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

CHARLES W. FOX, JR.	:	CIVIL ACTION
V.	:	NO. 98-CV-5279
MARTIN HORN, C.O., et al.	:	JURY TRIAL DEMAND

NOTICE OF MOTION

TO: Joel I. Fishbein, Esquire
Meyerson & Fishbein
1700 Market Street, St. 2632
Philadelphia, PA 19103

Randall J. Henzes, Esquire
Office of Attorney General
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107-2603

Notice is hereby given that defendants, William Sprague, M.D., Nuhad Kulaylat, M.D. and Correctional Physician Services, Inc., have filed with the Clerk of Court a Motion for Summary Judgment, along with supporting memorandum of law on November 16, 1999. Please be advised that you have fourteen (14) days upon receipt in which to respond or otherwise plead.

MONAGHAN & GOLD, P.C.

BY: _____
ALAN S. GOLD
Attorney for Defendants,
Nuhad Kulaylat, M.D., William
Sprague, M.D. and Correctional
Physician Services, Inc.

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ORDER

AND NOW, this day of , 1999, it is hereby ORDERED and DECREED that the Motion for Summary Judgment of William Sprague, M.D. is GRANTED and judgment is entered in his favor on all claims.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
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ORDER

AND NOW, this day of , 1999, it is hereby ORDERED and DECREED that the Motion for Summary Judgment of Nuhad Kulaylat, M.D. is GRANTED and judgment is entered in his favor on all claims.

_____
UNITED STATES DISTRICT JUDGE

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ORDER

AND NOW, this day of , 1999, it is hereby ORDERED and DECREED that the Motion for Summary Judgment of Correctional Physician Services, Inc. is GRANTED and judgment is entered in its favor on all claims.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
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MOTION FOR SUMMARY JUDGMENT OF NUHAD KULAYLAT, M.D., WILLIAM SPRAGUE, M.D. AND CORRECTIONAL PHYSICIAN SERVICES, INC.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the defendants, Nuhad Kulaylat, M.D. ("Kulaylat"), William Sprague, M.D. ("Sprague") and Correctional Physician Services, Inc. ("CPS") hereby move this Court to enter summary judgment in their favor and against Charles W. Fox, Jr. ("Fox") and states in support thereof the following:

1. Fox, an inmate at the State Correctional Institution at Graterford ("SCI-Graterford"), part of the Commonwealth of Pennsylvania prison system, has filed a second amended complaint against Kulaylat, a physician, Sprague, a physician, CPS, various state correctional officers and Martin Horn, the Secretary of the Department of Corrections of the Commonwealth of Pennsylvania, contending that on October 17 and 18, 1996 they denied Fox reasonable medical care and caused him to have a debilitating stroke. A copy of the second amended complaint appears hereto as Exhibit "A".

2. Count I of the second amended complaint asserts a cause of action against Kulaylat and Sprague based upon deliberate indifference to a serious medical need in violation of the Eighth Amendment of the United States Constitution and 42 U.S.C. §1983. The second amended complaint premises subject matter jurisdiction solely upon 42 U.S.C. §1983.

3. Count III of the second amended complaint alleges that CPS promulgated policies and procedures that violated the Eighth Amendment to the United States Constitution and caused injury to Fox because of deliberate indifference to a serious medical need in violation of 42 U.S.C. §1983.

4. Count IV of the second amended complaint states a cause of action against

Kulaylat and Sprague for medical malpractice based upon Pennsylvania common law.

5. Count V of the second amended complaint contends that CPS engaged in corporate negligence in violation of Pennsylvania common law.

6. Count VI of the complaint attempts to state a cause of action for intentional infliction of emotional distress against Kulaylat, Sprague and CPS based upon Pennsylvania common law.

7. CPS, a private corporation provides medical services to various state prisons. It had entered into a contract with the Commonwealth of Pennsylvania Department of Corrections whereby it assumed the responsibility for certain types of medical care for inmates at SCI-Graterford for a time period including October, 1996.

8. Kulaylat and Sprague had entered into independent contractor agreements with CPS whereby they agreed to provide medical services in their capacity as physicians to certain inmates at SCI-Graterford during certain hours of the day and during certain days of the week. See Sprague's agreement, Exhibit "B" hereto.

9. The time period for discovery has expired. Sprague, Kulaylat and CPS seek summary judgment on several different grounds. CPS asserts that Fox has produced insufficient evidence to support a jury verdict in his favor on any policy or practice of CPS violating the United States Constitution and constituting deliberate indifference to a serious medical need and causing injury to Fox. CPS also asserts that no state corporate negligence claim exists against it. Fox has not produced any expert testimony concerning such a claim. The Supreme Court of Pennsylvania requires expert testimony in order to support a cause of action based on corporate negligence. Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997). CPS also asserts that it has no respondeat superior liability for any state medical malpractice claim or for any claim based upon intentional infliction of emotional distress against Sprague because Sprague functioned as an independent contractor. Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 150-151, 189 A.2d 171-177 (1963).

10. CPS, Kulaylat and Sprague all seek summary judgment as to the intentional infliction of emotional distress claim contained in Count VI of the second amended complaint for two separate reasons.

11. First, in order to state a cause of action for intentional infliction of emotional distress Fox must establish that emotional distress caused by the actions of Sprague, Kulaylat and CPS caused him physical injury. Frankel v. Warwick Hotel, 881 F.Supp. 183 (E.D. Pa. 1994). Fox has no evidence on this issue.

12. Second, Fox has not produced sufficient evidence that CPS, Sprague or Kulaylat engaged in the outrageous conduct required to state a cause of action for intentional infliction of emotional distress. See Lazor v. Milne, 346 Pa. Super. 177, 499 A.2d 369, 370 (1985).

13. Kulaylat seeks summary judgment as to Count IV of the complaint based on medical malpractice because Fox has not presented any report from any expert indicating that Kulaylat breached the standard of care or that his alleged breach of the standard of care constituted a substantial factor in causing injury to Fox. In the absence of such testimony Fox lacks the ability to set forth a prima facie case of medical malpractice.

14. Both Kulaylat and Sprague contend that the two year statute of limitations applicable to all the claims against them in the second amended complaint applies and bar all the causes of action of Fox.

15. Sprague and Kulaylat also contend that Count I of the second amended complaint fails to state a cause of action against them based on 42 U.S.C. §1983 because Fox has insufficient evidence to support a jury verdict in his favor on the issue of deliberate indifference to a serious medical need. He has not shown the subjective knowledge by Kulaylat and Sprague that their actions or omissions presented a substantial risk of harm to Fox required by the Supreme Court in Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1979 (1994). Sprague and Kulaylat have also established a good faith defense which defeats the cause of action of Fox based on 42 U.S.C. §1983. Fox has also failed to produce sufficient evidence to overcome the

qualified immunity that Kulaylat and Sprague have against Fox's cause of action based upon 42 U.S.C. §1983.

They also rely on the attached memorandum of law with exhibits attached thereto which they incorporate herein by reference as if set forth herein in full.

WHEREFORE, William Sprague, M.D., Nuhad Kulaylat, M.D. and Correctional Physician Services, Inc. respectfully request that judgment be entered in their favor and against the plaintiff, Charles W. Fox, Jr.

MONAGHAN & GOLD, P.C.

BY: _____

ALAN S. GOLD
Attorney for Defendants,
Nuhad Kulaylat, M.D., William Sprague, M.D., and Correctional Physician Services, Inc.

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MEMORANDUM OF LAW OF NUHAD KULAYLAT, M.D., WILLIAM SPRAGUE, M.D. AND CORRECTIONAL PHYSICIAN SERVICES, INC. IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AGAINST THE SECOND AMENDED COMPLAINT OF CHARLES W. FOX, JR.

I. INTRODUCTION

Charles W. Fox, Jr. ("Fox") an inmate at the State Correctional Institution at Graterford ("SCI-Graterford"), part of the Commonwealth of Pennsylvania prison system, has filed a second amended complaint against Nuhad Kulaylat, M.D. ("Kulaylat"), a physician, William Sprague, M.D. ("Sprague"), a physician, Correctional Physician Services, Inc. ("CPS"), various state correctional officers and Martin Horn, the Secretary of the Department of Corrections of the Commonwealth of Pennsylvania, contending that on October 17 and 18, 1996 they denied Fox reasonable medical care and caused him to have a debilitating stroke. A copy of the second amended complaint appears hereto as Exhibit "A".

Count I of the second amended complaint asserts a cause of action against Kulaylat and Sprague based upon deliberate indifference to a serious medical need in violation of the Eighth Amendment of the United States Constitution and 42 U.S.C. §1983. The second amended complaint premises subject matter jurisdiction solely upon 42 U.S.C. §1983. Count III of the second amended complaint alleges that CPS promulgated policies and procedures that violated the Eighth Amendment to the United States Constitution and caused injury to Fox because of deliberate indifference to a serious medical need in violation of 42 U.S.C. §1983. Count IV of the second amended complaint states a cause of action against Kulaylat and Sprague for medical malpractice based upon Pennsylvania common law. Count V of the second amended complaint contends that CPS engaged in corporate negligence in violation of Pennsylvania common law.

Count VI of the complaint attempts to state a cause of action for intentional infliction of emotional distress against Kulaylat, Sprague and CPS based upon Pennsylvania common law.

CPS, a private corporation provides medical services to various state prisons. It had entered into a contract with the Commonwealth of Pennsylvania Department of Corrections whereby it assumed the responsibility for certain types of medical care for inmates at SCI-Graterford for a time period including October, 1996. Kulaylat and Sprague had entered into independent contractor agreements with CPS whereby they agreed to provide medical services in their capacity as physicians to certain inmates at SCI-Graterford during certain hours of the day and during certain days of the week. See Sprague's agreement, Exhibit "B" hereto.

The time period for discovery has expired. Sprague, Kulaylat and CPS seek summary judgment on several different grounds. CPS asserts that Fox has produced insufficient evidence to support a jury verdict in his favor on any policy or practice of CPS violating the United States Constitution and constituting deliberate indifference to a serious medical need and causing injury to Fox. CPS also asserts that no state corporate negligence claim exists against it. Fox has not produced any expert testimony concerning such a claim. The Supreme Court of Pennsylvania requires expert testimony in order to support a cause of action based on corporate negligence. Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997). CPS also asserts that it has no respondeat superior liability for any state medical malpractice claim or for any claim based upon intentional infliction of emotional distress against Sprague because Sprague functioned as an independent contractor. Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 150-151, 189 A.2d 171-177 (1963).

CPS, Kulaylat and Sprague all seek summary judgment as to the intentional infliction of emotional distress claim contained in Count VI of the second amended complaint for two separate reasons. First, in order to state a cause of action for intentional infliction of emotional distress Fox must establish that emotional distress caused by the actions of Sprague, Kulaylat and CPS caused him physical injury. Frankel v. Warwick Hotel, 881 F.Supp. 183 (E.D. Pa. 1994). Fox has no evidence on this issue. Second, Fox has not produced sufficient evidence that CPS,

Sprague or Kulaylat engaged in the outrageous conduct required to state a cause of action for intentional infliction of emotional distress. See Lazor v. Milne, 346 Pa. Super. 177, 499 A.2d 369, 370 (1985).

Kulaylat seeks summary judgment as to Count IV of the complaint based on medical malpractice because Fox has not presented any report from any expert indicating that Kulaylat breached the standard of care or that his alleged breach of the standard of care constituted a substantial factor in causing injury to Fox. In the absence of such testimony Fox lacks the ability to set forth a prima facie case of medical malpractice.

Both Kulaylat and Sprague contend that the two year statute of limitations applicable to all the claims against them in the second amended complaint applies and bar all the causes of action of Fox. Sprague and Kulaylat also contend that Count I of the second amended complaint fails to state a cause of action against them based on 42 U.S.C. §1983 because Fox has insufficient evidence to support a jury verdict in his favor on the issue of deliberate indifference to a serious medical need. He has not shown the subjective knowledge by Kulaylat and Sprague that their actions or omissions presented a substantial risk of harm to Fox required by the Supreme Court in Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1979 (1994). Sprague and Kulaylat have also established a good faith defense which defeats the cause of action of Fox based on 42 U.S.C. §1983. Fox has also failed to produce sufficient evidence to overcome the qualified immunity that Kulaylat and Sprague have against Fox's cause of action based upon 42 U.S.C. §1983.

II. STATEMENT OF THE FACTS

When Sprague applied to be a physician functioning as an independent contractor with CPS at SCI-Graterford he indicated that his speciality was in family practice. See deposition of Sprague, Exhibit "C", p. 24. He presented documentation that he completed his family practice residency in good standing. Exhibit "C", p. 25. He also produced a letter of recommendation from a previous instructor at Sacred Heart Hospital, Michael Goldner, M.D. He may have

presented other letters of recommendation. Exhibit "C", p. 25.

At no time prior to October 18, 1996, had anyone sued him for medical malpractice. At no time prior to CPS hiring him as an independent contractor physician had anyone complained about his conduct as a physician. Deposition of Glen R. Jeffes ("Jeffes"), Exhibit "D", p. 8. Jeffes, the regional director for the eastern region of CPS, indicated in his deposition testimony that as part of the hiring process Sprague submitted a resume and a copy of his DEA authorization. CPS' malpractice insurance carrier also had to approve Sprague for coverage as a condition of his being hired. He also had to undergo a state police criminal record check. Exhibit "D", p. 17.

Sprague brought his own stethoscope, ophthalmoscope, otoscope, tuning forks and curet and several smaller instruments when he treated patients at SCI-Graterford. Exhibit "C", p. 29. The agreement he entered into with CPS bore the title, "Letter of Commitment as Independent Contractor." Exhibit "B". It also states that as an independent contractor Sprague understands that he has a 1099 tax status and will pay his own taxes. See Exhibit "B". Sprague indicated that he did pay his own taxes. Exhibit "C", p. 30.

Sprague received no benefits from CPS. He had the right to have his own practice while employed by CPS. Exhibit "C", pp. 18-19; Exhibit "D", p. 47. CPS provided no worker's compensation coverage for Sprague. Exhibit "D", p. 57. Sprague established his own hours at CPS. Exhibit "D", pp.57-58.

Fox, in his deposition testimony, stated the following. In the evening of October 17, 1996 when he reached his cell he did not feel good. He took some water, rested but could not sleep. He went to the bathroom. He tried to lie down but could not sleep. He felt terrible. The shift of the guards had changed. He banged on the cell door and called for a guard and asked to be taken to the dispensary. He received a negative response. Exhibit "E", deposition of Fox, p. 9.

He laid down for about five minutes. He started to feel very queasy. He stood up and walked over to the door. He hollered to a follow shop worker and asked him to holler. He did.

Fox started banging on the cell door. The guard never showed up to help him. Exhibit "E", p. 10.

Other inmates kept banging on their cell doors and yelling but no guard ever came. Fox felt fatigued and laid back down. He started to vomit. He never felt like this before. He drank some water and continued to vomit. He tried to lay down and then started to vomit again. He banged on the door again. A correctional officer told him to "stop all that noise". Exhibit "E", p. 12. At some point a correctional officer approached him and said, "Shut the fuck up." Some inmate told the guard that Fox was sick. The correctional officer responded, "We're all sick in here." Exhibit "E", p. 13.

The next event Fox remembers consists of his waking up at a hospital outside SCI-Graterford looking at his family. He has no recollection at all of any treatment that he received in the infirmary from Sprague, Kulaylat or anyone else. Exhibit "E", p. 13. Everything he knows about his treatment at the infirmary at SCI-Graterford from Sprague and Kulaylat someone else told him. He has no independent knowledge of and no recollection of this treatment. Exhibit "E", p. 54.

According to Sprague when correctional officers brought Fox to the infirmary in October, 1996, a correctional officer told Sprague that Fox had just passed out recently. Exhibit "C", p. 194. If Sprague had known that Fox had been unconscious for many hours he would have immediately sent him to an outside hospital. Exhibit "C", pp. 201-202.

Sprague immediately examined Fox. He appeared not to be moving on the stretcher and seemed to have his eyes closed. According to Sprague, he had normal cephalic. He did not appear to have any trauma, any bleeding or any broken limbs or anything else that would indicate a recent trauma. Exhibit "C", p. 103.

First, Sprague ascertained his level of consciousness. He did this by a sternal rub. He took his hand and rubbed the center of the sternum. It's purpose is to elicit a response from the patient without causing any physical injury. Fox responded vigorously to the sternal rub. He was able to move both arms, both legs, and move his head around from side to side. Exhibit "C", p.

104. Sprague then did a head examination. He felt the scalp. He looked in the ears. He performed an eye exam, at which time he found the pupils to be 2 millimeter in diameter with a decrease in reactivity to light. There was no evidence of bleeding or ulcerations. Exhibit "C", p. 105. The decrease in reactivity of the pupils to light indicated the possibility of many different pathologies according to Sprague. Many conditions can cause eye changes, including eye medications, systematic drugs, prescription drugs and street drugs.

Sprague examined Fox's mouth and nose. He noted the mucous membranes were pink and moist which was indicative of normal hydration. Exhibit "C", p. 106.

Sprague noticed no bleeding in Fox's mouth or recently broken teeth. He examined his neck which he found was supple. He also performed a cardiac exam at which time he found his heart beating at a regular rate and rhythm without any rubs or gallops. He performed an auscultation of the lungs. He found all the lungs were clear. Fox's abdomen was soft. There were no masses that he noticed. His extremities from the sternal rub moved well. There appeared to be no gross abnormal findings relating to trauma or bleeding. Exhibit "C", p. 107. Sprague then admitted Fox to the infirmary with a working diagnosis of "rule out drug overdose". Exhibit "C", p. 107; medical records Exhibit "F".

Sprague had Fox placed in a hard cell. He was not sure whether he had the option of putting him in a bed cell in the infirmary. Exhibit "C", p. 138. He does not know if there were any other beds available. Exhibit "C", p. 139. He believes that his only other option was to place him a cell with 3 or 4 other patients. He preferred to have him in a cell by himself. Exhibit "C", p. 139. Sprague indicated that he never ordered him stripped of his clothes. Fox should have had a paper gown on at all times. Every time Sprague saw Fox in the infirmary he was wearing a paper gown. Exhibit "C", p. 139.

When Fox examined Sprague at 11:20 a.m. in the infirmary he grasped his hands to bring him to a seated position. He made the note indicating this at 11:20 a.m. in the hard cell. Fox was able to maintain his posture sitting up without leaning on the wall. He was sitting on a flat

surface and was able to sit up straight and support himself. Exhibit "C", p. 148.

Sprague was never under the impression that Fox could verbalize. Exhibit "C", p. 148. He could hold out his arms, and lift his legs although he did it with some difficulty. Exhibit "C", p. 144. At 11:20 a.m. Sprague took a blood pressure reading. He did it because he trusted his own physical examination. He often did his own blood pressure readings when he felt it was necessary. He felt that the nurses were giving him unusually high readings when they took Fox's blood pressure. He took his own to confirm what the blood pressures were. Exhibit "C", pp. 146-147. He blood pressure readings of Fox differed substantially from those of the nurses. Exhibit "C", p. 149.

He did not send Fox to the hospital immediately upon his arrival because Fox responded vigorously to a sternal rub. Exhibit "C", p. 163. Upon his first examining Fox he ordered that he be given Narcan. Narcan is a drug that is known to counteract certain types of drug overdoses. Exhibit "F". He then gave him additional Narcan. It did not result in any change in activity.

Sprague also ordered Fox to receive Procardia on two occasions in the infirmary. The purpose of the Procardia was to lower the blood pressure. Exhibit "F".

At some point Kulaylat came over to the infirmary and examined Fox. When he examined him he was in the hard cell, according Sprague. Exhibit "C", p. 122. Sprague indicated that as soon as the examination was finished Kulaylat called the ambulance and ordered Fox to be transferred to Suburban General Hospital. Exhibit "C", p. 123. Prior to the transfer decision Kulaylat had a conversation with Sprague. Exhibit "C", p. 123. Sprague indicated that he did not talk to Kulaylat before the exam. The conversation took place during the exam. Exhibit "C", p. 124.

According to Sprague someone from the nursing staff contacted Kulaylat and had him come over. He doesn't know who. No one told Sprague that they were calling Kulaylat. Exhibit "C", p. 124. Sprague understood that the nursing staff contacted Kulaylat because they had questions about Fox. Exhibit "C", p. 126. Sprague indicated that he remained present during

Kulaylat's examination. Exhibit "C", p. 127.

David DiGuglielmo ("DiGuglielmo"), who at the time of this incident was a deputy superintendent for Centralized Services at SCI-Graterford, indicated in his deposition that he had no knowledge of any incident involving Sprague prior to October 18, 1996. Exhibit "G", pp. 71-72. DiGuglielmo indicated in his deposition that during Sprague's first period of service at SCI-Graterford he had an impression that he did a very good job as a physician.

Frank Botto ("Botto"), Site Administrator for CPS at SCI-Graterford, indicated in his deposition that the acting medical director served as a consultant basically on a case by case basis but he did not supervise the way the medical director did in terms of the daily work. Exhibit "H", p. 21. Botto never received any critical report concerning Sprague's performance from the Department of Corrections prior to the Fox incident. Exhibit "H", pp. 29-30.

Jeff Boyer, R.N. ("Boyer"), a nurse employed by the Department of Corrections at SCI-Graterford indicated that when he saw Fox in the infirmary he was covered with a sheet or gown. Exhibit "I", p. 10. He never heard Sprague say that Fox was faking. Exhibit "I", p. 15. He indicated that Kulaylat at some point took over, examined Fox and ordered him sent out immediately. Exhibit "I", p. 16. Boyer knows of nothing that Kulaylat should have done but did not do. He considers Kulaylat a top notch physician. He stated, "We're lucky to have him." Exhibit "I", p. 19.

Mary Lou Stitt, R.N. ("Stitt"), a nurse employed by the Department of Corrections at SCI-Graterford, indicated that she put a gown on Fox in the infirmary and later on put a brown jump suit on him when he was ordered to be transferred. Exhibit "J", p. 12. She stated that Sprague at some point came in, yelled at Fox and slapped him. Fox groaned. Sprague said, "See, he's faking it." Exhibit "J", p. 13. Stitt indicated that Sprague told the ambulance crew that Fox was faking and the nurses were overreacting. She had no knowledge of any mistreatment of patients by Sprague before this incident involving Fox. Exhibit "J", p. 22.

Jean Wooster, R.N. ("Wooster"), a nurse employed by the Department of Corrections of

SCI-Graterford, indicated that she was the supervisor of nursing at SCI-Graterford during the day shift. Exhibit "K", pp. 6-7. She went to the dispensary on October 18, 1996 to see if anyone needed assistance. She found Fox on the exam table with Sprague present. Sprague ordered Narcan and wanted blood drawn for a drug screen. Exhibit "K", p. 10. She saw Fox in the infirmary 3 or 4 times during October 18, 1996. She does not recall when. When she saw him he was lying on the floor on a mattress in a hard cell. Exhibit "K", p. 12.

One of the nurses told her that Sprague refused to order the inmate sent to an outside hospital. He had ordered Narcan. The nurse refused to give an additional dose because several doses had already been given. Wooster told the nurse that she would speak to Kulaylat. Exhibit "K", p. 13. According to Wooster she saw Kulaylat twice. The first time she saw Kulaylat she contends that she explained to him about what was going on with the inmate, his vital signs and Sprague's refusal to send him out. Kulaylat went back to the infirmary to see Sprague. Wooster saw Kulaylat speaking with Sprague in a private office. Wooster then had to leave for some reason that she does not remember. Exhibit "K", p.14. When she returned Fox was still in the infirmary. She checked on him and found him still unresponsive. She then went to speak with Kulaylat again. She does not know how long elapsed between the two times. Exhibit "K", p. 14. She told him that she was seeing him in his capacity as acting medical director and that she wanted him to order Fox sent out. Kulaylat went with her immediately, examined Fox and gave the order to have him transferred to an outside facility. Kulaylat went into his cell, checked Fox's pupils, his vital signs and his blood pressure. He then indicated that Fox needed to be transferred to a hospital. Exhibit "K", p. 15. Wooster indicated that prior to this incident she had problems with Sprague because Sprague had told several people that she was incompetent. Exhibit "K", pp. 19-20. Wooster indicated that she never had any problem with Kulaylat and had a good working relationship with him. Exhibit "K", p. 22. She testified that Kulaylat is the best physician, in her opinion, that ever worked at SCI-Graterford. Wooster indicated that Kulaylat had acted appropriately in his treatment of Fox. Exhibit "K", p. 32.

Margaret Beauchesne, R.N. ("Beauchesne"), a nurse employed by the Department of Corrections of the Commonwealth of Pennsylvania at SCI-Graterford on October 18, 1996 indicated that when she first saw Fox it was reasonable to believe that he was suffering from a drug overdose. Exhibit "L", p. 35. Sprague told her that Fox was responsive when he admitted him to the infirmary. Exhibit "L", p. 43. Sprague obtained a different blood pressure reading then she did. Exhibit "L", p. 46. Sprague told her to give Fox Narcan and Procardia. Exhibit "L", p. 47. Beauchesne indicated that at some point Sprague came out of the hard cell and told her, "Well now that I threw ice water on - I'm not sure how he said it if it was fake or something to that effect." Exhibit "L", p. 50. Sprague told her that when Fox shivered long enough he would stop faking. Exhibit "L", p. 51.

According to Beauchesne, Kulaylat was in charge of the clinics that day and Sprague was in charge of the infirmary. Beauchesne stated that Kulaylat had nothing to do with the infirmary on October 18, 1996. Exhibit "L", p. 59. According to Beauchesne, ordinarily the clinics were extremely busy. She had never had any difficulty with Kulaylat. Exhibit "L", p. 60. She indicated that Kulaylat was a fine doctor and she would take any member of her own family to him. Exhibit "L", p. 61. According to Beauchesne, Kulaylat went Fox's cell in the infirmary, examined him, checked his pupils, and checked his level of consciousness. Within three to four minutes Kulaylat gave the order to call an ambulance. Exhibit "L", p. 61. Beauchesne indicated that he found nothing that Kulaylat did to be inappropriate. Exhibit "L", p. 82.

According to Beauchesne Kulaylat was the acting medical director for the day because the actual medical director was not there. That means that he would take phone calls or if there was a no show for sick call he would rearrange assignments to cover sick call. According to Beauchesne as acting medical director he was not supervising doctors. She states that:, "These are doctors, they have their license to practice in a state." She stated that Kulaylat was not responsible to supervise them. Exhibit "L", pp. 93-94.

III. ARGUMENT

A. Standard To Be Utilized In Determining A Motion 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).

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. 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. 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).

Fox has failed to meet this burden. He has not submitted sufficient evidence to support a jury verdict in his favor on any issue. He has not shown that Kulaylat and Sprague acted with

deliberate indifference to his serious medical needs. He has not shown that they possessed subjective knowledge that they were creating a substantial risk of harm to him. He has not shown that they knew that they were violating clearly established law or that they should have known this. He has not shown as to Kulaylat that he committed malpractice. He has not established as to CPS a breach of any duty to Fox based on corporate negligence or a violation of 42 U.S.C. §1983. Fox has not established that any regulation or rule of CPS or failure of CPS to supervise in any way caused any injury to Fox or constituted a constitutional violation.

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

To defeat the motion for summary judgment of Kulaylat, Fox must show that he has sufficient evidence to support a jury verdict in his favor on the issue of Kulaylat having had actual knowledge that his actions presented a substantial risk of harm to Fox. Fox must make this showing in order to establish deliberate indifference to a serious medical need. 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 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 now 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).

Thus, under Farmer, supra, 114 S.Ct. at 1979, Fox must show that Kulaylat knew that he would cause harm to Fox by the conduct Fox contends Kulaylat engaged in and yet Kulaylat

proceeded to act in such a way regardless. An examination of the record in this case establishes that Fox has insufficient evidence to support a jury verdict on the issue of subjective knowledge by Kulaylat concerning any conduct he alleged Kulaylat engaged in.

Fox concedes, as he must, that Kulaylat had limited involved in his treatment. Interpreting the record in a light most favorable to Fox results in the only evidence relating to Kulaylat consisting of Wooster's statement that she went to get Kulaylat to check on Fox. Kulaylat came upon her request, had a conference with Sprague, and then returned to the clinic which he was operating that day. Wooster has no idea as to what was discussed. Exhibit "K", p. 14. When she returned and found Fox still in the infirmary she again went to Kulaylat. He responded immediately, came with her and had Fox transferred to Suburban General Hospital. Exhibit "K", p. 15.

Wooster has no idea as to how much time elapsed from the first time Kulaylat responded to her and the second time. No indication exists that this time period contributed in any way to any injury of Fox. It fails to constitute deliberate indifference to a serious medical need. No evidence exists that Kulaylat had subjective knowledge that his failure to transfer Fox when he first received notice about him presented a substantial risk of harm to Fox. No court anywhere has found the type of evidence submitted by Fox against Kulaylat sufficient to support a jury verdict pursuant to 42 U.S.C. §1983, deliberate indifference to a serious medical need. Federal courts have granted summary judgment in factual situations similar to that presented by Fox here.

In Thomas v. Clark, Civil Action No. 3:96-0496 (M.D. Pa. 1997) plaintiff contended that the defendant, Dr. Clark, a psychiatrist, came to his cell and informed him that he would not treat him for his anxiety condition and that he would immediately discontinue the medication that another doctor had prescribed without the benefit of an examination or of consulting the plaintiff's file. Dr. Clark in support of his motion for summary judgment presented evidence that he had examined the plaintiff on two occasions and had found no evidence of anxiety. He

offered the plaintiff an alternative treatment to the one he desired. Judge Conaboy granted the motion for summary judgment of Dr. Clark concluding that the plaintiff had failed to produce sufficient evidence from which a reasonable jury could conclude that Clark had subjective knowledge that his conduct presented a serious risk of harm to the plaintiff. The court stated:

> Furthermore, the plaintiff has failed to present evidence from which a reasonable jury can conclude that Dr. Clark possessed the culpable mental state necessary for Eighth Amendment liability to attach. A review of the documentation submitted by Dr. Clark reveals that he treated the plaintiff on several occasions, none of which in Clark's opinion, warranted prescribing Klonopin. The record depicts meaningful efforts by Dr. Clark to provide the plaintiff with the necessary medical care, and an attendant mental state that falls woefully short of deliberate indifference. The record depicts nothing more than the plaintiff's subjective disagreement with the treatment decisions and medical judgment of Dr. Clark.

See opinion of the court, attached hereto as Exhibit "M", page 9.

That analysis applies here and requires the granting of the motion for summary judgment of Kulaylat. Kulaylat responded to Wooster's request that he come to the infirmary and confer with Sprague. When Wooster came to see him again he examined Fox and had him transferred. This fails to constitute deliberate indifference to a serious medical need. At most it shows that Fox disagrees with the treatment that Kulaylat provided to him. Disagreements with treatment fail to constitute deliberate indifference. At most they establish negligence. Negligence never supports a cause of action pursuant to 42 U.S.C. §1983. Daniels v. Williams, 474 U.S. 327 (1986).

In Estate of Cole by Pardue v. Fromm, 94 F.3d 254 (7th Cir. 1996) the Court of Appeals concluded that it could not permit the fact finder to infer subjective knowledge 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 fact finder to infer subjective knowledge of a substantial risk would conflict with the subjective medical judgment of Kulaylat.

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 claim 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 held 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 "N", opinion of the court.

In Logan v. Clarke, 119 F.3d 647 (8th Cir. 1997) the Court of Appeals concluded that no deliberate indifference existed when physicians waited three months to consult with a dermatologist to treat a skin infection. The Court concluded that such a delay constituted a disagreement with treatment not deliberate indifference. That analysis applies here. Kulaylat did not delay for three months. There is no indication that he delayed for any substantial time period at all in transferring Fox. Fox has the burden of establishing the length of the delay that he contends existed. Fox has failed to do so.

A disagreement with the medical treatment provided fails to support a claim based on 42 U.S.C. §1983. A prisoner's right to medical care fails to extend to the type of the 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 the medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326 at 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988).. Here, Fox challenges the appropriateness of his medical care. Thus, he fails to state a cause of action based on the Eighth Amendment as a matter of law.

The United States District Court for the Middle District of Pennsylvania in Farmer v. Carlson, 685 F.Supp. 1335 (M.D. Pa. 1988), in granting the defendant doctor's motion for summary judgment, held that questions regarding the timeliness of the treatment or the provision of medication were based on negligence or malpractice and must be dismissed. Judge Nealon stated:

> Thus, 'the key question...is whether defendants have provided plaintiff with some type of treatment regardless of whether it is what the plaintiff desires'. (Citations omitted).

Id. at 1339.

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.

The same analysis applies to the claim of Fox.

In order to show deliberate indifference to a serious medical need the delay must be prompted by "obduracy and wantonness, not inadvertence or error in good faith." Whitley v. Albers, 475 U.S. 312, 319 (1986). Here, no evidence of obduracy or wantonness exists concerning any delay. At best Fox has established inadvertence in error or good faith. Fox attempts to assert a constitutional violation based on the Eighth Amendment and §1983 because of negligence. But even gross negligence fails to support deliberate indifference as a matter of

law. Wilson v. Seiter, 501 U.S. 295, 305 (1991); Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996).

C. Fox Has Failed To Establish Sufficient Evidence To Support A Jury Verdict Defeating Kulaylat's Qualified Immunity.

Kulaylat has a qualified immunity which Fox must overcome in order to defeat the motion for summary judgment of Kulaylat. The defense for qualified immunity shifts the burden to Fox to come forward with facts or allegations sufficient to show that Kulaylat's alleged conduct violated the law and that the law was clearly established whether the alleged violation occurred. Pueblo Neighborhood Health Centers, Inc. v. Losadio, 847 F.2d 642, 646 (10th Cir. 1988). Under this doctrine defendants are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Rouse v. Plantier, 182 F.3d 192, 196 (3d Cir. 1999). The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). In determining whether defendants are entitled to claim qualified immunity the court engages in a third part inquiry: (1) whether the plaintiff alleged a violation of his constitutional rights; (2) whether the right alleged to have been violated was clearly established in the existing law at the time of the violation; and (3) whether a reasonable official knew or should have known that the alleged action violated the plaintiff's rights. Rouse, supra, 182 F.2d at 196 and 197.

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on whether it was objectively reasonable for the official to believe that he acted legally when the action is assessed in light of the legal rules clearly established at the time the action was taken. Anderson, supra, 483 U.S. at 639. In evaluating a defense of qualified immunity an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim. Grant v. City of Pittsburgh, 98 F.3d 116, 122, 125 (3d Cir. 1996). Here, it is an essential element.

In Grant, supra, the Court of Appeals for the Third Circuit observed that the

determination of whether a government official has acted in an objectively reasonable manner demands a highly individualized inquiry. Grant, supra, 98 F.3d at 122. The Court of Appeals stated:

> [T]he question is whether a reasonable public official would know that his or her specific conduct violated clearly established rights...Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record...to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant. Id. at 121, 122 (emphasis in original).

No physician in Kulaylat's position had reason to believe that not transferring Fox after conferring with Sprague the first time constituted a violation of the United States Constitution. No court had ever come to that conclusion before. No court has come to that conclusion since. Kulaylat had every reason to believe that he had acted appropriately and not in violation of the Constitution. Upon being contacted a second time he examined Fox and immediately transferred him. No dispute exists as to this. This fails to constitute a situation where a substantial amount of time elapsed between the first contact and the second contact. It appears to be an extremely short period of time. Fox has failed to establish the amount of time. He cannot use his failure to overcome the qualified immunity of Kulaylat.

Fox may contend that the decision of the Supreme Court in Richardson v. McKnight, 521 U.S. 399 (1997) deprives Kulaylat of the protection of qualified immunity. A close analysis of that case shows that it does not. The Supreme Court held that the common law had provided a kind of immunity for certain private defendants such as doctors and lawyers who performed services at the request of the sovereign. Id. 521 U.S. at 406. The Supreme Court expressly left open the possibility that the qualified immunity still remained for private physicians performing services for the state. That constitutes the situation here. Kulaylat has the benefit of a qualified immunity.

D. In The Event If The Court Concludes That Kulaylat Does Not Have A Qualified Immunity He Has A Good Faith Defense To The Claim Brought Against Him Pursuant To 42 U.S.C. §1983.

In Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) the United States Court of Appeals for the Third Circuit concluded that a private actor sued pursuant to 42 U.S.C. §1983 possesses a good faith defense. The Court of Appeals held that in order to overcome a good faith defense the plaintiff must establish that the private actor has a subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. To establish a violation of the good faith defense the plaintiff must produce evidence to support a jury verdict on the issue of whether the defendant acted in bad faith. Robinson v. City of San Bernardino Police Dept., 992 F.Supp. 1198, 1208 (C.D. Cal. 1998).

Here, no evidence exists to support a jury verdict on the issue of Kulaylat acting in bad faith. All the nurses in the infirmary indicated that Kulaylat acted appropriately. Wooster states Kulaylat acted appropriately. Exhibit "K", p. 32. Beauchesne stated that in her view Kulaylat acted appropriately. Exhibit "L", p. 82.

No evidence exists in this record that remotely supports the position of Fox that Kulaylat intentionally violated his constitutional rights. What witness statements have Fox produced on this issue? He has produced none. What deposition testimony supports his position? No deposition testimony supports his position. What documentation supports his position? No documentation supports his position on this issue.

E. No Respondeat Superior Liability Exists Pursuant To 42 U.S.C. §1983.

Fox may argue that Kulaylat has liability to him pursuant to 42 U.S.C. §1983 because he was the acting medical director on October 18, 1996. No basis exists to support this contention. Essentially Fox asks this Court to impose liability against Kulaylat based on the doctrine of respondeat superior. A fatal flaw exists with this analysis. The United States Court of Appeals for the Third Circuit has repeatedly concluded that no respondeat superior liability exists pursuant to 42 U.S.C. §1983 under any circumstance. See Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988); Robinson v. City of Pittsburgh, 120 F.3d 1285 (3d Cir. 1997). Fox lacks the ability to proceed to a jury against Kulaylat on the principle of respondeat superior liability.

Fox may contend that Kulaylat failed to supervise Sprague appropriately on October 18, 1996. He has failed to produce sufficient evidence that Kulaylat had any such responsibility. Botto testified that the acting medical director did not have the responsibility to supervise the physicians. Exhibit "H", p. 21.

Beauchesne states that Kulaylat, as acting medical director, had no responsibility to supervise the physicians. Exhibit "L", p. 93. Jeffes indicated that the acting medical director had no responsibility to supervise physicians. Exhibit "D", p. 31. Kulaylat only became an acting director in the absence of the director.

No evidence exists that any alleged failure of Kulaylat to supervise Sprague on October 18, 1996 constituted deliberate indifference to a serious medical need. Fox has not shown that Kulaylat knew that he had improperly supervised Sprague on that day. Fox must establish such subjective knowledge in order to state a claim pursuant to 42 U.S.C. §1983. Fox must also establish that Kulaylat knew that his alleged failure to supervise Sprague presented a substantial risk of harm to Fox. See Farmer v. Brennan, supra, 114 S.Ct. at 1979. Fox has failed to meet this burden.

F. Fox Has Failed To Present Sufficient Evidence To Support A Jury Verdict In His Favor On The Issue Of Medical Malpractice Against Kulaylat Because He Has Not Produced Expert Testimony Showing That Kulaylat Deviated From The Standard of Care And That Any Deviation Constituted A Proximate Cause Of Any Injury Suffered By Fox.

Fox has failed to produce any expert testimony indicating that Kulaylat violated the required standard of care and stating that any such violation constituted a proximate cause of any injury suffered by Fox. No expert report submitted by Fox even mentions Kulaylat. No expert report submitted by Fox even discusses Kulaylat's conference with Sprague and Kulaylat's decision to transfer Sprague. The only expert report presented on standard of care by Fox emanates from Nicholas L. DePace, M.D. ("DePace"). Examine that report. It never mentions Kulaylat. It never deals with Kulaylat's decision to transfer Fox. It never discusses Kulaylat's supposed failure to supervise Fox. It presents only silence on all of these issues. See report of

DePace, Exhibit "O".

To establish a prima facie case of medical malpractice Fox has to produce expert testimony to establish the recognized standard of care attributable to physicians under like circumstances. Tarter v. Linn, 396 Pa. Super. 155, 578 A.2d 453 (1990); Strain v. Ferroni, 405 Pa. Super. 349, 357, 592 A.2d 698, 703 (1991)(court held that expert must suggest that defendant physician deviated from the "requisite standard of care"); Cobert v. Weisband, 380 Pa. Super. 292, 301-2, 551 A.2d 1059, 1064 (1988)(plaintiff must prove by competent expert testimony that defendant's conduct fell below the standard of reasonable medical practice).

In Chandler v. Cook, 438 Pa. 447, 451, 265 A.2d 794, 796 (1970) the Pennsylvania Supreme Court expressly held:

> ...in malpractice cases...a jury will not be permitted to find negligence without expert testimony to establish variance from an acceptable medical practice.

An exception to this general rule exists where the matter in dispute is so simple and the lack of skill and want of care are so obvious as to be comprehensible by lay persons. Brennan v. Lankenau Hospital, 490 Pa. 588, 417 A.2d 196 (1980). Fox does not contend that this exception applies here. He has no basis for such a contention. Fox asserts that Kulaylat somehow provided inadequate treatment to him for his stroke by not transferring him to an outside hospital sooner than he did. He contends that when he first heard about Fox's problem instead of conferring with Sprague and not transferring him out right away he should have immediately transferred him. The issues presented by Fox's malpractice claim fail to constitute the type of situation about which an average individual has knowledge. The average individual has no knowledge as to when a transfer should take place of a patient from a prison to a hospital for treatment of a medical condition. The average individual has no idea as to when one physician should interfere in the care provided by another physician.

The courts of this Commonwealth have continually rejected the view that the treatment of complicated conditions lend themselves to resolution by lay persons without expert testimony.

In Maurer v. Trustees of the University of Pennsylvania, 418 Pa. Super. 510, 614 A.2d 754, 758 f.n. 2 (1992) app'l granted, 534 Pa. 640, 626 A.2d 1158 (1993) the plaintiff contended that the defendants had failed to administer a certain drug and had not provided sufficient physical therapy. The Superior Court en banc held that the common knowledge exception to the expert testimony requirement failed to apply because the average person lacked sufficient knowledge to make a decision as to whether or not the physicians had met the required standard of care.

If an average person lacks sufficient knowledge to determine whether a physician has administered the appropriate drug therapy and has produced sufficient physical therapy, certainly the average individual lacks knowledge of how to treat a stroke and when transfer to a hospital should occur. An average juror has no ability to judge whether Kulaylat met the required standard of care. The average juror has no ability to ascertain what that standard of care consists of.

To establish a cause of action for medical malpractice based on negligence the Supreme Court of Pennsylvania requires that Fox present an expert witness who will testify to a reasonable degree of medical certainty that the acts of Kulaylat that supposedly deviated from acceptable medical standards constituted a proximate cause of the harm suffered. Brennan v. Lankenau Hospital, 490 Pa. 588, 417 A.2d 196 (1980); Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 892 (1990). An examination of the expert reports submitted by Fox establish that they do not deal at all with the issue of whether anything that Kulaylat did or failed to do constituted a substantial factor in causing injury to Fox.

Res ipsa loquitur fails to help Fox in this case. That rule of evidence allows a jury to infer the existence of negligence and causation where the injury does not ordinarily occur in the absence of negligence. Bearfield v. Hauch, 407 Pa. Super. 624, 595 A.2d 1320, 1322 (1991). But, in a medical malpractice the plaintiff must present expert testimony to indicate that the injury would not have occurred in the absence of negligence where no fund of common knowledge exists from which a lay person can reasonably draw the inference of negligence.

Bearfield, supra, 595 A.2d at 1322. In order to establish a claim based on res ipsa loquitur Fox must show by the expert testimony that harm that he suffered fails to occur in the absence of negligence and that other reasonable causes, including his conduct and that of third persons are sufficiently eliminated by the evidence. See Restatement (Second) of Torts §328(d); Sedlitsky v. Pareso, 400 Pa. Super 1, 5 A.2d 1314 (1990) app'l den., 527 Pa. 673, 596 A.2d 659 (1991); Bearfield, supra, 595 A.2d at 1322.

The Restatement (Second) of Torts Comment e to Clause (a) of Subsection (1) elaborates upon the plaintiff's burden to show the above elements. It provides in relevant part:

> The plaintiff's burden of proof...requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant's negligence. Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof...

Fox has produced no expert testimony indicating that his injury would not have occurred absence the alleged negligence of Kulaylat. An examination of his expert report shows that he has failed to address this issue.

Fox has produced no expert testimony eliminating the other possible causes of injury to him. Since Fox has sued Kulaylat, Sprague, CPS, two correctional officers, and Horn, the Secretary of the Department of Corrections contending that each independently caused him harm, he lacks the ability as a matter of law to establish res ipsa loquitur. How can he show that no one else caused him harm except for Kulaylat when he contends in his second amended complaint that they all independently caused him harm. His own second amended complaint prevents the application of res ipsa loquitur to his case. The expert report of DePace also does this as well. DePace states that Sprague caused the harm not Kulaylat. Exhibit "O".

This fails to constitute a situation about which a jury has the ability to speculate for the purpose of res ipsa loquitur based upon its own common knowledge. The average person lacks sufficient information from every day experience to determine when one physician should overrule the judgments of another and when a physician should transfer a patient from an

infirmary in a prison to a hospital for treatment.

The Superior Court has repeatedly upheld the granting of summary judgment when plaintiffs in medical malpractice cases have attempted to use res ipsa loquitur to establish medical malpractice in situations far less complicated than that presented by Fox. In Bearfield, supra, 595 A.2d 1320 the plaintiff sued the defendant physician contending that he negligently removed his gallbladder. According to the plaintiff the defendant physician in performing the gallbladder operation caused a nerve entrapment of a tenth intercostal nerve. The Superior Court concluded in upholding summary judgment in favor of the defendant that the jury did not have within their common knowledge the resources to determine whether a nerve entrapment during a gallbladder operation would not occur in the absence of negligence or as perhaps an unavoidable consequence of that type of surgery. The Superior Court stated:

> Expert guidance would be necessary to ensure the jury not reach a decision based upon pure speculation. Because we agree with the trial court that expert testimony was necessary to establish that the injury would not have occurred absent negligence, we conclude the award of Summary Judgment was appropriately entered.

Id. at 595 A.2d at 1322.

In Gallegor by Gallegor v. Felder, 329 Pa. Super. 204, 478 A.2d 34 (1984) the absence of expert medical testimony was at issue in a case in which the plaintiff sought to establish his claim utilizing the doctrine of res ipsa loquitur. Considering circumstances where a boy suffered injuries to his facial nerves during an ear operation the Superior Court remarked:

> ...no inference of negligence arises merely because a surgical procedure terminates in an unfortunate result which might have occurred even though the proper care and skill had been exercised.

478 A.2d at 37.

The Superior Court held that the harm suffered could not be found to be so simple and obvious that a conclusion of negligence could be reached by a lay person based upon ordinary experience and comprehension. The Superior Court stated:

> This is simply not the equivalent of a situation in which a surgical tool is left inside a person after an operation.

Id. at 478 A.2d at 37. Based on this conclusion and because the plaintiff produced no evidence to show that the harm which occurred to the child would not have occurred in the absence of medical malpractice the Superior Court affirmed the trial court's grant of a compulsory non-suit.

The same analysis applies to Fox's claim. No basis exists to deny the motion for summary judgment of Kulaylat as to the medical malpractice claim of Fox

G. Count III Of The Second Amended Complaint Fails To State A Cause Of Action Against CPS For Failure To Promulgate Policies And Procedures Designed To Ensure The Provision Of Medical Attention To Inmates.

In Count III of the second amended complaint Fox contends that CPS failed to promulgate and enforce policies and procedures to ensure that the serious medical needs of inmates would not be deliberately ignored in violation of 42 U.S.C. §1983. See Exhibit "A", Count III. Fox has produced no evidence to establish the policies and procedures that CPS failed to promulgate or failed to enforce. Fox has failed to produce any evidence to indicate that any such policy or procedure of CPS was unconstitutional. Fox has produced no evidence to establish that any such policy or procedure that was unconstitutional caused injury to Fox. Fox has failed to produce sufficient evidence to support a jury verdict in his favor pursuant to his claim against CPS based on 42 U.S.C. §1983.

A private corporation may be held liable for a constitutional violation if "it knew of and acquiesced in the deprivation of the plaintiff's rights." Miller v. Hoffman, Civil Action No. 97-7987 (E.D. Pa. 1998). A copy of the opinion appears hereto as Exhibit "P". To meet this burden with respect to a private corporation Fox must show that the corporation "with the deliberate indifference to the consequences, established and maintained a policy, a practice, or custom which directly caused [plaintiff's] constitutional harm." Id., Exhibit "P", p. 11, quoting Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir. 1989) cert. den., 493 U.S. 1044 (1990).

In this case the second amended complaint and the evidence presented identifies no policy or practice which directly caused constitutional harm to Fox. Exhibit "A". A boilerplate

averment of a failure to have sufficient policies to prevent a denial of medical care appears. Exhibit "A". But no indication exists as to what the policy consists of or should have consisted of. Exhibit "A". No affirmative link appears between the alleged misconduct and CPS' policy or custom. Such an affirmative link must exist to state a cause of action pursuant to 42 U.S.C. §1983. Miller v. Hoffman, supra, Exhibit "P", p. 11. Fox presents no evidence on this issue.

In Miller v. Hoffman, supra, Exhibit "P", the court granted the motion to dismiss of CPS in a virtually identical factual situation. The plaintiff, an inmate, contended that CPS had knowledge of Hoffman's, a physician whom it employed, deliberate indifference to his medical needs. The complaint alleges that CPS did nothing to stop Hoffman's deliberate indifference and permitted him to carry on his policy of ignoring the serious medical needs of the plaintiff. CPS filed a motion to dismiss. Judge Hutton granted the motion to dismiss stating:

> But the plaintiff does not satisfy the Monell standard by pointing to a CPS 'policy, practice, custom caus[ing] the claimed injury.' Monell, supra, 436 U.S. at 690-94. Exhibit "P", page 12.

The same analysis applies here. Fox fails to allege a policy, practice or custom causing the claimed injury. Fox has failed to produce evidence of such a policy or custom. Fox fails to identify what policy, practice or custom should have existed and how the absence of that policy, practice or custom caused injury to him. He has not indicated what policy, practice or custom CPS failed to enforce.

In Burton v. Youth Services International, Inc., 176 F.R.D. 517 (D. Md. 1997) the court concluded that Fox's position here had no basis. The court required that the plaintiff in that case prove a policy and practice by the corporate defendant that caused harm to him. It was not enough that various employees may have violated his constitutional rights. The plaintiff could only establish the liability of the corporate defendant pursuant to 42 U.S.C. §1983 by showing that the corporate defendant's policies had caused the injury. In that case the plaintiff contended that while confined as an inmate at a juvenile center operated by the corporate defendant he had been sexually assaulted by his roommate. The court held:

> Congress did not intend to impose liability upon municipalities and corporations every time one of their employees violates a person's constitutional rights. See Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed. 2d 611 (1978); See also, Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982)(equating §1983 liability of municipalities and private corporations). They can be held liable only when action pursuant to an official corporate policy or custom caused the constitutional tort. Id. at 176 F.R.D. at 520.

In Ikander v. Forest Park, 690 F.2d 126 (7th Cir. 1982) the United States Court of Appeals for the Seventh Circuit concluded that a claim such as Fox's failed to state a cause of action pursuant to 42 U.S.C. §1983. In that case a store detective detained the plaintiff for allegedly shoplifting at the Zayre Department Store. The store detective called the police. The police arrested the plaintiff, detained her and strip searched her. The plaintiff later alleged violations under §1983, suing among others Zayre. The United States Court of Appeals for the Seventh Circuit reversed a jury verdict in favor of the plaintiff contending that the plaintiff had never set forth a cause of action pursuant to 42 U.S.C. §1983 against Zayre as a matter of law. The United States Court of Appeals for the Seventh Circuit concluded that the plaintiff had failed to establish that Zayre had acted in accordance with an impermissible policy or had a constitutionally defective rule or procedure that constituted the moving force of the constitutional violation. Also the Court held that a single act of unconstitutional conduct fails to support the inference that the conduct was pursuant to an impermissible policy of the corporation. That analysis applies here and supports the granting of summary judgment in favor of CPS to Fox's claim based on 42 U.S.C. §1983.

H. Fox Presents No Expert Testimony On The Issue Of Corporate Negligence As It Pertains To His Claim Against CPS.

In Count V of his second amended complaint Fox attempts to state a cause of action against CPS for corporate negligence based upon Pennsylvania common law. He alleges that CPS is liable to him because it failed to select and retain only competent physicians. He contends that CPS is liable to him because it failed to properly oversee those providing patient care. He contends that CPS is liable to him because it failed to formulate, adopt and enforce

adequate rules and policies to ensure quality of care to the patients it served. Exhibit "A".

In Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997) the Supreme Court of Pennsylvania concluded that the expert testimony required for medical malpractice cases applies to corporate negligence claims based on medical malpractice. Thus, Fox must produce an opinion from an expert that CPS committed corporate negligence and failed to meet the required standard of care and that this failure constituted a substantial factor in causing injury to Fox. Fox has not produced such an expert report. Fox has produced no answers to expert interrogatories dealing with corporate negligence. Consequently, Fox has failed to meet his burden. He cannot support a jury verdict in his favor on the issue of corporate negligence.

Fox's claim suffers from an independent defect. Fox has presented no evidence sufficient to support a jury verdict in his favor on the issue of CPS having been negligent in hiring or retaining Sprague. No indication exists that any investigation that CPS would have performed would have resulted in the production of information that would have lead CPS not to hire Sprague or terminate him before the incident with Fox occurred on October 18, 1996.

Fox has to establish in order to prove his claim that CPS would have discovered information that would have resulted in Sprague not being hired as an independent contractor physician. In Sabo v. LifeQuest, Inc., 1996 W.L. 583169 (U.S.D.C., E.D. Pa., Civ. A. 95-3757, October 8, 1996), the court granted summary judgment in favor of an employer upon a claim of negligent hiring. There, the plaintiff contended her employer negligently hired a supervisory staff member, who had sexually harassed plaintiff at work. The employer operated a health care facility, and hired the supervisor, Dr. Goff, as part of a contract to receive professional management services. The employer had no prior knowledge of Dr. Goff, and failed to speak with prior employees or consultants of Dr. Goff or to follow up when Dr. Goff omitted the four references required by the employer. Although the employer's investigation revealed that Dr. Goff's former employers and educators listed on his application disputed information he provided on his Curriculum Vitae, the employer did not discover any information suggesting that

Dr. Goff had previously engaged in sexually inappropriate conduct or that he posed a threat of doing so. Based on this evidence, the court found that plaintiff lacked an essential element of a negligent retention claim. She had no proof "that a more thorough investigation by the employer would have revealed that the employee had a history of harassing conduct." Id. at *4. Accordingly, the court ordered summary judgment in favor of the employer, concluding as follows:

> Plaintiff has failed to present a scintilla of evidence that, had defendants conducted a more thorough investigation, they would have discovered Dr. Goff's purported propensity to engage in sexual harassment. The only item of evidence adduced by plaintiff states that Dr. Goff was 'bought out by' a former employer because the employer's 'team approach to treatment [was] quite different from [Dr. Goff's] approach.' [Citation omitted].
>
> Thus, as in Dempsey v. Walso Bureau, Inc., 246 A2d 418 (Pa.1968),
> the real difficulty in the position taken by [plaintiff] that the [defendants were] negligent in not fully investigating [Dr. Goff's] past prior to hiring him is that there is absolutely no evidence that, had there been a more extensive and exhaustive investigation, such investigation would have revealed some improper actions or misconduct in [Dr. Goff's] past.

Id. at *4 - 5.

That analysis applies here. Fox has been unable to identify any incident in Sprague's past that it had been discovered by CPS would have reasonably indicated to CPS that Sprague had any propensity to abuse patients or to treat them in a negligent and deliberately indifferent manner. Thus, Fox lacks the ability to establish a critical element of his negligent hiring claim against CPS. CPS is entitled to summary judgment. See also, Dempsey v. Walso Bureau, Inc., 431 Pa. 562, 246 A2d 418 (1968) (security agency not liable for negligent hiring of security guard who allegedly assaulted dispatcher at bus depot, absent evidence that a more thorough investigation would have revealed some improper actions or misconduct of security guard before he was hired); Liu v. Striuli, 36 F.Supp. 2d 452 (D.R.I. 1999) (College not liable for alleged negligent hiring of professor accused of committing sexual harassment, absent evidence tending

to undermine college's hiring process, or facts existing at time of professor's hiring which would have given college reason to believe that professor posed a risk of sexual harassment); Focke v. United States, 597 F.Supp. 1325 (D. Ka 1982) (Veterans hospital not liable for negligence in hiring social worker who engaged in sexual misconduct with wife of mentally ill patient, despite hospital's failure to require employee to submit to pre-hiring psychological evaluation).

A similar result occurred in Costa v. Roxborough Memorial Hospital, __ Pa. Super. __, 708 A.2d 490 (1998), app'l den., 556 Pa. 691, 727 A.2d 1120 (1998). A security company employee stationed at a hospital brought suit against the hospital after she was assaulted by a hospital laundry worker. The trial court granted summary judgment against the plaintiff on her claim that the hospital negligently hired the laundry worker. The plaintiff appealed. The Superior Court affirmed, holding plaintiff failed to produce evidence suggesting that a more thorough hiring procedure would have revealed information that the laundry worker had a propensity for violent misbehavior.

No basis exists to hold CPS responsible for negligent supervision of Sprague unless Fox can show that in the exercise of ordinary care CPS should have known of circumstances necessitating an exercise of control over him. Fox has produced no such circumstance and no such evidence.

I. Fox Has Failed To Produce Sufficient Evidence To Support A Jury Verdict In His Favor On The Issue Of Intentional Infliction Of Emotional Distress Because He Has Offered No Evidence That He Suffered Physical Harm As A Result Of The Emotional Distress.

Pennsylvania courts have consistently required a showing of physical injury for a plaintiff to state a cause of action based on intentional infliction of emotional distress. In Abadie v. Riddle Memorial Hospital, 404 Pa. Super. 8, 589 A.2d 1143 (1991), the Superior Court of Pennsylvania upheld the granting of preliminary objections to a complaint which attempted to state a cause of action for intentional infliction of emotional distress. The Superior Court relied upon the plaintiff's failure to plead a physical injury from the emotional distress. The Superior Court concluded:

> As with her claim of negligent infliction of emotional distress, appellant's claim for intentional infliction of emotional distress must likewise fail for the lack of any averment in her amended Complaint of physical harm, injury or illness occurring as a result of appellee's conduct.

Id. at 589 A.2d at 1146.

In Ford v. Isdaner, 374 Pa. Super. 40, 542 A.2d 137 (1988) the plaintiff alleged that she suffered emotional distress which in turn resulted in numerous physical conditions including hypertension, anxiety, hernia, pulmonary interstitial fibrosis, enema, tremors, fatigue and shortness of breath, duodenal ulcers and mental depression. In sustaining the trial court's granting of preliminary objections to the complaint of the plaintiff, the Superior Court relied upon its view that the plaintiffs failed to allege with sufficient specificity physical injuries resulting from the emotional distress. The allegations in the complaint in Ford, supra, far surpass any physical injury claimed by Fox in this case.

Federal courts interpreting Pennsylvania law have also required physical injury from the emotional distress. In Frankel v. The Warwick Hotel, 881 F.Supp. 183 (E.D. Pa. 1995) the plaintiffs attempted to state a cause of action for intentional infliction of emotional distress. Judge Joyner stated:

> Moreover, we note that the younger Mr. Frankel has not alleged that he suffered physical injury, as is required under Pennsylvania law. Accordingly, plaintiffs' claim for damages under the theory of intentional infliction of emotional distress must be dismissed. (Emphasis added).

Id. at 187.

Fox has not presented any evidence that any emotional distress caused by Sprague, Kulaylat or CPS caused him physical injury. He does not even remember the events that took place on October 18, 1996. He does not know who treated him. He does not remember the kind of treatment that he received. He has not even established emotional distress. But even if he has established emotional distress, he has not shown that he suffered physical harm from that emotional distress.

Physical injury resulting from emotional distress constitutes a necessary element of a cause of action for intentional infliction of emotional distress pursuant to Pennsylvania common law. Fox has no ability to produce any evidence to meet his burden on this essential element. Thus, summary judgment should be granted in favor of CPS, Sprague and Kulaylat on Count VI of the second amended complaint.

J. Fox Has Failed To Establish Sufficient Evidence To Support A Jury Verdict In His Favor On The Issue Of Intentional Infliction Of Emotional Distress Against Sprague, Kulaylat And CPS Because He Has Not Shown Outrageous Conduct By Them Utterly Intolerable In A Civilized Community.

In Hoy v. Angelone, 720 A.2d 745, 753 (Pa. 1998) the Supreme Court of Pennsylvania indicated that it had never expressly adopted Section 46 of the Restatement (Second) of Torts which provides for a cause of action for intentional infliction of emotional distress. The Court declined to do so in that case. Id. at 720 A.2d at 753 f.n.10. Thus, it is an open question as to whether or not a cause of action for intentional infliction of emotional distress even exists based upon Pennsylvania common law. Because of the uncertainty surrounding whether or not such a tort exists this Court should be more reluctant than usual to permit such a cause of action to go forward to the jury.

The Supreme Court in Hoy, supra, 720 A.2d at 753 and 755, recognized that Pennsylvania courts have been reluctant to allow recovery for a claim for intentional infliction of emotional distress. According to the Court:

> Only if conduct which is extreme or clearly outrageous is established will a claim be proven.

The State Supreme Court stated:

> Indeed our Superior Court has noted, [t]he conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. Quoting with approval from Buczek v. First National Bank of Mifflin Town, 366 Pa. Super. 551, 558, 531 A.2d 1122, 1125 (1987). Id. 720 A.2d at 754.

The Supreme Court of Pennsylvania then quoted with approval from Comment (d) of the Restatement

(Second) of Torts:

> ...[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' (Emphasis Added). Id. at 720 A.2d at 754.

Cases which have found sufficient basis for a cause of action for intentional infliction of emotional distress have presented only the most egregious conduct. See e.g., Papieves v. Lawrence, 436 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents)(recognizing but not adopting §46); Banyas v. Lower Bucks Hospital, 293 Pa. Super. 122, 437 A.2d 1236 (1981)(defendants intentionally fabricated records to suggest that plaintiff had killed a third party which lead to plaintiff being indicted for homicide); Chew v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979)(defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false).

An examination of the evidence in this case establishes no outrageous conduct by Kulaylat, CPS or Sprague. What conduct did Kulaylat and CPS engage in that is intolerable in a civilized community? The allegations against Kulaylat consist of the contention that he should have transferred Fox to a hospital a few minutes before he did. How can that possibly support a cause of action for intentional infliction of emotional distress? Fox does not even have evidence that it constituted malpractice. He has produced no expert testimony on the issue. The same analysis applies to CPS. Fox identifies no conduct of CPS that is even negligent let alone outrageous.

Fox's claim against Sprague suffers from the same defect. Fox contends that Sprague slapped him one time in an effort to show that he was faking. He contends that Sprague threw cold water on his face. He asserts that Sprague treated him from a drug overdose when he suffered from a stroke. This fails to constitute evidence of outrageous conduct. Fox does not even remember any of this conduct. How can he have emotional distress? He cannot. Every indication exists that Sprague believed that he was treating Fox correctly. Thus, no evidence exists that Sprague acted in an intentional or reckless manner.

The United States Court of Appeals for the Third Circuit in Williams v. Guzzard, 875 F.2d 46 (3d Cir. 1989) indicated that if the Pennsylvania Supreme Court did adopt the tort of intentional infliction of emotional distress it would require that the conduct be extreme and outrageous and intentional or reckless. Williams, supra, 875 F.2d at 52. According to the United States Court of Appeals for conduct to be "outrageous" it must be extreme and offensive to the moral values of society. Williams, supra, 875 F.2d at 52. See also, Silver v. Mendel, 894 F.2d 598, 606 (3d Cir. 1990). A doctor treating a patient in a way he believes to be appropriate cannot act offensively to the moral values of society. A recitation of the facts of this case as Fox portrays them fails to lead an average member of the community to exclaim "outrageous". At best if believed it constitutes medical malpractice.[1]

Sprague has produced an expert report from Gilbert Grossman, M.D. ("Grossman"), an internist, who states that everything that Sprague did met the required standard of care. A copy of Grossman's report appears hereto as Exhibit "Q". How can Sprague's conduct outrage the average member of the community when a competent board certified doctor states that it met the required standard of care? It cannot.

In Motheral v. Burkhart, 400 Pa. Super. 408, 583 A.2d 1180 (1990), the Superior Court of Pennsylvania upheld the dismissal of an intentional infliction of emotional distress count in a

[1] Sprague vehemently denies that he ever slapped Fox or that he ever believed that Fox was faking. He contends that he used ice water on his face in small amounts to see if he could get a reaction to determine the nature of Fox's condition.

complaint in response to preliminary objections. Plaintiff based his intentional infliction of emotional distress claim upon averments in the complaint that the defendant lawyer had made knowingly false accusations to a police officer that the plaintiff had sexually molested his daughter. The complaint contended that the defendant lawyer made the statements solely to benefit the lawyer's client in a pending custody proceeding against the plaintiff and without any reasonable belief that any criminal conduct had actually occurred. The Superior Court held that these allegations, even if proven true, failed to rise to the level of outrageous conduct. The Superior Court affirmed the dismissal of that portion of the complaint in response to preliminary objections. Id. at 1190.

The conduct in Motheral, supra, 583 A.2d at 1190, equals in its repugnancy the conduct set forth by Fox. Fox alleges that in the course of providing medical treatment to him Sprague put ice water on him, slapped him one time and thought he was faking, while he provided treatment to him. This does not surpass the conduct of Motheral where the plaintiff contended that the defendant told the police knowing it was false that the plaintiff had caused harm to his daughter.

In Jones v. Nissenbaum, Rudolf and Seidner, 244 Pa. Super. 377, 368 A.2d 770 (1976), the plaintiffs sued a law firm that had written to them and stated that their house was to be sold at a Sheriff's sale. An agent of the law firm also came to the plaintiffs' house, told them that their house was going to be sold and that they had thirty days to "get their junk out." The plaintiffs went to the law firm and again were told that their house was to be sold. This was not true. The plaintiffs alleged that this caused severe emotional distress resulting in the death of one of the plaintiffs. The Superior Court held that as a matter of law these allegations failed to constitute extreme or outrageous activity. If consistently telling someone, on several occasions, that his house was going to be sold at Sheriff's sale, when it was not going to be sold at Sheriff's sale, fails to constitute outrageous conduct, even when it causes the death of the person told, how can making a decision concerning medical care constitute outrageous conduct? The question

answers itself. However disagreeable or questionable the conduct, it fails to constitute outrageous activity.

In DeWalt v. Halter, 7 D. & C. 4th 645 (1990), the plaintiff sought to recover against a tavern and its employees for serving a male patron excessive quantities of alcohol and then permitting that male patron to enter the ladies room and rape the plaintiff. The court held, as a matter of law, this failed to constitute extreme and outrageous conduct. If permitting a rape to occur fails to constitute extreme and outrageous conduct, how can providing ineffective medical care by putting ice water on a patient and by slapping the patient in an attempt to show that a patient is a fake constitute extreme and outrageous conduct? It does not and cannot as a matter of law.

In Doe v. Dwyer-Goode, 389 Pa. Super. 151, 566 A.2d 889 (1989) app'l den., 527 Pa. 587, 588 A.2d 509, plaintiff sued the defendant physician contending that she had provided an unauthorized AIDS test on the plaintiff's blood and then notified the plaintiff that he tested positive when he did not have AIDS. The trial court in response to preliminary objections dismissed the contention that this conduct stated a cause of action for intentional infliction of emotional distress. The Superior Court upheld the dismissal contending that the conduct failed to constitute outrageous conduct. That analysis applies here and requires the granting of summary judgment in favor of Sprague concerning the intentional infliction of emotional distress claim set forth in Count VI of the second amended complaint of Fox.

K. Fox Has Failed To Submit Sufficient Evidence To Support A Jury Verdict In His Favor Against Sprague Concerning His Claim Based On 42 U.S.C. §1983 Since He Has Not Shown That Sprague Had Subjective Awareness That His Conduct Presented A Substantial Risk Of Harm To Fox.

Pursuant to the Supreme Court's decision in Farmer v. Brennan, supra, 114 S.Ct. 1970, 1979 (1994) the Supreme Court defined the deliberate indifference standard by requiring a show that prison medical staff had subjective awareness of a substantial risk of harm to the prisoner. Thus, under Farmer, supra, 114 S.Ct. 1979, Fox must produce sufficient evidence to support a jury verdict in his favor on the issue of Sprague knowing that his treatment of Fox would cause

harm to him. Fox has produced no such evidence. All the evidence indicates that Sprague believed that he was providing appropriate care to Fox. Fox has produced no expert or document to the contrary.

In similar factual situations to the one here federal courts have granted summary judgment. In Rosales v. Coughlin, 10 F.Supp. 2d 261 (W.D. N.Y. 1998) the plaintiff/prisoner contended that various physicians employed by Correctional authorities to provide medical treatment acted in a deliberately indifferent manner in violation of 42 U.S.C. §1983. Plaintiff alleged that the defendants placed him on a waiting list for examination by an orthopedic specialist at Helen Hayes Hospital. He had complained of problems with his knee and back. Prison officials transferred him two months later to Downstate Correctional Facility so that he could be taken to Helen Hayes Hospital. Plaintiff was dissatisfied with his treatment because an orthopedic surgeon only examined his knee and not his back pain. The reason for this was that one of the original referring physicians who arranged for the examination had determined that the plaintiff's back problems had been adequately cared for at the transferring prison. The court concluded that this interference with the referral to an orthopedic specialist failed to constitute deliberate indifference to a serious medical need. The defendant physician did not have the required culpable state of mind. The court granted summary judgment on this claim. Id. at 10 F.Supp. 2d at 265. .

In Logan v. Clarke, 119 F.3d 647 (8th Cir. 1997) plaintiff, a prisoner, alleged that he suffered from a serious skin infection. Doctors at the prison attempted to treat it without success. After three months they referred him to a dermatologist. He alleged that the referral took too long. The Court of Appeals upheld the granting of summary judgment by the district court stating:

> Although the prison doctors may not have proceeded from their initial diagnosis to the referral to a specialist as quickly as hindsight perhaps allow us to think that they should have, their actions were not deliberately indifferent. The doctors made efforts to cure the problem in a reasonable and sensible manner. Id. at 119 F.3d at 650.

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 their 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 suggests nothing more than a mere difference of opinion as to appropriate method of treatment under the circumstances.

Fox essentially complains that Sprague misdiagnosed his condition. The federal courts to consider the issue have uniformly concluded that a mistake in diagnosis fails to constitute deliberate indifference to a serious medical need.

An allegation of misdiagnosis has never supported a claim based upon 42 U.SC. §1983. Simply showing that another doctor in similar circumstances might have ordered different treatment only raises questions about medical judgment and fails to show that the physician acted with deliberate indifference. Noll v. Petrovsky, 828 F.3d 461, 462 (8th Cir. 1987) cert. den., 484 U.S. 1014 (1988).

In Bellecourt v. United States of America, 994 F.2d 427 (8th Cir. 1993) the United States Court of Appeals for the Eighth Circuit dealt with a claim similar to the one asserted by the plaintiffs in this case. In that case the plaintiff a prisoner complained that the defendants had shown deliberate indifference to his serious medical needs. According to the plaintiff-prisoner,

while incarcerated, he had complained of chest pains. The doctor on duty at the prison examined him and diagnosed him as having indigestion. He gave him an antacid and left. Plaintiff appeared for sick call the next morning where an EKG was run and blood was drawn. The EKG showed that the prisoner had a heart attack earlier that morning. The court found that as a matter of law no claim based on a violation of the Eighth Amendment had been pled. According to the court, the plaintiff had received medical care. Any claim as to its appropriateness belonged in a medical malpractice suit pursuant to state law. The same analysis applies to the case now before this Court.

In Seward v. Hutto, 525 F.2d 1024, 1024-25 (8th Cir. 1974) the court found that a prisoner's disagreement over the diagnosis he received failed to state an Eighth Amendment claim. The same analysis applies to the case now before this Court. Accord, Rodriguez v. Joyce, 693 F.Supp. 1250 (D.Me. 1988); Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985); Brewer v. Blackwell, 836 F.Supp. 631, 643 (S.D. Iowa 1993).

In Estate of Cole by Purdue v. Fromm, 94 F.3d 254 (7th Cir. 1996) the United States Court of Appeals for the Seventh Circuit concluded that it could not permit the fact finder to infer subjective knowledge 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. According to the Court of Appeals, even if the defendant/physician's subjective knowledge was unreasonable this fails to constitute a basis for imposing liability pursuant to 42 U.S.C. §1983. The plaintiff has to establish that the defendant knew of the risk of harm not that the defendant should have known and not that it was reckless for the defendant not to know. Here, permitting the fact finder to infer subjective knowledge of a substantial risk would conflict with the subjective medical judgment of Sprague.

L. Sprague Has A Qualified Immunity To The Constitutional Claim Of Fox Based On 42 U.S.C. §1983 Which Fox Has Failed To Overcome Because He Has Not Shown That Sprague's Conduct Violated Clearly Established Law.

Sprague has a qualified immunity which Fox must overcome in order to defeat the motion for summary judgment of Sprague. The defense of qualified immunity shifts the burden to Fox to come forward with facts or allegations sufficient to show that the alleged conduct of Sprague violated law clearly established when the alleged violation occurred. Pueblo v. Neighborhood Health Centers, Inc. v. Losabio, 847 F.2d 642, 646 (6th Cir. 1998). Under this doctrine defendants are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person would have known. Rouse v. Plantier, 182 F.3d 192, 196 (3d Cir. 1999). The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). In determining whether defendants are entitled to claim qualified immunity the court engages in a third part inquiry: (1) whether the plaintiff alleged a violation of his constitutional rights; (2) whether the right alleged to have been violated was clearly established in the existing law at the time of the violation; and (3) whether a reasonable official knew or should have known that the alleged action violated the plaintiff's rights. Rouse, supra, 182 F.3d at 196 and 197.

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on whether it was objectively reasonable for the official to believe that he acted legally when the action is assessed in light of the legal rules clearly established at the time the action was taken. Anderson, supra, 483 U.S. at 639. In evaluating a defense of qualified immunity an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim. Grant v. City of Pittsburgh, 98 F.3d 116, 122, 125 (3d Cir. 1996). Here, it is an essential element.

In Grant, supra, the United States Court of Appeals observed that the determination of whether a government official has acted in an objectively reasonable manner demands a highly individualized inquiry. Grant, supra, 98 F.3d at 122. The Court of Appeals stated:

> [T]he question is whether a reasonable public official would know

> that his or her specific conduct violated clearly established rights...Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record...to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant. Id. at 121, 122 (emphasis in original).

Here, no indication exists that the conduct of Sprague violated clearly establish law existing on October 16, 1996. Interpreting the evidence in a light most favorable to Fox shows that Sprague offered constant treatment to Fox. He believed, according to two witnesses, that at some point Fox was faking but he still provided treatment to Fox. He provided medicine to lower his blood pressure.

No evidence exists to establish that a reasonable doctor in Sprague's position would know that his conduct violated the clearly established constitutional rights of Fox. Sprague intended his conduct to ascertain the condition of Fox. According to the testimony of all the nurses who indicate that Sprague believed that Fox was faking, Sprague engaged in various conduct to determine whether Fox was faking to enable him to better treat Fox. There is no indication that he acted with any kind of malicious motive toward Fox. Sprague's actual conduct shows that he did not. He provided constant treatment. No indication exists that he knew that his treatment was ineffective. He has produced the report of an expert, Grossman, who contends that Sprague provided appropriate treatment under the circumstances. See Exhibit "Q".

M. Sprague's Has Shown His Entitlement To Summary Judgment Concerning The Claim Of Fox Based On 42 U.S.C. §1983 Because Sprague Has Established That He Acted In Good Faith.[2]

In Jordan, supra, 20 F.3d 1250 (3d Cir. 1994), the Court of Appeals for the Third Circuit concluded that a private actor sued pursuant to 42 U.S.C. §1983 possesses a good faith defense. The Court of Appeals held that in order to overcome a good faith defense a plaintiff must establish that the private actor has subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. To establish a violation of the good faith defense a

[2] Sprague and Kulaylat concede that either they have a good faith defense or qualified immunity. They do not possess both. They present these defenses in the alternative.

plaintiff must produce sufficient evidence to support a jury verdict on the issue of whether the defendant acted in bad faith. Robinson, supra, 992 F.Supp. at 1208 (court found insufficient evidence of bad faith); Nemo v. City of Portland, 910 F.Supp. 491 (D. Or. 1995)(the court concluded that defendant had established a good faith defense for purposes of summary judgment where plaintiffs had not submitted any evidence from which it could be inferred that the defendant acted in bad faith).

Fox has the burden of establishing that Sprague acted in bad faith. Wyatt v. Cole, 504 U.S. 153 (1992), 173-74 (1992)(J. Ken. concurring)(burden of proof on the good faith question is the plaintiff's). An examination of the depositions and the medical records show that Fox has failed to produce sufficient evidence to support a jury verdict in his favor on the issue of Sprague having acted in bad faith. No indication exists that Sprague believed that he provided inappropriate medical care to Fox. At all times he thought that he was engaging in the appropriate conduct. No one has testified to the contrary. How can slapping a patient and putting ice water on him constitute appropriate conduct? Here, Sprague believed that these methods would establish the nature of Fox's condition. According to the nurses who testified that they saw this conduct Sprague indicated that he was trying to determine whether or not Fox was faking. Grossman's expert report finds that Sprague met the required standard of care. Exhibit "Q". Kulaylat testified in his deposition that the conduct of Sprague met appropriate medical standards. Exhibit "R", deposition of Kulaylat, pp. 91-92, 94, 96.

N. The Applicable Statute Of Limitations Bars All Counts Of The Second Amended Complaint Of Fox Against Kulaylat And Sprague Since The Relation Back Doctrine Of Federal Rule Of Civil Procedure 15(c)(3) Fails To Apply.

The two year statute of limitations of 42 Pa. C.S.A. §5524(2) applies to all the claims of Fox including the cause of action that he asserts pursuant to 42 U.S.C. §1983. The Supreme Court of the United States in Wilson v. Garcia, 471 U.S. 261 (1985) held that as a matter of law for statute of limitations purposes causes of action brought pursuant to §1983 should be characterized as personal injury actions for the purpose of determining the applicable limitations

period. The Supreme Court instructed the district court to follow the statute of limitations that the state in which it resides applies to personal injury actions. 42 Pa. C.S.A. §5524(2) applies to personal injury claims.

No doubt exists that here Fox's cause of action against Kulaylat and Sprague accrued on October 18, 1996 when he contends that they provided inadequate medical care to him. Thus, the statute of limitations expired two years later on October 18, 1998. However, Fox did not file the second amended complaint naming them as defendants until June 3, 1999, well after the statute of limitations had expired. The applicable statute of limitations bars all of Fox's claims against Kulaylat and Sprague unless Fox can establish that his filing on June 3, 1999, relates back to the original filing of this action. To do this, Fox has to show that he comes within the requirements of Federal Rule of Civil Procedure 15(c)(3).[3]

Federal Rule of Civil Procedure 15(c)(3) states:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when...
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Thus, Fox has two burdens to meet before the relation back doctrine of Federal Rule of Civil Procedure 15(c)(3) applies. He must establish fair notice and a mistake in identity. He has failed to meet either burden for the reasons discussed below.

Fox has not even alleged that his failure to name Kulaylat and Sprague as defendants in his original complaint and in his first amended complaint resulted from a mistake. Instead, he

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[3] Although this Court implicitly concluded that Fox had met the requirements of Federal Rule of Civil Procedure 15(c)(3) in granting the motion to amend to name Kulaylat and Sprague, Kulaylat and Sprague since they were not parties did not have the opportunity to raise this issue. This Court has the ability to change its initial determination.

asserts that he lacked knowledge of their identity. This fails to constitute a mistake as defined by Federal Rule of Civil Procedure 15(c)(3). The commentators to the federal rules have recognized that Federal Rule of Civil Procedure 15(c)(3) requires that the party seeking to amend made a mistake. In the Federal Civil Rules Handbook 1999 West Group Baicker-McKee, Janssen, Corr the authors indicated:

> It is unclear whether the mistake may be one of either fact or law, but in other respects this requirement has been construed rather strictly. Thus, if the party seeking to amend made no mistake, relation back is not permitted under 15(c)(3) at page 306.

Fox has the burden of establishing that he made a mistake concerning the identity of the party that he seeks to add as a defendant. To determine whether he made a mistake about the identity of the party that he seeks to add as a defendant as required for the application of the relation back doctrine the court's inquiry relates to Fox's state of mind as of the time that he filed the original complaint. Richardson v. John F. Kennedy Memorial Hosp., 838 F.Supp. 979 (E.D. Pa. 1993).

The majority of federal courts to consider the issue have concluded that lack of knowledge as to the joined party's identity fails to satisfy the mistake requirement of Federal Rule of Civil Procedure 15(c)(3). In Worthington v. Wilson, 8 F.3d 1253, 1256-57 (7th Cir. 1993) the Court of Appeals for the Seventh Circuit concluded that the lack of knowledge as to the joined party's identity does not satisfy the mistake requirement of Rule 15(c)(3).

In Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993) the Court of Appeals for the Ninth Circuit concluded that a mistake in choosing who is vulnerable to suit does not meet the mistake of identity requirement of Rule 15(c)(3). That analysis applies here. No indication exists that Fox made a mistake in not naming Kulaylat and Sprague. Instead, he claims that he did not know their identity. This fails to constitute a mistake as meant by Federal Rule of Civil Procedure 15(c)(3). Accord, Wilson v. United States Government, 23 F.3d 559 (1st Cir. 1994)(mere lack of knowledge of proper party was not such a mistake concerning the identity of the party as would permit relation back of amended complaint to date original

complaint was filed).

Federal Rule of Civil Procedure 15(c) permits an amended complaint submitted after the expiration of the statute of limitations to relate back to the original complaint if the party presenting the amended complaint has established that the new defendant added after the expiration of the statute of limitations received such notice of the institution of the action that he would not be prejudiced in maintaining a defense on the merits. Here, Fox has failed to meet his burden. He has not shown that Kulaylat and Sprague ever received such notice. CPS no longer employs Sprague. It has not employed Sprague for sometime. It did not employ Sprague when Fox filed this complaint. No indication exists that CPS ever communicated the filing of the complaint or amended complaint to Kulaylat. Kulaylat and Sprague did not know about the complaint, amended complaint or the second amended complaint until they were served with the second amended complaint. They did not know that but for a mistake they would have been named as defendants. Fox has failed to deal with this issue in any way. He ignores it.

Fox contends that the fact that Sprague and Kulaylat are defended by the same attorney as CPS results in their having had notice. This makes no sense. The decision by the insurance company of CPS to assign the same attorney for Sprague and Kulaylat occurred after the filing of the second amended complaint. That attorney never had any communication with Sprague and Kulaylat prior to the filing of the motion to amend the first amended complaint. He actually did not have any discussion with them until after they were served with the second amended complaint. The decision to assign that attorney was not automatic. It was not made until after the filing of the second amended complaint. The reasons why some courts conclude that parties defended by the same attorney have constructive notice fails to apply here.[4] No evidence exists that anyone at CPS had any knowledge that Kulaylat and Sprague were left out of the case by mistake or because Fox allegedly did not know that they should have been parties. In the past

[4] Kulaylat and Sprague incorporate by reference as if set forth herein in full the argument on this issue and the case authority on this issue presented by counsel for Horn, Howard, and Soroko in their brief in support of their motion for summary judgment.

CPS has been sued for medical malpractice and §1983 without the individual doctors ever being named at anytime during the litigation.

At all times Fox carries the burden to prove both the notice and mistake requirements of Federal Rule of Civil Procedure 15(c)(3). Hurst v. Beck, 1992 W.L. 189496 at 2 (E.D. Pa. August 3, 1992); Wine v. Emas Limited Partnership, 167 F.R.D. 34, 38 (E.D. Pa. 1996). Here, Fox has failed to meet that burden. He has produced no evidence on either issue.

In similar factual situations the federal courts have concluded that the proposed new parties lacked sufficient notice for the relation back doctrine to apply. In Graham v. City of Philadelphia, 1992 W.L. 220990 (E.D. Pa. 1992) this Court denied a motion to amend in a situation similar, if not identical, to the one presented by Fox's second amended complaint. In that case the plaintiff instituted an action against the City of Philadelphia regarding an incident alleged to have occurred on July 16, 1988. He instituted the action on June 21, 1990. On August 13, 1992, he filed a notice to amend his complaint to add a police officer as a defendant. He never provided any explanation as to why it took so long to identify the police officer as a defendant. This Court concluded that the plaintiff had presented no facts or documents to show that he put the police officer on notice of the institution of his action within the period provided by Federal Rule of Civil Procedure 4. According to this Court the action was at all times simply one against the City of Philadelphia until August 13, 1992. The same analysis applies here and requires dismissal of the entire action of Fox against Sprague and Kulaylat based on the bar of the statute of limitations.

In Eison v. McCoy, 146 F.3d 468 (7th Cir. 1998) the Court of Appeals for the Seventh Circuit concluded that the complaint's listing of aliases of police officer defendants did not provide notice to them where the Police Department had more than 17,000 employees. Here, Kulaylat and Sprague fail to even appear by means of an alias. They did not even have the notice that the Court found inadequate in Eison, supra.

In Maior v. Koletsos, 823 F.Supp. 497 (N.D. Ill. 1993) an amendment to a complaint

against police officers and the City by which the plaintiffs sought to name additional police officer defendants did not relate back to the original pleading according to the court. The complaint never named the additional officers. The plaintiffs did not initiate discovery until after the statute of limitations had run. The court held that the naming of the City did not toll the statute against all police officers and naming unknown police officers was insufficient to put the additional officers on notice of the action.

That analysis applies here. Fox did not engage in any discovery in this case until after the statute of limitations had run. Naming CPS does not toll the statute against all of its employees. Naming John Doe defendants failed to put Kulaylat and Sprague on notice about the action against them. Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Barrow v. Wethersfield Police Dept., 66 F.3d 466, 468 (7th Cir. 1995).

In Jones v. Dysinger, 815 F.Supp. 1127 (N.D. Ill. 1993) the Court concluded that an amended complaint seeking to add a City police officer as a defendant did not relate back to the filing of the complaint against two other officers. The court held the fact that all three officers were on the same police force and were represented by the same counsel was insufficient to establish the identity of interest sufficient to impute notice to the additional officer. The court indicated that there was no showing that the plaintiff was mistaken as to the identity of the proper party. Accord, Frazier v. City of Philadelphia, 927 F.Supp. 881, 885 n. 7 (E.D. Pa. 1996).

That analysis applies here. It requires the utilization of the statute of limitations to bar the second amended complaint of Fox against Kulaylat and Sprague. See Farrell v. McDonough, 966 F.2d 279 (7th Cir. 1992) reh. den., cert. den., 506 U.S. 1084 (inmate's §1983 complaint against prison officials did not relate back to original complaint against other prison officials and employees); Cruz v. City of Camden, 898 F.Supp. 1100 (D.N.J. 1995)(for the purposes of Federal Rule 15(c) dealing with relation back of amendments John Doe defendants could not be considered to have received constructive notice of institution of action though attorney who represented original county defendants and who subsequently defended John Doe defendants was

the same).

O. CPS Has No Vicarious Liability For The Actions Of Sprague Pursuant To The State Law Claims Of Fox Because Sprague At All Times Acted As An Independent Contractor.

CPS has no vicarious liability for the actions of Sprague pursuant to the state law claims of Fox because Sprague at all times acted as an independent contractor. Absent proof by Fox that an employment relationship existed between Sprague and CPS, CPS may not be held vicariously liable for either the intentional or negligent acts of Sprague. Clayton v. McCullough, 670 A.2d 710 (Pa. Super. 1996). Fox has the burden of showing such an employment relationship. Mahon v. City of Bethlehem, 898 F.Supp. 310 (E.D. Pa. 1995), reconsideration denied, 902 F.Supp. 76 (E.D. Pa. 1995).

In Strain v. Ferroni, supra, 592 A.2d 698, 704 (Pa. Super. 1991) the Superior Court of Pennsylvania set out the test for determining whether a physician acts as a servant of another physician or healthcare provider. In that case the Superior Court concluded that a principal may be held vicarious responsible for the acts of his agent where the principal controls the manner of performance and the results of the agent's work. The Superior Court quoted from the Supreme Court of Pennsylvania in Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255 where the Supreme Court wrote:

> Physicians and surgeons, like other persons, are subject to the law of agency and a physician may be at the same time the agent both of another physician and of a hospital even though the employment is not joint. [Citation omitted]. In determining whether a person is a servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner in performing it but that this work is to be performed on the business of the master for his benefit. [Citation omitted]. Actual control, of course, is not essential. It is the right to control which is determinative. On the other hand, the right to supervise, even as to the work and manner of performance, is not sufficient; otherwise the supervisory employee would be liable for the negligent act of another employee even though he would not be the superior or master of that employee in the sense the law means it. [Citations omitted]. Id. at 39, 153 A.2d at 259-60. Quoting with approval at 592 A.2d at 704.

Utilizing that test here establishes that Sprague functioned as an independent contractor.

His contract with CPS identified him as an independent contractor. Exhibit "B". Sprague testified at his deposition that he brought his own stethoscope, ophthalmoscope, otoscope, tuning forks and curet and several smaller instruments when he treated patients at SCI-Graterford. Exhibit "C", p. 29. Sprague indicated that he did pay his own taxes. Exhibit "C", p. 30.

Sprague received no benefits from CPS. He had the right to have his own practice while employed by CPS. Exhibit "C", pp. 18-19; Exhibit "D", p. 47. CPS provided no worker's compensation coverage for Sprague. See Exhibit "D", p. 57. Sprague established his own hours at CPS. Exhibit "D", pp. 57-58.

III. CONCLUSION

In the light of the foregoing, Correctional Physician Services, Inc., Nuhad Kulaylat, M.D. and William Sprague, M.D. respectfully request that their motion for summary judgment be granted.

MONAGHAN & GOLD, P.C.

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of defendants, Correctional Physician Services, Inc., Dr. Kulaylat and Dr. Sprague to the Motion for Summary Judgment, along with supporting memorandum of law by First Class Regular Mail on this date to the following individuals:

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