

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

ROBERT PORTER	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 00-0987
v.	:	
	:	
MONTGOMERY COUNTY	:	
CORRECTION FACILITY	:	
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

August 3, 2000

Presently before the Court is the Defendant's Motion for Summary Judgment. For the reasons presented below, the Motion is Granted.

**I. BACKGROUND**

*Pro se* plaintiff Robert Porter ("Porter") was incarcerated at Montgomery County Correctional Facility between April, 1998 and March, 1999.<sup>1</sup> Porter accuses MCCF of willfully refusing to give him surgery for a inguinal hernia. According to the Complaint, Porter's hernia developed because he was required to sleep on the top bunk of his cell. He also claims that MCCF refused to give him pain killers. In November, 1998, Porter did have surgery for the hernia. Porter wants MCCF to pay for both the hernia operation, and a future operation to

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1. From October 19, 1998 through March 17, 1999, Porter was treated for psychiatric problems at Norristown State Hospital. He is currently incarcerated at SCI-Camp Hill.

remove a growth on his testicle.<sup>2</sup> The Complaint was filed on December 29, 1999. Defendant filed a Motion to Dismiss that the Court converted to Motion for Summary Judgment by an order dated June 26, 2000.

## II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir.1992). 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). When considering a motion for summary judgment, a court must view all evidence in favor of the non-moving party. See Bixler v. Central Pa. Teamsters Health and Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993).

A 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. 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). For the dispute over the material fact to be genuine, “the evidence must be such that a reasonable jury could return a verdict in favor of the non-moving party.” Id.

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2. Porter claims that the lack of medical care he received has left him unable to achieve an erection. It is not clear from any of Plaintiff’s submissions to this Court whether he has paid for the surgery already undertaken. Generally, prisoners do not pay for operations that they undergo while incarcerated.

To successfully challenge a motion for summary judgment, the non-moving party must offer specific facts contradicting the movant's assertion that no genuine issue is in dispute. Kline v. First West Government Securities, 24 F.3d 480, 485 (3d Cir. 1994).

### III. DISCUSSION

The Plaintiff seeks to assert a § 1983 claim based on MCCF's failure to adequately treat a hernia that he claims developed while he was incarcerated at MCCF. § 1983 allows a plaintiff a remedy for a violation of a constitutional or other federally protected right. 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). As a governmental entity, the Defendant was acting under color of law. Therefore, the only issue is whether MCCF deprived Porter of any federally protected right. Although it is not clear on the face of the Complaint, Porter is asserting that he was denied medical care, that might violate his right to be free from "cruel and unusual punishment" under the Eighth Amendment.

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). A plaintiff has a difficult burden when establishing a complaint for deliberate indifference against an individual under § 1983.

Porter brings suit though, not against an individual, but against a municipal entity, the MCCF. When suit against municipality is based on § 1983, a municipality can only be liable when alleged constitutional transgression implements or executes policy, regulation or decision officially adopted by governing body or informally adopted by custom. See Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1997). Although the municipality may not be held liable for a constitutional tort under § 1983 on the theory of vicarious liability, it can be held responsible as an entity when the injury inflicted is permitted under its adopted policy or custom. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). A government policy or custom can be established in two ways. Policy is made when a "decision maker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law. Id., see also Bielewicz v. Dubinon, 915 F.2d 845, 850 (3d Cir.1990). Custom may also be established by evidence of knowledge and acquiescence. See Fletcher v. O'Donnell, 867 F.2d 791, 793 (3d Cir.1989).

Porter's best chance at establishing an Eighth Amendment claim against MCCF was to show a custom at the facility of deliberate indifference to the serious medical needs of inmates. Porter has not clearly alleged a custom of MCCF, but giving him the benefit of the doubt, the Court entertained his claim. But at the summary judgment stage, a Plaintiff must

produce sufficient evidence to allow a reasonable jury to find for him. Porter produces no evidence to suggest a “well-settled” custom at MCCF to ignore the medical problems of incarcerated persons. Defendant MCCF has produced evidence of extensive treatment given to Porter for his hernia and other ailments. Porter produces some evidence that he requested and was denied the treatment he would have preferred at times suitable to him. But at best this evidence establishes a claim for medical negligence on MCCF’s part. See White v. Napoleon, 897 F.2d 103, 108 (3d Cir. 1990) (stating a claim for medical malpractice does not support a § 1983 claim for deliberate indifference). The evidence produced by Porter would not even support a deliberate indifference claim against an individual defendant, much less a municipal defendant like MCCF.

#### **IV. CONCLUSION**

Since the Plaintiff has not produced evidence that could successfully establish a claim for deliberate indifference on the part of Defendant MCCF, summary judgment will be granted in favor of the Defendant.

An appropriate Order follows.

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MONTGOMERY COUNTY	:	
CORRECTION FACILITY	:	
	:	
Defendant.	:	

**ORDER**

AND NOW, this 3rd day of August, 2000, upon consideration of the Defendant's Motion for Summary Judgment (Docket No. 18), and the Plaintiff's Responses thereto (Docket Nos. 20 & 23); it is hereby **ORDERED** that the Motion is **GRANTED** and that judgment shall be entered in favor of the Defendant and against the Plaintiff.

This case shall be marked **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.