and physician assistants knew that their conduct presented a substantial risk of harm to the inmate. A copy of the court's opinion appears hereto as Exhibit "J". Judge Buckwalter stated:

> After reviewing the Complaint, the Court finds that the Plaintiff has never alleged that any of the Medical Defendants drew inferences that Outterbridge faced the risk of serious harm. The Complaint repeats that each Defendant continued to treat Outterbridge with INH even though he complained of its effects. Plaintiff also alleges that the Medical Defendants 'consciously disregarded' abnormal findings resulting from the ingestion of INH. While these facts suggest medical malpractice, they do not sufficiently allege that the Defendants knew of and disregarded the serious risks faced by decedent Outterbridge. Therefore, the Plaintiff's §1983 claim against the Medical Defendants will be dismissed.

See opinion of the Court in Outterbridge, attached hereto as Exhibit "J", page 4. That analysis applies here.

D. Brejcak Has Failed To Establish Sufficient Evidence To Support Her Claim Based On The Special Relationship Doctrine Or A State Created Danger.

Count III of the amended complaint attempts to state a cause of action based on the special relationship doctrine. Count IV of the amended complaint alleges a cause of action based on a state created danger. Both of these doctrines essentially constitute a restatement of the deliberate indifference standard. The federal courts to consider them have indicated that the same analysis applies as applies to a deliberate indifference claim. Gonzalez v. Angellili, 40 F.Supp. 615 (E.D. Pa. 1999). For the reasons stated herein, Brejcak has failed to produce sufficient evidence of deliberate indifference to support a jury verdict in their favor on that issue

against Dr. Brandt.

E. Brejcak Has Failed To Produce Sufficient Evidence To Support A Jury Verdict In Her Favor On The Issue of Deliberate Indifference By Dr. Brandt Because Of Lack of Training.

Brejcak has not shown that Dr. Brandt had any ability or duty to train any employees of BCCF. The evidence shows to the contrary. Dr. Brandt's contract of employment with BCCF did not provide for him to train anyone or to engage in any supervisory activities of any kind. The contract indicated that he had to provide medical care only to inmates at the BCCF on the days assigned to him. Exhibit "B", paragraph 2. At no time did Dr. Brandt have supervisory control or authority over any doctor at BCCF, including Dr. Davis. Exhibit "B", paragraph 4. At no time did Dr. Brandt have the authority to train nurses at the BCCF. Exhibit "B", paragraph 10. At no time did Dr. Brandt have the authority to train any medical staff or any staff at the BCCF. Exhibit "B", paragraph 11. At no time did Dr. Brandt's responsibilities include the training of any staff at the BCCF, including prison guards and nurses. Exhibit "B", paragraph 12.

To impose liability for lack of a duty to train Brejcak must show that the need for a particular type of training is obvious because the defendants face clear constitutional duties in recurrent situations or that the need for better training is obvious because a pattern of constitutional violations exists such that defendants know or should know that training measures are needed. Young v. City of Augusta, 59 F.3d 1160, 1172 (11th Cir. 1995); Belcher v. City of Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991). Under either theory Brejcak must show that Dr. Brandt knew or should have known of the need to train the medical staff and made a deliberate choice not to do so. See Gold v. City of Miami, 151 3d 1346, 1350 (11th Cir. 1998). Additionally, Brejcak must show that the training program itself is deficient and not simply that a particular nurse was inadequately trained. Owens v. City of Ft. Lauderdale, 141 F.Supp. 2d 1298 (Dist. Fla. 2001).

Brejcak has failed to produce any evidence let alone sufficient evidence to support a jury verdict in her favor on these issues against Dr. Brandt. She has not shown that the need for a

particular type of training was obvious to Dr. Brandt. She has not shown that the need for better training was obvious because a pattern of constitutional violations existed that Dr. Brandt knew of. Brejcak has produced no evidence that Dr. Brandt knew or should have known of the need to train anyone and made a deliberate choice not to do this. No evidence exists that he had any ability to impose any training methods upon any employees of BCCF.

V. CONCLUSION

In the light of the foregoing Louis Brandt, D.O. respectfully requests that his motion for summary judgment be granted.

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