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

CHARLES ISELEY	:	CIVIL ACTION
V.	:	NO. 00-4839
BRAD LORAH, P.A., et al.	:	

NOTICE OF MOTION

TO: Charles Iseley, Pro Se
AM-9320
S.C.I. Coal
1 Kelley Drive
Coal Township, PA 17866

Pat McMonagle, Esquire
Deputy Atty General
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107

Please be advised that Defendants, Renato Diaz, M.D., Brad Lorah, P.A., Laslo Kiraly, M.D. and Correctional Physician Services, Inc. on **March 14, 2001** have filed a Motion for Summary Judgment, along with supporting Brief and Exhibits. Please be advised that your response is due within fourteen (14) days of the date of this notice including weekends and holidays.

MONAGHAN & GOLD, P.C.

BY: _____
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Renato Diaz, M.D. Laslo Kiraly, M.D.,
Brad Lorah, P.A. and Correctional
Physician Services, Inc.

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

CHARLES ISELEY	:	CIVIL ACTION
V.	:	NO. 00-4839
BRAD LORAH, P.A., et al.	:	

ORDER

AND NOW, this day of , 2001, it is hereby ORDERED that the Motion for Summary Judgment of Brad Lorah, P.A., Renato Diaz, M.D., Laslo Kiraly, M.D. and Correctional Physician Services, Inc. and judgment is entered in favor of Brad Lorah, P.A., Renato Diaz, M.D., Laslo Kiraly, M.D. and Correctional Physician Services, Inc. and against Charles Iseley on all claims contained in the Amended Complaint.

_____
UNITED STATES DISTRICT JUDGE

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

CHARLES ISELEY	:	CIVIL ACTION
V.	:	NO. 00-4839
BRAD LORAH, P.A., et al.	:	

MOTION FOR SUMMARY JUDGMENT OF
BRAD LORAH, P.A., RENATO DIAZ, P.A., LASLO KIRALY, M.D. AND
CORRECTIONAL PHYSICIAN SERVICES, INC.

Renato Diaz, M.D. ("Diaz"), Brad Lorah, P.A. ("Lorah"), Laslo Kiraly, M.D. ("Kiraly") and Correctional Physician Services, Inc. ("Correctional") respectfully request that this Court grant their motion for summary judgment on all claims of Charles Iseley ("Iseley") and state in support thereof the following:

1. Iseley, an inmate at the State Correctional Institution of Coal Township ("SCI-Coal") has filed an amended complaint against several defendants, including various prison officials and private physicians, alleging that they deprived him of medical care for a variety of conditions in violation of his constitutional rights and contending that several of them denied him medical care in retaliation for his filing various law suits and grievances. A copy of the amended complaint appears hereto as Exhibit "A". Iseley bases the jurisdiction of this Court solely upon 42 U.S.C. §1983.

2. Iseley asserts that the denial of medical care occurred while he served time as an inmate at the State Correctional Institution of Mahanoy ("SCI-Mahanoy") and at SCI-Coal.

3. The amended complaint identifies Diaz as the medical director of SCI-Mahanoy. Exhibit "A", paragraph 12. It identifies Kiraly as a physician at SCI-Mahanoy. Exhibit "A", paragraph 13.

4. The amended complaint identifies Lorah as a physician assistant at SCI-Coal. See Exhibit "A", paragraph 7.

5. Correctional, a private corporation, had entered into a contract with the Department of Corrections of the Commonwealth of Pennsylvania to provide medical services to certain inmates at SCI-Coal and SCI-Mahanoy. Correctional utilized the services of Kiraly and Diaz as physicians at SCI-Mahanoy in the capacity of independent contractors. Correctional had entered into a contract with Lorah, a physician assistant, to provide certain medical services under the supervision of a physician at SCI-Coal. Lorah functioned as an independent contractor of Correctional.

6. According to Iseley he became aware that he had tested positive for Hepatitis C sometime in 1998. Exhibit "A", paragraph 27, amended complaint. He alleged in his amended complaint that he requested medical treatment in early, 1999 from Kiraly and Diaz but that they informed him that no treatment was available and that he could receive no treatment until he experienced significant liver damage. He asserts that they further advised him that the only treatment beneficial to him consisted of a low cholesterol diet, vitamins and exercise. Exhibit "A", paragraphs 29 and 30.

7. Kiraly and Diaz, according to the amended complaint, advised him that the policy of the Department of Corrections of the Commonwealth of Pennsylvania barred alternative or experimental treatments for hepatitis C. See Exhibit "A", amended complaint, paragraph 31.

8. Iseley asserts that he requested various supplements and drugs to alleviate him symptoms but was told by unidentified parties that he would not receive any treatment until he sustained significant liver damage. Exhibit "A", paragraph 37.

9. According to the amended complaint, Iseley notified Martin Horn ("Horn") the Secretary of the Department of Corrections of the Commonwealth of Pennsylvania, John Doe, the head of the Pennsylvania Department of Health, Robert Bitner ("Bitner"), the Chief Hearing Examiner of the Department of Corrections of the Commonwealth of Pennsylvania, Martin Dragovich ("Dragovich"), the Warden at SCI-Mahanoy, Marva Cerullo ("Cerullo") the Health Administrator at SCI-Mahanoy, Kiraly, Diaz, CPS, Carol Dolter ("Dolter"), Grievance Coordinator at SCI-Mahanoy, and XYZ, Inc., an unknown medical service provider at SCI-Mahanoy of his hepatitis C and failure to receive treatment for it. He contends that in response to this notification nothing occurred. Exhibit "A", paragraph 38.

10. Iseley contends that all of the defendants deliberately denied him medical treatment because of his status as a prisoner and in retaliation for his filing grievances and lawsuits in the past. See Exhibit "A", paragraph 39. He never identifies the grievances and lawsuits that he has filed. He never indicates the nature of the grievances and lawsuits and he

never indicates against whom he directed them. He never states when he filed them. See Exhibit "A".

11. Iseley also asserts that Horn, Doe, Dragovich, Dolter, Bitner, Cerullo, Diaz, Kiraly, CPS and XYZ, Inc. conspired to deny him medical care because of his status as a prisoner and in retaliation for his filing prison grievances and lawsuits in the past. See Exhibit "A", paragraph 40.

12. He never indicates the date that the defendants entered into the conspiracy. He fails to state any conduct that any of the defendants carried out concerning the conspiracy. He does not indicate the duration of the conspiracy. Instead, he submits a boilerplate averment of conspiracy only. See Exhibit "A", paragraph 40.

13. Iseley contends that on December 28, 1987, ten or more armed prison guards viciously attacked him. See Exhibit "A", paragraph 41. He asserts that the prison guards who attacked him acted from a racial motivation and in retaliation of Iseley's filing of prison grievances and lawsuits against prison administrators and personnel. Exhibit "A", paragraph 42. In his deposition Iseley contends that the attack occurred in 1990. See deposition of Iseley, Exhibit "B", page 40, line 19.

14. As a direct result of the attack Iseley asserts in his amended complaint that he sustained permanent damage to his eye sight and teeth, including but not limited to blurred vision, loss of visual acuity and difficulty biting and chewing. He contends that he brought suit to recover for these injuries. As part of the settlement of the action he asserts that the defendants agreed to provide necessary and appropriate medical care. He contends that they have failed to do so. He has not identified Kiraly and Diaz as being among the defendants whom he sued initially. He does not identify Kiraly and Diaz as being among the defendants who settled the case and agreed to provide him the necessary and appropriate medical care. See Exhibit "A".

15. Iseley contends that he has requested surgery or corneal implants to correct or alleviate his vision problem. Exhibit "A", amended complaint, paragraph 44. He contends that

prison officials and the ABC, Inc. denied his request for such treatment on the grounds that it constituted treatment for cosmetic purposes only. Thus, the policy of the Department of Corrections of the Commonwealth of Pennsylvania barred it. Exhibit "A', paragraph 45.

16. Iseley asserts that he contacted Horn, Bitner, Doe, Dragovich, Cerullo, Dolter, Diaz, Kiraly, CPS, ABC, Inc. and XYZ, Inc. concerning his need for laser surgery but nothing occurred because of his status as an inmate and in retaliation for his filing prison grievances and lawsuits. He never identifies what he told any of these individuals concerning his vision problem. He never indicates when he contacted them and whether he did so orally or in writing. He failed to identify the prison grievances and lawsuits he contends resulted in the alleged retaliation against him. See Exhibit "A", paragraph 51.

17. Iseley contends that he was barred from access to an ophthalmologist to prevent him from requesting laser surgery and to prevent him from securing a recommendation for laser surgery. He never indicates who barred him from access to an ophthalmologist. Exhibit "A", paragraph 52.

18. Iseley contends that he requested orthodontic treatment from Horn, Bitner, Dragovich, Cerullo, Dotter, Diaz, Kiraly, Correction Vision Services, Inc., Dental, Inc. and XYZ, Inc. to alleviate the dental injuries he sustained by the attack by the prison guards in 1987. See Exhibit "A", paragraph 54. He asserts that as a result of the attack he lacks the ability to bite or chew properly. Exhibit "A", paragraph 55.

19. He contends that the defendants denied his request for dental treatment because they viewed it as treatment for cosmetic purposes only. They asserted that the policies of the Department of Corrections of the Commonwealth of Pennsylvania prevented dental treatment for cosmetic purposes. Exhibit "A", paragraph 56.

20. Iseley contends that he notified Horn, Bitner, Dolter, Dragovich, Cerullo, Dental, Inc. and Diaz of his need for orthodontic treatment. He contends that each of these defendants failed to take any action to assist him in obtaining such treatment. Exhibit "A", paragraph 59.

He asserts that the denial of this treatment resulted from his status as a prisoner and was taken to retaliate against him for filing of prison grievances and lawsuits against prison administrators and personnel in the past.

21. Iseley contends that in late September or early October, 1999, prison officials at SCI-Mahanoy failed to allow him to keep his prescribed asthma medication in his cell. He concedes that he never complained about this to Kiraly and Diaz. He admits that they had nothing to do with this incident. Exhibit "A", paragraphs 62 to 67.

22. The only averments against Lorah in the entire amended complaint appear at paragraphs 70, 72 and 75. Paragraph 70 states as follows:

> 70. In April, 2000 Plaintiff requested treatment for hepatitis C and/or its symptoms. Plaintiff's request was denied by Defendant Dr. Brad Lorah. Dr. Lorah advised Plaintiff that as Plaintiff had served more than his minimum sentence Pennsylvania Department of Corrections' policy strictly prohibited Plaintiff from receiving treatment for hepatitis C. However, Defendant failed to direct Plaintiff to a specific Pennsylvania Department of Corrections policy.

Paragraph 72 states:

> 72. Although Defendant Lorah was aware of the above fact, he stated to Plaintiff that as long as Plaintiff's case was going to be brought before the parole board Pennsylvania Department of Corrections' policy barred Plaintiff from receiving treatment for hepatitis C. However, Plaintiff was not directed to a specific Pennsylvania Department of Corrections policy which supports Defendants' denial of medical care.

Paragraph 75 states:

> 75. Defendants' Lorah and Moe's contention that Plaintiff is beyond his minimum sentence requirement is incorrect.

23. Diaz, Kiraly, Lorah and Correctional have filed a motion for summary judgment on several different grounds each of which independently require the dismissal of the claims of Iseley against them. First, Iseley has failed to produce sufficient evidence to establish that he has exhausted his available administrative remedies as required by 42 U.S.C. §1997e(a). That provision states as follows:

> No action shall be brought with respect to prison conditions under Section 1979 of the revised statute of the United States (42 U.S.C. §1983) or any other Federal Law by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. §1997e(a).

24. The Department of Corrections of the Commonwealth of Pennsylvania at all times relevant to the amended complaint of Iseley had in force a Consolidated Inmate Grievance Review Procedure designated DC-ADM804 effective November 20, 1994. That procedure provided that after an attempted informal resolution of the problem a written grievance could be

submitted by the inmate to the Grievance Coordinator. An appeal from the Coordinator's decision may be made in writing to a Facility Manager or a Community Correctional Regional Director. DC-ADM804 is attached hereto as Exhibit "C". See Peoples v. Horn, Civil Action No. 3:CV-97-0205 (M.D. Pa. 1997) page 3 attached hereto as Exhibit "D".

25. A final written appeal may be presented to the Central Office Review Committee. As of May 1, 1998, DC-ADM804 provided for the award of monetary relief by the Department of Corrections of the Commonwealth of Pennsylvania to Iseley. See Exhibits "C" and "D", Peoples v. Horn, No. 3:97-0205 (M.D. Pa. 1997)(Judge Conaboy); Sykes v. Horn, Civil Action No. 99-6208 (E.D. Pa. March 21, 2000)(Judge Robreno). A copy of the opinion in Sykes v. Horn, supra, appears hereto as Exhibit "E".

26. Iseley contends in his amended complaint that he has exhausted his administrative remedies. In his deposition he also contends that he exhausted his available administrative remedies and that he sought monetary damages pursuant to the administrative procedures provided by the Department of Corrections of the Commonwealth of Pennsylvania. Exhibit "B", page 134. An examination of the grievances and appeals submitted shows that he never pursued monetary damages in any of his administrative remedies relating to medical care. A copy of the

grievances and appeals that Iseley presented appears hereto as Exhibit "F". He never indicates any claim for monetary damages based on the conduct of Kiraly, Diaz, Lorah or Correctional.

27. The administrative remedies he submitted fail to indicate any allegations against Kiraly, Diaz or Correctional. The grievances mention Diaz only indirectly concerning the Hepatitis C treatment. They do not mention him at all involving the failure to provide treatment for the eyes and teeth of Iseley. Iseley has not produced any grievances on these issues concerning monetary damages or any grievances mentioning Lorah, Correctional and Kiraly. He has not presented any grievances about which he complains about Diaz's failure to treat his teeth and his eyes. See Exhibit "F".

28. Consequently, Iseley has produced insufficient evidence to support a jury verdict in his favor on the issue of exhaustion of administrative remedies. In Geisler v. Hoffman, No. 99-1971 (3d Cir. September 12, 2000)(unreported) the United States Court of Appeals for the Third Circuit concluded that an inmate had failed to state a cause of action pursuant to 42 U.S.C. §1983 even though he had exhausted all of the administrative remedies provided for by DC-ADM804 since he failed to request monetary damages by means of the administrative process. See Exhibit "G".

29. Second, Iseley has failed to produce sufficient evidence to support a jury verdict in his favor on the issue of Diaz and Kiraly having acted with deliberate indifference to a serious medical need. In order to establish a cause of action pursuant to 42 U.S.C. §1983. Iseley must show deliberate indifference to a serious medical need.

30. To establish deliberate indifference to a serious medical need Iseley must establish that Kiraly and Diaz knew that their conduct presented a substantial risk of harm to Iseley and yet proceeded to act any way. Iseley has to show subjective knowledge of the risk of harm to him by Diaz and Kiraly. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994).

31. An examination of the record shows that Iseley has failed to produce sufficient evidence to support a jury verdict in his favor on the issue of subjective knowledge by Kiraly

and Diaz that their conduct presented a substantial risk of harm to Iseley. Iseley contends that Kiraly and Diaz told him there was no treatment for Hepatitis C for which he suffered. He asserts that they told him that the only treatment that would be available to him would be a low cholesterol diet, vitamins and exercise. Exhibit "B", page 74. He contends that this was not true. Yet, he has produced no expert testimony on this issue. He has not shown that acceptable medical treatment existed for Hepatitis C other than that provided by Diaz and Kiraly to him. He has not established that Diaz and Kiraly had subjective knowledge that better treatment existed appropriate for him and yet refused to give it to him. He only makes a conclusory allegation. He has no evidence to support it. The jury has no basis upon which to return a verdict in his favor on this issue. Diaz in his verification asserts that the treatment he provided consisting of vitamins and exercise constituted the best treatment available for Iseley at the time, given the level of the infection it was inappropriate to use any drug therapy. See verification of Diaz attached hereto as Exhibit "I".

32. He has also not shown that Diaz and Kiraly knew that their failure to approve LASIK surgery and orthodontic care for him presented a substantial risk of harm to him. He has not established their subjective knowledge of this. He has not even established that he will suffer any harm as a result of not having LASIK surgery for his eyes or orthodontic treatment for his teeth.

33. Yet a third reason exists which requires this Court to grant summary judgment in favor of Kiraly and Diaz concerning Iseley's claim based on 42 U.S.C. §1983. Diaz and Kiraly have established a good faith defense which defeats the cause of action of Iseley based on 42 U.S.C. §1983. The United States Court of Appeals for the Third Circuit in Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) has indicated that in order to overcome a good faith defense the plaintiff has to establish that a private actor had subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276.

Iseley has no evidence on this issue, let alone sufficient evidence, to support a jury verdict in his favor.

34. A fourth reason exists which requires the dismissal of Iseley's claim against Diaz and Kiraly to the extent that it states a cause of action pursuant to 42 U.S.C. §1983 based on failure to provide appropriate treatment for Iseley's teeth and eye. Neither of these conditions constitute a serious medical need. Iseley admits that he received root canal, filled cavities and chipped teeth repair in prison. He has gone to the dentist with complaints of pain and received treatment. Exhibit "B", page 67. He has only been refused dental treatment as to his request to be seen by an orthodontist. Iseley does not indicate that the orthodontic treatment is required to relieve pain or to prevent the aggravation of a serious condition concerning his teeth. He states that he has been told that the orthodontic treatment he requests is cosmetic. Exhibit "B", page 71.

35. The only problem with his eyes consists of his suffering from near sightedness. Exhibit "B", page 49. He wants LASIK surgery on both eyes so he does not have to wear glasses anymore. Exhibit "B", pages 49-51. This fails to constitute a condition that constitutes a serious medical need. To establish a serious medical need he must identify a condition of urgency, one that may produce death, degeneration or extreme pain. See Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 487 U.S. 1006 (1988).

36. Iseley has also failed to produce sufficient evidence to support a jury verdict in his favor on the issue of retaliation by Diaz, Kiraly and Lorah against him. Retaliation by a state actor against a person because of the person's exercise of First Amendment rights constitutes a basis for a cause of action pursuant to 42 U.S.C. §1983. Mt. Holly City Board of Education v. Doyle, 429 U.S. 274 (1977). Prison officials may not retaliate against an inmate for engaging in activity that does not threaten prison order, the security of other inmates or staff or implicate other legitimate penological interests. Todaro v. Bowman, 872 F.2d 43, 49 (3d Cir. 1989). To

set forth a retaliation claim Iseley must demonstrate that Kiraly, Diaz and Lorah engaged in retaliatory action and that this action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

37. Iseley has presented no evidence of retaliation. He has not shown that Diaz, Kiraly and Lorah even knew of conduct he engaged in pursuant to the First Amendment. He has not indicated that any action they took against him arose as a result of his engaging in conduct protected by the First Amendment. He has not shown what conduct that he engaged is protected by the First Amendment. He has not established that any conduct he engaged in is protected by the First Amendment caused the retaliation against him. He has not produced any evidence

sufficient to support a jury verdict in his favor on the issue of retaliation by Kiraly, Diaz and Lorah.

38. Iseley has failed to show sufficient evidence to establish that Lorah acted with deliberate indifference to a serious medical need. He has not indicated sufficient evidence to support a jury verdict in his favor on this issue. In order to establish deliberate indifference to a serious medical need Iseley must show that Lorah had subjective knowledge that his conduct presented a substantial risk of harm to him. He has not presented such evidence. Iseley at his deposition concedes that Lorah, a physician's assistant, told him that he could not get treatment for Hepatitis C because he had less than a year to serve of his sentence. Lorah indicated to him that the Commonwealth of Pennsylvania Department of Corrections had a policy which forbid treatment for Hepatitis C to anyone who had less than a year to serve. He has no claim against Lorah on any other basis. See Exhibit "B", p. 119, 128. He concedes that he had less than a year to serve at the time when Lorah told him about the policy. He does not indicate that Lorah had any ability to effect the policy. He admits that he does not even know if Lorah had the authority to prescribe treatment for Hepatitis C. As a physician's assistant Lorah lacks such authority.

39. The Commonwealth of Pennsylvania did have a policy that prohibited treatment of inmates for Hepatitis C that had less than a year to serve of their sentence. This policy refers to the drug therapy which Iseley desired. The policy issued on February 8, 2000 indicates that it has two reasons. First, medically it is important to insure that once treatment is started the inmates continued to receive the entire course until completed. Second, those with less than 12 months to serve can have treatment started and completed in the community after release. The medical rationale for this is that it is more detrimental to interrupt medical treatment once started than to defer treatment. A copy of the policy of the Department of Corrections and its rationale for it appears hereto as Exhibit "K".

40. Lorah as a private physician's assistant had no ability to effect this policy and had nothing to do with its authorization or its implementation.

41. Iseley has failed to produce sufficient evidence to overcome the good faith defense of Lorah. At no time did Lorah have a subjective belief that his conduct violated the constitutional rights of Iseley. Iseley has produced no medical testimony that the policy of the Commonwealth of Pennsylvania concerning hepatitis departed from competent and reasonable medical practice.

42. Iseley has failed to establish a serious medical need concerning his eye and his teeth because he has not produced expert testimony on this issue. In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) the United States Court of Appeals for the Third Circuit concluded that a plaintiff/inmate bringing a cause of action pursuant to 42 U.S.C. §1983 had to produce expert testimony to establish a serious medical need unless the facts of the case sufficiently permitted a jury to reach its own conclusion that a serious medical need existed. In Boring, supra, the Court of Appeals held that a plaintiff who alleged that he suffered from a hernia and was not given an operation for it failed to establish a serious medical need without expert testimony. Here, a lay jury lacks the ability to determine whether or not the condition of the eye concerning near sightedness and the orthodontic work that Iseley sought constitutes a serious medical need and thus the plaintiff must present expert testimony. Iseley's inability to pay for an expert fails to relieve him of the responsibility of producing expert testimony on this issue.

43. In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) the United States Court of Appeals specifically rejected the contention that an inmate did not have to produce expert testimony on the issue of a serious medical need pursuant to a claim based on 42 U.S.C. §1983 when he lacked the money to pay for an expert. The Court concluded that the plaintiff's inability to pay for an expert failed to excuse him from this requirement even if it resulted in the dismissal of his claim. In that case the Court of Appeals upheld the dismissal of a claim of an inmate pursuant to 42 U.S.C. §1983 because of the inmate's failure to produce expert testimony on the existence of a serious medical need.

44. Iseley has failed to state a cause of action pursuant to 42 U.S.C. §1983 against Correctional. As a private corporation Correctional only has liability if it has adopted a policy which violates the constitutional rights of Iseley. Iseley contends that Correctional had a policy of denying medical care. See Exhibit "B", pages 109-111. But he has not produced any evidence of the existence of such a policy. He simply states that it exists. He has not identified that this policy caused him harm or led to the deprivation of his constitutional rights. Miller v. Hoffman, Civil Action No. 97-7987 (E.D. Pa. 1998). See Exhibit "U"; Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir. 1989), cert. den., 493 U.S. 1044 (1990).

45. Iseley also attempts to hold Correctional responsibility for the actions of Diaz and Kiraly. No respondeat superior liability exists pursuant to 42 U.S.C. §1983. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993).

46. Iseley attempts to state a cause of action for civil conspiracy in violation of 42 U.S.C. §1983. He has failed to do so. He must submit evidence of a combination, agreement or understanding among all or any of the defendants to plot, plan or conspire to carry out the alleged chain of events in order to deprive him of a fairly protected right. Darr v. Wolfe, 767 F.2d 79, 80 (3d Cir. 1985). He never identifies the participants in the conspiracy. He never indicates the objectives of the conspiracy. He never produces any evidence of a conspiracy.

WHEREFORE, Renato Diaz, M.D., Brad Lorah, P.A., Laslo Kiraly, M.D. and Correctional Physician Services, Inc. respectfully request that their motion for summary judgment be granted.

MONAGHAN & GOLD, P.C.

BY: _____
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Renato Diaz, M.D., Brad Lorah, P.A.,
Laslo Kiraly, M.D. and Correctional
Physician Services, Inc.

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

CHARLES ISELEY	:	CIVIL ACTION
V.	:	NO. 00-4839
BRAD LORAH, P.A., et al.	:	

MEMORANDUM OF LAW OF BRAD LORAH, P.A., RENATO DIAZ, M.D., LASLO KIRALY, M.D. AND CORRECTIONAL PHYSICIAN SERVICES, INC. IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Charles Iseley ("Iseley"), an inmate at the State Correctional Institution of Coal Township ("SCI-Coal"), has filed an amended complaint against several defendants, including various prison officials and private physicians, alleging that they deprived him of medical care for a variety of conditions in violation of his constitutional rights and contending that several of them denied him medical care in retaliation for his filing various law suits and grievances. A copy of the amended complaint appears hereto as Exhibit "A".[1] Iseley bases the jurisdiction of this Court solely upon 42 U.S.C. §1983.

Iseley asserts that the denial of medical care occurred while he served time as an inmate at the State Correctional Institution of Mahanoy ("SCI-Mahanoy") and at SCI-Coal.

The amended complaint identifies Renato Diaz, M.D. ("Diaz") as the medical director of SCI-Mahanoy. Exhibit "A", paragraph 12. It identifies Laslo Kiraly, M.D. ("Kiraly") as a physician at SCI-Mahanoy. Exhibit "A", paragraph 13. The amended complaint identifies Brad Lorah, P.A. ("Lorah") as a physician assistant at SCI-Coal. See Exhibit "A", paragraph 7.

[1]Iseley has filed a motion to withdraw the amended complaint contending that his father submitted it without his approval. The Court denied that motion. Iseley has filed a motion with this Court to file an another amended complaint. This Court has not ruled on that motion yet. Consequently, the only complaint before this Court consists of the amended complaint which Iseley contends that he never filed.

Correctional, a private corporation, had entered into a contract with the Department of Corrections of the Commonwealth of Pennsylvania to provide medical services to certain inmates at SCI-Coal and SCI-Mahanoy. Correctional utilized the services of Kiraly and Diaz as physicians at SCI-Mahanoy in the capacity of independent contractors. Correctional had entered into a contract with Lorah, a physician assistant, to provide certain medical services under the supervision of a physician at SCI-Coal. Lorah functioned as an independent contractor of Correctional.

According to Iseley he became aware that he had tested positive for Hepatitis C sometime in 1998. Exhibit "A", paragraph 27, amended complaint. He alleged in his amended complaint that he requested medical treatment in early, 1999 from Kiraly and Diaz but that they informed him that no treatment was available and that he could receive no treatment until he experienced significant liver damage. He asserts that they further advised him that the only treatment beneficial to him consisted of a low cholesterol diet, vitamins and exercise. Exhibit "A", paragraphs 29 and 30.

Kiraly and Diaz, according to the amended complaint, advised him that the policy of the Department of Corrections of the Commonwealth of Pennsylvania barred alternative or experimental treatments for hepatitis C. See Exhibit "A", amended complaint, paragraph 31.

Iseley asserts that he requested various supplements and drugs to alleviate him symptoms but was told by unidentified parties that he would not receive any treatment until he sustained significant liver damage. Exhibit "A", paragraph 37.

According to the amended complaint, Iseley notified Martin Horn ("Horn") the Secretary of the Department of Corrections of the Commonwealth of Pennsylvania, John Doe, the head of the Pennsylvania Department of Health, Robert Bitner ("Bitner"), the Chief Hearing Examiner of the Department of Corrections of the Commonwealth of Pennsylvania, Martin Dragovich ("Dragovich"), the Warden at SCI-Mahanoy, Marva Cerullo ("Cerullo") the Health Administrator at SCI-Mahanoy, Kiraly, Diaz, CPS, Carol Dolter ("Dolter"), Grievance Coordinator at SCI-Mahanoy, and XYZ, Inc., an unknown medical service provider at SCI-Mahanoy of his hepatitis C and failure to receive treatment for it. He contends that in response to this notification nothing occurred. Exhibit "A", paragraph 38.

Iseley contends that all of the defendants deliberately denied him medical treatment because of his status as a prisoner and in retaliation for his filing grievances and lawsuits in the past. See Exhibit "A", paragraph 39. He never identifies the grievances and lawsuits that he has

filed. He never indicates the nature of the grievances and lawsuits and he never indicates against whom he directed them. He never states when he filed them. See Exhibit "A".

Iseley also asserts that Horn, Doe, Dragovich, Dolter, Bitner, Cerullo, Diaz, Kiraly, CPS and XYZ, Inc. conspired to deny him medical care because of his status as a prisoner and in retaliation for his filing prison grievances and lawsuits in the past. See Exhibit "A", paragraph 40.

He never indicates the date that the defendants entered into the conspiracy. He fails to state any conduct that any of the defendants carried out concerning the conspiracy. He does not indicate the duration of the conspiracy. Instead, he submits a boilerplate averment of conspiracy only. See Exhibit "A", paragraph 40.

Iseley contends that on December 28, 1987, ten or more armed prison guards viciously attacked him. See Exhibit "A", paragraph 41. He asserts that the prison guards who attacked him acted from a racial motivation and in retaliation of Iseley's filing of prison grievances and lawsuits against prison administrators and personnel. Exhibit "A", paragraph 42. In his deposition Iseley contends that the attack occurred in 1990. See deposition of Iseley, Exhibit "B", page 40, line 19.

As a direct result of the attack Iseley asserts in his amended complaint that he sustained permanent damage to his eye sight and teeth, including but not limited to blurred vision, loss of visual acuity and difficulty biting and chewing. He contends that he brought suit to recover for these injuries. As part of the settlement of the action he asserts that the defendants agreed to provide necessary and appropriate medical care. He contends that they have failed to do so. He has not identified Kiraly and Diaz as being among the defendants whom he sued initially. He does not identify Kiraly and Diaz as being among the defendants who settled the case and agreed to provide him the necessary and appropriate medical care. See Exhibit "A".

Iseley contends that he has requested surgery or corneal implants to correct or alleviate his vision problem. Exhibit "A", amended complaint, paragraph 44. He contends that prison

officials and the ABC, Inc. denied his request for such treatment on the grounds that it constituted treatment for cosmetic purposes only. Thus, the policy of the Department of Corrections of the Commonwealth of Pennsylvania barred it. Exhibit "A', paragraph 45.

Iseley asserts that he contacted Horn, Bitner, Doe, Dragovich, Cerullo, Dolter, Diaz, Kiraly, CPS, ABC, Inc. and XYZ, Inc. concerning his need for laser surgery but nothing occurred because of his status as an inmate and in retaliation for his filing prison grievances and lawsuits. He never identifies what he told any of these individuals concerning his vision problem. He never indicates when he contacted them and whether he did so orally or in writing. He failed to identify the prison grievances and lawsuits he contends resulted in the alleged retaliation against him. See Exhibit "A", paragraph 51.

Iseley contends that he was barred from access to an ophthalmologist to prevent him from requesting laser surgery and to prevent him from securing a recommendation for laser surgery. He never indicates who barred him from access to an ophthalmologist. Exhibit "A", paragraph 52.

Iseley contends that he requested orthodontic treatment from Horn, Bitner, Dragovich, Cerullo, Dotter, Diaz, Kiraly, Correction Vision Services, Inc., Dental, Inc. and XYZ, Inc. to alleviate the dental injuries he sustained by the attack by the prison guards in 1987. See Exhibit "A", paragraph 54. He asserts that as a result of the attack he lacks the ability to bite or chew properly. Exhibit "A", paragraph 55.

He contends that the defendants denied his request for dental treatment because they viewed it as treatment for cosmetic purposes only. They asserted that the policies of the Department of Corrections of the Commonwealth of Pennsylvania prevented dental treatment for cosmetic purposes. Exhibit "A", paragraph 56.

Iseley contends that he notified Horn, Bitner, Dolter, Dragovich, Cerullo, Dental, Inc. and Diaz of his need for orthodontic treatment. He contends that each of these defendants failed to take any action to assist him in obtaining such treatment. Exhibit "A", paragraph 59. He asserts that the denial of this treatment resulted from his status as a prisoner and was taken to retaliate against him for filing of prison grievances and lawsuits against prison administrators and personnel in the past.

Iseley contends that in late September or early October, 1999, prison officials at SCI-Mahanoy failed to allow him to keep his prescribed asthma medication in his cell. He concedes that he never complained about this to Kiraly and Diaz. He admits that they had nothing to do with this incident. Exhibit "A", paragraphs 62 to 67.

The only averments against Lorah in the entire amended complaint appear at paragraphs 70, 72 and 75. Paragraph 70 states as follows:

> 70. In April, 2000 Plaintiff requested treatment for hepatitis C and/or its symptoms. Plaintiff's request was denied by Defendant Dr. Brad Lorah. Dr. Lorah advised Plaintiff that as Plaintiff had served more than his minimum sentence Pennsylvania Department of Corrections' policy strictly prohibited Plaintiff from receiving treatment for hepatitis C. However, Defendant failed to direct Plaintiff to a specific Pennsylvania Department of Corrections policy.

Paragraph 72 states:

> 72. Although Defendant Lorah was aware of the above fact, he stated to Plaintiff that as long as Plaintiff's case was going to be brought before the parole board Pennsylvania Department of Corrections' policy barred Plaintiff from receiving treatment for hepatitis C. However, Plaintiff was not directed to a specific Pennsylvania Department of Corrections policy which supports Defendants' denial of medical care.

Paragraph 75 states:

> 75. Defendants' Lorah and Moe's contention that Plaintiff is beyond his minimum sentence requirement is incorrect.

Diaz, Kiraly, Lorah and Correctional have filed a motion for summary judgment on several different grounds each of which independently require the dismissal of the claims of Iseley against them. First, Iseley has failed to produce sufficient evidence to establish that he has exhausted his available administrative remedies as required by 42 U.S.C. §1997e(a). That provision states as follows:

> No action shall be brought with respect to prison conditions under Section 1979 of the revised statute of the United States (42 U.S.C. §1983) or any other Federal Law by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. §1997e(a).

The Department of Corrections of the Commonwealth of Pennsylvania at all times relevant to the amended complaint of Iseley had in force a Consolidated Inmate Grievance Review Procedure designated DC-ADM804 effective November 20, 1994. That procedure provided that after an attempted informal resolution of the problem a written grievance could be

submitted by the inmate to the Grievance Coordinator. An appeal from the Coordinator's decision may be made in writing to a Facility Manager or a Community Correctional Regional Director. DC-ADM804 is attached hereto as Exhibit "C". See Peoples v. Horn, Civil Action No. 3:CV-97-0205 (M.D. Pa. 1997) page 3 attached hereto as Exhibit "D".

A final written appeal may be presented to the Central Office Review Committee. As of May 1, 1998, DC-ADM804 provided for the award of monetary relief by the Department of Corrections of the Commonwealth of Pennsylvania to Iseley. See Exhibits "C" and "D", Peoples v. Horn, No. 3:97-0205 (M.D. Pa. 1997)(Judge Conaboy); Sykes v. Horn, Civil Action No. 99-6208 (E.D. Pa. March 21, 2000)(Judge Robreno). A copy of the opinion in Sykes v. Horn, supra, appears hereto as Exhibit "E".

Iseley contends in his amended complaint that he has exhausted his administrative remedies. In his deposition he also contends that he exhausted his available administrative remedies and that he sought monetary damages pursuant to the administrative procedures provided by the Department of Corrections of the Commonwealth of Pennsylvania. Exhibit "B", page 134. An examination of the grievances and appeals submitted shows that he never pursued monetary damages in any of his administrative remedies relating to medical care. A copy of the

grievances and appeals that Iseley presented appears hereto as Exhibit "F". He never indicates any claim for monetary damages based on the conduct of Kiraly, Diaz, Lorah or Correctional.

The administrative remedies he submitted fail to indicate any allegations against Kiraly, Diaz or Correctional. The grievances mention Diaz only indirectly concerning the Hepatitis C treatment. They do not mention him at all involving the failure to provide treatment for the eyes and teeth of Iseley. Iseley has not produced any grievances on these issues concerning monetary damages or any grievances mentioning Lorah, Correctional and Kiraly. He has not presented any grievances about which he complains about Diaz's failure to treat his teeth and his eyes. See Exhibit "F".

Consequently, Iseley has produced insufficient evidence to support a jury verdict in his favor on the issue of exhaustion of administrative remedies. In Geisler v. Hoffman, No. 99-1971 (3d Cir. September 12, 2000)(unreported) the United States Court of Appeals for the Third Circuit concluded that an inmate had failed to state a cause of action pursuant to 42 U.S.C. §1983 even though he had exhausted all of the administrative remedies provided for by DC-ADM804 since he failed to request monetary damages by means of the administrative process. See Exhibit "G".

Second, Iseley has failed to produce sufficient evidence to support a jury verdict in his favor on the issue of Diaz and Kiraly having acted with deliberate indifference to a serious medical need. In order to establish a cause of action pursuant to 42 U.S.C. §1983. Iseley must show deliberate indifference to a serious medical need.

To establish deliberate indifference to a serious medical need Iseley must establish that Kiraly and Diaz knew that their conduct presented a substantial risk of harm to Iseley and yet proceeded to act any way. Iseley has to show subjective knowledge of the risk of harm to him by Diaz and Kiraly. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994).

An examination of the record shows that Iseley has failed to produce sufficient evidence to support a jury verdict in his favor on the issue of subjective knowledge by Kiraly and Diaz

that their conduct presented a substantial risk of harm to Iseley. Iseley contends that Kiraly and Diaz told him there was no treatment for Hepatitis C for which he suffered. He asserts that they told him that the only treatment that would be available to him would be a low cholesterol diet, vitamins and exercise. Exhibit "B", page 74. He contends that this was not true. Yet, he has produced no expert testimony on this issue. He has not shown that acceptable medical treatment existed for Hepatitis C other than that provided by Diaz and Kiraly to him. He has not established that Diaz and Kiraly had subjective knowledge that better treatment existed appropriate for him and yet refused to give it to him. He only makes a conclusory allegation. He has no evidence to support it. The jury has no basis upon which to return a verdict in his favor on this issue. Diaz in his verification asserts that the treatment he provided consisting of vitamins and exercise constituted the best treatment available for Iseley at the time given the level of the infection it was inappropriate to use any drug therapy. See verification of Diaz attached hereto as Exhibit "I".

He has also not shown that Diaz and Kiraly knew that their failure to approve LASIK surgery and orthodontic care for him presented a substantial risk of harm to him. He has not established their subjective knowledge of this. He has not even established that he will suffer any harm as a result of not having LASIK surgery for his eyes or orthodontic treatment for his teeth.

Yet a third reason exists which requires this Court to grant summary judgment in favor of Kiraly and Diaz concerning Iseley's claim based on 42 U.S.C. §1983. Diaz and Kiraly have established a good faith defense which defeats the cause of action of Iseley based on 42 U.S.C. §1983. The United States Court of Appeals for the Third Circuit in Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) has indicated that in order to overcome a good faith defense the plaintiff has to establish that a private actor had subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. Iseley has no evidence on this issue, let alone sufficient evidence, to support a jury verdict in his favor.

A fourth reason exists which requires the dismissal of Iseley's claim against Diaz and Kiraly to the extent that it states a cause of action pursuant to 42 U.S.C. §1983 based on failure to provide appropriate treatment for Iseley's teeth and eye. Neither of these conditions constitute a serious medical need. Iseley admits that he received root canal, filled cavities and chipped teeth repair in prison. He has gone to the dentist with complaints of pain and received treatment. Exhibit "B", page 67. He has only been refused dental treatment as to his request to be seen by an orthodontist. Iseley does not indicate that the orthodontic treatment is required to relieve pain or to prevent the aggravation of a serious condition concerning his teeth. He states that he has been told that the orthodontic treatment he requests is cosmetic. Exhibit "B", page 71.

The only problem with his eyes consists of his suffering from near sightedness. Exhibit "B", page 49. He wants LASIK surgery on both eyes so he does not have to wear glasses anymore. Exhibit "B", pages 49-51. This fails to constitute a condition that constitutes a serious medical need. To establish a serious medical need he must identify a condition of urgency, one that may produce death, degeneration or extreme pain. See Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 487 U.S. 1006 (1988).

Iseley has also failed to produce sufficient evidence to support a jury verdict in his favor on the issue of retaliation by Diaz, Kiraly and Lorah against him. Retaliation by a state actor against a person because of the person's exercise of First Amendment rights constitutes a basis for a cause of action pursuant to 42 U.S.C. §1983. Mt. Holly City Board of Education v. Doyle, 429 U.S. 274 (1977). Prison officials may not retaliate against an inmate for engaging in activity that does not threaten prison order, the security of other inmates or staff or implicate other legitimate penological interests. Todaro v. Bowman, 872 F.2d 43, 49 (3d Cir. 1989). To set forth a retaliation claim Iseley must demonstrate that Kiraly, Diaz and Lorah engaged in retaliatory action and that this action did not advance legitimate goals of the correctional

institution or was not tailored narrowly enough to achieve such goals. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

Iseley has presented no evidence of retaliation. He has not shown that Diaz, Kiraly and Lorah even knew of conduct he engaged in pursuant to the First Amendment. He has not indicated that any action they took against him arose as a result of his engaging in conduct protected by the First Amendment. He has not shown what conduct that he engaged is protected by the First Amendment. He has not established that any conduct he engaged in is protected by the First Amendment caused the retaliation against him. He has not produced any evidence sufficient to support a jury verdict in his favor on the issue of retaliation by Kiraly, Diaz and Lorah.

Iseley has failed to show sufficient evidence to establish that Lorah acted with deliberate indifference to a serious medical need. He has not indicated sufficient evidence to support a jury verdict in his favor on this issue. In order to establish deliberate indifference to a serious medical need Iseley must show that Lorah had subjective knowledge that his conduct presented a substantial risk of harm to him. He has not presented such evidence. Iseley at his deposition concedes that Lorah, a physician's assistant, told him that he could not get treatment for Hepatitis C because he had less than a year to serve of his sentence. Lorah indicated to him that the Commonwealth of Pennsylvania Department of Corrections had a policy which forbid treatment for Hepatitis C to anyone who had less than a year to serve. He has no claim against Lorah on any other basis. See Exhibit "B", p. 119, 128. He concedes that he had less than a year to serve at the time when Lorah told him about the policy. He does not indicate that Lorah had any ability to effect the policy. He admits that he does not even know if Lorah had the authority to prescribe treatment for Hepatitis C. As a physician's assistant Lorah lacks such authority.

The Commonwealth of Pennsylvania did have a policy that prohibited treatment of inmates for Hepatitis C that had less than a year to serve of their sentence. This policy refers to the drug therapy which Iseley desired. The policy issued on February 8, 2000 indicates that it has two reasons. First, medically it is important to insure that once treatment is started the inmates continued to receive the entire course until completed. Second, those with less than 12 months to serve can have treatment started and completed in the community after release. The medical rationale for this is that it is more detrimental to interrupt medical treatment once started

than to defer treatment. A copy of the policy of the Department of Corrections and its rationale for it appears hereto as Exhibit "K".

Lorah as a private physician's assistant had no ability to effect this policy and had nothing to do with its authorization or its implementation. Iseley has failed to produce sufficient evidence to overcome the good faith defense of Lorah. At no time did Lorah have a subjective belief that his conduct violated the constitutional rights of Iseley. Iseley has produced no medical testimony that the policy of the Commonwealth of Pennsylvania concerning hepatitis departed from competent and reasonable medical practice.

Iseley has failed to establish a serious medical need concerning his eye and his teeth because he has not produced expert testimony on this issue. In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) the United States Court of Appeals for the Third Circuit concluded that a plaintiff/inmate bringing a cause of action pursuant to 42 U.S.C. §1983 had to produce expert testimony to establish a serious medical need unless the facts of the case sufficiently permitted a jury to reach its own conclusion that a serious medical need existed. In Boring, supra, the Court of Appeals held that a plaintiff who alleged that he suffered from a hernia and was not given an operation for it failed to establish a serious medical need without expert testimony. Here, a lay jury lacks the ability to determine whether or not the condition of the eye concerning near sightedness and the orthodontic work that Iseley sought constitutes a serious medical need and thus the plaintiff must present expert testimony. Iseley's inability to pay for an expert fails to relieve him of the responsibility of producing expert testimony on this issue.

In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) the United States Court of Appeals specifically rejected the contention that an inmate did not have to produce expert testimony on the issue of a serious medical need pursuant to a claim based on 42 U.S.C. §1983 when he lacked the money to pay for an expert. The Court concluded that the plaintiff's inability to pay for an expert failed to excuse him from this requirement even if it resulted in the dismissal of his claim. In that case the Court of Appeals upheld the dismissal of a claim of an

inmate pursuant to 42 U.S.C. §1983 because of the inmate's failure to produce expert testimony on the existence of a serious medical need.

Iseley has failed to state a cause of action pursuant to 42 U.S.C. §1983 against Correctional. As a private corporation Correctional only has liability if it has adopted a policy which violates the constitutional rights of Iseley. Iseley contends that Correctional had a policy of denying medical care. See Exhibit "B", pages 109-111. But he has not produced any evidence of the existence of such a policy. He simply states that it exists. He has not identified that this policy caused him harm or led to the deprivation of his constitutional rights. Miller v. Hoffman, Civil Action No. 97-7987 (E.D. Pa. 1998). See Exhibit "U"; Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir. 1989), cert. den., 493 U.S. 1044 (1990).

Iseley also attempts to hold Correctional responsibility for the actions of Diaz and Kiraly. No respondeat superior liability exists pursuant to 42 U.S.C. §1983. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993).

Iseley attempts to state a cause of action for civil conspiracy in violation of 42 U.S.C. §1983. He has failed to do so. He must submit evidence of a combination, agreement or understanding among all or any of the defendants to plot, plan or conspire to carry out the alleged chain of events in order to deprive him of a fairly protected right. Darr v. Wolfe, 767 F.2d 79, 80

(3d Cir. 1985). He never identifies the participants in the conspiracy. He never indicates the objectives of the conspiracy. He never produces any evidence of a conspiracy.

II. STATEMENT OF THE FACTS

Iseley served time as an inmate at the SCI-Mahanoy from December 2, 1998 until September 15, 1999. He was then transferred from SCI-Mahanoy to SCI-Pittsburgh. He was then transferred back to SCI-Mahanoy on October 13, 1999. See transfer records of Iseley attached hereto as Exhibit "L". On March 14, 2000, he was transferred from SCI-Mahanoy to SCI-Coal. See Exhibit "L".

When he arrived at SCI-Mahanoy his medical records from the Department of Corrections of the Commonwealth of Pennsylvania listed him as suffering from Hepatitis C. Thus, Diaz and Kiraly had no reason to tell him about his Hepatitis C since his records indicated that he already knew. See medical records, Exhibit "M".

His medical records established that Hepatitis C was listed as a chronic condition on his intake sheet when he arrived at SCI-Mahanoy. See intake sheet, Exhibit "M". His progress notes of December 14, 1998 establish that he was asking about Hepatitis C and he discussed it with the medical staff. See progress note of December 14, 1998, Exhibit "N". On March 17, 1999, the progress notes show that he complained about not wanting to work because of Hepatitis C fatigue. Exhibit "O". On June 21, 1999 his progress notes show possible chronic fatigue symptoms. Exhibit "P". On July 17, 1999, he received a B12 vitamin shot. On November 15, 1999, he refused a B12 vitamin shot. See Exhibit "Q". On January 27, 2000 he refused to come to the Hepatitis C clinic and be interviewed to discuss treatment options. See

Exhibit “R”. After the transfer from SCI-Mahanoy to SCI-Coal on March 14, 2000, Diaz and Kiraly had no further contact with Iseley.

The verifications of Diaz and Kiraly establish that they believed they were providing appropriate treatment to him for Hepatitis C. They provided an appropriate diet and they provided vitamins and relief for certain pain if he experienced any. (Exhibits “H” and “I”) He did not fit the protocol for Interferon because the disease had not progressed to the point where Interferon was commonly used either at the time or now. At all times they believed that they were providing the appropriate treatment. At no time did they ever withhold available medical treatment from him. At no time did they believe that their actions presented a substantial risk of harm to Iseley.

Kiraly only saw Iseley on time. He never had any other contact with him. (Exhibit “H”)

Iseley has not produced any expert testimony that any other available appropriate treatment existed for Hepatitis C when he requested it in 1999 and early, 2000 or at the present time which was denied to him.

Iseley presents his own opinion that he should have received Interferon. He presents no expert evidence on this issue. Without such evidence he lacks the ability to challenge successfully the medical opinions of Kiraly and Diaz. He has no evidence that they had a subjective belief that their treatment of him presented a substantial risk of harm to him.

According to Iseley, the care to his eyes that he requested and did not receive is laser surgery. He wanted a LASIK procedure to cure his near sightedness. Exhibit “B”, page 30. He currently wears glasses. Exhibit “B”, page 32. When he does not wear glasses he cannot see far

away. When he has then on he can see clearer. Exhibit "B", page 32. Most private insurance plans do not pay for LASIK surgery because it is considered cosmetic.

Iseley concedes that he received extensive care for his teeth. While in prison he has had root canals. He has had cavities filled and chipped teeth repaired while he was in prison. See Exhibit "B", page 67. The only dental treatment that he has been refused is his request to be seen by an orthodontist. Exhibit "B", page 68. He does not indicate the nature of the orthodontic treatment he wants or the reason why he wants it.

Iseley in his deposition contends that Correctional has a policy of denying medical care. But he has never identified the nature of the policy. He has never described the policy. He has just made a bold face statement that such a policy exists. He has failed to indicate how such a policy resulted in his constitutional rights being denied.

His claim against Lorah, a physician's assistant at SCI-Coal, arises solely from Lorah communicating to him in an informal fashion the policy of the Department of Corrections of the Commonwealth of Pennsylvania not to provide certain types of drug therapy for Hepatitis C to individuals who have less than a year to serve at a state correctional institution. That policy appears at Exhibit "K". That policy sets forth as its rationale two separate reasons. The first reason is that it is important to insure that once the treatment is started the inmate is going to have access to care until completion. The second reason is that inmates with less than 12 months to serve can have treatment started and completed in the community after release. The medical rationale for this is it is more detrimental to interrupt medical treatment once started then to defer treatment until the entire course can be completed after release. See Exhibit "K". No indication exists that Lorah had any ability to effect this policy or control it. He functioned as an independent contractor for a private corporation. The policy had been implemented by the Department of Corrections of the Commonwealth of Pennsylvania.

III. ARGUMENT

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

deliberate indifference to the decedent's psychological condition by not following the West Chester's police's normal policy regarding belt removal.

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

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

Iseley has failed to meet this burden. He has not submitted sufficient evidence to support a jury verdict in his favor on any issue on which he has the burden of proof pursuant to his claim based on 42 U.S.C. §1983.

B. Iseley Has Failed To Establish A Claim Based On 42 U.S.C. §1983 Against Diaz And Kiraly Because He Has Not Submitted Sufficient Evidence To Support A Jury Verdict In His Favor On The Issue Of Deliberate Indifference To A Serious Medical Need.

To defeat the motion for summary judgment of Diaz and Kiraly, Iseley must show that he has sufficient evidence to support a jury verdict in his favor on the issue of their having had actual knowledge that their actions or omissions presented a substantial risk of harm to Iseley. Iseley 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 fn. 10.

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

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

The United States Supreme Court has most recently defined the deliberate indifferent standard in its opinion in Farmer v. Brennan, supra, 114 S.Ct. 1970 (1994). According to the

Supreme Court, deliberate indifference 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 Court, 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, Iseley must show that Kiraly and Diaz knew that they would cause harm to Iseley by the conduct Iseley contends that they engaged in and yet they proceeded to act in such a way regardless. An examination of the record in this case establishes that Iseley has insufficient evidence to support a jury verdict on the issue of

subjective knowledge by Diaz and Kiraly concerning any conduct Iseley alleges they engaged in presenting a substantial risk of harm to Iseley.

Iseley contends that Kiraly and Diaz denied him medical care for Hepatitis C by telling him that there was no approved treatment other than vitamin therapy, diet and exercise. He acknowledges that he received this type of therapy from them. He has established no medical evidence to establish that any other accepted therapy existed that was correct and appropriate for him. His allegations that Interferon had been approved by the FDA and constituted appropriate treatment for him fails to constitute evidence. He lacks the knowledge to render such an opinion. He is not an expert concerning Interferon. He has produced no expert testimony on this issue. Diaz in his affidavit contends that Interferon would not have been appropriate for Iseley because of the stage of his infection. It was premature to give it to him. See Diaz's verification attached hereto as Exhibit "I". Kiraly and Diaz subjectively believed that the treatment that they afforded Iseley constituted appropriate treatment. In fact the objective evidence supports their view that it constituted appropriate treatment. But they do not have to meet the objective standard. Iseley has insufficient evidence to support a jury verdict on the issue of subjective knowledge by Kiraly and Diaz on the issue of their treatment of his Hepatitis C.

The expert report of Martin Black, M.D., Professor of Medicine and Pharmacology, Chief of the Liver Unit, Medical Director of Liver Transplantation, and Director of the Division of Clinical Pharmacology, at Temple University Hospital, shows that Kiraly and Diaz had no reason to have any subjective concerns about the treatment provided to Iseley for his Hepatitis-C. Black concludes that Iseley received appropriate treatment for his Hepatitis-C. He states "...I would add that Mr. Isley [sic] was provided a far better management plan for a documented HCV infection than the vast majority of non-confined members of society." (Exhibit "V") Kiraly only saw Iseley on one occasion. He never had any contact with him other than meeting with him one time. (See Exhibit "H") No evidence exists to support a jury verdict on the issue of Kiraly having acted in a deliberately indifferent manner to the serious medical needs of Iseley

on that one occasion. Kiraly provided an appropriate evaluation and appropriate care. No dispute exists as to this.

Iseley also has produced insufficient evidence on the subjective knowledge issue against Kiraly and Diaz concerning his eye care and his teeth. He has not shown that they believed that not referring him to an orthodontist for his teeth presented a substantial risk of harm to him. He has not even indicated what the nature of the orthodontic problem was. He concedes that he received constant dental care all during the time he was incarcerated. See Exhibit "B", page 68.

He has not shown that Kiraly and Diaz knew that failing to approve him for laser surgery to cure the near sightedness presented a substantial risk of harm to him. Many insurance plans refuse to even pay for it. He concedes that he received glasses for his near sightedness. Exhibit "B", page 32.

In Thomas v. Clark, Civil Action No. 3:96-0496 (M.D. Pa. 1997) the 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 Clonopin. 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 "S", page 9.

That analysis applies here and requires the granting of the motion for summary of Kiraly and Diaz. They did provide him with treatment. Iseley disagrees with the type of treatment he received.

On January 27, 2000, Diaz attempted to discuss treatment options for Hepatitis C with Iseley. Iseley refused to meet with Diaz to even hear about treatment options. See Exhibit "R".

Disagreements with treatment fail to constitute deliberate indifference. They do not show subjective knowledge. Most disagreements 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 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 majority of federal courts to consider the issue have concluded that as long as prison authorities provide some treatment to an inmate. even if that treatment constitutes inappropriate care, the required subjective knowledge fails to exist to impose liability upon the healthcare professionals involved. In Rodriguez v. Joyce, 693 F.Supp. 1250 (D.Me. 1988), the court granted a motion for summary judgment in a factual situation similar in all important respects to the one now before this Court. In that case, the plaintiff, a prisoner, alleged that he injured his finger while playing volleyball. When he sought medical treatment from employees of the prison, where he served as an inmate, he received aspirin for the pain. The medical personnel at the prison never took an x-ray. The plaintiff contended that he had fractured his finger. He maintained that the failure of the medical personnel at the prison to take the x-ray resulted in his receiving inadequate medical care. The court, in granting the motion for summary judgment, stated:

> But, as the Supreme Court clearly stated in Estelle, merely questioning the form of medical treatment does not constitute a cognizable section 1983 claim. Plaintiff has alleged nothing more than negligent diagnosis. A decision whether or not to order an x-ray 'is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measure, does not represent cruel and unusual punishment.' Estelle, (citation omitted.) This is quite apt in the context here, where the claim involves only a mere injury to a finger joint. The failure of the nurses to order an x-ray of plaintiff's injured finger is not cruel and unusual punishment. Our holding here is consonant with the approach towards preventing section 1983 from becoming a national state tort claims act administered in the federal courts. Quoting Estate of Bailey v. County of York, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

Id. at 693 F.Supp. at 1253.

C. Iseley Has Produced Insufficient Evidence Of Deliberate Indifference By Lorah To His Serious Medical Needs To Support A Jury Verdict In His Favor.

In order to prevail on his claim pursuant to 42 U.S.C. §1983, Iseley must produce sufficient evidence sufficient to support a jury verdict in his favor on the issue of Lorah having acted with subjective knowledge that his conduct presented a substantial risk of harm to Iseley. See Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994). Iseley admits that his entire case against Lorah depends solely upon Lorah having indicated to him that based on the policy of the Pennsylvania Department of Corrections he could not receive certain treatment for his Hepatitis C because he had less than a year to serve of his sentence. The policy appears hereto as Exhibit "S". Lorah did not adopt the policy. Lorah had no responsibility for the policy. He merely communicated the policy to Iseley. Lorah had no ability to change the policy. Lorah as a physician's assistant lacked the authority to authorize the treatment for Hepatitis C that Iseley desired.

D. Iseley Has Not Shown that His Near Sightedness In His Eyes And His His Desire To Have Orthodontic Care For His Teeth Constitute A Serious Medical Need.

In order to prove a cause of action pursuant to 42 U.S.C. §1983 for deliberate indifference to a serious medical need Iseley must meet an objective component and a subjective component. Wilson v. Seiter, 501 U.S. 294, 298 (1991). Iseley must establish serious hardship in order to satisfy the objective component of the Eighth Amendment of the United States Constitution. Id.

A medical need rises to the level of seriousness required for the Eighth Amendment and 42 U.S.C. §1983 if it has been diagnosed by a physician as mandating treatment or if it constitutes a condition so obvious that even a lay person recognizes the necessity for the doctor's attention. Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991); Monmouth County Correctional Institution Inmates v. Lanzaro, supra, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 106 (1988). The serious medical need requirement contemplates a condition of urgency, one that produces death, degeneration, or extreme pain. See Monmouth County Correctional Institutional Inmates v. Lanzaro, supra, 834 F.2d at 347; Archer v. Dutcher, 733 F.2d 14, 16-17

(2d Cir. 1984). Not every injury or illness invokes Constitutional protection - only those that rise to the required level of seriousness have that affect. Monmouth County Correctional Institutional Inmates, supra, 834 F.2d at 347.

An examination of the record in this case shows that Iseley has not produced sufficient evidence to support a jury verdict in his favor on whether he suffered from a serious medical need as it relates to his eyes and his teeth. He alleges that he has near sightedness in his eyes for which he received glasses. He contends that he wants a LASIK operation to cure his nearsightedness. He admits that the operation may not do that.

He asserts that he should have a consultation with an orthodontist. He never indicates why. He admits that he has had extensive treatment for his teeth over the course of several years.

The federal courts to consider the issue have uniformly concluded that conditions similar to that alleged by Iseley here that fail to produce death, degeneration or condition of urgency do not rise to the level of seriousness necessary to state a cause of action based on the Eighth Amendment of the United States Constitution pursuant to 42 U.S.C. §1983. In Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit held that swollen wrists failed to constitute a serious medical need sufficient to state a cause of action pursuant to 42 U.S.C. §1983. In Johnson v. Vondera, 790 F.Supp. 898, 900 (E.D. Mo. 1992), the court held that a plaintiff inmate who suffered from headaches, neck pain and blurred vision did not establish a serious medical need sufficient to require that the prison provide him with whirlpool treatments. In Borrelli v. Askey, 582 F.Supp. 512, 513 (E.D. Pa. 1984), the court held that a prisoner suffering from a slight visual impairment causing mild headaches and mild tension did not have a serious medical need. In Griffin v. DeRobertis, 557 F.Supp. 302, 306 (N.D. Ill. 1983), the court concluded that aches and sore throats do not constitute serious medical needs. In Dickson v. Coleman, 569 F.2d 1310 (3d Cir. 1978), the court concluded that headaches failed to rise to the level of a serious medical need. In Rodriguez

v. Joyce, 693 F.Supp. 1250 (D.Me. 1988), the Court concluded that a broken finger failed to rise to the level of a serious medical need.

In Jones v. Lewis, 874 F.2d 1125 (6th Cir. 1989) the United States Court of Appeals for the Sixth Circuit concluded that a mild concussion, together with a broken jaw failed to constitute a serious medical need sufficient to support a claim based on the Eighth Amendment of the United States Constitution. In Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988) the United States Court of Appeals for the Ninth Circuit concluded that a kidney stone failed to rise to the level of seriousness necessary to support a cause of action based on a violation of the Eighth Amendment of the United States Constitution. In Ware v. Fairman, 884 F.Supp. 1201, 1206 (N.D. Ill. 1995) the court held that the failure to treat a rash, acne and flu failed to state a cause of action for a violation of the Eighth Amendment of the United States Constitution. According to the court, none of these conditions, including the flu, constituted a serious medical need. If the flu, which causes thousands of deaths every year, does not rise to the level of a serious medical need how can the problem with his eye and teeth set forth by Iseley? It cannot. It does not.

In Davidson v. Scully, 914 F.Supp. 1011 (S.D. NY 1996), the Court granted a motion to dismiss the complaint of a prisoner contending that he received inadequate medical care in violation of the Eighth Amendment. The Court concluded that he failed to allege a serious medical need. In that case, the plaintiff complained of tinnitus. The Court concluded that tinnitus failed to constitute an urgent medical condition, the mistreatment of which presents a Constitutional claim. The Court stated that tinnitus was a condition of the ear manifested in a ringing sensation to the sufferer. According to the Court,

> While this condition may very well be painful, it does not cause death, and Plaintiff has not adduced sufficient evidence that his condition is degenerative or causes extreme pain.

Id. at 914 F.Supp. at 1015.

In Davidson, supra, 914 F.Supp. at 1015, plaintiff also contended that he had an allergy condition, a podiatric condition, a post-surgery hernia condition, a problem with his knee, urological problems, dermatological problems and cardiological problems. The Court concluded as a matter of law that none of these problems stated a claim pursuant to the Eighth Amendment. According to the Court:

> However appropriate certain care of these conditions may be, the conditions themselves, as presently alleged, are not life-threatening and do not cause the type of extreme pain cognizable in a constitutional claim. (Emphasis added).

Id. at 914 F.Supp. at 1016.

The analysis of the Court in Davidson, supra, 914 F.Supp. at 1015 and 1016 applies here. However, appropriate care may be for the near sightedness and orthodontic problems of Iseley, these conditions as presently alleged fail to constitute a life-threatening condition and do not cause the type of extreme pain required to state a constitutional claim.

E. Iseley Requires Expert Testimony To Establish A Serious Medical Need Pursuant To 42 U.S.C. §1983.

In order to state a cause of action based on 42 U.S.C. §1983 against Diaz and Kiraly, Iseley must establish a serious medical need. To establish a serious medical need based on the factual situation existing in this case Iseley must produce expert testimony showing that his problem with his eye and his teeth constitute a serious medical need. In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987) the United States Court of Appeals for the Third Circuit concluded that a plaintiff inmate challenging 42 U.S.C. §1983 had to produce expert testimony to establish a serious medical need unless the facts of the case sufficiently permitted a jury to reach its own conclusions that a serious medical condition existed. In Boring, supra, the Court of Appeals held that a patient who allegedly suffered from migraine headaches and from a hernia failed to establish a serious medical need without expert testimony. The Court of Appeals concluded:

> As laymen, the jury would not be a position to decide whether any conditions described by the plaintiffs could be classified as serious. Id. at 473.

In Van Holt v. Wells, et al., United States District Court for the Eastern District of Pennsylvania, Civil Action No. 97-7441, Judge Padova granted summary judgment to the defendant physician because he concluded that the plaintiff inmate had failed to establish a deliberate indifference to a serious medical need pursuant to 42 U.S.C. §1983. Judge Padova held that in order to establish a serious medical need the plaintiff inmate had to produce expert testimony. The plaintiff inmate alleged that the defendant physician failed to treat his constant migraine headaches. Plaintiff believed that he had a tumor. Judge Padova held that in the absence of expert testimony the jury lacked any basis to conclude that the plaintiff suffered from a serious medical need. Consequently, the court granted summary judgment to the defendant physician. A copy of Judge Padova's opinion appears hereto as Exhibit "T".

Here a jury lacks the ability to determine on its own whether near sightedness or an unknown orthodontic problem constitutes a serious medical need. It requires the help of an expert.

The United States Court of Appeals for the Third Circuit in Boring, supra, 833 F.2d 468, also concluded that it made no difference that the plaintiff lacked the ability to pay for an expert medical witness. According to the Court of Appeals:

> The plaintiffs' dilemma in being unable to proceed in this damage suit because of the inability to pay for expert witnesses does not differ from that of non-prisoner claimants who face similar problems. Non-prisoners often resolve the difficulty through contingent fee retainers with provisions for arranging expert testimony. By seeking government funding in this case, plaintiffs are in effect asking for better treatment than their fellow-citizens who have not been incarcerated but who have at least equal claims for damages. Id. at 475.

Accord, Van Holt, supra, Exhibit "T" (Judge Padova concluded that it made no difference that the plaintiff lacked the ability to afford an expert).

Thus, any lack of ability that Iseley has to procure the services of an expert fails to constitute a basis to relieve him from the requirement of producing expert testimony concerning

a serious medical need. Iseley has failed to meet this test because he has not produced an expert testimony. Consequently, the jury has no evidence upon which to conclude that he suffered from a serious medical need. Summary judgment should be entered on this basis in favor of Kiraly and Diaz.

F. Iseley Has Failed To State A Cause Of Action Against Correctional Pursuant To 42 U.S.C. §1983 Since He Relies Upon Respondeat Superior Liability.

Many of the allegations that Iseley has presented in his amended complaint against Correctional stem from Correctional's supposed responsibility for the conduct of Kiraly and Diaz. Thus, he bases his contentions upon the doctrine of respondeat superior. This reliance creates a fatal flaw in his cause of action against Correctional.

The United States Court of Appeals for the Third Circuit has repeatedly concluded that a doctrine of respondeat superior never applies to create a cause of action pursuant to 42 U.S.C.

§1983. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993); Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991)

G. The Amended Complaint Fails To State A Cause Of Action Against Correctional Based On 42 U.S.C. §1983 For Failing To Promulgate And Enforce Policies And Procedures.

The amended complaint bases a constitutional cause of action against Correctional on an alleged policy of not providing medical care to inmates. Iseley has produced no evidence of this policy. He has not indicated how the policy violates the constitution.

This fails to state a cause of action against Correctional pursuant to 42 U.S.C. §1983 as a matter of law. 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, C.A. No. 97-7987 (E.D. Pa. 7/1/98), Exhibit "U", page 11. To meet this burden with respect to a private corporation a plaintiff must show that the corporation with "deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [plaintiff's] constitutional harm." Id., Exhibit "U", page 11; quoting Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir. 1989) cert. den., 493 U.S. 1044 (1990).

In this case Iseley fails to identify any policy or practice which directly caused constitutional harm to him. No indication exists what the policy or practice consisted of. No affirmative link appears between the alleged misconduct and the policy or custom of Correctional. Such an affirmative link must exist to state a cause of action pursuant to 42 U.S.C. §1983. Miller v. Hoffman, supra, Exhibit "U", page 11.

In Miller v. Hoffman, supra, Exhibit "U", Judge Hutton granted the motion to dismiss of Correctional in a virtually identical factual situation. A plaintiff, an inmate, contended that Correctional had knowledge that Hoffman, a physician it employed acted with deliberate indifference to his medical needs. The complaint alleged that Correctional did nothing to stop Hoffman's deliberate indifference and permitted him to carry out his policy of ignoring the

serious medical needs of the plaintiff. Correctional 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 [causing] the claimed injury'.

Monell, supra, 436 U.S. 690-94 and Exhibit "U", page 12.

The same analysis applies here. Iseley fails to identify a policy, practice or custom causing the claimed injury. He fails to indicate that Correctional had any knowledge of the potential effect of its policy, practice or custom. He submits no evidence of this knowledge.

In Burton v. Youth Services International, Inc., 176 F.R.D. 517 (1997) the court concluded that Iseley's position here has 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 Iseley presents now 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 stripped 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 dismissal of the claim against Correctional.

H. Iseley Has Failed To Present Sufficient Evidence Of A Conspiracy Based Upon 42 U.S.C. §1983.

Iseley attempts to state a cause of action for a civil conspiracy in violation of 42 U.S.C. §1983. He has failed to do so for several reasons. First, he has not identified a constitutional violation. He has not shown that either Diaz or Kiraly acted with subjective knowledge that their conduct presented a substantial risk of harm to him. As to his teeth and eyes he has not shown a serious medical need. A civil conspiracy constitutes a vehicle by which §1983 liability may be imputed to those who have not actually performed the act denying constitutional rights. Fioriglio v. City of Atlantic City, 996 F.Supp. 379, 385 (D.N.J. 1998). As a result a §1983 civil conspiracy claim fails to exist without a violation of §1983. PBA Local No. 38 v. Woodbridge Police Department, 832 F.Supp. 808, 832 n. 23 (D.N.J. 1993). For the reasons previously stated in his memorandum of law Iseley has failed to set forth sufficient evidence to support a constitutional violation. Thus, there can be no conspiracy to violate the constitution.

A second reason exists which requires the granting of summary judgment as to the conspiracy claim of Iseley based on 42 U.S.C. §1983. To make out a §1983 conspiracy claim Iseley must produce evidence of a combination, agreement or understanding among all or

between any of the defendants to plot, plan or conspire to carry out the alleged chain of events in order to deprive him of a federally protected constitutional right. Darr v. Wolfe, 767 F.2d 79, 80 (3d Cir. 1985); Fioriglio v. City of Atlantic City, 996 F.Supp. 379, 385 (D.N.J. 1998).

Here, Iseley fails to meet this standard. He simply alleges that a conspiracy exists. He never produces any evidence of the conspiracy. He never indicates what the parties agreed to. He never even sets forth an agreement between them. He does not indicate how they intended to carry out the conspiracy. No court has found such evidence sufficient to support a jury verdict.

I. Iseley Has Failed To Submit Sufficient Evidence To Support A Jury Verdict In His Favor For Retaliation Against Diaz And Kiraly.

Iseley has failed to submit sufficient evidence to support a jury verdict in his favor for retaliation against Diaz and Kiraly. Iseley has also failed to state a cause of action for retaliation against Diaz and Kiraly. Retaliation by a state actor against a person because of the person's exercise of First Amendment rights constitutes a basis for a cause of action pursuant to 42 U.S.C. §1983. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). Prison officials may not retaliate against an inmate for engaging in activity that does not threaten prison order, the security of other inmates or staff or implicate other legitimate penological interests. Todaro v. Bowman, 872 F.2d 43, 49 (3d Cir. 1989). To set forth a retaliation claim Iseley must demonstrate that Kiraly and Diaz engaged in retaliatory action and that this action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). Conclusory allegations of retaliation fail to plead a cause of action based on the First Amendment. Flaherty v. Coughlin, 713 F.2d 10, 13 (2nd Cir. 1983).

Here, Iseley submits only his own conclusory allegations of retaliation. He never identifies the grievances or lawsuits that he contends resulted in retaliation. He never indicates how Diaz and Kiraly retaliated against him. He never states that Diaz and Kiraly even knew of the lawsuits or grievances that he had filed. He simply repeats in his deposition that he believes

that retaliation occurred. He submits not a scintilla of evidence of it, let alone sufficient evidence to support a jury verdict in his favor on the issue of retaliation.

J. Iseley Has Failed To Produce Sufficient Evidence To Overcome The Good Faith Defense Of Diaz, Kiraly And Lorah.

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 Diaz, Kiraly and Lorah acting in bad faith. Iseley concedes that Lorah only told him that the policy of the Department of Corrections of the Commonwealth of Pennsylvania prohibited certain types of treatment for Hepatitis C if an inmate had less than a year to serve. This fails to constitute bad faith. Lorah had no ability to control or effect the policy. Iseley has presented no evidence that Kiraly and Diaz acted in bad faith. At all times they believed that they had provided appropriate care to Iseley. Iseley has produced no evidence that the care was not appropriate except his own unsubstantiated opinion. Martin Black, M.D., Professor of Medicine and Pharmacology, Chief of the Liver Unit, Medical Director of Liver Transplantation, and Director of the Division of Clinical Pharmacology, at Temple University Hospital, agrees with them. (See Exhibit "V")

K. The Motion For Summary Judgment Of Lorah, Diaz And Kiraly Should Be Granted Because Iseley Has Failed To Exhaust His Administrative Remedies.

The Congress of the United States enacted 42 U.S.C. §1997e(a) barring any prisoner in any prison in the United States from initiating any action relating to any prison

condition, including medical care, without exhausting all available administrative remedies first. That provision states in relevant part as follows:

> No action shall be brought with respect to prison conditions under Section 1979 of the revised statute of the United States (42 U.S.C. §1983) or any other Federal Law by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. §1997e(a).

The Pennsylvania Department of Corrections at all times relevant to the amended complaint of Iseley had in force a Consolidated Inmate Grievance Review Procedure designated DC-ADM804 effective November 20, 1994. That procedure provided that after an attempted informal resolution of the problem a written grievance could be submitted by the inmate to the Grievance Coordinator. An appeal from the Coordinator's decision may be made in writing to a Facility Manager or a Community Correctional Regional Director. Exhibit "C".

A final written appeal may be presented to the Central Office Review Committee. As of May 1, 1998, the procedure provided for the award of monetary relief by the Department of Corrections of the Commonwealth of Pennsylvania to Iseley. See Exhibit "C"; Geisler v. Hoffman, United States Court of Appeals for the Third Circuit, No. 99-1971 (Sept. 12, 2000)(unreported). A copy of the opinion appears hereto as Exhibit "G".

The district court has the power to take judicial notice of the fact that the Pennsylvania Department of Corrections had in place at the time of the alleged facts giving rise to the incident set forth in Iseley's amended complaint a consolidated inmate grievance system available to all state prisoners. See Federal Rule of Evidence 201(b); Peters v. Delaware River Port Auth., 16 F.3d 1346, 1356 n. 12 (3d Cir. 1994); see also, City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998)(finding that to resolve 12(b)(6) motion, court may properly look at public records...in addition to allegations in complaint).

Iseley contends in his amended complaint that he has exhausted his administrative remedies. In his deposition he also contends that he exhausted his available administrative remedies and that he sought monetary damages pursuant to the administrative procedures

provided by the Department of Corrections of the Commonwealth of Pennsylvania. Exhibit "B", page 134. An examination of the grievances and appeals submitted shows that he never pursued monetary damages in any of his administrative remedies relating to medical care. A copy of the grievances and appeals that Iseley presented appears hereto as Exhibit "F". He never indicates any claim for monetary damages based on the conduct of Kiraly, Diaz, Lorah or Correctional.

The administrative remedies he submitted fail to indicate any allegations against Kiraly, Diaz or Correctional. The grievances mention Diaz only indirectly concerning the Hepatitis C treatment. They do not mention him at all involving the failure to provide treatment for the eyes and teeth of Iseley. Iseley has not produced any grievances on these issues concerning monetary damages or any grievances mentioning Lorah, Correctional and Kiraly. He has not presented any grievances about which he complains about Diaz's failure to treat his teeth and his eyes. See Exhibit "F".

Consequently, Iseley has produced insufficient evidence to support a jury verdict in his favor on the issue of exhaustion of administrative remedies. In Geisler v. Hoffman, No. 99-1971 (3d Cir. September 12, 2000)(unreported) the United States Court of Appeals for the Third Circuit concluded that an inmate had failed to state a cause of action pursuant to 42 U.S.C. §1983 even though he had exhausted all of the administrative remedies provided for my DC-ADM804 since he failed to request monetary damages by means of the administrative process. See Exhibit "G".

In Peoples v. Horn, No. 3:97-0205 (M.D. Pa. 1997), Exhibit "D", Judge Conaboy concluded that a complaint brought by an inmate for inadequate medical care based on 42 U.S.C. §1983 had to be dismissed for failure to exhaust administrative remedies. Plaintiff, an inmate, contended that he had filed his Part 1 grievance but he was "put down via semantics, etc., etc., etc. And I was persecuted (sic) because of my efforts to obtain relief." Judge Conaboy concluded that no indication existed in the complaint that he appealed the dismissal of his grievance. Judge Conaboy held:

> In that connection, the procedure contemplates several tiers of review and the Grievance Review System is not exhausted when an inmate files a grievance and then takes no other action through established channels when a grievance is not resolved to his or her satisfaction.

Exhibit "D", pp. 3-4.

Judge Conaboy concluded that the failure to proceed with the appeals constituted a failure to exhaust available administrative remedies. The Court dismissed the complaint without prejudice. Exhibit "D ".

In Booth v. Churner, 206 F.3d 289 (3d Cir. 2000) the United States Court of Appeals for the Third Circuit reaffirmed its holding in Nyhuis, supra. and indicated that although Nyhuis involved a Bivens action brought by a federal inmate the rule that the Court of Appeals announced in Nyhuis has equal force in the §1983 context §1997e(a), which applies to actions brought by a prisoner "under section 1983 of this title or any other Federal law" treats Bivens actions and §1983 actions as functional equivalents. Id. at 206 F.3d at 300.

The United States Court of Appeals for the Third Circuit concluded that because Booth failed to exhaust his available administrative remedies rather than those he believed would be effective before filing his §1983 action the district court appropriately dismissed his action

without prejudice. The analysis of the Court in Booth, supra, requires this Court to grant the motion of Ellien to dismiss the amended complaint of Iseley.

Because Iseley has failed to exhaust his available administrative remedies summary judgment should be entered in favor of Diaz, Kiraly and Lorah.

L. Iseley Has Produced No Evidence Against Kiraly, Diaz, Lorah And Correctional On The Issue Of Failure To Provide Him Treatment For His Asthma.

Neither in his deposition or in his amended complaint does Iseley contend that Kiraly, Diaz, Lorah or Correctional had any involvement with any problems relating to his asthma treatment. He never mentions them as having any involvement. He directs his allegations toward the other defendants concerning the asthma issue. See deposition of Iseley, Exhibit "B".

He contends that various state officials denied him his prescribed inhaler. He concedes that Commonwealth officials had responsibility for this alleged denial. The Commonwealth officials in their affidavit in support of their motion for summary judgment admit that they had in place regulations limiting Iseley's access to inhalers. See affidavit of Hendrickson attached to the motion for summary judgment of the Commonwealth defendants.

III. CONCLUSION

In the light of the foregoing, Renato Diaz, M.D., Laslo Kiraly, M.D., Brad Lorah, P.A., and Correctional Physician Services, Inc. respectfully request that their motion for summary be granted.

MONAGHAN & GOLD, P.C.

BY: _____

ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Renato Diaz, M.D., Laslo Kiraly,
M.D., Brad Lorah, P.A. and
Correctional Physician Services, Inc.