

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

KENNETH T. DEPUTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02C-04-314 JRS
	)	
ROY, Nurse Practitioner	)	
THOMAS CARROLL, Warden	)	
M. JANE BRADY, Attorney General,	)	
	)	
Defendants.	)	

---

Date Submitted: November 18, 2002

Date Decided: February 20, 2003

*Upon Consideration of*  
*Defendants' Motion for Summary Judgment.*  
**GRANTED in part and DENIED in part.**

Kenneth T. Deputy. Delaware Correctional Institution, Smyrna, Delaware. *Pro Se* Plaintiff.

Richard W. Hubbard, Esquire. Deputy Attorney General, Carvel State Building, 6<sup>th</sup> Floor, 820 North French Street, Wilmington, Delaware 19801.

**SLIGHTS, J.**

## **I. INTRODUCTION**

The Plaintiff, Kenneth T. Deputy, is an inmate at the Delaware Correctional Center (“DCC”) in Smyrna, Delaware. Acting *pro se*, he has filed a lawsuit against Roy (properly known as “Roy Dekler”), a nurse practitioner at the medical care facility located in DCC, Thomas Carroll, the warden at DCC, and M. Jane Brady, Attorney General of the State of Delaware. Mr. Deputy has alleged numerous violations of 42 U.S.C. § 1983 (“Section 1983”) as well as negligence based upon medical treatment he has received while incarcerated at DCC. Attorney General Brady and Warden Carroll (collectively, the “State Defendants”) have moved for summary judgment.<sup>1</sup>

## **II. FACTS**

Mr. Deputy injured his shoulder playing basketball in the first week of October 2001, causing pain in his shoulder and chest for the next several months. He made numerous trips to the medical treatment center at DCC. He alleges that he did not receive adequate medical treatment because the medical staff simply prescribed Motrin but did not examine him. According to Mr. Deputy, on February 19, 2002,

---

<sup>1</sup>The State Defendants actually filed a motion to dismiss Mr. Deputy’s complaint. Because the defendants attached an affidavit and medical records to this motion to dismiss, the Court will consider the motion as a motion for summary judgment. *See Shultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del. 1976) (a motion with “affidavits and depositions in addition to the pleadings ... must be considered a motion for summary judgment”).

Mr. Dekler refused to provide any medical treatment at all and told Mr. Deputy that he should not seek further medical treatment for this problem because there was nothing wrong with him. From October 2001 to February 2002, Mr. Deputy filed many complaints with various state officials, including Warden Carroll.

Subsequently, Mr. Deputy filed suit in Superior Court in April, 2002. His complaint sets forth four counts: 1) a violation of his Eighth Amendment rights based on inadequate medical treatment and the denial of medical treatment on February 19, 2002; 2) an equal protection violation based on Mr. Dekler's statements with "racial overtones;" 3) grossly negligent medical treatment; and 4) gross negligence in Warden Carroll's failure to train and supervise DCC medical staff.<sup>2</sup> The Court will treat the alleged violations of equal protection and the Eighth Amendment as a deprivation of constitutional rights under Section 1983.<sup>3</sup>

---

<sup>2</sup>Because the plaintiff is *pro se*, the Court will grant more leniency in discerning the legal arguments in support of his claim. See *Jackson v. Unemployment Ins. Appeal Bd.*, 1986 Del. Super. LEXIS 1367, at \*4 (holding that Superior Court may give a *pro se* litigant more leniency). Here, the Court finds that Mr. Deputy's separate count for an Eighth Amendment violation applied to the States through the Fourteenth Amendment is included in Count I.

<sup>3</sup>See *Alley v. Taylor*, 2001 Del. Super. LEXIS 119, at \*4-5 (treating an alleged Fourth Amendment violation as a Section 1983 claim because "Section 1983 imposes liability on government officials or actors through damages or injunctive relief for conduct which causes a deprivation of an individual's rights secured by the Constitution.")(citations omitted).

### **III. DISCUSSION**

#### **A. The Parties' Contentions**

Warden Carroll and Attorney General Brady have moved for summary judgment alleging that Mr. Deputy has no basis to sustain his Section 1983 and negligence claims. They first argue that Mr. Deputy failed to meet the threshold burden of a Section 1983 claim for supervisory liability because he did not show that the State Defendants were deliberately indifferent to his serious medical needs. Second, Attorney General Brady contends that she is entitled to summary judgment because the complaint fails to state any allegations connecting her to any of the claims, and she is immune from suit under Title 10, Section 4001 of the Delaware Code. Finally, Warden Carroll asserts that Mr. Deputy's claim against him is not supported in the record because several of Mr. Deputy's allegations in the complaint are contradicted by his medical records.

In response, Mr. Deputy argues that the State Defendants are liable in their supervisory capacities and that there are sufficient factual disputes to survive summary judgment. He also contends that the medical evidence supports the factual allegations in the complaint.

## **B. Standard of Review**

In considering a motion for summary judgment, the Court must examine all pleadings, affidavits and discovery in support of or in response to the motion;<sup>4</sup> and must do so in the light most favorable to the nonmoving party.<sup>5</sup> Summary judgment may be granted only when the Court determines there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.<sup>6</sup> Initially, the moving party bears the burden of demonstrating the absence of a material factual dispute.<sup>7</sup> Then, if the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact that remain in dispute.<sup>8</sup>

## **C. Claims Against Attorney General Brady**

Summary judgment is appropriate for Attorney General Brady. A Section 1983 suit against a government actor in her official capacity is considered an action against the State, and it is well-settled that the State is not a proper defendant in a Section

---

<sup>4</sup>*Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

<sup>5</sup>*See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

<sup>6</sup>*Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

<sup>7</sup>*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)).

<sup>8</sup>*Brzoska*, 668 A.2d at 1364.

1983 action.<sup>9</sup> Therefore, a Section 1983 suit may not proceed against the Attorney General in her official capacity.<sup>10</sup> In addition, Attorney General Brady is not subject to a Section 1983 suit in her individual capacity. To establish a Section 1983 claim, the plaintiff must show the defendant's personal involvement in the alleged constitutional violation.<sup>11</sup> Mr. Deputy, however, has not implicated the Attorney General in any manner.

For the state tort claims, Mr. Deputy's complaint fails to aver any negligence on the part of Attorney General Brady.<sup>12</sup> Indeed, the Attorney General's name does not appear in the complaint at all, except in the caption.<sup>13</sup> Accordingly, Attorney General Brady is entitled to summary judgment on all counts.

---

<sup>9</sup>*See Hall v. McGuigan*, 743 A.2d 1197, 1206 (Del. Super. 1999)(“It is well settled that official capacity actions under § 1983 are treated as suits against the government entity employing the official. It is also settled that a state is not a proper defendant in a § 1983 action.”)(citations omitted).

<sup>10</sup>*See Amaro v. Taylor*, 170 F. Supp. 2d 460, 464 (D. Del. 2001)(stating that Attorney General Brady was not subject to a Section 1983 suit in her official capacity).

<sup>11</sup>*See id.* (holding that an action against the Attorney General in her individual capacity is barred because she did not have any personal involvement or actual knowledge); *Bagwell v. Brewington-Carr*, 2000 U.S. Dist LEXIS 21276, at \*3, n. 1 (D. Del.)(“At the outset, the court will dismiss all of Bagwell's [Section 1983] claims against M. Jane Brady, the Attorney General of the State of Delaware, because there is no indication in the record (not even an allegation) that she was personally aware of or involved in any of the events which transpired.”)(citations omitted).

<sup>12</sup>*See Sauls v. Laws*, 1999 WL 458994 (Del. Super.)(dismissing action against defendant because the “complaint contains no statement or allegation concerning what Defendant Wooten did or did not do in connection with the accident” and “the complaint merely names Defendant Wooten as a party, but does not allege with particularity how she was negligent”).

<sup>13</sup>D.I. 1.

## D. Claims Against Warden Carroll

### 1. Section 1983 Claims

Mr. Deputy specifically asserts two Section 1983 claims: a violation of his Eighth Amendment rights and equal protection. As a preliminary matter, like the claim against the Attorney General, the Section 1983 claims against Warden Carroll in his official capacity are not viable.<sup>14</sup>

Mr. Deputy's equal protection claim may likewise be summarily rejected. To establish an equal protection claim, a plaintiff must "demonstrate a discriminatory purpose as the motivating factor."<sup>15</sup> Mr. Deputy presents no evidence that points to a discriminatory purpose; he simply makes vague references to his belief that Mr. Dekler had a discriminatory motive in refusing treatment.<sup>16</sup>

The Eighth Amendment violation under Section 1983, however, requires closer

---

<sup>14</sup> See *supra* note 9.

<sup>15</sup> *Abdul-Akbar v. Department of Corrections*, 1995 Del. Ch. LEXIS 38, at \*11.

<sup>16</sup> Mr. Deputy asserts that Mr. Dekler refused him medical treatment because Mr. Dekler believed him to be "an uneducated black man that would not have the knowledge to challenge defendant's actions." (D.I. 1, at 6). Mr. Deputy also states that "defendants [sic] statements represented racial overtones." *Id.* Mr. Deputy's allegations merely state his belief as to Mr. Dekler's motivations. These allegations do not establish that Mr. Deputy was a member of protected class, treated differently from a similarly situated group, or was denied medical treatment for a discriminatory reason. See *Bagwell*, 2000 U.S. Dist LEXIS 21276, at \*52-53. Mr. Deputy fails to meet the threshold burden for an equal protection claim. See, e.g., *Moore v. Riley*, 1993 U.S. App. LEXIS 30144, at \*11 (10<sup>th</sup> Cir.) ("Bare conclusory statements, including those alleging racial motivation, do not support a cause of action.").

scrutiny. Several principles must guide the Court's analysis. First, negligent medical treatment is not enough to create a Section 1983 claim; Section 1983 requires gross or wanton negligence.<sup>17</sup> Moreover, matters entrusted to a doctor's medical judgment will not give rise to a Section 1983 claim.<sup>18</sup> Nor will allegations of *respondeat superior* suffice.<sup>19</sup> Instead, the plaintiff must show that prison authorities were deliberately indifferent to his serious medical condition.<sup>20</sup> This standard establishes a very high burden for the plaintiff. The test for deliberate indifference requires the Court to consider whether the supervisor had actual knowledge of and acquiesced in the offending behavior.<sup>21</sup>

Here, Mr. Deputy argues that Warden Carroll had actual knowledge of and acquiesced in Mr. Dekler's conduct because Mr. Deputy sent Warden Carroll several complaints and received no response.<sup>22</sup> Federal and Delaware courts alike have ruled

---

<sup>17</sup>*Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

<sup>18</sup>*Vick v. Dep't of Corrections*, 1992 Del. Super. LEXIS 430, at \*8.

<sup>19</sup>*See Dickens v. Brewington-Carr*, 1999 WL 1240910, at \*3 (Del. Super.) ("A State employee cannot be held liable under 42 U.S.C. § 1983 merely because those under his or her supervision violate the constitutional rights of another.").

<sup>20</sup>*Estelle*, 429 U.S. at 105-106.

<sup>21</sup>*Dickens*, 1999 WL 1240910, at \*3.

<sup>22</sup>Mr. Deputy specifically refers to two letters in his complaint that he sent to Warden Carroll, but it is unclear in the record whether these two letters were his only correspondence with Warden Carroll. (D.I. 1, at 4).



that the warden's receipt of complaints and lack of a response, standing alone, do not constitute deliberate indifference.<sup>23</sup> In addition, the DCC medical staff made a judgment based on their medical knowledge to halt Mr. Deputy's course of treatment. Warden Carroll's deference to the "judgment calls" of the medical personnel responsible for Mr. Deputy's care is not a sufficient basis to infer Warden Carroll's deliberate indifference. Summary judgment will be entered in favor of Warden Carroll on the Section 1983 claims.

## **2. Claim for Negligent Failure to Train and Supervise**

Mr. Deputy contends that Warden Carroll failed to train and supervise Mr. Dekler, which resulted in Mr. Dekler administering insufficient medical care.<sup>24</sup> Accordingly, Mr. Deputy's count for negligent failure to train and supervise depends

---

<sup>23</sup>See, e.g., *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993)(the warden and State Commissioner for Corrections were not deliberately indifferent: "[n]either of these defendants, however, is a physician, and neither can be considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor."); *Williams v. Manilla*, 2000 WL 1307769, at \*7 (N.D. Ill.)(complaint letters to hospital director do not meet deliberate indifference standard); *Vick v. Department of Corrections*, 1993 Del. Super. LEXIS 115, at \*5 (plaintiff did not "meet the first prong of the deliberate indifference standard because of his failure to produce sufficient evidence indicating a deliberate indifference on the part of defendant Taylor other than a conclusory allegation that defendant Taylor received two letters from plaintiff and did not respond.').

<sup>24</sup>The Court will not address whether Warden Carroll is entitled to sovereign immunity because he did not produce an affidavit in compliance with Title 18, Section 6511 of Delaware Code. See *Teat v. Neal*, 1996 WL 944894, at \*3 (Del. Super.)(“The State, however, can waive immunity pursuant to 18 Del. C. Ch.65, Insurance for the Protection of the State.”). The Court also declines to consider qualified immunity because Warden Carroll also did not raise this affirmative defense. See *Hall*, 743 A.2d at 1206 (stating that qualified immunity is an affirmative defense).

for success upon the viability of the underlying medical negligence claim. To maintain this claim, Mr. Deputy must produce competent expert support, which he has thus far failed to do.<sup>25</sup> To support a motion for summary judgment, a defendant in a medical negligence action is not required to produce a supporting expert's affidavit if "the parties have adequate time for discovery and if 'the record unambiguously reflects that the plaintiff's allegations are not and will not be supported by any expert medical testimony.'"<sup>26</sup> The Court will allow 90 days as "adequate time" for Mr. Deputy to conduct discovery and produce competent expert support for his medical negligence claims. For now, the motion will be **DENIED** with respect to the negligence claim against Warden Carroll.<sup>27</sup> At the expiration of the 90 day discovery deadline, the Court will consider a properly filed renewed motion for summary judgment.

---

<sup>25</sup>*See Walls v. Cooper*, 1991 WL 247806, at \*4 (Del. Supr.)("When seeking to establish that a particular doctor or institution deviated from the proper standard of care, medical malpractice plaintiffs are required to produce expert medical testimony."); DEL. CODE ANN. tit. 18, § 6853 (1999)("No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death. . . .").

<sup>26</sup>*Green v. Weiner*, 766 A.2d 492, 495 (Del. 2001)(citations omitted).

<sup>27</sup>*See* DEL. SUPER. CT. RULES 56(f); *Guy v. Judicial Nominating Committee*, 659 A.2d 777, 780(Del. Super. 1995)("However, summary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.") (citations omitted).



#### **IV. CONCLUSION**

Based on the foregoing, the motion for summary judgment is **GRANTED** as to all claims against Attorney General Brady and the Section 1983 claims against Warden Carroll. The motion is **DENIED** with respect to the negligence claim against Warden Carroll.

**IT IS SO ORDERED.**

---

Judge Joseph R. Slights, III

Original to Prothonotary.

Cc: Kevin J. Connors, Esquire