DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____♦_____

ANTHONY FOX
Petitioner

v.

JOHN POWELL, Individually and as Adm. of Bayside State Prison; GARY M. LANIGAN, Individually and as Commissioner of the New Jersey Department of Corrections Respondents

_____♦_____

On Petition for Writ of Certiorari
to the United States
Court of Appeals for the Third Circuit

_____♦_____

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is this Court not required to protect the Constitution as envisioned by our founding fathers in the Eleventh Amendment of the Constitution and does not this case therefore present an important question of federal law that should be settled by this Court where a Motion to Dismiss pursuant to Rule of Civil Procedure 12 (b)(6) of the Rules of Civil Procedure was granted under the Eleventh Amendment in favor of the private defendants without the matter being evaluated to consider whether plaintiff should be permitted by Court Rule to conduct discovery and therefore has so far departed from the accepted and usual course of judicial proceedings and plaintiff had set forth in the complaint more than twenty specific acts against these defendants of violation of supervisory responsibility and does not this not result in the judicial abrogation of its duty to protect citizens at a time where the checks and balances mandated by the Constitution are under attack?

(Suggested answer in the affirmative)

THE PARTIES TO THE PROCEEDING

ANTHONY FOX
353 E. Upland Avenue
Galloway, NJ 08205

Petitioners

BAYSIDE STATE PRISON
4293 Route 47
Leesburg, NJ 08327

NEW JERSEY DEPARTMENT OF CORRECTIONS
Whittlesey Road
Trenton, NJ 08625

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY
57 US Highway 1
New Brunswick, NJ 08901

THE UNIVERSITY OF MEDICINE AN DENTISTRY OF NEW JERSEY
150 Bergen St
Newark, NJ 07103

JOHN POWELL, individually as Administrator of Bayside State Prison
4293 Route 47
Leesburg, NJ 08327

GARY M. LANIGAN, individually and as Commissioner of the New Jersey Department of Corrections
Whittlesey Road
Trenton, NJ 08625
Respondents

CORPORATE DISCLOSURE STATEMENT

Plaintiffs are not a corporation.

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE

The Order and Opinion of the United States District Court for the Eastern District Court for the Eastern District of Pennsylvania entered August 15, 2015 can be found at 2016 U.S. Dist. LEXIS 11856 and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeal for the Third Circuit, Chagares, Restrepo and Fisher, Circuit Judges dated March 2, 2018 affirming the Order of the District Court was non-precedential but was reported at 2018 U.S. App. LEXIS 5373.The Judgment and Memorandum Opinion are set forth in the Appendix at 15a.

The Order denying plaintiff's Motion for Rehearing dated April 30, 2018. The Motion for Reconsideration was submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service Judge Fisher's vote was limited to panel rehearing only. Fisher, Authoring Judge Said Order is unreported. The Order is set forth in the Appendix at page 22a.

STATEMENT OF THE BASIS FOR THE JURISDICTION IN THIS COURT

The Judgment sought to be reviewed was entered by the Court of Appeals for the Third Circuit on March 2, 2018 The Motion for Reconsideration was denied on April 30, 2018. The mandate was issued on May 8, 2018.

The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari the judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule of Civil Procedure12 (b)(6) provides:

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(6) failure to state a claim upon which relief can be granted

Constitution of the United States, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 USC § 1983
R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Basis for Federal Jurisdiction in the Court of First Instance

Plaintiff initiated this case in the United States District Court of the District of New Jersey on August 26, 2014 at 1:14-cv-05344-RBK. Jurisdiction is conferred under 28 U.S.C. Section 1331 and Section 1343(3).

The Facts Material to Consideration of the Questions Involved

Plaintiff, Anthony Fox, brought this action pursuant to 42 U.S.C. Section 1983 and in accordance with the Fourth, Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States of America. Jurisdiction is conferred under 28 U.S.C. Section 1331 and Section 1343(3).

Defendants filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule of Civil Procedure 12 (b)(6). Thus the issue was whether the Amended Complaint stated a claim upon which relief can be granted. Thus, the allegations of the Complaint must be examined as well as the Opinions of the District Court and the Court of Appeals.

Plaintiff brought this action bringing a claim under the Civil Rights Act, 42 U.S.C. § 1983, as well as pendent state actions of negligence, reckless,

intentional and outrageous conduct, battery, medical malpractice and agency. The action was brought against Bayside Prison, the New Jersey Department of Corrections and the Administrator and Commissioner of the Department of Corrections. John Powell and Gary M. Lanigan. This Petition for Certiorari is directed only to the Section 1983 action against Mr. Powell and Mr. Lanigan.

The Amended Complaint alleged plaintiff was an inmate confined at Bayside State Prison and on August 27, 2012, plaintiff sought treatment at the prison infirmary to have his blood pressure taken as a result of feeling dizzy. The nurse found plaintiff's blood pressure to be high and without permission or explanation, insisted on giving an injection to plaintiff. Plaintiff reacted to the injection by losing consciousness and falling to the floor landing on his face.

Plaintiff was taken to Atlantic City Hospital where he was treated for injuries to his face including a broken nose. Upon return to Bayside, plaintiff was accused of having overdosed with self-inflicted drugs and was placed in lock-up where he remained for approximately three weeks at which time, the toxicology report came back negative.

The Amended Complaint further alleged that following his return to Bayside, plaintiff did not receive proper treatment and was not sent for

treatment on his broken nose. He finally received surgery to his nose upon release several years later.

The Amended Complaint then alleged that defendants have refused to permit the additional surgery and have failed to treat plaintiff properly for the injuries suffered. As a result of the failure to properly treat his injuries, plaintiff suffered from significant breathing issues and his nose was deformed. Plaintiff was also deprived of his rights when placed in lock-up on suspicion of overdosing when, in fact, his injuries were caused by the treatment at the infirmary. Further, plaintiff lost his ability to qualify for entry into a "halfway house" with the subsequent ability to work and was incarcerated for an additional two years because he had been unlawfully written up for allegations which were untrue.

The Amended Complaint then listed 24 specific acts against defendants. They were as follows:

> a) failing to provide for plaintiff's basic needs including the safety of his person;
>
> b) failing to provide immediate, necessary and appropriate medical treatment;
>
> c) failing to order and/or perform tests and/or examinations which would have permitted proper treatment of plaintiff's condition;

d) improper monitoring and supervision of plaintiff's care;

e) failing to implement policies to prevent the administration of medical services without the consent of an inmate;

f) failing to develop policies regarding rendering proper medical care and/or treatment to inmates;

g) failing to implement policies regarding rendering proper medical care and/or treatment to inmates;

h) failing to enforce policies regarding rendering proper medical care and/or treatment to inmates;

i) developing unreasonable and inadequate policies regarding the investigation of inmate complaints;

j) implementing unreasonable and inadequate policies regarding the investigation of inmate complaints;

k) enforcing unreasonable and inadequate policies regarding the investigation of inmate complaints;

l) developing unreasonable and inadequate policies regarding rendering

proper medical care and/or treatment to inmates;

m) implementing unreasonable and inadequate policies regarding rendering proper medical care and/or treatment to inmates;

n) enforcing unreasonable and inadequate policies regarding rendering proper medical care and/or treatment to inmates;

o) conducting unreasonable and inadequate investigations of plaintiff's complaints;

p) failing to respond promptly to plaintiff's complaints that he had not taken drugs or overdosed;

q) depriving plaintiff of necessary and adequate medical treatment;

r) failing to remedy the complaints of plaintiff;

s) deliberately, intentionally and callously depriving and disregarding plaintiff's medical needs;

t) failing to supervise their agents, employees and/or representatives including

medical staff, correctional officers and all others involved with plaintiff;

u) increasing plaintiff's risk of harm by failing to render prompt, appropriate and necessary medical treatment;

v) failing to properly treat plaintiff's medical condition;

w) failing to use and consult competent and experienced physicians and medical staff;

x) unreasonably placing plaintiff in lock-up on suspicion of overdosing when his loss of consciousness was caused by the administration of an improper injection by defendants.

The District Court held that plaintiff failed to state a § 1983 claim against Powell and Lanigan to the extent they are being sued in their individual capacities. In discussing the legal standard, the District Court stated that in evaluating a motion to dismiss, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The Court then laid out a three steps process. Santiago v. Warminster Twp. , 629 F.3d 121, 130 (3d Cir. 2010). This included that the court must 'tak[e]note of the elements a plaintiff must plead to state a claim, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth and finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief. At no time did the Court include the test required by this Court in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) that the Court must not look at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

Following the Court of Appeals Decision affirming the Judgment of the District Court, plaintiff filed a Motion for Reconsideration which was denied. Interestingly, the vote of Judge Fisher, who wrote the Opinion of the Court of Appeals, was limited to panel rehearing only and in favor of an en banc Hearing.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This Court will grant certiorari when a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter..." The Court will also grant certiorari where the Court of Appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power Supreme Court Rule 10(a).

Here the Court of Appeals has dismissed the actions citing the case of **Barkes v. First Corr. Med., Inc.,** 766 F.3d 307, 317 (3d Cir. 2014), *rev'd on other grounds sub nom.* **Taylor v. Barkes**, 135 S. Ct. 2042 (2015) which held that to state a claim for failure to supervise, a plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure.

Barkes was decided on a Motion for Summary Judgment after there was a full opportunity to develop the record. In this case, the District Court

granted, and the Court of Appeals affirmed, the grant of a Motion to Dismiss. In so doing, the Court failed to follow the rulings of this Court on the standard for reviewing a Motion to Dismiss. Further, there is a split in the circuits as to the standards necessary to show supervisory liability so as to support a Section 1983 violation.

This Court has set the standard for review in **Scheuer v Rhodes**, 416 U.S. 232, 236 (1974), abrogated on other grounds by **Harlow v. Fitzgerald**, 457 U.S. 800 (1982); where it was stated that the court must not look at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." There was no such analysis in this case and the Opinions of both the District Court and the Court of Appeals failed to acknowledge this standard.

This Court in **Bell Atlantic v Twombly**, 550 U.S. 544, 127 S. Ct.1955, 167 L. Ed. 2d 929, held that the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." **Twombly** 550 U.S., at 555; **Ashcroft v. Iqbal**, 556 U.S. 662, 678, (2009). However, the heightened pleading requirement in no way removed the duty to consider whether the plaintiff is entitled to offer evidence to support the claims.

This is particularly significant as the Lower Court failed to use the proper standard to determine whether this Motion should have been granted. The Court cited **Twombly** and **Iqbal** and stated a complaint survived a motion to dismiss if it contained sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Thus, the District Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings.

This Court in **Twombly** emphasized the restrictive pleading requirements stated at p 563 n.8:

> "… Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the fact finder. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

This analysis was totally lacking from the Decisions of the District Court and the Court of Appeals.

The failure to review the Complaint by considering whether plaintiff should have been entitled to offer evidence is particularly important as there is a clear split in the circuits as to what must be set forth in a Complaint in order to support supervisory responsibility under Section 1983.

The very case cited by the Court of Appeals, **Barkes v. First Corr. Med., Inc.,** 766 F.3d 307, 317 (3d Cir. 2014), *rev'd on other grounds sub nom.* **Taylor v. Barkes**, 135 S. Ct. 2042 (2015) discussed in detail the split in the circuits on this issue. **Barkes** at p. 316 notes that state actors are liable only for their own unconstitutional conduct. The Court goes on the state:

> "With this principle in mind, we have previously identified two general ways in which a supervisor-defendant may be liable for unconstitutional acts undertaken by subordinates. First, liability may attach if they, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm." **A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.,** 372 F.3d 572, 586 (3d Cir. 2004) (quoting **Stoneking v. Bradford Area Sch. Dist**., 882 F.2d 720, 725 (3d Cir. 1989)). Second, "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the

person in charge, had knowledge of and acquiesced" in the subordinate's unconstitutional conduct. *Id.*

Barkes then discussed the split in the circuits in detail. This is a conflict that this Court should review. The Court began by reviewing the law of the 3rd Circuit stating that "'supervision' entails, among other things, training, defining expected performance by promulgating rules or otherwise, monitoring adherence to performance standards, and responding to unacceptable performance whether through individualized discipline or further rulemaking." Sample v. Diecks 885 F.2d 1099, 1116 (3d Cir. 1989).

In Iqbal at p. 677 this Court held that "absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." The Third Circuit then reviewed the positions of the Circuits on this issue.

They first cited Carnaby v. City of House., 636 F.3d 183, 189 (5th Cir. 2011) who found that Igbal abolished supervisory liability reading it to say thatunder § 1983, a government official can be held liable only for his own misconduct.

This was then compared with the Ninth Circuit. In al-Kidd v. Ashcroft, 580 F.3d 949, 976 (9th Cir. 2009), *overruled on other grounds*, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), the Court held that the United States Attorney General could be

liable for knowingly "fail[ing] to act in the light of even unauthorized abuses" of the federal material witness statute, insofar as that statute was used as a pretext to detain terrorism suspects despite a lack of probable cause of a criminal violation.

The Third Circuit then gravitated to the center, holding that because the state of mind necessary to establish a §1983 claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity. In **Dodds v. Richardson**, 614 F.3d 1185, 1199 (10th Cir. 2010), the Court stated:

> "Whatever else can be said about **Iqbal,** and certainly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which "subjects, or causes to be subjected" that plaintiff "to the deprivation of any rights . . . secured by the Constitution."

The Ninth Circuit in **Starr v. Baca**, 652 F.3d 1202, 1207 (9th Cir. 2011)stated they saw nothing in **Iqbal** indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in

conditions of confinement cases. The Ninth Circuit then cited a Seventh Circuit case, Sandra T.E. v. Grindle, 599 F.3d 583, 591 (7th Cir. 2010) where the Court held that when a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.

The Eighth Circuit in Whitson v. Stone Cty. Jail, 602 F.3d 920, 928 (8th Cir. 2010), took a different position and held that in a § 1983 case, an official "is only liable for his . . . own misconduct" and is not "accountable for the misdeeds of [his] agents" under a theory such as respondeat superior or supervisor liability citing Iqbal.

Applying the law to the facts, plaintiff asserts that the holding of this Court require this Court's supervisory powers and direction. The facts included plaintiff being given an injection without permission or explanation causing him to lose consciousness and falling to the floor landing on his face. After being treated at the Hospital, he was upon his return, accused of having overdosed with self-inflicted drugs and was placed in lock-up where he remained for approximately three weeks at which time, the toxicology report came back negative. He also did not receive proper treatment for his broken nose.

Following this recitation of the facts, the Complaint contained 24 allegations against defendants including the individual defendants at issue here. Without repeating all these specific allegations, the Amended Complaint included that defendants enforced unreasonable and inadequate policies regarding rendering proper medical care and/or treatment to inmates, conducted unreasonable and inadequate investigations of plaintiff's complaints, deprived plaintiff of necessary and adequate medical treatment. deliberately, intentionally and callously deprived and disregarded plaintiff's medical needs and failed to supervise their agents, employees and/or representatives including medical staff, correctional officers and all others involved with plaintiff.

Based on the reading of **Twombly** and **Igbal** by the various Circuits there is a conflict between the circuits as to whether supervisory liability applies only for the specific conduct of the defendant or for deliberate indifference and failure to supervise claims.

In addition to this conflict, the Court ignored the teachings of this Court that a Motion to Dismiss in reviewing the Complaint without considering whether plaintiff is entitled to offer evidence to support the claims.

These are troublesome times and the Article 3 powers of the Judicial Branch of government have never been more important. It is not of little import

to state the great sacrifice of life and treasure expended by so many in the defense of our Constitution.

Depriving a party of the right to his day in Court should not be done lightly. Justice requires, regardless of political philosophy, the protections foreseen by our founding fathers of the extreme importance of trial by a jury of one's peers to check the power of the rich and powerful whether they be individuals or corporate citizens though Petitioner is unaware of any shedding of corporate blood by the newly minted corporate citizens. This Court has therefore set standards which must be met.

Dismissing an action without the opportunity to introduce any evidence should only be done in the clearest of cases. Courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009); Twombly, 550 U.S. at 555; Igbal, 556 U.S. at 678-79. This analysis did not occur here,

The issues herein are important and relate to significant issues worthy of this Court's attention. As made clear, the Decision herein has so far departed from the accepted and usual course of judicial proceeding that this Court should take jurisdiction. Further several Circuits have

thoroughly examined the issue of supervisory liability after **Igbal** and reached contradictory opinions. For all these reasons this is a matter requiring this Court's supervisory powers and direction.

CONCLUSION

WHEREFORE, Petitioners pray this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THE RADMORE FIRM, LLC

BY: JAMES R. RADMORE, ESQUIRE
Attorney for Petitioner and Counsel of Record

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY FOX, Plaintiff,	:	
	:	Civ.No. 14-5344 (RBK)
v.	:	
	:	
BAYSIDE STATE PRISON, et al., Defendants.	:	**OPINION**

ROBERT B. KUGLER, U.S.D.J.

I. INTRODUCTION

Plaintiff is proceeding through counsel with an amended civil rights complaint filed pursuant to 42 U.S.C. § 1983. Presently pending before the Court are two motions to dismiss. The first motion to dismiss has been filed by defendants, the Bayside State Prison, the New Jersey Department of Corrections (hereinafter referred to as "the DOC"), Gary M. Lanigan and John Powell (collectively, the "State Defendants"). The second motion to dismiss has been filed by Rutgers University (hereinafter referred to as "Rutgers"). For the following reasons, the State Defendants motion to dismiss will be granted and Rutgers' motion to dismiss will be denied.

II. LEGAL STANDARD ON MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss an action for failure to state a claim upon which relief may be granted. In evaluating a motion to dismiss, "'courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In making this determination at the motion to dismiss stage, a court must take three steps. See *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1947). "Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1950). "Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950).

III. BACKGROUND

The amended complaint names the following defendants: (1) Bayside State Prison; (2) the DOC; (3) Rutgers, the State University of New Jersey; (4) the University of Medicine and Dentistry of New Jersey; (5) John Powell – Administrator of Bayside State Prison; (6) Gary Lanigan – Commissioner of the New Jersey Department of Corrections; and (7) John Does Nos. 1-25 of the Bayside State Prison. Plaintiff was incarcerated at Bayside State Prison when the circumstances giving rise to this complaint occurred. On August 27, 2012, plaintiff sought treatment at the prison infirmary because he was feeling dizzy. Plaintiff's blood pressure was high and a nurse subsequently gave him an injection. Plaintiff lost consciousness after receiving the injection and fell on the floor landing on his face. He was then taken to Atlantic City Hospital and treated for his injuries to his face which included a broken nose.

Plaintiff subsequently returned to Bayside State Prison where officials alleged that he had overdosed on self-inflicted drugs. He was placed in lock-up for three weeks. He alleges that he did not receive proper treatment during this time and was not sent for treatment on his broken nose for several months. Ultimately, he received surgery to his nose, but further surgery is necessary. Nevertheless, the defendants have refused to permit additional surgery. Plaintiff states that he suffers from significant breathing issues and a deformed nose as a result of the failure of defendants to treat his injuries.

Plaintiff asserts that the defendants were deliberately indifferent to his medical needs, that they failed to institute policies to address the needs of inmates and that they failed to supervise their agents and employees amongst other claims. He raises federal claims against the defendants pursuant to 42 U.S.C. § 1983. Plaintiff also raises state law claims against the defendants such as: (1) negligent, reckless, intentional and outrageous conduct; (2) battery; (3) medical malpractice; and (4) agency liability. He requests monetary damages as relief.

The State Defendants have filed a motion to dismiss the amended complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Rutgers has separately moved to dismiss plaintiff's medical negligence claim against it.

IV. DISCUSSION

A. State Defendants' Motion to Dismiss

i. *Bayside State Prison, the DOC, John Powell (Official Capacity) and Gary M. Lanigan (Official Capacity)*

Bayside State Prison and the DOC argue that the complaint should be dismissed against them because they are immune from suit pursuant to the Eleventh Amendment. Similarly, John Powell and Gary M. Lanigan assert that the complaint should be dismissed against them to the extent they are

sued in their official capacities because they are also immune from suit under the Eleventh Amendment.

As noted by the United States Court of Appeals for the Third Circuit:

> State governments and their subsidiary units are immune from suit in federal court under the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. "The Supreme Court extended the Eleventh Amendment's reach to suits by in-state plaintiffs, thus barring all suits against non-consenting States in federal court." *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 194 (3d Cir. 2008) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). Individual state employees sued in their official capacity are also entitled to Eleventh Amendment immunity because "official-capacity suits generally represent only another way of pleading an action" against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (internal quotation marks omitted).

Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 253-54 (3d Cir. 2010).

The DOC is considered a state entity. *See* N.J. STAT. ANN. § 30:1B-2 (establishing "in the

Executive Branch of the State Government a principal department which shall be known as the Department of Corrections"); *see also Cipolla v. Hayman*, No. 10-0889, 2013 WL 1288166, at *5 (D.N.J. Mar. 26, 2013) ("[T]he New Jersey Department of Corrections is a state entity.") Additionally, Bayside State Prison is a state entity as well. *See Bell v. Holmes*, No. 13-6955, 2015 WL 851804, at *3 (D.N.J. Feb. 23, 2015) (state prison is a state entity); *Bey v. Pennsylvania Dep't of Corr.*, 98 F. Supp. 2d 650, 657 (E.D. Pa. 2000) (state correctional institutions are arms of the state because they are run exclusively by and through the state's department of corrections). Finally, the United States Supreme Court has explained that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . . As such, it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, plaintiff's claims against Powell and Lanigan in their official capacities are also considered claims against the state.

As plaintiff's claims against the Bayside State Prison, the DOC, Powell (official capacity) and Lanigan (official capacity) are claims against the state, these defendants are immune from suit under the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (Eleventh Amendment immunity applies when state officials are sued for damages in their official capacity); *Endl v. New Jersey*, 5 F. Supp. 3d 689, 697-98 (D.N.J. 2014) (finding the DOC is immune from § 1983 suit under the Eleventh Amendment as it stands in the shoes

of New Jersey for sovereign immunity purposes and that claims against state officials in their official capacities are also similarly barred under the Eleventh Amendment); *Cipolla*, 2013 WL 1288166, at *5 (finding all claims against state prison barred by the Eleventh Amendment). It is worth noting that Eleventh Amendment immunity also applies to plaintiff's state law claims against these defendants in addition to his federal claims. *See K.J. v. Greater Egg Harbor Regional High School Dist. Bd. of Educ.*, No. 14-0145, 2015 WL 1816353, at *12 (D.N.J. Apr. 21, 2015) (applying sovereign immunity to plaintiff's state law claims) (citing *Hyatt v. Cnty. of Passaic*, 340 F. App'x 833, 837 (3d Cir. 2009); *Mierzwa v. United States*, 282 F. App'x 973, 976 (3d Cir. 2008) (per curiam)); *see also Severino v. Middlesex Cnty.*, No. 14-6919, 2015 WL 4042145, at *2 (D.N.J. July 1, 2015) ("[T]he Eleventh Amendment bars state law claims supported only by supplemental jurisdiction.") (citing *Garcia v. Richard Stockton Coll. of N.J.*, 210 F. Supp. 2d 545, 550 (D.N.J. 2002) (citing *Pennhurst v. State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 118-20) (1984)); *Tuite v. New Jersey*, No. 10-6722, 2014 WL 5035707, at *3 (D.N.J. Oct. 8, 2014) (finding § 1983 claims and state law claims against the state are barred by Eleventh Amendment sovereign immunity) (citing *Quern v. Jordan*, 440 U.S. 332, 342 (1979); *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121).

ii. John Powell and Gary M. Lanigan (Individual Capacity)

Plaintiff also raises his federal and pendant state law claims against Powell and Lanigan in

their individual capacities. Sovereign immunity under the Eleventh Amendment does not protect Powell and Lanigan from § 1983 liability to the extent they are being sued in their individual capacities. *See Hafer*, 502 U.S. at 30-31 ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983)."); *Goodall-Gaillard v. New Jersey Dep't of Corr.*, No. 09-0954, 2014 WL 2872096, at *26 (D.N.J. June 24, 2014) ("A claim for damages against a state official in his or her *individual capacity* is a different matter. In that individual capacity, he or she does not partake of the state's Eleventh Amendment sovereign immunity[.]") (citations omitted).

"In order for liability to attach under § 1983, a plaintiff must show that a defendant was personally involved in the deprivation of his federal rights." *Fears v. Beard*, 532 F. App'x 78, 81 (3d Cir. 2013) (per curiam) (citing *Rode v. Dellaciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)). "[L]iability cannot be predicated solely on the operation of respondeat superior. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005) (citation omitted).

In raising a § 1983 claim against a supervisor, a supervisor can be liable "if they established and maintained a policy, practice, or custom which directly caused [the] constitutional harm," or "if they participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and

acquiesced in [their] subordinates violations." *Santiago*, 629 F.3d at 129 n.5 (internal quotation marks and citation omitted). "Particularly after *Iqbal*, the connection between the supervisor's directions and the constitutional deprivation must be sufficient to 'demonstrate a 'plausible nexus' or 'affirmative link' between the [directions] and the specific deprivation of constitutional rights at issue.'" *Id.* (quoting *Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000)).

In this case, plaintiff provides no facts describing how Powell and Lanigan violated his constitutional rights, i.e., he fails to allege facts to show that these defendants directed the deprivation of his constitutional rights or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. Plaintiff's statement that Lanigan "had specific knowledge of the within conduct and policy and practice and took no steps to prevent said actions," (Dkt. No. 8 at p. 8.) is not entitled to the assumption of truth as it amounts to a conclusory statement that is a threadbare recital of the elements of a cause of action. *See Iqbal*, 556 U.S. at 678; see also *Cherry v. Whitehead*, No. 09-4161, 2012 WL 253138, at *7 (D.N.J. Jan. 25, 2012) (merely stating that failure to provide training or appropriate training to those persons charged with day-to-day care is conclusory statement that is insufficient to state a claim under *Iqbal* and *Twombly*). Accordingly, plaintiff fails to state a § 1983 claim against Powell and Lanigan in their individual capacities because he has failed to allege their personal involvement in the deprivation

of his constitutional rights. Thus, these claims will be dismissed without prejudice.

Plaintiff's reliance on the state created danger theory in his opposition to the State Defendants' motion to dismiss does not change this result. Under the state created danger theory, a plaintiff must allege:

> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) a state actor acted with a degree of culpability that shocks the conscience;
> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Kaucher v. Cnty. of Bucks, 455 F.3d 418, 431 (3d Cir. 2006) (citing *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)). However, as the Third Circuit noted in *Kaucher*, a plaintiff still must allege personal involvement on the part of the defendants even under a state created danger theory. *See* 455

F.3d at 431 n.7 (analyzing plaintiffs' claim under state created danger theory under Section 1983 and noting that plaintiffs failed to state a claim because they failed to allege personal involvement on the part of several defendants). For the reasons set forth above, such allegations are either lacking in the complaint or are conclusory and therefore not entitled to an assumption of the truth under *Iqbal*.

Plaintiff also alludes to the "special relationship" that is owed to him. He asserts in his response to the motion to dismiss that this "special relationship" created a duty on the part of the defendants to provide inmates with medical care. This Court does not disagree with plaintiff's assertion. Indeed, it is clear that a plaintiff-prisoner's constitutional rights are violated when a defendant is deliberately indifferent to a serious medical need of an inmate. *See Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004). However, the fact that plaintiff has a right to be free from deliberate indifference to his serious medical needs does not take away from the fact that plaintiff also needs to allege personal involvement on the part of the named defendants for that deliberate indifference. As stated above, such allegations of personal involvement on the part of Powell and Lanigan with respect to being deliberately indifferent to his serious medical needs is lacking in the amended complaint.

Because there are no more federal claims pending against Powell and Lanigan in their individual capacity, this Court will decline to exercise supplemental jurisdiction over plaintiff's

state law claims against them in their individual capacity. *See T.R. v. Cnty. of Delaware*, No. 13-2931, 2013 WL 6210477, at *8 (E.D. Pa. Nov. 26, 2013) (declining supplemental jurisdiction over plaintiff's state law claims against one defendant when there are no viable federal claims against that defendant despite the fact that plaintiff may have pled plausible claims against another defendant); *see also Nadal v. Christie*, No. 12-5447, 2014 WL 2812164, at *8 (D.N.J. June 23, 2014).

Accordingly, for the foregoing reasons, the State Defendants' motion to dismiss will be granted. Bayside State Prison and the DOC are entitled to sovereign immunity under the Eleventh Amendment on plaintiff's claims. Furthermore, defendants Powell and Lanigan in their official capacities are also entitled to sovereign immunity under the Eleventh Amendment. Additionally, plaintiff fails to state a § 1983 claim against Powell and Lanigan to the extent they are being sued in their individual capacities and this Court declines to exercise supplemental jurisdiction over plaintiff's state law claims against Powell and Lanigan in their individual capacities.

B. Rutgers' Motion to Dismiss

Rutgers has also filed a motion to dismiss the amended complaint. (*See* Dkt. No. 23.) Rutgers filed its motion on April 21, 2015. In the motion, Rutgers argues that plaintiff's claim of medical negligence against it must be dismissed because plaintiff did not file an affidavit of merit. However, as plaintiff notes in his response, he in fact filed an affidavit of

merit with the Court on March 5, 2015. (*See* Dkt. No. 21.) In the reply, Rutgers argues that while plaintiff has filed an affidavit of merit, the affidavit of merit filed is insufficient.

The United States Court of Appeals for the Third Circuit has counseled against dismissing complaints for failing to file an affidavit of merit. Indeed, "[t]hat the affidavit is not a pleading requirement counsels that a defendant seeking to 'dismiss' an action based on the plaintiff's failure to file a timely affidavit should file a motion for summary judgment under Rule 56, and not a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Nuveen Munc. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withumsmith Brown, P.C.*, 692 F.3d 283, 303 n.13 (3d Cir. 2012).

The Court will deny Rutgers' motion to dismiss. First and foremost, as stated above, a defendant's argument that a plaintiff failed to file an affidavit of merit should be made in a motion for summary judgment, *see id.*, not a motion to dismiss as Rutgers did in this case. Secondly, as previously stated, plaintiff did in fact file an affidavit of merit such that Rutgers' motion to dismiss is factually mistaken on its face.

Rutgers' argument in its reply that the affidavit of merit filed by plaintiff is insufficient does not change this result. First and foremost, from a procedural standpoint, this Court need not consider arguments raised for the first time in what amounts to Rutgers' reply brief to its motion to dismiss. *See Harris v. Colvin*, No. 13-7130, 2015 WL

3648725, at *8 n.2 (D.N.J. June 11, 2015) (citing *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994)). Secondly, as described above, the affidavit of merit is not a pleading requirement. *See Nuveen Mun. Trust*, 692 F.3d 303 n.13. Therefore, to the extent that Rutgers challenges the sufficiency of the affidavit of merit, it needs to do so in a motion for summary judgment as opposed to the instant motion to dismiss. *See id.* Accordingly, Rugters' motion to dismiss will be denied.

V. CONCLUSION

For the foregoing reasons, the State Defendants' motion to dismiss will be granted. Bayside State Prison and the DOC are entitled to sovereign immunity under the Eleventh Amendment. Furthermore, Powell and Lanigan are also entitled to sovereign immunity to the extent they are being sued in their official capacities. Plaintiff's federal claims against Powell and Lanigan in their individual capacities will be dismissed without prejudice for failure to state a claim upon which relief may be granted and the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims against Powell and Lanigan in their individual capacities. Rutgers' motion to dismiss will be denied. An appropriate Order will be entered.

DATED: August 18, 2015

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-170

ANTHONY FOX,
Appellant

v.

BAYSIDE STATE PRISON; NEW JERSEY DEPARTMENT OF CORRECTIONS; RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY; THE UNIVERSITY OF MEDICINE & DENTISTRY OF NEW JERSEY; JOHN POWELL, Individually and as Administrator of Bayside State Prison; GARY M. LANIGAN, Individually and as Commissioner of the New Jersey Department of Corrections; JOHN DOES NOC. 1-25 OF BAYSIDE STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D. N.J. No. 1-14-cv-05344)
District Court Judge: Honorable Robert B. Kugler

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
December 15, 2017
Before: CHAGARES, RESTREPO and FISHER,
Circuit Judges.

(Filed: March 2, 2018)

OPINION*

FISHER, Circuit Judge.

Anthony Fox was an inmate at Bayside State Prison in Leesburg, New Jersey. Based on a medical mishap, Fox filed a 42 U.S.C. § 1983 claim against Bayside and associated entities. The District Court dismissed Fox's claims, and we will affirm.

I

In August 2012, Fox reported to the prison infirmary complaining of dizziness. After discovering that Fox's blood pressure was elevated, the infirmary nurse injected him with medication. Fox subsequently lost consciousness and fell to the floor, suffering injuries to his face and nose. Fox was taken to the hospital, and upon his return officials placed him in "lock-up." The parties do not define the term lock-up, but we assume it denotes a punitive confinement status. Fox was placed in lock-up upon suspicion that his loss of consciousness was precipitated by some form of drug abuse. Fox remained in lock-up for about three weeks and was released when toxicology results disproved officials' drug use suspicions.

Fox alleges that his medical treatment upon his return to Bayside was improper. Fox eventually

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* This disposition is not an opinion of the full Court and pursuant to I.O.P.5.7 does not constitute binding precedent.

underwent surgery to repair his nose damage, but claims that his surgery was too long delayed and insufficient. He alleges that Bayside officials continue to deny him additional, necessary surgeries. As a result, Fox suffers from significant breathing issues and facial deformity.

Fox filed a civil rights complaint under 42 U.S.C. § 1983 against Bayside State Prison, the New Jersey Department of Corrections (DOC), Bayside administrator John Powell, and DOC Commissioner Gary Lanigan.[1] Fox's complaint focuses on alleged deficiencies in his medical treatment and his placement in lock-up. The District Court dismissed the claims against Bayside and the DOC on sovereign immunity grounds. To the extent Powell and Lanigan were sued in their official capacities, they also fell within the District Court's sovereign immunity ruling. As to their individual capacities, the District Court dismissed under Federal Rule of Civil Procedure 12(b)(6).[2]

II

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review a District Court's dismissal based on sovereign immunity under a plenary standard.[3] We apply the same standard when reviewing a

[1] Fox's suit also named Rutgers University and the University of Medicine and Dentistry of New Jersey as defendants. The District Court granted summary judgment as to those defendants, and Fox has not appealed those rulings.

[2] Fox does not challenge the District Court's dismissal of his related state law claims.

[3] *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir. 1996).

dismissal under Rule 12(b)(6).[4] In reviewing Fox's complaint, we accept all well-pled allegations as true and draw all reasonable inferences in his favor.[5]

III

A. Sovereign Immunity

The Eleventh Amendment bars suits against state governments in federal courts. This immunity extends to any entity that is an arm of the state.[6] We have adopted a three-part test to determine whether an entity is an arm of the state,[7] but a detailed application of that test is unnecessary here. The DOC is quintessentially an arm of the state and is funded by, controlled by, and accountable to the state.[8] As a facility wholly owned and operated by the DOC, Bayside is similarly protected. In their official capacities, Powell and Lanigan are likewise protected because "a suit against a state official in his or her official capacity . . . is a suit against the official's office" that is "no different from a suit against the State itself."[9] Accordingly, the District

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[4] *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 452 (3d Cir. 2006).
[5] *Id.*
[6] *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–30 (1997).
[7] *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989).
[8] *See Snyder v. Baumecker*, 708 F. Supp. 1451, 1455–56 (D.N.J. 1989) (describing the characteristics of the DOC); cf. *Koslow v. Pennsylvania*, 302 F.3d 161, 169 (3d Cir. 2002) (determining that the Pennsylvania DOC was entitled to sovereign immunity and then analyzing whether Congress had abrogated said immunity by statute).
[9] *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Court did not err in applying sovereign immunity to these defendants.

B. Section 1983 Claims

In their individual capacities, Powell and Lanigan are unprotected by sovereign immunity and subject to suit under 42 U.S.C. § 1983. The gravamen of Fox's complaint is that the medical care he received at Bayside—both before and after his injury—was deficient. In so pleading, Fox invokes terms indicative of two distinct theories of relief under § 1983: failure to supervise and deliberate indifference. On both counts, however, Fox's pleadings are deficient.

To state a claim for failure to supervise, a plaintiff must:

> identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure.[10]

[10] *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 317 (3d Cir. 2014), *rev'd on other grounds sub nom. Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam).

In this vein, Fox avers that "defendants were aware of . . . the need for additional rules, regulations, testing, policies, [and] procedures"[11] to provide adequate medical care to inmates, but the complaint is fatally lacking in detail. At the outset, Fox fails to identify a specific policy to undergird his claim, which necessarily forecloses the possibility of adequately pleading that any risk associated with the policy was unreasonable, that prison officials were aware of and indifferent to this risk, and that the specific policy led to his injury. Accordingly, Fox fails to plead a valid failure to supervise claim.

An official's deliberate indifference to an individual's constitutional rights provides an alternative basis for relief under § 1983. As relevant here, a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment.[12] To plead such a claim, however, it is necessary—though not sufficient—to allege that the "official was subjectively aware of the risk."[13] Fox claims that the "conduct of defendants . . . constituted a breach of . . . duty and was in deliberate indifference to the danger and substantial risk facing plaintiff,"[14] but the complaint lacks any assertion that either Powell or Lanigan was aware of any risk in this case, let

[11] App. 33.
[12] *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).
[13] *Id.* at 829.
[14] App. 33.

alone "a substantial risk of serious harm."[15] Thus, the complaint fails to state a deliberate indifference claim.

IV

For all of these reasons, we will affirm the District Court's judgment.

[15] Farmer, 511 U.S. at 829. The complaint does allege that "Lanigan[] had specific knowledge of the within conduct and policy and practice and took no steps to prevent said actions," App. 32, but this assertion falls quite short of identifying a specific policy and alleging that Lanigan was subjectively aware that this policy posed a substantial risk of serious harm.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-170

ANTHONY FOX,
Appellant

v.

BAYSIDE STATE PRISON; NEW JERSEY DEPARTMENT OF CORRECTIONS; RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY; THE UNIVERSITY OF MEDICINE & DENTISTRY OF NEW JERSEY; JOHN POWELL, Individually and as Administrator of Bayside State Prison; GARY M. LANIGAN, Individually and as Commissioner of the New Jersey Department of Corrections; JOHN DOES NOC. 1-25 OF BAYSIDE STATE PRISON

(D.C. No. 1-14-cv-05344)

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS and FISHER[1], Circuit Judges

[1] Judge Fisher's vote is limited to panel rehearing only

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

The petition for rehearing filed by Appellant, Anthony Fox in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:
s/D. Michael Fisher
Circuit Judge

Dated: April 30, 2018
CJG/cc: James R. Radmore, Esq.
Matthew J. Lynch, Esq.