IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1125

SHERRI A. TURNER,

Plaintiff-Appellant,

v.

RAYMOND M. KIGHT, et al.,

Defendants-Appellees.

BRIEF OF APPELLEES ARTHUR WALLENSTEIN, THERESA L. HICKS, ROBERT ANDREWS, AND MONTGOMERY COUNTY, MARYLAND

On Appeal from the United States District Court
for the District of Maryland
(Alexander Williams, Jr., Judge)

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JURISDICTIONAL STATEMENT

Appellees Arthur Wallenstein, Theresa L. Hicks, Roberts Andrews, and Montgomery County, Maryland accept Appellant's Jurisdictional Statement as set forth in his brief.

STATEMENT OF THE ISSUES

I. Was the district court clearly erroneous in finding that the correctional officers did not demonstrate deliberate indifference to Dr. Turner's medical needs?

II. Is the Detention Center's search policy that distinguishes between temporary and pre-trial detainees constitutional?

III. Is Officer Hicks entitled to qualified immunity based on her reasonable belief that she did not violate Dr. Turner's constitutional rights?

IV. Did the district court correctly consider Officer Hicks' second affidavit that clarified facts and did not conflict with her first affidavit?

V. Did the district court correctly dismiss claims against Arthur Wallenstein and Montgomery County where there were no allegations in the amended complaint sufficient to establish personal involvement or municipal liability?

STATEMENT OF THE CASE

Dr. Sherri Turner initiated this action in the United States District Court for the District of Maryland against Sheriff Raymond M. Kight, Bruce P. Sherman, Rodney Brown, Richard Kane, Robert Moose, William Pechnick, Eric Brown, Brian Philips, Arthur M. Wallenstein, Theresa L. Hicks, Robert Andrews, and

Montgomery County, Maryland, alleging various federal constitutional claims arising out of her arrest and detention by employees of the Montgomery County Sheriff's Office and the Montgomery County Department of Correction and Rehabilitation. After all Defendants filed motions to dismiss, Dr. Turner filed an amended complaint containing 19 separate counts adding several factual allegations and claims for violation of Articles 24 and 26 of the Maryland Declaration of Rights and state torts. In response to the amended complaint, the defendants filed motions to dismiss, or for summary judgment. The district court granted the motions, dismissing or granting summary judgment on behalf of all of the defendants. After Dr. Turner filed a motion for reconsideration, however, the district court reopened the case, but only as to the conduct of Correctional Officer Hicks and the alleged strip search, and denied the motion as to the remaining counts. The parties filed counter motions for summary judgment and the district court granted summary judgment in favor of Officer Hicks. This appeal followed.

STATEMENT OF FACTS

Dr. Turner was scheduled to appear on February 9, 2000, in the District Court for Montgomery County for an oral examination in aid of enforcement of a landlord's money judgment, but she failed to do so. Dr. Turner claims that she sent a letter to the court dated March 7, 2000 requesting a new court date, but the court

subsequently issued an arrest warrant for her on a charge of contempt of court. As a result, the Montgomery County Sheriff's Office sent a notice to Dr. Turner advising her of the warrant and requesting her immediate response. Before she had knowledge of the arrest warrant, however, Dr. Turner sent the court another letter by certified mail. (J.A. 394c)

After Dr. Turner received notice of the warrant, she initiated telephone calls to the Montgomery County Sheriff's Office over the next few days and spoke with three individuals. She explained that she was disabled, needed to arrange handicap transport, and advised one of the Sheriff's employees that she would call him ahead of time to let him know when she would appear at the Sheriff's Office so she could handle the matter expeditiously. (J.A. 394c - d)

In accordance with her agreement, Dr. Turner arrived at the Sheriff's Office on April 21, 2000 at 9:00 a.m. with her 14-year old daughter to respond to the arrest warrant. (J.A. 279-80, 394e) At that time, Dr. Turner was processed by a deputy sheriff and taken to the courthouse to appear before a judge, who required her to post a $100.00 cash bond before she could be released. Dr. Turner then was taken to a holding cell at the courthouse. (J.A. 293-301) Approximately two hours later, two deputy sheriffs transported Dr. Turner to the Montgomery County Detention Center ("MCDC" or "Detention Center"). (J.A. 301-03) She was placed in a

holding area for approximately 20 to 25 minutes and then taken to the women's section. (J.A. 304-06)

Dr. Turner was permitted to use the bathroom, which was located in a separate room adjacent to the holding area. While Dr. Turner was in the bathroom, Correctional Officer Hicks opened the door and told Dr. Turner that she was going to have to take a shower and put on jail clothes. (J.A. 53, 306-13) Officer Hicks believed that Dr. Turner was ready to be processed into the general population as a pre-trial detainee and did so in accordance with MCDC policy. (J.A. 427-28)

Dr. Turner testified that she stood in a small area where she removed her clothes. Officer Hicks stood nearby and told Dr. Turner to hurry up and take her clothes off so she could shower. (J.A. 316-17) Dr. Turner gave her clothes to Officer Hicks as she removed them. According to Dr. Turner, as she stood there naked, she began to turn around to go into the shower, but before she entered into the shower stall, Officer Hicks said to her, "show me your breasts." (J.A. 318-24)

While Dr. Turner was in the shower with the curtain closed, Officer Hicks returned to the room and brought a towel, throwing it over the railing. (J.A. 324) When Dr. Turner exited the shower stall, no one else was in the room. Dr. Turner put on a jump suit that had been given her, along with her shoes and socks. (J.A. 325)

After Dr. Turner was fully dressed, Officer Hicks returned to the room and noticed that Dr. Turner had on an underwire bra. At that point, Officer Hicks told Dr. Turner she could not wear that bra. She also told her to take off her shoes and socks to show Hicks her feet. (J.A. 325-26) According to Dr. Turner, Officer Hicks touched her bra to determine that it had underwire and then told her to remove it. (J.A. 327-30)

Officer Hicks then processed the paper work and obtained specific information from Dr. Turner for the intake papers. The processing took some time because Dr. Turner was uncooperative. (J.A. 54) Dr. Turner complained that she was in pain and asked for medication several times. (J.A. 53) Officer Hicks was not authorized to dispense any medication and she advised Dr. Turner that she would be able to see medical personnel after the booking procedures were concluded. (J.A. 53-54) Although Dr. Turner complained about muscle spasms and indicated that she had not taken her medication in the hours since her arrest, Dr. Turner did not appear to be in any life-threatening medical situation that warranted the immediate response of medical staff to the holding room. (J.A. 54; 94) Officer Hicks called the medical department to advise them of the situation. Since there was no emergency, medical personnel did not respond at that time. (J.A. 53-54, 94)

After the processing was completed, Dr. Turner was placed back into the holding cell and was later taken to be photographed. (J.A. 341-44)

While waiting in the holding room, Dr. Turner was checked periodically by Officer Robert Andrews and Officer Hicks as they made their normal rounds in accordance with standard procedure. (J.A. 54, 93-94) During his rounds, Officer Andrews heard Dr. Turner request medical assistance or medication for her complaints of pain. Like Officer Hicks, however, Officer Andrews could not dispense medication. (J.A. 93-94)

Before Dr. Turner could be seen by medical personnel, Officer Hicks received information that Dr. Turner's daughter had posted her bond and that she should be released. Officer Hicks processed Dr. Turner for release, had her change her clothes and had another officer take Dr. Turner to the area where she could retrieve her belongings and be released. Dr. Turner was released from MCDC at approximately 8:48 p.m. (J.A. 55, 349-50, 356)

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment in this case based on the undisputed facts. The evidence established that the correctional officers did not demonstrate deliberate indifference to Dr. Turner's medical needs because they had no knowledge of a serious medical need or that their actions would create a substantial risk of harm. Officer Hicks followed proper procedures by notifying the medical section of Dr. Turner's complaints. The brief delay between the time of the complaints and Dr. Turner's release before she could be evaluated by the medical section does not amount to a constitutional violation.

The Montgomery County Detention Center's search policy is constitutional because it does not provide for indiscriminate strip searches routinely applied to all detainees. The policy sets forth parameters for searches of inmates depending on the status of the inmate at the jail and is consistent with the requirements for strip searches as set forth in the case law. Officer Hicks' actions were reasonable under the circumstances of this case, and they did not violate Dr. Turner's constitutional rights under the law. Further, Defendant Hicks is entitled to qualified immunity.

Lastly, the district court properly dismissed all claims against Arthur Wallenstein, the director of the Department of Correction and Rehabilitation, and Montgomery County. Dr. Turner failed to allege specific facts to establish

supervisory liability on the part of Wallenstein and she failed to allege facts to establish liability for the County.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the dismissal of a complaint under Fed. R. Civ. P. 12(c) *de novo*. *Bruce v. Riddle*, 631 F.2d 272, 273-74 (4th Cir. 1980). In doing so, the Court construes the allegations in the complaint in the light most favorable to the plaintiff. If it appears that the plaintiff would not be entitled to relief under any facts that could be proved in support of his claim, the Court must affirm the dismissal of the complaint. *Id*.

This Court reviews the grant of summary judgment de novo. *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003). Summary judgment is appropriate if "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). In determining whether there is a genuine issue of material fact, the Court reviews the record in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

I. The district court was not clearly erroneous in finding that the correctional officers did not demonstrate deliberate indifference to Dr. Turner's medical needs.

In order to establish a legally cognizable claim for lack of medical care, a plaintiff must establish that prison officials displayed a "deliberate indifference to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). A correctional officer's negligent inaction or action towards a pre-trial detainee's medical needs does not rise to the level of a constitutional claim. *Daniels v. Williams,* 474 U.S. 327, 332 (1986); *Young v. City of Mount Ranier,* 238 F.3d 567, 575 (4th Cir. 2001). The deliberate indifference standard requires that the correctional officer act with "recklessness in a criminal or subjective sense." *Farmer v. Brennan,* 511 U.S. 825, 838 (1994). This Court applies a clearly erroneous standard to a district court finding that a correctional officer did not act with deliberate indifference. *Brice v. Virginia Beach Correctional Center,* 58 F.3d 101 (4th Cir. 1995).

The Supreme Court in *Farmer* adopted a subjective test for deliberate indifference concluding that a plaintiff must show that the official "knows of and disregards an excessive risk to inmate health or safety." 511 U.S. at 837. Not only must the official be "aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, the official must also draw the inference."

Id. Furthermore, the "serious medical needs" requirement is based on "objective evidence" presented to the correctional officer, rather than the subjective statements made by the individual detainee. *Grayson v. Peed,* 195 F.3d 692 (4th Cir. 1999). This Court has recognized that a deliberate indifference to a pre-trial detainee's medical needs is a "very high standard." *Young, supra*.

For a medical condition to be considered a "serious medical condition," it must be one in which the need for treatment is apparent and the defendant must be aware of it. *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). Dr. Turner alleges that she was in pain and suffered muscle spasms, and despite her repeated requests for medication, neither Officer Hicks nor Officer Andrews provided her with medical accommodation. While it is not disputed that Dr. Turner complained about her medical condition, the subjective complaints themselves do not provide support that she had a serious medical need. Even after she complained of pain, Dr. Turner was able to walk and move about and Officer Hicks did not observe any significant distress during the booking process. Accordingly, the officers had no knowledge of a substantial risk of harm. Further, Officer Hicks acted appropriately in calling the medical department to alert them to Dr. Turner's complaints, but Turner was released before she could be evaluated.

The brief delay between the time Dr. Turner first complained and her release could not have reasonably been seen as a decision that could result in a "substantial risk of harm." In fact, the courts have recognized that a brief delay in treating pain does not amount to a constitutional violation. *See Wood v. Houseright*, 900 F.2d 1332, 1334-35 (9th Cir. 1990) (several days of delay in providing pain medication to plaintiff did not violate constitutional rights); *Martin v. Gentile*, 849 F.2d at 871 (no violation of plaintiff's constitutional rights resulting from a 14-hour delay in providing medical care).

Considering the undisputed facts in this case, the district court was not clearly erroneous in holding that Officers Hicks and Andrews did not demonstrate deliberate indifference to Dr. Turner's medical needs and that decision should be upheld.

II. The Detention Center's search policy that distinguishes between temporary and pre-trial detainees is constitutional.

While Appellees dispute that the shower process that Dr. Turner underwent was a strip search, even if it were, the MCDC policy is constitutional and Officer Hicks reasonably complied with the policy. Policy and Procedure 300-18 governs the receipt, temporary release and discharge of inmates who are arrested and committed to MCDC pending bond on a pre-trial or sentence basis. Specifically,

the policy sets forth definitions for a temporary detainee and a pre-trial detainee and provides criteria covering various searches. There are specific procedures governing the searching of temporary detainees, who may be strip searched only under specific circumstances. The policy also sets forth parameters for conducting a strip search of a pre-trial detainee.

As defined in the policy, a temporary detainee is a newly arrested, unconvicted and unsentenced prisoner who either has not had a bail bond review before a state district judge or who has been in the Detention Center after a bail bond review for less than 24 hours. Defining the temporary detainee in this manner allows an inmate who has seen a judge on bond review the opportunity to post the bond within a reasonable amount of time. A pre-trial detainee, on the other hand, is one who has appeared before a judge and is committed to the Detention Center on a no bond status or who has been at the Detention Center for more than 24 hours after the bond hearing and has not posted the bond. The policy also provides a definition for a sentenced inmate. (J.A. 61-62).

Separate and apart from the strip search parameters, the policy provides that newly admitted inmates are to take a shower and the receiving and discharge officer is to examine the inmate's clothing for any concealed items of contraband, including checking all pockets, collars, cuffs, etc. Special attention is directed to

the inmate's shoes since they are returned to the inmate for wearing at the Detention Center.

The policy makes clear that different rules apply to temporary detainees unless an exception applies. Dr. Turner tries to confuse the Court by referring to "search and shower" collectively, implying that the "search" is a strip search, no matter what designation has been given to the detainee. In actuality, while each detainee's clothing is searched, his body is not. Dr. Turner's reliance on past cases involving the strip searching of detainees at MCDC, therefore, is misplaced. A review of those earlier cases does not establish that the MCDC policy in issue in this case is unconstitutional and does not establish that Officer Hicks violated Dr. Turner's constitutional rights. Moreover, the facts in those cases are vastly different from this case.

Smith v. Montgomery County, 547 F. Supp. 592 (D. Md.1982), involved a challenge to the former practice of performing non-private, visual strip searches on persons detained temporarily at the Montgomery County Detention Center, absent probable cause to believe the detainees possessed weapons or contraband. Vivian Smith was arrested for contempt of court for failing to appear in a child support action. Ms. Smith was taken to a police station where she was photographed and an arrest report was filed. She was then taken to the women's receiving and

discharge area of the Detention Center, where a female correctional officer ordered her to remove all of her clothing. Ms. Smith was asked to move her arms, open her mouth and bend over and squat, while the officer conducted a visual inspection of her body, including an inspection of her oral, vaginal and anal cavities. The search was conducted in the presence of another female detainee. Ms. Smith then showered and was placed in a holding cell with other female detainees overnight. *Smith*, 547 F. Supp. at 594. At that time, the Detention Center strip search policy required that all persons held or detained in the Montgomery County Detention Center were to undergo the same preliminary procedures which included the removal of their clothing, the checking for weapons and contraband, and checking of their body cavities. *Id.*

In the first *Smith* case, the plaintiff sought a preliminary injunction, which the court granted, enjoining the County and the individual defendants "from permitting, promulgating policy permitting or enforcing a policy permitting the visual strip search of a temporary detainee . . . , except upon probable cause to believe that such detainee has weapons or contraband concealed on his or her person and from permitting, promulgating a policy permitting or enforcing a policy permitting the conducting of such searches other than in private." *Id.* at 599.

On the merits, the district court held in *Smith v. Montgomery County*, 573 F. Supp. 604 (D. Md. 1983) (*Smith II*), that MCDC's strip search policy was unconstitutional because it was an indiscriminate policy which applied to all detainees. The court also concluded that where strip searches were permissible, the failure to conduct them in private was unconstitutional. *Id*. at 611.

The facts in the instant case are distinguishable from those in *Smith* and *Smith II*. The plaintiff in the *Smith* cases had not seen a judge or magistrate before she was placed in the jail and searched. Once in the jail, the search of her person was extensive and significantly intrusive. Not only was she required to remove all of her clothing, including her undergarments, in front of another detainee, she was told to move her arms, open her mouth and bend over and squat while a female correctional officer conducted a visual inspection of her body, including an inspection of her oral, vaginal and anal cavities. In this case, the search was no where near as intrusive as the search given to Ms. Smith. First, the only reason why Dr. Turner was asked to remove her clothing was to take a shower and was not for the purpose of a strip search like that in the *Smith* cases. Second, Dr. Turner was in an enclosed and private area with only Officer Hicks present to obtain the clothing. Finally, there is no evidence in this case to suggest that Officer Hicks

made Dr. Turner move her arms or that she conducted any visual inspections of Dr. Turner's oral, anal and vaginal cavities.[1]

The district court in *Smith II* relied on *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), a case not involving Montgomery County. In *Logan,* a woman who had been in an accident and was suspected of driving while intoxicated was placed under arrest and taken to a police station for a breathalyzer test, which she refused. She was then brought before a magistrate, who issued an arrest warrant for driving while intoxicated and an additional warrant for refusing to take the breathalyzer test. Ms. Logan was booked and again went before a magistrate for bond hearing. At the bond hearing, the magistrate released Logan on her own recognizance, but told her that, according to policy, she would be unable to leave the Arlington County Detention Center for four hours or until a responsible person came to pick her up. *Id*. at 1009-10. Logan was then placed in the Sheriff's custody and taken to a holding cell at the Detention Center where a deputy sheriff conducted a visual strip search.[2] The evidence indicated that no one could see into or out of the

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[1]While it is alleged that Officer Hicks ordered Dr. Turner to turn around and show her breasts before she got into the shower, this inspection did not reach the level of intrusion as the search in *Smith.*

[1]The Sheriff's policy was to strip search all persons held at the Detention Center for weapons or contraband regardless of their offense. This policy was based on an incident that occurred after a deputy was shot by a person who

holding cell during the search and that once the strip search was conducted, Logan was permitted to make a phone call. A little over an hour after being placed in the custody of the Sheriff, Logan was released to another person.

This Court in *Logan* concluded that the Sheriff's strip search policy was unconstitutional because it "bore no . . . discernable relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified." *Id.* at 1013. Significantly, the Court found there was never a time that Logan or similar detainees would be intermingled in the general jail population. Additionally, the charge against Logan was one not "commonly associated by its very nature with the possession of weapons or contraband," and she had been at the Detention Center for less than two hours without even a pat down search. *Id.* at 1013. The Court went on to find that there was an indiscriminate strip search policy which was "routinely applied to detainees such as Logan along with all other detainees." Accordingly, the court held that such a policy was not constitutionally "justified simply on the basis of administrative ease in attending to security considerations." *Id.* (citations omitted.)

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allegedly committed a misdemeanor but who had not been strip searched. *Logan*, 660 F.2d at 1010.

The facts in this case are distinguishable. In *Logan*, the plaintiff went before a magistrate but was released on her own recognizance. The only reason she was placed in the Detention Center was because of a policy that required DWI suspects to be held for four hours or until a responsible person could take custody of the person. Therefore, Logan was not committed to the Detention Center for anything but to sober up and she was never going to be placed into the general population. Unlike the plaintiff in *Logan*, Dr. Turner had a bond placed on her and she went to jail because she did not post her bail. Further, Officer Hicks believed that Dr. Turner was ready for processing into the general population as a pre-trial detainee.

Finally, in *Levinson-Roth v. Parries*, 872 F. Supp. 1439 (D. Md.1995), the plaintiff was arrested on a writ for a body attachment for contempt after she was in arrears of child support payments. Two deputy sheriffs executed the body attachment and subjected the plaintiff to a number of pat down searches before being brought to MCDC. Upon her arrival, the plaintiff was patted down for a fifth time. While inside the Detention Center, the deputies patted her down for a sixth and final time. *Levinson-Roth*, 872 F. Supp. at 1442-43. The plaintiff was then told that the institutional rules required her to undress for a strip search, remove her wig

and wear a jumpsuit during her detention.[3] Female officers at MCDC conducted the search by requiring the plaintiff to remove her wig and the rest of her clothes. Although they provided a towel so that the plaintiff could cover her head, they conducted a visual search of her body and touched her lightly during the course of the search. After the search, the plaintiff was told to take a shower and put on the jumpsuit. Levinson-Roth objected that she could not wear the jumpsuit because of her religion, but eventually complied. She was then released shortly afterwards when a friend posted her bond. *Id.*

In viewing the actions relating to the strip search, the court in *Levinson-Roth* relied on *Logan* for the parameters of a strip search and concluded that the Detention Center's policy provided for an indiscriminate strip search routinely applied to all detainees. *Levinson-Roth*, 872 F. Supp. at 1452. But unlike the policy in *Levinson-Roth*, in this case MCDC's policy clearly delineates between the type of search permitted on inmates of different status. The policy does not provide for strip searches to be routinely applied to all detainees.

The Montgomery County Detention Center strip search policy is not indiscriminately applied to all detainees.

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[3]Levinson-Roth was "an observant Jew" and she claimed that she could not remove her wig or wear the MCDC jumpsuit because her religious beliefs precluded her from doing so. *Levinson-Roth*, 872 F.Supp. at 1433.

The focus of the analysis in *Smith II*, *Logan* and *Levinson-Roth* was that the policies in question applied to all inmates, no matter what their status. The policy now before this Court is significantly different from the policies as discussed in those cases. Specifically, MCDC Policy and Procedure 300-18 provides for types of detainees that may be located at or committed to the jail. A temporary detainee is distinguished from a pre-trial detainee and a sentenced inmate. The County was careful to establish the parameters for the search of particular inmates at MCDC. (J.A. 62-63) A temporary detainee is subject to a frisk and search and screening with a handheld metal detector unless one of five factors exist, justifying a strip search:

> (1) Any person who is at the Detention Center because of an arrest on felony charges.
> (2) Any person who is at the Detention Center because of a misdemeanor that involves weapons or contraband.
> (3) Any person (including misdemeanants, civil cases, and traffic offenders) who is known to have prior records of convictions or unresolved arrests for felony offenses.
> (4) Any person (including misdemeanants, civil cases, and traffic offenders) who is known to have prior histories of distribution, sale or manufacture of CDS charges.
> (5) Any person (including misdemeanants, civil cases, and traffic offenders) for whom reasonable suspicion exists by virtue of the individual's physical or medical condition, behavior, or verbal statements, including failure to cooperate with the search procedures. This means that an individual must give some indication, usually by way of behavior or verbal comments, that

> would lead a reason[able] person to believe that a strip search is necessary.

(J.A. 61)

A pre-trial detainee, on the other hand, who is a person who has had a bond hearing and is committed to the Detention Center on no bond or has been at the Detention Center for more than 24 hours after seeing a judge and has posted no bond, can be strip searched. Thus, the policy relating to strip searching of inmates does not apply to all incoming inmates but is dependent on the inmate's status at the jail.

Accordingly, the policy does not fit within the analyses set forth in *Smith II, Logan* or *Levinson-Roth*. To the contrary, MCDC Policy and Procedure 300-18 provides for the very distinctions those cases mandate and establishes the parameters for the permissible searches of inmates dependent upon their status in the jail. As a matter of law, the MCDC policy is not indiscriminately and routinely applied to all detainees and does not authorize unconstitutional behavior.

Officer Hicks' actions were reasonable and did not violate Dr. Turner's rights.

In *Logan*, this Court found that strip searches are "constrained by the due process requirements of reasonableness under the circumstances." 660 F.2d at 1013. The Court noted that there must be a balancing of the need for the particular

search against the invasion of personal rights and that the factors to consider are the scope of the intrusion, the manner in which it was conducted, the justification for the intrusion and the place where it was conducted. *Id*.

In this case, Dr. Turner was initially brought into the jail and held in the male section of the MCDC where she waited for some time. She then was brought to the upstairs of the jail and placed in the female section of the MCDC. It is not disputed that by that time, Dr. Turner had already seen a judge, a bond had been placed on her, and she had not yet posted any bail. At the time Dr. Turner was brought upstairs, Officer Hicks, believing that Dr. Turner had not posted her bail and believing that Dr. Turner was ready to be processed into the general population, acted in accordance with procedures pertaining to pre-trial detainees. (J.A. 427-28) Officer Hicks acknowledged that she did not confirm whether Dr. Turner had been in the jail for under 24 hours but believed that since she had not posted her bail and she was in the holding cell waiting for processing, she was ready to be processed for entry into the general population. (J.A. 428)

In accordance with preparing Dr. Turner for entry into the general population, Officer Hicks instructed Dr. Turner to take a shower and put on Detention Center clothes. The alleged strip search included asking Dr. Turner to remove her clothes down to her undergarments in an area that was completely

secluded from the general view of inmates and other staff. The area where Dr. Turner removed her clothes for a shower was a private room enclosed with four walls and a door. The only individual present when Dr. Turner removed her clothes was a female correctional officer — Officer Hicks. Officer Hicks stayed with Dr. Turner only long enough for Turner to remove her clothes and hand them to Officer Hicks. (J.A. 428-29)

Although Officer Hicks disputes that Dr. Turner removed her undergarments and that she told Dr. Turner to show her breasts, looking at the facts in the light most favorable to Dr. Turner, Officer Hicks did not physically touch Dr. Turner to search her body nor did she ask Dr. Turner to take any further action or movement. Further, Officer Hicks left the room as Dr. Turner went into the shower stall. (J.A. 428) While Dr. Turner was taking a shower, Officer Hicks returned to bring her a towel. The next time Officer Hicks returned to the room, Dr. Turner was out of the shower and fully clothed. At this time, Officer Hicks noticed that Dr. Turner was wearing an underwire bra and, for obvious security reasons, told her to remove the bra. Officer Hicks searched Dr. Turner's clothes after they were removed for the purpose of preparing an inventory of the items that MCDC would hold while Dr. Turner was detained in jail and for other security reasons. (J.A. 429) Officer Hicks had the right to take Dr. Turner's clothes and search them. *See United States v.*

Edwards, 415 U.S. 800, 803-04 (1974) (clothing of detainee may be seized and analyzed).

In applying the balancing test dictated by *Logan*, the actions of Officer Hicks were reasonable under the law: the scope of the intrusion was brief, the search did not include any significant physical contact, Dr. Turner was not asked to make any movement with her body parts, and there was no visual inspection of any body cavities. The search occurred in a private, enclosed area and was not extensive.

It was reasonable to have Dr. Turner shower for entry into the general population based on health and safety reasons for inmates entering into the general population. At that point in time, Defendant Hicks believed it was not prudent to allow Dr. Turner to sit around to see if she would eventually post her bail since she had been at the jail for some time and had not yet done so. The need for orderly administration of established procedures ensured efficiency and timeliness of the process.

In none of the cases relied upon by Dr. Turner do the facts establish that the detainees were getting ready to be placed into the general population. In fact, in *Logan,* the detainee was not even committed to the jail but was only there as the result of a policy of holding persons arrested for DWI for a certain period of time to allow them to sober up or provide sufficient time for someone else responsible

to come pick the person up. At no time was Logan to be intermingled in the general jail population. Those facts are significantly different from the instant case. As Officer Hicks indicated in her affidavit, she was preparing Dr. Turner for admission into the general population as a pre-trial detainee. (J.A. 427-28) The fact that Officer Hicks did not wait the 24-hour period as dictated by the policy does not necessarily invoke a constitutional violation relating to intrusions of personal privacy as dictated by *Logan*. At the very most such conduct is evidence of negligence or carelessness, which the district court did not condone, but recognized is not sufficient to state a constitutional claim. (J.A. 438) The district court, therefore, properly found that Officer Hicks' "actions show reasonable compliance with the regulations, and her mistake in this case is not grounds for an unconstitutionality argument." (J.A. 439)[4]

III. Officer Hicks is entitled to qualified immunity based on her reasonable belief that she did not violate Dr. Turner's constitutional rights.

The district also court correctly found that even if Officer Hicks' actions were unconstitutional, she would be entitled to qualified immunity. Officer Hicks had an objective basis for believing that she had not violated Dr. Turner's rights

[4]Dr. Turner attempts to use the "evidence of pretext" analysis that is applied in discrimination cases. That analysis has no application to cases alleging violation of the Fourth Amendment.

and would therefore be entitled to qualified immunity. (J.A. 440-41) The court did not err in this assessment.

Officer Hicks met the general requirements for qualified immunity.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991). The Supreme Court has recognized that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Summary judgment is an appropriate procedure for making such a determination. *Id.*

In this case, while Officer Hicks may have known that Dr. Turner was a civil detainee and her charge was one not normally associated with weapons, she also knew that Dr. Turner had been before a judge, had been committed to MCDC on a bond, had not paid her bail, had been at the jail for several hours and appeared ready for processing into the general population as a newly admitted inmate. Given Officer Hicks' belief that Dr. Turner was being subjected to the procedures of a pre-trial detainee because she was being processed into the general population, her actions were objectively reasonable given the total circumstances that she was

confronted with at the time. Therefore, while the district court found that Dr. Turner had a Fourth Amendment right against an unlawful search and seizure, it also correctly concluded, based on the facts in this case, that Officer Hicks "did not know that her conduct was unlawful in the situation she confronted." (J.A. 441)

IV. The district court correctly considered Officer Hicks' second affidavit that clarified facts and did not conflict with her first affidavit.

The district court correctly considered both affidavits of Officer Hicks. Unlike the plaintiff in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), Officer Hicks did not change her legal position from any prior litigation by submitting her second affidavit. Instead, the second affidavit provided further factual information to the district court about the events that occurred in this case. The second affidavit further explained some of the matters set forth in the first affidavit and did not contradict the sworn facts in the first affidavit.

This Court in *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984), addressed the issue of using a subsequent affidavit to create a dispute of fact where the plaintiff had been questioned at length during two prior depositions:

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Id. at 960 (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). Unlike the plaintiff in *Barwick*, Officer Hicks never set forth her facts as they relate to this case during any discovery process, because Dr. Turner failed to conduct any discovery. While a party may not be required to conduct discovery, she should not be able to complain when a defendant seeks to put facts before the court through the only method available to her under the circumstances.

Judicial estoppel is not applicable to the matters set forth in Officer Hicks' second affidavit.

The procedural posture of this case is significant to understanding why Officer Hicks presented her second affidavit to the district court in this matter. After Dr. Turner filed an amended complaint in this case, Officer Hicks and other County defendants filed a motion to dismiss or for summary judgment. Officer Hicks submitted the first affidavit in an effort to put before the court certain procedures utilized at MCDC for the handling and processing of inmates. She also provided the district court with a minimal factual background of the events surrounding Dr. Turner's placement in the jail.

After reviewing the matter, the district court issued an order granting the County defendants' motion. The court, however, granted Dr. Turner's motion for reconsideration for the limited issue relating to the conduct of Officer Hicks and the alleged strip search. In its order, the district court expressed uncertainty as to Dr. Turner's status:

> Given the unclear status of Plaintiff as temporary detainee or pre-trial detainee, which in turn affects the appropriateness of the strip search, the Court feels that the most fair route is to grant Plaintiff's Motion for Reconsideration as to the strip search. After discovery, the Court expects that the constitutionality of Defendant Hicks' action with regards to the alleged strip search will be clarified. On the other hand, the Court does not believe that Plaintiff has presented any new factual or

> legal arguments with regards to other aspects of her Motion for Reconsideration and will thus deny those parts of the motion.

(J.A. 251)

The district court reopened the case and issued a scheduling order that included a discovery deadline. Obviously, the court envisioned that discovery would occur so that if and when the time came for it to review this matter again, the factual background of what occurred could be presented for a determination of the constitutionality of Officer Hick's actions. Thereafter, Officer Hicks served a set of interrogatories and requests for production of documents on Dr. Turner, to which she did not timely respond. The parties filed a consent motion for modification of the scheduling order, which was granted. Months later, Dr. Turner responded to Officer Hicks written discovery and was deposed. Seven and a half months after the Court issued the scheduling order in this case, Dr. Turner had not conducted any discovery whatsoever. As a result, Officer Hicks could not rely on any prior deposition testimony or sworn interrogatories to present her facts in support of a motion for summary judgment. Therefore, Officer Hicks submitted a second affidavit to further explain the events that occurred.

Dr. Turner erroneously believes that just because she chose not to conduct any discovery Officer Hicks was precluded from presenting the facts to the district

court and complains that the affidavit was submitted to the court after the close of discovery. But Officer Hicks was not obligated to provide Dr. Turner with sworn affidavit testimony during discovery when she never served any discovery on Hicks and never asked for any information whatsoever concerning the incident or the County's policies and procedures.

Officer Hicks' second affidavit is not contradictory or inconsistent with the first affidavit.

This Court has ruled that the circumstances under which judicial estoppel may be invoked are not "reducible to any general formulation of principle, . . . several factors typically inform the decision whether to apply the doctrine in a particular case." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). *See also 1000 Friends of Md. v. Browner*, 265 F.3d 216, 226 (4th Cir. 2001). This Court generally requires that three elements be present before it will apply the doctrine of judicial estoppel:

> First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation. And the position sought to be estopped must be one of fact rather than law or legal theory. Second, the prior inconsistent position must have been accepted by the court . . . . Finally, the party sought to be estopped must have intentionally misled the court to gain unfair advantage.

Id. at 226-27 (citing *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)). Because of the harsh results that may occur when a party is precluded from asserting a

position that would normally be available to the party, however, judicial estoppel must be applied with caution. *Lowery*, 92 F.3d at 224 (citing *John S. Clark Co. v. Faggert & Frieden*, 65 F.3d 26, 29 (4th Cir. 1995)).

In this case, the first factor is not applicable. The statements contained in the second affidavit of Officer Hicks are consistent with those in the first affidavit. The second affidavit attempts to further explain Officer Hicks' actions in processing Dr. Turner. It also sets forth Officer Hicks' belief that she was processing Dr. Turner for entry into the general population as a pre-trial detainee. Officer Hicks maintained in her first affidavit that she was processing Dr. Turner as a pre-trial detainee in accordance with MCDC policy. What she would have done if she believed that Dr. Turner was a temporary detainee has not been explored by Dr. Turner since she conducted no discovery.

Dr. Turner challenges Officer Hicks' statements by arguing that the shower policy does not distinguish between pre-trial and temporary detainees. She apparently wants to equate what she believes is a shower policy to strip searching inmates. However, Dr. Turner has established no facts that the lack of delineating the status of inmates for purpose of a shower makes the policy unconstitutional. There is no evidence in this case that Officer Hicks or the County policy required all temporary detainees to shower and that during the showering process they were

strip searched. The fact that an inmate may be asked to shower and provide his or her clothing to the correctional officer for inventory does not establish that a strip search has occurred. As Officer Hicks indicated in her second affidavit, she did not require Dr. Turner to strip naked in her presence. Whether or not she did so, however, does not change the fact that Officer Hicks believed that she was processing Dr. Turner for entry into the general population. Officer Hicks' position on this matter has never changed.

With regard to the second factor, Officer Hicks did not ask the district court to accept a different position than was presented in the first affidavit. Moreover, there is nothing in the second affidavit that establishes that Officer Hicks tried to mislead the district court. In fact, the court assumed that both parties would conduct discovery to develop the facts to clarify Dr. Turner's status as a temporary detainee or pre-trial detainee. Since Dr. Turner conducted no discovery, Officer Hicks was forced to file the second affidavit in an attempt to clarify the facts upon which she would rely in this case. Officer Hicks' affidavit simply provided additional factual basis to the court for what occurred.

V. The district court correctly dismissed claims against Arthur Wallenstein and Montgomery County where there were no allegations in the amended complaint sufficient to establish personal involvement or municipal liability.

Liability under 42 U.S.C. § 1983 extends only to those persons who are personally involved in the deprivation of the federal rights of other persons. *See Rizzo v. Goode*, 423 U.S. 362, 377 (1976). Supervisory liability can be imposed only if a plaintiff shows "actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.'" *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)).

The amended complaint in this case is devoid of any allegation of personal involvement by Mr. Wallenstein, the Director of the Department of Correction and Rehabilitation. While Dr. Turner makes vague allegations that the MCDC employees acted under "policies, directives and training" that were "instituted, condoned, ratified and authorized" by Mr. Wallenstein, such allegations simply do not state a cause of action for any personal culpability on the part of Mr. Wallenstein. (J.A. 113-14) The district court, therefore, did not err in dismissing the claims against Mr. Wallenstein. Similarly, the district court properly dismissed claims against the County because Dr. Turner failed to allege specific facts related to customs, policies, or procedures supporting a claim for violation of her constitutional rights. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

CONCLUSION

The district court correctly granted summary judgment in this case because the undisputed facts establish that the County correctional officers were not deliberately indifferent to Dr. Turner's medical needs and that the Detention Center's search policy did not violate Dr. Turner's constitutional rights. Additionally, based on the allegations in the amended complaint, the court properly dismissed all claims against Arthur Wallenstein and Montgomery County. This Court should affirm the district court's decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2004, two copies of the foregoing Brief of Appellees were mailed, postage prepaid, first-class, to:

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