

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

CHARLES FOX,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-5279
MARTIN HORN, et al.	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

January 21, 2000

Plaintiff Charles Fox (“Fox”), a state prisoner, filed this civil rights action against Martin Horn, Secretary of the Commonwealth of Pennsylvania Department of Corrections (“Horn”), Corrections Officers Edward Howard (“Howard”) and David Soroko (“Soroko”), Correction Physician Services, Inc. (“CPS”), Nuhad Kulayat (“Kulayat”) and William M. Sprague, M.D. (“Sprague”). Fox, an inmate at the State Correctional Institute at Graterford (“SCI-Graterford”) contends that these Defendants, over the course of a two-day span in October, 1996, denied reasonable medical care to Fox, leading him to have a debilitating cerebral vascular hemorrhage . Presently before the Court are two separate Motions for Summary Judgment. For the reasons stated below, the Motion for Summary Judgment by Horn, Soroko and Howard (the “State Defendants”) will be Granted. The Motion of Defendants Kulayat, Sprague and CPS (the “Medical Defendants”) will be Granted in part and Denied in part.

I. PROCEDURAL HISTORY

A complaint in this action was originally filed on October 5, 1998. This Court entered an order granting Defendant Horn's motion to dismiss in part. The Court dismissed the original complaint's state law claims with prejudice and the federal civil rights claims without prejudice because Fox had failed to exhaust his administrative remedies. Fox amended his complaint twice and filed the Second Amended Complaint ("Complaint") on June 3, 1999. Count I of the Complaint asserts causes of action under 42 U.S.C. § 1983 against Kulayat and Sprague based upon their deliberate indifference to inmate's serious medical need in violation of the Eighth Amendment. Counts II and III assert similar § 1983 claims against Soroko and Howard (the "Corrections Officers") and CPS and Horn respectively. Count IV asserts medical malpractice against Dr. Sprague and Dr. Kulayat, while Count V alleges Corporate Negligence against CPS. Finally, Count VI asserts Intentional Infliction of Emotional Distress against CPS, Kulayat and Sprague.

II. FACTUAL BACKGROUND

Charles Fox was in his single cell (#216) on Cell Block D at SCI-Graterford on the night of October 17, 1996. At around 8:30 P.M., Fox began to feel ill. Defendants Howard and Soroko were the corrections officers responsible for Cell Block D that night. They began their shift on Cell Block D at approximately 10:00. According to the correction officers, they conducted at least three tours of the cell block. Normal protocol requires that the corrections officers actually look into each cell to see if the inmates are present. Plaintiff disputes the

officers' accounts of how often these checks were made. Soroko and Howard did not notice or report any problems on the night of October 17-18.

According to Fox, at approximately 10:00 P.M., feeling quite ill, he started banging on his cell door and called for correction officers to take him to the infirmary. He received no response from any correction officers. At some point he began to vomit and asked his fellow inmates on either side of his cell to "yell and holler" in order to get an officer's attention. Still no one appeared, but a corrections officer was heard to say to the inmates "Stop making all of that noise." According to Plaintiff's account, he and his fellow inmates continued to make noise and holler until about midnight. At 7:00 A.M. on October 18, 1996, Fox was found passed out in his cell by two corrections officers (not the Defendant Corrections Officers). Eventually Mr. Fox was brought to the Infirmary.

Dr. Sprague treated Fox in the Infirmary of SCI-Graterford. Fox remained under the care of Dr. Sprague for several hours during which he was placed in a hard cell. Fox's blood pressure was taken by both Dr. Sprague and Nurses Wooster and Beauchesne. At all times, it remained high. The patient was given a drug called Procardia in an attempt to lower the blood pressure. There was some dispute between Dr. Sprague and several nurses over whether Fox should be sent to an outside hospital. Eventually, Dr. Sprague ruled out the possibility that Fox was suffering from a drug overdose. Dr. Sprague states that he did not send Fox to a hospital immediately because Fox responded to a sternal rub.

On October 18, 1996, Dr. Kulayat was serving the dual role at SCI-Graterford of acting medical director and chief of the "clinics". At some point during the morning of October 18, Nurse Wooster informed Dr. Kulayat that there were problems with Fox in the Infirmary.

Upon the prompting of Nurse Wooster, Kulayat met with Dr. Sprague and the two held a discussion. Dr. Kulayat then returned to the clinics. Some time later, Nurse Wooster again approached Dr. Kulayat to inform him that Fox was still being held in the hard cell near the Infirmary. Kulayat then examined Fox in the hard cell and immediately ordered him to be transferred to an outside hospital. Fox left SCI-Graterford at approximately 1:00 in the afternoon to be transported to the outside hospital. Eventually, Fox was as diagnosed as having a cerebral vascular hemorrhage.

III. LEGAL STANDARD

Rule 56 allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. The purpose of the rule is to eliminate a trial in cases where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566,573 (3d. Cir. 1976). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Movant “bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact”. Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, they need only point to the court “that there is an absence of

evidence to support the nonmoving party's case. Id. at 325. Not every disputed fact, but only those which are material, necessitate a trial. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment motions require judges to assess on a case by case basis how one-sided evidence is or what a fair-minded jury could reasonably decide. See Williams v. Borough of West-Chester, Pa., 89 F.2d 458 (3d Cir. 1989) (Plaintiff's presentation of "some" evidence is not necessarily enough to survive summary judgment).

IV. DISCUSSION

A. § 1983 Claims

To make out a cause of action under § 1983, a plaintiff must show that (1) the defendants acted under color of law; and (2) their actions deprived him of rights secured by the Constitution or federal statutes. See Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir.1993).

The Defendants were acting under color of law as they were all either government officials or working at the behest of the state at the time of the alleged violations. Therefore, the issue is whether the Individual Defendants deprived plaintiffs of any constitutionally protected right. Fox asserts in Counts I-III of his Second Amended Complaint that each named Defendant violated his rights under the Eighth Amendment prohibiting "cruel and unusual punishment. Fox alleges that each Defendant subjected him to cruel and unusual punishment through their acts or omissions.

1. Horn

A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior. See Rode

v. Dellarciprete, 845 F.2d. 1195, 1207 (3d. Cir. 1989) *quoting* Parratt v. Taylor, 451 U.S. 527, 537 n. 3 (1981). The mere fact that a named defendant is in a supervisory position is insufficient. See Hampton v. Holmesburg Prison Officials, (“Even if liability had been established against the guards, no liability for the warden absent evidence of actual knowledge of deprivation). .

Defendant Horn, in his capacity as Secretary of the Department of Corrections, is too far removed from the alleged actions of CO Howard and CO Soroko to be liable in this scenario. The Department of Corrections had established procedures for both providing medical care to inmates and for monitoring incarcerated prisoners. The Secretary can not be held responsible if individual persons at SCI-Graterford did not comply with these policies. Since the Plaintiff has not demonstrated sufficient involvement on the part of Defendant Horn, summary judgment will be granted to Horn on all claims.

2. Soroko and Howard

The Supreme Court has declared that, in accordance with the " 'broad and idealistic, concepts of dignity, civilized standards, humanity, and decency' " embodied in the Eighth Amendment, the government is obliged "to provide medical care for those whom it is punishing by incarceration." Estelle v. Gamble, 429 U.S. 97, 102(1976). Deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." Id. at 104. To be in violation of the Eighth Amendment, there must be both deliberate indifference on the part of the officials and a serious medical condition. Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987).

Both parties cite to the Supreme Court's decision in Farmer v. Brennan, 511 U.S. 825, 837 (1994), in which the Court adopted a subjective test for what would constitute an Eighth Amendment violation:

“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 both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”. Id.

Therefore, the Court continued, “...an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment”. Id. at 838. Under the Supreme Court's teaching, then, even if the Defendant Correction Officers should have been aware of Fox's illness, but were not as a result of their non-compliance with proper procedures, there is not a cognizable claim for an Eighth Amendment violation.

In the present case, the Plaintiff has presented evidence that he and his fellow inmates attempted to call officers to his cell. Fox can not provide any evidence that the two Correction Officers knew of Fox's condition and ignored the diagnosis. Instead, Fox argues that the Corrections Officers are to blame for the failure to diagnose his serious medical need. In effect, the argument is that Defendants Howard and Soroko engaged in cruel and unusual punishment when they ignored the cries for medical attention. According to Farmer, defendants have to be aware of the facts which cause one to infer that a substantial risk of harm exists, and actually make the inference. 503 U.S. at 837. Since the Court must assume factual disputes in favor of the non-moving party, it is assumed that the Correction Officers failed to follow prison procedures and did not respond to calls for help. In other words, Howard and Soroko may have

been aware of the facts which could cause them to infer there was a substantial risk of harm to Fox.¹ However, there is no evidence that Correction Officers Howard and Soroko made the inference that Fox faced substantial risk of serious harm and then deliberately ignored helping Fox. The Officers failure to alleviate the risk of substantial harm, while not commendable, is not cruel and unusual punishment. Therefore, summary judgment will be granted to Correction Officers Soroko and Howard on Count II of Fox's Second Amended Complaint.

3. Dr. Kulayat

Under the standard discussed above, summary judgment will be granted to Dr. Kulayat. Nurse Wooster testified that Dr. Kulayat, upon being informed of Fox's condition, immediately went and conferred with the treating physician, Dr. Sprague. When Nurse Wooster came a second time to tell him that Dr. Sprague refused to send Fox to a hospital, Dr. Kulayat responded by actually examining Fox. Upon completing his examination of Fox, Dr. Kulayat ordered that Fox be sent to the hospital. Therefore, upon making the inference that a continued denial of more sophisticated medical care would present a substantial risk of serious harm, Dr. Kulayat responded appropriately.

The main thrust of Fox's argument against him is that Dr. Kulayat, upon hearing the account of Nurse Wooster, did not immediately examine Fox himself and override Dr. Sprague's treatment. To support this contention, Dr. Moyers' testified that Dr. Kulayat had a duty as acting medical director to countermand decisions if he disagreed with them. Thus, Fox

1. The Correction Officers point out that even assuming they knew that Fox was sick; the symptoms he exhibited and the yelling of other patients would not have given them the facts to infer that Fox faced a substantial risk of serious harm. However, if the Corrections Officers had done thorough inspections of Cell Block D, which Fox contends they did not do, and had found him in the position next to the toilet where he was eventually found, then they would likely have been aware of the facts from which to draw an inference that Fox faced a substantial risk of serious harm.

disagrees with the treatment he received and Dr. Kulayat's timing in ordering him to the hospital. These contentions can not support a finding that the Eighth Amendment was violated. See Lanzaro, 834 F.2d at 346. (prisoner complaints regarding the quality or appropriateness of the medical care never support an Eighth Amendment claim). At most Dr. Kulayat was negligent in responding to the information he had received, but negligence does not support a cause of action under § 1983. See Daniels v. Williams, 474 U.S. 327 (1986). Therefore, a reasonable jury could not find that Dr. Kulayat acted with deliberate indifference to the medical needs of Fox.

Summary Judgment will be granted to Dr. Kulayat on Count I.

4. Dr. Sprague

Summary Judgment will not be granted to Dr. Sprague on Counts I. Since there are many disputed facts, a reasonable jury could find that Dr. Sprague was subjectively aware of a substantial risk of serious harm to Fox. Dr. Sprague argues that Fox merely complains of disagreements with his diagnosis and treatment. As discussed with regard to Dr. Kulayat, these allegations can not support findings of deliberate indifference. But with regard to Dr. Sprague, Fox has raised evidence suggesting not only that he was aware of the facts by which he could infer that Fox faced a substantial risk of serious harm, but also that he in fact made the inference. Several of the nurses testified to the fact that Fox received no treatment because Dr. Sprague thought he was faking. There is also some evidence that Dr. Sprague violated typical protocols for how to treat patients who are in a state like Fox's by not sending him to the hospital upon arrival. His attitude towards Fox and other inmates also raises the question of whether he might have been deliberately indifferent to Plaintiff's medical needs. This is not to say that Fox has proved his case as to whether Dr. Sprague was deliberately indifferent to Plaintiff's medical

needs despite having made the inference that Fox faced substantial risk of serious harm. A jury could believe that Dr. Sprague either followed the proper protocols or merely misdiagnosed the Plaintiffs' symptoms. However, there is enough evidence presented to let a jury find that Dr. Sprague knew that Fox was in serious danger and still did not seek the appropriate medical treatment. Therefore, summary judgment will be denied.

5. CPS

Fox alleges that CPS' policies, or lack thereof, with regard to the medical treatment of inmates and the hiring of doctors, lead to a violation of his constitutional rights. While a corporation can not be held vicariously liable for the actions of its staff, it may be held liable if it knew of and acquiesced in the deprivation of Plaintiff's rights. See Miller v. City of Philadelphia, 1996 WL 683827 at *4. This reasoning follows from the U.S. Supreme Court's holding in City of Canton v. Harris, that the inadequacy of police training may serve as the basis for a municipality's §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. 489 U.S. 378, 388 (1989) ("If the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, the policy makers of the city can reasonably be said to have been deliberately indifferent to the need").

Fox has presented evidence disputing the adequacy of policies that CPS used to supervise Dr. Kulayat. However, there is no indication that these policies would in anyway have lead to a violation of Fox's constitutional rights. The policies presented by Fox show that CPS allowed Dr. Sprague, fresh out of his residency without any specialty or formalized training by CPS, to treat patients at SCI Graterford. Fox admits that CPS policies called for a staff physician

like Sprague to bring a problem to the attention of the medical director. Apparently, there were no established written protocols for treating drug overdose or a cerebral vascular accident. Fox concludes by saying that these lack of policies lead to the harm he suffered. These complaints about the lack of policies support a contention that CPS may have demonstrated negligence with regard to the hiring and supervision of Dr. Sprague. However, the claim against CPS is that it was deliberately indifferent to the medical need of its patients. The claims against Dr. Sprague under §1983 survive not because he was incompetent or misdiagnosed Fox's condition, but because there is evidence to show that when he knew Fox faced serious harm, he may have not taken action to get him help. The procedures in place, lax as they may have been, told Sprague to notify the acting director if a problem arose. He chose not to do so, but that does not necessarily make the policy inadequate. Eventually, Dr. Kulayat came and countermanded Sprague's decision, which CPS' policy required him to do. Since there is no evidence to suggest that CPS' policies were likely to lead to constitutional violations, summary judgment will be granted to CPS with respect to Count III.

B. Medical Malpractice against Defendants Sprague and Kulayat (Count IV)

Fox alleges that the two Doctor Defendants rendered treatment that fell below the standard of medical practice in the community when they failed to diagnose and treat the symptoms related to his intraventricular hemorrhage. To establish a prima facie case of medical malpractice, a plaintiff must produce expert testimony that establishes the recognized standard of care attributable to physicians under like circumstances. See Strain v. Ferroni, 405 Pa. Super 349, 357; Brannan v. Lankenau Hospital, 490 Pa. 588 (1980) (expert testimony required in

medical malpractice cases to establish standard of care). A plaintiff must present expert testimony to establish to a reasonable degree of medical certainty that the defendant's acts deviated from an accepted medical standard, and that such deviation was the proximate cause of the harm suffered. Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888 (1990). The Pennsylvania Supreme Court has stated that a finding of malpractice must be supported by expert testimony suggesting the defendant deviated from the standard of care and that the deviation was a substantial factor leading to plaintiff's harm. See Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997) (expert testimony must be used to demonstrate both medical malpractice and corporate negligence based on that malpractice). An expert need not use "magic words" such as "substantial factor" when expressing her opinion to make a prima facie case. Instead the Court must look at the substance of the expert's testimony. See Id.

Defendant Kulayat points out that the Plaintiff's expert, Dr. DePace, does not use the "magic words" in his testimony. Plaintiff does not argue this point, but encourages the Court to extrapolate the conclusion that Kulayat's inaction was a substantial factor leading to Fox's harm. Dr. DePace's testimony need not show that only Dr. Kulayat's actions were a substantial factor leading to harm. See Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978). Clearly the majority of Dr. DePace's testimony relates to the allegedly negligent actions of Dr. Sprague. The report only mentions Dr. Kulayat once (§ 13 of DePace Affidavit). In a conclusory fashion, Dr. DePace states that Dr. Kulayat's failure to monitor Dr. Sprague contributed to Fox's harm. There is no mention of what a reasonable standard of care would have required of Dr. Kulayat, with regard to his monitoring of Dr. Sprague's treatment. Dr. DePace also makes his conclusion without stating how long the delay was between Nurse Wooster's first meeting with Dr. Kulayat

and the Defendant's actual examination of Fox. Finally, while the report need not have the words "substantial factor" in causing harm to Fox, there need be some indication of how Kulayat's actions "substantially" contributed to the harm. Since Fox fails to offer sufficient evidence to support a finding of medical malpractice against Dr. Kulayat, summary judgment will be granted in Kulayat's favor as to Count IV.

C. Corporate Negligence Against Defendant CPS (Count V)

A cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself, rather than the specific acts of individual employees. See Moser v. Heitand, 545 Pa. 554, 558, 681 Pa. 1322, 1325 (1996) (hospital liable for its own negligent policies, not negligent actions of its staff). The Pennsylvania Supreme Court recognized a cause of action for corporate negligence against a hospital in Thompson v. Nason Hospital, 527 Pa. 330, 339, 591 A.2d 703, 707 (1991). The hospital could be held liable to a patient if the hospital breached one of the following; (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients. Id. To be held liable for negligence, it is necessary to show that the hospital had actual or constructive knowledge of the defect or procedures which created the harm. Id. at 708. Furthermore, the hospital's negligence must have been a substantial factor in bringing about the harm to the injured party. Hamil, 481 Pa. 256 (1978). The charges of corporate negligence must also be supported by expert testimony. Welsh, 698 A.2d at 585. Pennsylvania's intermediate

appellate court has also recognized corporate negligence against Health Maintenance Organizations (HMOs). See Shannon v. McNulty, 718A.2d. 828, 836 (Pa. Super. 1998) (HMOs, like hospitals, are responsible for patient's total health care and can be held liable for negligence). A factor that lead both the Thompson and Shannon courts to hold the institutions liable was the recognition that the patients in both cases had been constrained, in their choice of medical care options, by the entity sued. Id. at 831.

The Supreme Court of Pennsylvania has not yet had an opportunity to decide whether an organization like CPS, which contracts to provide medical services to state inmates, can be held liable under the theory of corporate negligence. When presented with a novel issue of state law, or where applicable state precedent is ambiguous, a federal court must predict how the highest state court will rule. Rolick v. Collins Pine Co., 925 F.2d 661, 664 (3d Cir. 1991). Absent a definitive state of applicable law by the state's highest court, intermediate state court opinions facilitate a federal district court' predictive inquiry. Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998). Therefore, since the Superior Court has extended corporate negligence in the health care context to HMOs, the Court here predicts that it would likewise extend liability to organizations like CPS that are responsible for a patient's total health care. As an inmate, Fox had no meaningful choice in his health care choices but to rely on what was provided to him at SCI-Graterford. Since CPS had the contract to provide physicians at the facility, it played a role for Fox similar to that played by an HMO. The control over Fox's health care distinguishes this case from the optometry practice discussed by the court in Milan v. American Business Center, 34 F.Supp.2d 279, 281 (E.D. Pa. 1998) (distinguishing optometry practice from an HMO because the optometry patient does not forfeit his rights either legally or

practically to seek medical care elsewhere). The Court in Milan predicted that Pennsylvania law would not extend liability for corporate negligence to an optometry practice that does not control the total health care of its patients. Id. Since CPS does significantly control Fox's "total health care", he can continue with his prima facie case of CPS's corporate negligence.

Just as it must be presented to support a claim of medical malpractice, expert testimony is required to demonstrate corporate negligence. See Welsh, 698 A.2d at 585. Once again, Dr. DePace's testimony does not use the "magic words", so we look to the substance of his testimony. Id. Dr. DePace's affidavit is critical of the CPS's hiring policies, testing, peer review and supervision of staff physicians. See Pl. Mem. Ex. M. However, there is no baseline presented by which one could compare CPS policies with those of an institution that was following reasonable procedures. Dr. DePace essentially makes allegations that CPS has violated its duty of care. That is sufficient to survive a motion to dismiss. However, at the summary judgment stage, Fox must present expert evidence of a standard of care, how CPS deviated from that standard, and how that deviation lead to substantial harm. The accepted standard of care is an essential part of the expert testimony without which the fact finder can not make an informed judgment as to whether the defendant has been negligent. In this context, it is important to compare CPS with like institutions. Dr. DePace may assume that the accepted standards are those of a hospital. CPS argues that it is neither a hospital nor a clinic and must be judged against the standard of care typical of a doctor's office. As the expert does not provide evidence of an accepted standard at any institution, a jury could not find that CPS was similarly situated and had violated that standard. Since Fox has not presented sufficient evidence to support his

claim of corporate negligence against CPS, defendant CPS will be granted summary judgment as to Count V.

D. Intentional Infliction of Emotional Distress (Count VI)

“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.²” Restatement (Second) of Torts § 46(1). Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. See Motheral v. Burkhart, 400 Pa. Super, 408, 422 (1990) (outrageousness standard not met by defendant’s unfounded allegations of sexual molestation by plaintiff). It is for the court to determine initially whether the defendant's conduct can be regarded as so extreme and outrageous as to permit recovery. Dawson v. Zayre Department Stores, 346 Pa.Super. 357, 359, 499 A.2d 648, 649 (1985). Where reasonable persons may differ, it is for the jury to determine whether the conduct is sufficiently extreme and outrageous so as to result in liability. See Miller v. Hoffman, 1999 U.S. Dist. LEXIS 9225 at *22 (E.D. Pa. 1999). To state a claim for either negligent or intentional infliction of emotional distress under Pennsylvania law, a plaintiff must demonstrate some physical injury, harm or illness caused by the defendant's conduct. Rolla v. Westmoreland Health Sys., 651 A.2d 160, 163 (Pa. Super. 1994) .

2. There is some dispute about whether the tort of intentional infliction of emotional distress is recognized under Pennsylvania law. As recently as 1998, the Pennsylvania Supreme Court clearly stated that it had not officially adopted the Restatement definition of the tort. See, Hoy v. Angelone, 720 A.2d 745, 753 (Pa. Super. 1998). However, the Superior Court has used the § 46 definition when discussing the tort. See Buczek v. First National Bank of Mifflin Town, 366 Pa. Super. 551, 558, 531 A.2d 1122, 1125 (1987)

Summary judgment will be granted to all three Defendants named under this Count VI. Although Sprague, Kulayat and CPS are named in this Count VI for intentional infliction of emotional distress, it is really only Dr. Sprague's conduct that is in question here. Fox has put forth sufficient evidence, through depositions and affidavits, to show that Dr. Sprague may have been negligent and unprofessional. It is debatable whether this conduct rises to the level of outrageousness, requiring a jury determination. The problem with Fox's claim is that there is no evidence of emotional distress. The potentially "outrageous" events that occurred were of no distress to Fox at the time of their occurrence. There is evidence that Fox has suffered harm from the behavior of Dr. Sprague during the several hours he stayed at the Infirmary on the morning of October 18. But this physical harm is likely a result of the alleged malpractice by Sprague rather than physical harm that manifests itself as a result of emotional distress. Pennsylvania courts have noted that in order to recover, a plaintiff must witness the alleged outrageous acts by defendant. See, e.g., Baker v. Morjon, Inc., 393 Pa.Super. 409, 574 A.2d 676, 679 (1990) (plaintiff can not recover under § 46 if not present at the time of the alleged outrageous conduct); Daughen v. Fox, 372 Pa.Super. 405, 539 A.2d 858, 861 n. 2 (1988) (no recovery when plaintiff did not witness wrongful acts performed on his dog). Fox was not aware of how he was being treated by Dr. Sprague, as he has admitted that he remembered nothing from the time he was in his jail cell until he awoke in the hospital. In summary, while Fox' injuries may have become worse because of Dr. Sprague's actions, they did not arise out of emotional distress caused by Sprague. Therefore, summary judgment will be granted to Sprague, Kulayat and CPS as to Count VI.

V. CONCLUSION

Summary Judgment is denied with respect to Defendant Sprague as to Count I under § 1983 and Count IV for medical malpractice. Summary Judgment is granted with respect to Defendant Kulayat as to Count I under § 1983 and Count IV for medical malpractice. Summary Judgment is granted with respect to all Defendants as to Counts II, III, V and VI.

An order follows.

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

CHARLES FOX,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-5279
MARTIN HORN, et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 21st day of January, 2000, upon consideration of Defendants' Motions for Summary Judgment (Docket Nos. 71-72), Plaintiff's Responses thereto (Docket Nos. 81-82), Defendants' Reply (Docket No. 84), and Plaintiff's Sur-Reply (Docket No. 86) it is hereby **ORDERED** that Defendants Horn, Soroko and Howard's Motion is **GRANTED** in its entirety and Defendant CPS, Sprague and Kulayat's Motion is **GRANTED** in part and **DENIED** in part. More specifically, it is **FURTHER ORDERED** that:

1. Counts II, III, V & VI are **DISMISSED** against all Defendants.
2. Defendants' Sprague and Kulayat's Motion is **DENIED** as to Counts I & IV with respect to Defendant Sprague but **GRANTED** as to Counts I & IV with respect to Defendant Kulayat.

BY THE COURT:

RONALD L. BUCKWALTER, J.