



to the Montgomery County Correctional Facility to complete serving the balance of a 30-day jail sentence for driving under the influence of alcohol.<sup>1</sup> Plaintiff asserts that he was sore from the surgery, but not in extreme pain because of the pain medication. At intake, Plaintiff presented a note from his dentist regarding his need to take the prescription medications. However, his medications were confiscated pursuant to PHS policy. Also as a matter of PHS policy, a nurse would have been called at that time to interview and evaluate the individual entering the prison and to receive the confiscated medication and any related physician's note.

Another nurse evaluated Plaintiff the day after his admission, at approximately noon on August 8<sup>th</sup>. On the prison dentist's verbal order, the nurse placed Plaintiff on the prison dental protocol. The dental protocol includes administration of antibiotics and a prescription pain medication, Motrin 600 milligrams. Within several hours (sometime between 4:30 PM and 9:00 PM), Plaintiff received his first dose of Motrin, which was ordered three times a day for three days. Plaintiff claims that he was "skipped over" for some of this medication, and prison records can only definitively verify that Plaintiff received two doses of pain medication per day on August 9<sup>th</sup> and 10<sup>th</sup>, three on the 11<sup>th</sup>, and two on the 12<sup>th</sup>. Plaintiff alleges that he fainted in his cell due to his pain at some point on August 8<sup>th</sup>, although the record is not clear whether this occurred before or after he was evaluated by the nurse on that date. In any event, a nurse went to Plaintiff's cell at that time and determined that he did not need further medical attention.

On August 9<sup>th</sup>, Plaintiff filled out and submitted one or two (the record is not clear) sick call slips, complaining of pain. In addition, Plaintiff asserts that at some point during

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<sup>1</sup> PHS is a private subcontractor of Montgomery County with responsibility for the healthcare of prison inmates in the Montgomery County Correctional Facility. Laurence Roth is the warden of Montgomery County Correctional Facility. Dennis Molyneaux is the medical director of Montgomery County Correctional Facility.

his incarceration, his personal dentist placed a call to Roth regarding his treatment that was not returned. On August 10<sup>th</sup>, the prison dentist evaluated Plaintiff and determined that he had normal post-operative healing. At that time, according to his medical records, Plaintiff complained of dizziness, but not pain. On August 12<sup>th</sup>, the prison dentist again evaluated Plaintiff, who complained of difficulty sleeping. The dentist determined that food debris was stuck in the surgical site, which was irrigated. In addition, Plaintiff's pain medication was switched to Tylenol #3 at bedtime for 3 days. Five days later, the dentist performed another evaluation of Plaintiff, who was found to have no swelling and an x-ray within the normal limits.

## **II. LEGAL STANDARD**

A motion for summary judgment shall be granted where all of the evidence demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when “a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc.,

369 U.S. 654, 655 (1962). The nonmoving party, however, cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim. Fireman’s Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

### **III. DISCUSSION**

#### **A. Defendants Laurence Roth and Dennis Molyneaux**

The Eighth Amendment to the United States Constitution prohibits “cruel and unusual punishment.” U.S. Const. amend. VII.<sup>2</sup> A plaintiff who alleges, pursuant to § 1983, that a failure to provide medical care in prison violates the Eighth Amendment must demonstrate the defendant’s “deliberate indifference” to the prisoner’s “serious medical need.” Estelle v. Gamble 429 U.S. 97, 104-105 (1976). However, government officials performing discretionary functions are immune from liability for civil damages if their conduct does not violate “clearly established”

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<sup>2</sup> Although Plaintiff’s complaint invokes rights under the Fourth Amendment as well, Plaintiff does not advance any such argument in his Brief, and none is considered by the Court.

constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In addition, a § 1983 claim against individual defendants must be based upon the defendant's personal involvement with the constitutional violation; it may not be imposed upon supervisory individuals vicariously or on grounds of respondeat superior. Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995), Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988), Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). Specifically, a supervising official is not personally liable under § 1983 unless he "participated in violating [plaintiff's] rights ... directed others to violate them, or ... had knowledge of and acquiesced in his subordinates' violations." Baker, 50 F.3d at 1190-91. Furthermore, such claims of participation or involvement must be made with particularity. Rode, 845 F.2d at 1207.

Roth and Molyneaux argue that they are entitled to qualified immunity because their actions did not violate "clearly established" law under Harlow, and that, in any case, they were not deliberately indifferent to Plaintiff's serious medical need under Estelle. However, the Court need not consider these arguments, as they also correctly assert that there are no facts in the record to indicate that either of them had any personal knowledge of or involvement with Plaintiff, his incarceration, or his medical care during his incarceration. In short, there is no involvement on the part of Roth or Molyneaux for which immunity could attach or which might be measured against the standard articulated in Estelle.

Plaintiff apparently concedes this point with regard to Molyneaux, since he makes no argument and sets forth no facts in his Brief with regard to that defendant. Plaintiff's sole argument with regard to Roth is that he was deliberately indifferent to a serious medical need

when he ignored the phone message that Plaintiff's personal dentist left for him. This argument fails. Roth denies receiving any phone call or message from Plaintiff's personal dentist. There is no admissible evidence in the record that such a call was even placed – only Plaintiff's inadmissible hearsay testimony that his personal dentist told him that he called, left a message, and that his call was not returned. Furthermore, this testimony alone, without any further evidence (for example, what the message said) does not demonstrate Roth's knowledge of or involvement with the alleged constitutional violations.

Regardless of whether any other individual was deliberately indifferent to any serious need of the Plaintiff, summary judgment is granted as to Roth and Molyneaux because there is no evidence of their personal knowledge of or involvement with the alleged constitutional violations. There is no evidence at all that either of them “participated in violating [plaintiff's] rights ... directed others to violate them, or ... had knowledge of and acquiesced in his subordinates' violations.” Baker, 50 F.3d at 1190-91.

#### B. Defendants Montgomery County and PHS

As noted above, a plaintiff alleging failure to provide medical care in prison as the basis for a constitutional violation must demonstrate the defendant's “deliberate indifference” to a “serious medical need” of the plaintiff. Estelle, 429 U.S. at 104-105. However, a municipality cannot be held liable for under § 1983 on a theory of respondeat superior solely because it employs a tortfeasor. Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978). Instead, local governments may only be sued where a government policy or custom inflicts injury. Id. at 694. In other words, “municipal liability under § 1983 attaches where – and only where – a deliberate choice is made from among various alternatives” by policymakers. Pembaur v.

Cincinnati, 475 U.S. 469, 483-84 (1986). A claim under § 1983 may be brought alleging either that an injurious government policy or custom is itself unconstitutional, or that the governmental policy or custom was enacted with “deliberate indifference” to its consequences. See, e.g., Oklahoma City v. Tuttle, 471 U.S. 808, 820-824 (1985); Board of the County Comm’rs. v. Brown, 520 U.S. 397, 404-405 (1997). This standard of liability – and not respondeat superior – is also properly applied to private subcontractors of the government, such as PHS. See, e.g., Baird v. Goldstein, No. CIV. A. 95-6920, 1998 WL 221030 at \*5 (E.D. Pa. May 1, 1998), aff’d., 178 F.3d 1278 (3d Cir. 1999); Miller v. City of Philadelphia, No. CIV. A. 95-3578, 1996 WL 683827 at \*3 (E.D. Pa. Nov. 25, 1996).

Montgomery County and PHS assert that the record does not reflect any evidence, even viewed in the light most favorable to the Plaintiff, from which a reasonable jury could find that a policy or custom of either was unconstitutional on its face or amounted to a deliberate indifference to the serious medical need of Plaintiff. As a result, they argue, they cannot be held liable under Monell. Plaintiff apparently concedes this point as to Montgomery County, since he makes no argument and sets forth no facts in his Brief regarding that defendant. With regard to PHS, Plaintiff asserts it maintained an unconstitutional policy or custom that required confiscation of a prisoner’s prescription medications at intake without immediately providing a reasonably adequate substitute, particularly in the case of pain medication for a prisoner such as Plaintiff, who was only a day removed from surgery.<sup>3</sup>

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<sup>3</sup> Throughout Plaintiff’s Brief, he also refers to a variety of omissions or deficiencies regarding the medical care provided to him – for example, that his alleged fainting spell was not taken seriously by the prison nurses, and that he was wrongfully “skipped” for doses of pain medication. There is nothing in the record to indicate, and Plaintiff does not argue in his Brief, that these allegations are related to any policy or custom of Montgomery County or PHS. They are the actions of individual PHS employees, and as such do not form the basis for a claim against either Montgomery County or PHS under Monell.

Plaintiff is only half right. The record reflects that it was PHS' policy (1) to confiscate all prescription medication at intake, both because the prison cannot verify that the medication is in fact what it purports to be, and because certain medications, such as Vicodin, are addictive and have value as contraband in a prison setting; (2) for a nurse to immediately interview and evaluate all prisoners from whom prescription medications are confiscated at intake; and (3) not to prescribe Vicodin in the prison under any circumstances due to its addictive qualities. These are the only relevant policies or customs of PHS on the record. In contrast to Plaintiff's assertions, there is no evidence on the record of a PHS policy or custom that prohibited Plaintiff from receiving replacement prescription pain medication immediately, despite the fact that he did not in fact receive such until the day after his admission.<sup>4</sup> Although there is no evidence that has been brought to the Court's attention regarding the events that occurred at intake in Plaintiff's case, presumably the nurse, in performing her interview of Plaintiff as per PHS policy, decided for whatever reason that Plaintiff did not need replacement prescription pain medication immediately. It is precisely this discretion – since no “deliberate choice to follow a course of action” had apparently been made by policymakers – for which Monell and its progeny prohibit finding PHS liable under § 1983. Pembaur, 475 U.S. at 483-84. As a matter of law, PHS cannot be found liable for the decision not to immediately provide Plaintiff with replacement prescription pain medication; there is no evidence that it is a policy or custom of PHS.

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<sup>4</sup> In fact, the record reveals it is PHS' policy or custom to replace prescription medication immediately if a prisoner's confiscated prescription medication is related to a life-threatening condition.

Examining PHS' policies that are in fact in the record, it is clear that there is no evidence upon which a jury could find that any PHS policy was on its face unconstitutional or demonstrated deliberate indifference to any serious medical need of Plaintiff, even assuming that such a need existed. Plaintiff's prescription medication was confiscated at intake pursuant to PHS policy, but there is no constitutional right to bring outside medication into prison. Furthermore, as recounted above, PHS policy dictated that if prescription medication is confiscated, a nurse is immediately called to interview the prisoner and perform an evaluation, and there is no PHS policy or custom on the record that prohibited replacing Plaintiff's pain medication immediately. Finally, PHS policy effectively barred Plaintiff from receiving his preferred prescription of Vicodin during his incarceration. However, there is no constitutional right to a specific treatment that the prisoner prefers. *See, e.g., Cloud v. Goldberg*, No. CIV. A. 98-4250, 2000 WL 157159 at \*5 (E.D. Pa. Feb. 11, 2000). In any event, PHA policy apparently permitted prescribing Motrin and Tylenol #3, both of which were prescribed for Plaintiff.

The Court notes that no cases cited by Plaintiff in his Brief hold a municipality or its private subcontractor liable at all, let alone under facts similar to this case.

#### **IV. CONCLUSION**

Summary judgment is granted as to Defendants Roth and Molyneaux because there is no evidence of their personal knowledge of or involvement with the alleged constitutional violations. Summary judgment is granted as to Defendants Montgomery County and PHS because Plaintiff has failed to demonstrate, even viewing the facts in the light most favorable to the Plaintiff, how a reasonable jury could conclude that a policy or custom of either was itself unconstitutional or amounted to a deliberate indifference to any serious medical need of Plaintiff.

An appropriate order follows.

