

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

JESSICA E. WOLFE : CIVIL ACTION
V. : NO. 97-3114
PETER BADDICK, D.O., et al. :

MEMORANDUM OF LAW OF PETER J. BADDICK, III, D.O. IN SUPPORT
OF HIS MOTION FOR SUMMARY JUDGMENT

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

JESSICA E. WOLFE : CIVIL ACTION
V. : NO. 97-3114
PETER BADDICK, D.O., et al. :

ORDER

AND NOW, this day of , 2000, it is hereby ORDERED that the Motion for Summary Judgment of Peter J. Baddick, III, D.O. is GRANTED and judgment is entered in his favor and against Jessica E. Wolfe on all claims set forth in the Amended Complaint of Jessica E. Wolfe in the above-captioned matter.

THE HONORABLE ANITA BRODY,
UNITED STATES DISTRICT JUDGE

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

JESSICA E. WOLFE : CIVIL ACTION
V. : NO. 97-3114
PETER BADDICK, D.O., et al. :

MOTION OF PETER J. BADDICK, III, D.O. FOR SUMMARY JUDGMENT

Peter J. Baddick, III, D.O. (“Baddick”) respectfully requests that this Court grant his motion for summary judgment against Jessica E. Wolfe (“Wolfe”) and states in support thereof the following:

1. Wolfe, an inmate currently incarcerated at the State Correctional Institution at Mahanoy (“SCI-Mahanoy”), has filed an amended complaint pursuant to 42 U.S.C. §1983 contending that John Mitchell Hume, M.D. (“Hume”), a psychiatrist, Louis Martin, M.D. (“Martin”), a psychiatrist, Martin L. Loske, D.O. (“Loske”), and Peter J. Baddick, III, D.O. (“Baddick”), a physician who was an internist, violated his constitutional rights to adequate medical care pursuant to the Eighth and Fourteenth Amendment of the United States Constitution by failing to provide her with hormone therapy for a psychiatric disorder known either as gender dysphoria or transsexualism. See Exhibit “K”, amended complaint.

2. Count I of the amended complaint attempts to state a cause of action against all of the defendants, including Baddick, based upon deliberate indifference to the serious medical needs of Wolfe. Wolfe contends that all of the defendants violated her Eighth Amendment rights by withdrawing her hormone therapy treatments, or approving the decision to withdraw those treatments or by refusing to authorize hormone therapy treatments after another physician had withdrawn them.¹ See Exhibit

¹ Throughout this motion Baddick refers to Jessica Wolfe in the feminine as a courtesy to Jessica Wolfe. Baddick does not admit that Jessica Wolfe is a biological woman. Jessica Wolfe is a man.

“K”, paragraph 55.

3. Count II of the amended complaint relies upon Article I, Section 13 of the Pennsylvania Constitution which contains a prohibition against the infliction of cruel punishment. Essentially Wolfe reasserts the same claim as contained in Count II under the umbrella of the Pennsylvania Constitution. See Exhibit “K”, Count II.

4. Count III of the amended complaint alleges that all of the defendants, including Baddick, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by engaging in discriminatory conduct against Wolfe because she is a transsexual. Exhibit “K”, Count III, pp. 65-70.

5. Count IV of the amended complaint attempts to assert a medical malpractice complaint against Baddick, Loske, Martin and Hume based upon Pennsylvania common law. Exhibit “K”, Count IV.

6. Baddick has filed a motion for summary judgment relying on several different grounds. First, 42 U.S.C. §1997e(e) of the Prison Litigation Reform Act of 1996, bars Wolfe’s causes of action based on federal grounds because Wolfe has not shown sufficient evidence to support a jury verdict on the issue of his seeking compensation for a physical injury. Instead, Wolfe contends only that Baddick caused her minor mental or emotional injury. Exhibit “K”, pp. 106-107. 42 U.S.C. §1997e(e) provides:

Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

7. Wolfe conceded under oath at her deposition that Baddick’s refusal to prescribe hormone therapy did not cause her any physical harm. Exhibit “C”, pp. 106-107. The vast majority of federal courts to consider the issue have concluded that inmate plaintiffs who submit evidence similar to Wolfe’s in this case have no cause of action because they seek recovery for mental or emotional injury suffered while in

custody without a prior showing of physical injury.

8. In McGrath v. Mahanoy Counselor John L. Johnson, 67 F.Supp. 2d 499 (E.D. Pa. 1999) the Honorable Lowell A. Reed, Jr. of this Court concluded that asserting that an alleged constitutional violation caused an emotional trauma which manifested itself by causing a pre-existing skin condition to become inflamed failed to satisfy the statutory pre-requisite of 42 U.S.C. §1997e(e) that a plaintiff inmate make a showing of a prior physical injury from the defendant's conduct. Id. at 507. See Cain v. Commonwealth of Virginia, 982 F.Supp. 1132, 1135 n. 3 (E.D. Va. 1997)(headaches causing vision loss and requiring pain medication as well as numbness, joint pain and stomach cramps are not a physical injury within the scope of 42 U.S.C. §1997e(e)).

9. A second reason exists which supports the grant of Baddick's motion for summary judgment concerning Wolfe's claim based on 42 U.S.C. §1983. In order to defeat the motion for summary judgment of Baddick, Wolfe must submit sufficient evidence to support a jury verdict in her favor on the issue of Baddick having acted with subjective knowledge that his conduct or omissions presented a substantial risk of harm to Wolfe and that Baddick proceeded with this conduct or failure to act any way. Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 1979 (1994). An examination of the record shows that Wolfe has produced insufficient evidence on this issue to support a jury verdict in her favor.

10. Baddick had no involvement in the decision to stop the hormone therapy of Wolfe at the State Correctional Institution at Camp Hill ("SCI-Camp Hill"). See deposition of Wolfe, Exhibit "B", Part 2, p. 67. Wolfe admits this. Exhibit "B", p. 67. Wolfe has indicated that she believed that Baddick had good intentions concerning his treatment of her. Exhibit "B", p. 93. Wolfe testified at her deposition that she had no idea whether Baddick knew that his treatment of her was calculated to cause substantial harm to her. Exhibit "B", p. 94.

11. No evidence exists to rebut Baddick's contention that he believed that hormone therapy was not medically required. Exhibit "B", p. 95. Baddick, an internist, relied upon the opinions and recommendations of Arthur Boxer, M.D. ("Boxer"), a psychiatrist at SCI-Mahanoy, the opinion and recommendations of Harold Heckman, M.D. ("Heckman"), a psychiatrist at SCI-Mahanoy, the opinions and recommendations of Jeffrey Sarnoff, M.D. ("Sarnoff"), a psychiatrist at SCI-Mahanoy, and the opinions and recommendations of Louis Martin, M.D. ("Martin"), a psychiatrist at SCI-Mahanoy. Baddick, an internist, depended upon the expertise of these four psychiatrists. Exhibit "C", pp. 39 and 43. Baddick, an internist, had no reason to disregard the opinion of these four psychiatrists. None of the four psychiatrists ever recommended hormone therapy or cross dressing for Wolfe. No indication exists that Baddick ever refused to accept any proposal for therapy submitted by any of the four psychiatrists for Wolfe. No indication exists that Baddick ever interfered with the therapy that the four psychiatrists provided to Wolfe.

12. Yet a third reason exists which requires this Court to grant summary judgment in favor of Baddick and against Wolfe concerning Wolfe's claims based on 42 U.S.C. §1983 including the equal protection claim of Wolfe and the deliberate indifference claim of Wolfe. Baddick has established a good faith defense which defeats the cause of action of Wolfe based on 42 U.S.C. §1983. The United States Court of Appeals for the Third Circuit in Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) has indicated that in order to overcome a good faith defense the plaintiff must establish that a private actor had a subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. Wolfe has no evidence on this issue, let alone sufficient evidence to support a jury verdict in her favor.

13. Wolfe has failed to establish any evidence sufficient to support a jury

verdict in her favor concerning her claim that Baddick has violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Wolfe has failed to indicate how Baddick treated inmates who were not transsexuals different than he treated Wolfe. No evidence exists that any inmate at SCI-Mahanoy ever received hormone therapy. No indication exists that Baddick relied upon any state regulation or rule that limited the access of transsexual inmates to any type of medical care. Even if such a rule existed Baddick indicated that he did not know about. He never relied upon it in providing medical treatment to Wolfe or anyone else. Exhibit "C", p. 68.

14. Wolfe has failed to state a cause of action pursuant to Article I, Section 13 of the Pennsylvania Constitution as a matter of law. This provision does not provide a basis for the award of damages. No court interpreting Pennsylvania law has ever held that it does. Even if this Court concludes that it does, Wolfe has not established that Baddick believed that his conduct toward Wolfe presented a substantial risk of harm to Wolfe.

15. The Commonwealth Court interpreting Article I, Section 13 has concluded that the standard utilized to determine whether a violation of Article I, Section 13 occurs constitutes the same standard as utilized by the Supreme Court of the United States in Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1979 (1994). Jochen v. Horn, 727 A.2d 645, 649 (Pa. Cmwlth. 1999).

16. Wolfe has failed to submit sufficient evidence to support a jury verdict in her favor on the issue of her medical malpractice claim against Baddick. To establish medical malpractice she must present expert testimony that shows that Baddick's conduct failed to meet the required standard of care and that this failure constituted a substantial factor causing the injury for which Wolfe seeks compensation. Wolfe relies upon the expert testimony of Charles Moser, Ph.D., M.D. ("Moser") and Maureen Osborne, Ph.D. ("Osborne"). Neither of these individuals in their expert reports ever

deal with the issue of causation. They never indicate that anything that Baddick did or failed to do constituted a substantial factor in causing harm to Wolfe. They hold him responsible for the actions of the psychiatrists at SCI-Mahanoy. No evidence exists that Baddick had control over the decision making of the psychiatrists. He never functioned as their employer. No respondeat superior liability applies.

17. Osborne never identifies any deviation from the standard of care by Baddick. Osborne, a psychologist, never indicates that she has sufficient knowledge or experience to provide an expert opinion as to the standard of care applicable to an internist. Moser, a psychiatrist, never indicates that he has sufficient knowledge to provide an expert opinion as to the standard of care applicable to an internist.

18. Wolfe impermissibly attempts to impose liability upon Baddick for referring her to four different psychiatrists for treatment. Once the referral took place Baddick had no further duty toward Wolfe concerning the psychiatric treatment she received. In Estate of Hannis by Hannis v. Ashland State General Hospital, 123 Pa. Cmwlth. 390, 554 A.2d 754 (1989) app'l den., 524 Pa. 632, 574 A.2d 73 (1989) the Commonwealth Court concluded that Pennsylvania law did not impose any duty upon a family physician to supervise the care of a patient once he referred that patient to a specialist. That analysis applies here and defeats Wolfe's common law medical malpractice claim against Baddick. See Weidner v. Nassau, 28 D&C 4th 269 (1993) aff'd. 436 Pa. Super. 658, 647 A.2d 274 (1994)(physician who refers patient to a specialist is not liable under a theory of negligent referral as a result of the alleged negligence of the specialist).

19. Baddick has no responsibility for the actions of any of the psychiatrists at SCI-Mahanoy since he did not function as their employer. He had no ability to control the work that they did or the manner of performing it. No indication exists from the evidence that the psychiatrists at SCI-Mahanoy performed their professional work for his benefit. To create a jury issue on the question of Baddick functioning as the master

of the psychiatrists at SCI-Mahanoy for purposes of respondeat superior liability Wolfe must produce sufficient evidence to establish that Baddick had the right to control how the work was done by the psychiatrists and the manner of their performing it. Wolfe also must establish that the psychiatrists performed their work on the business of Baddick or for his benefit. See Strain v. Ferroni, 405 Pa. Super. 349, 357, 592 A.2d 698, 703 (1991).

20. Baddick incorporates by reference as if set forth herein in full his brief in support of his motion for summary judgment.

WHEREFORE, Peter J. Baddick, III, D.O. respectfully requests that his motion for summary judgment be granted and that judgment be entered in his favor and against Jessica E. Wolfe on all claims of Jessica E. Wolfe set forth in her amended complaint in this case.

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MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Jessica E. Wolfe (“Wolfe”) an inmate currently incarcerated at the State Correctional Institution at Mahanoy (“SCI-Mahanoy”) has filed an amended complaint pursuant to 42 U.S.C. §1983 contending that John Mitchell Hume, M.D. (“Hume”), a psychiatrist, Louis Martin, M.D. (“Martin”), a psychiatrist, Martin L. Loske, D.O. (“Loske”), and Peter J. Baddick, III, D.O. (“Baddick”), a physician who was an internist, violated his constitutional rights to adequate medical care pursuant to the Eighth and Fourteenth Amendment of the United States Constitution by failing to provide her with hormone therapy for a psychiatric disorder known either as gender dysphoria or transsexualism. See Exhibit “K”, amended complaint.

Count I of the amended complaint attempts to state a cause of action against all of the defendants, including Baddick, based upon deliberate indifference to the serious medical needs of Wolfe. Wolfe contends that all of the defendants violated her Eighth Amendment rights by withdrawing her hormone therapy treatments, or approving the decision to withdraw those treatments or by refusing to authorize hormone therapy treatments after another physician had withdrawn them.² See Exhibit “K”, paragraph 55.

² Throughout this brief Baddick refers to Jessica Wolfe in the feminine as a courtesy to Jessica Wolfe. Baddick does not admit that Jessica Wolfe is a biological woman. Jessica Wolfe is a man.

Count II of the amended complaint relies upon Article I, Section 13 of the Pennsylvania Constitution which contains a prohibition against the infliction of cruel punishment. Essentially Wolfe reasserts the same claim as contained in Count II under the umbrella of the Pennsylvania Constitution. See Exhibit "K", Count II.

Count III of the amended complaint alleges that all of the defendants, including Baddick, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by engaging in discriminatory conduct against Wolfe because she is a transsexual. Exhibit "K", Count III, pp. 65-70.

Count IV of the amended complaint attempts to assert a medical malpractice complaint against Baddick, Loske, Martin and Hume based upon Pennsylvania common law. Exhibit "K", Count IV.

Baddick has filed a motion for summary judgment relying on several different grounds. First, 42 U.S.C. §1997e(e) of the Prison Litigation Reform Act of 1996, bars Wolfe's causes of action based on federal grounds because Wolfe has not shown sufficient evidence to support a jury verdict on the issue of his seeking compensation for a physical injury. Instead, Wolfe contends only that Baddick caused her minor mental or emotional injury. Exhibit "K", pp. 106-107. 42 U.S.C. §1997e(e) provides:

Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Wolfe conceded under oath at her deposition that Baddick's refusal to prescribe hormone therapy did not cause her any physical harm. Exhibit "C", pp. 106-107. The vast majority of federal courts to consider the issue have concluded that inmate plaintiffs who submit evidence similar to Wolfe's in this case have no cause of action because they seek recovery for mental or emotional injury suffered while in custody without a prior showing of physical injury.

In McGrath v. Mahanoy Counselor John L. Johnson, 67 F.Supp. 2d 499 (E.D.

Pa. 1999) the Honorable Lowell A. Reed, Jr. of this Court concluded that asserting that an alleged constitutional violation caused an emotional trauma which manifested itself by causing a pre-existing skin condition to become inflamed failed to satisfy the statutory pre-requisite of 42 U.S.C. §1997e(e) that a plaintiff inmate make a showing of a prior physical injury from the defendant's conduct. Id. at 507. See Cain v. Commonwealth of Virginia, 982 F.Supp. 1132, 1135 n. 3 (E.D. Va. 1997)(headaches causing vision loss and requiring pain medication as well as numbness, joint pain and stomach cramps are not a physical injury within the scope of 42 U.S.C. §1997e(e)).

A second reason exists which supports the grant of Baddick's motion for summary judgment concerning Wolfe's claim based on 42 U.S.C. §1983. In order to defeat the motion for summary judgment of Baddick, Wolfe must submit sufficient evidence to support a jury verdict in her favor on the issue of Baddick having acted with subjective knowledge that his conduct or omissions presented a substantial risk of harm to Wolfe and that Baddick proceeded with this conduct or failure to act any way. Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 1979 (1994). An examination of the record shows that Wolfe has produced insufficient evidence on this issue to support a jury verdict in her favor.

Baddick had no involvement in the decision to stop the hormone therapy of Wolfe at the State Correctional Institution at Camp Hill ("SCI-Camp Hill"). See deposition of Wolfe, Exhibit "B", Part 2, p. 67. Wolfe admits this. Exhibit "B", p. 67. Wolfe has indicated that she believed that Baddick had good intentions concerning his treatment of her. Exhibit "B", p. 93. Wolfe testified at her deposition that she had no idea whether Baddick knew that his treatment of her was calculated to cause substantial harm to her. Exhibit "B", p. 94. No evidence exists to rebut Baddick's contention that he believed that hormone therapy was not medically required. Exhibit "B", p. 95. Baddick, an internist, relied upon the opinions and recommendations of

Arthur Boxer, M.D. ("Boxer"), a psychiatrist at SCI-Mahanoy, the opinion and recommendations of Harold Heckman, M.D. ("Heckman"), a psychiatrist at SCI-Mahanoy, the opinions and recommendations of Jeffrey Sarnoff, M.D. ("Sarnoff"), a psychiatrist at SCI-Mahanoy, and the opinions and recommendations of Louis Martin, M.D. ("Martin"), a psychiatrist at SCI-Mahanoy. Baddick, an internist, depended upon the expertise of these four psychiatrists. Exhibit "C", pp. 39 and 43. Baddick, an internist, had no reason to disregard the opinion of these four psychiatrists. None of the four psychiatrists ever recommended hormone therapy or cross dressing for Wolfe. No indication exists that Baddick ever refused to accept any proposal for therapy submitted by any of the four psychiatrists for Wolfe. No indication exists that Baddick ever interfered with the therapy that the four psychiatrists provided to Wolfe.

Yet a third reason exists which requires this Court to grant summary judgment in favor of Baddick and against Wolfe concerning Wolfe's claims based on 42 U.S.C. §1983 including the equal protection claim of Wolfe and the deliberate indifference claim of Wolfe. Baddick has established a good faith defense which defeats the cause of action of Wolfe based on 42 U.S.C. §1983. The United States Court of Appeals for the Third Circuit in Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) has indicated that in order to overcome a good faith defense the plaintiff must establish that a private actor had a subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. Wolfe has no evidence on this issue, let alone sufficient evidence to support a jury verdict in her favor.

Wolfe has failed to establish any evidence sufficient to support a jury verdict in her favor concerning her claim that Baddick has violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Wolfe has failed to indicate how Baddick treated inmates who were not transsexuals different than he treated Wolfe. No evidence exists that any inmate at SCI-Mahanoy ever received

hormone therapy. No indication exists that Baddick relied upon any state regulation or rule that limited the access of transsexual inmates to any type of medical care. Even if such a rule existed Baddick indicated that he did not know about. He never relied upon it in providing medical treatment to Wolfe or anyone else. Exhibit "C", p. 68.

Wolfe has failed to state a cause of action pursuant to Article I, Section 13 of the Pennsylvania Constitution as a matter of law. This provision does not provide a basis for the award of damages. No court interpreting Pennsylvania law has ever held that it does. Even if this Court concludes that it does, Wolfe has not established that Baddick believed that his conduct toward Wolfe presented a substantial risk of harm to Wolfe.

Wolfe has failed to submit sufficient evidence to support a jury verdict in her favor on the issue of her medical malpractice claim against Baddick. To establish medical malpractice she must present expert testimony that shows that Baddick's conduct failed to meet the required standard of care and that this failure constituted a substantial factor causing the injury for which Wolfe seeks compensation. Wolfe relies upon the expert testimony of Charles Moser, Ph.D., M.D. ("Moser") and Maureen Osborne, Ph.D. ("Osborne"). Neither of these individuals in their expert reports ever deal with the issue of causation. They never indicate that anything that Baddick did or failed to do constituted a substantial factor in causing harm to Wolfe.

They hold him responsible for the actions of the psychiatrists at SCI-Mahanoy. No evidence exists that Baddick had control over the decision making of the psychiatrists. He never functioned as their employer. No respondeat superior liability applies.

Osborne never identifies any deviation from the standard of care by Baddick. Osborne, a psychologist, never indicates that she has sufficient knowledge or experience to provide an expert opinion as to the standard of care applicable to an internist. Moser, a psychiatrist, ever indicates that he has sufficient knowledge to

provide an expert opinion as to the standard of care applicable to an internist.

Wolfe impermissibly attempts to impose liability upon Baddick for referring her to four different psychiatrists for treatment. Once the referral took place Baddick had no further duty toward Wolfe concerning the psychiatric treatment she received. In Estate of Hannis by Hannis v. Ashland State General Hospital, 123 Pa. Cmwlth. 390, 554 A.2d 754 (1989) app'l den., 524 Pa. 632, 574 A.2d 73 (1989) the Commonwealth Court concluded that Pennsylvania law did not impose any duty upon a family physician to supervise the care of a patient once he referred that patient to a specialist. That analysis applies here and defeats Wolfe's common law medical malpractice claim against Baddick. See Weidner v. Nassau, 28 D&C 4th 269 (1993) aff'd. 436 Pa. Super. 658, 647 A.2d 274 (1994)(physician who refers patient to a specialist is not liable under a theory of negligent referral as a result of the alleged negligence of the specialist).

Baddick has no responsibility for the actions of any of the psychiatrists at SCI-Mahanoy since he did not function as their employer. He had no ability to control the work that they did or the manner of performing it. No indication exists from the evidence that the psychiatrists at SCI-Mahanoy performed their professional work for his benefit. To create a jury issue on the question of Baddick functioning as the master of the psychiatrists at SCI-Mahanoy for purposes of respondeat superior liability Wolfe must produce sufficient evidence to establish that Baddick had the right to control how the work was done by the psychiatrists and the manner of their performing it. Wolfe also must establish that the psychiatrists performed their work on the business of Baddick or for his benefit. See Strain v. Ferroni, 405 Pa. Super. 349, 357, 592 A.2d 698, 703 (1991).

II. STATEMENT OF UNCONTESTED FACTS

Wolfe stopped receiving hormone therapy while incarcerated at the State Correctional Institution at Dallas ("SCI-Dallas"). Exhibit "B", deposition of Wolfe, Part 2,

p. 67. The purpose of the hormone therapy was to make Wolfe appear to be a female. Exhibit "K", at paragraph 31.

John Mitchell Hume, M.D. ("Hume") made a medical decision to discontinue hormone therapy for Wolfe. Exhibit "B", p. 67. Baddick had no involvement in making that decision. Baddick never worked at the State Correctional Institution at Camp Hill ("SCI-Camp Hill") in any capacity. Exhibit "B", p. 67; Exhibit "C", dep. of Baddick, p. 72.

At SCI-Camp Hill, Wolfe received Prozac and Estrace until September 24, 1996. The Lupron was cut off immediately. Exhibit "B", pp. 33 and 43. Wolfe was at SCI-Camp Hill for close to 100 days. Exhibit "B", p. 45.

Wolfe arrived at the State Correctional Institution at Mahanoy ("SCI-Mahanoy") on November 19, 1996. See Exhibit "B", p. 55. She received Prozac there until sometime in 1997. She made the decision to stop the Prozac.³ Exhibit "B", pp. 55, 90 lines 16 to 22.

Wolfe indicated her belief that she did not get hormone therapy at SCI-Camp Hill for financial reasons. Exhibit "B", p. 91. Wolfe stated that she did not believe that the decision not to provide her with hormone therapy at the SCI-Mahanoy stemmed from financial reasons. Exhibit "B", pp. 91 and 92.

10. Wolfe indicated that she believed that Baddick had good intentions in his treatment of her and sought to help her. Exhibit "B", p. 93. Wolfe testified that she had no idea whether Baddick knew that his treatment that he prescribed for her was reasonably likely to cause substantial harm to her. Exhibit "B", p. 94. Wolfe indicated that Baddick never mistreated her physically. Exhibit "B", p. 95. Wolfe stated that any mental mistreatment only consisted of what Wolfe viewed as Baddick's denial of the hormone therapy. Exhibit "B", p. 95. Wolfe indicated that she had no idea whether

³ Baddick refers to Jessica Wolfe in the feminine as a courtesy. Wolfe is a biological man.

Baddick believed that hormone therapy was medically required. Exhibit "B", p. 95. Wolfe testified that she was basing her entire claim against Baddick on the her belief that he denied her two medications that Wolfe thought that she should have. Exhibit "B", pp. 95 and 96.

Wolfe indicated that the only basis for her claim against Baddick is Baddick telling her that the hormones could be dangerous to her. She believed that the reason Baddick told her that was just to have a reason to avoid giving her the hormones. Exhibit "B", pp. 96-97.

According to Wolfe, Baddick told Wolfe that he was not giving Wolfe the hormones because he believed that they were dangerous to her. Exhibit "B", p. 97. When Baddick declined to approve hormone therapy it had already been discontinued as of September 24, 1996 by Hume, a psychiatrist. Exhibit "B", p. 51. Wolfe testified at her deposition that she had no evidence to support her disbelief of Baddick's reasons for denying her hormone therapy. When asked what she based her disbelief upon, she responded, "I have no idea." She was then asked, "Its just your gut feeling, right?" She responded, "Right." Exhibit "B", p. 97.

The hormone and surgical reassignment standard for gender dysphoric persons, prepared by the Harry Benjamin International Gender Dysphoria Association, states at 4.5.1 Principle 14 that the administration of estrogens and progesterones to males may lead to mild or serious health threatening complications. Wolfe indicated that she believed that Baddick acted correctly in denying her hormone treatment. Exhibit "B", p. 105-106.

Wolfe conceded at her deposition testimony that Baddick's refusal to prescribe hormone therapy did not cause her any physical harm. She was asked:

Q. Now did Dr. Baddic's (sic) denial of any drug to you cause you any physical harm?

A. No. Most of it was done prior.

Q. So you were done with any of your withdrawal symptoms before Dr. Baddic (sic) saw you?

A. Correct.

Exhibit "B", pp. 106-107.

Wolfe indicates that Baddick's conduct toward her caused her minor psychological harm at best. In response to the question, "Is it your contention that his denial of these drugs to you caused you any psychological harm? Wolfe answered:

A. Well, a little stress and stuff...

Exhibit "B", pp. 106-107.

Wolfe contends that the failure of Hume to renew the hormone therapy caused her hair loss. She asserts that it continued while she was incarcerated at SCI-Mahanoy. The hair loss had commenced before Wolfe ever saw Baddick. Exhibit "B", p. 107.

Wolfe has not produced any expert testimony that Baddick caused any hair loss or physical injury of any kind or any psychological harm to Wolfe. See expert report of Charles Moser, Ph.D., M.D. attached hereto as Exhibit "E". See expert report of Maureen Osborne, Ph.D., attached hereto as Exhibit "F". These constitute the only expert reports submitted by Wolfe.

Wolfe indicated that no one ever told her that taking the hormones again would reverse her hair loss. No one ever told her that her cessation of taking the hormones caused her hair loss. Exhibit "B", p. 247.

Wolfe has never been approved for sexual reassignment surgery by anyone including the Persad Center. Exhibit "B", p. 130.

Wolfe attempted to kill herself several times prior to her incarceration. Exhibit "B", p. 133. Wolfe believes that she is bisexual and a transsexual. Exhibit "B", p. 147.

While in the transsexual program at the Persad Center prior to her incarceration Wolfe belonged to a support group called the TS Group. The TS Group dismissed her

from it because it felt that she did not have a sufficiently serious attitude concerning being a transsexual. Exhibit "B", pp. 213 and 217.

While incarcerated in the state prison system Wolfe continued to get Prozac until she made the decision that she no longer wanted it. She told prison medical staff to stop giving it to her. Exhibit "B", p. 181.

At SCI-Mahanoy Wolfe resides in the special needs unit. Wolfe believes that the Department of Corrections has assigned her there because of other inmates wanting her to perform sexual favors. She requested that assignment. Other inmates would tell her that they wanted to be her cell mate and they wanted her to give them blow jobs, etc. She stated that she felt fearful of that and requested the special assignment. Prison officials granted it immediately. Exhibit "A", Part 1 of deposition of Wolfe, p. 15.

Wolfe would like to live as a female in a male prison. She wants to wear female undergarments and to have a nice skirt. She would also like to wear cosmetics. Exhibit "A", p. 73.

Wolfe believes that she should be transferred to the State Correctional Institution at Muncy ("SCI-Muncy") even though she is aware that the prison houses inmates who are biologically female. Exhibit "A", p. 78. She believes that though she has been convicted of raping a female she should be placed in a female prison. Exhibit "A", p. 80. Wolfe is sexually attracted to both men and women. Exhibit "A", p. 81.

Wolfe contends that as of November, 1999, she was seeing the psychiatrist at SCI-Mahanoy once every three to four months. She talks about her grief, how she feels and what she would like to do. She discusses her gender identity disorder. She contends that the longest the meetings last is ½ hour. Her psychiatrist at that time was Dr. Wittke. She states that seeing the psychiatrist once every three months is "okay". Exhibit "A", p. 97

Wolfe knows of no other inmate that received Lupron or Estrace, the hormones

she wishes to receive, at either SCI-Camp Hill or SCI-Mahanoy. Wolfe has no knowledge of any other inmate at either prison whom prison officials permit to dress as a woman. Exhibit "A", p. 106.

Baddick served as the Medical Director at SCI-Mahanoy from January 19, 1996 until September 15, 1997. See Exhibit "C", deposition of Baddick at p. 6. While the Medical Director at SCI-Mahanoy, Baddick directed the entire medical department. He did daily infirmary rounds. He also reviewed charts for abnormal lab studies, wrote chronic medication reorders, oversaw the operations of the physician assistants, conducted sick call and ran the medical director's sick call. Anywhere from five to ten doctors functioned at SCI-Mahanoy, including off site specialists who would come on site to conduct clinics. Two full-time psychiatrists also provided care at SCI-Mahanoy. Exhibit "C", pp. 7-8.

Baddick never diagnosed Wolfe as having a history of gender identity disorder because it constitutes a psychiatric diagnosis. Baddick is not a psychiatrist. Baddick is an internist. See Exhibit "C", p. 17; Exhibit "G", verification of Baddick.

Baddick ordered a psychiatric consultation because of Wolfe's history of depression. Exhibit "C", p. 17. Wolfe never told Baddick that she was having any symptoms as a result of not being on the hormones. Baddick did not believe that Wolfe was still having the symptoms because Wolfe had been off the hormones for a while. Exhibit "C", p. 26.

In November, 1996, Wolfe did not tell Baddick that she was having any problems adjusting to prison. She did not tell him that she needed to wear female clothing or have long hair. Exhibit "C", p. 27.

On November 19, 1996, Baddick approved a psychiatric referral for Wolfe. Wolfe arrived at SCI-Mahanoy on November 19, 1996. See Exhibit "B", p. 55. See medical record entry of November 19, 1996, Exhibit "H1". Baddick also continued the

Prozac that Wolfe had previously received. See Exhibit "H1".

On November 21, 1996, Arthur Boxer, M.D. ("Boxer"), a psychiatrist at SCI-Mahanoy had a psychiatric session with Wolfe. In Boxer's note, Boxer never indicates that Wolfe required hormone therapy. Boxer never made any such representation to Baddick. See Exhibit "H2".

Baddick's first meeting with Wolfe occurred on January 6, 1997. Exhibit "C", p. 29. Baddick put in his note on that date:

Without impending surgical procedure for... genitalia or a sex change...I cannot and don't feel female hormones are necessary at this time...The functioning testes producing male hormone I medically feel there exists an internal chemical and hormonal conflict and would advise against hormonal therapy.

See Exhibit "C", p. 30; Exhibit "H3".

The first time that Baddick discussed hormones with Wolfe was in January, 1997. See Exhibit "C", p. 33. On January 6, 1997, Wolfe did not ask Baddick for hormones. Wolfe asked to see Baddick because she wanted him to review the chart to determine the validity of reordering female hormones. Consequently, they met concerning why Wolfe was not receiving hormones. See Exhibit "C", pp. 33-35.

Baddick believed that the decision whether Wolfe should receive hormones should be made by a psychiatrist. None of the psychiatrists at SCI-Mahanoy who treated Wolfe indicated that Wolfe needed hormones. See Exhibit "C", pp. 35-36.

Boxer was the first psychiatrist to examine Wolfe at SCI-Mahanoy. Baddick consulted Boxer's report. Boxer did not recommend hormone therapy. Baddick based his decision not to give hormones on the fact that the specialist in the field, Boxer, did not recommend it. Exhibit "C", p. 37.

Baddick believed that Boxer had expertise in the area of gender identity disorder. He assumed that Boxer received training in that area. If Boxer did not know how to deal with gender disorder, Baddick believed that Boxer would have consulted another

specialist. Since he did not, Baddick believed that Boxer knew how to handle that disorder. Exhibit "C", p. 39.

Baddick indicated that none of the subsequent psychiatrists who saw Wolfe at SCI-Mahanoy ever recommended hormone therapy. Exhibit "C", p. 43. Baddick based his decision on the reliability of the psychiatrist who had evaluated Wolfe. Exhibit "C", p. 43.

On December 19, 1996, Dr. Heckman, a psychiatrist, had a psychiatric session with Wolfe. He noted a lack of depression. He did not recommend hormone therapy. Exhibit "H4".

On January 15, 1997, Dr. Heckman again had a psychiatric session with Wolfe. He did not recommend hormone therapy or permitting Wolfe to grow long hair, wear female clothing or put on make up. See Exhibit "H5".

On February 12, 1997, Dr. Heckman had a psychiatric session with Wolfe at SCI-Mahanoy. Wolfe complained about not receiving hormones. Wolfe threatened to sue the prison. Heckman observed no acute psychiatric symptoms or problems. Heckman refused to prescribe hormones. See Exhibit "H6".

On March 12, 1997, Wolfe had another psychiatric session with Heckman. Heckman did not recommend hormone therapy or any other type of treatment except Prozac and the continuation of therapy. See Exhibit "H7".

On April 2, 1997, Baddick, Judy Rodickok ("Rodickok"), the site administrator for Correctional Physician Services, Inc. ("Correctional"), Beth Gallagher ("Gallagher"), the assistant site administrator for Correctional, Joseph Rush, P.A. ("Rush") and Maria Cerello ("Cerullo"), an administrator at SCI-Mahanoy, had a meeting with Wolfe to discuss Wolfe's request for hormones. Baddick explained that female hormones were not prescribed at the time because surgery for removal of her testicles was not pending. Baddick explained that there were risks for the administration of estrogen when

testosterone is being produced including thrombophlebitis, cancer of the breast and cancer of the testicles. See Exhibit "H8" dispensary note of April 2, 1997.

Correctional was a private corporation which had entered into a contract with the Commonwealth of Pennsylvania to provide various medical services for inmates at SCI-Mahanoy. Correctional utilized Baddick as an independent contractor to function as the medical director at SCI-Mahanoy. Exhibit "C", p. 51.

Baddick informed Wolfe during the April 2, 1997 meeting that the hormone therapy Wolfe desired had not been recommended by any of her psychiatrists at SCI-Mahanoy. He told Wolfe that Wolfe would have to be approved by a psychiatrist for the medication because of her history of depression and suicide attempts. Exhibit "C", p. 53.

Baddick reviewed the notes of the psychiatrists. He believed that the psychiatrists had provided treatment to Wolfe. Baddick had no reason to doubt the conclusions that the various psychiatrists at SCI-Mahanoy had reached concerning Wolfe's treatment since he was not a psychiatrist. See Exhibit "C", p. 54.

After April 2, 1997, Baddick never examined Wolfe or had any encounters with Wolfe. As far as Baddick knows after April 2, 1997, Wolfe never asked to see him. Exhibit "C", p. 57.

Baddick did not consider permitting Wolfe to wear women's clothes as a treatment because none of the psychiatrists had ever recommended it. Exhibit "C", p. 62.

If any of the psychiatrists had ever recommended hormones Baddick would have ordered it. Allowing cross dressing failed to constitute a decision that he could make. It was a security decision made by prison officials. It was not a medical decision. Exhibit "C", p. 64.

The cost of the hormones never entered into Baddick's decision. He never

discussed the cost with anyone. Exhibit "C", p. 65.

Baddick believed that the Department of Corrections of the Commonwealth of Pennsylvania did permit hormone therapy. He was not aware of any policy of the Department of Corrections concerning transsexualism. Exhibit "C", p. 76.

No indication exists that any state rule or regulation influenced Baddick's decision concerning Wolfe's treatment in any way including the decision not to order hormone therapy. See Exhibit "C", pp. 35-37, 76.

If a psychiatrist had recommended that Wolfe needed more psychiatric visits Baddick would have accepted that recommendation without question. Exhibit "C", p. 77.

Baddick would have permitted a psychiatrist to examine Wolfe every day if the psychiatrist had felt it necessary. Exhibit "C", p. 77. Baddick did not take over the treatment of Wolfe from the psychiatrists. He deferred to their expertise. Exhibit "C", p. 77.

Baddick never limited the psychiatrists at SCI-Mahanoy in their treatment of Wolfe. He never substituted his medical judgment for the judgment of the psychiatrists as to their care of Wolfe. Exhibit "C", p. 78.

On April 9, 1997, Heckman had another psychiatric session with Wolfe. Heckman indicated in the medical chart that mentally Wolfe was looking pretty good. She did not appear significantly depressed. Exhibit "H9".

On May 5, 1997, Jeffrey Sarnoff, M.D. ("Sarnoff") conducted a psychiatric evaluation of Wolfe. He did not recommend hormone therapy or cross dressing. Exhibit "H10".

On May 8, 1997, a psychiatric review team met concerning Wolfe. The participants were M. Youron, R. Cudworth, E. Yescavage, Dr. Martin, a psychiatrist, M. Fuksta, L. Verta, a psychologist and M. Connell. They made no recommendation that

hormone therapy be provided. They made no recommendation concerning cross dressing. See Exhibit "H11".

On June 27, 1997, Dr. Martin, a psychiatrist, had a psychiatric session with Wolfe. Wolfe told him that she was suing the penal system because it was not providing her with a life style that is in accord with her chosen gender. Martin did not recommend hormone therapy or cross dressing. Exhibit "H12".

On July 25, 1997, Martin again had a psychiatric session with Wolfe. He did not recommend hormone therapy or cross dressing. Exhibit "H13".

On August 22, 1997, Wolfe again had a psychiatric session with Martin. Martin did not recommend hormone therapy or cross dressing. Exhibit "H14".

On August 27, 1997, Wolfe attended a psychology mental health group conducted by David R. Bailey, M.S. ("Bailey"). Bailey did not recommend hormone therapy or cross dressing. Exhibit "H15".

On September 15, 1997, Baddick left his employment at SCI-Mahanoy. He then assumed the position of medical director of the State Correctional Institution at Graterford ("SCI-Graterford"). Exhibit "C", deposition of Baddick, p. 6.

After Baddick left SCI-Mahanoy, Martin continuously provided medical care for Wolfe. He had psychiatric sessions with Wolfe on October 17, 1997, November 15, 1997, December 12, 1997, January 9, 1998, February 6, 1998, March 6, 1998, March 22, 1998, April 24, 1998, June 19, 1998, July 17, 1998, and August 14, 1998. At no time did Martin ever recommend hormone therapy or cross dressing for Wolfe. See Exhibit "H16".

After Baddick left SCI-Mahanoy on September 15, 1997, Dr. Wright had a psychiatric session with Wolfe on May 22, 1998. He did not recommend hormone therapy or cross dressing. Exhibit "H17".

After Baddick left SCI-Mahanoy on September 15, 1997, Mary Anne Wittke, M.D.

("Wittke"), a psychiatrist, had psychiatric sessions with Wolfe on September 11, 1998, November 6, 1998, December 9, 1998, December 31, 1998 and January 7, 1999. At no time did she recommend hormone therapy or cross dressing. Exhibit "H18".

Martin did not work for Correctional. Another private contractor employed him as a staff psychiatrist. See deposition of Martin, Exhibit "I", p. 5.

When Martin treated Wolfe he was not aware of any regulations dealing with the treatment of transsexual inmates. Exhibit "I", p. 14. During his treatment of Wolfe, Martin never considered reinstating the hormone therapy that had occurred prior to incarceration. Exhibit "I", p. 35.

Heckman indicated that he could have seen a patient at SCI-Mahanoy more often than once a month if he deemed it necessary. He had done that with other patients. Exhibit "J", p. 41.

Heckman saw some patients at SCI-Mahanoy as often as once a week. If Wolfe had needed it he would have asked to see Wolfe more often. He did not believe that Wolfe needed to be seen more often than he saw him. Exhibit "J", p. 42.

Heckman did not think it was appropriate for Wolfe to be on the hormones for years because estrogen drugs can cause cancer. Exhibit "J", p. 51. He believed that even sex clinics do not do that for their patients. Exhibit "J", p. 50.

III. STATEMENT OF THE ISSUES PRESENTED

1. Does 42 U.S.C. §1997e(e) requiring a physical injury to exist bar Wolfe's claim for damages pursuant to 42 U.S.C. §1983, the Eighth Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution when Wolfe concedes in her deposition testimony that Baddick caused her no physical injury and when Wolfe admits that she has no evidence that the resumption of hormone therapy would have reversed her hair loss when every federal court to consider the issue has held that injuries similar to hair loss fail to constitute a physical injury as

defined by Congress when it enacted 42 U.S.C. §1997e(e)?

2. Has Wolfe submitted sufficient evidence to support a jury verdict in her favor on the issue of a deliberate indifference to serious medical need in violation of the Eighth Amendment of the United States Constitution and 42 U.S.C. §1983 when she has not produced sufficient evidence to establish that Baddick knew that his conduct toward her and his reliance on the four psychiatrists at SCI-Mahanoy presented a substantial risk of harm to Wolfe?

3. Has Wolfe submitted sufficient evidence to support a jury verdict in her favor on the issue of deliberate indifference to a serious medical need when at best she has shown that a difference of opinion exists between psychiatrists concerning the appropriate care for transsexualism?

4. Has Wolfe presented sufficient evidence to support a jury verdict in her favor on the issue of Baddick having acted in bad faith concerning his medical treatment of her when Wolfe concedes that she believes that Baddick acted in good faith concerning her medical treatment and when Baddick relied on the opinions of four separate psychiatrists concerning the treatment of Wolfe?

5. Has Wolfe set forth sufficient evidence to support a jury verdict in her favor on the issue of a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when she has failed to show that she has standing to assert such a claim?

6. Has Wolfe submitted sufficient evidence to support a jury verdict in her favor on the issue of a violation occurring against her pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when she has not shown that others similarly situated to her received superior treatment to her?

7. Has Wolfe presented sufficient evidence to support a jury verdict in her favor on the issue of common law medical malpractice against Baddick when she has

not presented expert testimony that establishes that Baddick's conduct to a reasonable medical certainty violated the applicable standard of care?

8. Has Wolfe presented sufficient evidence to support a jury verdict in her favor on the issue of Baddick having committed common law malpractice against her when she has not produced sufficient expert testimony to establish that Baddick's conduct or omissions constituted a substantial factor in causing harm to her when one of her experts, Moser fails to even address the causation issue and her other expert, Osborne, indicates that her opinion is based upon what is arguable?

9. Has Wolfe presented sufficient expert testimony to support a cause of action based on medical malpractice against Baddick when neither of her experts have indicated that their opinions emanate from a reasonable medical certainty?

10. Does Baddick have any liability to Wolfe for referring Wolfe to four psychiatrists for treatment?

11. Does Baddick have any responsibility for the actions of four psychiatrists at SCI-Mahanoy when he did not employ them, when they did not work to benefit him and when he had no control over the work that they did or their manner of performing it?

12. Has Wolfe established sufficient evidence to support a cause of action based on Article I, Section 13 of the Pennsylvania Constitution when she has not shown that Baddick knew that his conduct or his omissions presented a substantial risk of harm to Wolfe and when no Pennsylvania court has ever held that Article I, Section 13 of the Pennsylvania Constitution creates a cause of action for damages?

III. ARGUMENT

A. Standard To Be Utilized In Determining A Motion For Summary Judgment.

In 1986 the Supreme Court of the United States radically changed the standard for summary judgment and in effect issued a directive to district courts to be more

assertive in using this procedural tool to eliminate cases prior to trial. As the Supreme Court indicated in Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) once the party seeking summary judgment has pointed out to the court the absence of a fact issue:

...its opponent must do more than simply show that there is a metaphysical doubt as to the material facts...In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial'...where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'. 475 U.S. at 586-87.

Summary judgment must be granted unless the evidence construed in favor of the non-moving party is sufficient for a reasonable jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 243, 249-50 (1986). Granting summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

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

Since the Supreme Court decided its summary judgment trilogy, appellate courts have increasingly been called upon to engage in difficult line-drawing exercises to determine whether a non-moving party has adduced sufficient evidence to defeat a motion for summary judgment. Id. at 459.

The Court in that case was faced with a situation where the plaintiff had established a dispute as to a genuine issue of material fact. Yet, the Court of Appeals upheld the district court's granting of summary judgment for the defendants. The Court stated that although a dispute had been established, plaintiff had failed to show that he could produce sufficient evidence to support a jury verdict in his favor. In that case the

plaintiff claimed that the decedent had committed suicide while in the custody of the West Chester police. The decedent had previously been in the custody of the West Chester police on prior occasions. A police sergeant of the West Chester police testified at his deposition that the decedent's suicidal tendencies were widely known at the West Chester police department. The specific defendants who were charged with not taking appropriate precautions to prevent decedent's suicide denied knowing of the tendencies. No direct evidence was established that they did know of his suicidal tendencies. The defendant officers had served on a squad that had recorded the bizarre behavior of the decedent. The Court indicated that the question was whether given the propensity of human beings to talk about bizarre behavior, a reasonable jury could find that the defendant officers knew about decedent's suicidal tendencies and whether the jury could find that they acted with deliberate indifference to the decedent's psychological condition by not following the West Chester's police's normal policy regarding belt removal.

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

Although the line we draw today is, as I have said, not easy to place, the line must be drawn somewhere, and somewhere that adequately protects the salutary policies underlying Rule 56. Of course the right to present one's claims to a jury provides competing, no less important policies to be considered, but the upshot of the Supreme Court's summary judgment trilogy is the former must not be sacrificed entirely to the latter. The old scintilla rule, although it would make cases like this one far easier to decide, did just that. I concede, as I must, that plaintiffs have adduced some circumstantial evidence tending to show deliberate indifference. However, because the line we must draw depends entirely on context and differences in degree, 'some evidence is not necessarily enough to survive summary judgment. *Id.* at 891 F.2d at 466 (Emphasis added).

Wolfe has failed to meet this burden. She has not submitted sufficient evidence to support a jury verdict in her favor on any issue on which she has the burden of proof pursuant to her claim based on 42 U.S.C. §1983. She has not shown that Baddick acted with deliberate indifference to her serious medical needs. She has not shown that Baddick possessed subjective knowledge that he created a substantial risk of harm to Wolfe. Wolfe concedes that Baddick's conduct caused her no physical harm. Exhibit "B", pp. 106-107. Wolfe indicates that Baddick's conduct toward her caused her minor psychological harm at best. Exhibit "B", pp. 106-107. Wolfe concedes that she believed that Baddick had good intentions in his treatment of her. Exhibit "B", p. 93.

Wolfe has not produced sufficient evidence to overcome the good faith defense of Baddick. She has not produced sufficient evidence to support a jury verdict in her favor on the issue of Baddick having known that his conduct violated the constitutional rights of Wolfe.

Wolfe has not shown as a matter of law that Baddick committed malpractice. Wolfe's two experts, Moser and Osborne, do not address the issue of causation. They do not identify the required standard of care for an internist. They do not indicate how Baddick violated that standard of care. They impute to Baddick the conduct of other physicians, including four psychiatrists, for whom Baddick had no legal responsibility since he was not their employer and since he did not control their decision making. Baddick referred Wolfe to the psychiatrists at SCI-Mahanoy for treatment of Wolfe's transsexualism. He had no duty or reason to overrule their treatment of Wolfe.

- B. 42 U.S.C. §1997e(e) Bars Wolfe's Claim Pursuant To 42 U.S.C. §1983 Based On Deliberate Indifference To A Serious Medical Need And Based On A Violation Of The Equal Protection Clause Of The Fourteenth Amendment Because Wolfe Only Seeks Damages For Mental And Emotional Injuries From Baddick.
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In her amended complaint Wolfe seeks monetary damages for only mental and emotional injuries. Wolfe has failed to produce any evidence that any action or

omission of Baddick caused her physical harm which resulted in mental or emotional injuries.

42 U.S.C. §1997e(e) bars this claim because Wolfe has not produced sufficient evidence that she suffered from a physical injury caused by Baddick. 42 U.S.C. §1997e(e) states:

No Federal civil action may be brought by a prisoner confined to a jail, prison or other correctional facility for mental or emotional injuries suffered while in custody without a prior showing of physical injury.

Wolfe's deposition testimony conclusively establishes that Baddick never caused any physical injury to Wolfe. Wolfe proceeds against Baddick solely for damages resulting from mental or emotional injury.

Wolfe has conceded that Baddick's refusal to prescribe hormone therapy never caused her any physical harm:

Q. Now did Dr. Baddic's (sic) denial of any drug to you cause you any physical harm?

A. No. Most of it was done prior.

Q. So you were done with any of your withdrawal symptoms before Dr. Baddic (sic) saw you?

A. Correct.

Exhibit "B", pp. 106-107, deposition of Wolfe, Part 2.

Wolfe admitted that Baddick's conduct toward her caused her minor psychological harm. In response to the question:

Q. Is it your contention that his denial of these drugs to you caused you psychological harm?

She answered:

A. Well a little stress and stuff...

Exhibit "B", pp. 106-107.

Wolfe contends that the failure of Hume to continue the hormone therapy caused

her hair loss. She asserts that it continued while she was incarcerated at SCI-Mahanoy. The hair loss had commenced before she saw Baddick. Exhibit "B", p. 107.

Wolfe has not produced any expert testimony that Baddick caused any hair loss or any physical injury of any kind to Wolfe. Wolfe has produced no evidence that if Baddick had prescribed hormones for her the hair loss would have been reversed or would not have continued. The expert reports submitted by Wolfe from Moser and Osborne fail to address this issue. Thus, no evidence exists on this record of any kind that Baddick caused any physical harm to Wolfe. Wolfe must submit more than some evidence of physical harm. She must submit sufficient evidence to support a jury verdict in her favor. She has totally failed to meet this standard.

Every federal court to consider the issue has found evidence similar to that produced by Wolfe in this case insufficient to meet the physical injury requirement adopted by the Congress of the United States when it enacted 42 U.S.C. §1997e(e). Even if this Court concludes that sufficient evidence exists to support a jury verdict concerning Baddick's conduct or omissions having caused hair loss to Wolfe, hair loss fails to constitute a physical injury as defined by 42 U.S.C. §1997e(e). Every federal court to consider the issue has concluded that similar allegations of physical injury fail to meet the definition of physical injury mandated by Congress when it enacted 42 U.S.C. §1997e(e).

In McGrath v. Mahanoy Counselor John L. Johnson, 67 F.Supp. 2d 499 (E.D. Pa. 1999) the Honorable Lowell A. Reed, Jr. ("Judge Reed"), Judge of the United States District Court for the Eastern District of Pennsylvania, found that the plaintiff, an inmate, in his complaint pursuant to 42 U.S.C. §1983 failed to meet the physical injury requirement of 42 U.S.C. §1997e(e) with allegations of physical injury that far surpasses any evidence that Wolfe has the ability to produce here. In McGrath, the plaintiff contended that he required treatment for a skin condition that got inflamed

during periods of severe mental and emotional pain. He asserted that the condition was so noticeable that he was tested for Lupus. Judge Reed held that:

Asserting that alleged constitutional violations caused an emotional trauma which manifested itself by causing a preexisting skin condition to become inflamed does not satisfy the statutory prerequisite that McGrath make a showing of a prior physical injury from the defendants' conduct. Id. at 67 F.Supp. 2d at 508.

In Cain v. Commonwealth of Virginia, 982 F.Supp. 1132, 1135 n. 3 (E.D. Va. 1997) the Court concluded that headaches causing visual loss and requiring pain medication as well as numbness, joint pain and stomach cramps failed to constitute a physical injury within the scope of 42 U.S.C. §1997e(e). All of these physical conditions which the Court found inadequate to meet the physical injury requirement of 42 U.S.C. §1997e(e) far surpass anything that Wolfe has alleged and any physical symptom that Wolfe has the ability to prove.

In Pinkston-Bey v. DeTella, 1997 W.L. 158343 at * 3 (N.D. Ill. March 31, 1997) the district court concluded that severe headaches fail to constitute a physical injury as defined by 42 U.S.C. §1997e(e). Evidence of severe headaches far surpasses the physical injury Wolfe claims from Baddick here. See Porter v. Coombe, 1999 W.L. 587896 (S.D.N.Y. 1999)(court concluded that allegation that plaintiff suffered weight loss as a result of defendant's conduct failed to meet physical injury requirement as intended by Congress when it enacted 42 U.S.C. §1997e(e)); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997)(prisoner's §1983 action dismissed where court found that a bruised ear lasting for three days did not constitute physical injury); Wright v. Miller, 973 F.Supp. 390, 396 (S.D.N.Y. 1997)(holding that under the Prison Litigation Reform Act of 1996 prisoners could not recover damages for mental anguish); Morro v. Wackenhut Corrections Corp., Inc., 1999 W.L. 817725 (E.D. Pa. October 12, 1999)(the Honorable Clifford Scott Green of this Court concluded that an inmate failed to state a cause of action pursuant to 42 U.S.C. §1983 because of the physical injury requirement

of 42 U.S.C. §1997e(e) based on an alleged infestation of rodents and roaches where he conceded that he had no physical injury from the rodents and roaches but only psychological harm.

In Leon v. Johnson, 96 F.Supp. 2d 244 (W.D.N.Y. 2000), the Court dealt with the issue of whether a delay in receiving medicine alone constitutes a physical injury of the type contemplated by 42 U.S.C. §1997e(e). The Court concluded that Congress intended the use of the words “physical injury” to require some actual harm to the plaintiff and that the harm must be bodily in nature. Id. at *3. The Court held that the harm alleged, a delay in receipt of medication to treat the plaintiff’s disease, is at most merely a potential harm possibly putting plaintiff at risk of a worsened condition. The plaintiff did not offer evidence that his condition did become worse as a result of not taking his medication. There was no evidence that he suffered any adverse effects from the delay. Thus, the Court concluded that 42 U.S.C. §1997e(e) barred the plaintiff inmate’s cause of action arising from 42 U.S.C. §1983 contending that prison officials had acted in a deliberately manner to his serious medical needs.

That analysis applies here and constitutes persuasive authority for the granting of summary judgment against Wolfe and in favor of Baddick. Wolfe has not shown any evidence to suggest that Baddick’s supposed refusal to renew his prescription for hormone therapy had any adverse effects upon him that were physical. Wolfe has conceded that Baddick’s conduct toward him did not cause any physical harm to him.

Thus, Wolfe has failed to state a cause of action as a matter of law against Baddick based on either deliberate indifference to a serious medical need or a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Wolfe seeks damages from Baddick only because of psychological, mental or emotional harm. Because Wolfe has not set forth sufficient evidence of a physical injury as defined by Congress when it enacted 42 U.S.C. §1997e(e), Baddick

has established an absolute right to summary judgment.

- C. Wolfe Has Failed To Submit Sufficient Evidence To Support A Jury Verdict In Her Favor Concerning Her Claim Pursuant To 42 U.S.C. §1983 Against Baddick Because She Has Not Submitted Sufficient Evidence To Establish That Baddick Acted With Subjective Knowledge That His Conduct Or Omissions Presented A Substantial Risk Of Harm To Wolfe.
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To defeat the motion for summary judgment of Baddick, Wolfe must show that she has sufficient evidence to support a jury verdict in her favor on the issue of Baddick having had actual knowledge that his actions presented a substantial risk of harm to Wolfe. Wolfe must make this showing in order to establish deliberate indifference to a serious medical need. The United States Supreme Court in Estelle v. Gamble, 429 U.S. 97 (1976) has set forth the elements of a cause of action brought by a prisoner pursuant to 42 U.S.C. §1983 raising allegations of the infliction of cruel and unusual punishment based on medical care. In upholding summary judgment in favor of the defendant/doctor in that case the Supreme Court stated:

It suffices to note that the primary concern of the drafters was to prescribe 'tortures' and other 'barbarous methods of punishment'... it is safe to affirm that punishments of tortures...and all others in the same line of unnecessary cruelty, are forbidden by that amendment...We therefore conclude that deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'. (citations omitted.)

Id. at 102-104.

Examples of the "unnecessary and wanton infliction of pain", which constitute deliberate indifference provided by the Supreme Court consists of the following:

...doctors choosing the easier and less efficacious treatment of throwing away the prisoner's ear and stitching the stump may be attributable to deliberate indifference... rather than an exercise of professional judgment...injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction ...prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon. (citations omitted.)

Id. at 104 f.n. 10.

In Estelle v. Gamble, supra, the United States Supreme Court rejected a Constitutional claim based on medical malpractice, stating:

Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute an 'unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'. Thus a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment. Id. at 106.

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

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

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

Thus, under Farmer, supra, 114 S.Ct. at 1979, Wolfe must show that Baddick knew that he would cause harm to Wolfe by the conduct Wolfe contends Baddick engaged in and yet Baddick proceeded to act in such a way regardless. An examination of the record in this case establishes that Wolfe has insufficient evidence to support a jury verdict on the issue of subjective knowledge by Baddick concerning

any conduct Wolfe alleges Baddick engaged in presenting a substantial risk of harm to Wolfe.

What evidence has Wolfe presented that Baddick knew that his reliance on four psychiatrists who never recommended hormone therapy presented a substantial risk of harm to Wolfe? Wolfe has presented no evidence on this issue at all, let alone sufficient evidence to support a jury verdict in her favor. What evidence has Wolfe presented to support a jury verdict on the issue of Baddick knowing that his refusal to approve hormone therapy for Wolfe presented a substantial risk of harm to Wolfe? Wolfe has presented no evidence on this issue, let alone sufficient evidence to support a jury verdict in her favor on this issue. Instead, Wolfe concedes that Baddick's conduct caused her little harm at all. The following exchange during Wolfe's deposition establishes this:

Q. Now did Dr. Baddick's (sic) denial of any drug to you cause you any physical harm?

A. No. Most of it was done prior.

Q. So you were done with any of your withdrawal symptoms before Dr. Baddick (sic) saw you?

A. Correct.

Exhibit "B", pp. 106-107.

Wolfe indicated that Baddick's conduct toward her caused her minor psychological harm. In response to the question:

Q. Is it your contention that his denial of these drugs to you caused you any psychological harm?

She answered:

A. Well, a little stress and stuff...

Exhibit "B", pp. 106-107.

Thus, Wolfe concedes that Baddick's conduct presented no substantial risk of harm to her at all. Even if it did Wolfe has to establish that Baddick knew that it would.

She has not done this.

Wolfe concedes in her deposition testimony under oath that Baddick had good intentions. She states:

Well, I believe he has good intentions, but I believe that by him - - his idealism or reasoning for denial of stuff could have been harmful yes.

Exhibit "B", deposition of Wolfe, Part 2, p. 93.

Wolfe's admission of Baddick's good intentions dooms her claim based on 42 U.S.C. §1983 to defeat. If Baddick acted with good intentions he had no ability to form the subjective intent required to state a cause of action pursuant to 42 U.S.C. §1983. Wolfe's contention that Baddick's conduct could have harmed her fails to defeat Baddick's motion for summary judgment. It fails to support a jury verdict in her favor on the issue of the subjective knowledge required to establish deliberate indifference.

Wolfe admits that she bases her entire claim against Baddick upon Baddick denying her two types of hormones that Wolfe thought she should have. Exhibit "B", pp. 95-96. This constitutes a disagreement with the medical care received. It fails to show subjective knowledge by Baddick. Wolfe concedes that Baddick told her that he was not approving the hormones because he believed that they were dangerous for her. Exhibit "B", p. 97. Wolfe admits that she has no evidence to show that Baddick did not believe that. She relies upon her gut feeling. Exhibit "B", p. 97. Gut feelings fail to constitute sufficient evidence to support a jury verdict.

Baddick had no involvement in the original decision to discontinue the existing hormone therapy. Hume made that decision at SCI-Camp Hill. Exhibit "B", p. 51. Baddick never worked at SCI-Camp Hill and never had any communication with Hume at any time concerning Wolfe. No dispute exists as to this. When Baddick declined to approve hormone therapy Hume had already discontinued it as of December 24, 1996. Exhibit "B", p. 51. Baddick had no involvement with Wolfe until November 19, 1996.

Wolfe concedes that all withdraw symptoms had ceased prior to Wolfe ever arriving at SCI-Mahanoy and ever seeing Baddick. Exhibit "B", pp. 106-107.

On the very day that Wolfe arrived at SCI-Mahanoy Baddick approved a psychiatric referral for Wolfe. See Exhibit "H1". Baddick also continued the Prozac that Wolfe had previously received. See Exhibit "H1". Baddick did nothing to interfere with any treatment that Wolfe was still receiving as of November 19, 1996, when Wolfe arrived at SCI-Mahanoy. Baddick continued all such treatment.

Baddick relied upon the medical judgment of four separate psychiatrists concerning Wolfe not needing hormone therapy. On November 21, 1996, Boxer, a psychiatrist at SCI-Mahanoy examined Wolfe. See Exhibit "H2". Boxer never recommended hormone therapy. He never recommended any treatment to Baddick for Wolfe other than continued meetings with psychiatrists. See Exhibit "H2". Boxer's meeting with Wolfe occurred within two days of his arrival at SCI-Mahanoy. See Exhibit "H2". Baddick consulted Boxer's report concluding that Wolfe did not require hormone therapy for his transsexualism. Exhibit "C", p. 37.

Baddick believed that Boxer had expertise in the area of gender identity disorder. He assumed that Boxer received training in that area. If Boxer did not know how to deal with transsexualism Baddick believed that Boxer would have consulted another specialist. Since he did not Baddick concluded that Boxer knew how to treat that disorder. Exhibit "C", p. 39.

On December 19, 1996, on January 15, 1997, on February 12, 1997, on March 12, 1997, and on April 9, 1997, Heckman, a psychiatrist, had sessions with Wolfe. See Exhibits "H4, H5, H6, H7, H9". In the treatment notes that Heckman made after each session he never recommended to Baddick that Wolfe receive hormone therapy. He never recommended to Baddick that Wolfe needed to dress in women's clothes to treat her transsexualism. He never recommended to Baddick that Wolfe be seen by another

specialist or be transferred to another institution. He never asked Baddick to approve weekly treatment of Wolfe.

No indication exists that Boxer, Heckman or any other psychiatrist ever asked Baddick for any additional care of Wolfe that Baddick ever refused. Baddick did nothing to interfere with the treatment of the four psychiatrists who addressed the needs of Wolfe while Baddick was the medical director at SCI-Mahanoy. Baddick never refused to carry out a single recommendation of any psychiatrist at SCI-Mahanoy concerning Wolfe.

On May 5, 1997, Sarnoff, a psychiatrist, conducted a psychiatric evaluation of Wolfe. He did not recommend hormone therapy or cross dressing. Exhibit "H10".

On May 8, 1997, a psychiatric review team met concerning Wolfe. They made no recommendation that Baddick or anyone else provide hormone therapy to Wolfe. They made no recommendation concerning cross dressing. See Exhibit "H11".

On June 27, 1997, July 25, 1997, and August 22, 1997. Martin, a psychiatrist had sessions with Wolfe. At no time did Martin ever recommend hormone therapy or cross dressing to Baddick or anyone else for Wolfe. See Exhibits "H12, H13, and H14." On August 27, 1997, Wolfe was also seen by David R. Bailey, M.S., who made no recommendations for hormone therapy. See Exhibit "H15".

On September 15, 1997, Baddick left his position at SCI-Mahanoy. Until the date he left his position Baddick had scrupulously followed the recommendation presented to him by four different psychiatrists who had examined and treated Wolfe. No dispute exists as to this. See Exhibit "C", p. 43. Baddick based his decision concerning no hormone therapy for Wolfe on the psychiatrists who had evaluated Wolfe. He had no reason to doubt their reliability. Exhibit "C", pp. 43 and 54.

Baddick was an internist. See Exhibit "G". He did not provide treatment to Wolfe. Four psychiatrists provided treatment to Wolfe. Baddick deferred to their

expertise. Exhibit "B", p. 43.

The cost of the hormones never entered into Baddick's decision not to interfere with the treatment provided by the four psychiatrists. He never discussed cost with anyone. See Exhibit "C", p. 55. Wolfe has no evidence to dispute this.

Baddick believed that the Department of Corrections of the Commonwealth of Pennsylvania did permit hormone therapy. He had no knowledge of any policy concerning transsexualism. Exhibit "C", p. 76.

If the psychiatrists had recommended the Wolfe needed more psychiatric visits Baddick would have accepted that recommendation without question. Exhibit "C", p. 77. Baddick would have permitted a psychiatrist to examine Wolfe every day if any of the four psychiatrists had felt it necessary. Exhibit "C", p. 77. Wolfe has no evidence that disputes this.

Baddick never limited the four psychiatrists in their treatment of Wolfe. He never substituted his medical judgment for the judgment of his psychiatrists as to their care of Wolfe. Exhibit "C", p. 78. Wolfe has no contrary evidence on this issue, let alone sufficient evidence to support a jury verdict in his favor on the issue of Baddick's subjective knowledge that his conduct presented a risk of harm to Wolfe.

Baddick had no subjective knowledge that his conduct presented a substantial risk of harm to Wolfe. Baddick religiously followed the directives of four psychiatrists he believed to be competent and to be knowledgeable concerning the treatment of Wolfe's condition.

It would have been irresponsible, unethical and a breach of the standard of care for Baddick to have interfered with the recommendations and treatment provided by four psychiatrists all of whom had superior knowledge concerning transsexualism to Baddick. Baddick had no reason to question their judgment.

No court anywhere has found the type of evidence submitted by Wolfe against

Baddick sufficient to support a jury verdict pursuant to 42 U.S.C. §1983 based on deliberate indifference to a serious medical need. Federal courts have uniformly granted summary judgment in factual situations similar to that presented by Wolfe here.

In Thomas v. Clark, Civil Action No. 3:96-0496 (M.D. Pa. 1997) the plaintiff contended that the defendant, Dr. Clark, a psychiatrist, came to his cell and informed him that he would not treat him for his anxiety condition and that he would immediately discontinue the medication that another doctor had prescribed without the benefit of an examination or of consulting the plaintiff's file. Dr. Clark in support of his motion for summary judgment presented evidence that he had examined the plaintiff on two occasions and had found no evidence of anxiety. He offered the plaintiff an alternative treatment to the one he desired. Judge Conaboy granted the motion for summary judgment of Dr. Clark concluding that the plaintiff had failed to produce sufficient evidence from which a reasonable jury could conclude that Clark had subjective knowledge that his conduct presented a serious risk of harm to the plaintiff. The court stated:

Furthermore, the plaintiff has failed to present evidence from which a reasonable jury can conclude that Dr. Clark possessed the culpable mental state necessary for Eighth Amendment liability to attach. A review of the documentation submitted by Dr. Clark reveals that he treated the plaintiff on several occasions, none of which in Clark's opinion, warranted prescribing Klonopin. The record depicts meaningful efforts by Dr. Clark to provide the plaintiff with the necessary medical care, and an attendant mental state that falls woefully short of deliberate indifference. The record depicts nothing more than the plaintiff's subjective disagreement with the treatment decisions and medical judgment of Dr. Clark.

See opinion of the court, attached hereto as Exhibit "L", page 9.

That analysis applies here and requires the granting of the motion for summary judgment of Baddick. Baddick relied upon the opinions of four different psychiatrists.

On the very day that Wolfe appeared at SCI-Mahanoy, November 19, 1996, Baddick authorized a psychiatric consultation of her by Boxer, a psychiatrist. See Exhibit "H1" and Exhibit "K", ¶48. The evaluation by Boxer occurred on November 21, 1997. Exhibit "H2". At most Wolfe shows a disagreement with the treatment that the four psychiatrists provided to her with which Baddick did not interfere. Disagreements with treatment fail to constitute deliberate indifference. They do not show subjective knowledge. Subjective knowledge must exist to establish deliberate indifference. At most disagreements establish negligence. Negligence never supports a cause of action pursuant to 42 U.S.C. §1983. Daniels v. Williams, 474 U.S. 327 (1986).

The failure of Baddick to interfere with the treatment recommended by the four psychiatrists at SCI-Mahanoy, Boxer, Heckman, Sarnoff, and Martin based upon a difference in treatment from what the Persad Center ("Persad") in Pittsburgh, Pennsylvania had provided fails to create a material issue of fact for the jury on the question of deliberate indifference. It does not show that Baddick had subjective knowledge that following the recommendations of the four psychiatrists at SCI-Mahanoy presented a substantial risk of harm to Wolfe. He had no duty under the Eighth Amendment of the United States Constitution and 42 U.S.C. §1983 to disregard the recommendations of the four psychiatrists who were then currently treating Wolfe in favor of recommendations made almost a year before by another medical facility. No court anywhere has ever found such evidence sufficient to defeat summary judgment. Baddick challenges Wolfe to produce any such case authority. It fails to exist.

No psychiatrist at Persad had ever recommended hormone therapy for Wolfe. Instead, only psychologists and endocrinologist had reached such a recommendation. They based that recommendation on their view that the hormone therapy constituted a prerequisite to gender altering surgery in the immediate future. See Exhibit "M", deposition of Linda Humphreys, M.D. ("Humphreys") pp. 10-12 and 16.

The only psychiatrist to treat Wolfe at Persad, Humpreys, did not consider herself an expert in treating gender disorders. See Exhibit "M", p. 16. She conceded that many ways of treating gender disorders existed. They ranged from counseling to sex change operations. Exhibit "M", p. 17. She indicated that only a small hand full of her patients had ever had sex change operations. Exhibit "M", p. 18. She stated that in some cases counseling is the best long term treatment for gender disorders. Exhibit "M", p. 29. She stated that different psychiatrists can legitimately disagree as to which treatment constitutes the most effective one for a particular patient. Exhibit "M", p. 29. Initially she reached the opinion that Wolfe should not have hormone therapy before receiving extensive psychotherapy. Exhibit "M", p. 29. Humpreys admitted that hormones often are not the most effective treatment for gender disorder. Exhibit "M", p. 33.

The expert reports of Moser and Osborne fail to create a factual issue concerning the subjective intent of Baddick. Neither expert report ever addresses Baddick's subjective intent. They offer no support for a jury verdict on the issue of Baddick knowing that his conduct presented a substantial risk of harm to Wolfe. Moser asserts that if an individual with a rare medical condition arrives at prison it is prudent to continue the treatment prescribed by an expert in that condition until another expert consultation can be obtained. He asserts that the prison physicians, without naming which ones, did not act with this prudence. But he ignores the fact that Baddick had nothing to do with the discontinuance of the hormone therapy. By the time Wolfe had arrived at SCI-Mahanoy, where Baddick functioned as the medical director, the decision not to continue the hormone therapy had been made. The withdraw had occurred and had been completed. Wolfe had not received hormone therapy for almost two months by the time he arrived at SCI-Mahanoy and came within Baddick's authority. Baddick did defer to the individuals whom he believed were appropriate experts, four separate

psychiatrists. Moser's report fails to provide any reason for Baddick to have doubted the competency of any of the four psychiatrists, let alone all of them.

Moser questions Baddick's conclusion that the hormone therapy presented a substantial risk of harm to Wolfe. See report of Moser, Exhibit "E". But, neither Moser nor any other witness for Wolfe nor any document presented by Wolfe establishes that Baddick did not believe that the hormone therapy presented substantial risk of harm to Wolfe. This constitutes the crucial question. What Baddick should have believed has no relevancy to the issue of deliberate indifference. What a reasonable doctor should have believed has no relevancy to the issue of deliberate indifference. It fails to show the required state of mind, subjective knowledge, necessary to defeat a motion for summary judgment and support a jury verdict on the issue of deliberate indifference to a serious medical need.

The expert report of Osborne suffers from the same defect as that of Moser. It fails to produce any evidence, let alone sufficient evidence to support a jury verdict on the issue of Baddick knowing that his treatment of Wolfe presented a substantial risk of harm to Wolfe. Osborne never addresses the issue at all. See Exhibit "F", report of Osborne. Osborne's report never even criticizes the conduct of Baddick. See Exhibit "F", p. 21.

Even if the expert testimony of Moser and Osborne had concluded that Baddick had subjective knowledge of a substantial risk that would fail to constitute admissible evidence sufficient to defeat the motion for summary judgment of Baddick.

In Estate of Cole by Pardue v. Fromm, 94 F.3d 254 (7th Cir. 1996) the United States Court of Appeals for the Seventh Circuit concluded that it could not permit the fact finder to infer subjective knowledge by a physician of a substantial risk that the plaintiff would harm himself based on expert testimony that the risk was obvious because this would conflict with the defendant physician's subjective medical judgment

evidenced by her diagnosis. Id. at 261. Here, permitting the jury to infer subjective knowledge of a substantial risk based on expert testimony would conflict with the subjective medical judgment of Baddick.

In Muhammad v. Schwartz, 1997 W.L. 43015 (E.D. Pa., January 27, 1997), Judge Van Antwerpen granted a motion to dismiss a prisoner's claim based on 42 U.S.C. §1983 alleging inappropriate medical care. Judge Van Antwerpen held that the complaint failed to state that the defendant physician knew that his treatment presented a substantial risk of harm to the prisoner. Judge Van Antwerpen held that, "Without alleging actual knowledge, any reference to obviousness via the medical records available or what the doctor 'should have known' is unavailing." See Exhibit "N", opinion of the court.

Here, Wolfe asks this Court to allow the jury to find the subjective knowledge required for deliberate indifference based solely on what Baddick should have known. This Court lacks the ability to do so without disregarding the express directive of the Supreme Court of the United States in Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1979 (1994).

Here Wolfe only presents a disagreement with the medical care he received. A disagreement with the medical treatment provided fails to support a claim based on 42 U.S.C. §1983. A prisoner's right to medical care fails to extend to the type of the medical care which the prisoner personally desires. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979). Prisoner complaints regarding the quality or appropriateness of the medical care never support a claim of an Eighth Amendment violation. Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) cert. den., 486 U.S. 106 (1988). Here, Wolfe challenges the appropriateness of her medical care. Thus, she fails to state a cause of action based on the Eighth Amendment as a matter of law.

A disagreement between Persad Center, Osborne, Moser, Baddick and the four psychiatrists Baddick relied upon concerning the appropriate treatment for Wolfe's transsexualism fails to produce sufficient evidence to indicate that Baddick acted with the culpable state of mind required for deliberate indifference to a serious medical need pursuant to 42 U.S.C. §1983 and the Eighth Amendment of the United States Constitution. It does not supply the necessary evidence to show the subjective knowledge required for deliberate indifference to a serious medical need. See Douglas v. Stanwick, 93 F.Supp. 2d 320, 325 (W.D. N.Y. 2000)(difference in opinion between physicians concerning appropriate medical treatment for inmate fails to show deliberate indifference).

In Snipes v. DeTella, 95 F.3d 586 at 590 (7th Cir. 1996) cert. den., 519 U.S. 1126 (1997) the United States Court of Appeals for the Seventh Circuit concluded:

Physicians will disagree about whether a particular course of treatment is appropriate, or even if treatment is appropriate at all, but a disagreement in treatment alone will not support a constitutional violation.

The United States Court of Appeals for the Eighth Circuit in Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989) reached the same conclusion stating:

A difference of opinion whether between an inmate and a physician or between physicians, does not give rise to an Eighth Amendment violation.

Even differing medical opinions among prison doctors does not support a claim of cruel and unusual punishment based on deliberate indifference to a serious medical need. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) cert. den., 450 U.S. 1041 (1981). While evidence of disagreements between outside doctors and prison doctors might be sufficient to overcome a summary judgment motion in a medical malpractice action even if proven such evidence fails to demonstrate deliberate indifference to a serious medical need. Sanders v. Vigil, 917 F.2d 28, 1990 W.L. 160964 *2 (9th Cir. 1990). Accord, Cruz v. Ward, 558 F.2d 658, 662 (2nd Cir. 1977)(it is to be expected that

prison physicians should sometimes disagree with the opinions of the hospital staff) cert. den., 434 U.S. 1018 (1978). In Gardner v. Zaunbrecher, No. 95-CV-1543, 1996 W.L. 507072 *2 (N.D. N.Y. Sept. 4, 1996) the Court held that a disagreement among an inmate's physicians over a proper course of treatment did not show conscious or callous indifference to a serious medical need.

In Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999) plaintiff, the estate of an inmate, contended that while confined in prison the inmate received inadequate medical care for decubitus ulcers. The estate contended that these ulcers ultimately caused the inmate's death. The Court of Appeals concluded that the district court correctly granted summary judgment for the defendant physicians based on there being inadequate evidence to show subjective knowledge that their conduct presented a serious risk of harm to the plaintiff.

One of the defendant physicians transferred the decedent to a nearby non-prison hospital for consultation and treatment by a local surgeon, Dr. Wright. Upon the decedent's return to the prison hospital the defendant/physician did not follow Dr. Wright's recommendations that the decedent be transferred to another facility for physical therapy. Instead, the defendant/physician ordered that the decedent be kept out of bed as much as possible and that the nurses move his extremities. The Court of Appeals concluded that even though the defendant physician did not follow Dr. Wright's recommendations this suggested nothing more than a mere difference of opinion as to the appropriate method of treatment under the circumstances.

Here, Baddick did follow the recommendations of four psychiatrists assigned to treat Wolfe at SCI-Mahanoy. He did discontinue Wolfe's treatment. He merely continued the course of treatment already started by Dr. Hume at SCI-Camp Hill and approved of by four psychiatrists at SCI-Mahanoy.

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

Denying plaintiff's Eighth Amendment claim I remain consistent with the ruling '[W]here the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim'. Roach v. Kligman, 412 F.Supp. 421, 525 (E.D. Pa. 1976). Quoting approvingly in Norris v. Frame, supra, 585 F.2d at 1185.

Id. at 231.

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

Because Smith's complaints represent nothing more than mere disagreement with the course of his medical treatment, he has failed to state an eighth amendment claim of deliberate indifference. Id. at 910 F.2d at 502.

The majority of federal courts to consider the issue have concluded that as long as prison authorities provide some treatment to an inmate. even if that treatment constitutes inappropriate care, the required subjective knowledge fails to exist to impose liability upon the healthcare professionals involved. In Rodriguez v. Joyce, 693 F.Supp. 1250 (D.Me. 1988), the court granted a motion for summary judgment in a factual situation similar in all important respects to the one now before this Court. In that case, the plaintiff, a prisoner, alleged that he injured his finger while playing volleyball. When he sought medical treatment from employees of the prison, where he served as an inmate, he received aspirin for the pain. The medical personnel at the prison never took an x-ray. The plaintiff contended that he had fractured his finger. He maintained that the failure of the medical personnel at the prison to take the x-ray

resulted in his receiving inadequate medical care. The court, in granting the motion for summary judgment, stated:

But, as the Supreme Court clearly stated in Estelle, merely questioning the form of medical treatment does not constitute a cognizable section 1983 claim. Plaintiff has alleged nothing more than negligent diagnosis. A decision whether or not to order an x-ray 'is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measure, does not represent cruel and unusual punishment.' Estelle, (citation omitted.) This is quite apt in the context here, where the claim involves only a mere injury to a finger joint. The failure of the nurses to order an x-ray of plaintiff's injured finger is not cruel and unusual punishment. Our holding here is consonant with the approach towards preventing section 1983 from becoming a national state tort claims act administered in the federal courts. Quoting Estate of Bailey v. County of York, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

Id. at 693 F.Supp. at 1253.

In Perkins v. Kansas Department of Corrections, 165 F.3d 803 (10th Cir. 1999) plaintiff, an inmate, submitted the same type of claim based on deliberate indifference to a serious medical need as presented by Wolfe here. In Perkins, supra, plaintiff asserted that although he received medical care it was so ineffective as to constitute no medical care at all. He admitted that he had received treatment for his HIV with two drugs but he claimed that the HIV was going to be immune to those two drugs if he did not receive a third drug. The United States Court of appeals for the Tenth Circuit upheld the dismissal of the action for failure to state a claim based upon its conclusion that prison officials had provided treatment. According to the Court of Appeals the plaintiff merely disagreed with the course of his treatment. That disagreement failed to give rise to a claim for deliberate indifference to a serious medical need. That analysis applies here and requires summary judgment in favor of Baddick and against Wolfe.

In Farmer v. Carlson, 685 F.Supp. 1335 (M.D. Pa. 1988), then Chief Judge Nealon of the United States District Court for the Middle District of Pennsylvania entered summary judgment for the defendants in a factual and legal situation virtually

identical to that presented by Wolfe's claims here. Judge Nealon rejected all the same contentions raised by Wolfe. The plaintiff, an inmate in the United States prison system, established that he suffered from transsexualism. He asserted that he received improper medical care deliberately indifferent to his serious medical needs. He based this on two different contentions. First, he asserted that prison officials denied him hormone treatment. Second, he contended that they denied him adequate psychiatric care. The court concluded that the defendants admitted that they denied him hormone treatment. But the court held that the denial did not stem from deliberate indifference to the inmate's medical needs but instead resulted from an informed medical opinion. The defendants submitted expert affidavits in which several experts asserted that the plaintiff was not an appropriate candidate for hormone therapy because of the risks presented by the hormone therapy. The experts concluded that the proper treatment for people suffering from transsexualism who have a normal genetic complement but who feel that nature has assigned them the wrong sexual characteristics remains firmly in the providence of psychotherapy not in hormonal or surgical manipulation. The experts conceded that other physicians had different opinions on this subject. The experts also conceded that it is possible that other physicians given the same facts would not hesitate to prescribe hormone therapy for the inmate plaintiff.

Judge Nealon concluded that he would not second guess the decision made by the experts presented by the defendants. Judge Nealon held that at best the plaintiff had established a difference of opinion as to how best to treat transsexualism. According to Judge Nealon this provided an insufficient basis on which to deny the motion for summary judgment of the defendants.

The Court also found unconvincing plaintiff's assertion that the defendants had acted in a deliberately indifferent manner to his serious medical needs by denying him

psychiatric treatment. The undisputed medical records established that he had been interviewed by psychiatrists on three occasions in his cell. The psychiatrists had also provided him with an anti-depressant to combat the plaintiff's insomnia and depression. The Court found this not to be a deliberate indifference to a serious medical need. At best, according to the Court, the plaintiff had shown a disagreement with the medical treatment he received. The Court concluded that a disagreement with the quality of medical care never supported a cause of action based on 42 U.S.C. §1983 and deliberate indifference to a serious medical need.

That analysis applies here. Wolfe concedes that she has received constant psychiatric care at SCI-Mahanoy. She disputes the quality of it. The psychiatrists at SCI-Mahanoy and Baddick relying upon those psychiatrists made an informed decision not to provide hormone therapy to Wolfe. Three separate experts agree with their decision. Robert S. Ravetz, D.O. ("Ravetz"), a psychiatrist, has issued an expert report in this case in which he concludes that within a reasonable degree of medical certainty:

...the plaintiff, while incarcerated should not be given hormonal treatment. Because he is not functioning in society, but is in prison, hormonal therapy would afford no data as to his adjustment or indication of prognosis for transgender surgery. Indeed, being the only convict in a all male prison, the development (sic) secondary female sexual characteristics, might make him feel even more 'freakish' and different. It is my opinion that, within a reasonable degree of medical certainty, Drs. Peter Baddick, John Hume, Louis Martin, Martin Lasky used proper medical judgment in refusing to continue hormonal therapy, and their decision was consistent with the standard of treatment in this area.

It was reasonable for Dr. Baddick to rely on psychiatric recommendations since he is not a psychiatrist. There, was no reason for him to question the treatment for a gender dysphoric disorder provided by the psychiatric staff. Dr. Baddick acted properly for an internist.

See Exhibit "O", report of Ravetz, p. 10. His Curriculum Vitae also appears as Exhibit "O".

Terrence R. Malloy, M.D. ("Malloy") Chief of the Section of Urology and Clinical

Professor of Urology at the University of Pennsylvania Healthcare Systems has also issued an expert report in this case. Malloy concludes that Wolfe should not receive hormone therapy. Malloy states:

All of these factors make him an inappropriate candidate for entrance into a gender identity treatment therapy at the Pennsylvania Hospital and the University of Pennsylvania.

The fact that his physicians have not given him hormone therapy is quite appropriate. For Dr. Moser to state that the withholding of hormones was akin to withholding insulin therapy for a diabetic borders on a ridiculous medical charge.

Therefore, after reviewing all of these records I can state, based on reasonable medical certainty and the fact that I have more than 25 years experience in doing the surgery on transsexual patients, that James (Jessica) would not be an appropriate candidate for transsexual surgery.

Page 3. A copy of Malloy's report is attached hereto as Exhibit "P".

Robert M. Toborowsky, M.D. ("Toborowsky"), Vice-Chairman of the Department of Psychiatry at Pennsylvania Hospital has also issued an expert report in this case. He concludes:

The plaintiff, in my opinion, was unsuitable as a candidate for transsexual surgery given the severity of plaintiff's psycho pathology and chronic emotional instability. Dr. Martin exercised reasonable medical judgment in his treatment of plaintiff and in not acquiescing to plaintiff's wishes that he reinstate the ill advised hormonal therapy that had been prescribed in the past.

Page 2. His report appears hereto as Exhibit "Q".

The same situation exists here as Judge Nealon found to exist in Farmer v. Carlson, supra, 685 F.Supp. at 1339. At best Wolfe has shown a difference of opinion among psychiatrists and other specialists concerning the appropriate treatment for his transsexualism. Such a difference of opinion may support a claim for medical malpractice based upon Pennsylvania common law. It never establishes deliberate indifference to a serious medical need. It fails to constitute evidence of the subjective

knowledge necessary to impose liability for damages against a physician pursuant to 42 U.S.C. §1983. How could Baddick have subjective knowledge that his conduct presented a substantial risk of harm to Wolfe when three specialists in the area of gender disorders and transsexualism approve of his conduct and would have provided the same care? Wolfe has failed to establish a crucial element of her claim.

In Lamb v. Maschner, 633 F.Supp. 351 (D. Kan. 1986) the Court granted summary judgment to the defendants and rejected a claim by an inmate virtually identical to that presented by Wolfe to this Court. In that case an inmate who claimed he was a transsexual sought transfer to a women's facility, female clothing and cosmetics or pre-operative hormone treatment and a sex change operation. The Court granted summary judgment to the defendants concluding that the plaintiff had failed to establish sufficient evidence to support a jury verdict in his favor on the issue of deliberate indifference to a serious medical need. The Court assumed that the plaintiff had transsexualism. The Court concluded that a male prisoner cannot be housed in a women's prison. According to the Court even though a transfer to a female prison may relieve plaintiff's anxieties, clearly a violation of the women's rights would be at issue. The Court held:

Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose. Id. at 633 F.Supp. at 352.

The Court also concluded that prison authorities must have the discretion to decide what clothing will be tolerated in a male prison. The Court held that the denial of female clothing and cosmetics fails to constitute a constitutional violation. Id. at 633 F.Supp. at 352. The Court stated that the plaintiff had received psychiatric care while in prison from medical doctors, psychologists, psychiatrists and social workers. In none of these evaluations were recommendations made for preoperative hormone treatment and surgery. The Court concluded that at best the plaintiff had only shown a

disagreement with the care received. The same analysis applies here and requires the entry of summary judgment for Baddick on all claims of Wolfe relating to deliberate indifference to a serious medical need.

In Long v. Nix, 86 F.3d 761 (8th Cir. 1996)(rehearing and suggestion for rehearing en banc denied), plaintiff claiming to be a transsexual brought a claim pursuant to 42 U.S.C. §1983 against prison officials asserting that he was denied appropriate living conditions and medical treatment. The plaintiff sought to require the Iowa Department of Corrections to provide him with a sensitive psychotherapist trained in gender-identity issues. The Court concluded that since the prison medical staff provided him with trained psychologists they had met their obligation to him concerning their treatment of his transsexualism. There was no constitutional requirement that a sensitive psychotherapist trained in gender identity issues be available to him. Id. at 86 F.3d at 766. That analysis applies here. See Murray v. United States Bureau of Prisons, 106 F.3d 401 (6th Cir. 1997) 1997 W.L. 34677 (table unpublished)(Court of Appeals upheld grant of summary judgment concerning deliberate indifference claim by an inmate contending that he received less hormone therapy than had previously been provided before imprisonment. The Court concluded that even though the conduct violated the prison's own regulations the Court would defer to the professional judgment of the physician and it would not second guess that judgment); Jones v. Flannigan, 949 F.2d 398 (7th Cir. 1991)(table) 1991 W.L. 260880 (Court explained that although a transsexual inmate is entitled to some type of treatment the inmate does not have a right to any particular treatment. A record that demonstrates that the plaintiff inmate received continuous psychological treatment satisfies the Eighth Amendment).⁴

Wolfe has submitted no evidence that removes her claim from an ordinary

⁴ Although this is an unpublished opinion and cannot be cited as precedent it is presented for its reasoning.

contention of medical malpractice. In fact, she proceeds under that theory as well as deliberate indifference to a serious medical need based on the Eighth Amendment of the United States Constitution and 42 U.S.C. §1983. What evidence has Wolfe submitted that transforms this case into a deliberate indifference case? What evidence has Wolfe submitted as to Baddick that shows that any decision was made with subjective knowledge that it presented a substantial risk of harm to Wolfe? To permit this case to go to the jury results in permitting virtually any medical malpractice case to be dressed up in the guise of a constitutional tort.

D. The Eighth Amendment Of The United States Constitution Does Not Entitle A Prison Inmate To A Cure The Treatment For His Gender Dysphoria.⁵

The Eighth Amendment of the United States Constitution does not require prison authorities to provide curative treatment for transsexualism. In Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) Chief Judge Posner, of the United States Court of Appeals for the Seventh Circuit, writing for a unanimous court, held that while prisons have a duty to provide some treatment to inmates suffering from transsexualism they do not have a duty to authorize the hormonal and surgical procedures that in most cases would be necessary to cure a prisoner's transsexualism. According to the Court, these procedures are protracted and expensive. Even after a person is diagnosed as having gender dysphoria, treatment protocols require that he complete at least three months of

⁵ Even if this Court rejects the analysis of the United States Court of Appeals for the Seventh Circuit in Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) Wolfe has failed to produce sufficient evidence to support a jury verdict in her favor on the issue of deliberate indifference to a serious medical need for the reasons set forth in Section C of this brief. Baddick presents the decision of the United States Court of Appeals for the Seventh Circuit in Maggert as an alternative argument. The rejection of it by this Court in no way impairs the validity of the reasoning set forth in Section C of this brief. Section D stands independent of Section D and from the decision of the United States Court of Appeals for the Seventh Circuit in Maggert, supra.

psychotherapy before beginning to take estrogen and that before undergoing the surgical last stage of the treatment he live for two or three years in the gender of orientation while taking estrogen. During this period non-genital surgeries and electrolysis are performed as part of the treatment. Judge Posner concluded:

A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he was a free person let alone an affluent free person...He is entitled to only minimum care...Although some cases hold that states cannot categorically exclude sex change operations from Medicaid coverage...many state Medicaid statutes contain a blanket exclusion..., and we imagine as a practical matter it is extremely difficult to obtain Medicaid reimbursement for such a procedure. According to a recent article, Minnesota is the only state in which Medicaid currently pays for sex change operations...Medicare does not pay for such operations...in general, then, you have to pay for the treatment yourself; and the total cost, which can easily reach \$100,000, puts the treatment beyond the reach of a person of average wealth. Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who would not have obtained the benefit if he had refrained from committing crimes...Id. at 131 F.3d at 671, 672.

The Court concluded by stating:

...except in special circumstances that we do not at present and foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria...131 F.3d at 672.

That analysis applies here. Pennsylvania does not permit Medicaid to pay for hormone treatment or sex change operations. 55 Pa. Code §1141.59(11); 55 Pa. Code §1163.59(a)(1). Although, Wolfe did find somebody to pay for her hormone treatment prior to incarceration no indication exists that this was lawful or would have continued. If this Court mandates hormone treatment for her, he obtains a benefit that he would not have obtained if he had not committed a crime.

E. Wolfe Has Failed To Produce Sufficient Evidence To Support A Jury Verdict In Her Favor On The Issue Of Baddick's Good Faith Defense.

In Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) the United States Court of Appeals for the Third Circuit concluded that a private actor sued pursuant to 42 U.S.C. §1983 possesses a good faith defense. The Court of Appeals held that in order to overcome a good faith defense the plaintiff must establish that the private actor has a subjective appreciation that his actions deprived the plaintiff of his constitutional rights. 20 F.3d at 1276. To establish a violation of the good faith defense the plaintiff must produce evidence to support a jury verdict on the issue of whether the defendant acted in bad faith. Robinson v. City of San Bernardino Police Dept., 992 F.Supp. 1198, 1208 (C.D. Cal. 1998).

Here, no evidence exists to support a jury verdict on the issue of Baddick acting in bad faith. Wolfe testified that she believed that Baddick had good intentions in his treatment of her. Exhibit "B", p. 93. Wolfe testified that she had no idea whether Baddick knew that his treatment was likely to cause substantial harm to her. Exhibit "B", p. 94. Wolfe indicated that Baddick never mistreated her physically. Exhibit "B", p. 95. Wolfe indicated that any mental mistreatment of her by Baddick only consisted of what Wolfe viewed as Baddick's denial of hormone therapy to her. Exhibit "B", p. 95. Wolfe indicated that she had no idea whether Baddick believed that the hormone therapy was medically required or not. Exhibit "B", p. 95. Wolfe admits that she has no evidence that Baddick did not believe that prescribing hormone therapy to Wolfe would have presented a substantial danger to Wolfe. Exhibit "B", p. 97.

Three separate experts have concluded that Baddick made the right decision in not approving hormone therapy for Wolfe. Four psychiatrists failed to recommend the hormone therapy. The four psychiatrists were treating Wolfe, Baddick was not. Baddick is an internist. He reasonably deferred to the experts in the field, the psychiatrists, as to the appropriate treatment for transsexualism for Wolfe. Not a scintilla of evidence of bad faith exists here let alone sufficient evidence to support a

jury verdict in favor of Wolfe on this issue. Thus, Baddick has established his entitlement to summary judgment based upon a good faith defense since no genuine issue of material fact exists concerning that defense. See Nemo v. City of Portland, 910 F.Supp. 491, 499 (D. Or. 1995)(court concluded that defendant had established a good faith defense for purposes of summary judgment where plaintiffs had not submitted any evidence from which it could be inferred that the defendant acted in bad faith).

F. Wolfe's Claim Based On 42 U.S.C. §1983 Fails As A Matter Of Law Because She Seeks To Impose Respondeat Superior Liability Upon Baddick.

Wolfe attempts to impose liability upon Baddick because he was the medical director of SCI-Mahanoy during some of the time period during which she served as an inmate. She seeks to hold him responsible for the actions of the four psychiatrists who treated her during the time he was medical director at SCI-Mahanoy. Baddick depended upon the four psychiatrists to provide care to Wolfe for her transsexualism. Baddick is an internist. Baddick did not take over Wolfe's care. He did not function as her treating physician. No dispute exists as to this. Thus, a fatal flaw exists with Wolfe's claim against Baddick. It depends upon Baddick having responsibility for the actions of other physicians and personnel at SCI-Mahanoy.

The United States Court of appeals for the Third Circuit has repeatedly concluded that no respondeat superior liability exists under any circumstance pursuant to 42 U.S.C. §1983. See Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988); Robinson v. City of Pittsburgh, 120 F.3d 1285 (3d Cir. 1997). Wolfe lacks the ability to proceed to a jury against Baddick on the theory of respondeat superior liability as to his claim arising from 42 U.S.C. §1983. This also applies to Wolfe's equal protection claim as well as to her contention that Baddick's conduct constituted deliberate indifference to a serious medical need in violation of the Eighth Amendment of the United States

Constitution.

- G. Baddick Has Shown His Entitlement To Summary Judgment As To The Equal Protection Claim Of Wolfe Because Wolfe Has Not Produced Sufficient Evidence To Support A Jury Verdict On The Issue Of Baddick Having Treated Her Differently Than Any Other Inmate Because Of Wolfe's Transsexualism.
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Wolfe contends in Count III of her amended complaint that all of the defendants, including Baddick, engaged in discriminatory conduct against her, based solely on her status as a transsexual. See Exhibit "K", amended complaint, Count III, p. 67. Wolfe asserts that such alleged conduct violates the Equal Protection Clause of the Eighth Amendment of the United States Constitution.⁶

To state a claim under the Equal Protection Clause, Wolfe must meet three requirements. First, Wolfe must show that she has standing to bring the claim. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).⁷

Second, once she has shown standing,

[t]he threshold inquiry in evaluating the equal protection claim is... 'to determine whether a person is similarly situated to those persons who allegedly received favorable treatment'.

Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996), cert. den., 520 U.S. 1196 (1997). Third, Wolfe must show that the requisite relationship between the disparate treatment and the

⁶ 42 U.S.C. §1997e(e) requiring physical injury for recovery of monetary damages bars the Equal Protection Claim for damages of Wolfe for the same reason as it bars Wolfe's claim based on deliberate indifference to a serious medical need arising from the Eighth Amendment. 42 U.S.C. §1997e(e) applies to any cause of action emanating from federal law asserted by an inmate relating to his conditions of confinement.

⁷ To prove standing Wolfe must show: (1) she has suffered a concrete, personal, and particularized "injury in fact" to a legally protected interest; (2) a causal connection between the injury and the actions of the defendant, fairly traceable to the challenged action; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61.

government interest does not exist. To make this determination the Court must determine whether the disparate treatment is based on a suspect classification or affects a fundamental right. If it does the Court must apply the strict scrutiny test, which requires that the law or policy be narrowly tailored to achieve a compelling government interest. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985). If the disparate treatment is not based on a suspect classification and does not affect a fundamental right, the Court must apply the rational basis test which requires that there be a rational relationship between the differential treatment and the government's interest. Id.

Wolfe has failed to meet any of the three requirements. Consequently she has failed to establish any equal protection claim with sufficient evidence to withstand Baddick's motion for summary judgment.

Wolfe has not shown that she has the standing to bring the claim because she has not produced sufficient evidence to establish a causal contention between the injury and the action of Baddick fairly traceable to the challenged action. No evidence exists that Baddick relied upon any rule, regulation or statute that discriminated against transsexuals. Baddick denies even knowing of such regulation, statute or rule. See Exhibit "C", p. 68. Baddick believed that the Pennsylvania Department of Corrections did permit hormone therapy. He was not aware of any policy concerning transsexualism. Exhibit "C", p. 76. Thus, the existence of any such policy failed to effect Baddick's actions. Baddick's treatment of Wolfe did not stem from any discriminatory attitude toward transsexuals. Instead, Baddick relied upon the professional opinion of four psychiatrists in affirming their opinion that Wolfe did not need hormone therapy and that in fact such therapy could be harmful to her. Baddick never limited the four psychiatrists in their treatment of Wolfe. He never substituted his medical judgment for their judgment. Exhibit "C", p. 78. No contrary evidence exists.

Thus, Wolfe has produced no evidence to support her view on this issue sufficient to support a jury verdict in her favor. Baddick believed that the four psychiatrists had the expertise in the area of gender identity disorder. He assumed that if they did not know how to deal with gender disorder they would have consulted with another specialist. Since they did not, he believed that they knew how to treat Wolfe's problem. Exhibit "C", p. 79. Baddick on his belief based his treatment of Wolfe in the reliability of the psychiatrists who had evaluated Wolfe. Exhibit "C", p. 43. Thus, there is no causal connection between any injury of Wolfe and the actions of Baddick fairly traceable to any discriminatory rule or regulation or practice of either Baddick or anyone else.

Wolfe has also failed to establish standing because she has not shown a likelihood, as opposed to mere speculation, that her injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61. Here, if Wolfe prevails on her equal protection claim there is no likelihood that her injury will be redressed. She seeks hormone therapy. Baddick depends upon sources independent of any regulation or bias toward transsexuals. Thus, even if he were still the medical director of SCI-Mahanoy and was directed by the Court to reevaluate his decision on purely medical grounds he would reach the same decision. Baddick is not the medical director of SCI-Mahanoy. He does not even work for Correctional at the present time. He has no ability to affect the medical care of Wolfe.

Second, Wolfe has failed to establish sufficient evidence to show that persons similarly situated to her received more favorable treatment than her. What evidence has she produced on this issue? She has produced not a scintilla of evidence let alone sufficient evidence to support a jury verdict in her favor on this issue. Who did Baddick treat more favorably than her? She has not identified an individual or class of individuals who received more favorable treatment. She has not indicated how other inmates received more favorable treatment.

Instead of evidence, Wolfe submits a conclusory statement that all of the defendants discriminated against her in terms of the medical treatment that she received because of her status as a transsexual. She does not even identify how this occurred. Wolfe concedes that she knows of no other inmate at SCI-Camp Hill or SCI-Mahanoy that has received Lupron or Estrace, the hormones she desires. Exhibit "A", p. 106. She has no knowledge of any other inmate at either prison whom prison officials permit to dress as a woman. Exhibit "A", p. 106. Thus, her own admissions doom her equal protection claims to dismissal. She concedes that she lacks the ability to identify anyone who received more favorable treatment than her.

To establish an equal protection violation Wolfe must show intentional or purposeful discrimination against her because of her membership in a definable class. Nabozny v. Podlesny, 92 F.3d 446, 453-54 (7th Cir. 1996). Wolfe has not shown any evidence of intentional or purposeful discrimination by Baddick against her because of her being a transsexual.

In Peterson v. Bodlovich, 2000 W.L. 702126 (7th Cir., May 24, 2000) the United States Court of Appeals for the Seventh Circuit upheld the grant of summary judgment by a district court to an equal protection claim brought by an inmate where the inmate produced evidence similar to that on which Wolfe relies on. The inmate plaintiff contended that prison officials had refused to transfer him from one prison dormitory to another because of his race. The Court of Appeals concluded that the district court had properly granted summary judgment because the plaintiff had not been able to produce evidence showing a racially discriminatory intent by the prison officials. The defendants submitted affidavits denying that the decision not to transfer Peterson was racially motivated. Peterson had insufficient contrary evidence. That constitutes the situation here and requires summary judgment for Baddick against Wolfe concerning Wolfe's equal protection claim.

In Dorsey v. Palmer, 191 F.3d 451 (table)(6th Cir. 1991), 1999 W.L. 777452 the United States Court of Appeals for the Sixth Circuit upheld the dismissal of a prisoner's suit based on 42 U.S.C. §1983 alleging an equal protection violation by prison officials. Plaintiff contended that the defendants violated his equal protection rights by refusing to protect him in prison because he is a homosexual. The United States Court of Appeals noted that the plaintiff did not name any non-homosexual prisoner who refused to identify the source of a threat yet was placed in protective custody. The Court indicated that such a failure resulted in the plaintiff lacking the ability to prove his claim.

That analysis applies here. Wolfe has no ability to identify anyone in a similar situation to her who received the medical treatment that she contends Baddick denied her.

In Hedges v. Poletis, 177 F.3d 1071 (8th Cir. 1999)(rehearing and rehearing en banc denied) the Court of Appeals for the Eighth Circuit affirmed the entry of summary judgment in favor of a defendant police chief and against the plaintiff, a homosexual male, who contended that he was involuntarily committed to a mental institution because of his homosexuality, because plaintiff failed to produce sufficient evidence to support a jury verdict on the motive of the police chief. The Court concluded that the mere fact that the plaintiff is a member of a disfavored group does not automatically entitle him to claim that anything that has happened to him has happened because he is a member of the disfavored group. Mere knowledge by the defendant that the plaintiff was a member of a disfavored class is not enough to prove intentional discrimination. That analysis applies here and requires the grant of summary judgment for Baddick as to Wolfe's claim based on equal protection.

Because Wolfe has failed to establish standing for two separate reasons and has not met the threshold inquiry of showing that a person similarly situated to her received more favorable treatment than she, it makes no difference whether Wolfe can

show that the requisite relationship between the disparate treatment and the government interest does not exist. But she has not shown this either. To make this determination this Court must determine whether a suspect classification exists or whether the conduct effects a fundamental right. Here there is no suspect classification as a matter of law. No court has ever concluded that being a transsexual constitutes a suspect classification. In Holloway v. Arthur Anderson & Co., 566 F.2d 659, 663 (9th Cir. 1977) the United States Court of Appeals for the Ninth Circuit concluded that transsexuality did not meet the traditional indicia of a suspect classification because transsexuals are not a discrete insular minority and because the plaintiff did not establish that transsexuality is an immutable characteristic determined solely by the acts of birth like race or national origin. A number of courts have adopted the Holloway court's holding. See Doe v. Alexander, 510 F.Supp. 900, 904 (D.Minn. 1981). In Brown v. Zabar, 63 F.3d 967 (10th Cir. 1995) the United States Court of Appeals for the Tenth Circuit agreed with the United States Court of Appeals for the Ninth Circuit in Holloway and declined to hold that transsexuality constitutes a suspect classification.

Every court to consider the issue for the purpose of equal protection analysis has held that an inmate's right to medical treatment fails to constitute a fundamental right. The United States Court of Appeals for the Tenth Circuit in Brown, supra, 63 F.3d 967 at 971 reached this conclusion. The Court in Farmer v. Hawk-Sawyer, 69 F.Supp. 2d 120, 127 (D. D.C. 1999) also reached this conclusion.

Thus, the rational basis test applies to Wolfe's claim. Wolfe has failed to show that Baddick's conduct lacked a rational relationship between the differential treatment and the legitimate purpose of the Commonwealth of Pennsylvania. Here, prison officials had a legitimate reason to prevent inmates from adopting female characteristics. It creates instability and encourage sexual attacks. The same rational

applies to bans on cross dressing and use of cosmetics by male inmates.⁸

- H. Wolfe Has Failed To Produce Sufficient Expert Testimony To Support A Jury Verdict In Her Favor In The Issue Of Medical Malpractice Because The Expert Testimony She Relies Upon Does Not Establish Causation By Baddick To A Reasonable Medical Certainty And Does Not Indicate The Standard Of Care That Baddick Should Have Adhered To A Reasonable Medical Certainty.
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In Count IV of her amended complaint Wolfe seeks to recover against all of the defendants, including Baddick, based upon common law medical malpractice. See Exhibit "K", paragraphs 72 and 73. According to paragraph 72 of the amended complaint the negligence of Baddick consists of his breaching his duty by his refusal to administer hormones to Wolfe as well as his failure to remedy Dr. Martin's alleged negligent actions. In order to establish medical malpractice sufficiently to support a jury verdict in her favor Wolfe must submit to the jury expert testimony on the issue of a deviation by Baddick from the required standard of care for a physician with Baddick's training and in Baddick's position, and must produce expert testimony that the deviation from the standard constituted a substantial factor in causing the harm for which Wolfe now seeks compensation from Baddick.

In Chandler v. Cook, 438 Pa. 447, 451, 265 A.2d 794, 796 (1970) the Pennsylvania Supreme Court expressly held:

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

Tarter v. Linn, 396 Pa. Super. 155, 578 A.2d 453 (1990); Strain v. Ferroni, 405 Pa. Super. 349, 357, 592 A.2d 698, 703 (1991)(court held that expert must suggest that

⁸ Here, Baddick did not utilize any state regulation as a justification for his decision. He relied upon four psychiatrists. He did not consider the policy reasons of the Pennsylvania Department of Corrections in relying upon the treatment decisions of the four psychiatrists. He deferred to what he viewed as the superior knowledge of the four psychiatrists.

defendant physician deviated from the “requisite standard of care”); Cobert v. Weisband, 380 Pa. Super. 292, 301-2, 551 A.2d 1059, 1064 (1988)(plaintiff must prove by competent expert testimony that defendant’s conduct fell below the standard of reasonable medical practice).

In Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888, 892 (1990) the Supreme Court of Pennsylvania concluded that in order to establish medical malpractice sufficient to support a jury verdict in her favor Wolfe must present an expert witness who will testify to a reasonable degree of medical certainty that the acts of Baddick that supposedly deviated from acceptable medical standards constituted a proximate cause of the harm suffered.

Wolfe has presented reports from two experts, Moser and Osborne. The time period for the submission of expert reports by Wolfe has expired. An examination of the expert reports of Moser and Osborne show that they do not address the issue of causation by Baddick of the injuries for which Wolfe seeks compensation from Baddick based on medical malpractice in the manner required by the courts of the Commonwealth of Pennsylvania. Moser’s report fails to even discuss the issue of Baddick’s causation. He never indicates to a reasonable degree of medical certainty that anything that Baddick did or failed to do caused injury to Wolfe. Examine the report line by line. He never even mentions causation. See Exhibit “E”, report of Moser.

An examination of Osborne’s report shows that she has also failed to address adequately the issue of causation by Baddick. Her only comment concerning causation appears at the last page of the report. She states:

She has suffered, and continues to suffer as a result of being withdrawn from the treatment that had offered her the first real hope for lasting relief after a lifetime of gender confusion and its social/vocational/behavioral consequences. Should her attempts to redress the situation legally meet with failure, I would expect a marked

deterioration in her mental/emotional functioning, with probable resumption of active suicidality.

See Exhibit "F", p. 22.

This statement fails to indicate that anything that Baddick did or failed to do caused injury to Wolfe to a reasonable medical certainty. Although magic words do not have to appear in a report Osborne's statements fail to comport with the requirement that her opinion contain language that approximates the reasonable medical certainty standard. No indication exists that she even tried to meet the standard in her report or was even aware that she had to meet that standard.

The appellate courts of this Commonwealth have continually expressed their adherence to the requirement that an expert's opinion meet the reasonable medical certainty standard. The Supreme Court of Pennsylvania in McMahon v. Young, 442 Pa. 484, 486, 276 A.2d 534, 535 (1971) explained its reasoning as follows:

The expert has to testify, not that the condition of the Claimant might have, or even probably did, come from the accident, but that in his professional opinion the result in question came from the cause alleged. A less direct expression of opinion falls below the required standard of proof and does not constitute legally competent evidence. [cit. omitted]. The issue is not merely one of semantics. There is a logical reason for this rule. The opinion of a medical expert is evidence. If the fact finder chooses to believe it, he can find as a fact what the expert gave as an opinion. For a fact finder to award damages for a particular condition to a plaintiff it must find as a fact that the condition was legally caused by the defendant's conduct. Here, the only evidence offered was that it was 'probably' caused, and that is not enough. Perhaps in the world of medicine nothing is absolutely certain. Nevertheless, doctors must make decision in their own profession every day based on their own expert opinions. Physicians must understand that it is the intent of our law that if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which the jury can make a decision with sufficient certainty so as to make a legal judgment.

See also Kravinsky v. Glover, 263 Pa. 8, 21, 396 A.2d 1349, 1356 (1979)(when a party must prove causation through expert testimony, the expert must testify with a

“reasonable certainty” that “in his professional opinion, the result in question did come from the cause alleged.”); Hreha v. Benscoter, 381 Pa. Super. 556, 560, 554 A.2d 525, 526 (1989)(expert testimony fails to meet the “reasonable certainty” requirement when the expert testifies that the alleged cause “possibly” or “could have” led to the result); Hoffman v. Brandywine Hospital, 443 Pa. Super. 245, 661 A.2d 397, 402 (1995)(plaintiff’s expert report in which the expert opined that the administration of medication “may have” hastened the onset of disease failed to express the requisite degree of medical certainty for causation).

In Hoffman, supra, 661 A.2d at 402, the Superior Court concluded that statements by an expert in a medical malpractice case that it was very highly probable that the negligence of a physician caused the harm to the plaintiff failed to meet the required standard of certainty. In such a case the Superior Court stated that the trial court should enter summary judgment for the physician.

Thus, the appellate courts of the Commonwealth of Pennsylvania have found language far more explicit than that used by Osborne in her report insufficient to meet the reasonable medical certainty standard.

Osborne’s comment that Wolfe suffers from being withdrawn from the treatment that had offered the first real hope for lasting relief apparently applies to the hormones that she was receiving prior to her arrival of SCI-Camp Hill. But Baddick never withdrew these hormones. Hume did. The only allegation against Baddick consists of his refusal to overrule four psychiatrists who had the obligation to treat Wolfe for her transsexuality and order that the hormone treatment be resumed. Osborne never indicates that the failure to resume hormone therapy constituted a cause of Wolfe’s injuries. She never indicates that Baddick caused that failure or that he had any duty to overrule the four psychiatrists that refused to authorize hormone therapy at SCI-Mahanoy.

The reports of Moser and Osborne suffer from an additional fatal flaw besides

not adequately addressing the issue of causation. They do not sufficiently set forth a deviation from the required standard of care by Baddick sufficient to support a jury verdict on that issue in favor of Wolfe and against Baddick.

An examination of Moser's report shows that it never states that Baddick deviated from the standard of care. It never identifies the standard of care for someone in Baddick's position, an internist. See Exhibit "E". Moser's report acknowledges that the prison physicians taking care of Wolfe were not specialists in the care of gender dysphoria. See Exhibit "E", p. 2. Moser then indicates that since this is a complicated area of medicine consultation with appropriate experts should have been sought. Moser never acknowledges an undisputed fact in the record that Baddick did consult with individuals who he did thought were appropriate experts, four psychiatrists at SCI-Mahanoy. Those psychiatrists had responsibility for treating Wolfe, not Baddick. No dispute exists as to this.

Baddick had no involvement in the decision to terminate hormone therapy at SCI-Camp Hill. Hume rendered that decision. Baddick never worked at SCI-Camp Hill in any capacity. Exhibit "B", p. 67. Exhibit "C", p. 72. Baddick never diagnosed Wolfe as having a history of gender identity disorder because it constitutes a psychiatric diagnosis. Baddick is not a psychiatrist. Baddick is an internist. See Exhibit "C", p. 17. Baddick ordered a psychiatric consultation for Wolfe on November 19, 1996, Wolfe's very first day at SCI-Mahanoy. See Exhibit "B", p. 55 and Exhibit "H1".

Baddick indicated that he did not approve hormones for Wolfe because Boxer, a psychiatrist at SCI-Mahanoy had not recommended hormones. None of the psychiatrists who treated SCI-Mahanoy ever indicated that Wolfe needed hormones. See Exhibit "C", pp. 35-36. Baddick believed that all of the psychiatrists had expertise in the area of gender identity disorder. He believed that they had received training in that area. If they did not know how to deal with gender disorder, he believed that they

would have consulted another specialist. Exhibit "C", p. 39.

On April 2, 1997, Baddick informed Wolfe that the hormone therapy that he desired had not been recommended by any of the psychiatrists at SCI-Mahanoy. Baddick informed her that she would have to be approved by a psychiatrist for the hormone therapy because of her history of depression and suicide attempts. Exhibit "C", p. 53. Baddick had no reason to doubt the conclusions that the four psychiatrists at SCI-Mahanoy had reached concerning Wolfe's treatment since he was not a psychiatrist. Exhibit "C", p. 54.

After April 2, 1997, Baddick never examined Wolfe or had any encounters with Wolfe. As far as Baddick knew after April 2, 1997 Wolfe never asked to see him. Exhibit "C", p. 57.

Baddick testified that if any of the psychiatrists had ever recommended hormone therapy he would have ordered it. Exhibit "C", p. 64. If the psychiatrists had recommended that Wolfe needed more psychiatric visits Baddick would have accepted that recommendation without question. Exhibit "C", p. 67. Baddick would have authorized a psychiatrist to examine Wolfe every day if the psychiatrists had felt it necessary. Exhibit "C", p. 77.

Baddick never limited the psychiatrists in their treatment. He never substituted his medical judgment for their judgment concerning the care of Wolfe. Exhibit "C", p. 78.

Moser never considered this deposition testimony of Baddick in reaching his opinion. He never considered that Baddick relied on four psychiatrists. He never states that the reliance on the four psychiatrists by Baddick, an internist, violated the applicable standard of care. He never addresses this issue. His failure to consider crucial evidence in this case renders his expert report a nullity and insufficient to withstand Baddick's motion for summary judgment on the issue of common law medical

malpractice.

In Doby v. Decresenczo, 171 F.3d 858 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit indicated the weight to be provided to an expert report which failed to consider crucial facts in the record when the district court decides a motion for summary judgment. In that case the plaintiff contended that the defendant psychiatrist had committed medical malpractice by involuntarily committing her. She submitted an expert report which indicated that the defendant psychiatrist had failed to meet the required standard of care and had acted in a grossly negligent manner. The expert report failed to acknowledge the existence of two suicide notes upon which the defendant psychiatrist had relied in reaching his opinion. The United States Court of Appeals for the Third Circuit concluded that the failure to discuss the significance of the suicide notes or to even acknowledge their existence resulted in the expert report lacking any validity. The Court of Appeals concluded that the district court properly disregarded it and correctly entered summary judgment in favor of the defendant psychiatrist. Id. at 876.

The analysis of the United States Court of Appeals in Doby, supra, applies here and binds this Court. Moser fails to acknowledge Baddick's reliance on four psychiatrists. He fails to indicate why that reliance deviated from the required standard of care. He fails to indicate why Baddick should have disregarded the opinion of four psychiatrists who were treating Wolfe when Baddick was not a psychiatrist.

Moser never indicates in his report that his opinions concerning the standard of care are based on a reasonable degree of medical certainty. He never uses words that even approximate that standard or show that he utilized that standard. His failure to do so renders his expert opinion a nullity ineffectual in its ability to defeat a motion for summary judgment. See Pirches v. General Accident Co., 354 Pa. Super. 303, 307, 511 A.2d 1349, 1351 (1986).

Moser also disregards another important fact, Baddick left SCI-Mahanoy on September 15, 1997. Exhibit "C", p. 6. Moser never indicates what effect that has on his opinion. After Baddick left SCI-Mahanoy nothing changed concerning the care of Wolfe. The psychiatrist treating Wolfe did not authorize hormone therapy. This shows that Baddick did not exercise day to day control over whether Wolfe received hormone therapy. It depended upon the recommendation of his treating psychiatrist at SCI-Mahanoy. Any harm that Wolfe experienced after Baddick left cannot be attributed to Baddick. Yet, in determining the standard of care and in determining the issue of causation Moser ignores the effect of Baddick's departure. He acts as if it never happened. Based on the decision of the United States Court of Appeals in Doby, supra, this fails to justify according weight to the expert opinion. It renders the report ineffective to defeat the motion for summary judgment of Baddick.

Osborne's expert report suffers from the same defects concerning identifying the required standard of care as infects the report of Moser. An examination of Osborne's report shows that she never even identifies the required standard of care for Baddick. Examine the report page by page. Where does the required standard of care that Baddick violated appear? Osborne never sets it forth at all. See Exhibit "F".

On page 21 of her report Osborne identifies the conduct of some of the defendants which she contends constitutes a lack of due care for Wolfe's serious medical needs. She never indicates that these actions constitute a departure from the standard of care and she never identifies the standard of care that they departed from. But, even if the Court assumes that these factors constitute a statement of the standard of care Osborne never indicates that Baddick violated these factors. No evidence exists in the record to support such an opinion if Osborne had rendered it. See Exhibit "F", p. 21, report of Osborne.

An examination of each factor identified by Osborne as showing a lack of due

care to Wolfe's serious medical needs shows the failure to attribute such conduct to Baddick. The first factor identified by Osborne consists of her statement that Hume engaged in the unilateral decision not to continue female hormone therapy. This fails to effect Baddick. Baddick did not work at SCI-Camp Hill and has never worked there. He had no responsibility for Hume's decision and had no knowledge of it when it was made. No dispute exists as to this. No dispute can exist as to this.

Thus, the conduct of Hume fails to support an opinion that Baddick deviated from the standard of care required of an internist. It fails to constitute a basis upon which to defeat Baddick's motion for summary judgment as to the common law claim of Wolfe based on medical malpractice.

The second factor identified by Osborne in her report relating to lack of due care consists of Osborne's statement that unidentified defendants failed to obtain and read previous medical records of Wolfe prior to making an important medical decision regarding Wolfe's care and admitted at a subsequent deposition that these records would not have influenced the decision. Exhibit "F", p. 21. No indication exists that Baddick did this. Osborne never states that Baddick did this. Osborne never considers whether if Baddick in fact did this it was justified because he relied on four psychiatrists at SCI-Mahanoy who were then currently treating Wolfe for transsexualism and had superior expertise to Baddick and were responsible for the treatment of the transsexualism of Wolfe while Baddick was not.

Thus, this factor fails to support the opinion of Osborne, if Osborne has given one, concerning a deviation from the standard of care by Baddick. It constitutes an insufficient basis on which to defeat Baddick's motion for summary judgment concerning the common law medical malpractice claim of Wolfe.

Third, Osborne contends that a particular lack of due care was caused by the failure to follow through or make contact with another doctor after making a referral for

a second opinion. Osborne never identifies the doctor who did this. It appears to be Hume not Baddick. In fact, Baddick relied upon four different opinions from four different psychiatrists. Exhibit "C", p. 43. Thus, this fails to constitute a basis upon which to defeat the motion for summary judgment of Baddick as it relates to the common law medical malpractice claim of Wolfe.

Fourth, Osborne asserts that a particular lack of due care is shown by the failure on the part of all treating physicians to follow the standard procedure in medical practice of seeking consultation/supervision, training, or reviewing current literature in the field in which the practitioner has limited knowledge or experience. Osborne ignores the fact and never mentions in her report that four different psychiatrists at SCI-Mahanoy concluded that Wolfe should not have hormone therapy. None of them recommended approval of cross dressing or the use of female cosmetics. No evidence exists that Baddick ever refused to carry out any recommendation made to him by any psychiatrists at SCI-Mahanoy concerning Wolfe. No evidence exists that Baddick interfered with the treatment of these psychiatrists at SCI-Mahanoy of Wolfe. The failure of Osborne to consider the undisputed factual record concerning Baddick's reliance on the four psychiatrists at SCI-Mahanoy renders her decision on this issue a nullity. It has no force. It lacks the ability to defeat the motion for summary judgment of Baddick. See Doby v. Decresenczo, 171 F.3d 858 (3d Cir. 1999).

Fifth, Osborne criticizes what she views as the persistent refusal by prison staff to call the inmate by her legal female name. No evidence exists that Baddick had responsibility for this or the ability to prevent it or even had knowledge of it. Osborne never indicates that Baddick as a physician had a duty to ensure that prison staff called Wolfe by her female name. This fails to constitute a basis upon which a jury can base a verdict of medical malpractice against Baddick in favor of Wolfe. Thus, it fails to defeat the motion for summary judgment of Baddick as it relates to Wolfe's medical

malpractice claim.

Sixth, Osborne asserts that a particular lack of due care to Wolfe's serious medical needs was shown by withholding mail in Wolfe's legal name. No indication exists that Baddick had control over the delivery of mail to Wolfe. Osborne never renders an opinion that Baddick had a responsibility to ensure that prison officials and prison employees delivered mail to Wolfe in her legal name. This fails to constitute a basis for a claim of medical malpractice against Baddick.

Seventh, Osborne also asserts that a particular lack of due care to Wolfe's serious medical needs is shown by an absence of any evidence that Wolfe's psychological need to find some avenue for feminine expression was considered seriously as a subject of therapeutic discussion. Osborne never indicates that Baddick as an internist had a duty to ensure that this occurred. Osborne fails to consider the fact that Baddick relied upon the opinions of four psychiatrists. She never states that he should not have relied on those opinions. How can an internist disregard the opinion of four psychiatrists? He cannot. Certainly the failure to disregard the opinions of four psychiatrists does not constitute a deviation from the standard of care and does not constitute medical malpractice.

Osborne candidly admits that none of the conduct that she identifies as showing a lack of due care for Wolfe is based upon a reasonable degree of medical certainty. Instead, she introduces her discussion of these factors by stating:

In my estimation, it can be argued that the following behaviors show a particular lack of due care for Ms. Wolfe's serious medical needs.

See Exhibit "F", p. 21.

No Pennsylvania court has ever found that language utilizing the phrase "it could be argued" constitutes an opinion to a reasonable degree of medical certainty. The Pennsylvania courts to consider the issue have found far more exact language to be

insufficient to meet the reasonable medical certainty required of an expert opinion.

The Supreme Court of Pennsylvania stated in McMahon v. Young, 442 Pa. 484, 486, 276 A.2d 534, 535 (1971):

The expert has to testify, not that the condition of the Claimant might have, or even probably did, come from the accident, but that in his professional opinion the result in question came from the cause alleged. A less direct expression of opinion falls below the required standard of proof and does not constitute legally competent evidence. [cit. omitted]. The issue is not merely one of semantics. There is a logical reason for this rule. The opinion of a medical expert is evidence. If the fact finder chooses to believe it, he can find as a fact what the expert gave as an opinion. For a fact finder to award damages for a particular condition to a plaintiff it must find as a fact that the condition was legally caused by the defendant's conduct. Here, the only evidence offered was that it was 'probably' caused, and that is not enough. Perhaps in the world of medicine nothing is absolutely certain. Nevertheless, doctors must make decision in their own profession every day based on their own expert opinions. Physicians must understand that it is the intent of our law that if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which the jury can make a decision with sufficient certainty so as to make a legal judgment.

See also Kravinsky v. Glover, 263 Pa. 8, 21, 396 A.2d 1349, 1356 (1979)(when a party must prove causation through expert testimony, the expert must testify with a "reasonable certainty" that "in his professional opinion, the result in question did come from the cause alleged."); Hreha v. Benscoter, 381 Pa. Super. 556, 560, 554 A.2d 525, 526 (1989)(expert testimony fails to meet the "reasonable certainty" requirement when the expert testifies that the alleged cause "possibly" or "could have" led to the result); Hoffman v. Brandywine Hospital, 443 Pa. Super. 245, 661 A.2d 397, 402 (1995)(plaintiff's expert report in which the expert opined that the administration of medication "may have" hastened the onset of disease failed to express the requisite degree of medical certainty for causation).

In Hoffman, supra, 661 A.2d at 402, the Superior Court concluded that

statements by an expert in a medical malpractice case that it was very highly probable that the negligence of a physician caused the harm to the plaintiff failed to meet the required standard of certainty. In such a case the Superior Court stated that the trial court should enter summary judgment for the physician.

Osborne has not met this standard. Her own words show that she has not rendered an opinion on any issue to a reasonable degree of medical certainty. Thus, her opinion fails to provide support for a jury verdict. It fails to provide a basis for denying the motion for summary judgment of Baddick.

I. Moser And Osborne Lack The Ability To Offer An Expert Opinion Concerning The Standard Of Care For Baddick Because They Have Never Indicated That They Have The Required Knowledge To Render An Opinion Concerning The Standard Of Care Required Of An Internist Relying Upon The Expert Testimony Of Psychiatrists In Treating A Patient Who Suffers From Transsexualism.

Moser identifies himself as a psychiatrist. See Exhibit "E". Osborne identifies herself as a psychologist. See Exhibit "F". Neither Moser nor Osborne indicate that they have knowledge of the standard of care required of an internist who attempts to treat a transsexual and who relies upon the expert opinions of four psychiatrists. Neither Moser nor Osborne have set forth the basis of their knowledge concerning the standard of care for an internist. Their failure to do so results in their lacking sufficient experience to render an expert opinion about Baddick meeting the standard of care concerning his treatment of Wolfe.

An examination of the relevant decisions of the Pennsylvania appellate courts establishes that Moser and Osborne fail to possess the required experience or education to provide an expert opinion on whether Baddick violated the required standard of care.

In Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 664 A.2d 525 (1995) the Supreme

Court set forth the standard to be applied for a qualifying an expert as follows:

The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. Id. at 480-81, Id. at 528.

A witness may be qualified to render an expert opinion based on training and experience. Rutter v. Northeastern Beaver County School District, 496 Pa. 590, 598, 437 A.2d 1198, 1202 (1981); (plurality opinion). Pennsylvania courts do not require formal education on the subject matter of the testimony. Reardon v. Meehan, 424 Pa. 560, 564, 227 A.2d 667, 670 (1967).

In similar factual situations to the one here the appellate courts of this Commonwealth have concluded that a physician lacks the expertise to testify as an expert. In Dierolf v. Slade, 399 Pa. Super. 9, 581 A.2d 649 (1990) the Superior Court upheld the trial court's refusal to permit an orthodontist to testify as to the standard of care for an oral surgeon in a dental malpractice case. Plaintiff's proposed expert testified that he was an orthodontist who did not perform oral surgery. He indicated that he had discussed surgeries with oral surgeons, had observed oral surgeries in the past and had testified as an expert for the defense in several dental malpractice cases. However, he had never performed surgery, never observed a peroneal nerve injury, was not a neurologist, was not board certified and was rarely present in the operating room. The injury at issue involved the peroneal nerve. The Superior Court concluded that plaintiff's expert had neither recent clinical experience in operating room procedures nor training in a relevant area of medicine that would satisfy the requirements for qualification as an expert. The Superior Court upheld the trial court's refusal to permit him to testify as an expert.

That analysis applies here. Neither Osborne nor Moser have testified that they are comfortable providing an opinion concerning the standard of care for an internist.

They have not shown that they have experience as to what the standard of care consists of for an internist treating a patient who suffers from transsexualism.

The Superior Court of Pennsylvania has concluded that a medical specialist in one area has the ability to testify concerning other areas of specialization where the specialties overlap or where the specialist has experience in another related field. Montgomery v. South Philadelphia Medical Group, 441 Pa. Super. 146, 656 A.2d 1385 (1995), app'l den., 542 Pa. 648, 666 A.2d 1057 (1995). Here, no such overlap has occurred. Wolfe has failed to establish that either Moser or Osborne has knowledge concerning internal medicine.

Although Pennsylvania Courts have adopted a liberal standard for qualification of an expert that standard requires that a witness have a reasonable pretension to expertise in the specific area under investigation. Lavish v. Archbold Ladder Co., 39 D&C 4th 455, 469 (1999). A witness may be unqualified to testify as an expert "if the witness possesses neither experience nor education in the subject matter under investigation...".. Dierolf, supra, 581 A.2d at 651. That constitutes the situation here. Neither Moser or Osborne possess either the experience or education in the subject matter under investigation.

In Dambacher by Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408 (1984), app'l disp., 508 Pa. 643, 500 A.2d 428 (1985), the Superior Court in dicta concluded that an ophthalmologist would not be qualified to testify concerning the causes and treatment of heart disease. That analysis applies here.

In McDaniel v. Merck, Sharp & Dohme, 367 Pa. Super. 600, 533 A.2d 436 (1987) app'l den., 520 Pa. 589, 551 A.2d 216 (1988) the trial court excluded the testimony of the plaintiff's expert doctor, who specialized in anesthesiology and taught pharmacology at Louisiana State University. After reviewing the doctor's educational and professional background, the Superior Court stated:

[b]y his own admission, Dr. Adriani's extensive and impressive pharmacology experience is focused on anesthetics. Although generally familiar with Mefoxin through the literature available, he has never studied nor conducted research on the drug nor reviewed the clinical reports on Mefoxin...he had no reasonable pretension to specialized knowledge of the drug. Id. at 610-11, 533 A.2d at 441.

Accordingly, the Superior Court found the doctor unqualified to express an opinion on whether the antibiotic Mefoxin was the cause of decedent's death, whether the hospital was negligent in supervising the surgical staff, or whether the defendant doctor was negligent in failing to consult specialists. According to the Court, the proposed expert was not properly qualified because his training, education and experience, while providing general expertise, did not fit the question presented for jury determination.

That analysis applies here and indicates that Moser and Osborne lack the ability to testify as expert concerning Baddick. Their expertise, while extensive, does not fit the question for jury determination as it relates to Baddick.

J. Baddick Breached No Duty Of Care To Wolfe Because He Referred Wolfe To Competent Psychiatrists.

Essentially Wolfe's medical malpractice claim against Baddick depends upon Baddick having responsibility for the actions of four psychiatrists who treated Wolfe for her transsexualism at SCI-Mahanoy. Baddick indicated that he did not assume responsibility for Wolfe's treatment. He essentially referred Wolfe to four psychiatrists. According to Wolfe's medical records Baddick saw Wolfe on two occasions, January 6, 1997 and April 2, 1997. See Exhibits "H3 and H8". On both occasions, Baddick merely informed Wolfe of the treatment decisions rendered by the psychiatrists who were actively conducting Wolfe's care.⁹ Baddick never diagnosed Wolfe as having a history

⁹ Wolfe has not contested the accuracy of the medical records of SCI-Mahanoy. She has no basis to support such an assertion if in fact she decides to make it.

of gender identity disorder because it constitutes a psychiatric diagnosis. Baddick is not a psychiatrist. Exhibit "C", p. 17. Baddick ordered the psychiatric consultation on the very day that Wolfe arrived at SCI-Mahanoy. Exhibit "C", p. 17. Baddick concluded that Wolfe should not have hormones in substantial part because his treating psychiatrist had not recommended hormones. Baddick believed that the hormone decision should be made by the psychiatrists. None of the psychiatrists believed that Wolfe needed hormones. Exhibit "C", pp. 35-36.

Baddick had no reason to question the expertise of the four psychiatrists at SCI-Mahanoy. He believed that if they did not have the required expertise they would consult another specialist who did. Exhibit "C", pp. 39 and 54.

If any of the psychiatrists had ever recommended hormones he would have ordered it. Exhibit "C", p. 64. Baddick did not consider permitting Wolfe to wear women's clothes as a treatment because none of the psychiatrists had ever recommended it. See Exhibit "C", p. 62. If a psychiatrist had recommended that Wolfe needed more psychiatrist visits Baddick would have accepted that recommendation without hesitation. Exhibit "C", p. 77. Baddick would have permitted a psychiatrist to examine Wolfe every day if the psychiatrists had felt it necessary. Baddick never limited the psychiatrists in their treatment. He never substituted his judgment for their judgment as to the care of Wolfe. Exhibit "C", p. 78. No factual dispute exists as to this. Thus, Baddick has essentially referred Wolfe to four separate psychiatrists for treatment of transsexualism. He served the same function as a referring physician to a specialist outside the prison context.

Pennsylvania courts have repeatedly concluded that a physician in Baddick's position has no duty of care once he refers a patient to a specialist. In Hannis v. Ashland State General Hospital, 123 Pa. Cmwlth. 390, 554 A.2d 574 (1989) the Commonwealth Court of Pennsylvania concluded that there is no precedent in

Pennsylvania which requires a family practitioner to follow a patient after referring a patient to a specialist. Id. at 554 A.2d at 578. That still constitutes the current situation. No Pennsylvania court has ever imposed such a duty upon a physician. Accord, Weidner v. Nassau, 28 D&C 4th 269 (1993) aff'd 437 Pa. Super. 658, 647 A.2d 274 (1994).

In Bourke v. Kazaras, 746 A.2d 642 (Pa. Super. 2000) the Superior Court of Pennsylvania concluded that a bar association's lawyer referral service had no liability to a client for malpractice committed by an attorney to whom the bar association had referred the client. The Superior Court based its view on the fact that no cause of action existed against any professional for a negligent referral.

The Superior Court found two federal court decisions apparently to the contrary to be limited to their facts. In the first case, Federici v. Hally, 1997 W.L. 399384 (E.D. Pa. 1997) the plaintiff sued two doctors who referred her to a third. The third had prescribed a drug that had allegedly injured the plaintiff. According to the Superior Court in Bourke, supra, the Court based its decision on the fact that the two referring doctors were plaintiff's continuing treating nephrologists. They had a duty to monitor the plaintiff's use of the drug prescribed by the third doctor. No such duty exists here upon Baddick. He had the right to rely upon the expertise of the four psychiatrists. He was in no position to monitor the treatment. He had every right to depend upon them.

The Superior Court in Bourke, supra, also concluded that the district court's decision in Trainor v. Bloomsburg Hospital, 60 F.Supp. 2d 412 (M.D. Pa. 1999) failed to create a general cause of action for negligent referral. The Superior Court concluded that the district court's analysis depended upon the referring doctor knowing the doctor to whom he referred the patient was incompetent. No such evidence exists here. Wolfe makes no such contention. The record fails to support it.

- K. No Respondeat Superior Liability Exists Against Baddick For The Actions Of The Four Psychiatrists At SCI-Mahanoy As A Matter Of Law

Because Baddick Did Not Control Their Manner Of Performance And
The Result Of Their Work.

Wolfe attempts to hold Baddick responsible for the actions of the four psychiatrists at SCI-Mahanoy. No basis exists to impose liability upon Baddick for the conduct of the four psychiatrists at SCI-Mahanoy. Baddick only has responsibility for their actions if Wolfe establishes sufficient evidence to show that they acted as his agent and that he controlled the manner of their performance and the result of their work. Strain v. Ferroni, 405 Pa. Super. 349, 592 A.2d 698, 704 (1991). In Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255, 259-60 (1959) the Pennsylvania Supreme Court set forth the test for respondeat superior liability when physicians were involved stating:

Physicians and surgeons, like other persons, are subject to the law of agency and a physician may be at the same time the agent both of another physician and of a hospital even though the employment is not joint. (citation omitted). In determining whether a person is the servant of another it is necessary not only that he be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it but that this work is to be performed on the business of the master or for his benefit. (Citation omitted). Actual control, of course, is not essential. It is the right to control which is determinative. On the other hand, the right to supervise, even as to the work and the manner of performance, is not sufficient; otherwise a supervisory employee would be liable for the negligent act of another employee but who would not be the superior or master of that employee in the sense the law means it. (Citations omitted).

No indication exists in the record in this case that any of the four psychiatrists functioned as Baddick's employee. He did not hire them. He had no ability to fire them. He functioned as an independent contractor for Correctional, a private corporation. Exhibit "C", p. 51. Martin did not work for Correctional. Another private contractor employed him as a staff psychiatrist. Exhibit "I", p. 5. No indication exists that Correctional even employed the other three psychiatrists. Even if Correctional did they still did not function as employees of Baddick. Correctional may have had respondeat

superior liability for their actions but Baddick did not.

No evidence exists in this record to support the view that Baddick had the right to control the work to be done or the manner of performing it. The evidence shows the contrary. Baddick deferred totally to all the recommendations made by the four treating psychiatrists at SCI-Mahanoy. He did not tell them how to perform their work. He did not tell them their manner of performing it.

No evidence exists in this record to show that the four psychiatrists performed their work to benefit Baddick. It did not benefit Baddick. Baddick and the four psychiatrists served different masters. The four psychiatrists did not serve Baddick.

- L. Wolfe Has Failed To Establish A Cause Of Action Against Baddick Sufficient To Withstand Summary Judgment Based On Article I, Section 13 Of The Pennsylvania Constitution Because That Provision Provides No Greater Protection Than The Eighth Amendment Of The United States Constitution.

In Count II of her amended complaint Wolfe attempts to state a cause of action against Baddick based on Article I, Section 13 of the Constitution of the Commonwealth of Pennsylvania. Wolfe relies upon the same evidence that she utilizes to establish a violation of the Eighth Amendment of the United States Constitution to support her claim based on Article I, Section 13 of the Pennsylvania Constitution.

In Jochen v. Horn, 727 A.2d 645, 649 (Pa. Cmwlth. 1999) the Commonwealth Court held that:

The guarantee against cruel and unusual punishment contained in the Pennsylvania Constitution provides no greater protection than that afforded under the Eighth Amendment to the United States Constitution. Id. at 727 A.2d at 649.

In Jochen, supra, the Commonwealth Court concluded that the standard set forth by the Supreme Court of the United States in Farmer v. Brennan, 511 U.S. 825 (1994) applied to any claim brought pursuant to Article I, Section 13 relying upon cruel and unusual punishment. The Commonwealth Court held that in order to establish a cause

of action pursuant to Article I, Section 13 a plaintiff had to show that the defendant knew of and disregarded an excessive risk to the plaintiff's health or safety. Id. at 727 A.2d at 649.

Baddick has shown in great detail in Section C of this brief why Wolfe lacks the ability to defeat his motion for summary judgment concerning deliberate indifference to a serious medical pursuant to the Eighth amendment of the United States Constitution and 42 U.S.C. §1983. That reasoning and analysis applies here and requires the granting of summary judgment in favor of Baddick and against Wolfe concerning Wolfe's claim arising from Article I, Section 13 of the Pennsylvania Constitution.

A second reason exists which requires the granting of summary judgment in favor of Baddick and against Wolfe concerning Wolfe's claim based on Article I, Section 13 of the Pennsylvania Constitution. No Pennsylvania court has ever concluded that Article I, Section 13 of the Pennsylvania Constitution creates a cause of action for monetary damages. No reason exists for this Court to create such a claim. Common law remedies and 42 U.S.C. §1983 provide Wolfe with more than adequate redress.

M. This Court Should Decline To Exercise Supplemental Jurisdiction Over The Claim Of Wolfe Pertaining To Article I, Section 13 Of the Pennsylvania Constitution Because It Raises A Novel Issue Of State Law.

Even if this Court concludes that a cause of action exists pursuant to Article I, Section 13 of the Pennsylvania Constitution, this Court should decline to exercise supplemental jurisdiction over it. It possesses the discretion to decline to exercise supplemental jurisdiction if the claim of Wolfe against Baddick based on Article I, Section 13 of the Pennsylvania Constitution raises a novel or complex issue of state law. See 28 U.S.C. §1367(c)(1).

Wolfe's claim does raise a novel issue of state law. Wolfe asserts that Article I, Section 13 of the Pennsylvania Constitution provides her with a cause of action for

damages against Baddick. No Pennsylvania court has ever found such a cause of action emanating from Article I, Section 13. Thus, this Court should permit the state courts to address this issue. Pennsylvania courts should interpret the Pennsylvania Constitution when a novel claim presents itself.

The federal district courts have declined to exercise pendent jurisdiction where novel issues of state law exist in situations similar to that presented by Wolfe here. In Bordallo v. Banco Bilbao Vizcaya de Pr., 952 F.Supp. 72 (D. Puerto Rico, 1997) the district court declined to exercise supplemental jurisdiction under 28 U.S.C. §1367(c)(1) over an employee's individual liability claim against a supervisor. The court relied upon the fact that the Puerto Rico Supreme Court had not decided the issue raised by the employee. Thus, it constituted a novel issue of law.

In Schwartz v. System Software Associates, Inc., 813 F.Supp. 1364 (N.D. Ill. 1993) the court dismissed the common law fraud claim and refused to exercise supplemental jurisdiction because no Illinois court had yet addressed the issue of whether a fraud on the market theory may be invoked to substitute for actual reliance under Illinois law. The court indicated that it had the right pursuant to 28 U.S.C. §1367(c)(1) to decline to exercise supplemental jurisdiction over state law claims if it raised a novel issue of state law.

III. CONCLUSION

In the light of the foregoing, Peter J. Baddick, III, D.O. respectfully requests that his motion for summary judgment be granted and that judgment be entered in his favor and against Jessica E. Wolfe.

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of defendant, Peter J. Baddick, III, D.O.'s Motion for Summary Judgment along with supporting Memorandum of Law and Exhibits by First Class U.S. Regular Mail on this date to the following individuals:

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