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

RICHARD VAN HOLT	:	CIVIL ACTION
v.	:	NO. 97-7441
RICHARD W. WELLS, P.A., et al.	:	

DEFENDANTS', RICHARD W. WELLS, P.A. AND STANLEY HOFFMAN, M.D., MOTION FOR SUMMARY JUDGMENT

Defendants, Richard W. Wells, P.A. and Stanley Hoffman, M.D., by and through their attorneys, Monaghan & Gold, P.C., hereby move before this Honorable Court for the entry of an Order granting Summary Judgment in their favor and against the Plaintiff, Richard Van Holt, and dismissing his claims with prejudice, pursuant to Federal Rule of Civil Procedure 56.

In support of this Motion for Summary Judgment, Moving Defendants hereby rely upon and incorporate by reference their Memorandum of Law in Support of Motion for Summary Judgment, which has been filed concurrently with this Motion. For the reasons stated therein, Moving Defendant respectfully request that this Honorable Court grant their Motion for Summary Judgment, and dismiss Plaintiff's claims with prejudice.

Respectfully submitted,

MONAGHAN & GOLD, P.C.

BY: _____
ALAN S. GOLD, ESQUIRE
SEAN ROBINS, ESQUIRE
Attorney for Defendants,
Richard W. Wells, P.A. and
Stanley Hoffman, M.D.

DATE:_____

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DEFENDANTS', RICHARD W. WELLS, P.A. AND STANLEY HOFFMAN, M.D., BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, Richard Van Holt ("Van Holt"), commenced this action on or about January 30, 1998, with the filing of a Complaint. On May 1, 1998, the Court granted Van Holt leave to file an amended complaint. On September 21, 1998, the Court granted Van Holt's motion for the appointment of counsel, and appointed counsel from the law firm of Dechert, Price & Rhoads to represent the Plaintiff. On or about January 20, 1999, Van Holt was granted leave to file a Second Amended Complaint, which complaint what then filed. (See copy of Plaintiff's Second Amended Complaint, attached hereto as Exhibit "A")

At all times relevant to his complaint, Van Holt was incarcerated at the State Correctional Institution at Graterford, Pennsylvania ("Graterford"). Defendant, Richard A. Wells, P.A. ("Wells") was a Physician's Assistant at Graterford, and Defendant, Stanley Hoffman, M.D. ("Hoffman") was a physician at Graterford. Van Holt has asserted claims under 42 U.S.C. §1983 and state law, alleging that Wells and Hoffman acted with deliberate indifference to his serious medical needs, and failed to provide him with treatment for head pains he was suffering:

> Defendants acted with deliberate indifference to Plaintiff's serious medical need. The Defendants were subjectively aware of, but chose to disregard, Plaintiff's serious medical condition. Plaintiff specifically informed Defendants that he had previously experienced these severe head pains, and that medication previously prescribed by a physician for treatment had alleviated his pain and suffering. Despite being subjectively aware of Plaintiff's prior treatment, Defendants, upon information and belief, made no effort to obtain Plaintiff's medical records to determine Plaintiff's previously diagnosed condition or the treatment prescribed for his condition. In fact, Defendants provided Plaintiff with no treatment whatsoever for his serious

medical needs.

Exhibit "A", at ¶22.

Plaintiff alleges that some time after being placed in the Disciplinary Housing Unit at Graterford on August 18, 1997, he "began to experience sharp and severe head pains," and that he had previously experienced the same pains while incarcerated at the Youth Development Center in New Castle, Pennsylvania ("YDC"). (Exhibit "A", at ¶7) Van Holt alleges that he was seen by Wells, and that at the time he told Wells:

> that the plaints were similar to those he had experienced while incarcerated at YDC New Castle, and explained to Dr. Wells[1] that he had received medication at that time that relieved his pains and suffering. Plaintiff asked Dr. Wells to pull his medical records from YDC New Castle to determine his prior diagnosis and the medication he had been given.

Exhibit "A", at ¶9. Van Holt admits that an x-ray of his head was performed, but disputes that he was ever informed of its results, and claims that he was never provided any medication for the head pains. (Exhibit "A", at ¶¶10-12)

Van Holt, nowhere in his Second Amended Complaint or his deposition testimony, states what medical condition he believes he is suffering from and, in fact, provides no indication that he has any idea whatsoever what medical condition he may have, if any, that is responsible for his head pains. He claims only to suffer from time to time from head pains which, at times, are severe. It is clear from the pleadings and discovery in this matter that neither Van Holt nor his counsel have any information that demonstrates that Van Holt suffers from any medical or neurological condition which is responsible for the head pains. The only thing which Van Holt can state with any certainty is that he believes that he has had the same type of head pains in the past and that, he believes, he was given some unknown, unspecified medication at some time in the past that helped relieve the pain.

Van Holt has failed to established any of the elements which are required to sustain his

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[1] While Van Holt refers to Wells as "Dr. Wells" at time in his complaint, it is not disputed that Wells is a Physician's Assistant.

claims for deliberate indifference to a serious medical need under 42 U.S.C. §1983 and his claim under state law for medical malpractice. Van Holt has failed to establish that he suffers from a serious medical need, or what that serious medical need might be. He has failed to establish that the treatment which was provided to him for his head pains was in any way inappropriate, and has therefore failed to prove that Wells and Hoffman were deliberately indifferent or that their care did not rise to the appropriate standard of care. Van Holt's claims against Wells and Hoffman must, therefore, be dismissed.

The pleadings are closed, and discovery in this matter closed as of June 28, 1999. The depositions of the parties, Van Holt, Wells and Hoffman, have been completed. Written discovery has been exchanged, and there are no outstanding discovery requests. Defendants, Wells and Hoffman, hereby move before this Honorable Court for the entry of Summary Judgment in their favor and against the Plaintiff, pursuant to Fed.R.Civ.P. 56.

II. STANDARD 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, 106 S. Ct. at 2553.

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

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

Id. at 459.

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

regarding belt removal.

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

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

Id. at 891 F.2d at 466 (Emphasis added).

Van Holt has failed to meet this burden. He has not submitted sufficient evidence to support a jury verdict in its favor on the issue of the Defendants' allegedly having acted with deliberate indifference to his serious medical needs. He has not shown that Wells or Hoffman acted with subjective knowledge that they were violating Van Holt's constitutional rights. Van Holt has failed to establish deliberate indifference. He has only set forth a personal disagreement with the care that he received. Van Holt has also failed to demonstrate that he, in fact, suffers from a serious medical need: He has failed to demonstrate that he suffers from any particular medical or neurological condition whatsoever, or what that condition might be.

III. LAW AND DISCUSSION

A. VAN HOLT'S COMPLAINTS AND TREATMENT AT GRATERFORD.

Van Holt alleges that his headache first started appearing when he was at the Glen Mills School, shortly before going AWOL from that institution, and about a year before being

committed to the YDC in about 1983. (See deposition of Richard Van Holt, attached as Exhibit "B", at 10-11 and 16-18) While at the YDC, from 1983 to 1984, Van Holt testified that he received various testing for his headaches, and was given medication which relieved his pain. (Exhibit "B", at 18-23) Van Holt complains that he asked the Defendants to obtain his medical records from the YDC so that they could discover what medication had been prescribed to him (Exhibit "A", at ¶9; Exhibit "B", at 75-76) Van Holt testified that he had no idea what medication he had been given at the YDC. (Exhibit "B", at 23 and 76)

It is not disputed that the first time Van Holt complained about having head pains to anyone at Graterford was on August 26, 1997, eight (8) days after being placed in the Disciplinary Housing Unit ("DHU"), and more than six (6) months after his incarceration at Graterford in February, 1997. (Exhibit "B", at 68-74) Van Holt admitted in his deposition testimony that prior to August 26, 1997, although he had been seen medically on a number of occasions at Graterford, **he had never complained about head pain**. (Exhibit "B", at 67-73; see also Van Holt's Graterford medical records, including Dispensary Cards, Physician's Orders and Progress Notes, attached as Exhibit "C")

On August 26, 1997, Van Holt testified, he was visited in the DHU by Wells, who was responding to his sick call request, submitted less than 24 hours earlier. (Exhibit "B", at 75) According to Van Holt:

> I explained to him that I was having some head pain and explained to him that I had a history of head pain. ... That I received some medication and it was helpful during the juvenile incarceration periods at YDC.

Exhibit "B, at 75. Also according to Van Holt, he "asked Dr. Wells to pull his medical records from YDC New Castle to determine his prior diagnosis and the medication he had been given." (Exhibit "A", at ¶9) In his August 26, 1997 notes, Wells relates the subjective history provided by Van Holt as being a "[h]istory of being treated for 'tumor'" and notes Van Holt's complaint of "having sharp pain left parietal 6-8 days - no sensory or motor loss." (See Dispensary Card,

8/26/97, attached as Exhibit "D") At this time, Wells ordered an x-ray "skull series" on Van Holt. (Exhibit "B", at 74; Physician's Orders, 8/26/97, attached as Exhibit "E") The x-ray series was performed two (2) days later on August 28, 1997, and the results were "negative." (See x-ray report, attached as Exhibit "F") According to Van Holt, he had been told that the results of the x-ray report were required before any medication could be prescribed. (Exhibit "A", at ¶10) Wells testified that, in addition to ordering the x-ray series on August 26, 1997, he informed Van Holt that if his pain continued, that he could request aspirin or Tylenol from the correctional officer on the block without getting a prescription first. (See deposition of Richard W. Wells, attached as Exhibit "W", at 83) He also informed Van Holt that if the x-rays revealed anything abnormal, he would be informed in writing, with information as to what would follow. (Exhibit "W", at 84)

The next time Van Holt made any complaint about headaches, was on September 7, 1997, when her requested "sick call," and was seen by Dr. Hoffman. (Exhibit "B", at 79-80) Hoffman's notes for September 7, 1997 states Van Holt's complaints of "headaches and constipation." (Exhibit "D") Van Holt testified that he "doesn't recall" whether Hoffman prescribed any pain medication for him. (Exhibit "B, at 81) The medical records, however, demonstrate that Hoffman did, in fact, on September 7, 1997, order the pain reliever Advil for Van Holt, along with Colase, Metamucil and milk of magnesia. (Exhibit "E") As recently as about a month prior to Van Holt's March 25, 1999 deposition, Van Holt testified, he requested medication for headaches, and he was provided with a ten (10) day supply of that pain medication. (Exhibit "B", at 105) Van Holt testified that over-the-counter pain medications, such as Tylenol, are effective in relieving his headache pain. (Exhibit "B", at 12-13 and 16-17)

Following this September 7, 1997 sick call visit with Dr. Hoffman, testified Van Holt, although he had numerous sick call visits with various medical personnel at Graterford, including both Wells and Hoffman, **at no time has he made any further complaints about having head pain**. Van Holt testified specifically as to each of the numerous sick calls he has had subsequent

to September 7, 1997, and admitted as to each, that he made no complaints about having any headaches. (Exhibit "B", at 85-104; Exhibit "C") In fact, Van Holt testified, the last time that he complained to anyone about having headaches was in November of 1997, when he spoke with his grievance coordinator. (Exhibit "B", at 94) Van Holt admits that he has not complained to any medical personnel about having headaches since at the latest, September, 1997:

> It has been clear to me ever since August or late September that I am not going to get any relief due to the head pain. That is why I am not communicating with any of these other doctors when I am signing up for sick call, pertaining to head pains.

Exhibit "B", at 104. Therefore, according to Van Holt himself, shortly after complaining of having head pain **for the first time** to anyone at Graterford, shortly after the skull series was performed and found to be negative, and shortly after Dr. Hoffman prescribed him a course of Advil for the headaches he complained about on September 7, 1997, **Van Holt made a conscious decision not to make any further complaints to any medical personnel about having any further head pain**. The medical records bear out this course of action on Van Holt's part, showing no further complaints of head pain after the September 7, 1997 sick call with Dr. Hoffman. (Exhibit "C")

B. THE MEDICAL RECORDS FROM THE YDC DEMONSTRATE THAT VAN HOLT'S NEUROLOGICAL CONDITION WAS EXTENSIVELY EVALUATED, AND THE DETERMINATION MADE THAT HE SUFFERED FROM NO NEUROLOGICAL CONDITION.

A major "theme" of Van Holt's complaints is his assertion that the Defendants failed to obtain and review his medical records from the time he spent at the Youth Development Center (YDC) in New Castle, Pennsylvania, between 1983 and 1984 as a juvenile. Van Holt has asserted and testified that he believed those records would have provided information to Wells and Hoffman which would have aided in their diagnosis of his head pain problem, and would have indicated what medication was provided to him that help with the pain. The records from

the YDC, where Van Holt was incarcerated from 1984 to 1985, have been subpoenaed in this litigation, and they do neither. The first indication in the YDC records of any investigation concerning any brain or head-related problem of Van Holt's appears in the April 17, 1984 report of Van Holt's treating physician, Dr. Shoukry Matta, in which Dr. Matta states:

> The student came in today and was complaining of severe insomnia. He claimed that he has difficulty falling asleep. Also, the staff feels that there might be some confusion and some evidence that he might have some organic lesion, so we are going to make some investigation like EEG and Brain Scan, and in the meantime, I'll give him Mellaril 25 mg. at bedtime, and I'd like to see him next week.

See 4/17/84 report of Dr. Matta, attached as Exhibit "H".

On April 25, 194, Van Holt was seen at St. Francis Hospital, in New Castle, Pennsylvania, where a "brain scan & flow" was performed, which was evaluated as normal. In addition, the report notes a history of "No headaches, No trauma, No complaints (unreadable)." (See 4/25/84 brain scan report, attached as Exhibit "I") An electroencephalogram (EEG) was also performed on April 25, 1984, which was read as abnormal because of "persistent slowing in the left temporal occipital areas." (See 4/25/84 EEG report, attached as Exhibit "J") Because of this "questionably abnormal" EEG result, a repeat EEG was performed on June 27, 1984, at which time it was read as "Within Normal Limits." (See 6/27/84 EEG report, attached as Exhibit "K") On June 29, 1984, a CT brain scan was performed on Van Holt and was likewise reported as normal. (See 6/29/84 CT scan report, attached as Exhibit "L")

In a July 6, 1984 report regarding a neurological referral of Van Holt to the Falk Clinic at the University of Pittsburgh, the neurologist summarized his neurological findings, in which he notes that the referral resulted not from any history of headaches or head pain, but from a history of insomnia:

> On questioning the patient, he has no history of seizures or passing out spells or staring spells. He denied episodes of weakness or numbness, incontinence, deja vu or jamais vu, micropesia or macropesia, visual scotome or hallucinations, siplopia, unusual

> olfactory experiences, gastric symptoms. He denies any previous head trauma. He admits to a previous history of amphetamine and PCP usage prior to the present confinement. He also has a history of heavy ethanol usage for the past three years.
>
> * * *
>
> He is alert, coherent and head is normocephaic without cranial, cervical or ocular bruits. **His neurologic exam is essentially within normal limits**. ...
>
> * * *
>
> At present, we have a report of the CT scan done on June 29, 1984 with and without contrast, which was reported as normal. ...
>
> * * *
>
> **My impression of the patient's case is that he has an essentially within normal limits neurological exam, and no evidence of focal brain pathology** except for the EEG that showed the left temporal slowing, ... Since this slowing of the left temporal area does not show epileptiform activity, it would not be necessary to treat this patient with anticonvulsants. ... His behavioral problems probably will be more beneficially managed by psychiatric consultations. (emphasis added)

See July 6, 1984 report, attached as Exhibit "M". As noted above, the "questionably abnormal" EEG was subsequently repeated, and found to be normal.

In his November 13, 1984 report, Van Holt's psychiatrist, Dr. Matta, again addressed Van Holt's neurological concerns, and wrote:

> This student has been interviewed today ... because the student has been worried and concerned about the neurological examination that was done at Falk Clinic. What happened is that there are some abnormalities that showed in the EEG only; however, all other tests have been normal. We wanted to make sure that there is no other problems in connection with the EEG abnormalities. He went to Falk Clinic, and he was examined there **and everything came up normal**. So I explained to him that he shouldn't be worried about this test that came in doesn't mean anything that the other tests are normal, so it there is anything abnormal it should have shown in his neurological examination. (emphasis added)

See 11/13/84 report, attached as Exhibit "N". Finally, in a psychiatric follow-up about six (6) months later, Dr. Matta reports that "All reports regarding the neurological examination came in within normal limits and the student doesn't need to be on any anti-convulsive medication." (See 6/25/85 report, attached as Exhibit "O")

Throughout Van Holt's stay at the YDC, the records received demonstrate that while

there were some initial, possibility neurological-related concerns prompted by Van Holt's complaints of **insomnia**, there are no complaints about head pain or headaches whatsoever, and no indication of any neurological problems requiring any treatment of any kind. The 4/25/84 brain scan was normal. The 6/27/84 repeat EEG was normal. The 6/29/84 CT scan was normal. The comprehensive neurological evaluation that Van Holt underwent at the Falk Clinic was normal. The history provided in connection with the bran scan indicates **no history of headaches**.

C. THE MEDICATION RECORDS FROM THE YDC DEMONSTRATE THAT VAN HOLT WAS PRESCRIBED NO MEDICATION WHATSOEVER FOR ANY HEADACHE OR HEAD PAIN.

Likewise, neither the Medication Records or the Nurse's Records from the YDC indicate the administration of **any pain medication whatsoever** to Van Holt in relation to any complaint of headaches or head pain. (See Medication Records, attached as Exhibit "P", and Nurse's Records, attached as Exhibit "Q") The bulk of the medications written for Van Holt were either antidepressants (such as Mellaril or Endep), Vitamin A, or antibiotics (such as V-Cillin K). (See Exhibit "P") In fact, the only "analgesic" medications listed are, for the most part, over-the-counter medications, which appear in the Nurse's Records, and are given for reasons **other than** headaches or head pain. (Exhibit "Q") On 2/3/94, Van Holt is given Ecotrin (enteric coated aspirin) for a toothache; on 2/16/84, he is given Ecotrin again for "oral pain"; and again, Ecotrin on 3/1/84 for oral pain; Co-Tylenol (Tylenol cold formula), for congestion; on 4/21/84, he is given Tylenol for pain in his left foot, sustained while playing ball; and on 5/13/84, he is given Tylenol #3 for "severe oral pain." (Exhibit "Q")

The Plaintiff complains that the Defendants should have obtained the medical records from the YDC in August, 1997. The records reveal that on both August 28, 1997 and November 18, 1997, Wells did, in fact, write orders seeking Van Holt's records from the YDC. (Exhibits "E" and "G") Unfortunately, it does not appear from Van Holt's Graterford file that those

records were ever received by the institution. Van Holt's assertion that had the Defendants reviewed his YDC medical records they would have had the benefit of a diagnosis for the cause of his head pain and information as to medication given for that pain is sheer nonsense. The records now received in this litigation make clear that the only information which would have been received by the Defendants concerning Van Holt's alleged neurological problems would have been records, reports and information concerning testing that **ruled out any neurological problem** on Van Holt's part. Quite contrary to the Van Holt's suggestions, the only effect of receiving the YDC records would have been to confirm the results of the August 28, 1997 x-ray skull series performed on Van Holt, that there was no neurological problem. In response to Van Holt's complaints of head pain, following the conduct of the x-rays ordered by Wells, Dr. Hoffman, on September 7, 1997, prescribed for Van Holt a course of Advil. Following this, **according to Van Holt's own testimony**, he never again reported head pain or headaches to the Defendants. The records bear this out; Van Holt's testimony bears this out.

D. THE NEUROLOGICAL EXAMINATION AND REPORT BY A. CHARLES WINKELMAN, M.D., DEMONSTRATES THAT VAN HOLT SUFFERS FROM NO NEUROLOGICAL CONDITION OR IMPAIRMENT REQUIRING TREATMENT.

A. Charles Winkelman, M.D., of the Department of Neurology at Hahnemann University, pursuant to this Court's order permitted an independent neurological examination of Van Holt, on April 13, 1999 examined him at SCI-Graterford, and subsequently rendered a report. (A copy of the report and Dr. Winkelman's curriculum vitae are attached as Exhibit "R")

In his report, Dr. Winkelman relates the history provided by Van Holt, who states that he began to have headaches in 1981, at the Glen Mills School, and claims that during the 18 months he spent at the YDC, he was provided with "pills" which Van Holt claims "significantly alleviated the headaches." As discussed in detail above, the records from the YDC demonstrate that Van Holt was provided with no pain medication whatsoever for these alleged headaches.

(Exhibits "P" and "Q") The only medications taken throughout most of Van Holt's stay were psychiatric in nature, prescribed by Van Holt's psychiatrist. Dr. Winkelman also notes, as Van Holt also testified, that he **neither sought nor received any treatment for headaches during the twelve (12) years he was out of prison**, following his release from the YDC.

In his report, Dr. Winkelman notes that he reviewed the medical records from SCI-Graterford, and that the initial complaint of headaches by Van Holt at Graterford was on August 26, 1997, and that the skull series performed on August 28, 1997 was negative. Dr. Winkelman then reviews Van Holt's present complaints in detail, as well as his symptomology. Dr. Winkelman than describes in detail his examination of Van Holt leading to his conclusions:

> The patient is well nourished, very pleasant, cooperative man in no acute distress. He was able to provide a detailed history, as noted above, and there is no evidence of disturbance of speech and/or language. There is nothing to suggest any impairment of memory and he has an adequate fund of knowledge. He did graduate from high school. He has worked in maintenance when not incarcerated.
>
> The cranial nerve examination reveals the pupils to be about 2-1/2 mm bilaterally, round, and reactive directly and consensually to light. There is no afferent pupillary defect. Funduscopic exam reveals well outlined healthy looking nerve heads with normal appearing retinal vasculature. The palpebral fissures are symmetrical bilaterally. Extraocular motility is full and without any abnormal movements. Facial expression is symmetrical. The uvula moves in the midline. There is good masseter bulk and strength, as is the case on examining the tongue. Facial sensation is preserved to all modalities. Hearing is also good bilaterally.
>
> The strength, bulk, and tone in the arms and legs is normal. The deep tendon reflexes are somewhat hypoactive, but symmetrically so in both upper and lower extremities. There are no Babinski reflexes. There is no release of perioral reflexes or any release of primitive reflexes such as grasping of palmomental.
>
> Sensory testing to primary and secondary sensory modalities is within normal limits.
>
> Finger to nose testing, rapid alternating and rapid repetitive movements of the hands are performed adequately. He is able to tandem walk. He can stand on each foot by itself and stands without wavering with feet together, both with eyes opened and closed.
>
> There is good movement of the neck in all planes.

There are no bruits heard over the carotid artery.

Exhibit "R", at 2-3. Winkelman then opines that Van Holt's neurological status is normal, and that there is no evidence of any neurological problems:

> The neurological examination at this time **is completely normal and there is nothing to suggest any underlying neurological disease**. The headaches are very longstanding and are quite nonspecific. The patient's description of the head pain and the lack of family history in no way suggests that there are migranous in nature. The failure of the patient to consult a physician for these headaches during the 12 years when he was not in prison, even though the headaches persisted, would I think, be a reflection of the benign nature of the headaches. (Emphasis added)

Exhibit "R", at 3.

Accordingly, as recently as April 13, 1999, when examined by Dr. Winkelman, Van Holt's neurological condition had been assessed by a competent and qualified neurologist who assessment confirms the neurological assessments made while Van Holt was at the YDC, and the conclusions reached by the Defendants in August of 1997: that **Van Holt's neurological status is normal, and that he has no neurological condition which requires any treatment**. The headaches about which Van Holt complains, "are very longstanding and are quite nonspecific." For the most part, Van Holt has never sought or received any specific treatment for these headaches. For the twelve year period he was at liberty, he chose not to seek any treatment. When at the YDC, contrary to Van Holt's nonspecific recollection that "something" was wrong with him and that he was given "something" for his pain, the records demonstrate that the only pain medications he was given while there **were not for head-related pain**. The only evidence in this matter is that Van Holt has no demonstrable neurological condition for which he requires treatment, that he only complained about headaches on two occasions while at Graterford, and that he was prescribed Advil for those headache complaints.

E. THE EXPERT REVIEW AND REPORT OF GILBERT GROSSMAN, M.D., DEMONSTRATES THAT THE TREATMENT RENDERED BY HOFFMAN AND WELLS TO VAN HOLT FOR HIS COMPLAINTS OF HEAD PAIN WAS APPROPRIATE AND

WITHIN THE STANDARD OF CARE.

Defendants, Wells and Hoffman, retained the services of Gilbert Grossman, M.D. to review the medical records and the treatment provided to Van Holt by them for his complaints of head pain. Dr. Grossman has almost forty (40) years experience in internal medicine and cardiology, and is Board Certified by the American Board of Internal Medicine. Dr. Grossman reviewed the medical records of Van Holt from SCI-Graterford, as well as the records of Van Holt's treatment at the Youth Development Center. (See April 20, 1999 report of Dr. Grossman, attached as Exhibit "S"; and May 25, 1999 supplemental report of Dr. Grossman, with his curriculum vitae, attached as Exhibit "T")

Dr. Grossman notes the August 26, 1997 complaint to Wells of head pain, and the results of his examination of Van Holt that day, which notes "that there was no sensory or motor loss. There was no parasthesia, speech was normal." (Exhibit "S", at 1) He notes that x-rays of Van Holt's skull performed on August 28, 1997 (which was normal). (Exhibit "S", at 2; Exhibit "F") Dr. Grossman notes the second time Van Holt complained about headaches, in a September 7, 1997 visit with Dr. Hoffman. The physical exam at that time was normal, and Dr. Hoffman provided appropriate medication for the headache complaint:

> Advil was ordered 2 tablets t.i.d. on 9/7/97 which is appropriate therapy for headache pain. ... Advil was ordered for pain relief which is appropriate therapy.

Exhibit "S", at 2. Dr. Grossman's review of the entirety of the Graterford medical records demonstrates that there were no other complaints made by Van Holt of headaches or head pain that the two noted, and none following the September 7, 1997 prescription of Advil for Van Holt's headache complaint. He also notes that there is "No documentation on the records referable to severe recurrent headaches."

Dr. Grossman concludes, as to the treatment rendered to Van Holt by Hoffman and Wells, that:

> It is my opinion with a reasonable degree of medical certainty that the care provided by Richard W. Wells, P.A. and Stanley Hoffman,

> M.D. **was appropriate and that there was no deviation from accepted medical care provided to Mr. Van Holt.** (Emphasis added)

Exhibit "S", at 2. Dr. Grossman, in his supplemental report of May 25, 1999, additionally reviews the medical records obtained from the Youth Development Center, from, 1983 to 1985. He details the extensive neurological testing performed on Van Holt at that time, and notes:

> Review of the Youth Development Center records documents that a CT scan of the brain was performed at Presbyterian Hospital in 1984. At that time an EEG was done which showed an abnormal tracing of persistent slowing in the left temporal occipital area. The CT scan of the brain, however, was reported to be normal. The main complaint of Mr. Van Holt at that time was referable to insomnia. There was no history of seizures or syncope. There is no documented history of head trauma and there was no history of severe headaches. Neurological examination as well as hematologic studies revealed no significant abnormality.

Exhibit "T", at 1. Dr. Grossman states that his opinion, following this additional review, remains the same, "**that the care provided Mr. Van Holt did not deviate at all from accepted medical standards**." (Exhibit "T", at 2)

F. THE EXPERT REVIEW AND REPORT OF WILLIAM MEST, P.A., DEMONSTRATES THAT THE TREATMENT RENDERED TO VAN HOLT FOR HIS COMPLAINTS OF HEAD PAIN WAS APPROPRIATE AND WITHIN THE STANDARD OF CARE.

Defendants also submitted the medical records of the treatment provided to Van Holt at Graterford to William Mest, P.A., for review of the actions of Mr. Wells. (A copy of Mr. Mest's April 12, 1999 report and curriculum vitae are attached as Exhibit "U") Mr. Mest is a certified and state-licensed Physician's Assistant in Pennsylvania.

Mr. Mest's review noted that Van Holt arrived at Graterford on February 3, 1997 from another institution, and that time, the inter-institutional transfer form, signed by Van Holt, indicated that he denied having any medical problems. He notes that the first complaint of headache made by Van Holt at Graterford was on August 26, 1997. The examination of that date revealed no abnormalities, and an x-ray skull series order at that time was reported as negative.

Mr. Mest notes that Van Holt saw Wells on two additional occasions at sick call, and one more time for a physical, and that at no time were there any further complaints of headaches. The November 18, 1997 physical examination was the last time that Van Holt saw Wells, and following that time, there were no further complaints of head pain or headaches to be found in the medical records. Mr. Mest summarizes as follows:

> The defendant (Wells) had seven contacts with the plaintiff over a nine-month period of time. Two of these occasions were to the initial intake screening and the second was a routinely scheduled physical examination. Of the five sick call reports, only one was for a headache. The first occasion on which the plaintiff spoke of a headache was almost seven months after the inmate's arrival at State Correctional Institution at Graterford. Despite not finding any positive physical findings, the defendant proceeded to request the inmate's old records and order an x-ray series of the plaintiff's skull. The defendant acted in a totally appropriate fashion in doing what he did. ... On all occasions that the plaintiff sought treatment from the defendant, the care that was provided was accurate and appropriate.

Exhibit "U", at 2. Mr. Mest concludes:

> **The care that was provided to the plaintiff while he was incarcerated at the State Correctional Institution Graterford did not deviate from accepted medical standards**. All of my above stated opinions and conclusions are made with a reasonable degree of medical certainty. (Emphasis added)

Exhibit "U", at 2. The treatment provided by Mr. Wells, according to Mr. Mest, also a practicing Physician's Assistant, fell within the appropriate standard of care.

G. VAN HOLT HAS FAILED TO SUSTAIN HIS BURDEN UNDER 42 U.S.C. §1983 TO ESTABLISH THAT THE DEFENDANTS ACTED WITH DELIBERATE INDIFFERENCE TO HIS SERIOUS MEDICAL NEEDS, AND HIS CLAIMS MUST THEREFORE BE DISMISSED WITH PREJUDICE.

1. Van Holt Has Failed to Establish that He Suffers from a Serious Medical Need.

In order to sustain a cause of action under 42 U.S.C. §1983 for deliberate indifference to a serious medical need, a plaintiff must establish both an objective component and a subjective

component. Wilson v. Seiter, 501 U.S. 294, 298 (1991).

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

The federal courts have consistently held that conditions such as the one from which Van Holt alleges (that is, headaches, head pain), that fail to produce death, degeneration, extreme pain or a condition of urgency, fail to rise to the level of seriousness necessary to support a cause of action based on the Eighth Amendment pursuant to 42 U.S.C. §1983.

The federal courts have extensively examined what does and does not rise to the requisite level of seriousness necessary to support a cause of action under 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 under 42 U.S.C. §1983. In Johnson v. Ventura, 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 (5th 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 Glasper v. Wilson, 559 F.Supp. 13 (W.D.N.Y. 1982), the court held that bowel problems failed to rise to the level of a serious medical need. In Jones v. Lewis, 974 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 under the Eighth Amendment. 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 upon a violation of the Eighth Amendment. In Ware v. Fairman, 884 F.Supp. 1201, 1206 (N.D. Ill. 1995), the court held that a failure to treat a rash, acne and flu failed to state a cause of action for an Eighth Amendment violation. None of these conditions, the Court held, constituted a serious medical need, including flu, which causes thousands of deaths per year.

In Davidson v. Scully, 914 F.Supp. 1011 (S.D.N.Y. 1996), the court concluded that the tinnitus complained of by the plaintiff did not constitute a serious medical need. The court stated that tinnitus was a condition of the ear manifested in a ringing sensation to the sufferer:

> 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 1015. In Davidson, the plaintiff also claim that he suffered from an allergy condition, a podiatric condition, a post-surgery hernia condition, a problem with his knee, urological problems, dermatological problems and cardiac problems. The court concluded as a matter of law that none of these problems stated an Eighth Amendment claim:

> 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 1016.

The evidence in this matter fails to support the conclusions that Van Holt suffers from a serious medical need requiring treatment. In this case, Van Holt alleges only that he suffers from headaches, but has presented no evidence whatsoever as to what medical or neurological condition, if any, he suffers from. All of the available medical evidence in this matter demonstrates that Van Holt does not suffer from any neurological condition requiring treatment. This conclusion is supported by the medical records from the YDC, the extensive testing performed there, the evaluation made by the Defendants at Graterford, and the conclusions of Dr. Winkelman from his examination of Van Holt, and review of the medical records. Van Holt suffers from nothing more than occasional headaches, for which he has sought no medical treatment for long periods of time, and for which he has testified are alleviated by simple, over-the-counter pain medication such as Tylenol. There is no evidence to support a conclusion that Van Holt's "condition" is one which presents the prospect of death, degeneration or severe pain. He has simple headaches for which there is no specific cause, and which respond to over-the-counter pain medication.

Since arriving at the DHU at Graterford, Van Holt complained on two occasions to Wells and to Hoffman. On the first, on August 26, 1997, Wells ordered an x-ray skull series to determine whether the was any neurological condition needing to be addressed. The results of this August 28, 1997 x-ray series was negative. Less than two weeks later, on September 7, 1997, after a normal result on the skull series, upon Van Holt's next complaint of headaches, Dr. Hoffman prescribed a course of Advil for the pain. It is Van Holt's own testimony that after this point, **he never again complained of headaches or head pain to the medical staff at Graterford**. As Dr. Winkelman concluded, Van Holt's neurological condition is "completely normal," and "there is nothing to suggest any underlying neurological disease." There is no indication that Van Holt's "longstanding and ... nonspecific" headaches are migranous in nature, and, concludes Dr. Winkelman, they are "benign" in nature.

Finally, the United States Court of Appeals for the Third Circuit, in Boring v.

Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), affirmed the trial court's ruling that in order to prevail in a claim of deliberate indifference to a serious medical need, a plaintiff **must produce expert testimony that the injuries alleged were, in fact, "serious."** At issue in Boring, were plaintiffs' claims of numbness and spasm in the fingers, and throbbing pain in the left write, stemming from ulnar nerve neuropathy; seborrheic dermatitis; problems with dental fillings; periodic attacks of migraine headache; and a failure to provide a special diet. Id. at 469-470. In affirming the trial court's determination, the Third Circuit explained that expert testimony would be required to prove the existence of a serious medical need, except where "the seriousness of injury or illness would be apparent to a lay person." Id. at 473. By example, the Court noted that a "serious" medical need that a jury could take note of without expert testimony would be something of the nature of "a gunshot wound." Id., citing City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 103 S.Ct. 2979 (1983). Such circumstances, explained the Court, were not present in the plaintiffs' complaints:

> Boring's ulnar nerve injury had occurred some months before he entered the jail and the jail physician concluded that surgery to correct the condition was "elective." We cannot say, based on this evidence, that a factfinder would be able to determine that the condition of his arm was "serious." On the record, the need for treatment does not appear to be one that was acute.
>
> Boring's scalp condition, even less critical, seems to be little more than an annoyance. Although plaintiff believed a difference brand of shampoo would have more effectively controlled the scaling, courts will not "second-guess the propriety of adequacy of a particular course of treatment [which] remains a question of sound professional judgment." Inmates of Allegheny County [Jail v. Pierce], 612 F.2d [754,] at 762 [(3d Cir. 1979)]. Similarly, we do not question the dentist's decision to provide temporary fillings during pretrial detention. These complaints merely reflect a disagreement with the doctors over the proper means of treating plaintiff's condition.
>
> Geidel's knee disorder was an injury that had occurred years before incarceration. Although he allegedly had planned surgery shortly before his confinement, the evidence again does not establish an acute condition. Rather, the ailment qualified for elective surgery which safely could be deferred for the presumably brief detention period preceding trial.

> **Similar comments apply to Perry's complaints of migraine headaches** and his request for a temporary special diet.
>
> As laymen, **the jury would not be in a position to decide whether any of the conditions described by plaintiffs could be classified as "serious."** In these circumstances, the district cour properly required expert medical opinion, ... and in its absence properly withdrew the issue from the jury. (Emphasis added)

Boring, 833 F.2d at 473-474. Here, as in Boring, the plaintiff's condition, non-specific, unidentified headaches is a condition, under the circumstances, which no lay juror could reasonable conclude constituted a "serious" medical condition in the absence of expert testimony. In Boring, the court specifically held that one of the plaintiffs' complaints of migraine headaches, without the benefit of expert testimony, could not be considered to be a "serious medical need." The Plaintiff submits no expert testimony as to this issue or any other issue in this case. The only expert testimony, in fact, is that the headaches about which Van Holt complains are not serious, and that the response to his two complaints (8/26/97 and 9/7/97), an x-ray skull series, and prescription of a course of Advil, was appropriate medical treatment. Van Holt's longstanding, chronic headaches (since at least 1983), for which he had gone many years without even seeking treatment (the 12 years prior to his present incarceration), and which, Van Holt himself admits, respond to over-the-counter medications such as Tylenol, cannot be deemed "serious" by any lay jury in the absence of expert testimony to the contrary. To hold otherwise would be to permit a jury to engage in rank speculation as to the cause, if any, for Van Holt's headaches. The only evidence, and it is substantial, is that there is not discernable neurological cause for these headaches. Van Holt's headaches, unlike a gunshot wound or a broken leg, is not an obviously "serious" medical condition which would be "apparent to a lay person."

The only evidence is that Van Holt suffers from nothing greater than the ordinary, run-of-the-mill headache, the kind of which can commonly be brought out by the ordinary tensions and stressors of day-to-day life, let alone prison incarceration. Van Holt has failed to establish that he suffers from any serious medical need which he alleges the Defendants failed to

treat, and his claims must therefore be dismissed.

2. Van Holt Has Failed to Establish that Wells and Hoffman Had Knowledge that Their Conduct Presented a Substantial Risk of Harm to Him.

To defeat the Defendants' Motion for Summary Judgment, Van Holt must be able to demonstrate that he has sufficient evidence to support a jury verdict in his favor on the issue of whether the Defendant had actual knowledge that their actions presented a risk of substantial harm to him. This showing is required in order to prove deliberate indifference to a serious medical need. While the Defendants believe (as discussed above) that Van Holt has failed to demonstrate the existence of a serious medical need, even if this Court finds that he has, his claim still must fail as he has failed to demonstrate that Wells and Hoffman acted with deliberate indifference.

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

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

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

Thus, under Farmer, supra, 114 S.Ct. 1979, Van Holt must prove that Wells and Hoffman subjectively knew that their actions, in treating Van Holt's headache complaints, presented a

substantial risk of harm him. In the present case, there is no evidence from which a jury could conclude that Defendants Wells and Hoffman acted with knowledge that their actions in treating Van Holt posed a substantial risk of serious harm to him. In fact, the only evidence is that Van Holt presented to the Defendants on only two occasions with complaints of headaches and head pain. On the first instance, August 26, 1997, Wells examined Van Holt, and ordered an x-ray skull series to determine whether there was any neurological problem. The x-rays came back two days later as negative. Less than two (2) weeks later, Van Holt presented for the second and last time, to Dr. Hoffman, with complaint of headaches, at which time Dr. Hoffman examined him, review the records, and prescribed a course of Advil for the headaches. Van Holt admits that, following these two sick call complaints of head pain, **he never again complained about experiencing headaches or head pain to the medical personnel at Graterford**. The only information known to the Defendants concerning Van Holt's condition was that he complained about headaches on two occasions, and that the x-rays taken were negative. While the twice-ordered YDC medical records were never received by the Defendants at Graterford, their review in the context of this litigation demonstrates that they would have done nothing more than to confirm the Defendants' conclusion that Van Holt suffered from no neurological problems.

There is no evidence in this matter than Van Holt suffered from anything other than ordinary headaches. There is no evidence that Van Holt suffers from or ever suffered from any neurological problem that might cause his headaches. There is no evidence that the headaches are migranous in nature, or that they require treatment by anything but over-the-counter pain medication, such as the Advil prescribed. Dr. Winkelman has opined that Van Holt suffers from no neurological condition requiring treatment. Dr. Grossman has opined that the treatment provided to Van Holt by Hoffman and Wells was appropriate and met the standard of care. William Mest, P.A., has likewise opined that the treatment accorded Van Holt by Wells met the appropriate standard of care. Even if this Court were to find that Van Holt has demonstrated that he suffers from a "serious" medical condition, which Defendants believe he has not, he has failed

to prove that Defendants, Wells and Hoffman, acted with the subjective awareness that their actions posed a substantial risk of serious harm to Van Holt.

3. Van Holt Has Stated Nothing More than a Mere Disagreement with Wells and Hoffman as to the Course of His Medical Treatment.

Van Holt's claims against Wells and Hoffman must also fail became he has failed to state anything more than a mere disagreement between himself and his medical providers as to the appropriate course of treatment for his headaches and head pain.

A disagreement with the medical treatment provided to an inmate fails to support a claim based on 42 U.S.C. §1983. A prisoner's right to receive medical care does not extend specifically to the type of medical care which the prisoner personally desires. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979). Prisoner complaints regarding the quality or appropriateness of medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institution Inmates, 834 F.2d 326, 346 (3d Cir. 1987) cert. denied, 486 U.S. 106 1988. Here, Van Holt challenges the appropriateness of the medical treatment which he received from Defendants, Wells and Hoffman. While the Defendants order x-rays and provide him with Advil, Van Holt asserts that they should have obtained more than 12-year-old medical records, and prescribed some other, unspecified medication. He disagrees with the course of treatment which was provided to him by the Defendants.

The United States District Court for the Middle District of Pennsylvania, in Farmer v. Carlson, 685 F.Supp. 1335 (M.D.Pa. 1988), in granting the defendant-physician's motion for summary judgment, held that questions concerning the timeliness of the treatment, or the provision of medication, were questions based in medical malpractice or negligence allegations, and therefore must be dismissed as §1983 claims. Judge Nelson of the Middle District stated that:

> "the key questions...is whether defendants have provided plaintiff with some type of treatment regardless of whether it is what the

> plaintiff desired." (citations omitted)

Id. at 1339. In Holly v. Rapone, 476 F.Supp. 226 (E.D.Pa. 1979), Senior Judge Davis held:

> In 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."

Id. at 231, citing Roach v. Kligman, 412 F.Supp. 421, 425 (E.D.Pa. 1976), quoted approvingly in Norris v. Frame, 585 F.2d 1183, 1185 (3d Cir. 1978).

In Sult v. Prison Health Services Polk County Jail, 806 F.Supp. 251 (M.D.Fla. 1992), the United States District Court for the Middle District of Florida found that a complaint similar to the one at issue in this case failed to state a cause of action under 42 U.S.C. §1983. In Sult, the plaintiff, a prisoner, contended that the defendant engaged in conduct that was deliberately indifferent to his serious medical needs by failing to conduct an MRI examination, or to refer him to a specialist for further evaluation of his back pain. The court held that:

> Whether diagnostic techniques or particular forms of treatment are indicated is a matter for medical judgment. A medical decision not to order such measures does not represent cruel or unusual punishment.

Id. at 252. The same analysis requires the granting of summary judgment in favor of Defendants, Wells and Hoffman. Van Holt challenges the treatment provided to him, and asserts that he should have received some other treatment.

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 many 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.

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

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

Id. at 910 F.2d at 502.

The same analysis applies to the claim of Van Holt. Like the inmates in Sult, in Rodriguez and in Smith, Van Holt asserts that he should have been provided with treatment different from that with which he was provided. Van Hold claims that the Defendants should

have obtained old medical records from the YDC to see what medication he was provided with there for his headaches, and that he should have then been provided with that medication. This constitutes a disagreement with the course of treatment provided by Wells and Hoffman. This cannot form the basis for a claim under 42 U.S.C. §1983. Such allegations, at best, constitute a claim for medical negligence. Medical negligence fails to constitute a claim under 42 U.S.C.§1983. As the United States Supreme Court held in Estelle, supra:

> 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. See also Daniels v. Williams, 374 U.S. 327 (1986).

Van Holt's mere disagreement as to the course of the treatment for his headaches fails to constitute a claim under 42 U.S.C. §1983, and therefore must be dismissed.

4. Van Holt Has Failed to Establish Sufficient Evidence to Overcome the Good Faith Defenses of Defendants, Wells and Hoffman.

In order to prevail against Well and Hoffman pursuant to 42 U.S.C. §1983, Van Holt must overcome their good faith defense. Plaintiff has the burden of producing sufficient evidence to overcome that defense. Jolly v. Kline, 923 F. Supp. 931, 946 (S.D. Tex. 1996); Saldana v. Garza, 684 F.2d 1159, 1163 (5th. Cir. 1982) cert. den. 460 U.S. 1012 (1983). The Supreme Court of the United States has held that private actors such as Wells and Hoffman, do not have a qualified immunity defense to a §1983 claim. Wyatt v. Cole, _ U.S. _, 112 S.Ct. 826 (1992). However, the United States Court of Appeals for the Third Circuit in Jordan v. Fox,

Rothchild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) has concluded that a private actors sued pursuant to 42 U.S.C. §1983 possess a good faith defense. The United States Court of Appeals indicated that in order to overcome a good faith defense the plaintiff must establish that a private actor has subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276.

What evidence has Van Holt produced to establish that Wells and Hoffman had subjective knowledge that their actions deprived Van Holt of his constitutional rights? An examination of the records shows not a scintilla of evidence exists on this issue. Van Holt cannot meet his burden by merely showing deliberate difference. (Although, as discussed above, he has not even done this) It is not enough for him to establish that Wells and Hoffman knew that their actions caused harm to him. Van Hold can only overcome the good faith defense by producing evidence that Wells and Hoffman knew that their alleged failures violated Van Holt's constitutional rights. Van Holt has not produced a single witness or document on this issue. Thus, Van Holt has failed to meet his burden of proof. This failure of Van Holt alone requires the granting of a motion for summary judgment of O'Connor as to the 42 U.S.C. §1983 claim.

H. VAN HOLT HAS FAILED TO SUSTAIN HIS BURDEN OF PROVING, THROUGH EXPERT MEDICAL TESTIMONY, THAT THE MEDICAL CARE PROVIDED TO HIS FELL BELOW THE STANDARD OF CARE.

To establish a cause of action for medical malpractice based on negligence in Pennsylvania, the Supreme Court of Pennsylvania requires that a plaintiff present an expert witness who will testify to a reasonable degree of medical certainty that the acts of the physician deviated from acceptable medical standards and that such deviation constituted the proximate cause of the harm suffered. Brennan v. Lankenau Hospital, 490 Pa. 588, 595, 417 A.2d 196, 199 (1980); Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 892 (1990).

To establish a prima facie case of medical malpractice, Van Holt must produce expert testimony to establish the recognized standard of care attributable to physicians and physicians

assistants under like circumstances. Tarter v. Linn, 396 Pa. Super. 155, 578 A.2d 453 (1990); Strain v. Ferroni, 405 Pa. Super. 349, 357, 492 A.2d 698, 703 (1991)(court held that expert must suggest that defendant/ physician deviated from the "requisite standard of care"); Cobert v. Weisband, 380 Pa. Super. 292, 301-2, 551 A.2d 1059, 1064 (1988) (plaintiff must prove by competent expert evidence that defendant's conduct fell below the standard of reasonable medical practice). In Chandler v. Cook, 438 Pa. 447, 451, 265 A.2d 794, 796 (1970) the Pennsylvania Supreme Court expressly held that:

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

Van Holt has provided no expert reports or testimony in this matter whatsoever, nor has he indicated any intention of doing so. He has provided no expert discovery in this matter whatsoever. In the absence of expert testimony as to the standard of care applicable to the treatment he received from Wells and Hoffman, and expert testimony that the standard of care was breached by the Defendants, Van Holt, as a matter of Pennsylvania medical negligence law, cannot prevail on his claim of medical malpractice.

The only evidence concerning the applicable standard of care, and whether the actions of Wells and Hoffman complied with that standard of care, comes from the expert opinions of Dr. Winkleman, Dr. Grossman, and Physician's Assistant William L. Mest. Dr. Winkleman has opined that Van Holt does not suffer from any neurological condition requiring treatment. His neurological examination of Van Holt was normal. He also indicates that nowhere in Van Holt's medical history, either from his Graterford medical records, or the 1983-1984 records from the Youth Development Center, does there appear any basis for concluding that Van Holt ever suffered from any neurological condition requiring treatment, or that he has ever suffered from headaches which were Migranous in nature. To the contrary, he notes, for the twelve (12) year period between incarcerations, Van Holt sought no medical treatment for his headaches whatsoever. Rather, the only indication, in Dr. Winkelman's opinion, is that Van Holt has had

headaches of a "benign" nature.

Both Dr. Grossman, as to Hoffman and Wells, and P.A. Mest, as to Wells, have reviewed the medical records, and the treatment provided, and have opined that the standard of care was met by both in the treatment of Van Holt's complaints of head pain and headaches. As noted above, they have reviewed the treatment provided, and the medical records detailing Van Holt's complaints, testing and diagnosis over the years, and have determined that Defendants, Wells and Hoffman acted within the appropriate standard of care in the treatment of Van Holt's complaints of head pain and headaches.

Van Holt lacks the ability, as a matter of Pennsylvania law, to prevail in his state law claim of medical malpractice in the absence of expert testimony which defines the applicable standard of care, and which opines that the defendants' conduct breached that standard of care. The Plaintiff's lack of expert support for his medical malpractice claims is particularly troublesome as there is no evidence of record that the Plaintiff suffered from any medical condition, neurological or otherwise, which caused his headaches, and which required treatment. A jury, on these issues, could only be left to hopelessly speculate, speculate as to what the applicable standard of care required Wells and Hoffman to do, speculate as to whether the actions of Wells and Hoffman comported with the standard of care, and speculate as to what, if any, medical or neurological condition the Plaintiff suffered from.

In the absence of any expert testimony in support of the Plaintiff's medical malpractice claim in this matter, the Defendants' Motion for Summary Judgment should be granted, and the Plaintiff's claims dismissed.

IV. CONCLUSION

For the reasons discussed herein, moving Defendants, Richard W. Wells, P.A. and Stanley Hoffman, M.D., respectfully request that this Honorable Court grant their Motion for Summary Judgment, and dismiss with prejudice all of Plaintiff's claims in this matter.

Respectfully submitted,

MONAGHAN & GOLD, P.C.

BY: _____

ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants,
Richard W. Wells, P.A. and
Stanley Hoffman, M.D.

DATE: July 6, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of Defendants, Stanley Hoffman, M.D. and Richard Wells, P.A.'s Motion for Summary Judgment, Memorandum of Law in support thereof, and proposed form of Order, via First Class Regular Mail on this date to the following individual:

Michael E. Baughman, Esquire
DECHERT, PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

SEAN ROBINS

DATE: July 6, 1999

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

RICHARD VAN HOLT	:	CIVIL ACTION
v.	:	NO. 97-7441
RICHARD W. WELLS, P.A., et al.	:	

O R D E R

This matter, having come before the Court upon the Motion for Summary Judgment of Defendants, Richard W. Wells, P.A. and Stanley Hoffman, M.D.; and having considered the submissions in support thereof; and the opposition thereto; and for good cause shown; it is this _____ day of _____, 1999, hereby

ORDERED that the Defendants' Motion for Summary Judgment is GRANTED, and the Plaintiff's Complaint, Amended Complaint and Second Amended Complaint are DISMISSED WITH PREJUDICE.

BY THE COURT:

_____