UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIA RAMSAY-NOBLES, *individually and as Administratix of the Estate of Karl Taylor, Deceased,*

Plaintiff,

-against-

WILLIAM KEYSER, *et al.*,

Defendants.

No. 16 Civ. 5778 (CM)

MEMORANDUM DECISION AND ORDER DENYING THE OFFICER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART THE OTHER DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DENYING THE SUPERVISOR DEFENDANTS' MOTION TO STRIKE THE PONTE AFFIDAVIT; AND ORDERING PLAINTIFF TO SHOW CAUSE WHY THE CLAIMS AGAINST DR. LEE SHOULD NOT BE SEVERED FOR SEPARATE TRIAL

McMahon, C.J.:

In this case, Plaintiff Julia Ramsay-Nobles brings civil rights claims on behalf of herself and her deceased brother, Karl Taylor, a mentally ill prisoner who was housed at Sullivan Correctional Facility ("Sullivan"). On the morning of April 13, 2015, Taylor was involved in a physical altercation with at least three Sullivan correction officers; he was pronounced dead at the prison infirmary shortly thereafter.

Plaintiff brings this action against three groups of defendants, all of whom are current or former employees of Sullivan. (Second Am. Compl. ("SAC"), Dkt. No. 115.) First, she sues eleven correction officers (the "Officer Defendants"), for violations of her brother's Eighth and Fourteenth Amendment rights (*id.* ¶¶ 78–82, 84–85 (42 U.S.C. § 1983)); for conspiracy to violate his Eighth and Fourteenth Amendment rights (*id.* ¶¶ 86–89 (42 U.S.C. § 1983)); and for conspiracy

to interfere with his civil rights (*id.* ¶¶ 95–102 (42 U.S.C. § 1985(3))). Second, Plaintiff brings a supervisory liability claim against Sullivan's current superintendent and former deputy superintendent (the "Supervisor Defendants"), under the Eighth and Fourteenth Amendments, on theories of failure to supervise and failure to train. (*Id.* ¶¶ 78–85 (42 U.S.C. § 1983).) Third, Plaintiff brings claims against a Sullivan psychiatrist, Dr. Seung Ho Lee ("Dr. Lee") for deliberate indifference to her brother's serious medical needs (*id.* ¶¶ 103–108 (42 U.S.C. § 1983)); and for medical malpractice (*id.* ¶¶ 109–13 (New York law)).

Following discovery, these three groups of Defendants make separate motions for summary judgment. (Dkt. No. 268, 273, 295.) For the reasons that follow, the Officer Defendants' motion is denied in its entirety; the other two motions are granted in part and denied in part.

I. The Motion of the Officer Defendants Is Denied Because All Parties Agree That There Are Genuine Issues of Material Fact As To All Issues

Ordinarily on a motion for summary judgment I would begin by discussing the facts—those that are undisputed and those that are disputed—using as my source the moving defendants' statements of undisputed fact, filed pursuant to Local Rule 56.1, and the Plaintiff's corresponding Local Rule 56.1 statement. However, it is possible to get rid of the Officer Defendants' motion without discussing much of anything at all. Here is why.

Local Rule 56.1(a) reads, "Upon any motion for summary judgment pursuant to Rule 56 of the [FRCP], there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." Subsection (d) further provides, "Each statement by the movant . . . pursuant to Rule 56.1(a) . . . must be followed by citation to evidence which would be admissible[.]"

Subsection (c) reads, "Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."

The Officer Defendants moved for summary judgment. (Dkt. Nos. 275, 297.) Herewith their Rule 56.1 statement:

> **Defendant Correctional Officers' Statement of Undisputed Material Facts upon Motion for Summary Judgment (Local Rule 56 (1))**
>
> 1) In 1995, Inmate Karl Taylor began serving consecutive New York prison sentence of 27 to 55 years (2 Complaint paragraph 22). "2 Complaint" means plaintiff's Second Amended Complaint, which is docketed in this case as "document 106."
>
> 2) Inmate Taylor was incarcerated at the New York State Sullivan Correctional Facility from November 25, 2014 until April 13, 2015 (2 Complaint paragraph 2).
>
> 3) Inmate Taylor had been convicted of repeated aggravated sexual crimes.
>
> 4) While serving his sentence at Sullivan Correctional, Inmate Taylor was housed on the "ENorth" cell block (2 Complaint paragraph 2).
>
> 5) During the course of his incarceration, Inmate Taylor had been diagnosed with Schizoaffective Disorder, Delusional Disorder, Anti-Social Disorder, and Polysubstance Dependence (2 Complaint paragraph 25).
>
> 6) Because Inmate Taylor had been diagnosed with serious mental illnesses, he was house in Sullivan's Intermediate Care program ("ICP"), located in the facility's E-North cell block (2 Complaint paragraphs 29-31).
>
> 7) Taylor refused to participate in group treatment programs or leave his cell for medical t treatment (2 Complaint paragraph 36).

8) On April 13, 2015, an incident occurred during which, amongst other things, plaintiff's descendants inmate "Taylor took the baton (from Correction Officer Tucker), and struck CO Tucker on the forearm. "(2 Complaint paragraph 4)

9) Tucker suffered a fracture of his forearm as a result thereof. Correction Officer Steven Witte was struck in the head by the baton from a blow by Taylor and suffered permanent brain damage.

10) "Taylor was then restrained and taken to the hallway, which was not visible to inmatesin [*sic*] the cell block." (2 Complaint paragraph 5).

11) Taylor died later that day of April 13, 2015.

12) There is no legally actionable proof in this case that the Correction Officer defendants, or anyone else, engage in a conspiracy to harm, or to deprive Taylor, or his administratrix of any of their respective civil rights either before or after April 13, 2015.

(Dkt. No. 298).

This is not a Statement of Undisputed Facts that complies with Local Rule 56.1. It is limited to only a few of the numerous material facts in this case; there are far more than 11 of them. Statement 12 is a pure conclusion of law, which does not belong in a Rule 56.1 statement and so will be ignored. *See Siddiqi v. N.Y.C. Health & Hosps. Corp.*, 572 F. Supp. 2d 353, 368 (S.D.N.Y. 2008) ("Of course, [a] conclusory statement is not evidence."). None of the 11 statements of allegedly undisputed fact cites to any supporting evidence; the only citations are to the SAC, which is not evidence, and there is not even a citation to the SAC to support four of the "statements of fact." Finally, the Rule 56.1 statement is submitted on behalf of eleven individuals, each of whom is entitled to have the evidence against him analyzed separately from the evidence against any other individual defendant; needless to say, the evidence is not separately discussed as to each Officer Defendant. And if ever there were a case when the evidence must be analyzed separately as to each individual defendant, it is this one.

In short, this "Rule 56.1 Statement" is utterly insufficient and of absolutely no help to the Court in framing and analyzing the issues that must be discussed in order to dispose of this motion. Submission of such a defective statement is, as far as this Court is concerned, malpractice *per se*.

It is also grounds for denying the Officer Defendants' motion without more.

Plaintiffs move for denial of the motion as a sanction for the failure of the moving Officer Defendants to comply with Local Rule 56.1. (Dkt. Nos. 289 at 1, 312.)

While it is tempting to take up Plaintiff's suggestion, this would just make more work for Plaintiff and the Court, since the denial of summary judgment would have to be without prejudice to the making of a properly supported motion. *See, e.g.*, *Jarry v. Nat'l Collegiate Student Loan Tr. 2005-3*, No. 18-cv-0315, 2019 WL 1517106, at *1 (E.D.N.Y. Feb. 6, 2019), *report and recommendation adopted*, 2019 WL 1517096 (E.D.N.Y. Feb. 26, 2019); *Vanbrocklen v. Gupta*, No. 09-cv-897, 2010 WL 1492328, at *2 (W.D.N.Y. Mar. 24, 2010), *report and recommendation adopted*, 2010 WL 1492337 (W.D.N.Y. Apr. 13, 2010); *Searight v. Doherty Enters., Inc.*, No. 02-cv-604, 2005 WL 2413590, at *1 (E.D.N.Y. Sept. 29, 2005); *Martinez v. Headley*, No. 99-cv-1735, 2001 WL 483448, at *1 (E.D.N.Y. Jan. 18, 2001). I am not inclined to go through this exercise again.

Furthermore, there is a far better reason not to do as Plaintiff asks. The Officer Defendants' motion can be denied on the merits.

First, even assuming all eleven facts in the Officer Defendants' Rule 56.1 Statement to be true (and Plaintiff does not dispute most of them), those few facts, taken together, do not entitle the Officer Defendants to summary judgment dismissing the Plaintiff's claims as a matter of law. They do not even address Plaintiff's highly fact-based claims.

Second, in response to the Officer Defendants' utterly inadequate Rule 56.1 Statement, Plaintiff did not file a "Counterstatement of Undisputed Facts."[1] Instead she filed an "Objections and Responses to Defendants' Rule 56.1," which was accompanied by a far more comprehensive counterstatement of material facts, styled "Plaintiff's Statement of Additional *Disputed* Facts" (Dkt. No. 289-1 (emphasis added).) In other words, Plaintiff opposed the Officer Defendants' motion by asserting that most (if not all) of the *material* facts concerning what happened between Plaintiff's decedent and the Officer Defendants are disputed. The Officer Defendants agree. (*See* Dkt. No. 310 at 1 & n.1 (titled "Defendant Correction Officer's [*sic*] Response to Plaintiff's Statement of Disputed Facts; adopting Plaintiff's characterization of her additional facts as "disputed;" and "admit[ting] that the fact[s] characterized by plaintiff as disputed [are,] in fact[,] disputed.")) Since nearly every fact in the Plaintiff's statement of additional disputed facts is material to the resolution of this case, and since both sides agree that those facts are disputed, the Officer Defendants' motion must be denied on the merits and it its entirety. Further discussion is neither necessary nor appropriate, since summary judgment cannot be awarded where, as here, material facts are hotly disputed. That remedy is only for in cases where the material facts are not in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

For that reason, all remaining claims against the Officer Defendants will go to trial.[2] Their motion for summary judgment is denied. The motion to strike portions of their brief for exceeding the limit imposed by the Court's rules (Dkt. No. 312) is denied.[3]

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[1] Contrast this with the fact that Plaintiff did file a counterstatement of undisputed facts in response to the motion for summary judgment filed by Dr. Lee.

[2] Plaintiff's claim for conspiracy to obstruct justice—Third Cause of Action—was dropped (Dkt. No. 289 at 17 n.14) and so is out of the case. It is not a "remaining claim;" it will not go to trial. And it will not be discussed further in this opinion.

[3] I note that, in the reply brief that I declined to strike, the Officer Defendants expressly abandon their defense of qualified immunity, except with respect to the blood spill cleanup, which Plaintiff does not actually allege

However, it is impossible to deal with the other Defendants' motions for summary judgment without recounting a great deal of the hotly disputed tale of what occurred between the Officer Defendants and Plaintiff's decedent, Karl Taylor, on August 13, 2015.

I now proceed to tell that story—relying in large part on the very comprehensive statement of *disputed* facts that was filed by the Plaintiff, as well as some evidence cited in her brief. *See Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 543 n.5 (S.D.N.Y. 2005); *see also U.S. Fid. & Guar. Co. v. Madison Fin. Corp.*, No. 01-cv-3998, 2002 WL 31731020, at *1 n.3 (S.D.N.Y. Dec. 4, 2002). In addition, I have relied on the Supervisor Defendants' Local Rule 56.1 statement and Plaintiff's response and counterstatement thereto, as well as Dr. Lee's Local Rule 56.1 statement and Plaintiff's response and counterstatement thereto.

I will begin by telling the story of what happened between the Officer Defendants and Taylor, adding at the end how the Supervisor Defendants became involved. Because the facts that relate only to the claims against Dr. Lee have absolutely no bearing on the claims against the Supervisor Defendants, I will tell Dr. Lee's story after discussing the legal merits of the Supervisor Defendants' motion for summary judgment.

BACKGROUND

I. Facts

A. Sullivan Correctional Facility

Sullivan Correctional Facility ("Sullivan) is a maximum-security correctional facility managed by the New York State Department of Corrections and Community Supervision ("DOCCS"). (Supervisor Defs.' Rule 56.1 Statement, Dkt. No. 269 ("Super. 56.1") ¶ 22.)

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is a constitutional violation. (Dkt. No. 305 at 21.) Qualified immunity for the Officer Defendants, like the Plaintiff's abandoned obstruction of justice conspiracy charge, is out of the case.

Sullivan is comprised of eight housing units, four of which cater to inmates with special needs. (*Id.* ¶ 7.)

One of the units is the Intermediate Care Program ("ICP"). (*Id.* ¶ 23.) The ICP is located in a separate housing unit within the facility and is specifically designed for inmates diagnosed with a serious mental illness. (*Id.* ¶¶ 23, 25.) At the Sullivan ICP program, inmates are to be seen by clinicians on daily rounds and are supposed to receive regular evaluations by psychiatrists and social workers and to participate in out of cell treatment programs. (*See* Decl. of Daniel M. Eisenberg in Opp. to Mots. for Summ. J., Dkt. No. 281 ("Eisenberg Decl.") Ex. 54 ("ICP Manual"), at -124–31.)

B. Karl Taylor

Inmate Karl Taylor was convicted of Rape in the First Degree and Sexual Abuse in the First Degree and sentenced to serve consecutive sentences of 27 to 55 years. (Def. Lee's Statement of Undisputed Material Facts, Dkt. No. 274 ("Lee 56.1") ¶ 32; Pl. CO 56.1 Resp. ¶ 1.) Taylor entered DOCCS custody on March 24, 1995. (Lee 56.1 ¶ 32.)

During his time in DOCCS custody, but prior to arriving at Sullivan, Taylor was rearrested and convicted of Aggravated Harassment of a Prison Employee by an Inmate, because he threw feces and urine at a CO. (*Id.*; Eisenberg Decl. Ex. 71. ("NYSCOC Prelim Rep.") at -56100.) He was sentenced to 2 1/2 to 5 years, to be served consecutive to his rape sentence. (*Id.*)

Taylor was transferred to Sullivan on November 24, 2014. (Lee 56.1 ¶ 54.) He was assigned to the ICP and housed in building E-North, Cell #148. (*Id.* ¶ 55; Supervisor 56.1 ¶ 24.) Within the ICP, Taylor was assigned to the Assisted Daily Living ("ADL") program. (Eisenberg Decl. Ex. 3 ("Bird EBT"), at 16:15–17:11.)

C. The Supervisor Defendants

Defendant William Keyser is the Superintendent at Sullivan, a position he has held since June of 2014. (Super. 56.1 ¶ 2.) As Superintendent, Keyser has supervisory oversight over all aspects of the facilities, and his responsibilities range from maintaining the facility budget to programs, security, and administration. (*Id.* ¶ 3.)

Defendant Edward Burnett became Deputy Superintendent for Security at Sullivan on November 15, 2014, where he remained until July 2018, when he transferred to Downstate Correctional Facility. (*Id.* ¶ 9.) As Deputy Superintendent for Security, Burnett had overall responsibility for the supervision of all security staff, as well as the care, custody, and control of the inmate population. (*Id.* ¶ 10.)

D. The Officer Defendants

Defendants Bruce Tucker, Steven Witte, Shane Topel, Kevin Darling, Daniel Walter, Michael Weir, James Steinberg, Felix Santos, and Joseph D'Addezio are all correction officers at Sullivan. (*See* Pl. CO 56.1 at ¶¶ 9, 18–21, 29, 30.)

Defendants Timothy Bunch and John Frunzi are correction officers at Sullivan who hold the rank of sergeant. (*See id.*)

Prior to the incident that led to Taylor's death, Officer Tucker, who was assigned to the ICP, had more uses of force on his record over the previous two years than any other correction officer in Sullivan's ICP and Special Needs Unit ("SNU") combined. (Eisenberg Decl. Ex. 91.) Prior to starting work as the Superintendent of Sullivan, Superintendent Keyser had been warned to keep an eye out for Officer Tucker. (*Id.* Ex. 13 ("Keyser EBT"), at 221:4–24.)

On April 7, 2015, Taylor filed a grievance against Officer Tucker. (Keyser Decl. ¶ 21; *id.* Ex. 1.) The grievance, which was written on a "know your rights" pamphlet and was otherwise disjointed and difficult to understand, alleged that some of Taylor's personal property was missing

and that he feared abuse by Officer Tucker. (*Id.*) The allegations were investigated by non-party Sergeant Beach, who interviewed both Taylor and Officer Tucker. (Super. 56.1 ¶¶ 93–94.) Sergeant Beach asked Taylor "if Officer Tucker had spoken to him in a negative manner," and Taylor responded that "he did not and it was the officer's appearance and the way he acts [that] is his fear." (Keyser Decl. Ex. 2.) Sergeant Beach also wrote that "Taylor stated that he was not threatened in any way by Officer Tucker and that he feels that it may happen," but Taylor "did not give any specifics." (*Id.*) Beach ultimately concluded there was no merit to Taylor's allegations. (*Id.*)

E. Events of April 13, 2015

The following account of the two incidents that immediately preceded Taylor's death—one in Cell Block E-North, and the other in a hallway between the cell block and the infirmary—is drawn from the testimony of the Officer Defendants and four inmates who witnessed various parts of the decedent's encounters with Sullivan COs: Raymond Bird, Kurtis Lamar Williams, Gregory Judge, and Malik Thomas. All four inmates were housed with Taylor in E North and witnessed the initial encounter in the cell block. (Bird EBT at 29:18–19; Eisenberg Decl. Ex. 4 ("Williams EBT") at 17:15–16; *id.* Ex. 6 ("Judge EBT") at 55:9–10); *id.* Ex. 7 ("Thomas EBT") at 32:21–24).) Williams, who then left the cell block in order to obtain medication, also testified that he witnessed the second encounter while standing at the cross gates in the hallway. (Williams EBT at 17:8–24:23.)

As I have already noted, the facts about both incidents are hotly disputed.

1. First Use of Force – E North

According to Bird, Williams, and Judge, for the six months that Taylor was at Sullivan prior to his death, various unidentified correction officers and, most particularly, Officer Tucker waged a campaign of racist name-calling and harassment against him. (Pl.'s Statement of

Additional Disputed Facts, Dkt. No. 289-1 ("Pl. CO 56.1") ¶¶ 1–8.) On one occasion, they destroyed property in his cell. (*Id.* ¶ 8.) Taylor often sought to protect himself from harassment by asking to be housed in the more restrictive mental health facilities at Sullivan. (Bird EBT at 21:16–24:25.)

During the day shift of 7:00 a.m. to 3:00 p.m. and the afternoon shift of 3:00 p.m. to 11:00 p.m., three correction officers—a main officer and two escort officers—are assigned to the ICP. (Burnett Decl. ¶ 8.)

Officer Tucker was one of the regular officers assigned to the E-North housing unit. (Lee 56.1 ¶ 63 (citing Decl. of Helene R. Hechtkopf in Supp. of Mot. for Summ. J. ("Hechtkopf Decl."), Dkt. No. 276, Ex. 29 (together with Eisenberg Decl. Ex. 101, "Tucker EBT") at 31:1–12).) On the morning of April 13, 2015, Officers Witte and Topel accompanied Officer Tucker on his rounds in E-North. (Eisenberg Decl. Ex. 25 ("Unusual Incident Rep.") at -002.)

According nonparty witness CO Jeffrey Hunt, on the morning of April 13, 2015, Officer Tucker entered the E-North cell block and instructed Hunt to "crack Taylor out"—meaning, open Mr. Taylor's cell, which was up a flight of stairs from the main area in E-North, called "the pit." (Eisenberg Decl. Ex. 5 ("Hunt EBT") at 99:25.) Hunt testified that, after doing so, he "went over to the other side of the control room to top [his] coffee mug off and [] heard a commotion." (*Id.* at 100:3–5.)

According to an inmate witness, Officer Tucker approached and banged on Taylor's cell, shouting words to the effect of: "Come out of the f*** cell, m***f***." (Bird EBT at 76:8–21.) Two inmates then saw Taylor exit his cell and head down the stairs, straight towards the "A officer's" desk, in the pit, where, for his own protection, Taylor asked the "A officer" to "call the captain, call the sergeant, call somebody" and stated, "I want to go to the Mental Health Unit" and,

"I want to go to the observation cell." (Bird EBT at 77:9–78:5; Thomas EBT at 42:24–43:6.) The officer at the A post apparently did not respond. (Thomas EBT at 52:16–19.)

Officer Tucker then said that Taylor wasn't going anywhere if he did not clean his cell. (Thomas EBT at 43:6–9, 43:20–44:8, 52:20–53:4); *accord* Unusual Incident Rep. at -001.)

Officer Hunt testified that he went back over to the controls after hearing the commotion, and Officer Tucker instructed him to "lock [Taylor] in" his cell. (Hunt EBT at 100:5–6.) Officer Hunt waited for Taylor to go back into his cell, but "It didn't happen." (*Id.* at 100:7.)

The parties disagree about who initiated the altercation.

At least one inmate saw Taylor walk toward the stairs to his cell, and then saw Officer Tucker hit Taylor with his baton without any provocation. (Thomas EBT at 44:4–14.) According to the two inmate eyewitnesses, Taylor tried to flee and was struck again. (Bird EBT at 83:22–84:18, 89:21–25; Thomas EBT at 44:13–17.) According to Officer Hunt, however, Officer Tucker took his baton out, and "Taylor came rushing at him. Bruce [Tucker] took it. He swung it. I don't know if he clipped Taylor or not because I was up in the control room." (Hunt EBT at 100:9–11.) Hunt agreed that "Tucker took the first swing with the baton" but did not "remember if he actually clipped Taylor or not." (*Id.* at 106:4–9.)

It is undisputed that Taylor wrestled the baton from Officer Tucker (*see id.*), and that he swung it and struck Officer Tucker. (Bird EBT at 83:20–84:18, 89:21–25).) Hunt did not see Taylor grab Officer Tucker's baton, but that once Taylor did, and then "the melee started." (Hunt EBT at 100:11–14.)

Someone called in a Code 1. Officer Hunt testified that he told another CO who was up in the control room with him to call a Code 1. (Hunt EBT at 100:15–17; *accord* Thomas EBT at 57:5–6 ("the guy who opens up the gate called in for backup").) Inmate Bird testified that, Officer

Tucker "pulled the pin" on his radio and called a Code 1, signaling that an officer was in distress, but that he did so later, after Taylor had been subdued. (Bird EBT at 96:3–16.)

Officer Tucker headed toward the stairs leading back up to Taylor's cell. (Eisenberg Decl. Ex. 9 ("Topel EBT") at 103:4–11.) Officer Tucker fell going up the stairs, and Taylor struck him with the baton. (Thomas EBT at 56:2–11.) Officer Topel pursued Taylor up the stairs, and Officer Tucker eventually got to his feet again. (Topel EBT at 108:1–4.)

At the top of the stairs, Officer Topel dodged several more swings from Taylor. Officer Topel then grabbed the baton, causing Taylor to lose his balance. Officer Witte ran up the stairs, and Officers Topel and Witte tackled Taylor, who landed face-down. (Topel EBT at 116:11–14, 117:21–24, 118:11–14.)

Officer Topel struggled with Taylor, who was still holding on to the baton, even as he was lying face-down. Officer Topel admits that he struck Taylor in the back of the head several times with his fists. (Topel EBT at 120:2–121:13.) Officer Topel saw blood underneath Taylor, although he did not know where the blood came from. (*Id.*)

Officer Defendants Santos, Steinberg, Walter, Darling, Weir, D'Addezio, Frunzi, and Bunch responded to the call. (Pl. CO 56.1 ¶ 19 (citing Eisenberg Decl. Ex. 10 ("Darling EBT") at 12:25–16:14; *id.* Exs. 34, 40–42 (written incident reports of Frunzi, D'Addezio, Bunch, and Santos).) According to an eyewitness, although Taylor had already been pinned down by Officers Topel and Witte by the time backup arrived, these officers began assaulting Taylor. (Bird EBT at 96:22–97:7.) The same eyewitness testifies that, during the assault, Taylor cried repeatedly that he couldn't breathe, then fell silent. (Bird EBT at 97:3–5.)

Statements prepared by the Officers Defendants themselves suggest that few—if any—of the eight officers who arrived in response to the distress call actually touched Taylor, let alone

were involved in an assault against him after he was restrained. (*See* Eisenberg Decl. Exs. 34, 40–42 (written incident reports of Frunzi, D'Addezio, Bunch, and Santos).) However, the Officer Defendants do not list this among their 11 "statements of undisputed fact," and Plaintiff submitted eyewitness testimony to the effect that "you got over 20 something officers ran up in E North *and they're all beating on [Taylor*]." (Bird EBT at 96:23–24 (emphasis added).) Another inmate testified that the six to seven officers who responded to the code "were getting their licks in and hitting Taylor" as inmates in surrounding cells screamed at them to stop. (Thomas EBT at 131:13–16.)

One witness estimates that three minutes passed from the time Taylor was restrained until the officers picked him up from the floor and began escorting him to the infirmary. (Thomas EBT at 66:22–67:7.)

2. Second Use of Force – Hallway to Infirmary

Before Taylor left E-North, Officers Tucker and Witte headed to the infirmary. (Topel EBT at 138:17–139:23.) Officer Topel stayed behind until he was relieved. (*Id.*)

Some of the Officer Defendants then lifted Taylor to his feet and walked him off the cell block towards the Sullivan infirmary. (Pl. CO 56.1 ¶ 23.) When he left E North, "Taylor had no significant visual injuries," except that his face looked "roughed up." (*Id.* ¶ 24; Thomas EBT at 64:13–66:16.) This is consistent with the Officer Defendants' written statements, which say that Taylor left E North walking under his own power. (Eisenberg Decl. 11 ("Weir EBT") at 50:6–9; Eisenberg Decl. Ex 16 ("Witte EBT") at 117:17–25; *see also* Unusual Incident Rep. at -020–23 (compiling written statements from other COs and civilian witnesses).)

Then, according to inmate Williams (who was being transported through the hallway at the time), the Officer Defendants who were escorting Taylor to the clinic began to beat him, until he fell to the floor. (Pl. CO 56.1 ¶¶ 25–35; Williams EBT at 24:10–13, 25:8–20, 23:6–11.) Williams

could identify only one Officer Defendant involved in this attack—Sergeant Frunzi—but Plaintiff's Statement of Additional Disputed Fact cites to the statements of the eleven Officer Defendants in asserting that all of them either testified, said in their written statements, or were observed by someone else to have either (1) personally escorted Taylor to the clinic, (2) passed the escort on their way to the clinic, or (3) saw the escort proceed down the hallway. (Pl. CO 56.1 ¶¶ 29–31.)

The Officer Defendants deny that any such assault took place. Several of them testified that Taylor's State-issued green pants fell down during the walk to the clinic, so the escorting officers pulled them up. (Darling EBT at 27:13–29:6, 47:7; Weir EBT at 50:10–51:11; Eisenberg Decl. Ex. 15 ("Bunch EBT") at 49:25.) They also testify that Taylor asked for a "cart" because he didn't want to walk (Darling EBT at 23:11–16, 25:10–13; Bunch EBT at 66:6; *see also* Unusual Incident Rep. at -036), then slumped to his knees. (Darling EBT at 30:3–14; Bunch EBT at 66:5–6; *see also* Unusual Incident Rep. 25 at -002, -019, -036.) Sergeant Bunch eventually made the call to carry Taylor into the clinic face-down. (Bunch EBT at 67:9–14; *see also* Unusual Incident Rep. at -003).

The parties estimate that it takes between 5 and 10 minutes to walk from E-North to the infirmary. (Judge EBT at 89:8–13 (stating it is "quite a ways" and that it takes 10 minutes if you're walking at "regular pace").)

According to the infirmary nurse who triaged him, Taylor arrived in the clinic at approximately 8:35 a.m. (Eisenberg Decl. Ex. 12 ("Greener EBT") at 63:8–18; *id.* at 117:18–20; *but see* Darling EBT at 12:22–24 (stating he arrived on the scene in E-North at approximately 8:35 a.m.); Unusual Incident Rep. at -021 and -023 (statements of K. Danzilo and T. Wright stating that they observed the escorts at 8:40 and 8:45 a.m., respectively).)

At approximately 8:45 a.m., nonparty-inmates Steven Lovett and Stacy Liggan, who were trained in and assigned to "blood spill" work, were asked to clean up blood in the hallway leading from E-North to the infirmary. (*See* Eisenberg Decl. Ex. 22 ("Lovett Aff.") (describing how the inmate saw "mostly puddles" and that it took "at best 1 to 1 ½ hours to remove all the blood"); *id.* Ex. 23 ("Liggan Aff.") (drawing 0.5 cm to 1 cm circles to illustrate "the size of blood drops in the hallway from the clinic area to E-Block" and that it took "at least an half an hour to clean").)

Taylor was still in mechanical restraints when he arrived at the infirmary, breathing heavily and complaining of discomfort. Sergeant Bunch either saw or was told by Taylor that Taylor's sweatshirt was bunched around his neck. Because Taylor was still in restraints, Sergeant Bunch took a pair of safety scissors he had requested from the nurse and cut the sweatshirt. Taylor allegedly thanked him. (Bunch EBT at 74:15–75:6; Unusual Incident Rep. at -003 (report summary).)

3. Events at the Infirmary

It is only at this point that the Supervisor Defendants enter the picture; it is undisputed that neither Superintendent Keyser nor Deputy Superintendent Burnett was present either in E-North or on the way to the infirmary.

Deputy Superintendent Burnett received a phone call advising him that a serious assault on staff had occurred. (Burnett Decl. at ¶ 22.) He and Superintendent Keyser proceeded to the infirmary. (*Id.*)

According to the Supervisor Defendants, when they entered the infirmary, Taylor was in Exam Room 2, in a chair, accompanied by two officers and a sergeant—most likely Sergeant Bunch. (*Id.*; Keyser Decl. ¶ 25; *see also* Weir EBT at 83:17–20; Unusual Incident Rep. at -019 (memorandum from nonparty CO E. Kratz to Superintendent Keyser submitted as part of unusual

incident report); *id.* at -007 (noting that Sergeant Bunch was involved in use of the automatic external defibrillator on Taylor).)

The Supervisor Defendants testified that they then went into a nearby exam room, where Officers Tucker, Witte, and Topel—all of whom had been injured in the first altercation—were taken. (Keyser Decl. ¶ 26; Burnett Decl. ¶ 23.) The Supervisor Defendants spoke to these officers, and then left the infirmary so that Superintendent Keyser could call DOCCS Central Office from the nurse's station and advise them of the incident. (Keyser Decl. ¶ 28; Burnett Decl. ¶ 24.)

According to the triage nurse, during this time, Taylor was waiting in Exam Room 2. (Greener EBT at 63:8–18.) Greener testified that she did not enter the exam room initially, because it needed to get cleared by prison security. (*Id.* at 97:16–22.) Greener estimates this took "minutes." (Greener EBT at 63:8–18; *id.* at 117:18–20.) But when Greener began her examination, Taylor was not showing signs of life. (*Id.*; *but see* Unusual Incident Rep. at -037 (stating that another nurse, Nurse Floyd K. Darbee, II, "found inmate to be unconscious with shallow breathing chest moving air" but "unable to obtain femural [*sic*] pulse due to positioning").)

According to the Supervisor Defendants, as they were walking down the hallway, non-party Nurse Practitioner FNU Diaz yelled that she needed assistance because Taylor was unresponsive. (Burnett Decl. ¶ 24.) The Supervisor Defendants apparently proceeded to the nurse's station and called the Central Office. (*Id.*) At some point, Nurse Practitioner Diaz advised Superintendent Keyser that Taylor was in distress and that they were moving him to another room. (Keyser Decl. ¶ 28.) At some point, the infirmary staff called a Code Blue. (*See, e.g.*, Liggan Aff. at -001.)

While at the clinic, Taylor was pronounced dead by Dr. Wladyslaw Sidorowicz. (Lee 56.1 ¶ 135.)

The Supervisor Defendants were notified near the infirmary that Taylor had died, and were notified again upon returning to their offices. (Keyser Decl. ¶ 28; Burnett Decl. ¶ 24.)

On April 13, 2015, an autopsy was conducted by Sullivan County Medical Examiner Dr. Margaret Prial. (Lee 56.1 ¶ 137.) Taylor's cause of death was identified as "cardiac arrhythmia complicating hypertensive cardiovascular disease following physical altercation with correction officers." (Eisenberg Decl. Ex. 29 ("Autopsy Rep.") at -054.)

The report also showed that Taylor had also suffered severe trauma to his neck, eight blunt force impacts to his head, and various internal and external hemorrhages to his body, both back and front. (Pl. CO 56.1 ¶¶ 38–40.)

II. Procedural History

The Court recounted the procedural history of this case extensively in its written opinion granting Plaintiff's motion to strike Officers Tucker's, Witte's, and Topel's counterclaims. *Ramsay-Nobles v. Keyser*, No. 16-cv-5778, 2018 WL 6985228, at *1 (S.D.N.Y. Dec. 18, 2018). Herewith a briefer summary.

On July 20, 2016, Plaintiff Julia Ramsay-Nobles, Taylor's sister, filed her initial Complaint, which named only certain Defendants—Superintendent Keyser, Deputy Superintendent Burnett, and Officers Tucker, Topel, and Witte. (Dkt. No. 1.) The named Defendants answered the Complaint (Dkt. No. 30), and the parties proceeded to discovery (Dkt. Nos. 27, 31–32).

On April 25, 2017, Plaintiff amended her Complaint with Defendants' consent. (Dkt. No. 53.) In this First Amended Complaint ("FAC"), Plaintiff added two additional Defendants—Dr. Lee and Sergeant Frunzi. (*Id.*) All named Defendants again answered, with Dr. Lee answering separately. (Dkt. Nos. 58, 61.)

On March 23, 2018, Plaintiff filed a Second Amended Complaint ("SAC") with the leave of the Court. (Dkt. No. 115.) In the SAC, Plaintiff added additional Defendants—Sergeant Bunch and Officers Walter, D'Addezio, Darling, Steinberg, Santos, and Weir. (*Id.*)

Until this point, all Defendants except Dr. Lee had been represented by the New York State Attorney General's Office ("NY AG"). However, after alerting the Court to a potential conflict and securing its consent, the NY AG withdrew its representation of everyone but the Supervisor Defendants. *See Ramsay-Nobles*, 2018 WL 6985228, at *2. The correction officers collectively retained new counsel, the Orseck Law Firm. *Id.*

On July 5, 2018, the Officer Defendants' new counsel filed an answer to the SAC. In that answer, Officers Tucker, Witte, and Topel—who had been named in the original Complaint filed two years earlier—asserted counterclaims against Plaintiff for assault and battery, for injuries suffered during the first altercation in E-North. (Dkt. No. 171.) On Plaintiff's motion, the Court struck these counterclaims and denied the officers' cross-motion for leave to amend. *Ramsay-Nobles*, 2018 WL 6985228, at *11.[4]

After the close of discovery (during which counsel for the Officer Defendants was repeatedly sanctioned for discovery violations (*see* Dkt. Nos. 230, 237, 278)) all three groups of Defendants moved separately for summary judgment. (Dkt. Nos. 268, 273, 295.) The Supervisor Defendants also move strike the testimony of Plaintiff's expert, Joseph Ponte. (Dkt. No. 303.)

III. Summary Judgment Standard

A moving party is entitled to summary judgment when it establishes that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

[4] In their answer to the SAC, Officers Tucker, Witte, and Topel also asserted a cross-claim against Dr. Lee for medical malpractice, which was later dismissed on consent. (Dkt. Nos. 171, 235.)

of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting previous version of Fed. R. Civ. P. 56(c)). The district court must "resolv[e] all factual ambiguities and credit[] all inferences in favor of" the non-moving party. *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 75 (2d Cir. 2005). If the moving party demonstrates the absence of a genuine issue of material fact, the non-movant can rebut the moving party with evidence on the record presenting a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also* Fed. R. Civ. P. 56(c)(1)(B). The non-movant may not defeat summary judgment through conclusory allegations or unsupported speculation. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998).

SUPERVISOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND RELATED MOTION TO STRIKE

I. Overview of Claims Against the Supervisor Defendants

Defendants Superintendent Keyser and Deputy Superintendent Burnett have moved for summary judgment on the only remaining count of the SAC asserted against them—supervisory liability under Section 1983 (First Cause of Action), which is based on three theories: (1) failure to train; (2) failure to protect Taylor from the risk of excessive force and racially discriminatory treatment by Officer Tucker; and (3) failure to protect Taylor from the risk of excessive force and racial discrimination by the other Officer Defendants. (Dkt. No. 268; *see also* Defs.' Mem. of Law in Further Supp. of their Mot. for Summ. J., Dkt. No. 270 ("Super Br.") at 5–15.)[5]

While Plaintiff originally brought three other Causes of Action against the Supervisor Defendants in her Second Amended Complaint, she advises the Court that she has now dropped them: "Plaintiff has consented to voluntary dismissal with prejudice of the Second, Third, and

[5] Ideally, each constitutional violation (Eighth Amendment, Fourteenth Amendment) and each theory (failure to train, failure to protect) would have been asserted as a separate cause of action in the complaint. We have separated them for individualized discussion.

Fourth Causes of Action against the Supervisor Defendants . . . because there is insufficient evidence in the discovery record that the Supervisor Defendants[] conspired with the CO Defendants." (Pl.'s Opp. to Mot. for Summ. J. by Supervisor Defs., Dkt. No. 288 ("Super. Opp.") at 2.) The conspiracy claims are, therefore, dismissed with prejudice.

The Supervisor Defendants move for summary judgment on the remaining counts, both on the merits and on the ground of qualified immunity. (Supervisor Defs.' Mem. of Law in Further Supp. of Their Mot. for Summ. J. ("Super. Br.") at 5–15.)

In support of her opposition brief, Plaintiff offers the expert affidavit of Joseph Ponte, the former New York City Department of Correction Commissioner with over 49 years of experience in corrections. (Dkt. No. 284.) The Supervisor Defendants move to strike his testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). (Dkt. No. 303.)

II. The Supervisor Defendants' Motion to Strike the Testimony of Plaintiff's Expert Joseph Ponte Is Denied

The Court first considers the admissibility of Mr. Ponte's testimony, and then considers the Supervisor Defendants' summary judgment motion. "If the expert testimony is excluded as inadmissible, the court must make the summary judgment determination without that evidence." *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 168 (S.D.N.Y. 2018) (quoting *Water Pollution Control Auth. of City of Norwalk v. Flowserve US Inc.*, No. 14-cv-549, 2018 WL 1525709, at *5 (D. Conn. Mar. 28, 2018)).

A. The *Daubert* Standard

Federal Rule of Evidence 702 codifies the standard for admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), under which the Court's role is to determine whether the expert is qualified to testify and whether the testimony is reliable. *Id.* at 589; Fed. R. Evid. 702; *Namenda*, 331 F. Supp. 3d at 168.

"[A]n expert with specialized knowledge [who] will help the trier of fact may testify so long as that testimony is based on sufficient facts or data and is the product of reliable principles and methods that the witness has reliably applied . . . to the facts of the case." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 253 (2d Cir. 2016) (internal quotations and alterations omitted). "The proponent of the expert testimony bears the burden of establishing these admissibility requirements, and the district court acts as a 'gatekeeper' to ensure that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* (internal quotations and alterations omitted).

As this Court noted, "The standard to evaluate non-scientific expert testimony is whether the expert bases testimony upon professional studies or personal experience and employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Namenda*, 331 F. Supp. 3d at 168 (quoting *La.Wholesale Drug Co. v. Sanofi-Aventis*, No. 07-cv-7343, 2008 WL 4580016, at *6 (S.D.N.Y. Oct. 14, 2008)).

B. The Supervisor Defendants' Motion to Strike Is Denied

1. Mr. Ponte's Unassailable Credentials

Plaintiff's expert Joseph Ponte has over 49 years of experience in the field of corrections, and has served "every uniform position from Correction Officer to Captain." (Ponte Decl., Dkt. No. 284 ¶ 1.) Mr. Ponte was first promoted to warden in 1980, and has "served at this level of authority or higher for more than 37 years, including as Commissioner for the New York City Department of Corrections and as the Commissioner of Corrections for the State of Maine." (Ponte Decl. Ex. 1 ("Ponte Rep.") at 1.) The Supervisor Defendants do not—and could not—challenge Mr. Ponte's qualifications to testify regarding sound correctional policies.

2. Mr. Ponte's Methodology

Mr. Ponte was asked to provide expert testimony "regarding the proper policies and procedures to be followed in correctional facilities" with respect to certain issues, including: (*i*) the use of force by correction officers against inmates, and supervisors' investigation of and responses thereto; (*ii*) the use of de-escalation and crisis intervention techniques by correct officers; (*iii*) the escort of inmates by correction officers; (*iv*) supervisors' investigation of, and response to, inmate grievances alleging improper conduct by correction officers; and (*v*) the preservation of evidence and securing of a crime scene following an incident of violence at a correctional facility. (Ponte Rep. at 1–2.)

In the second half of his report, Mr. Ponte applies these standards to the events that occurred at Sullivan, leading up to, during, and after Taylor's death, and opines on whether the staff's response was reasonable. (*Id.* at 2.)

Mr. Ponte's affidavit states that he relies on his "education, 49 years of experience in corrections, and the factual information provided to [him] by [Plaintiff's counsel]" in forming his opinions. (*Id.* at 3.) In forming his opinions about the behavior of the Officer Defendants, Mr. Pone reviewed, not only materials prepared during the investigation of the Taylor incident and testimony given during this litigation, but also the ICP Manual; the DOCCS Employee Manual section on the Disciplinary Control of Inmates; the DOCCS Use of Force Directive; various DOCCS training documents on the use of batons, the prevention of aggressive behavior, and aggressive behavior and de-escalation skills; as well as the Office of Mental Health Corrections-Based Incident Policy 2.8—and even a report prepared by Human Rights Watch concerning U.S. prisons and offenders with mental illness. (Ponte Rep. Ex. B.) These strike the court as exactly the sort of documents one would expect an expert in correctional practice and procedure to review in reaching an opinion.

3. The Motion to Strike Ponte's Report Is Denied

Best correctional practices is a subject to which expert testimony is appropriately given. It is a subject with which the average juror is unfamiliar. Courts—including this Court—accept testimony about best correctional practices, like testimony about best police practices, routinely.

Mr. Ponte's report could have been more elegantly drafted. It is obvious that he is familiar with best practices, for both supervisors and correction officers, as utilized at DOCCS. Moreover, between his extensive experience and his familiarity with the materials he cites in Exhibit B, he is probably better equipped to testify about those practices—and about whether particular actions by the defendants comported with those practices—than anyone on the planet.

One might prefer that various assertions Mr. Ponte makes about best practices were accompanied by citations to sources that document those practices—to the DOCCS manuals and training materials, for example. For the most part they are not. The failure to do that is not necessarily fatal to his testimony. As I have said, "There is nothing wrong with [relying on experience]: the very text of Fed. R. Evid. 702 provides that an expert can be qualified on the basis of his 'knowledge, skill, *experience*, training, or education[.]'" *Veleron Holding, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404, 443 (S.D.N.Y. 2015) (emphasis in original) (quoting Fed. R. Evid. 702); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

However, "a proffered expert who relied solely on his or her experience in arriving at his or her expert opinion must have based that opinion on sufficient facts or data, and must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts[.]" *Veleron*, 117 F. Supp. 3d at 444 (internal quotations omitted). In the ordinary course, an expert—even one whose experience

is as extensive as Mr. Ponte's—should explain which supporting materials (*i.e.*, which of the materials in Exhibit B, or what aspects of his experience) are cited as authority for the proposition asserted. Mr. Ponte's report really does not do that. He states that he consulted certain materials; those materials do include what seem to this Court to be the universe of best practices materials and training documents used by DOCCS. Mr. Ponte certainly has the experience to be familiar with those materials—indeed, for all I know, many of them were developed under his watch or at his direction. The footnotes in the report, however, rarely mention any of those source materials. Instead, his assertions are often "supported" by citations to the testimony of the Officer Defendants. This appears intended to advise the Court that at least some of the Officer Defendants acknowledge that the practices Mr. Ponte discusses are best practices—as well as to demonstrate that these particular officers were trained by DOCCS in mental health inmate care and were aware of DOCCS policies and procedures. As a litigation technique, that will undoubtedly prove useful at trial; Plaintiff will want the jurors to know that the Defendants were familiar with best practices. But Mr. Ponte's expert report is not the best place to make that point.

That said, I simply cannot ignore Mr. Ponte's extensive experience in corrections—experience familiar to every judge who has sat on this court for any length of time—or his assertion that his opinions about best correctional practices (as set out in the first half of his report) are grounded, not only in information about this particular incident, but also in the various manuals and training devices cited in Exhibit B. While I can think of more effective ways to craft a report, his testimony is plainly relevant and material and he is qualified to give it. And the fact that various Officer Defendants testified that statements now adopted by Mr. Ponte are in fact procedures they are supposed to follow makes his testimony about such matters—matters about which he has extraordinary professional knowledge—all the more powerful.

I will not, therefore, accept the Supervisor Defendants' suggestion that Mr. Ponte's testimony be stricken, or at least ignored in connection with this summary judgment motion. *Daubert* is designed to eliminate "junk science" from the courtroom—not to get rid of testimony from obviously qualified individuals that might have been better crafted. Mr. Ponte's opinions are not "junk science." Contrary to the Defendants' argument, Mr. Ponte did not take the facts of this case and "reverse engineer" a rubric for the purpose of assessing whether the defendants acted properly or not in Taylors' case – which, if true, would make his conclusions inadmissible. *In re Mirena IUD Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213, 241 (S.D.N.Y. 2018). This is simply not such a case. In the first half of his report, Mr. Ponte sets the stage by testifying extensively about best practices for officers and supervisors and by asserting that DOCCS officers are trained in those practices. In the second half of his report, he assesses the conduct of the DOCCS personnel in this case against those best practices. That is exactly what any expert in correctional practice and procedure would do in his expert testimony.

Therefore, the motion to strike Mr. Ponte's testimony is denied.

At trial, Mr. Ponte can be cross-examined, with the benefit of the various manuals and training materials listed in Exhibit B, about the various "best practices" assertions he makes in his report. For now, they will be considered as I determine whether Plaintiff has raised genuine issues of material fact.

III. The Supervisor Defendants' Motion for Summary Judgment Is Granted in Part and Denied in Part

A. The Court Will Consider All Arguments Fairly Raised By the Supervisor Defendants' Motion for Summary Judgment

Plaintiff's opposition to this motion includes the following footnote:

> The Supervisor Defendants' motion for summary judgment on Plaintiff's First Cause of Action (violation of 42 U.S.C. § 1983

> ("Section 1983")) is directed exclusively to the Supervisor Defendants' failure to protect Mr. Taylor against the risk of assault by Officer Tucker, and therefore Plaintiff's response to the motion is limited to that issue and does not address other ways that the Supervisor Defendants violated their duty to protect against constitutional violations by the correction officer Defendants under their supervision.

(Super Opp. at 2 n.1 (emphasis added).) But Plaintiff is not correct when she asserts that the Supervisor Defendants' motion only addresses her failure to protect from assault by Officer Tucker theory of recovery. The Supervisor Defendants' motion quite clearly addresses two additional theories of supervisory liability: (*i*) failure to train, which is discussed at pages 12–13 of her brief (and is listed in the table of contents); and (*ii*) deliberate indifference to the risks posed by ten of the eleven individually named Officer Defendants. (*See* Super. Br. at 8 ("With respect to Officers Witte, Topel[,] Walter, Daddezio, Darling, Steinberg, Santos, and Weir and Sergeants Frunzi and Bunch, plaintiff cannot raise a triable issue of fact regarding whether Superintendent Keyser or Deputy Superintendent Burnett were aware that any of these Officers posed a risk to Mr. Taylor, as there is no evidence regarding their knowledge.").)

Plaintiff's failure to respond to these clearly-raised arguments means that the motion will be considered without benefit of her response. I will not accept any reservation of rights in this regard. If there is no evidence to support these theories of recovery (and we have found none), the motion can and should be granted, and Plaintiff will be precluded from relying on those theories at trial.

B. Plaintiff Raises a Genuine Issue of Fact that the Supervisor Defendants Failed to Protect Taylor from the Risk of Excessive Force by Officer Tucker

The Supervisor Defendants move for summary judgment on the ground that Plaintiff has failed to raise a genuine issue of material fact that they failed to protect Taylor from Officer Tucker. For the following reasons, this argument fails.

1. Legal Standard

An inmate asserting a § 1983 claim that a prison official failed to protect him from harm in violation of the Eighth Amendment must satisfy both prongs of the test adopted in *Farmer v. Brennan*, 511 U.S. 825 (1994). Under the objective prong, the inmate must show that he was "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Subjectively, the prison official must have acted with a "sufficiently culpable state of mind." *Id.* This "culpable state of mind" exists when a prison official has "knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm." *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

A "plaintiff may [] state a claim for deliberate indifference based on a failure to protect him against a general risk of harm to all inmates at the facility." *Parris v. N.Y. State Dep't of Corr. Servs.*, 947 F. Supp. 2d 354, 363 (S.D.N.Y. 2013). To survive summary judgment under this theory, "a plaintiff must" raise a genuine issue of material fact that "the defendant knew of a history of attacks similar to that suffered by the plaintiff, and that the measures they should have taken to prevent the reoccurrence of such attacks would have prevented the harm to the plaintiff." *Stephens v. Venettozzi*, No. 13-cv-5779, 2016 WL 929268, at *21 (S.D.N.Y. Feb. 24, 2016), *report and recommendation adopted*, 2016 WL 4272376 (S.D.N.Y. Aug. 5, 2016) (collecting cases). "Generally, a claim based on a generalized risk of assault requires facts showing a longstanding, pervasive, well-documented history of similar attacks, coupled with circumstances suggesting that the defendant-official being sued had been exposed to this information." *Id.* (internal quotation and alterations omitted).

2. Plaintiff Meets Her Burden on Both Prongs

a) Objective Prong

The Supervisor Defendants argue that Taylor "was not incarcerated under conditions posing a substantial risk to his safety," and that his custody created no "risk to his safety, regardless of which Officers were working on the unit." (Super. Br. at 7–8.)

Plaintiff raises a triable issue of fact that, viewed objectively, Taylor's incarceration in a unit overseen by an officer with a long record of using force, and long list of grievances describing unprovoked attacks, posed a substantial risk of serious harm. Specifically, Officer Tucker's extensive use of force and grievance record, containing admissions that he repeatedly used force to subdue inmates or allegations that he used unprovoked force against them, respectively, would permit a reasonable juror to conclude that Officer Tucker's assignment to the ICP objectively posed a serious threat to Taylor.

In Officer Tucker's time working at the ICP and SNU, both of which housed mentally ill prisoners, Officer Tucker had twelves uses of force—constituting more than half of the 23 uses of force for all COs in that unit. The next officer had only "three or four," making Officer Tucker the clubhouse leader three times over. (Eisenberg Decl. Ex. 91.) This high incidence caused Albany concern; they raised the issue with Supervisor Keyser before he began working at Sullivan, and they raised the issue again with both Supervisor Defendants shortly before the incident occurred.

In the time Superintendent Keyser worked at Sullivan, inmates also filed six grievances against Officer Tucker alleging unprovoked assaults and excessive force. These included: (1) aggressively pat frisking and sexually abusing an inmate (Eisenberg Decl. Ex. 87); (2) tripping a handcuffed inmate during an escort and then punching the inmate in the head and face (*id.* Ex. 85; (3) physically assaulting an inmate on two separate occasions on the same day (*id.* Ex. 83);

(4) threatening an inmate with assault if he "came off the wall" during a pat frisk, and then sexually assaulting the inmate (*id.* Ex. 82); (5) sexually assaulting an inmate during a pat frisk (*id.* Ex. 90); and (6) slamming a handcuffed inmate onto the ground and beating and kicking him (*id.* Ex. 89). Deputy Superintendent Burnett was at Sullivan for the first four of the incidents listed.

The Supervisor Defendants protest that each of the uses of force and grievances was duly investigated. All uses of force except the most recent, on March 27, 2015, were found to be justified. Moreover, all grievances, except the most recent, on April 6, 2015, were found to be unsubstantiated. Both the unjustified use of force and the substantiated grievance were escalated to DOCCS' Office of State Investigations ("OSI").

In *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), a case with similar facts from a different Circuit, the Sixth Circuit disagreed with the district court's finding that, because the CO's "employment record show[e] no incidents of *unprovoked* assault on inmates, there was no evidence that the supervisors could have known that [the CO] would use *excessive force* on prison inmates." *Id.* at 507 (internal quotation marks omitted) (emphasis added). Instead, the Sixth Circuit held that because the CO's "employment record contain[ed] a great deal of evidence concerning . . . his propensity to use force against inmates and cause injury to them," there was a genuine issue of fact whether the officer posed a substantial risk of serious harm. *Id.* at 508.

b) Subjective Prong

The record also contains significant evidence that raises a genuine issue of material fact about whether the Supervisor Defendants "knew of a history of attacks similar to that suffered by the plaintiff." *Stephens*, 2016 WL 929268, at *21.

There is no dispute that, before Defendant Keyser began working as Superintendent of Sullivan, the Assistant Commissioner for Facility Operations of DOCCS, who had previously

worked as the superintendent of Sullivan, warned Keyser that they were "concerned about" Officer Tucker because of his high number of use-of-force incidents, telling Defendant Keyser to "pay closer attention to" any uses of force by Officer Tucker. (Pl.'s Objs. & Resps. to Supervisor Defs.' Rule 56.1 Statement, Dkt. No. 287 ("Pl. Super 56.1 Resp.") ¶ 6; *see also* Keyser EBT at 221:4–15; 292:7–12.) Defendant Keyser admits that he did not review Officer Tucker's then-existing uses of force then or at any time. (Keyser EBT at 311:2–9.)

While Keyser was Superintendent of Sullivan, Officer Tucker was involved in six more use of force incidents, and two of those occurred while Burnett was Deputy Superintendent. (*Compare* Super. 56.1 ¶¶ 2, 9 *with* Eisenberg Decl. Ex. 92.) *See Poe*, 282 F.3d at 143 ("In some cases, notice will also be imputed to an individual because of the particular duties he is assigned by virtue of his position.").

Both Supervisor Defendants were clearly put on notice of Officer Tucker's record second time, when the DOCCS office in Albany asked the Supervisor Defendants to compile a list of Officer Tucker's use of force reports spanning the past two years. (Pl.'s Counterstatement of Additional Disputed Facts, Dkt. No. 287 ("Pl. Super. 56.1") ¶ 7; Eisenberg Decl. Ex. 91 (email correspondence); *id.* Ex. 92 (listing uses of force).) As Deputy Superintendent Burnett told Albany, during the relevant period, Officer Tucker had twelve use of force reports, eleven of those against inmates with serious mental illness or disabilities. This was three to four times more than any other officer at Sullivan, and accounted for just over half of all uses of force in the ICP and SNU units. (*Id.*) This did not prompt either Keyser or Burnett to review these use of force reports, to speak with Officer Tucker, or to ask any of Officer Tucker's superiors to speak with him. (Pl. Super. 56.1 ¶ 7.)

Moreover, as discussed, Superintendent Keyser and Deputy Superintendent Burnett would have been aware of six and four grievances, respectively, which alleged unprovoked assaults by Officer Tucker. As Superintendent Keyser himself acknowledged in his deposition, grievances, even if unsubstantiated, may indicate a pattern of behavior that warrants investigation or requires him or the deputy superintendent of security to have a talk with the officer. (Keyser EBT at 191:9–192:9, 276:5–17. And, as Plaintiff's expert has noted, "An effective grievance investigation must also include a consideration by supervisors of any past allegations made against the correction officer and past uses of force involving the officer, even if unsubstantiated, to determine whether a pattern of behavior is exhibited. If the conduct alleged is consistent with past allegations or use of force, further and more rigorous investigation may be warranted." (Ponte Rep. at 10–11.)

Finally, the evidence raises a genuine issue of material fact whether the Supervisor Defendants failed to take reasonable steps to abate the risk of harm posed by Officer Tucker to inmates. It is undisputed that the Supervisor Defendants did not take any action against Officer Tucker within the walls of Sullivan, by, for example, placing him on desk duty or assigning him to the control room (rather than foot patrol). Plaintiff's expert has opined that this is unreasonable. "[W]here a series of grievances indicates a pattern of potential misconduct by a correction officer, immediate re-assignment may be warranted. Re-assignment of the officer—for example, to duties without direct inmate contact—is often the prudent course of action[.]" (*Id.* at 11.) It is undisputed that neither the Supervisor Defendants nor their subordinates even spoke with Officer Tucker about his conduct. It is undisputed that the Supervisor Defendants failed to take anything but routine actions with respect to the uses of force and grievances that occurred during their tenure—except on two occasions, when they referred the March 27, 2015 use of force and the April 6, 2015 grievance to OSI. And regarding the grievance, Superintendent Keyser states that he referred the

grievance "because the inmate had made allegations of sexual abuse"—not because he hoped OSI would take further action with respect to Officer Tucker. (Dkt. No. 301 ("Second Keyser Decl.") ¶ 6.)

The Court therefore finds that Plaintiff has raised a genuine issue of fact with respect to each prong of her claim alleging that the Supervisor Defendants failed to protect Taylor from the threat of excessive force posed by Officer Tucker. The Supervisor Defendants' motion to dismiss on this ground is denied.

C. The Supervisor Defendants Are Not Entitled to Qualified Immunity on Plaintiff's Failure to Protect Claim with Respect to Officer Tucker

The Supervisor Defendants next argue that their actions were objectively reasonable, entitling them to qualified immunity. (SJ Br. at 13–15.)

1. Legal Standard

"Qualified immunity shields public officials from liability for civil damages if their actions were objectively reasonable, as evaluated in the context of legal rules that were 'clearly established' at the time." *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002). This framework is intended to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

"The entitlement is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." *Atwood v. Town of Ellington*, 468 F. Supp. 2d 340, 351 (D. Conn. 2007) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original)).

Qualified immunity involves application of a two-part test: (1) whether there was a constitutional violation, and (2) whether the defendant acted unreasonably under settled law, *i.e.*, whether the right was clearly established. *Mara v. Rilling*, 921 F.3d 48, 68 (2d Cir. 2019).[6]

Needless to say, the Court has already found that Plaintiff has raised a genuine issue of material fact that the Supervisor Defendants violated her brother's Eighth Amendment right to be free from cruel and unusual punishment.

The second prong of qualified immunity requires courts to "consider[] whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Bailey v. Pataki*, 708 F.3d 391, 404 (2d Cir. 2013) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *see also Doninger v. Niehoff*, 642 F.3d 334, 346 (2d Cir. 2011) ("in the light of pre-existing law the unlawfulness must be apparent") (internal quotation omitted).

"[T]he objective legal reasonableness of an official's actions must be viewed in light of the action's relationship to the clearly established law at the time." *Walentas v. Lipper*, 862 F.2d 414, 423 (2d Cir. 1988). The objective reasonableness test is met when "officers of reasonable competence could disagree on" the legality of the challenged actions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A court facing this question at summary judgment must ask whether "the evidence is such that, even when it is viewed in the light most favorable to the plaintiff and with all permissible inferences drawn in his favor, no rational jury could fail to conclude that it was objectively reasonable for the defendant to believe that he was acting in a fashion that did not

[6] The Second Circuit recognizes that "There is some tension in our Circuit's cases as to whether the qualified immunity standard is of two or three parts, and whether the 'reasonable officer' inquiry is part of step two—the 'clearly established' prong—or whether it is a separate, third step in the analysis." *Bailey v. Pataki*, 708 F.3d 391, 404 n.8 (2d Cir. 2013). Regardless, the analysis is not materially different.

violate a clearly established right." *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006) (internal quotation and alterations omitted).

The Second Circuit has held that "in order for a supervisor to be held liable under section 1983, both the law allegedly violated by the subordinate and the supervisory liability doctrine under which the plaintiff seeks to hold the supervisor liable must be clearly established." *Poe*, 282 F.3d at 126; *see also Atwood*, 468 F. Supp. 2d at 351 ("In the context of supervisory liability, as here, there is an additional part to . . . the inquiry; not only must the right violated have been clearly established, but the theory under which the supervisor may be held liable must also have been clearly established.").

For supervisory liability predicated on the actions of an employee, appellate precedent clearly establishes that a supervisor violates a plaintiff's constitutional rights when he or she fails to take reasonable steps to investigate a risky subordinate, particularly if that subordinate has engaged in a pattern of constitutional torts. *See Poe*, 282 F.3d at 141. For supervisory liability to issue under these circumstances, "the concept of notice" is key. *Id.* Actual or constructive notice of facts by a supervisor may "require [the supervisor] to do more," or to investigate "by virtue of his supervisory position." *Id.*

2. Qualified Immunity Does Not Shield the Supervisor Defendants

Plaintiff brings her Section 1983 claim against the Supervisor Defendants pursuant to a failure to protect theory, *i.e.*, for knowingly or recklessly ignoring a high degree of risk that Officer Tucker would violate Taylor's right to be free from excessive force.

The Supervisor Defendants' argument begins and ends with the second prong of qualified immunity. "[T]he undisputed facts establish that both Superintendent Keyser and Deputy Superintendent Burnett took appropriate actions to ensure the safety of the inmates at Sullivan in general and Mr. Taylor in particular." (Super. Br. at 15.) They maintain they did this by: "keeping

an eye out" for complaints against Tucker; taking Tucker's written statements after use of force incidents (which is standard practice following all use of force incidents); forwarding one suspicious use of force incident to OSI; and reviewing inmate grievances against Officer Tucker (which is done as a matter of course).

In light of the record, these actions do not entitle them to qualified immunity.

It is true that "A supervisor is not grossly negligent . . . where the supervisor took *adequate* remedial steps immediately upon learning of the challenged conduct." *Raspardo v. Carlone*, 770 F.3d 97, 117 (2d Cir. 2014) (emphasis added.) But, in order to be adequate, such responses must be meaningful. *See Talib v. Officer Garcia*, No. 98-cv-3318, 2000 WL 968772, at *7 (S.D.N.Y. July 12, 2000) (officials must make a "meaningful investigation into charges that [subordinates] had used excessive force") (quoting *Ricciuti v. NYC Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991)); *Selvaggio v. Patterson*, 93 F. Supp. 3d 54, 79 (E.D.N.Y. 2015) ("meaningful[] investigation" required after notice). The question is whether "*essentially* no action was taken" after the supervisors were put on notice. *Cosentino v. Town of Hamden*, No. 11-cv-1669, 2014 WL 1305148, at *3 (D. Conn. Mar. 31, 2014) (emphasis added).

Several cases from this Circuit confirm that opening real investigations and taking disciplinary action will typically shield a supervisor from liability, whereas merely going through the motions or conducting a superficial investigation will not.

In *Raspardo*, for example, the Second Circuit affirmed a district court's determination that qualified immunity shielded a supervisor who, in response to allegations that his subordinate was harassing female officers: conducted a thorough investigation; disciplined the officer through verbal counseling; ordered the officer not to pick up female officers in his patrol vehicle; gave the officer another verbal warning when he continued to pick up female officers; and, eventually,

suspended the officer for two days and ordered him to surrender two days' holiday time. 770 F.3d at 124. That same supervisor was protected by qualified immunity where, in response to allegations of racial harassment against the same subordinate, he placed the officer on administrative leave and opened an investigation, *id.*, and, in response to allegations of sexual misconduct perpetrated by the same officer, he contacted the prosecutor's office; demoted the officer from sergeant to patrol officer; and recommended at the conclusion of the investigation that the office be terminated, *id.* at 124–25.

By contrast, the Second Circuit held that a police chief was deliberately indifferent to his officers' unlawful use of force when the plaintiff introduced evidence that the chief, who oversaw a relatively small force, had received five serious complaints of police brutality and had conducted only cursory investigations in response. *Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319, 329–31 (2d Cir. 1986). The chief's investigation—which was limited to personally interviewing the officers—did not involve taking any formal or written statements, opening any investigations, or making any notation in the officers' files. *Id.* at 331. At trial, the chief "testified that, with respect to each claim or complaint, he had conducted as much investigation as he thought necessary" and that he had "satisfied himself with respect to each of the claims described above that no departmental rules had been violated and no disciplinary action was warranted." *Id.* at 330–31. The Second Circuit held that this was not enough, and that the jury was entitled to conclude that his "response to complaints of use of excessive force by City police officers was uninterested and superficial." *Id.*

In a third case, the Second Circuit held that supervisors were not entitled to qualified immunity after they failed to monitor an officer who "had been identified by the police department as a 'violent-prone' individual who had a personality disorder manifested by frequent quick-

tempered demands for 'respect,' escalating into physical confrontations for which he always disavowed responsibility[.]" *Vann v. City of New York*, 72 F.3d 1040, 1050–51 (2d Cir. 1995). The panel wrote that "the need to be alert for new civilian complaints filed after [the officer's] reinstatement to full-duty status was obvious," and the jury could find deliberate indifference from the "paucity of [the department's] monitoring system after such officers [are] reinstated." *Id.* *Vann*'s holding, therefore, suggests that, where the risk of a constitutional violation is heightened, and the supervisors are on notice of this heightened risk, employing ordinary investigative procedures may constitute deliberate indifference. *See also Shaw v. Stroud*, 13 F.3d 791, 801, 802–03 (4th Cir. 1994) (discussed favorably in *Poe*, 282 F.3d at 142–43) (upholding grant of qualified immunity to police sergeant (Smith) who, in response to brutality allegations about one officer, had a line sergeant speak with that officer, personally rode with the officer on patrol at least twice, and assigned a line sergeant to attend a trial where the officer's conduct during a stop was at issue); *but see id.* at 806 (Hall, J., dissenting) (supervisors were not entitled to qualified immunity where complaints against the officer received "ostrich-like investigation, perhaps from ineptitude, perhaps by design").

Returning to this case, when the evidence is viewed in the light most favorable to the Plaintiff, I cannot conclude that the Supervisor Defendants' anemic responses to Officer Tucker's record and continued conduct was anything but "ostrich-like." As described above, there is no dispute regarding the actions that the Supervisor Defendants took—or, more aptly—did not take with respect to the outlier behavior of Officer Tucker, of which the Supervisor Defendants were well aware. Simply put, there is no evidence in the record that they took *any* extra precautions with respect to Officer Tucker, and no evidence that they viewed him differently than any other officer at Sullivan.

Plaintiff's expert also opines that, in light of best correctional policies and practices, theirs was not a reasonable response. "Officer Tucker's use-of-force record—which was flagged for Superintendent Keyser and available well before April 13, 2015, despite the fact that Sullivan failed to track and monitor officers' use of force records—warranted immediate action to separate Officer Tucker from inmates on the ICP." (Ponte Rep. at 27.)

For all these reasons, the Supervisor Defendants' motion for summary judgment on the basis of qualified immunity is denied.

D. The Supervisor Defendants Are Entitled to Summary Judgment on the Remaining Theories of Liability

As discussed, the Supervisor Defendants also move for summary judgment with respect to Plaintiff's failure to train claims and failure to protect claims in relation to the other Officer Defendants. As noted above, Plaintiff misread an unambiguous brief, did not offer any substantive response to these arguments, and instead purported to reserve her rights in a footnote. The court rejects that effort; I will consider the Supervisor Defendants' arguments.

Despite the fact that Plaintiff did not respond to these aspects of the Supervisor Defendant's motion, "[a] district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (quoting *United States v. One Piece of Real Prop., 5800 S.W. 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004)). After considering the merits, I find that the Supervisor Defendants are entitled to summary judgment on these remaining claims.

1. Failure to Train

With respect to Plaintiff's failure to train theory, nothing in the evidence suggests that either Superintendent Keyser's or Superintendent Burnett's failure to recommend more training

for any Officer Defendant proximately caused Taylor's death. This is because there is no evidence that Officer Tucker or any other officer actually fell short on required training, no evidence that further training was available (or that it would have made a difference), and no plausible theory of the case that is consistent with failure to train liability. Again, Plaintiff principally contends that the attacks were the result of conspiracy, carried out in retaliation or out of racial animus. It is difficult to square this argument with one alleging that a lack of training proximately caused the attack.

2. Failure to Protect Against the Risk of Excessive Force by Other Officer Defendants

In addition, Plaintiff has not raised any triable issue of fact that the Supervisor Defendants were either "grossly negligent in supervising" the ten other Officer Defendants or that they "exhibited deliberate indifference" by failing to act on information about them. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). The materials cited in Plaintiff's opposition do not include any evidence regarding the disciplinary, use of force, or grievance records of any of the other ten Officer Defendants—with the exception of one grievance that mentions Sergeant Frunzi. The record similarly reveals no instance where DOCCS personnel in Albany singled out any of these other ten Officer Defendants as a potentially problematic officer. Where there is "no indication" of "prior problems," failure to review or investigate subordinates is "mere negligence," which is "insufficient as a matter of law to state a claim under section 1983." *Poe*, 282 F.3d at 145.

* * * *

In sum, the Court DENIES the Supervisor Defendants' motion for summary judgment on Plaintiff's Section 1983 claim (First Cause of Action), to the extent the claim is based on a theory of failure to protect Taylor from the risk of excessive force posed by Officer Tucker.

The Court GRANTS the Supervisor Defendants' motion for summary judgment on Plaintiff's Section 1983 claim (First Cause of Action), to the extent the claim is based on either a theory of (*i*) failure to train or (*ii*) failure to protect Taylor from the risk of excessive force and racial discrimination posed by the other Officer Defendants.

The Court now turns to Dr. Lee's motion.

DR. LEE'S MOTION FOR SUMMARY JUDGMENT

I. Factual Background

A. Dr. Lee

Dr. Seung Ho Lee is a psychiatrist, duly licensed to practice medicine in New York. (Lee 56.1 ¶ 1.) Dr. Lee graduated from medical school in Korea in 1967 and completed a three-year psychiatric residency in New York. (*Id.* ¶¶ 2–3.)

Dr. Lee has been employed by OHM as a psychiatrist since 1976. (*Id.* ¶ 5.) He has worked at Sullivan since 2011, providing psychiatric care to its incarcerated patients. (*Id.* ¶ 6.)

The psychiatric team at Sullivan includes Dr. Lee and two other psychiatrists from the New York State Office of Mental Health ("OMH"): Dr. Syed Mahmud, who is both the supervisory psychiatrist at Sullivan and also in charge of the ICP unit, and Dr. Larry Ertrachter, who, like Dr. Lee, reports to Dr. Mahmud. (*Id.* ¶¶ 7, 9.) All Sullivan psychiatrists, in turn, report to Dr. Venkateswara Inaganti, the OMH Hudson River Regional Clinical Director, who worked offsite and supervised psychiatrists by providing a second layer of review based on records forwarded to him. (*Id.* ¶ 10.)

B. Overview of Mental Health Treatment for Prisoners

In New York State correctional facilities, services provided for inmates include, among others, the Residential Crisis Treatment Program ("RCTP"); ICP; inpatient hospitalization;

traditional outpatient clinic services, such as psychotherapy; and, when indicated, pharmacotherapy. (*Id.* ¶ 13.)

1. Residential Crisis Treatment Program ("RCTP")

Sullivan's Residential Crisis Treatment Program ("RCTP"), which consists of both observation cells and a dormitory, is intended for short-term crisis intervention. (*Id.* ¶ 17.)

Inmate-patients at Sullivan are sent to RCTP observation cells when they are "psychiatrically unstable, unpredictable and/or a danger to themselves or others." (Hechtkopf Decl. Ex. 9 at -11656.)

Inmates are transferred out of RCTP when: the crisis precipitating the original transfer has been resolved; psychiatric assessment suggests the patient is capable of meaningfully participating in programming and can return to a lower level of care; or the psychiatric assessment determines the need for an increased level of treatment, such as transfer to an in-patient hospital for higher levels of care. (*Id.* at -11662.)

2. Central New York Psychiatric Center ("CNYPC")

In addition to providing mental health services at individual prisons like Sullivan, OMH operates one inpatient psychiatric hospital for inmates, the Central New York Psychiatric Center ("CNYPC"). (Lee 56.1 ¶ 24.) Once at the CNYPC, inmates like Taylor become eligible to have a court order that they be forcibly medicated.

In acute circumstances, if a psychiatrist believes an inpatient inmate is mentally ill, but the inmate refuses to make medication, the psychiatrist may provide treatment, regardless of objection, "where the patient is presently dangerous and the proposed treatment is the most appropriate reasonably available means of reducing that dangerousness." N.Y. Comp. Codes R. & Regs. tit. 14, § 527.8(c)(1); *see also id.* § 527.8(c)(5)(i).

For longer, non-emergency circumstances, an inmate may not be given a psychotropic medication over his objection without court authorization. *Id.* § 527.8(c)(5)(i). This is called court-ordered psychotropic medication ("COPM"). Title 14, Section 527.8 of the Compilation of Codes, Rules, & Regulations for the State of New York lays out the requirements that the clinical director of CNYPC (or his designee) must follow to make a reasoned decision concerning the administration of the proposed medication. *Id.*

C. Taylor's Mental Health Treatment History

1. Taylor's Twenty-Year-Long Mental Health Treatment Pre-Sullivan (May 1995 to November 24, 2014)

Taylor began receiving mental health treatment in May 1995, shortly after he entered DOCCs custody. (Lee 56.1 ¶ 33.)

On May 11, 1995, Taylor was admitted to CNYPC and diagnosed with Delusional Disorder and Paranoid Personality Disorder. (Hechtkopf Decl. Ex. 18 ("Colley Rep.") at 3.) While at CNYPC, Taylor was given emergency antipsychotic medication, but generally refused to take most doses of his prescribed medication, haloperidol. (*Id.*) He was discharged from CNYPC on May 31, 1995. (Hechtkopf Decl. Ex. 17 at -55188.)

Between May 1995 and October 2009, after Taylor had been discharged from CNYPC, he "largely refused" mental health services, as well as his prescribed psychotropic medication. (Lee 56.1 ¶ 37.)

On October 22, 2009, Taylor was again admitted to CNYPC. (*Id.* ¶ 38.) At the time of his admission, he was "barking like a dog, acting bizarre, delusional, withdrawn . . .[and] refusing to talk to [the] staff and treatment team." (*Id.* ¶ 39.) His admission report noted his history of infractions for violent and disruptive behavior including, "Assault on inmate, Fighting, Weapon, and Violent Conduct [*sic*], Refusing direct Order, Threats . . . Interference with Employee,

Property damage and loss, Create Disturbance [*sic*]." (*Id.* at 4.) Notes from his mental examination administered upon admission say that he had poor personal hygiene, smelled, and appeared to be of a thin weight. (*Id.*) They explain his "thought process was Tangential and Circumstantial, but content indicated paranoia," and that "His affect was anxious, angry and inappropriate was suspicious and paranoid [*sic*]." (*Id.*)

Taylor's primary admission diagnosis was Schizoaffective Disorder, a new diagnosis. (*Id.*) Taylor was immediately prescribed an antipsychotic and an antimanic medication. (*Id.*)

Taylor had difficulty adjusting to hospitalization and required multiple "stat IM medication for psychotic agitation." (*Id.*) The treating psychiatrist then petitioned for Court Ordered Psychiatric Medication ("COPM"), which was granted. (*Id.*)

Taylor spent a total of seven months at CNYPC. (Lee 56.1 ¶ 43.) On May 17, 2010, he was discharged to the Attica Correctional Facility ("Attica"). (*Id.*) His outpatient treatment plan, discharge summary, and progress notes—all drafted by CNYPC staff—attributed his improvement to medication, and noted that without it, he was subject to "mood change[s], auditory hallucinations, paranoi[a], [and] delusion[s]." (Eisenberg Decl. Ex. 104 at -2092; Ex. 48 at -626; Ex. 51 at -1132.)

At Attica, Taylor was placed initially in the Attica special treatment program, where he remained for two months, when he was transferred to Attica's ICP unit. (*Id.* ¶¶ 44–45.) He remained in the ICP unit until January 24, 2011, when he was transferred to the ICP unit at the Wende Correctional Facility. (*Id.* ¶ 45.)

The facts are not clear as to when Taylor's COPM expired—one set of notes says that Taylor's COPM expired on May 20, 2011, and he refused subsequent medications after that time (Hechtkopf Decl. Ex. 21 at -55710), while his "core history" says that his psychiatric medications

were discontinued on April 22, 2012 (Eisenberg Decl. Ex. 44 ("Core History") at -023). What is undisputed is that Taylor refused medication after his COPM expired, and that he was subsequently neither prescribed nor forced to take medication. (Lee 56.1 ¶¶ 47, 51; Pl. Lee 56.1 Resp. ¶¶ 47, 51).

Beginning in early 2011, Plaintiff was transferred among ICP and other mental health treatment programs at several prisons. (Lee 56.1 ¶ 51.) At each facility, he consistently refused to take medication. (*Id.*) Taylor's core history states that he "remained stable" without these medications but Plaintiff disagrees, pointing out that prior to his death, Taylor exhibited delusions, hallucinations, paranoia and symptoms of psychosis. (Pl.'s Resps. to Dr. Lee's Rule 56.1 Statement, Dkt. No. 285 ("Pl.'s Lee 56.1 Resp.") ¶ 47.)

2. Taylor's Transfer to Sullivan and Two-Month-Long Initial Treatment (November 24, 2015 to January 29, 2015)

At Sullivan, Taylor was assigned to the ICP. (Lee 56.1 ¶ 55.)

At the Sullivan ICP, Taylor's primary therapist was social worker Laura[7] Miller ("Miller"), LCSW/Social Worker II. (*Id.* ¶ 60.) In January 2015, Miller observed that Taylor refused to come out of his cell for call-outs, was refusing all programs, and presented as hostile during cell-side interactions. (*Id.* ¶ 61.) She also observed that his hygiene remained poor. (*Id.* ¶ 62.) She noted that Taylor denied having auditory hallucinations and that she did not observe psychotic symptoms during her session. (*Id.* ¶¶ 61–62.)

On January 14, 2015, Taylor was put on medical keeplock—confinement to his cell—for refusing a tuberculosis test. (NYSCOC Prelim. Rep. at -56105.)

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[7] She is referred to as "Linda Miller" on typed, sworn statement taken on June 1, 2015. (Hechtkopf Decl. Ex. 28 at -56223.)

3. Taylor's One-Month-Long Admission to Sullivan's RCTP (January 29, 2015 to February 25, 2015)

On January 29, 2015, Officer Tucker submitted a mental health referral for Taylor, writing that Taylor had not showered or cleaned his cell in over two months, and marking in a checklist that Taylor talked about "Giving up" (listed as a possible self-harm concern), and that he exhibited verbal behaviors such as "Makes verbal threats," "Yells and screams," and "Talks about: People being out to get me." (Eisenberg Decl. Ex. 56 at -215.)

Taylor was initially evaluated by Dr. Ertrachter, and then formally admitted to the RCTP for further observation. (Lee 56.1 ¶ 67.) During his evaluation, Taylor complained that the "officer who brought him to this area to be seen" was trying to "jump" him and was harassing him to get him to clean his cell. (Eisenberg Decl. Ex. 66 at -103.) At the time of his admission, his hygiene was recorded as "poor" and his cell was described as "filthy," with mold accumulating behind his property. (*Id.* Ex. 76 at -55105.)

When Dr. Lee returned to work at Sullivan in early February 2015, Taylor was assigned as one of his patients. (Lee 56.1 ¶ 69.)

It is unclear whether Dr. Lee reviewed Taylor's medical history when Taylor was assigned to his service or ever. Dr. Lee testified that he "probably" would have read Taylor's core history prior to seeing Taylor and then that he "believes" he reviewed the assessment evaluation prior to treating Taylor; he said that his routine is to review documents if they are available, which Taylor's were. (Hechtkopf Decl. Ex. 3 and Eisenberg Decl. Ex. 65 (collectively, "Lee EBT") at 111:12–18; 133:6–134:8.) However, Dr. Lee also told the Medical Review Board during its review of Taylor's death that "if he was aware of the fact that Taylor had previously had a COPM, he probably would have sent him to CNYPC." (NYSCOC Prelim Rep. at -56107.) Given that

Taylor's COPM would have been in his medical history, this suggests that Dr. Lee did not actually review Taylor's history.

Dr. Lee testified that he and other team members participated in daily treatment team meetings, where they discussed all patients, including Taylor. He further testified that during these meetings, the team reviewed the nurses' notes from the prior day's rounds, as well as the notes of any other member of the mental health team who met with the patient. (Lee EBT at 159:17–23, 160:9–25.) There are no notes or records from these meetings. (Hechtkopf Decl. Ex. 7 and Eisenberg Decl. Ex. 70 (collectively, "Sneckenberg EBT") at 25:18–26:25.) Plaintiff claims that at these meetings Dr. Lee failed to respond to important observations and questions about Taylor's condition and, more generally, that he failed to engage with other members of the mental health treatment team regarding key components of Taylor's treatment. (Pl. Lee 56.1 Resp. ¶ 71.)

a) Taylor's Evaluations While in RCTP

At first, Taylor refused to meet either RCTP psychiatrist for a private interview. (Lee 56.1 ¶ 72.) Nurses and social workers had daily interactions with Taylor, but during these "interactions," Taylor often refused to talk, sometimes going into bed to cover himself up. (Eisenberg Decl. Ex. 66 at -197.) On the "nursing note" forms, Taylor's hygiene was consistently recorded as "fair," but it is not clear whether or not the nurses were actually able to determine whether Taylor was actually showering, as he refused to leave his cell. The nurses also indicated that Taylor did not exhibit signs of "dangerousness." (Lee 56.1 ¶ 74.) But other members of the treatment team believed that, given Taylor's history, he did pose a substantial risk of harm to himself or others. (*See* Eisenberg Decl. Ex. 62 ("Jackson EBT") at 80:21–81:6; Sneckenberg EBT at 103:15–104:2.)

OMH requires that the RCTP treatment team submit a "7 Day Consult" for each patient who remains in the RCTP for at least seven days. (Lee 56.1 ¶ 80.) The report must then be updated every seven days thereafter. (*Id.*)

On February 5, 2017, Kristie Sneckenberg, Psychologist Level II, prepared Taylor's 7-day consult. (Lee 56.1 ¶ 82.) As a "Psychologist II" with OMH, Sneckenberg "see[s] patients . . . provide[s] therapy both individual and group, if necessary . . . provide[s] counseling," and works with the interdisciplinary team to ensure that patients receive appropriate treatment. (Sneckenberg EBT at 12:21–13:4.) She was temporarily assigned to the RCTP at the time of Taylor's evaluation—her regular assignment involved working as the Pre-Release Coordinator for inmate patients preparing for their release from DOCCS custody. (Lee 56.1 ¶ 84.) In her normal role she was "very rarely" in the mental health unit. (*Id.*) Nevertheless, Dr. Lee stated that he had no reason to disagree with Sneckenberg's observations. (Lee EBT at 167:8–168:5.)

Sneckenberg sent the 7-day consult to Dr. Inaganti on February 5, 2015, cc'ing the rest of the medical team, including Dr. Lee. In her cover email to Dr. Inaganti, Sneckenberg wrote:

> Dr. Inaganti, Taylor has not showered in 60 days and states he is a trained Marine (delusion) and so has been trained to not need showers avoiding offensive odor. He is refusing medication and treatment and has remained in his RCTP cell with the exception of his first interview. He does engage cell side but becomes paranoid and delusional with pressured speech within minutes. He may need admission to CNYPC.

(Lee 56.1 ¶ 86.)

That same day, Dr. Inaganti responded: "Go ahead and send me a TTN [Transfer Termination Note]. Please document and emphasize (paranoid and delusional) statements make him a target to get hurt by other inmates." (Eisenberg Decl. Ex. 60.) Dr. Inaganti says that by this email, he "did not dictate that the Sullivan practitioners had to send Taylor for in-patient treatment"

but that if they could make a case for such treatment, they should send the TTN. (Hechtkopf Decl. Ex. 6 ("Inaganti Decl.") ¶ 12.) No TTN was sent.

On February 12, 2015, Raymond Fernekes, Social Worker II, prepared a 14-day consult to update Dr. Inaganti on Taylor's status. (Eisenberg Decl. Ex. 67 ("14-Day Consult").) Fernekes observed that Taylor "continue[d] to not shower or provide self-care other than eat/drink." (*Id.* at -55084.) He explained that Taylor was "being considered last week for admission to CNYPC, but was held back to see if the extended stay would show any possible positive movement and cooperation, which has not come to light." (*Id.* at -55085.) Dr. Lee testified that he was "the one who made the decision" to hold Taylor back, (Lee EBT at 269:2–7), which the unit's acting chief and nurse administrator, Garrick Jackson, confirmed. (Jackson EBT at 95:8–24.) Notably, Dr. Lee made this decision without having yet seen Taylor, who had refused all regular private interviews with Dr. Lee at that time. (Lee 56.1 ¶ 92.)

Dr. Inaganti wrote in response to Fernekes' evaluation that the team should "consider admission to CNYPC early next week." (Eisenberg Decl. Ex. 68.) He asked that he be sent the "TTN early next week, so that I can approve admission, provided that there is no turnaround." (*Id.*) Dr. Lee was not on Dr. Inaganti's initial email, but the next day, February 13, Sneckenberg—who also was not on the original email but had received it from another member of the team—forwarded Dr. Inaganti's responses to Drs. Lee, Mahmud, and Ertrachter, writing "Gentleman [*sic*] Dr. Inaganti wanted him send [*sic*] up early next week . . . . . What are we doing with this????" (Eisenberg Decl. Ex. 69.) There is no indication that she received any response from Dr. Lee.

On February 18, 2015, Dr. Lee visited Taylor "cell-side" because Taylor continued to refuse his psychiatric interviews in a private room. (Lee 56.1 ¶ 93.) Dr. Lee's notes state that

Taylor said he felt "good, beautiful." (Hechtkopf Decl. Ex. 32 at -079.) However, Taylor also told Lee that he did not feel safe and requested to be placed in protective custody. (*Id.*) Lee wrote:

> Pt. says, "I need to protect myself. They beat me up. I like Sullivan. I want to be in PC at Sullivan." Speech is loud and pressured. He states that coming out of his cell for interview will make prejudice people lie [*sic*]. He is paranoid and delusional. He state that he will not come out for private interview. Mood is angry. He denies having mental illness and refuses meds. ASSESSMENT/CURRENT DIAGNOSTIC IMPRESSION/PLAN – Encourage pt to take meds.

(*Id.*)

The next day, February 19, 2015, Sneckenberg sent a 21-Day Consult to Dr. Inaganti. She wrote, "It is the consensus of most of the team that [Taylor] requires inpatient treatment for his significant psychiatric decompensation. There has been no change in his status and he continues to refuse medication." (Eisenberg Decl. Ex. 78 ("21-Day Consult") at -55103). She also wrote that Taylor had not showered in 90 days. (*Id.*)

Dr. Inaganti wrote back that Taylor's stay could be extended and that "Inpatient level of care seem[s] appropriate." (Hechtkopf Decl. Ex. 40 at -55105.)

On February 25, 2015, Dr. Lee again met with Taylor cell-side. (Lee 56.1 ¶ 100.) Dr. Lee's notes from his interview say:

> Pt was interviewed cellside because he continues to refuse to come out of his cell for interview in a private room. When asked how he felt, he said 'Beautiful.' He denied having complaints except for missing of his properties and not being in PC. He has been refusing to come out of his cell for private interview continually. He stated that he has been taking shower in RCTP . . . Pt was talkative. He talked loudly. He refused to talk about the Marines which he said he was in. However speech was relevant and coherent. He claimed that an officer on his block assaulted him and that the officer is prejudicial. He said, 'I need to protect myself. I want to be in PC.' He denied hallucinations. He denied suicidal and homicidal ideas. He stated that he eats and sleeps very well and describes his mood as 'beautiful.' He denied depression. Initially he was pleasant, but

> he became upset when he was told that he has to go back to his block to initiate the process for PC. – He denied suicidal ideas.

(Lee 56.1 ¶ 101.) Dr. Lee also wrote that he encouraged Taylor to consider taking medications, but that Taylor continued to refuse to do so. (*Id.* ¶ 102.)

Dr. Lee testified that, based on this meeting with Taylor, he concluded that Taylor had "no symptoms . . . no acute symptoms. He was not suicidal or homicidal. And one of the major concerns was that he was not taking shower. He was taking shower. And often he described he's good, using word 'beautiful' . . ." (Lee EBT at 200:23–201:8.)

As a result, Dr. Lee concluded that Taylor could be returned to the ICP program to continue treatment in an outpatient setting. (Lee 56.1 ¶ 97; Lee EBT at 200:18–22.)

Dr. Lee says that Dr. Mahmud, who supervised the other two psychiatrists at Sullivan and who oversaw care at the ICP unit, agreed with his decision. (*Id.*) Dr. Lee recorded in his progress notes on February 25 that "This case was discussed with Dr. Mahmud and it was concluded that pt no longer needs to be in RCTP and he should be sent back to his block. Reportedly he will be placed back in keeplock when he goes back to his bloc." (Lee 56.1 ¶ 105.) Dr. Mahmud said that Dr. Lee's progress note indicated that Taylor's condition had improved and that he was showering, and based on that information, he agreed that it was appropriate to return Taylor to ICP for further monitoring. (Hechtkopf Decl. Ex. 5 ("Mahmud Decl.") ¶¶ 14–15; Hechtkopf Decl. Ex. 32 at -083–85 (Lee's notes from February 25 meeting with Taylor); Eisenberg Decl. Ex. 63 ("Mahmud Statement").) Dr. Mahmud had never seen Taylor nor reviewed his records. (*Id.*)

Dr. Lee testified that he knew that by discharging Taylor to ICP, he was sending him somewhere where he could be seen by mental health staff and where he could have treatment. He further stated that, "In case there is a problem . . . ICP staff can call us or they can bring in [*sic*] for another evaluation and the doors are open all the time." (Lee EBT at 201:11–25.) Plaintiff

disagrees with Dr. Lee's assessment, claiming that while these services *might* be available to ICP inmates more generally, they may not have been available to Taylor, who, as Dr. Lee knew, was confined to his cell and not engaging with programming or mental health professionals. (*See* Lee 56.1 ¶ 68.)

b) The RCTP Treatment's Teams Differing Opinions on Taylor's Treatment

It is clear that during Taylor's time in the RCTP, the members of the treatment team differed as to how to treat him. It is also undisputed that, while each member of the treatment team has a chance to express his or her opinion on the appropriate treatment for a patient, ultimately it is up to the treating psychiatrist to decide the appropriate course of treatment for the patient. (Lee 56.1 ¶ 98.)

Most team members, including Sneckenberg, believed Taylor should be sent to CNYPC for inpatient treatment and COPM, and did not agree with Dr. Lee's decision to hold Taylor or send him back to ICP. (Lee 56.1 ¶ 96.) For example, in a statement taken on June 18, 2015, Garrick Jackson, the Acting Unit Chief at the time of Taylor's admission, said: "Every time we discussed Mr. Taylor's case, the plan that was discussed was to admit him to [CNYPC.] Dr. Lee would indicate that he wanted to have more time to evaluate him . . . Then all of a sudden Dr. Lee wanted to discharge him on the day that he did. Basically the rest of the team did not agree with this plan . . ." (Eisenberg Decl. Ex. 61.) He further stated that "99.9% of the time we would admit the patient to Central [*i.e.*, CNYPC] in this case." (*Id.*)

4. Taylor's Return to ICP and Death (February 25, 2015 to April 13, 2015)

Taylor was returned to the ICP on February 25, 2015. (Lee 56.1 ¶ 111.) Taylor was in "keeplock" because he still refused the PPD skin test to diagnose a tuberculosis infection. (*Id.* ¶¶ 106–07.) He was in keeplock until April 8, 2015. (*Id.* ¶ 119.)

Taylor was reassigned to Dr. Mahmud and Laura Miller. (Lee 56.1 ¶¶ 114–15.) In the ICP, Taylor was supposed to receive daily mental health checks, during rounds in the morning and afternoons, but there is no formal documentation that these checks actually occurred, other than Dr. Mahmud's general statement that Taylor "was seen by clinicians on the treatment team daily." (Mahmud Decl. ¶ 19.)

Taylor was scheduled for an appointment with Dr. Mahmud on March 23, 2015, but he did not appear for the appointment. (Lee 56.1 ¶ 118.)

During the time between which Taylor was returned to the ICP and his death, Miller says that she observed no psychotic symptoms. However, she also said that while he was "stable enough to send back to the block" he was "resistant to treatment . . .delusional . . . verbally aggressive . . .and wasn't on meds." (Hechtkopf Decl. Ex. 42 at -56223.) Upon review the contemporaneous reports of mental health team, Plaintiff's expert and the Officer Defendants' expert noted that Miller's and other's observations of "irrelevant speech, loose associations per separation and paranoia . . . are symptoms of psychosis." (Eisenberg Decl. Ex. 8 ("Colley EBT") 230:19–24; *id.* Ex. 49 ("Bardey EBT" 49:4–53:5 (testifying that Taylor was "psychotic" and "delusional" while in the ICP at Sullivan).)

The ICP team felt generally that Taylor should be admitted to CNYPC and, would "discuss on occasion to reconsider readmission during team meetings." (Eisenberg Decl. Ex. 77 at -56245 (sworn written statement of Fernekes).) But, they felt that their hands were tied because "the RCTP team [of which Dr. Lee was principal psychiatrist] relayed that this was how the [inmate patient] Taylor is going to be." (*Id.*)

Dr. Lee testified that after he discharged Taylor, he hadn't "heard anything about him and nothing showed up, nothing came up in the round, so [he] assumed he was okay." (Lee EBT at 246:12–15.)

Taylor was once referred for mental health evaluation while in the ICP, on April 8, 2015, because another nurse, who visited him when he was taken off of medical keeplock, observed that he had toilet paper around his neck. (Lee 56.1 ¶ 122.) In response to the mental health referral, Miller spoke with Taylor cell-side. She found that he did not appear to be in acute distress. (*Id.* ¶ 123.) She observed that this behavior "appear to be an aspect of patient's baseline behavior," and that she did not feel he was in crisis but that he "was bizarre and would do bizarre things." (*Id.* ¶ 124.) Miller determined that he did not need to be transferred to the RCTP and that he should remain in ICP. (*Id.* ¶ 125.)

On April 13, 2015, Taylor was involved in an altercation with correction officers in the E-North Housing unit. (*Id.* ¶ 131.) Taylor was pronounced dead at the prison infirmary later that morning. (*Id.* ¶ 135.)

II. Dr. Lee's Motion for Summary Judgment

A. Overview of Claims Against Dr. Lee; Proximate Causation

The basic claim against Dr. Lee is that—against the advice of many colleagues—he did not transfer Taylor out of the ICP and into an inpatient program providing a higher level of mental health care. If he had done that, Taylor would not have been in E-North on April 13, 2015—the date he was beaten to death.

It is quite clear from the papers that Plaintiff seeks to have Dr. Lee held liable for her brother's death under two theories: section 1983 deliberate indifference (Fifth Cause of Action) and New York state medical malpractice (Sixth Cause of Action).

That effort fails.

"Defendants may be held liable under § 1983 if they . . . exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." *Hawkins v. Nassau Cty. Corr. Facility*, 781 F. Supp. 2d 107, 112 (E.D.N.Y. 2011) (internal quotation and alterations omitted). Similarly, "In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." *Gillespie v. N.Y. Hosp. Queens*, 96 A.D.3d 901, 902, 947 N.Y.S.2d 148, 149 (2d Dep't 2012). In each instance, a defendant can be held liable only for injuries proximately caused by his deliberate indifference or his deviation from accepted medical practices.

Viewing the facts in the light most favorable to the Plaintiff, I cannot conclude that Taylor's death was proximately caused by Dr. Lee's failure to transfer him to an inpatient program outside of Sullivan.

"When evaluating causation under § 1983, courts consider the 'foreseeability or the scope of the risk created by the predicate conduct,' and must conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Anderson v. City of N.Y.*, No. 16-cv-6629, 2017 WL 2729092, at *4 (S.D.N.Y. June 23, 2017) (quoting *Cty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1548–49 (2017)).

Plaintiff fails to meet either the substantial factor or foreseeability prong.

First, there is no indication that Taylor's untreated mental illness had a direct relationship to the E-North altercation. There is not a scintilla of evidence that Dr. Lee decided to leave Taylor in E-North as a result of any interaction with Officer Tucker, Sergeant Frunzi, or any of the Officer

Defendants. Nor is there evidence that Taylor had behaved aggressively against correction officers in the past. His mental health history as an inmate includes a few, but not many, acts of aggression—at least one during his time at CNYPC in 1995 (Eisenberg Decl. Ex. 45 at -559–60), his throwing feces and urine at a CO in 2002, and again during his admission to CNYPC in 2010 (*id.* Ex. 48 at -622)—and none within five years of his death. Two occurred at CNYPC, not in prisons, and only one involved a correction officer. Plaintiff points to no documentation of aggression in Taylor's more recent psychiatric history, despite his propensity for agitation, and provides no evidence that Taylor acted violently or aggressively while in the Sullivan ICP or RCTP.

There is also no indication that the E-North altercation was foreseeable—at least to Dr. Lee. There is no evidence in the record that Dr. Lee was aware of Officer Tucker's increased tendency to employ force, or of the multiple grievances alleging unprovoked assaults and sexually abusive pat-downs. Although Dr. Lee knew that Taylor had a history of "paranoid thoughts about correctional officers" generally (Mem. in Supp. of Def. Lee's Mot. for Summ. J., Dkt. No. 277 ("Lee Br.") at 21), a history of general complaints is insufficient to make an altercation with COs foreseeable—particularly as Plaintiff points to no documentation that Taylor had physical conflicts with these COs in the past.

Plaintiff argues that Dr. Lee should have foreseen an altercation with Officer Tucker, because Taylor claimed, upon his admission to the RCTP, that the officer who brought him there (Officer Tucker), had threatened him. But this one comment does not make a life-ending altercation "foreseeable" to an OMH employee.

So there is absolutely no basis on which Plaintiff can hold Dr. Lee accountable for her brother's death, on a theory that Dr. Lee's failure to move Taylor to CNYPC left him in the wrong place at the wrong time. The case against Dr. Lee will not proceed to the jury on that theory.

The question remains: do either of Plaintiff's claims against Dr. Lee remain viable because Dr. Lee's deliberate indifference and/or medical malpractice caused him to suffer another injury, specifically, prolonged psychosis and/or worsened mental distress? I find that such injury, if there is evidence of it, would be cognizable under both causes of action. *See, e.g.*, *Fricano v. Lane Cty.*, No. 16-cv-1339, 2018 WL 2770643, at *9 (D. Or. June 8, 2018) ("Here, there is evidence from which a reasonable jury could find that, because of Mr. Pleich's failure to take reasonable ameliorative steps, Mr. Fricano suffered through an unnecessarily long period of psychosis.").

I also conclude that there is a genuine issue of material fact whether Taylor was acutely psychotic when he returned to the ICP. The evidence shows that, after being discharged from the RCTP, Taylor continued to experience symptoms of psychosis. He still refused to shower or leave his cell, and exhibited "hostile" and "odd behavior." (Eisenberg Decl. Ex. 55 at 199–205.) On one occasion, a few days prior to his death, he had written on toilet paper and was wearing it around his neck like a scarf. (*Id.* at -211.)

With that injury in mind, the Court turns to the claims against Dr. Lee.

B. Section 1983 Claim for Deliberate Indifference to Serious Medical Needs (Fifth Cause of Action)

The Eighth Amendment's Cruel and Unusual Punishment Clause requires prison officials to ensure that inmates receive adequate medical care. *Farmer*, 511 U.S. at 832. Accordingly, a prison official who exhibits "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment because such action "constitutes the unnecessary and wanton infliction of

pain." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

As with other Eighth Amendment claims, deliberate indifference to serious medical needs has both an objective and a subjective prong. *Hawkins*, 781 F. Supp. 2d at 112. The objective prong requires that "the alleged deprivation of adequate medical care . . . be 'sufficiently serious.'" *Salahuddin*, 467 F.3d at 279 (quoting *Farmer*, 511 U.S. at 844). The subjective requirement is that the "charged official must act with a sufficiently culpable state of mind." *Id.* at 280 (quoting *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)).

1. Plaintiff Raises a Genuine Issue of Fact Whether Taylor Was Denied Constitutionally Adequate Care

A "sufficiently serious" deprivation occurs when 'the conditions, either alone or in combination, pose an unreasonable risk of serious damage to [plaintiff's] health.'" *King v. Falco*, No. 16-cv-6315, 2018 WL 6510809, at *7 (S.D.N.Y. Dec. 11, 2018) (quoting *Darnell v. Pineiro*, 849 F.3d 17, 30 (2d Cir. 2017)). This, in turn, has two components: *first*, whether the prisoner was actually deprived of adequate medical care, *id.*, and, *second*, whether the inadequacy in medical care is sufficiently serious. *Salahuddin*, 467 F.3d at 279. The Court looks at "how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Id.* at 280.

a) A Genuine Issue of Material Fact Exists as to Whether Taylor Was Denied Adequate Care

There is no doubt that Taylor was provided with medical care while at Sullivan—the question here is whether that care was adequate. "Medical care is adequate where the care provided is a 'reasonable' response to the inmate's medical condition." *Melvin v. Cty. of Westchester*, No. 14-cv-2995, 2019 WL 1227903, at *9 (S.D.N.Y. Mar. 15, 2019) (internal

quotation omitted). Federal courts are "reluctant to second guess medical judgments and constitutionalize [medical malpractice claims]"—when a prisoner has received some medical treatment, deliberate indifference will be found when "the medical attention rendered [was] so woefully inadequate as to amount to no treatment at all." *Johnson v. Wright*, 234 F. Supp. 2d 352, 360 (S.D.N.Y. 2002) (internal quotation omitted). For example, one Second Circuit panel found deliberate indifference when the "course of treatment was largely ineffective [and the physician] declined to do anything more to attempt to improve [the inmate's] situation." *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994). However, "Mere differences in opinion, whether between doctors or laymen, based on medical care does not give rise to an Eighth Amendment violation of inadequate medical treatment pursuant to section 1983." *Webb v. Jackson*, No. 92-cv-2149, 1994 WL 86390, at *3 (S.D.N.Y. Mar. 16, 1994), *aff'd*, 47 F.3d 1158 (2d Cir. 1995).

Taking all the facts in a light most favorable to Plaintiff, a jury could find that Dr. Lee failed to provide Taylor with constitutionally adequate care. Specifically, a jury could find that Dr. Lee provided inadequate treatment when he refused to refer Taylor for further treatment beyond Sullivan's in-house RCTP, and eventually sent him back to ICP housing without changing his treatment plan.

Dr. Lee missed several opportunities to either transfer Taylor to CNYPC for a higher level of inpatient care, to seek a COPM, or to change his treatment plan within RCTP. When Taylor was admitted to the RCTP on January 29, 2015, he was "paranoid" and "delusional." (Eisenberg Decl. Ex. 58 at -061–63; *id.* Ex. 66 at -101–03.) He claimed to be "an officer trained in sex crimes" and a "trained soldier." (*Id.*) He denied any mental illness. (*Id.*) Taylor remained in the RCTP for 27 days, during which his providers (except for Dr. Lee) noted no improvement. Taylor consistently refused to come out of his cell and speak with mental health staff. On the few

occasions that he did speak with the staff, he was described as "delusional" and "paranoid." (Eisenberg Decl. Ex. 66 at -107, -123, -131.) There is no evidence that Taylor showered during the month he was under observation at the RCTP. (*See id.* at -135.) As a result of Taylor's behavior, staff members consistently recognized that he might need further treatment and hospitalization—their notes say that Taylor "appears to need inpatient hospitalization and possible COPM" and "CNYPC is being actively considered." (*See id.* at -145, -183.)

Dr. Lee was made aware of Taylor's behavior as well as his fellow team members' beliefs that Taylor required additional levels of care. These issues were raised in daily meetings and, more than once, Dr. Lee was included on emails in which staff members inquired about raising Taylor's level of care by admitting him to CNYPC, including emails from the regional clinical director Dr. Inaganti. (*See* Lee EBT at 163:14–165:14, 167:8–168:5; Eisenberg Decl. Ex. 69.) Dr. Lee never responded to this information. He neither replied to the emails nor informed the staff of his next steps.

Dr. Lee decided that he would not follow Dr. Inaganti's suggestion to transfer Taylor because he felt more observation was needed. Dr. Lee made this decision when he had yet to meet with Taylor, and potentially without knowledge of his full history. Dr. Lee did not actually meet with Taylor until five days later on February 18, when he observed that Taylor was "loud and pressured," "paranoid and delusional," and that he seemed "angry" and was refusing meds. (Eisenberg Decl. Ex. 58 at Lee_00079.) Still, he kept Taylor in RCTP.

Dr. Lee then did not see Taylor again until seven days later. In the interim, Dr. Lee's colleague again suggested that Taylor receive a higher level of care. (21-Day Consult.) At this second meeting, on February 25, Dr. Lee found that Taylor had improved. He based on this conclusion on the fact that Taylor reported his mood as "beautiful," denied hallucinations and

depression, and had showered (although there is no documentation of how Dr. Lee knew that Taylor had showered).

This one evaluation led Dr. Lee to determine that Taylor was ready to be sent back to ICP unit, which, while it provides mental health treatment, does so at a level of care that is less than that of RCTP. (*See id.* at -83–85, -250.) While Dr. Lee noted that he consulted with Dr. Mahmud, Dr. Mahmud performed no independent evaluation of Taylor and relied on Dr. Lee's observations.

Not only were Dr. Lee's actions contrary to RCTP medical health team's conclusions and the conclusions of the regional clinical director, but Plaintiff has provided expert testimony that they were inadequate and unreasonable. Plaintiff's expert, Dr. Jeremy Colley, a board certified psychiatrist and the Director of Inpatient Psychiatry at Bellevue Hospital Center, submits that "[t]here was no reasonable medical justification for Dr. Lee's treatment decision" because his evaluations "fell well below the standard of care." He concluded that the records of Taylor's time in RCTP show that Taylor "met the criteria for inpatient admission and involuntary medication," as recognized on clinicians on his treatment team. (Colley Rep. at 12.) Moreover, Dr. Colley observed that Dr. Lee's analysis failed to consider Taylor's history of violence and refusal of medication, which was clearly documented by the team and presented to Dr. Lee. (*Id.*)

Drawing all inferences in favor of Plaintiff, Plaintiff has raised a genuine issue of material fact as to whether Dr. Lee's treatment was reasonable. *See Fricano*, 2018 WL 2770643, at *7 (finding genuine issue of material fact as to whether treatment was adequate when Plaintiff "arrived and departed from [the jail] in the same acutely psychotic state, despite evidence that his condition could have been, and indeed was, quickly improved with basic therapeutic interventions"). Plaintiff has provided evidence that (1) Dr. Lee's actions were contrary to medical

standards and the contemporaneous opinions of his peers; (2) without adequate justification, given his limited evaluations; and (3) uninformed, given Plaintiff's history.

b) There is a Genuine Issue of Material Fact as to Whether the Inadequacy of Care Was Sufficiently Serious.

Next, the Court turns to the second part of the objective prong, which asks whether there is a genuine issue of material fact that the inadequacy in care was "sufficiently serious." When the "offending conduct is the medical treatment given . . . the seriousness inquiry is narrower. . . . Courts look to the alleged inadequate treatment, not the underlying condition alone, and consider the effectiveness of the treatment the prisoner received, and the harm that resulted from the alleged shortfalls." *King*, 2018 WL 6510809, at *7 (internal citations and quotations removed). Psychosis may be a serious medical condition. *Charles v. Orange Cty.*, 925 F.3d 73, 88 (2d Cir. 2019).

Defendant argues that there is no evidence that Dr. Lee's decision to send Taylor to ICP and not to transfer him to CNYPC caused him any harm. (Lee Br. at 10.) Plaintiff argues that Dr. Lee's decision harmed Taylor by prolonging his psychosis and by sending him "in a paranoid and unstable state to a cellblock where he felt threatened," a decision lead to Taylor's death. (Pl.'s Opp. to Mot. for Summ. J. by Def. Lee, Dkt. No. 286 at 13.)

A reasonable juror could conclude that, because of Dr. Lee's actions, Taylor suffered additional period of psychosis that could have been avoided with adequate treatment. (Bardey EBT at 94:9–22 (explaining that Taylor was "suffering" without higher level of care and it was like "psychological torment . . . to be having those kinds of symptoms on an ongoing basis.").) It is clear that Taylor's symptoms continued when he returned to ICP. This was not unpredictable given that, as Dr. Lee was aware, Plaintiff felt threatened in ICP and the ICP unit was not equipped to provide care for inmates "so severely dysfunctional that, at the time of referral they require acute care." (Eisenberg Decl. Ex. 54 at -120.)

Dr. Lee argues that Taylor might have continued to experience the same symptoms even if he were transferred to CNYPC, since prison officials would still need to obtain a COPM in order to medicate Taylor. (Lee Br. at 3–5, 10.) While Dr. Lee is correct that obtaining a COPM was not guaranteed (although, as Plaintiffs expert has stated, it does seem likely given his history), a reasonable juror could nonetheless conclude that, given the opinions of the medical treatment team in the RCTP, Taylor's ongoing symptoms, and the fact that Taylor had received COPM in the past, Dr. Lee's decision denied Taylor his only opportunity for effective treatment, and that this led to him to experience additional, unwarranted, symptoms of psychosis.

In sum, Plaintiff has raised a genuine issue of material fact regarding whether Taylor was denied adequate care.

2. Plaintiff Fails to Raise a Genuine Issue of Material Fact Whether Dr. Lee Acted With Deliberate Indifference

Since Plaintiff has raised a genuine issue of material fact as to whether Defendant violated the objective prong, the Court turns to the subjective prong.

To be held culpable for a claim of failure to provide adequate medical care, the prison official must exhibit "deliberate indifference." *Wilson*, 501 U.S. at 302. A prison official acts with deliberate indifference when he or she "knows of and disregards and excessive risk to inmate health or safety." *Ortiz v. Goord*, 276 F. App'x 97, 98 (2d Cir. 2008) (summary order) (quoting *Farmer*, 511 U.S. at 837). Deliberate indifference is equivalent to "subjective recklessness," which requires that the "charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Salahuddin*, 467 F.3d at 280. "[I]t is well-settled that a complaint that a doctor was 'negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.'" *Atkins v. Cty. of Orange*,

372 F. Supp. 2d 377, 412 (S.D.N.Y. 2005), *aff'd on other grounds sub nom. Bellotto v. Cty. of Orange*, 248 F. App'x 232 (2d Cir. 2007) (quoting *Estelle*, 429 U.S. at 106).

Moreover, the official must be aware that his conduct creates such a risk—"a defendant's belief that his conduct poses no risk of serious harm (or an insubstantial risk of serious harm) need not be sound so long as it is sincere. Thus, even if objectively unreasonable, a defendant's mental state may be nonculpable." *Salahuddin*, 467 F.3d at 281. "Mere medical malpractice is not tantamount to deliberate indifference, but it may rise to the level of deliberate indifference when it involves culpable recklessness, *i.e.*, an act or a failure to act . . . that evinces a conscious disregard of a substantial risk of serious harm." *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2d Cir. 2000) (internal quotation omitted).

Plaintiff has not raised a triable issue of fact that Dr. Lee evinced a "conscious disregard of a substantial risk of serious harm." At most, the evidence raises an issue of whether Dr. Lee was negligent—a state of mind insufficiently culpable for liability under the Eighth Amendment. The evidence reflects only a possible disagreement regarding the best course of treatment. *Cf. R.T. v. Gross*, 298 F. Supp. 2d 289, 299 (N.D.N.Y. 2003) ("The evidence in the record is that Melendez did not ignore or otherwise callously disregard Plaintiff's condition. Melendez observed Plaintiff on three separate occasions . . . . and determined that he was not suffering from any delusions, depression, suicidal ideations, or mania[.]").

First, Dr. Lee's staff, including nurses, social workers and a psychologist, saw Taylor daily during his stay in the RCTP. Second, While Taylor initially refused private interviews with Dr. Lee and Dr. Ertrachter initially, Dr. Lee attended meetings where Taylor's condition was discussed, and, toward the end of Taylor's stay at RCTP, Dr. Lee himself saw Taylor twice in person. Although hindsight suggests that Dr. Lee may have been wise to probe further, Taylor

stated that he felt well, and that he had showered. Further, Taylor had been admitted to the RCTP because he had mentioned "giving up," but no healthcare provider in the RCTP concluded that Taylor was a threat to himself or to others. Finally, Dr. Lee released Taylor into the care of his colleague and supervisor, Dr. Syed Mahmud, who had previously been assigned to treat Taylor in the ICP, after speaking with Dr. Mahmud about what he had observed during his most recent patient interview. There is no evidence that Dr. Lee knew, or had reason to guess, that returning Taylor to the ICP after he had spent 27 days in the RCTP in an arguably stable condition, would "result[] in a 'a condition of urgency that may result in degeneration or extreme pain'" or lead to an "irreversible deterioration of the plaintiff's mental condition[.]" *Smith v. Wurzberger*, No. 05-cv-968, 2008 WL 2157127, at *5 (N.D.N.Y. Mar. 27, 2008), *report and recommendation adopted*, 2008 WL 2157126 (N.D.N.Y. May 20, 2008) (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

Under these facts, therefore, "no rational fact finder could conclude that [Dr. Lee] acted with a mental state akin to criminal recklessness." *Hall v. NYS Dep't of Corr. & Cmty. Supervision*, No. 12-cv-0377, 2015 WL 901010, at *19 (N.D.N.Y. Mar. 3, 2015). Therefore, I grant summary judgment to Dr. Lee on Plaintiff's claim for deliberate indifference to serious medical needs under the Eighth Amendment (Fifth Cause of Action).

C. Plaintiff Raises a Genuine Issue of Material Fact on Her Medical Malpractice Claim (Sixth Cause of Action).

Plaintiff also brings a medical malpractice claim under New York state law against Dr. Lee. The Court declines to dismiss this claim.

"To establish a claim for medical malpractice under New York law, a plaintiff must prove (1) that the defendant breached the standard of care in the community, and (2) that the breach proximately caused the plaintiff's injuries." *Lettman v. United States*, No. 12-cv-6696, 2013 WL

4618301, at *3 (S.D.N.Y. Aug. 29, 2013) (quoting *Arkin v. Gittleson*, 32 F.3d 658, 664 (2d Cir. 1994)); *Matthews v. Malkus*, 377 F. Supp. 2d 350, 356 (S.D.N.Y. 2005).

"To meet the initial burden on a summary judgment motion in a medical malpractice action, defendants must present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that they complied with the accepted standard of care or did not cause any injury to the patient." *Tkacheff v. Roberts*, 147 A.D.3d 1271, 1272 (3d Dep't 2017) (internal quotation omitted). The burden then shifts to the Plaintiff to show the existence of a material question of fact as to whether the defendant's actions departed from the accepted standard of care. *Id.*

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury." *Tarqui v. United States*, No. 14-cv-3523, 2017 WL 4326542, at *7 (S.D.N.Y. Sept. 27, 2017) (quoting *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 936, 957 N.Y.S.2d 167, 171 (2d Dep't 2012)).

1. New York Correction Law § 24 Does Not Immunize Dr. Lee

Dr. Lee argues that he is to be awarded immunity for this claim pursuant to New York Correction Law § 24 ("Section 24"). Section 24 reads:

> No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, which for purposes of this section shall include members of the state board of parole, in his or her personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.

N.Y. Correct. Law § 24. "Courts in the Second Circuit have long held that Section 24 precludes a plaintiff from raising state law claims in federal court against state employees in their personal

capacities for actions arising within the scope of their employment." *Davis v. McCready*, 283 F. Supp. 3d 108, 123 (S.D.N.Y. 2017).

The Parties agree that the statute explicitly refers to protections only for DOCCS employees, not OMH employees. *See Colon v. New York State Dep't of Corr. & Cmty. Supervision*, No. 15-cv-7432, 2017 WL 4157372, at *9 (S.D.N.Y. Sept. 15, 2017). Nevertheless, Dr. Lee argues that "courts have extended [the Section 24] protection to individuals employed by OMH working in a correctional setting." (Lee Br. at 24.)

The cases upon which Dr. Lee relies do not support his argument. First, in in *Brown v. Dep't of Corr. Servs.*, No. 09-cv-949, 2011 WL 2182775 (W.D.N.Y. June 2, 2011), the Court found that the "defendants," who were a mix of DOCCS and OMH employees, would be entitled to immunity under Section 24 without discussing (or recognizing) that the defendants included non-DOCCs employees and that any extension of immunity would be extending the language of the statute beyond its plain text. *Id.* at *9. Likewise, in *Povoski v. Artus*, No. 11-cv-120, 2014 WL 1292219 (N.D.N.Y. Mar. 28, 2014), the court found that Section 24 barred a case against "the defendants, who are all DOCCS employees," failing to acknowledge that one of the employees was technically employed by OMH, not DOCCS. *Id.* at *2. The Court never actually held that the statute extended to OMH employees. Finally, in *Hall v. N.Y.S. Dep't of Corr. & Cmty. Supervision*, No. 12-CV-0377, 2015 WL 901010, (N.D.N.Y. March 3, 2015), the court dismissed the plaintiff's claims because they were unaccompanied by surviving federal claims against these same defendants *and* because the case raised a complex issue of state law, which was whether or not Section 24 actually applied to non-DOCCS personnel, such as OMH employees. *Id.* at *15 & n.30 (citing *Brown*, 2011 WL 2182775, at *9 and *Povoski*, 2014 WL 1292219, at *2.)

Plaintiff, by contrast, points persuasively to *Reeder v. Hogan*, No. 09-cv-0977, 2011 WL 1484118 (N.D.N.Y. Mar. 1, 2011), *report and recommendation adopted*, 2011 WL 1302915 (N.D.N.Y. Mar. 31, 2011), where the Court examined Section 24 liability only for the DOCCS employees, and not the OMH employees, because "Section 24 does not shield non-DOCCS personnel, including employees of the OMH, from liability." *Id.* at *13 & n.13; *see also Abreu v. Travers*, No. 15-cv-540, 2016 WL 6127510, at *17 (N.D.N.Y. Oct. 20, 2016) (barring state tort law claims against only DOCCs defendants based on Correction Law § 24 and not OMH defendants, whose claims were barred on separate basis). In another case, a district court did immunize a provider of medical care; however, that provider was employed by DOCCS. *Vann v. Sudranski*, No. 16-cv-7367, 2017 WL 6515612, at *1, *7 (S.D.N.Y. Dec. 20, 2017), *appeal dismissed*, No. 18-270, 2018 WL 2064771 (2d Cir. Apr. 25, 2018).

Dr. Lee further argues that there is no "logical basis" to deprive psychiatrists of the same protections afforded to other medical professionals. However, this is no reason to ignore the plain language of the statute, which bars actions against "any officer or employee *of the department*," N.Y. Correct. Law § 24(1) (emphasis added).

Given the plain language of the statute and the fact that neither state courts nor the Second Circuit have clearly extended its protection to non-DOCCS employees, I cannot find that Section 24 grants Dr. Lee immunity from liability.

Accordingly, I turn to Dr. Lee's arguments regarding the substance of Plaintiff's state law claim.

2. Plaintiff Raises a Genuine Issue of Fact that Dr. Lee Did Not Meet the Standard of Care

"It is well-established that New York courts will not impose liability for a mere error in professional medical judgment . . . Rather, for liability to attach, a plaintiff must show that "the

provider's treatment decision was something less than a professional medical determination." *Cerbelli v. City of New York*, 600 F. Supp. 2d 405, 414 (E.D.N.Y. 2009) (internal quotation omitted). Courts recognize that "[t]he line between the proper exercise of judgment and deviation from accepted practice can be difficult to delineate, particularly in cases involving psychiatric treatment." *Id.*

"When a psychiatrist chooses a course of treatment, within a range of medically accepted choices, for a patient after a proper examination and evaluation, the doctrine of professional medical judgment will insulate such psychiatrist from liability." *O'Sullivan v. Presbyterian Hosp. in City of N.Y. at Columbia Presbyterian Med. Ctr.*, 217 A.D.2d 98, 100 (1995) (denying summary judgment on basis that reports by state agencies and plaintiff's expert concluded that psychiatrist's treatment was inadequate). By contrast, "a decision that is without proper medical foundation, that is, one which is not the product of a careful examination" is not protected as an adequate professional judgment. *Gallen v. Cty. of Rockland*, 137 A.D.3d 969, 970 (2d Dep't 2016) (internal quotation omitted). Ultimately, "Liability may not be imposed for honest errors in medical judgment but can and should ensue if that judgment was not based upon intelligent reasoning or upon adequate examination so that there has been a failure to exercise any professional judgment." *O'Sullivan*, 217 A.D.2d at 103 (internal quotations omitted).

Dr. Lee argues that he provided appropriate psychiatric care to Taylor while he was an inpatient at the RCTP by reviewing Dr. Ertrachter's case notes on Taylor, discussing Taylor's case in daily treatment meetings, visiting Taylor in his cell despite Taylor's consistent refused to meet with Dr. Lee for private interviews, continually monitoring Taylor's psychiatric condition, and making the decision to return Taylor to the ICP after his February 25 evaluation with the approval of his supervisor. (Lee Br. 18–19.) He contends that any error he made would have been an honest

"error in medical judgment," for which he is not legally liable. *Fiederlein v. City of N.Y. Health & Hosps. Corp.*, 80 A.D.2d. 821, 822 (1st Dep't 1981).

To support his case, Dr. Lee provides an expert report from Dr. George D. Annas—whose resume is omitted from the record but whose qualifications Plaintiff does not appear to dispute. (Hechtkopf Decl. Ex. 13 ("Annas Rep.").) In his report, Dr. Annas concludes that Dr. Lee did not depart from the acceptable standards of psychiatric care in his treatment of Taylor, because he evaluated and offered him medications, appropriately determined and documented that Taylor had improved, and exercised reasonable clinical judgment by discharging Taylor to the ICP after discussing the decision with this colleague. (*Id.* at 10.)

However, Plaintiff provides her own expert, Dr. Colley, who opines that Dr. Lee consistently made unreasoned medical decisions based on insufficient information, inadequate examination, and flawed reasoning. Dr. Colley asserts that Dr. Lee's decision breached the standard of care by not admitting Taylor for inpatient treatment, given that his medical record and symptoms while in RCTP demonstrated that he was acutely psychotic and presented a risk to himself and others. (Colley Rep. at 12–13.) Dr. Colley specifically found that Dr. Lee's decisions had "no reasonable medical justification." (*Id.*) "[W]hen there are dueling experts, both of whom have put forward opinions in contradiction with each other, and when those opinions are important to resolution of a material factual dispute, summary judgment may not be appropriate." *Melvin*, 2019 WL 1227903, at *14 (internal quotation omitted).

Dr. Colley's opinion is supported by the record. Dr. Lee made his decision to keep Taylor in RCTP, rather than preparing the paperwork to initiate the transfer to CNYPC, as recommended by other members of the team, without seeing Taylor, despite reports that Taylor was hostile,

confrontational, and not improving. (Colley Rep. at 8 (citing -2972–94).) It was not until seven days later that Dr. Lee actually met with Taylor, one of two times he did so.

In addition, in this first meeting, Dr. Lee found Taylor's behavior to be consistent with other team members' reports, noting that Taylor was "paranoid and delusional" and "angry." (Hechtkopf Decl. Ex. 32 at -78–81.) Then, at the second meeting, seven days later, Dr. Lee concluded that Plaintiff's behavior had changed. As has been discussed, Dr. Lee relied exclusively on Taylor's own descriptions of his mood and hygiene behaviors to justify transferring him to the ICP, despite the fact that notes from other members of the treatment team on the previous days documented that Taylor had been acutely psychotic. (Colley Rep. at 9.) These facts raise a genuine issue whether Dr. Lee's referral to ICP was based on intelligent reasoning and adequate examination. *See Thomas v. Reddy*, 86 A.D.3d 602, 604 (2d Dep't 2011) (genuine issue of fact when plaintiff's expert opined that psychiatrist had made "an incomplete and superficial assessment of the decedent's mental condition prior to discharge").

Moreover, it is not clear whether Dr. Lee made this decisions with adequate knowledge of Taylor's history, as would be expected for a "careful examination." Dr. Lee argues that he examined the case notes and other records, but he also told the Commission of Correction that he was unaware of Taylor's history of COPM, and further, that if he had been aware of it, he probably would have sent Taylor to CNYPC. (NYSCOC Prelim Rep. at -56105.) This is also sufficient to raise a genuine issue of material fact as to whether the decision to send Taylor to the ICP was made with the "proper medical foundation." *Fotinas v. Westchester Cty. Med. Ctr.*, 300 A.D.2d 437, 439 (2002) (failure to obtain and review patient's hospital records sufficient to raise genuine issue of material fact).

Here, Dr. Lee's and Plaintiff's experts have "reasonable differences," and each expert does not "merely assert[] his own *ipse dixit*." *Realtime Data, LLC v. Morgan Stanley*, No. 11-cv-6696, 2012 WL 5835303, at *4 (S.D.N.Y. Nov. 15, 2012), *aff'd,* 554 F. App'x 923 (Fed. Cir. 2014). Accordingly, the Court must leave the credibility of the experts' opinions to the jury. *See Melvin*, 2019 WL 1227903, at *14.

III. Order to Show Cause Why Dr. Lee's Case Should Not Be Severed

The facts relevant to the lone remaining claim against Dr. Lee, for medical malpractice under New York State law, are wholly different from the facts relevant to the remaining claims against the Officer and Supervisor Defendants.

Moreover, the allegations against the Officer and Supervisor Defendants, and the brutal testimony that will be adduced in support of those claims, have the potential to unduly prejudice a jury against Dr. Lee -- who, per the ruling of this Court, bears no legal responsibility for the death of Karl Taylor.

Accordingly, the Plaintiff is ordered to show cause, no later than September 10, 2019, why the claim against Dr. Lee should not be severed and tried separately. As there is no federal interest in the remaining claim against Dr. Lee, Plaintiff must also show cause why the case against him should not be dismissed without prejudice to being brought again in the New York State Supreme Court within the six-month time period provided by N.Y. C.P.L.R. § 205(a).

* * * *

In sum, the Court GRANTS Dr. Lee's motion for summary judgment on Plaintiff's Section 1983 claim for deliberate indifference to serious medical needs (Fifth Cause of Action).

The Court DENIES Dr. Lee's motion for summary judgment on Plaintiff's medical malpractice claim (Sixth Cause of Action).

Plaintiff is ordered to show cause, no later than September 10, 2019, why the claim against Dr. Lee should not be severed and tried separately.

CONCLUSION

This constitutes the written opinion and order of the Court.

The Clerk of Court is directed to close the motions at Docket Numbers 186, 188, 190, 192, and 194.

Dated: August 21, 2019

Chief Judge

BY ECF TO ALL COUNSEL