

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

MARGUERITE BUTLER, as Administratrix	:	
of the ESTATE OF TIMOTHY BUTLER Deceased	:	
and for the Benefit of AMANDA HOLT, a minor, the	:	
daughter of TIMOTHY BUTLER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 03-4689
	:	
COUNTY OF BUCKS, et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

MARCH 18, 2005

Plaintiff, Marguerite Butler, individually and as Administratrix of the Estate of Timothy Butler, filed this civil rights suit on behalf of her decedent son, Timothy Butler (“Butler”), who was incarcerated at the Bucks County’s Men’s Community Corrections Center (“MCCC”) and subsequently died at Doylestown Hospital. Plaintiff’s Complaint alleges a violation of 42 U.S.C. § 1983 based upon violations of the Eighth and Fourteenth Amendments of the United States Constitution. Presently before this Court is the Motion for Summary Judgment filed by the County of Bucks, Lewis D. Polk, M.D. (“Polk”), Allen Nesbitt (“Nesbitt”) and Harris Gubernick (“Gubernick”).¹ For the reasons discussed below, Defendants’ Motion for Summary Judgment will be granted.

¹ Counsel for Polk, in his official capacity, joined in the Motion for Summary Judgment. (Doc. No. 24). Polk was the Director of the Bucks County Department of Health, Nesbitt was the Director of the Bucks County Department of Corrections and Gubernick was the Superintendent of the Community Corrections Centers.

I. FACTUAL HISTORY

On July 24, 2001, thirty-five year old Butler was taken into custody at the Bucks County Correctional Facility (“BCCF”). During his intake evaluation on that day, a corrections officer preparing the intake form noted that Butler complained of a bad knee and shoulder. On July 25, 2001, Linda Dunn, R.N. (“Nurse Dunn”) of the Bucks County Department of Health performed Butler’s intake medical history. Nurse Dunn noted Butler’s current medical problems as “strained knees and shoulders.”

On July 26, 2001, Butler was transferred to MCCF because he was deemed a low risk inmate. At MCCF, David Davis, O.D. (“Dr. Davis”) performed an initial physical assessment of Butler on July 31, 2001. After a brief physical exam, Dr. Davis noted that Butler’s physical examination was within normal limits except for the findings of positive anterior cervical lymph nodes and wheezing. At his deposition, Dr. Davis stated that his findings were found serendipitously and Butler did not have any complaints. Dr. Davis assessed Butler’s condition as a sino-pulmonary infection for which he ordered Sudafed, Amoxicillin and a one week follow-up appointment. There is no record that the drugs prescribed by Dr. Davis were administered to Butler.²

On August 7, 2001, Dr. Davis performed a follow-up examination of Butler. In his progress note, Dr. Davis recorded Butler’s blood pressure and made the following notations:

² In the MCCC, a patient is given a supply of the medication to take as directed when a physician orders a prescription medicine. When the patient is given the prescribed medication, he is required to sign a form called *Resident/Medical Staff Contract for Self-Administration of Medication* as acknowledgment of receiving the medication. This self-administration form of medications was not present in Butler’s medical record for the medication prescribed by Davis; thus, there is no record that the medication was, in fact, administered to Butler.

Butler's sinuses were still inflamed bilaterally; examination of Butler's ears showed that his tympanic membrane (eardrum) was slightly bulging, indicating eustachian tube dysfunction; and minimal bilateral wheezing. As a result, Dr. Davis diagnosed a sinus infection and increased the previously prescribed dose of Sudafed, prescribed a tapered dose of Prednisone and noted that x-rays of Butler's sinuses would be necessary if there was no improvement within a seven day period. Dr. Davis also ordered a complete blood count ("CBC") to be drawn in the morning and sent to the laboratory on a STAT (urgent) basis in order to determine whether Butler had a bacterial infection and to rule out a low hemoglobin/hematocrit (a test for anemia). There is documentation showing that the blood test was drawn and sent to Doylestown Hospital laboratory on August 8, 2001, and the laboratory received it at 2:45 p.m. that afternoon. According to Anne Boehringer ("Boehringer"), the corporate designee of Doylestown Hospital, there was no indication on the request form to the laboratory that the test was to be performed on a STAT basis.³ It is recorded that the laboratory obtained the blood test and ran its examination at 3:09 p.m. The blood test was completed at 3:56 p.m. on that same day.

On August 10, 2001, Evelyn Barr, R.N. ("Nurse Barr") saw Butler in the MCCC dispensary three times. Her first contact with Butler was at 5:20 p.m. where she recorded in

³ Boehringer stated that, in the absence of a STAT order, the results of a routine test would be printed automatically early the next day (August 9) and transported to the prison by a hospital courier in the late morning to mid-afternoon. (Pl.'s Resp. Defs.' Mot. Summ. J., Ex. E, p. 14-19). There is no indication in any of the medical records that a nurse at the MCCF or BCCF received the CBC results until August 10, 2001 at 11:20 p.m. Butler's CBC revealed that his white blood cell count was elevated and his hemoglobin and hematocrit were extremely low. Boehringer stated that Doylestown Hospital has a notification process in place where a blood test which was not ordered on a STAT basis requires immediate attention due to the test results. The process is called a critical value list. Regarding the results of Butler's CBC, Boehringer stated that there was nothing on Butler's blood specimen inquiry form which would be on the critical value list.

Butler's medical records that he was complaining about feeling worse. Nurse Barr also recorded that Butler's color was pale, his hands were blanched, and his fingers were cold with no capillary refill. Additionally, she noted that Butler was complaining about the following: coughing up blood tinged mucus; difficulty breathing; dizziness; achy joints; and that he was experiencing episodes of feeling hot, followed by chilled sweats. Nurse Barr noted that Butler had a normal body temperature and clear lungs, but appeared to be restless and in physical distress. She called Lewis J. Brandt, D.O. ("Dr. Brandt") who advised her to give Butler his medications as ordered on August 7, 2001. At this time, Nurse Barr realized that the medications previously prescribed on August 7, 2001 had not been administered to Butler as ordered by Dr. Davis.⁴

Nurse Barr saw Butler for the second time on August 10, 2001 at 9:00 p.m. Nurse Barr noted on Butler's medical chart that he stated that he was feeling slightly better. She advised Butler to continue with his medication, rest, increase his fluid intake and to contact the dispensary if necessary. At 10:55 p.m., Butler returned to the infirmary and Nurse Barr noted that he complained about continuing to cough and he had a tickle in his throat. She also recorded that Butler stated that his joints were not quite as achy, but he was still feeling yucky. Nurse Barr gave Butler cough medication. Later on that night, at 11:20 p.m., Nurse Barr made an entry noting that she called Dr. Brandt regarding the laboratory results of Butler's CBC. She also noted that Dr. Brandt advised her to send Butler to the Emergency Room for evaluation. Butler was sent to the Doylestown Hospital Emergency Room and was subsequently admitted to the Intensive Care Unit. Butler died on August 19, 2001 of pulmonary emboli.

⁴ The only self-administration of medications record in Butler's chart was dated August 10, 2001 and was for the Prednisone that Dr. Davis had ordered on August 7, 2001.

II. STANDARD

Pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment is proper “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56 (c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

Plaintiff concedes that her Section 1983 claims against Polk, in his individual capacity, Nesbitt and Gubernick should be dismissed and, accordingly, Defendants' Motion for Summary Judgment is granted in their favor.⁵ (See Pl.'s Resp. Defs.' Mot. Summ. J.; Tr. 2/25/05, p. 21). As a result, the only remaining Defendants in this action are Polk, in his official capacity, and the County of Bucks.⁶ Plaintiff alleges that the County of Bucks violated Butler's constitutional rights through the following: the existence of an unconstitutional policy or practice which may fairly be said to represent official policy with regard to the deficient medical treatment rendered at MCCC; inadequate training of the nurses administering healthcare at the MCCC amounting to deliberate indifference; lack of proper supervision over Dr. Davis and the nurses in the provision of medical care; a failure to properly provide adequate medical staffing

⁵ Plaintiff's Complaint also named Dr. Brandt as a Defendant. However, Dr. Brandt was dismissed from this action when his Motion to Dismiss was granted as unopposed on November 14, 2003. (Doc. No. 17).

⁶ Plaintiff has sued Polk in his official capacity as the Director of the Bucks County Department of Health. It is noted that "suits against municipal employees in their official capacities are 'treated as claims against the municipal entities that employ these individuals.'" Lakits v. York, 258 F. Supp.2d 401, 405 (E.D. Pa. 2003)(quoting Smith v. Sch. Dist. of Phila., 112 F. Supp.2d 417, 425 (E.D. Pa. 2000)). "This is because, in a suit against a municipal official in his official capacity, the real party in interest is the municipal entity and not the named official." Id. (citations omitted). Thus, "[w]here a suit is brought against a public officer in his official capacity, the suit is treated as if the suit were brought against the governmental entity of which he is an officer." Mitros v. Cooke, 170 F. Supp.2d 504, 506 (E.D. Pa. 2001)(citation omitted). Since Plaintiff has directly sued the County of Bucks under Section 1983, the official capacity suit asserted against Polk is treated as being brought against the County of Bucks.

Defendants raise the defense of qualified immunity. It is noted that "[n]either governmental agencies nor individuals sued in their official capacity are accorded qualified immunity." Duffy v. County of Bucks, 7 F. Supp.2d 569, 581-82 (E.D. Pa. 1998). In light of the fact that the County of Bucks is the sole remaining Defendant, and since there are no more claims asserting individual capacity suits against any Defendant, Defendants' argument regarding qualified immunity is moot.

which rose to the level of deliberate indifference; and a failure to adopt adequate policies and procedures to ensure that STAT laboratory tests were drawn and followed up based on a STAT basis. Viewing the underlying facts and all reasonable inferences in favor of Plaintiff, examination of Plaintiff's evidence reveals that her Section 1983 claim fails as a matter of law. To begin, Plaintiff has not established a constitutional violation by making the requisite showing of deliberate indifference. Even if Plaintiff successfully established a constitutional violation, she has not made the necessary showing of scienter-like indifference on the part of a particular policymaker or policymakers required to hold the County of Bucks directly liable for such constitutional violation.⁷

A. Section 1983

Plaintiff has directly sued the County of Bucks under Section 1983 for violation of

⁷ In addition, Plaintiff's claims against the County of Bucks for failure to train and supervise do not survive scrutiny. "'Failure to train' claims are analyzed as a species of 'custom or practice' liability." Owens v. City of Phila., 6 F. Supp.2d 373, 387 (E.D. Pa. 1998)(citations omitted). "A municipality may be liable under § 1983 for a failure to train subordinate officers only where such failure reflects a policy of deliberate indifference to the constitutional rights of citizens." Garcia v. County of Bucks, 155 F. Supp.2d 259, 268 (E.D. Pa. 2001)(citations omitted). "The same standard applies to claims of inadequate supervision." Id. (citation omitted). In order "[t]o maintain such a claim, a plaintiff must show that a responsible municipal policymaker had contemporaneous knowledge of the offending occurrence or knowledge of a pattern of prior incidents of similar violations of constitutional rights and failed to take adequate measures to ensure the particular right in question or otherwise communicated a message of approval to the offending subordinates." Id. (citations omitted). In the instant action, viewing all evidence in a light favorable to Plaintiff and making all reasonable inferences in Plaintiff's favor, Plaintiff's failure to train and supervise claims fail because she has not shown that a responsible municipal policymaker had contemporaneous knowledge of the offending occurrence or knowledge of a pattern of prior incidents of similar violations of constitutional rights and failed to take adequate measures to ensure the particular right in question or otherwise communicated a message of approval to the offending subordinates. Although Plaintiff's failure to train and supervise claims fail, my analysis of Plaintiff's Section 1983 policy, practice or custom claims illustrates the ways in which all of Plaintiff's claims against the County of Bucks do not succeed.

the Eighth and Fourteenth Amendments. “To establish a valid claim under 42 U.S.C. § 1983, the plaintiff must establish by a preponderance of the evidence that the conduct of which he complains was committed by one acting under color of state law and that it deprived him of rights, privileges, or immunities guaranteed by the Constitution.” McCabe v. Prison Health Sys., 117 F. Supp.2d 443, 448 (E.D. Pa. 1997)(citations omitted). For purposes of Section 1983, the County of Bucks is a state actor and Plaintiff alleges that it deprived Butler of his Eighth and Fourteenth Amendment rights by exhibiting deliberate indifference to his serious medical needs.

1. Constitutional Violation

“[O]nly ‘unnecessary and wanton infliction of pain’ or ‘deliberate indifference to the serious medical needs’ of prisoners are sufficiently egregious to rise to the level of a constitutional violation.” Spruill v. Gillis, 372 F.3d 218, 235 (3d Cir. 2004)(quoting White v. Napoleon, 897 F.2d 103, 108-09 (3d Cir. 1990)). “In order to establish an Eighth Amendment (and Fourteenth Amendment) violation a plaintiff must demonstrate that there was a deliberate indifference [on the part of the State] to serious medical needs of prisoners.”⁸ Reynolds v. Wagner, 128 F.3d 166, 174 (3d Cir. 1997), *aff’d*, 128 F.3d 166 (3d Cir. 1997). “[T]o establish a

⁸ Plaintiff’s Complaint includes an allegation that “Defendants’ failure to ensure that Mr. Butler would receive medical care under circumstances establishing a special relationship constitute a violation of Mr. Butler’s right to substantive due process under the 14th Amendment to the U.S. Constitution.” (Compl. ¶ 34). Although Plaintiff’s Complaint includes an allegation of a violation of Butler’s Fourteenth Amendment rights, it appears that she has proceeded solely upon the basis that Butler’s Eighth Amendment rights were violated. Even if Plaintiff had proceeded upon her Fourteenth Amendment violation claim, it would not succeed because she has not shown any substantive due process violation. My analysis of Plaintiff’s action applies with equal force to any claim that she may assert pursuant to the Fourteenth Amendment. The United States Court of Appeals for the Third Circuit (“Third Circuit”) has “noted previously that the Due Process Clause provides at a minimum, no less protection than is provided by the Eighth Amendment.” Natale v. Camden County Corr. Facility, 318 F.3d 575, 581 n.5 (3d Cir. 2003)(quotation and internal quotation marks omitted).

violation of [a person's] constitutional right to adequate medical care, evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need.” Natale, 318 F.3d at 582 (citation omitted). Defendants do not contest that Butler suffered from a serious medical need. (Tr. 2/25/05, p. 11). The issue, therefore, is whether Plaintiff can establish that the County of Bucks itself was deliberately indifferent to Butler's serious medical need through the acts or omissions by its policymakers.⁹

a. Deliberate Indifference

“Deliberate indifference is a ‘subjective standard of liability consistent with recklessness as that term is defined in criminal law.’” Natale, 318 F.3d at 582 (quoting Nicini v. Morra, 212 F.3d 798, 811 (3d Cir. 2000)). “[F]inding a prison official [or employee] liable for violating a prisoner's Eighth Amendment rights requires proof that the official [or employee] ‘knows of and disregards an excessive risk to inmate health or safety.’” Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). “He must be ‘both [] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . draw the inference.’” Id. (quoting Farmer, 511 U.S. at 837). In order to survive a motion for summary judgment based upon this issue, “the [Plaintiff] must point to some evidence beyond [his or her] raw claim that [prison employees] w[ere] deliberately indifferent,’ or put another way, some evidence ‘that [prison employees] knew or w[ere] aware of [the risk to Plaintiff].’” Id. (quoting Singletary v. PA Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2003)). Deliberate indifference

⁹ It is noted that only the question of whether Plaintiff has shown a violation of a constitutional right would be resolved if she produced evidence that prison employees were deliberately indifferent to Butler's serious medical needs. Whether the County of Bucks itself can be held liable for the violation of that right remains to be shown. See Part III.B.2.

in claims involving inadequate medical care has been found “where there was objective evidence that [a] plaintiff had serious need for medical care, and prison officials ignored that evidence . . . and where necessary medical treatment is delayed for non-medical reasons.” Id. (quotations and internal quotation marks omitted).

“In the context of a deliberate indifference claim based on failure to provide adequate medical treatment, ‘[i]t is well-settled that claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute ‘deliberate indifference.’”

Singletary, 266 F.3d at 192 n.2 (quoting Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999)).

“A prisoner’s claims of negligent diagnosis or treatment, do not rise to the level of deliberate indifference.” Bednar v. County of Schuylkill, 29 F. Supp.2d 250, 253 (E.D. Pa. 1998)(citing

Estelle v. Gamble, 429 U.S. 97, 105- 07 (1976)(finding that ‘in the medical context, . . . 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’); Parham v.

Johnson, 126 F.3d 454, 458 n.7 (3d Cir. 1997)(recognizing ‘well-established law in this and virtually every circuit that actions characterizable as medical malpractice do not rise to the level of ‘deliberate indifference’); Durmer v. O’Carroll, 991 F.2d 64, 67 (3d Cir. 1993)(same)).

“Further, a doctor’s decision not to order specific forms of diagnostic treatment, an x-ray for example, constitute medical judgment, which is not actionable.” Bednar, 29 F. Supp.2d at 253

(citing Estelle, 429 U.S. at 107). “The Third Circuit has stated that ‘[w]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgment and to constitutionalize claims

which sound in state tort law.’” Id. (quoting United States ex rel. Walker v. Fayette County, PA,

599 F.2d 573, 575 n. 2 (3d Cir. 1979)). “A disagreement between the doctor and the plaintiff as to the medical diagnosis and treatment does not constitute deliberate indifference.” Id. (citations omitted).

2. Monell

During oral argument regarding Defendants’ Motion for Summary Judgment, Plaintiff’s counsel acknowledged that this action directly asserted against the County of Bucks is based solely upon a Monell claim. (Tr. 2/25/05, p. 20-21, 27). In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), the United States Supreme Court held “that local governing bodies, although not subject to respondeat superior liability, may be sued directly under section 1983 for constitutional injuries arising from the implementation of municipal policies or customs.” Simmons v. City of Phila., 947 F.2d 1042, 1058 (3d Cir. 1991)(citing Monell, 436 U.S. at 694). “[A] municipality may not be held liable under § 1983 under a theory of respondeat superior, or simply because it employs a tortfeasor.” O.F. ex rel. N.S. v. Chester Upland Sch. Dist., 246 F. Supp.2d 409, 421 (E.D. Pa. 2002)(citation omitted). “A public entity such as Bucks County may be held liable for the violation of a constitutional right under 42 U.S.C. § 1983 only when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy.” Reitz v. County of Bucks, 125 F.3d 139, 144 (3d Cir. 1997)(citing Monell, 436 U.S. at 690-91).

“To establish municipal liability under Monell, a plaintiff must identify the challenged policy, [practice, or custom,] attribute it to the [municipality] itself, and show a causal link between the execution of the policy, [practice, or custom,] and the injury suffered.” Beswick

v. City of Phila., 185 F. Supp.2d 418, 427 (E.D. Pa. 2001)(quotation and internal quotation marks omitted). “In addition, plaintiffs must ‘present scienter-like evidence of indifference on the part of a particular policymaker or policymakers.’” Id. (quoting Simmons, 947 F.2d at 1060-61). “The Third Circuit has held that plaintiffs can establish liability based solely on a municipal policy or custom if the plaintiffs have both connected the policy to a constitutional injury and adduced evidence of scienter on the part of a municipal actor with final policymaking authority in the areas in question.” Hansberry v. City of Phila., 232 F. Supp.2d 404, 412 (E.D. Pa. 2002)(quotation and internal quotation marks omitted). “The requirement of producing scienter-like evidence on the part of an official with policymaking authority is consistent with the conclusion that ‘absent the conscious decision or deliberate indifference of some natural person, a municipality, as an abstract entity, cannot be deemed to have engaged in a constitutional violation by virtue of a policy, a custom or failure to train.’” Beswick, 185 F. Supp.2d at 427 (quoting Simmons, 947 F.2d at 1063).

B. Analysis

Viewing the underlying facts and all reasonable inferences therefrom in the light most favorable to Plaintiff, I conclude that summary judgment must be granted in the favor of the County of Bucks.¹⁰ Plaintiff’s Section 1983 claim must be dismissed based upon the following

¹⁰ During oral argument, the issue of whether hearsay evidence could be considered on a motion for summary judgment was raised. (Tr. 2/25/05, p. 17-19). Specifically, Plaintiff’s counsel requested that the Court consider hearsay evidence concerning the issue of whether Butler was coughing up blood during his incarceration which was not recorded in his prison medical records. (Id.). While Plaintiff’s counsel is correct that hearsay statements may be considered in deciding a summary judgment motion, it is noted that “the rule in this circuit is that hearsay statements can be considered on a motion for summary judgment if they are capable of being admissible at trial.” Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1275 n.17 (3d Cir. 1995))(citations omitted); see also Shelton v. Univ. of Med. and Dentistry, N.J.,

two grounds: (1) Plaintiff fails to make the requisite showing of deliberate indifference to establish a constitutional violation and (2) Plaintiff fails to produce the scienter-like evidence of indifference on the part of Polk, or any policymaker, that is required to hold the County of Bucks directly liable. I will address these grounds *seriatim*.

1. Constitutional Violation

Primarily relying upon Butler's medical records and two expert reports, Plaintiff contends that she has adduced sufficient evidence of the following: the existence of an unconstitutional policy or practice which may fairly be said to represent official policy with regard to the deficient medical treatment rendered at MCCC; inadequate training of the nurses administering healthcare at the MCCC amounting to deliberate indifference; lack of proper supervision over Dr. Davis and the nurses in the provision of medical care; a failure to properly provide adequate medical staffing which rose to the level of deliberate indifference; and a failure to adopt adequate policies and procedures to ensure that STAT laboratory tests were drawn and followed up based on a STAT basis. Viewing all reasonable inferences in favor of Plaintiff, examination of Plaintiff's evidence reveals that she fails to establish a constitutional violation by showing deliberate indifference on the part of the medical staff or officials of MCCC and BCCF.

223 F.3d 220, 223 n.2 (3d Cir. 2000)(same); Robinson v. Hartzell Propeller Inc., 326 F. Supp.2d 631, 645 (E.D. Pa. 2004). Since there is no suggestion of record that Plaintiff intended to, or would be able to, offer admissible evidence to support the hearsay evidence at issue, I will not weigh the hearsay evidence in my consideration of Defendants' Motion for Summary Judgment. In any event, consideration of the hearsay evidence would not affect the outcome of this action because it does not, and cannot, touch upon the absence of the scienter-like evidence of the state of mind of Polk, or any policymaking official, regarding a County of Bucks' policy, custom or practice (or failure to train or supervise). Thus, Plaintiff would still be unable to meet the deliberate indifference standard for directly subjecting the County of Bucks to Section 1983 liability by failing to present scienter-like evidence of indifference on the part of a particular policymaker or policymakers.

Plaintiff has not shown that any of the medical staff or prison officials knew of and disregarded an excessive risk to Butler's health. There is no evidence that any of the medical staff or prison officials were aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and such an inference was actually drawn. While mistakes were made, and the consequences were tragic, the deliberate indifference analysis does not focus on the standard for negligence, medical malpractice or medical choices which in hindsight appear to be wrong. See Dimitirs v. Lancaster County Prison Bd., No. 00-3739, 2002 WL 32348283, at *6-7 (E.D. Pa. June 7, 2002)(a prison suicide case acknowledging that the standard for negligence or malpractice is not the standard for liability under Section 1983 and stating that "[t]he prison and its officials made choices which in hindsight appear to be wrong, but what is important is that they made choices").

Plaintiff relies upon two expert reports addressing the issue of deliberate indifference regarding the medical care administered to Butler; however, neither report, nor any evidence proffered by Plaintiff, shows the subjective recklessness or a conscious disregard regarding a substantial risk of harm necessary to establish deliberate indifference. The record reveals that the prison medical staff were actively treating Butler. While Plaintiff's evidence and the record shows that Butler may have received negligent care, "[d]eliberate indifference requires a state of mind more blameworthy than negligence." Wright v. O'Hara, No. 00-1557, 2002 WL 1870479, at *7 (E.D. Pa. Aug. 14, 2002)(citing Farmer, 511 U.S. at 835). Thus, the evidence does not show that the prison medical staff or officials knew of and disregarded, recklessly or otherwise, an excessive risk to Butler's health. As a result, I conclude that Plaintiff has failed to make the requisite showing of deliberate indifference to establish a constitutional violation.

Without establishing a constitutional violation, Plaintiff's Section 1983 fails as a matter of law. Accordingly, summary judgment is granted in favor of the County of Bucks.

2. Monell

Assuming, *arguendo*, that Plaintiff has presented more than conclusory evidence of a constitutional violation, she still has not presented the requisite scienter-like evidence of indifference on the part of a particular policymaker or policymakers in order to hold the County of Bucks directly liable for a deprivation of Butler's Eighth and Fourteenth Amendment rights. Thus, even when reading Plaintiff's Section 1983 claim in the most forgiving light, it does not state a cause of action for which relief can be granted against the County of Bucks.

As previously explained, with the exception of the official capacity claim against Polk, Plaintiff has consented to the dismissal of all of the individual Defendants in this action. Since the official capacity suit asserted against Polk is treated as being brought against the County of Bucks, the only remaining Defendant in this action is the County of Bucks. Arguing that the County of Bucks directly deprived Butler of his constitutional rights, Plaintiff is not only required to identify the challenged policy, practice, or custom, attribute it to the County of Bucks itself, and show a causal link between the execution of the policy, practice or custom, and the injury suffered, but she is also required to present scienter-like evidence of indifference on the part of a particular policymaker or policymakers.

It appears that the only policymaker identified by Plaintiff in relation to the issue of deliberate indifference is Polk. Plaintiff states that "Dr. Polk, in his official capacity as the Director of Bucks County Department of Health, was ultimately responsible for establishing policies and procedures for the delivery of healthcare at the MCCC and BCCF." (Pl.'s Mem.

Law Supp. Pl.’s Resp. Defs.’ Mot. Summ. J. at 8). Plaintiff relies upon Polk’s directory role to show that he was ultimately responsible for establishing policies and procedures for the delivery of healthcare at the MCCC and BCCF; however, she also points to his lack of knowledge regarding the policies and procedures for the delivery of healthcare at MCCC and BCCF as grounds for his deliberate indifference. For instance, Plaintiff states “[d]espite his role as the Director of the Bucks County Department of Health, Dr. Polk had no knowledge of staffing levels in the MCCC” and “[h]e was not involved in any discussions or setting of policy concerning the communication of medical information between nurses at the MCCC and nurses at the BCCF.” (Id.). Although Plaintiff relies upon Polk’s lack of knowledge as grounds for deliberate indifference, it is his lack of knowledge regarding Butler’s case and his lack of knowledge pertaining to the policies and practices at MCCC and BCCF which shows the absence of the requisite scienter-like evidence on the part of a policymaker that is needed to establish liability against the County of Bucks.

Examination of Polk’s deposition testimony reveals that he was not directly in charge of supervising the prison healthcare system. (Doc. No. 29). At the time of Butler’s incarceration, Polk explained that Barbara Schellhorn (“Schellhorn”), Director of Personal Health Services, had the prison health services as part of her responsibility. (Id., p. 19-20). Polk stated that Schellhorn reported to him and she, in turn, had a supervising nurse at the prison report to her. (Id., p. 20-21). Polk explained that the supervising nurse had an administrative executive role equivalent to the title of the director of prison health services. (Id., p. 21-22). Polk further explained that Schellhorn and the supervising nurse would most likely have knowledge regarding the policies, procedures and practices regarding communication between

shifts for nursing and issues surrounding medication administration record keeping. (Id., p. 44-45).

In relation to the instant action, Polk stated that he did not have any personal knowledge of the case. (Id., p. 22). According to Polk, no one has ever reported problems to him that they recognized in relation to Butler's case in so far as they concern the Bucks County Department of Health's policies and procedures at BCCF. (Id., p. 22-23). Additionally, Polk denied any knowledge or involvement in the following: the methods of communication utilized by nurses changing shifts regarding blood tests ordered on a STAT basis; the development of policies, procedures or practices concerning communication between nurses regarding blood test ordered on a STAT basis; the policies for reporting the results of blood tests performed at Doylestown Hospital to the healthcare professionals at BCCF; training of nurses on policies set forth in the prison health manuals; and personal review of whether the staffing levels at MCCC were adequate given the number of inmates. (Id., p. 23-45).

As evidenced by Polk's deposition testimony and the record, Plaintiff has not produced any evidence that Polk, or any policymaker for the County of Bucks, had any knowledge about an unconstitutional policy or practice regarding the following: deficient medical treatment at BCCF or MCCC; inadequate training of nurses; lack of proper supervision over Dr. Davis and the nurses; a failure to provide adequate medical staffing; and a failure to adopt adequate policies and procedures ensuring that STAT laboratory tests were drawn and followed up on a STAT basis. Likewise, there is also no evidence concerning the ignoring of these issues by Polk, or any County of Bucks policymaker, causing Butler's injury. Plaintiff does not present any evidence pertaining to scienter-like evidence of the state of mind of Polk, or any

policymaking official, regarding a municipal policy, custom or practice (or failure to train or supervise). Absent such evidence of a policymaker's authorization of a policy or knowledge of a problem and scienter-like indifference to it, Plaintiff cannot establish the essential link from a County of Bucks' policy or custom to any constitutional violation suffered by Butler. There is evidence that the prison doctors and nurses may have erred and made unsound choices, but the scienter-like evidence of a County of Bucks' policymaker is woefully absent. Without such scienter-type evidence, no reasonable jury could find that the County of Bucks acted with deliberate indifference to Butler's constitutional rights. Consequently, Plaintiff has not met her burden of presenting evidence to establish every element of a claim for direct municipal liability under Section 1983. Thus, Defendants' Motion for Summary Judgment is granted in favor of the County of Bucks.

An appropriate Order follows.

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

MARGUERITE BUTLER, as Administratrix	:	
of the ESTATE OF TIMOTHY BUTLER Deceased	:	
and for the Benefit of AMANDA HOLT, a minor, the	:	
daughter of TIMOTHY BUTLER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 03-4689
	:	
COUNTY OF BUCKS, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of March, 2005, upon consideration of the Motion for Summary Judgment filed by the County of Bucks, Lewis D. Polk, M.D., Allen Nesbitt and Harris Gubernick (Doc. No. 23), Plaintiff's Response thereto, arguments made during oral argument conducted on February 25, 2005, and all other submissions made to the Court, it is hereby

ORDERED that:

1. summary judgment is **GRANTED** in favor of Polk, in his individual capacity, Gubernick and Nesbitt due to the consent Plaintiff and
2. summary judgment is **GRANTED** in favor of Polk, in his official capacity, and the County of Bucks.

BY THE COURT:

s/ Robert F. Kelly _____
Robert F. Kelly, Sr. J.