IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

OBAH FARAH WALKER, Administrator of the Estate of the late Farah Saleh Farah, Plaintiff, v. CORRECT CARE SOLUTIONS, LLC, *et al.*, Defendants.	)	CASE NO. 1:10-cv-1012

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendants Correct Care Solutions, LLC ("CCS"), Nigist Ketema, and Joe Ann Smith's Motion for Partial Summary Judgment (Dkt. No. 180); Defendant CCS' Motion to Dismiss (Dkt. No. 130); and Plaintiff Obah Farah Walker's, Administrator of the Estate of the late Farah Saleh Farah, ("Ms. Walker") Motion to Amend Complaint (Dkt. No. 197). This case concerns the wrongful death and civil rights claims arising from the death of Decedent Farah Saleh Farah ("Decedent"), who, at the time of his death, was a mentally ill 24-year old man incarcerated at the Alexandria Adult Detention Center, for which Defendant CCS provided health services to inmates.

The following issues are before the Court. First, whether the Court should deny Defendants' Motion for Partial Summary Judgment as to Plaintiff's Eighth Amendment claims against Defendants Ketema and Smith because there is a genuine dispute of material fact as to whether they acted with deliberate indifference in the face of a serious medical need? Second, whether the Court should grant Defendants' Motion for Partial Summary Judgment and deny Defendant CCS' Motion to Dismiss as moot as to Plaintiff's Eighth Amendment claim against

Defendant CCS because Plaintiff has failed to offer any evidence that the alleged policy or custom of CCS proximately caused the constitutional violation? Third, whether the Court should deny Defendants' Motion for Partial Summary Judgment as to Plaintiff's request for punitive damages in connection with her state law wrongful death claim because there is a dispute of material fact as to whether Defendants Ketema and Smith acted with wanton or willful conduct? Fourth, whether the Court should grant Plaintiff's Motion for Leave to Amend Complaint to include certain facts uncovered in discovery and correct certain deficiencies because leave to amend should be freely granted?

For the reasons stated below, the Court denies Defendants' Motion for Partial Summary Judgment as to Plaintiff's Eighth Amendment claims against Defendants Ketema and Smith because there is a genuine dispute of material fact as to whether they knew of and disregarded an excessive risk to Decedent's health and safety. In addition, the Court grants Defendants' Motion for Partial Summary Judgment and denies Defendant CCS' Motion to Dismiss as moot as to Plaintiff's Eighth Amendment claim against Defendant CCS because Plaintiff has failed to produce any evidence to prove that the alleged policy or custom proximately caused the alleged constitutional violation. Further, the Court denies Defendants' Motion for Partial Summary Judgment as to Plaintiff's request for punitive damages in connection with her state law wrongful death claim because there is a genuine dispute of material fact as to whether Defendants acted with reckless indifference in a conscious disregard to Decedent's health and safety. Finally, the Court grants Plaintiff's Motion to Amend Complaint because leave to amend should be freely given, and the amendment would not be futile or unduly prejudicial to Defendants.

I. BACKGROUND

In November 2007, Decedent reported to the Alexandria Adult Detention Center ("ADC") to serve a sentence for carrying a concealed weapon. He was sentenced to serve three months in jail and nine months of probation. A condition of Decedent's probation was that he was to remain on the medication prescribed to treat his paranoid schizophrenia.

According to Plaintiff, when Decedent was on his medication, he was "functional, social, competent, and friendly." In contrast, when he was not taking his medication, as a result of his mental illness, Decedent would, among other things, starve himself and refuse water, becoming dehydrated to a degree that required emergency hospital intervention.

From his prison report date to January 4, 2008, Decedent stopped taking his medication, and his mental condition worsened. He refused to see family members, stopped eating normally, and lost weight. Decedent's behavior became such that jail mental health staff decided that hospitalization was appropriate. A temporary detention order mandating his hospitalization was secured, and, on or about January 4, 2008, Decedent was discharged from the jail directly to Mt. Vernon Hospital.

On January 7, 2008, a civil commitment hearing was conducted to determine whether Decedent would remain involuntarily detained at the hospital. The presiding magistrate judge determined that Decedent could not be detained as a danger to himself or others because, even though he sometimes refused to eat, he had been compliant with his medication while in the hospital, was apparently oriented to his surroundings, and denied suicidal and homicidal ideation. Accordingly, Decedent was released.

Following his release, Decedent reported to his probation officer. Decedent told his probation officer that he did not need the medication, and he refused to take it. The probation

officer reminded Decedent that taking his medication was a condition of his probation and directed him to return on January 10, 2008 with his medication. On January 10, 2008, Decedent reported back without his medication, again stating that he refused to take it. Decedent was arrested for violating the terms of his probation and returned to ADC, where he remained until he died 13 days later.

Pursuant to its contract with ADC, at all relevant times, Defendant CCS was responsible for the provision of health care to the jail's inmates. CCS's only responsibility with regard to mental health care at the jail is the provision of psychotropic medications. The Alexandria Community Services Board ("CSB") is the provider of mental health care at ADC. However, CCS policies require cooperation between medical services and mental health staff and programs at ADC. For example, to the extent that mental health records were kept separate from medical records, there was to be process that ensured the sharing of information. At a minimum, this would require a problem list that indicated a listing of a patient's current problems and medications that would be common to mental health, medical, and dental records of an inmate. There was also a board displaying all of the inmates and their medical needs. In this case, ADC deputies testified that this board indicated that Decedent had a mental illness. In addition, if a mental health patient who was not taking his psychotropic medication began deteriorating physically, CCS would have the patient evaluated by a medical doctor at the same time the mental health professionals were addressing the problem.

Based on their experience working with CCS staff, CSB personnel learned that they had to be very proactive in ascertaining and double-checking necessary medical information regarding mental health patients receiving medical services from CCS. CCS nurses did not seem

appropriately well-informed in responding to CSB inquiries, and, on several occasions, CCS nurses told CSB personnel that certain patients had been given medications when they had not.

During his January 10-23, 2008 period of incarceration, Decedent was kept in the "booking" area, also known as the Inmate Receiving Classification or IRC, because there was no space in the mental health unit. Every inmate housed in the IRC is subject to a 15-minute check, in which a deputy looks at the inmate to verify that the inmate is breathing and is "okay."

During this final period of incarceration, Decedent continued to refuse to take his medication. Decedent's failure to take his medication was documented in the medication log. Defendants failed to convince him to take his medication, secure informed refusal to take the medication, and document Decedent's refusal, which was required by Defendant CCS' policies. Ms. Regina McGloin of CSB, who coordinates CSB client services, stated in her Declaration that she was never told that Decedent was not taking his medication, so she assumed that he was taking the medication that had been prescribed for his schizophrenia. She stated that Decedent was "plainly more at risk when he did not take it. His condition of paranoid schizophrenia had to be controlled to help prevent him from being a danger to himself or others." (Pl.'s Ex. 32.)

After a few days, Decedent ate and drank very little, resulting in the dramatic deterioration of his physical and mental health. He exhibited signs of weakness, gaunt visage, sunken eyes, and dry, discolored, and "tenting" skin.

On the morning of January 21, 2008, Decedent requested an I.V., a ginger ale, and a doctor. Deputy Morgan summoned Defendant Nurse Ketema. Defendant Ketema has been a licensed practical nurse since 2003, and she worked for CCS since 2007 on an "as-needed" basis, which amounted to approximately 8-10 night shifts per month. On the early morning of January 21, 2008, when she was summoned to Decedent's cell, she was told that Decedent had not eaten

for two days, that he was nauseous and had been vomiting, and that he wanted an IV and a doctor.

At her deposition, Defendant Ketema testified to the sequence of events surrounding her interaction with Decedent on the morning of January 21, 2008. When she first arrived, she asked what his problem was and how she could help him. Defendant Ketema testified that she did not know that Decedent was mentally ill. Decedent came out of his cell and sat in a chair right outside the doorway. Decedent told Defendant Ketema that he did not have any pain, but he needed ginger ale and an IV. Defendant Ketema told Decedent that there was no ginger ale or an IV, and, instead, she offered him food, milk, and water. Decedent refused the food, stating that he did not like jail food. Defendant Ketema testified that Decedent got up from the chair, but "he's bending sometimes." She "thought he was a little bit confused," so she told him to have some water, milk, or food. Again Decedent refused, insisting that Defendant Ketema give him ginger ale and an IV. Decedent repeatedly asked for ginger ale and an IV. Defendant Ketema continuously refused, explaining that this was a jail, and it did not have ginger ale or an IV. She asked him if he needed medical help. He denied needing medical help, stating that he needed only ginger ale or an IV. According to Defendant Ketema, they had this conversation "several times, over and over."

Defendant Ketema testified that she went to the nursing station to retrieve the machine to take Decedent's vital signs. By that time, Decedent had gone back into his cell. Defendant's cell was in close proximity to, and could be seen from, the nursing station. Defendant Ketema returned to find Decedent mopping his room to clean the vomit from the floor. Defendant waited until he finished mopping then told Decedent to wash his hands. Decedent complied. As he was leaning over the sink washing his hands, he repeatedly asked if Defendant Ketema had ginger ale

or an IV. Defendant Ketema testified that she took Decedent's vital signs while he was leaning on the sink. She testified that the process took between 40 and 60 seconds.

Defendant Ketema further testified that she then returned to the nursing station because Decedent did not need her help. She testified that she did not see any dehydration. She logged Decedent's vital signs on the shift report, indicating that Decedent's pulse rate was 101 and his blood pressure 110/75, and she also documented Decedent's nausea and vomiting. The shift report or progress sheet is the document that contains the information for all of the patients seen during a shift. Defendant Ketema did not put the information on Decedent's personal chart. She did not know where the chart was, and she took no action to find it.

A video camera recorded some of Defendant Ketema's interaction with Decedent on January 21. From the video, it is unclear whether Defendant Ketema was in Decedent's cell long enough to have taken his vital signs.[1] (Pl.'s Ex. 45.) In addition, deputies on duty at the time Defendant Ketema interacted with Decedent said that Defendant Ketema did not take Decedent's vital signs. (*See* Pl.'s Ex. 46 & 47 ¶ 4.)

In her police interview shortly after Decedent's death, Defendant Ketema also gave a statement about the sequence of events surrounding Decedent's death. She explained that she had interacted with Decedent in his previous period of incarceration at ADC, and she thought the reason he left was to go to a mental health hospital. When asked about Decedent's medication, Defendant Ketema stated that Decedent was on Seroquel, which she described as "psycho medication," but that he never took his medication. She thought he was supposed to be taking

[1] There is a 22-second skip in the video, but it is questionable whether Defendant Ketema could have taken the vital signs during that time period. CCS personnel attempted to take vital signs to determine whether they could be taken in such a short time period and concluded that it would not be possible. This issue is for a fact finder to decide at trial.

the medication twice per day, but he never took it; he was refusing everything, including medication and treatment.

Defendant Ketema gave the police officers the following description of Decedent from the morning of January 21, 2008. She told police officers that Decedent appeared very sluggish and weak during their interaction. He was nauseated and trying to vomit. She commented that she had seen his vomit, and it was just watery with no food in it. She explained that, in her nurse's judgment, she thought Decedent was dehydrated because he was sluggish and weak, his pulse was very high, he was vomiting a watery substance but no food, and his skin was dry and scaly. In addition, Decedent had not eaten in the past two or three days.

Defendant Ketema was trained to encourage an inmate who had not eaten for two days to eat or drink and, if he did not do so, the doctor has to see him.[2] Similarly, if the patient was nauseous or vomiting, she would encourage him to take fluids, and the next step is to be seen by the doctor because the doctor can prescribe any needed medication. Further, if a patent is vomiting, but there is no food in the vomit, that would be an occasion to see a doctor. Defendant Ketema testified that she would also encourage him to take fluids. Finally, if a patient was suffering from dehydration, she would encourage him to take fluids and eat. Nurse Ketema was trained to call a doctor if a patient had dry, discolored skin or was so weak that he could not stand up properly.

At the end of her shift at approximately 7:00 a.m. on the morning of January 21, 2008, Defendant Ketema reported to the oncoming nurse, Defendant Smith, about her interaction with Decedent. Defendant Ketema testified that she informed Defendant Smith of Decedent's vital

[2] Defendant Ketema testified that the response would be to "put him for a doctor to be seen." When asked what that meant, she responded: "The doctor has to see him."

signs and that the deputy had told her Decedent had not eaten. Defendant Ketema also told her to put Decedent on the sick call list to see the doctor. Defendant Ketema testified that she also told Defendant Smith that Decedent had requested ginger ale and an IV.

Defendant Smith, a registered nurse who had worked for CCS at ADC for three years, also testified in her deposition about the sequence of events and her interaction with Decedent when she started her shift on the morning of January 21, 2008. She testified that Defendant Ketema gave her report of her interaction with Decedent, and Defendant Smith also read the progress report. Defendant Smith does not recall Defendant Ketema communicating anything to her that was not on the progress chart.

Defendant Smith then went to see Decedent. Defendant Smith asked the deputy accompanying her whether Decedent had eaten, and he told her that he had not fed him. Defendant Smith did not ask whether the deputy meant that Decedent had refused food or that the deputy had not distributed food to him. When the deputy opened the door to Decedent's cell, Defendant Smith found him lying on the floor about a foot from the door with his back to the door. She leaned over him to look at his face and found his eyes closed. Defendant Smith testified that she told Decedent that she was going to take his vital signs, but Decedent refused, crossing his arms. Defendant Smith asked Decedent if he had eaten, and if he wanted water. Decedent did not respond. Defendant Smith testified that she did not touch Decedent after that because that would be considered assault after he refused to let her take his vital signs. Instead, she leaned over him to see if she could see into his eyes and his mouth. Decedent's eyes were closed, and she could not see into his mouth.

Defendant Smith spent about five minutes in Decedent's cell. She does not recall asking him any more questions or trying to impart any more medical attention. Defendant Smith

documented her visit on the shift report, indicating that Decedent had not responded to questions, and that the deputy did not know if he had eaten. Defendant Smith testified that she documented her interactions on a progress note that went into Decedent's medical record. Defendant Smith also put Decedent on the list to see the doctor when the doctor next visited ADC. Defendants did not produce any evidence that Decedent was put on the list to see the doctor. In any event, the doctor was not scheduled to visit until two days later.

Defendant Smith testified at her deposition that she does not believe you can tell someone is dehydrated by appearance. She testified that, to assess a patient for dehydration, she would check the patient's mucous membranes, eyes, and skin. She might also talk to a patent and ask to examine him, but a patient has a right to refuse an examination. Defendant Smith also testified that she would call a doctor for a patient if he had nausea, vomiting, and high fever, or if the patient's pulse was over 150-160.

Defendant Smith knew that patients could die of dehydration, but she had no experience with patients dying of dehydration. If a patient was dehydrated, Defendant Smith testified that she would put him on the sick call list and examine him, if possible, but she could not conclude that a patient was dehydrated based on nausea and vomiting alone and without examining him.

On the morning of January 23, 2008, deputies reported that Decedent appeared unconscious. After Decedent did not respond to cold water splashed on his face, a guard, worried at Decedent's appearance, called for a nurse. Defendant Ketema responded without any medical equipment. Decedent was lying on his back, unresponsive. Defendant Ketema took Decedent's pulse, stating that she did not hear a heartbeat. Defendant Ketema observed that Decedent felt cold to the touch. When one of the guards asked Defendant Ketema to get the external defibrillator unit, she replied that none was available. One of the deputies proceeded to

retrieve the external defibrillator. Defendant Ketema told the guards that it was not necessary to call 911, but the ranking correctional officer directed the control center to call 911.

While they waited for the 911 responders, correctional personnel provided Decedent with life-saving measures. During this time, Defendant Ketema stood apart, looking on and doing nothing. She was "in shock" and had frozen. She did nothing to direct or assist in attempting to treat Decedent except to obtain the necessary paperwork to secure Decedent's transport from the jail with the emergency responders.

Soon after being brought to the Alexandria Hospital, Decedent died.[3] The autopsy report describes "sunken eyes, dry tissue, skin tenting and electrolyte abnormalities." A medical examiner attributed his death to "dehydration due to psychosis with medication and food refusal due to schizophrenia, paranoid type."

According to the opinion of Plaintiff expert Dr. Jonathan Arden, a pathologist, Decedent "would have looked markedly ill" as early as January 21, 2008. He would have been "severely weak and confused . . . with sunken eyes and/or hollow cheeks." In fact, he would have been so affected as to be severely ill and obviously in need of immediate medical care. Dr. Arden opines that, if Decedent had been sent to the emergency room prior to January 23, 2008, common and basic laboratory testing and other evaluation would have led to the diagnosis of his severe dehydration and treatment that would have prevented his death and alleviated his pain and sufferance. In his report, Dr. Arden wrote that it is "overwhelmingly likely" that Decedent's death could have been prevented, if he had received proper treatment on January 21 or 22, 2008.

On January 6, 2010, Plaintiff Obah Farah Walker, Administrator of the Estate of the Late Farah Saleh Farah, filed suit in Alexandria Circuit Court. The Circuit Court action was

[3] It is unclear whether Decedent died at the jail or the hospital.

nonsuited on March 30, 2010. On September 9, 2010, Plaintiff filed the above-captioned federal lawsuit naming as Defendants Correct Care Solutions, LLC, the business contracted to provide health care services to Alexandria Adult Detention Center inmates; Nigist Ketema and Joe Ann Smith, CCS nurses who worked at ADC; and Merry Brinkley, an employee of CCS who worked full time as the CCS medical administrator of the jail. Plaintiff subsequently amended her Complaint, asserting claims for (1) wrongful death against all Defendants under Virginia Code §8.01-50 *et. seq.* (Count I), and (2) Eighth Amendment violations against each of the Defendants (Counts II-V). Pursuant to a stipulated agreement, Defendant Merry Brinkley was dismissed as a Defendant in this case.

On February 14, 2011, Defendant CCS filed a Motion to Dismiss. On March 18, 2011, Defendants CCS, Ketema, and Smith filed Defendants' Motion for Partial Summary Judgment. Plaintiff has filed oppositions to both of these motions. On April 7, 2011, Plaintiff filed a Motion to Amend Complaint, requesting leave to file a Second Amended Complaint to address factual deficiencies raised in Defendant's Motion to Dismiss by including facts uncovered in discovery, to make clear Plaintiff's request for punitive damages as a remedy for Count I, and to eliminate the claim against Defendant Brinkley. Defendants' Motion for Partial Summary Judgment, Defendant CCS' Motion to Dismiss, and Plaintiff's Motion to Amend Complaint are now before the Court for consideration.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. A "material fact" is a fact that might affect the outcome of a party's case. *Id.* at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson*, 477 U.S. at 248. Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

III. ANALYSIS

1. Motion for Partial Summary Judgment as to Plaintiff's Eighth Amendment Civil Rights Claims Against Defendants Ketema and Smith.

The Court denies Defendants' Motion for Partial Summary Judgment as to Plaintiff's Eighth Amendment claims against Defendants Ketema and Smith because there is a genuine

dispute of material fact as to whether Defendants acted with deliberate indifference in response to Decedent's serious medical need. The Eighth Amendment governs the conditions under which prisoners are confined and the treatment they receive while in prison, imposing duties on prison officials to ensure that inmates receive adequate food, clothing, shelter, and medical care. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Because an inmate must rely on prison authorities to treat his medical needs, if the authorities fail to do so, those needs will not be met. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In the worst cases, the failure to meet such needs may produce consequences, such as physical torture or death, that are inconsistent with contemporary standards of decency. *Id.* As such, the Eighth Amendment's prohibition of cruel and unusual punishment prohibits prison officials from exhibiting deliberate indifference to prisoners' serious medical needs. *Id.*

This conclusion does not mean, however, that every prisoner's claim for inadequate medical treatment states a violation of the Eighth Amendment. *Id.* at 105. A complaint that medical personnel has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment, as medical malpractice does not rise to the level of a constitutional violation simply because the victim is a prisoner. *Id.* at 105-06. To state a cognizable claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" because "[i]t is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 106. Deliberate indifference is more than mere negligence but less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. *Farmer*, 511 U.S. 825. Rather, the standard is equivalent to the reckless disregard of that risk. *Id.* at 836.

The test to determine whether a prison official acted with deliberate indifference to a substantial risk of serious harm involves both an objective and a subjective component. First, the objective component requires that the deprivation alleged be sufficiently serious. *Id.* at 834. Second, to satisfy the subjective requirement, a plaintiff must show that the defendant had a sufficiently culpable state of mind. *Id.* The Supreme Court has defined the standard as follows:

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837-38.

In light of this interpretation of the requisite mental state, liability may be imposed for deliberate indifference only if the plaintiff proves that the defendant actually knew of an excessive risk to inmate health or safety and disregarded that risk. Proof that the defendant should have perceived the risk but did not is insufficient. *See Johnson v. Quinones*, 145 F.3d 164, 167 (4th Cir. 1998) ("A prison official is not liable if he 'knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.'") (quoting *Farmer*, 511 U.S. at 844). Consciousness of a risk of harm is required. *Id.* at 168. That consciousness must be of the serious medical condition itself, not the symptoms of a serious medical condition. *Id.*

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. *Id.* at 842. A fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. *Id*; *Brice v. Virginia Beach Correctional Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995) (". . . even under this subjective standard, a prison official cannot hide behind an excuse that he was unaware of a risk, no matter how obvious."). Further, a prison official who "merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist" would not escape liability. *Id.* at 843 n.8; *Brice v. Virginia Beach Correctional Ctr.*, 58 F.3d at 105. Finally, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the resulting harm was not ultimately averted. *Id.* at 844.

Defendants concede for purposes of this motion that Decedent had a serious medical need. Thus, the Court's inquiry turns on whether Defendants Ketema and Smith had knowledge of the substantial risk of harm to Decedent and disregarded that risk. The Court denies Defendant's Motion for Partial Summary Judgment because, when the evidence is construed in the light most favorable to Plaintiff, the record contains triable issues of fact as to whether Defendants Ketema and Smith acted with deliberate indifference in the face of Decedent's serious medical need.

With respect to Defendant Ketema, there is a dispute of material fact and evidence from which a reasonable jury could find that Defendant knew of a substantial risk of harm and disregarded that risk. First, there is a dispute of material fact as to whether Defendant was aware of facts from which the inference could be drawn that a risk of serious harm existed. Defendant

testified that she did not know of Decedent's mental condition, but she told police officers that she knew that Decedent was a mental health patient, who had been refusing to take his Seroquel medication for his schizophrenia or to accept any other treatment. Further, Defendant was told Decedent had not eaten, that he had been nauseas and was vomiting, that he had asked for a doctor, and that he repeatedly requested ginger ale and an IV. In addition, it is undisputed that Decedent seemed confused and weak, and Defendant observed him bending and leaning over throughout her interaction with him on the morning of January 21, 2008. Defendant Ketema stated that Decedent told her he did not need medical attention despite the fact that one reason she had been called was because he had requested a doctor. In addition, in her statement to police, Defendant Ketema described Decedent's appearance as consistent with the very symptoms of dehydration. Thus, Defendant was either aware of facts, or there is a dispute of material fact as to whether she was aware of such facts, from which the inference could be drawn that Decedent was dehydrated or that he was otherwise at risk of serious harm.

Second there is a dispute of material fact as to whether Defendant actually drew the inference that Decedent was dehydrated or otherwise at risk of serious harm. In addition to observing that Decedent exhibited the signs of dehydration, Defendant stated that, in her nurse's judgment, she thought Decedent was dehydrated. Defendants maintain that, even if Defendant Ketema drew the conclusion that Decedent was dehydrated, this conclusion does not mean that she thought he required emergency medical attention because there are varying degrees of dehydration. Further, the fact that Decedent lived for another two days demonstrates that it was not emergent, and Defendant Ketema's conduct is consistent with a belief that it was not emergent. However, this position simply highlights the dispute of material fact as to whether Defendant drew the inference that Decedent was at risk of serious harm. Defendant's testimony

does not expressly indicate the degree of severity of Decedent's dehydration. Defendant's conduct in connection with her nurse's judgment of dehydration, her assessment that dehydration was the cause of death, and all of the other evidence discussed above serve as circumstantial evidence as to the inference that Defendant actually drew regarding Decedent's condition and whether Defendant believed that Decedent's dehydration was so severe that it required emergency medical care. Accordingly, there is a genuine dispute of material fact as to whether Defendant was aware of facts from which the inference could be drawn that a substantial risk of harm existed and whether she actually drew that inference.

Finally, if Defendant was aware of a substantial risk of harm requiring emergent medical care, there is a dispute of material fact as to whether Defendant Ketema acted with deliberate indifference by disregarding the risk of serious harm. Specifically, there is conflicting evidence regarding the steps Defendant Ketema took in response to Decedent's medical needs and whether such steps were reasonable. Defendant Ketema offered Decedent milk and water in response to his request for a doctor, ginger ale, and an IV and in the face of apparent symptoms of dehydration. At the time, Defendant Ketema knew of Decedent's mental health illness and his history of his refusal to take medication or receive treatment, yet she did not act further to secure immediate medical treatment for Decedent. In addition, there is conflicting evidence as to whether she took vital signs, which would have allowed her to further assess the seriousness of his condition and provide information to nurses who would be monitoring Decedent, and whether she informed Defendant Smith to put Decedent on the list to see the doctor, who was not scheduled to come to ADC until two days later. In addition, in her deposition, Defendant stated that the proper response in the face of certain symptoms of dehydration, which she also testified that she observed in Decedent's appearance, was to call the doctor. However, Defendants

explain that this response did not mean to actually call a doctor immediately; rather, it meant that a nurse should put the inmate on the list to see the doctor. Whether the proper response is to immediately call a doctor or simply put the patient on the list to see the doctor is a question of fact. Further, if simply putting the patient on the list to see the doctor is the proper response to symptoms of dehydration, whether that response is reasonable here, where the doctor was not scheduled to see ADC patients until two days later, is in dispute. Thus, there is a dispute of fact as to the medical steps Defendant Ketema took in response to Decedent's medical needs, and whether such steps were reasonable, in light of the apparent emergent need for care. Accordingly, the Court denies Defendants' Motion for Partial Summary Judgment with respect to Defendant Ketema because there is a genuine dispute of material fact as to whether Defendant Ketema knew of and disregarded an excessive risk of serious harm to Decedent's health or safety.

Similarly, there is a dispute of material fact with respect to Defendant Smith and whether she was aware of and disregarded a substantial risk of harm to Decedent, thus acting with deliberate indifference. Based on the record, it is not entirely clear what information Defendant Ketema reported to Defendant Smith on the morning of January 21, 2008. At the very least, Defendant Smith knew from Decedent's progress report that Decedent was nauseous and had been vomiting and that Decedent should be put on the list to see the Doctor. When Defendant Smith went to check on Decedent, he was lying down, with his eyes closed. He was not responding to questions and non-verbally refused Defendant Smith's request to take his vital signs. Defendant Smith explained that she leaned over him to get a better look, but she could not see into his eyes because they were closed. From this interaction, Defendant Smith stated that she was not aware of a risk of substantial harm. Defendant cannot escape liability by merely

stating she was not aware of obvious signs or by failing to confirm underlying facts from which the inference could be drawn that there was a substantial risk of harm. *See Brice*, 58 F.3d at 105. By the time she interacted with Decedent, the inference could be drawn that Decedent was exhibiting the same signs that Defendant Ketema observed, and, based on Defendant Smith's observations, that his condition had actually deteriorated. Further, Defendant Smith testified that she would examine a patient's mucous membrane and eyes to assess for dehydration. Here, Defendant Smith did not conduct such an examination or further pursue an examination upon Decedent's refusal to be examined. In addition, although there is no direct evidence that Defendant Smith was aware of Decedent's mental condition or refusal to take medication, Decedent's diagnosis and the fact that he had not had his medication for several days were documented in his medical records, the patient board indicated his mental health status, and one deputy stated that it was commonly known that Decedent had a mental illness. From this circumstantial evidence, a jury could determine that his condition was so obvious as to make it known to Defendant. Thus, there is a dispute of material fact and a jury could find that Defendant Smith was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed.

Second, there is a dispute of material fact as to whether Defendant actually made the inference that Decedent was at risk of serious harm. Although Defendants rely heavily on the lack of direct evidence demonstrating that Defendant Smith actually made the inference of a substantial risk of harm, if she was aware of the underlying facts, here, again, Defendant Smith cannot escape liability by hiding behind the obvious. *See Brice*, 58 F.3d at 105. There is circumstantial evidence from which a jury could infer that Defendant Smith failed to confirm and ignored the obvious known facts from which the inference of a substantial risk of harm could be

drawn. Specifically, Defendant's nausea and vomiting, his request for medical attention, his skin color, and his immobile state and unresponsiveness to Defendant Smith's request to take his vital signs. Although Defendant Smith may not have made a judgment as to the precise condition from which Decedent suffered, there is a dispute of fact as to whether she determined that he was in need of immediate medical attention.

Finally, there is a dispute of material fact as to whether Defendant Smith acted with deliberate indifference by disregarding the substantial risk of harm. Here, Defendant Smith failed to provide any treatment or even examine Decedent to ascertain additional symptoms despite knowing that he had not eaten, had been nauseous and was vomiting, and was lying on the floor, unmoving and refusing to respond to questions. Instead she simply put him on the list to see a doctor, knowing that the doctor was not scheduled to come to ADC for two more days. Thus, there is a dispute of material fact as to whether such conduct is reasonable in light of a known, serious medical need. Accordingly, because there is a dispute of material fact as to whether Defendant Smith was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, that she actually made the inference, and that she disregarded the known risk, the Court denies Defendant's Partial Motion for Summary Judgment as to Defendant Smith.

2. Motion for Partial Summary Judgment as to Eighth Amendment Claim against CCS

The Court grants Defendants' Motion for Partial Summary Judgment as to Plaintiff's Eighth Amendment civil rights claim against Defendant CCS because Plaintiff has failed to offer evidence that proves the requisite causal connection between the alleged policy or custom of CCS and the alleged constitutional violation that occurred.

Municipal liability for the constitutional violations of its employees results only when the municipality itself can be directly charged with fault for a constitutional violation, not through a theory of vicarious liability. *Spell v. McDaniel*, 824 F.2d 1380, 1386, 1387 (4th Cir. 1987). The Fourth Circuit applies this same principle to private corporations. *Powell v. Shopco Laurel Company*, 678 F.2d 504 (4th Cir. 1982). Thus, to establish corporate liability for a constitutional violation, a plaintiff must show that a corporation had a policy or custom that is (1) fairly attributable to the corporation as its own, and (2) the moving force behind the particular constitutional violation. *See Spell*, 824 F.2d at 1387.

Corporate policy can be found in regulations and governing provisions that directly command or authorize constitutional violations and also in formal or informal policy choices or decisions of officials authorized to make such decisions. *Spell*, 824 F.2d at 1385-86. In this context, policy is defined as a "course of action consciously chosen from among various alternatives respecting basic [corporate] functions, as opposed to episodic exercises of discretion in the operational details of [a corporation]." *Id.* at 1386 (quotation omitted).

Training programs have been considered policies, such that liability may be imposed for deficient training programs. *Id.* at 1389. With respect to deficient training programs, a specific deficiency rather than a general laxness or ineffectiveness in training must be shown. Further, the deficiency or deficiencies must be such "as to make occurrence of the specific violation a reasonable probability rather than a mere possibility." *Id.* at 1390. In other words, the specific deficiency must be such that the specific violation is almost bound to happen, rather than merely likely to happen. *Id; see Brown v. Mitchell*, 327 F. Supp. 2d 615 (E.D. Va. 2004) (explaining that, to survive summary judgment on a claim based on a failure to train, a plaintiff must raise a triable issue of fact with respect to the following elements: (1) that the company's subordinates

actually violated the victim's constitutional rights; (2) that the company failed to train the subordinates properly, demonstrating a deliberate indifference to the rights of the persons with whom the subordinates come into contact; and (3) that this failure to train actually caused the subordinates to violate the victim's rights).

Official policy is not the only means of imposing liability on a corporation; corporate custom or usage may also serve to impose liability. *Id.* The existence of such custom or usage may be found in "persistent and widespread practices of [corporate] officials" which, even though they are not authorized by official policy, are so permanent and well-settled as to have the force of policy. *Id.*

As stated above, this policy or custom must be attributable to the corporation as its own. An official policy may be attributable to a corporation if it is made by its governing body, or if it is made by a division or individual that has final authority to establish and implement the policy, either through delegation from the governing body or by conferral from a higher authority. *Id.* at 1387. A custom or usage may be attributable to a corporation when the duration and frequency of the practice is such that the governing body has actual or constructive knowledge that the practices have become customary among employees. *Id.* Actual knowledge may be demonstrated by recorded reports to, or discussions by, the governing body. *Id.* Constructive knowledge may be shown by the fact that the practices are so widespread or flagrant that, in the proper exercise of the official responsibilities, the governing body should have known of them. *Id.*

In addition to identifying a policy or custom that is directly attributable to the corporation, to impose liability on a corporation, a plaintiff must prove a causal connection between the policy and the constitutional violation. A policy or custom that is not itself

unconstitutional must be independently proven to have caused the violation. *Spell*, 824 F.2d at 1387-88. To prove that a policy or custom caused the constitutional violation, a plaintiff must prove at least an "affirmative link" between the policy or custom and the violation. *Id.* at 1388. Proof merely that the policy or custom was likely to cause a particular violation is insufficient. *Id.* The evidence must prove that the causal connection was proximate and not merely "but for" causation-in-fact. *Id.* Notably, "[n]either the existence of such a policy or custom nor the necessary causal connection can be established by proof alone of the single violation charged." *Id.*

Here, even assuming that Plaintiff could prove that (1) Defendant CCS had a policy or custom of not treating mental health patients and of failing to train its employees in requisite medical services,[4] (2) these policies or customs were attributable to CCS, and (3) a constitutional violation occurred, Plaintiff's Eighth Amendment claim fails against CCS because Plaintiff has not offered any evidence that proves that the alleged policy or custom caused the constitutional violation. Plaintiff has offered no evidence that proves that Decedent's serious medical needs were ignored because CCS had a policy of not treating mental health patients or that CCS personnel lacked the proper training to respond properly.

First, Plaintiff offered no evidence demonstrating that the Defendant nurses acted as they did because they were complying with an alleged policy that CCS personnel were not to treat mental health patients. In fact, the undisputed evidence demonstrates the contrary. Specifically, Defendants Ketema responded to deputy concerns about Decedent's medical condition, and Defendant Smith followed up on Defendant Ketema's report of Decedent's condition. Further,

[4] CCS has abandoned its position that the Defendant nurses' deliberate indifference stems from CCS' focus on financial considerations.

Plaintiff has not provided any evidence that the inadequacy of this treatment was caused by the alleged policy of CCS. Thus, Plaintiff has failed to demonstrate the causal connection between an alleged CCS policy that CCS personnel do not provide medical care for mental health patients and the constitutional violation.

Further, Plaintiff has offered no evidence proving that the Defendant nurses acted as they did due to a lack of training. Plaintiff identifies the following failures in training: taking and recording vital signs, distributing medication to patients, getting reluctant inmates to take medication, identifying signs of dehydration, dealing with patients appearing to suffer from dehydration, making notes on patient interactions, and testing for electrolytes. In addition, Plaintiff states that CCS failed to train in the forcible administration of psychotropic medication and in recognizing when to call for assistance and recommend emergency treatment. At oral argument, Plaintiff also added to this list the lack of training for responding to emergency situations under the unique circumstances of a detention center. Plaintiff maintains that "but for" these failures in training, Decedent's condition would have been brought to the attention of a doctor, and he would have received the necessary treatment. However, the evidence to prove the causal connection must prove that the causal connection was proximate and not merely "but for" causation-in-fact. *See Spell*, 824 F.2d at 1388. Plaintiff does not provide any evidence proving that these alleged training failures proximately caused the Defendant nurses to disregard Decedent's medical needs. Rather, Plaintiff contends that it is for the nurses to explain and provide the reason for their actions. This argument fails because it is Plaintiff that must produce evidence establishing the causal connection before Defendants are required to rebut such evidence. Moreover, Plaintiff has not provided any evidence that is not connected to this particular incident. Proof connected to only one incident is insufficient to prove a policy or

custom or the requisite causal connection. *See id.* Accordingly, because Plaintiff has failed to prove that the constitutional violation was bound to happen, rather than was just likely to happen, as a consequence of the alleged policy or custom of CCS, the Court grants Defendant's Motion for Partial Summary Judgment as to the Eighth Amendment claim against CCS. Because the Court grants Defendant's Motion for Partial Summary Judgment on this claim, the Court denies Defendant CCS' Motion to Dismiss as moot.

3. Motion for Partial Summary Judgment as to Plaintiff's Claim for Punitive Damages in Connection with State Law Wrongful Death Claim

The Court denies Defendants' Motion for Partial Summary Judgment as to Plaintiff's claim for punitive damages in connection with her state law wrongful death claim. The Virginia Wrongful Death statute allows recovery for punitive damages "for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others." Va. Code § 8.01-52(5) (West 2011). Willful or wanton conduct is "action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Green v. Ingram*, 269 Va. 281, 292 (2005) (citation omitted) (discussing whether conduct is sufficient to support a claim for punitive damages in a personal injury case).

Here, the Court denies Defendant's Motion for Summary Judgment on Plaintiff's claim for punitive damages because there is a dispute of material fact as to whether Defendants Ketema and Smith's conduct falls within this standard. The conduct for willful or wanton conduct required to support a claim for punitive damages is substantially similar to that of deliberate indifference, which is required for a civil rights claim under the Eighth Amendment. Both standards require knowledge of circumstances and conditions that would indicate that

indifference to consequences would probably result in injury. As discussed above, there is a genuine dispute of material fact as to whether Defendants Ketema and Smith acted with deliberate indifference to Decedent's serious medical need. Similarly, the Court finds that there is a material dispute of fact as to whether Defendants acted with such wanton or reckless conduct that demonstrates a conscious disregard for the safety of others, such that punitive damages would be appropriate. Accordingly, Defendants' Motion for Partial Summary Judgment as to Plaintiff's claim for punitive damages in connection with her state law Wrongful Death claim is denied.

4. Plaintiff's Motion to Amend Complaint

The Court grants Plaintiff's Motion to Amend Complaint because leave to amend should be freely granted. The court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). Denial of a motion to amend is within the district court's discretion as long as it gives a justifying reason. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). A motion to amend should be denied "*only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999). An amendment is futile when "the proposed amendment is clearly insufficient or frivolous on its face." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980), *cert. dismissed*, 448 U.S. 911 (1980). An amendment is futile if it would have no impact on the outcome of a pending motion to dismiss, *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 320 (4th Cir. 2010), or where "the proposed amendment would not have corrected the fundamental defect in the complaint," *New Beckley Mining Corp. v. United Mine Workers of America*, 18 F.3d 1161, 1164 (4th Cir. 1994).

Here, the Court grants Plaintiff leave to amend to correct the asserted deficiencies because the proposed amendment is not futile or prejudicial to Defendants. Specifically, Plaintiff seeks only to add facts that were uncovered in discovery, clarify its request for punitive damages, and eliminate the claim that has been dismissed against former Defendant Brinkley pursuant to stipulation of the parties. Rather than prejudice Defendants, this will actually facilitate clarity and understanding of Plaintiff's case. Further, the amendment is not futile because the amendment is not "clearly frivolous on its face" and bolsters Plaintiff's claim for proper evaluation on summary judgment. Accordingly, the Court grants Plaintiff leave to amend and deems the Second Amended Complaint filed.

IV. CONCLUSION

For the foregoing reason, the Court grants in part and denies in part Defendants' Motion for Partial Judgment, denies Defendant CCS' Motion to Dismiss as moot, and grants Plaintiff's Motion to Amend Complaint. Accordingly, it is hereby

ORDERED that Defendants' Motion for Partial Summary Judgment is GRANTED in part and DENIED in part. Specifically, summary judgment is GRANTED in favor of Defendant CCS and DENIED as to Defendants Ketema and Smith as to Plaintiff's Eighth Amendment claims, and DENIED as to Plaintiff's claim for punitive damages. It is further

ORDERED that Defendant CCS' Motion to Dismiss is DENIED as moot. It is further

ORDERED that Plaintiff's Motion to Amend Complaint is GRANTED, and Plaintiff's Second Amended Complaint is deemed filed. Defendants are directed to file a responsive pleading to the Second Amended Complaint within 14 days.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 27th day of April, 2011.

Alexandria, Virginia
4/27/2011

/s/
Gerald Bruce Lee
United States District Judge

/s/
Gerald Bruce Lee
United States District Judge