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

LAWRENCE J. PEET	:	**CIVIL ACTION**
	:	**No. 3:1010-CV-482**
v.	:	**(Judge Caputo)**
	:	**(Magistrate Judge Carlson)**
JEFFREY A. BEARD, Ph.D, et al.	:	**ELECTRONICALLY FILED**

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

I. Counter Statement of the Case and Procedural History 1

II. Questions Presented 2

III. Legal Standards 3

IV. Argument on Issues Presented

A. Whether Plaintiff's Complaint meets the requisite pleading standards for a cause of action based upon deliberate indifference against Defendant PHS and individual medical Defendants Drs. Underwood, Beaven and Miller, and therefore, should not be dismissed for failure to state a claim.. 7

B. Whether Plaintiff's Complaint states a cause of action based upon state-created danger against Defendant PHS and against individual medical Defendants Drs. Underwood, Beaven and Miller because the Complaint sets forth numerous factual allegations supporting this claim.......................... 16

C. Plaintiff's Complaint Meets the Requisite Pleading Standards for a Cause of Action Based on Deliberate Indifference Arising From a Lack of Training and, Therefore, Should Not Be Dismissed for Failure to State a Claim. 21

D. Plaintiff's Complaint Meets the Requisite Pleading Standards for a Cause of Action Against Defendant PHS for Corporate Negligence and Against Individual Medical Defendants Drs. Underwood, Beaven and Miller, and, Therefore, Should Not Be Dismissed for Failure to State a Claim. 21

E. This Court Should Exercise Supplemental Jurisdiction Pursuant To 28 U.S.C. §1367(c) To Adjudicate State Claims. 24

F. Count II of Plaintiff's Complaint States a Cause of Action Against Defendant PHS, and Against Individual Medical Defendants Drs. Underwood, Beaven and Miller for Negligence and Not Breach of Contract. 26

V. CONCLUSION 27

CERTIFICATE OF SERVICE 29

TABLE OF CITATIONS

Cases ***Page(s)***

Airborne Beepers & Video, Inc. v. AT&T Mobility, LLC
449 F.3d 663, 667 (7th Cir. 2007) 4

Arthur v. Maersk, Inc. 28
434 F.3d 196, 204 (3d Cir. 2006)

Ashcroft v. Iqbal
129 S. Ct. 1937, 1950 (2009) 5, 6, 8, 9, 28

Bell Atl. Corp. v. Twombly
550 U.S. 544, 570 (2007) 4, 5, 8, 9, 16

Belt v. Geo Group, Inc.
207 U.S. Dist. LEXIS 25114 (E.D. Pa. April 4, 2007) 21

Borough of West Mifflin v. Lancaster
45 F.3d 780 (3d Cir. 1995) 24, 26

Brown v. Commonwealth of Pennsylvania, Department of Health Emergency Medical Services Training Institute
318 F.3d 473(3)(d) (3d Cir. 2003). 18

Bullock v. Beard,
3:10-CV-401, April 14, 2010 .... 4, 5, 6, 16

Carter v. City of Philadelphia
181 F.3d 339, 358 (3d Cir. 1999) 15

City of Pittsburgh v. W. Penn Power Co.
147 F.3d 256, 263 & n. 13 (3d Cir. 1998) 5

Decker v. Borough of Hughestown
2009 U.S. Dist. LEXIS 110113 (M.D. Pa. Nov. 25, 2009) (Caputo, J.) 15

Erickson v. Pardus
551 U.S. 89, 93 (2007) 4

Estate of Smith v. Marasco
318 F.3d 497 (3d Cir. 2003) 20

Cases ***Page(s)***

Estelle v. Gamble

429 U.S. 97; 97 S. Ct. 285 (1976) 23

Farmer v. Brennan
511 U.S. 825, 837; 114 S. Ct. 1970 (1994)... 7

Fowler v. UPMC Shadyside
578 F.3d 203 (3d. Cir. 2009)... 5, 6, 8, 9, 11

Gioffre v. County of Bucks
2009 U.S. Dist. LEXIS 101894 (E.D. Pa. November 2, 2009).............................. 15

Gould Elecs. v. United States,
220 F.3d 169, 178 (3d Cir. 2000)... 5

Grayson v. Mayview State Hospital
293 F.3d 103, 108 (3d Cir. 2002)... 27

In Re Burlngton Coat Facotry Sec. Litig.
114 F.3d 1410, 1429-30 (3d Cir. 1997)... 5

Kost v. Kozakiewicz
1 F.3d 176, 183 (3d Cir. 1993)... 4

Long v. Wilson
F.3d 390, 400 (3d Cir. 2004)... 28

Martinez v. State of California
444 U.S. 277, 100 S. CT. 553 (1980) 17

Miller v. City of Philadelphia
174 F.3d 368 (3d Cir. 1999). 17

Monmouth County Correctional Inst. Inmates v. Lanzaro
834 F.2d 326, 346 (3d Cir. 1987) cert. denied, 486 U.S. 1006 (1988).................... 7

Morse v. Lower Merion Sch. Dist.
132 F.3d 902, 906 (3d Cir. 1997)... 5

Pension Benefit Guar. Corp. v. White Consol. Indus, Inc.
998 F.2d 1192, 1196 (3d Cir. 1993).. 4

Cases	***Page(s)***

Phillips v. County of Allegheny
515 F.3d 224, 234 (3d Cir. 2008) 4, 6

Pratt v. Stein
444 A.2d 674 (Pa. Super. 1982) 22

Rivas v. City of Passaic
365 F.3d 181 (3d Cir. 2004) 19, 20

Sanford v. Stiles
456 F.3d 298 (3d Cir. 2006) 19, 20

Scheuer v. Rhodes,
416 U.S. 232, 236 (1974) 5

Sparks v. Hershey
661 F.2d 30 (3d Cir. 1981) 25, 26

Thompson v. Nasan Hospital
527 Pa. 330, 691 A.2d 703 (1991) 23

Winslow v. Prison Health Services, Inc.
No. 1:08-CV-0785, 2010 WL 57166 at 5 (M.D. Pa. Feb. 12, 2010) 6

I. COUNTER STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This cause of action stems from severe injuries Plaintiff sustained on March 16, 2008 while incarcerated at SCI Camp Hill. As alleged in the Complaint, on March 7, 2008, Plaintiff had an epileptic seizure while in his cell, and was thereafter taken to Holy Spirit Hospital, Camp Hill, Pennsylvania, for medical attention. After arriving at Holy Spirit Hospital on March 7, 2008, Plaintiff had a grand mal seizure which was witnessed and documented by hospital medical staff. Plaintiff was released from Holy Spirit Hospital back to SCI Camp Hill on March 11, 2008, at which time, Defendants were instructed by Holy Spirit Hospital staff to monitor Plaintiff, continue appropriate dosages of anti-seizure medication, and to otherwise protect Plaintiff in the event he suffered additional seizures. Plaintiff was known to Defendants as being an epileptic and as a person who suffered from a seizure disorder.

On March 16, 2008, Plaintiff had a grand mal seizure while alone in cell A-18, and became unconscious. In the midst of his seizure and while unconscious, Plaintiff fell against a hot standing radiator in his cell. His face remained on the radiator for approximately thirty (30) minutes. Plaintiff sustained third degree burns to his face, hands and forearms; is permanently blind in his right eye; and, his face is grossly disfigured. He also sustained a serious cervical fracture at the C-2 level.

Three hours ***prior*** to this incident, Plaintiff was taken to the medical ward at SCI Camp Hill (operated by PHS) because he was suffering seizure-like symptoms. Plaintiff was released from the care of Defendant PHS and other medical Defendants, and returned to his cell. ***Within hours of being released from the medical ward,*** **Plaintiff had the grand mal seizure described above.**

Plaintiff's theory of liability is a §1983 action for violation of his constitutional rights and medical malpractice. The thrust of Plaintiff's Complaint is that moving Defendants were deliberately indifferent to Plaintiff's epileptic condition which ultimately led to his injuries. As to the medical Defendants, Plaintiff also alleges negligence.

Suit was instituted on December 3, 2009. Thereafter, Plaintiff withdrew his Complaint without prejudice and re-filed under the instant caption on March 3, 2010. Moving Defendants then filed a Motion to Dismiss Plaintiff's Amended Complaint on May 5, 2010, with their Brief due on June 7, 2010.

II. QUESTIONS PRESENTED

A. Whether Plaintiff's Complaint meets the requisite pleading standards for a cause of action based upon deliberate indifference against Defendant PHS and individual medical Defendants Drs. Underwood, Beaven and Miller, and therefore, should not be dismissed for failure to state a claim.

Answered in the affirmative by Plaintiff.

B. Whether Plaintiff's Complaint states a cause of action based upon state-created danger against Defendant PHS and against individual medical Defendants Drs. Underwood, Beaven and Miller because the Complaint sets forth numerous factual allegations supporting this claim.

Answered in the affirmative by Plaintiff.

C. Whether Plaintiff's Complaint meets the requisite pleading standards for a cause of action based on deliberate indifference arising from a lack of training and, therefore, should not be dismissed for failure to state a claim.

Answered in the affirmative by Plaintiff.

D. Whether Plaintiff's Complaint meets the requisite pleading standards for a cause of action against Defendant PHS for corporate negligence and against individual medical Defendants Drs. Underwood, Beaven and Miller, and, therefore, should not be dismissed for failure to state a claim.

Answered in the affirmative by Plaintiff.

E. Whether this Court should exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367(c) to adjudicate state claims.

Answered in the affirmative by Plaintiff.

F. Whether Count II of Plaintiff's Complaint states a cause of action against Defendant PHS, and against individual medical Defendants Drs. Underwood, Beaven and Miller for negligence and not breach of contract.

Answered in the affirmative by Plaintiff.

III. LEGAL STANDARDS

A. Introduction - Legal Standard For a Rule 12(b)(6) Motion to Dismiss

This Court recently specified the applicable legal standard in *Bullock v. Beard,* Civil Action No. 3:10-CV-401, April 14, 2010.[1] (Memorandum Opinion attached as Exhibit "A.") This Court specified the legal standard in these types of Motions to Dismiss the Pleadings as follows:

[1]The Memorandum Opinion by the Honorable A. Richard Caputo in *Bullock* was in response to an almost identical Motion filed on behalf of Prison Health Services by attorney Alan S. Gold in their Motion to Dismiss Plaintiff's Complaint. This Court dismissed Defendant's Motion in *Bullock*.

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded 'enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)*,* meaning enough factual allegations "to raise a reasonable expectation that discovery will reveal evidence of" each necessary element, *Phillips v. County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008) quoting *Twombly,* 550 U.S. at 556); see also, *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir. 1993) (requiring a complaint to set forth information from which each element of a claim may be inferred). In light of Federal Rule of Civil Procedure 8(a)(2), the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus, 551* U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555). "[T]he factual detail in a complaint [must not be] so undeveloped that it does not provide a defendant [with] the type of notice of claim which is contemplated by Rule 8." *Phillips,* 515 F3d at 232*; see also, Airborne Beepers & Video, Inc. v. AT&T Mobility LLC,* 449 F.3d 663, 667 (7th Cir. 2007).

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. See *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir. 1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, see *City of Pittsburgh v. W. Penn Power Co.,* 147 F.3d 256, 263 & n.13 (3d Cir.1998)*,* or credit a complaint's "bald assertions" or "legal conclusions," *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In Re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1429-30 (3d Cir. 1997)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1950 (2009).

> When considering a Rule 12(b)(6) motion, the Court's role is limited to determining whether a plaintiff is entitled to offer evidence in support of his claims. <u>See</u> *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court does not consider whether a plaintiff will ultimately prevail. <u>See</u> <u>*Id*</u>. A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. <u>See</u> *Gould Elecs. V. United States,* 220 F.3d 169, 178 (3d Cir. 2000).

Bullock at 5-6.

In *Fowler v. UPMC Shadyside,* 578 F.3d 203 (3d. Cir. 2009)[2], the Third Circuit discussed the fact that prior to *Twombly* and *Iqbal*, the test for analyzing a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim was if "it appeared beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fowler, 578 F3d at 210.*

After *Iqbal*, the Third Circuit noted that, "When presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The district court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a district court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Fowler, 578 F.3d at 210-11* citing *Iqbal, 129 S.Ct. at 1950.* The appropriate standard for judging Rule 12(b)(6) motions remains that the court must accept all factual allegations as true, construe the complaint in a light most favorable to plaintiff, and determine whether the plaintiff may be entitled to relief, under any

[2]Moving Defendants mistakenly tell the Court that *Fowler* is a non-reported decision when, in fact, it is a reported decision. Moving Defendants also attached the wrong Complaint as an exhibit. (They attached Plaintiff's Complaint filed in a prior cause of action, since withdrawn without prejudice).

reasonable reading of the complaint. *Bullock* Id. at 9, footnote 7, citing *Fowler,* 578 F.3d at 210 (citing *Phillips v. County of Allegheny*, 515 F.3d at 224, 232 (3d Cir. 2008)).

B. Introduction - Legal Standard Under 42 U.S.C. §1983: Liability for Private Corporations

A private corporation may be held liable for violations of §1983 if, while acting under color of law, the corporation knew of and acquiesced in the deprivation of the plaintiff's Constitutional rights. *Winslow v. Prison Health Services, Inc.*, No. 1:08-CV-0785, 2010 WL 57166 at 5 (M.D. Pa. Feb. 12, 2010). To establish liability, the plaintiff must prove that the corporation with deliberate indifference to the consequences established and maintained a policy, practice or custom that directly caused the plaintiff's constitutional harm. *Bullock Id.* at 7.

IV. ARGUMENT ON ISSUES PRESENTED

A. Plaintiff's Complaint Meets the Requisite Pleading Standards for a Cause of Action Based Upon Deliberate Indifference Against Defendant PHS and Individual Medical Defendants Drs. Underwood, Beaven and Miller and, Therefore, Should Not Be Dismissed for Failure to State a Claim.

(Response to Defendants Arguments B & D)

An inmate setting forth a §1983 claim for violations of the inmate's Eighth Amendment rights on the basis of a failure to provide necessary medical treatment must show both that his medical needs were serious and that the defendants' failure to attend to his medical needs rose to the level of deliberate indifference. *Monmouth County Correctional Inst. Inmates v. Lanzaro,* 834 F.2d 326, 346 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988). A serious medical need is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Id.* at 347.

The Supreme Court has held that a prison official is deliberately indifferent to the serious medical needs of an inmate when that official "knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Farmer v. Brennan,* 511 U.S. 825, 837; 114 S. Ct. 1970 (1994).

Defendants' Motion that the Complaint fails to state a cause of action for deliberate indifference against the individual doctors is frivolous on its face. The basis for this portion of Defendants' Motion to Dismiss is that the Plaintiff's pleading fails because the Plaintiff never alleges what the individual doctors did or did not do that constituted deliberate indifference, and the

Complaint never alleges the Defendants knew their conduct presented a substantial risk of harm to Plaintiff. This basis of Defendants' Motion is meritless. For instance, Plaintiff alleges the individual medical Defendants failed to timely and properly dispense anti-seizure medication; failed to follow discharge orders from Holy Spirit Hospital; and, allowed Mr. Peet to be returned to his cell after being improperly discharged from the medical ward of the prison when he had seized just three hours earlier. The Complaint has numerous other specific allegations against the individual medical Defendants.

The Defendants also complain that Plaintiff "lumps all of the Defendants together" as opposed to alleging what each individual medical Defendant did which showed deliberate indifference to Plaintiff. Nothing in *Twombly, Iqbal*, or *Fowler* disallows the method by which Plaintiff has chosen to plead his Complaint. It simply makes no difference whether these Defendants' actions as alleged in the Complaint are "lumped together." To require otherwise would only lead to an unduly and excessively long repetitive pleading. Defendants are, in essence, asking Plaintiff to prepare a separate Complaint against each individual medical Defendant. Clearly, this is not practical, as the Complaint would be several hundred, if not several thousand, pages in length.

Contrary to moving Defendants' allegations, it is perfectly logical to assume that all three of the Defendant doctors were, in fact, on duty at the same time when Plaintiff sustained his injuries, and three hours before. It is also likely that each of the medical doctor Defendants were on duty at crucial times when decisions were made about Plaintiff's care. These are facts which only need to be admitted or denied. Moving Defendants' argument for dismissal is not supported by the pleading standard of *Twombly, Iqbal, or*

Fowler. Paragraphs 82, 83, 84, 85, 87, and 94, as well as all of the subparagraphs therein of the complaint inform moving Defendants of how, when, and where their conduct showed deliberate indifference to Plaintiff's serious medical needs. The exact whereabouts of each of the named medical Defendants at crucial times during Plaintiff's medical treatment is only known by moving Defendants. Although, the whereabouts of some Defendants are known from the records. For instance, *The Medical Incident/Injury Report* dated March 16, 2008 at 2200 hours p.m., attached as Exhibit "C," confirms that Defendant Dr. Barry Beaven describes the initial impression/injury in the following manner: "Inmate is non-verbal and [sic] unresponsive to verbal stimuli, confused and disoriented. Treatment rendered . . . orders received by Dr. Beaven to send by ambulance to Holy Spirit Hospital." Clearly, Defendant Beaven provided care to Plaintiff during this incident. (The Commonwealth employees admit at paragraph 73 in their Answer to the Complaint that on March 16, 2008 Plaintiff was taken to see the medical staff.)

On page 15 of moving Defendants' Brief, Defendants state "according to Peet, PHS and the other defendants should have alerted everyone who came into contact with him of his history of epilepsy. This violates Peet's right to privacy." These Defendants go on to complain that if they had such a policy they would be defending another cause of action. This is nonsense. More importantly, there are no privacy violation allegations that appear in the Complaint, and therefore, they cannot form the basis of a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). A critical issue here is whether these medical Defendants subjectively knew of Plaintiff's epileptic condition and nevertheless maintained a policy that essentially did not keep him in the medical division of the prison given the fact that he was seen and was seizing

three hours before he was injured in the cell on March 16, 2008. If they had not been indifferent to Plaintiff's medical needs, Plaintiff may still have suffered an epileptic seizure, but he would not have seized alone in his cell, fallen unconscious against the radiator, and thereby sustaining the injuries which are at issue. These Defendants knew, according to the medical records in Defendants' possession, of his prior seizures and treatment at Holy Spirit Hospital from March 7, 2008 to March 11, 2008. They treated him for seizures three hours before he seized in his cell and was injured. These Defendants did not need to inform everyone they came in contact with about Plaintiff, but they did need to have a reasonable protocol in place to deal with an epileptic inmate. If they did not, or if they maintained a policy which did not allow for reasonable protocol, whether it was the protocol of Defendant PHS or of the individual medical doctor Defendants, they then were deliberately indifferent to Plaintiff's serious medical needs.

Generally speaking, the policy, practice or custom which Defendants PHS, Underwood, Beaver, and Miller maintained was the failure to have appropriate protocol in place to protect an inmate who suffered from epileptic seizures such as Plaintiff. *Complaint* at 105-106. Specifically, Plaintiff properly alleges that these Defendants allowed Plaintiff to be returned to his cell on March 16, 2008 despite the fact that three hours earlier he had been in the medical care of the Defendants for the same symptoms. In other words, Plaintiff was seizing three hours before he suffered another seizure causing him to fall against the radiator, and was taken to the medical ward of the prison. This information is in the medical and prison records and form the basis of Plaintiff's allegations. See, *Complaint* at 87(w). *See,* Exhibit "D" entitled *Pennsylvania Department of Corrections Employee Report of Incident*

completed and signed by Defendant Correctional Officer Scott Seese. In it, he describes finding Plaintiff in the cell after the injury and then goes on to state ***"this is the second time this inmate was seen by medical because of the same incident took place approximately 3 hours earlier. He was seen by medical earlier tonight and then was returned within 30 minutes. Now this recurred."*** [sic]

Plaintiff has stated a plausible cause of action against Defendant PHS based on specific factual averments in the Complaint. In keeping with the two-step analysis described in *Fowler*, first, the Court must separate out the factual elements of Plaintiff's claim. In his Complaint, Plaintiff has alleged particular policies and customs with sufficient specificity to survive a Motion to Dismiss. The facts of Plaintiff's §1983 claim against Defendant PHS as pled, include, but are not limited to:

> 69. Plaintiff was released from Holy Spirit Hospital on March 11, 2008 at which time, Defendants were instructed by the staff at Holy Spirit Hospital to monitor Plaintiff and continue appropriate dosages of anti-seizure medication, and to otherwise protect Plaintiff in the even the suffered a seizure after March 11, 2008.
>
> 70. Plaintiff was known to Defendants as being an epileptic and a person who suffered from seizure disorder.
>
> 71. On March 16, 2008, Plaintiff had a grand mal seizure while in A block, cell B-16 (upon information and belief) and became unconscious.
>
> 73. Approximately three (3) hours prior to this incident, Plaintiff was taken to medical and seen by the medical staff because he suffered similar symptoms. Plaintiff was returned to his cell within thirty (30) minutes of this first medical visit.

76. Defendants, each of them, through their actions and/or policies and/or indifference, allowed Plaintiff to be injured while he was in their custody and under their exclusive control.

78. At all times relevant hereto, Defendants, each of them, were aware of, and recklessly and deliberately indifferent to, the need for additional and/or different training, testing, rules, regulations, policies, procedures, guidelines, directives, monitoring and investigation relating to the protection of individuals, and particularly relating to the protection of Plaintiff.

79. The Defendants, each of them, had no policy or guidelines or other structured procedure used or applied prior to the date of the Plaintiff's injury to protect Plaintiff.

82. At all relevant times hereto, Defendants, each of them, were aware of, and were deliberately indifferent to, the need for additional and/or different training, testing, rules, regulations, policies, procedures, guidelines, directives, monitoring and investigation relating to the detention of inmates, particularly, but not limited to, inmates such as Plaintiff who were epileptic and/or who suffered from seizure disorders.

83. At all relevant times hereto, Defendants, each of them, were aware of, and were deliberately indifferent to, the need for additional and/or different training, testing, rules, regulations, policies, procedures, guidelines, directives, monitoring and investigation relating to the detention of inmates with epilepsy.

84. At all relevant times hereto, Defendants, each of them, were aware of, and deliberately indifferent to, the need for additional and/or different training, testing, rules, regulations, policies, procedures, guidelines, directives, concerning the prison placement of inmates with epilepsy.

86. Defendants, each of them, acted with deliberate indifference to the need for additional and/or different training, testing, rules, regulations, policies, procedures, guidelines and directives in failing to adequately protect Plaintiff while he was in their exclusive custody.

87. The brutal and gruesome injury of Plaintiff was a direct and proximate result of the recklessness and deliberate indifference of the Defendants, each of them, named herein. Such reckless and deliberate indifference consisted of:

    p. Failing to have reasonable protocol;

    t. Failing to provide a policy and/or reasonable guidelines concerning assignment of inmates to cells at SCI Camp Hill;

    u. Failing to have policy and reasonable guidelines addressing the issue of where an inmate should be placed who suffered from epileptic seizures;

    v. Failing to have policy and reasonable guidelines to alert the staff and other employees of inmates such as Plaintiff who had a history of epileptic seizures; and,

105. At all times relevant and material hereto, Defendant PHS, had the ability to control the manner in which their agents and employees, specifically, Barry Beavens, M.D., Gordon Miller, M.D., David Underwood, M.D., Dr. Gajgan, John Doe #3, and Jane Doe #3, carried out their duties as employees or agents of the Defendants and, in fact, at all times relevant hereto and Defendants' specific agents and employees including said doctors were controlled by the Defendants in terms, *inter alia*, of how they provided medical care to inmates and how referrals of inmates for diagnostic testing and specialized medical care was to be accomplished.

106. At all times relevant hereto, Defendant PHS, promulgated Defendants' own policies and protocols and mandated

> participation by employees and agents in continuing education programs designed specifically by the Defendants for use and implementation by their agents and employees in the delivery of health care and specialized medical services according to "sound medical practices" to inmates incarcerated at SCI Camp Hill and its is also specifically alleged that Defendant PHS, controlled the manner in which their agents and employees, carried out their duties as employees or agents of the Defendant PHS by, *inter alia*, providing these employees and agents with such specific policies, protocols, publications and mandatory continuing educational materials and requiring compliance therewith.

See also, Paragraph 94,(A),(B),(E),(F),(G),(I),(J)(VIII), (J)(IX),(J)(XX), (J)(XXI), (J)(XXII), of Plaintiff's Complaint.[3]

Plaintiff notes that this Court has recently held that, "There is no requirement at the pleading stage for plaintiff to identify a specific policy to survive a motion to dismiss." *Decker v. Borough of Hughestown,* 2009 U.S. Dist. LEXIS 110113 (M.D. Pa. Nov. 25, 2009) (Caputo, J.) *citing Carter v. City of Philadelphia,* 181 F.3d 339, 358 (3d Cir. 1999).

In *Gioffre v. County of Bucks,* 2009 U.S. Dist. LEXIS 101894 (E.D. Pa. November 2, 2009), the Court held that the following language was sufficient to survive a Rule 12(b)(6) Motion to Dismiss regarding supervisory liability in an Eighth Amendment context: "Defendants had established,

[3]In further support of Defendant PHS' custom of providing inadequate medical care to inmates, Plaintiff notes there have been at least 27 lawsuits, not including the instant suit, filed against Defendant PHS by inmates in the last ten years in the Middle District of Pennsylvania alone. Plaintiff did not specifically plead the evidence about other lawsuits against Defendant PHS. While Plaintiff's counsel believes that pleading such evidence is not necessary, should the Court desire, Plaintiff would amend his Complaint to allege facts about those other cases as support for Plaintiff's allegation that Defendant PHS' custom was to provide inadequate medical care to inmates and to provide inappropriate medications and dosages of medications to inmates.

tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates to 'avoid the costs of necessary medication, treatment and hospitalization.'" *Gioffre,* 2009 U.S. Dist. LEXIS 101894 at 10-11. The pleadings in the instant case contain many more specific allegations.

Plaintiff has clearly alleged particular policies or customs with sufficient specificity to survive a Motion to Dismiss. Particularly, Plaintiff has alleged that Defendant PHS failed to have policies concerning inmates with epilepsy and/or seizure disorders. Plaintiff anticipates, through the course of discovery, that dozens of specific policies and/or lack of policies will emerge pertaining to inmates such as Plaintiff. Defendants, in essence, ask this Court to hold that Plaintiff is not entitled to discovery concerning policy and procedure. It is simply premature to entertain the thought of dismissing these Defendants since discovery has not commenced. The exact protocols and policies in place by Defendant PHS at the relevant time of Plaintiff's treatment and injuries are known by moving Defendants and solely within their possession.

Twombly did not foreclose the discovery process. To the contrary, the *Twombly* Court stated a lower Court must be cautious in dismissing a complaint in advance of discovery. *Twombly*, 550 U.S. 557-558. It would be patently unfair to expect a plaintiff such as Peet to reach into the PHS policy manual pre-discovery and recite PHS' policies word-for-word. What plaintiff has done is pointed to specific policies and customs.

As this Court stated in *Bullock*, the ultimate success or failure of these claims is not before the Court on a Rule 12(b)(6) Motion, but only whether Plaintiff has properly alleged a cause of action.

B. Plaintiff's Complaint States a Cause of Action Based Upon

State-Created Danger Against Defendant PHS and Individual Medical Defendants Drs. Underwood, Beaven and Miller Because the Complaint Sets Forth Numerous Factual Allegations Supporting This Claim.
(Response to Defendants' Arguments C & E)

Plaintiff's factual allegations concerning the policy and procedure of Defendant PHS and the actions of the individual medical Defendants are outlined and discussed in Argument IV(A) above and are herein incorporated by reference. The issue then remains whether the Complaint sufficiently alleged all Defendants acted with a degree of culpability which meets the legal standard for state-created danger.

Liability will attach to Defendant PHS if it has a policy or practice of placing helpless persons in situations of serious danger in a reckless or deliberately indifferent manner and thereby causing harm to them. The Third Circuit has held that decision making which is "clearly arbitrary, can be said to be conscious shocking." *Miller v. City of Philadelphia,* 174 F.3d 368 (3d Cir. 1999). Contrary to Defendant PHS' argument that an affirmative action is required in this case and that no affirmative action has been alleged, the response is twofold. First, affirmative actions have been alleged by Plaintiff against Defendant PHS as well as the individual medical Defendants. Specifically, but not limited to, the fact that Plaintiff was released from the medical ward within hours of having seizure activity. Second, and perhaps more importantly, the law recognizes where there is a "special relationship" between the Plaintiff and the Defendants, this may give rise to an affirmative duty for the Defendants to act and to protect the Plaintiff. *Martinez v. State of California*, 444 U.S. 277, 100 S. CT. 553 (1980). In *Martinez,* the Court recognized there were situations which created a special relationship between

the plaintiff and the defendant, sufficient to give rise to an affirmative duty to protect; such as prisoners and involuntarily committed mental patients. In the instant case, Plaintiff Peet was a State prisoner in the custody of the Commonwealth of Pennsylvania and under the control of Defendant PHS and the other individual medical Defendants. Defendant PHS affirmatively exercised its authority over Plaintiff in this custodial environment by releasing him from the medical ward back to his cell within hours of having seizure activity. This action (whether considered an affirmative action or failure of Defendant PHS' affirmative duty to protect the Plaintiff) rendered Plaintiff more vulnerable to serious injury which, in fact, did occur.

Also, the level of culpability in state-created danger cases is directly related to the urgency or non-urgency of each situation. The culpability requirement is proportional to the degree of urgency. The more urgent the situation, the higher the level of conscious shocking standard required for a State actor to be held liable under the state-created doctrine. The Third Circuit has held that the "shocks the conscious" standard applies if the State actor had to act with urgency. . . who likewise will have little time for reflection, typically making decisions in haste and under pressure. *Brown v. Commonwealth of Pennsylvania, Department of Health Emergency Medical Services Training Institute*, 318 F.3d 473 (3d Cir. 2003). In the instant case, there was absolutely no urgency in the decision making concerning Plaintiff Peet's epileptic condition and seizures. This, in fact, lowers the threshold for the level of culpability required. In *Brown, Id*., the Third Circuit held that for affirmative duty purposes, there was a special relationship between the State and a minor plaintiff who had been placed in a home in which he was sexually abused. The Court commented that other Circuits had ruled that

foster children have a substantive due process right to be free from harm at the hands of State-regulated foster parents on the grounds of an analogy between persons placed in foster care and those persons incarcerated. In these types of special relationship cases, the State made the individual dependent on it for basic needs. In *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006), the Court determined that the context was important in discerning the meaning of conscious shocking conduct and that the "level of culpability required to shock the conscious increases as the time State actors have to deliberate decreases." In the *Sanford* case, the mother of a 16 year-old who committed suicide at home, sued a school district under a state-created danger theory. **The Third Circuit found that the appropriate standard was whether there was a "conscious disregard of a great risk of harm."** It is important to note that this is a lower standard than shocks the conscious. It is also significant to note that there was no custodial relationship in *Sanford* as there is between Plaintiff Peet and Defendant PHS and the individual medical Defendants.

In the instant case, the Complaint has numerous allegations which can readily be determined to be conduct not only which rises to the level of "a conscious disregard of the great risk of harm" to Plaintiff Peet, but even to the higher level of conduct which "shocks the conscious."

In *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), **the plaintiff decedent, a middle-aged man suffering a <u>seizure</u>**, was restrained by police officers after medical professionals had responded to the emergency. He died shortly after police arrived. Affirming the District Court's denial of summary judgment to the EMT defendants, the Third Circuit ruled that the plaintiff's supplied sufficient evidence to prove their substantive due

process state-created danger theory, noting, among other things, **the police were not informed by the EMT defendants of decedent's medical condition** or warned that he should not be restrained; also the EMT defendants may have had the requisite culpable state of mind - conduct that shocks the conscious - required in situations where State actors have to act with some urgency, namely conscious disregard of not just a substantial risk, but a great risk, that serious harm would result. It is suggested to this Court that Plaintiff Peet is entitled to more constitutional protection than Plaintiff *Rivas,* in that Plaintiff Peet had a special custodial relationship as a prisoner.

In *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), the Third Circuit summarized its approach to state-created danger as follows:

1. The harm ultimately caused to the plaintiff was foreseeable and fairly direct.
2. The state actors' conduct shocked the conscious[4].
3. There existed some relationship between the State and the plaintiff.
4. The State actors used their authority to create an opportunity which would otherwise not have existed for harm to occur to plaintiff.

In *Marasco*, the Third Circuit reversed the District Court's grant of summary judgment for the defendant state trooper who allegedly was responsible for the plaintiff-decedent suffering a fatal heart attack due to the

[4]Under special relationship circumstances, i.e. prisoners, the standard may be lowered to "a conscious disregard of a great risk of harm." *See, Sanford. Id*.

stress of an incident at his residence.

Applying these standards to the instant case, the Complaint, as filed, sufficiently alleges conduct which meets all the criteria of state-created danger against Defendant PHS and the individual medical Defendants.

C. Plaintiff's Complaint Meets the Requisite Pleading Standards for a Cause of Action Based on Deliberate Indifference Arising From a Lack of Training and, Therefore, Should Not Be Dismissed for Failure to State a Claim. (Response to Defendants' Argument F)

An allegation of failure to train can be the basis of a §1983 claim. *Belt v. Geo Group, Inc.*, 207 U.S. Dist. LEXIS 25114 (E.D. Pa. April 4, 2007). Plaintiff incorporates the arguments under Section IV.A above as though fully set forth herein at length. Plaintiff has sufficiently plead failure to train as specified above and, in particular, paragraphs 78, 79, 82, 83, 84, 86, 87, and 106 of the Complaint. Whether as Defendants state, establishing liability for a failure to train under a §1983 claim is difficult, same is not relevant for the purposes of a Rule 12(b)(6) Motion.

D. Plaintiff's Complaint Meets the Requisite Pleading Standards for a Cause of Action Against Defendant PHS for Corporate Negligence and Against Individual Medical Defendants Drs. Underwood, Beaven and Miller, and, Therefore, Should Not Be Dismissed for Failure to State a Claim.
(Response to Defendants' Arguments G, H and I)

In terms of the pleading pertaining to medical malpractice, moving Defendants recite one paragraph, with no supporting case law, which states that the malpractice claim does not stand because it does not identify exactly what the individual medical doctors did or failed to do which constituted medical practice. The moving Defendants have failed to adequately read the

Complaint. This portion of moving Defendants' Brief seems to be an attempt to throw its arguments against the wall to see what may possibly stick. The Complaint, at paragraphs 110-122 lays out absolutely, and with great specificity, exactly what these individual medical doctors did or failed to do which constituted medical malpractice. Professional negligence consists of the negligent, careless, or unskilled performance by a physician of the duties imposed upon him by the professional relationship with the patient. It is also negligence when a physician shows a lack of proper care and skill in the performance of a professional act. This is hornbook law. See, for instance, Pennsylvania Selected Standard Jury Instructions 11.00. _See also_, *Pratt v. Stein*, 444 A.2d 674 (Pa. Super. 1982). It is also hornbook law in a medical malpractice case that plaintiff must prove:

1. Duty;
2. Standard of care and breach (that the defendant was negligent);
3. That defendant's negligence was a factual cause in bringing about the harm and damages suffered by the plaintiff; and
4. The extent of damages caused by the defendants' negligence.

See, for instance, Pennsylvania Selected Standard Jury Instructions 11.03.

Plaintiff recognizes that every claim by a prisoner that he has not received adequate medical care does not rise to the level of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976). Neither accident nor mere negligence suffices to establish culpability of a constitutional violation. _*Id.*_ However, alleging deliberate indifference to a prisoner's serious medical needs and simultaneously alleging that a doctor

departed from the standards of good and accepted medical practice are not prohibited by existing case law. The two causes of action are mutually exclusive and Peet has pled them as such.

Thompson v. Nasan Hospital, 527 Pa. 330, 691 A.2d 703 (1991) requires a plaintiff to plead and prove the following in order to make out a case of corporate negligence in the malpractice setting.

a. Failing to select and retain only competent physicians and employees;

b. Failing promptly and properly to oversee its agents within its facility as to patient care;

c. Failing to formulate, adopt, and enforce adequate rules and policies to ensure quality are for patients; and

d. Increased the risk of harm to plaintiff, as a result of the negligence and carelessness set forth above.

Plaintiff alleges that Defendant PHS had the ability to control the manner in which individual medical Defendant Drs. Underwood, Beaven and Miller carried out their duties, how they provided medical care to inmates, and how referrals were made for more specialized care. *Complaint* at 105. Further, Plaintiff alleges that Defendant PHS promulgated its own policies and protocols as well as mandated participation by said Defendant doctors in continuing education seminars for the sole purpose that delivery of sound medical practices in generalized and specialized medical services areas be accorded to inmates, such as Plaintiff Peet at SCI Camp Hill. *Complaint* at 106. Plaintiff further alleges that Defendant PHS undertook the responsibility of providing the individual Defendant doctors with the specific policies, protocols, publications and training such that sound medical care would be

provided to inmates such as Plaintiff. *Complaint* at106. Plaintiff alleges that Defendant PHS's failure in this regard led to his injuries.

E. This Court Should Exercise Supplemental Jurisdiction Pursuant to 28 U.S.C. §1367(c) to Adjudicate State Claims.
(Response to Defendants' Argument J)

Argument J of Defendants' Brief reads, "This Court, if it grants summary judgment to PHS on Plaintiff Peet's federal claims should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C §1367(c)." First, Defendant's Motion is not a Motion for Summary Judgment. It is clear that this was a boilerplate heading cut and pasted by the Defendants. However, Plaintiff will address the issue of supplemental jurisdiction.

The Court should exercise supplemental jurisdiction over the state medical malpractice claims pursuant to 28 U.S.C. § 1367, in the interests of judicial economy, convenience and fairness to the parties. Plaintiff also relies on *Borough of West Mifflin v. Lancaster*, 45 F.3d 780 (3d Cir. 1995). There, the Third Circuit made it clear that the test for District Courts exercising pendant jurisdiction is based upon whether the federal and state claims are:

> [b]ased on the same nucleus of operative facts unless the district court can point to some substantial countervailing consideration. This is teaching of our opinion in *Sparks v. Hershey*, 661 F.2d 30 (3d Cir. 1981), where the complaint asserted a civil rights claim under §1983, a state wrongful death claim, and a state survival act claim, all based on the same jailhouse suicide. We there observed:
>
> > *We do not hold that where there is a common nucleus of operative facts, state claims must always be appended to the federal claim; but where, as here, the*

> *district court does not set forth a persuasive, reasoned elaboration for dismissing the state claims, we are inclined to believe that the dictates of "judicial economy, convenience, fairness to the parties, and comity" are better served by recognizing pendent jurisdiction. This is especially true where it is desirable to avoid the possibility of duplicating the recovery of damages. Here it is preferable for a single fact finder, under proper instruction from the court, to consider the varying elements of damages recoverable under the federal §1983 claim and the state wrongful death and survival actions. We will therefore reverse the district court's order dismissing the pending state claims and direct that court to exercise jurisdiction over them.*

Sparks, 661 F.2d at 33-34 (citations omitted). …

> When a district court exercises its discretion not to hear state claims under §1367(c)(2), the advantages of a single suit are lost. For that reason, §1367(c)(2)'s authority should be invoked only where there is an important countervailing interest to be served by relegating state claims to the state court. This will normally be the case only where "a state claim constitutes the real body of a case, to which the federal claim is only an appendage," only where permitting litigation of all claims in the district court can accurately be described as allowing a federal tail to wag what is in substance a state dog.

Id. at 789.

Thus, if Plaintiff's State Court claims are remanded to State Court,

Plaintiff would be forced to litigate in two separate forums in direct violation of the directives from *Borough of West Mifflin*. The facts in the case at bar are identical to those as *Sparks*. Certainly in the instant case, the State malpractice claim is not a state dog wagging a federal tail.

F. Count II of Plaintiff's Complaint States a Cause of Action Against Defendant PHS, and Against Individual Medical Defendants Drs. Underwood, Beaven and Miller for Negligence and Not Breach of Contract.
(Response to Defendants' Argument K)

Plaintiff agrees he is not a party to the contract. However, moving Defendants completely miss the point as to why the contract between Defendant PHS and the Commonwealth was attached to the Complaint. Simply put, Plaintiff never alleges that he was a party to a contract between the Commonwealth of Pennsylvania and Defendant PHS, or that the contract was a basis for Plaintiff's cause of action. Rather, the contract itself was attached to the Complaint to establish, inter alia, that Defendant PHS was contracted to provide general and specialized medical services for inmates of the Commonwealth. Plaintiff is not using the contract as a basis for a cause of action against the individual medical Defendants. This is contrary to how moving Defendants would like to be perceived. For instance, at p. 29 of their Brief, moving Defendants argue that Defendant PHS was not a comprehensive health care provider, and Defendant PHS "serve[d] only one branch of medicine" to inmates. That does not appear to be true based on Sections 2.1 and 2.3 of the contract (attached to the Complaint), which states that Defendant PHS is responsible for all general health care and specialized medical services to inmates in Commonwealth prisons. As such, Defendants' argument in this regard must fail because it is not supported by the contract

into which Defendant PHS entered with the Commonwealth.

V. CONCLUSION

For the foregoing reasons, Plaintiff Lawrence J. Peet respectfully requests that Defendants Prison Health Services, Inc., David Underwood, M.D., Barry Beaven, M.D., and Gordon Miller, M.D.'s Motion to Dismiss be denied.

In the alternative, Plaintiff requests that the Court grant Plaintiff at least 120-180 days to conduct discovery, and upon expiration of that time period allow Plaintiff to file an Amended Complaint. A Plaintiff should generally be granted leave to amend before dismissing a claim that is merely deficient. See, *Grayson v. Mayview State Hospital,* 293 F.3d 103, 108 (3d Cir. 2002); "motions to amend pleadings should be liberally granted." *Long v. Wilson*, F.3d 390, 400 (3d Cir. 2004); and, "leave to amend must generally be granted unless equitable considerations render it otherwise unjust." *Arthur v. Maersk, Inc.*, 434 F.3d 196, 2004 (3d Cir. 2006).

Iqbal, Id. was remanded to the Circuit Court to consider whether the plaintiff should have been permitted to amend his complaint to cure the deficiencies. Such is consistent with this Circuit's precedent, in which leave to amend is to be freely granted prior to dismissal, unless an amendment is clearly futile or inequitable.

Respectfully requested,

KREITHEN, BARON & CARPEY, P.C.

Respectfully requested,

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CERTIFICATE OF SERVICE

I, James D. Famiglio, Esquire, certify that on this 30th day of June, 2010, the foregoing Brief and Exhibits were filed electronically and are available for viewing and downloading from the ECF System of the United States District Court for the Middle District of Pennsylvania. The following parties received electronic service of the Notice of Electronic Case Filing:

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Dated: 6/30/10