Deliberate Indifference or Not: That Is the Question in the Third Circuit Jail Suicide Case of Woloszyn v. Lawrence County

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"DELIBERATE INDIFFERENCE" OR NOT: THAT IS THE QUESTION IN THE THIRD CIRCUIT JAIL SUICIDE CASE OF WOLOSYN v. LAWRENCE COUNTY

"An individual incarcerated . . . becomes vulnerable and dependent upon the state to provide certain simple and basic human needs."

I. INTRODUCTION

Suicide\(^2\) is one of leading causes of death in jails\(^3\) across the United States.\(^4\) In 1983, suicide accounted for 56% of the deaths that occurred in jails.\(^5\) Moreover, from 1994 to 1996, the suicide rate in county

2. Suicide, as defined by the American Heritage Dictionary, is "the act or an instance of intentionally killing oneself." AMERICAN HERITAGE DICTIONARY 811 (3d ed. 1994) (defining suicide).
3. A jail, as defined by Black's Law Dictionary, is "[a] local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined." BLACK'S LAW DICTIONARY 851 (8th ed. 2004) (defining jail). A prison, on the other hand, is defined as "[a] state or federal facility of confinement for convicted criminals, esp. felons." Id. at 1232 (defining prison).
4. See Karen L. Cropsy, Suicide in Jails and Prisons: What the Numbers Tell Us, 7 UDC/DCLS L. REV. 213, 213 (2002) (highlighting fact that suicide is, at time of publication of article, third leading cause of death, behind natural causes and AIDS); see also Lindsay M. Hayes, Suicide in Adult Correctional Facilities: Key Ingredients to Prevention and Overcoming the Obstacles, 27 J.L. MED. & ETHICS 260, 260 (1999) (emphasizing that suicide in jails is "public health problem" and that at time of publication, suicide was leading cause of death in jails).
5. See Christopher J. Mumola, U.S. DEP'T OF JUSTICE, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 1 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf (summarizing data from Bureau of Justice Statistics data collection that collected death records from all local jails in 2000 and all state prisons in 2001). The Bureau of Justice Statistics ("BJS") began to collect data to comply with the Death in Custody Reporting Act of 2000. See id. at 1 (reporting purpose of study). The first report included data from 2000 to 2002 and highlighted both suicide and homicide statistics in local jails and state prisons. See id. (same); see also James E. Robertson, Fatal Custody: A Reassessment of Section 1983 Liability for Custodial Suicide, 24 U. TOL. L. REV. 807, 807-08 (1993) ("Suicide is the leading cause of death of prisoners."); Christy P. Johnson, Comment, Mental Health Care Policies in Jail Systems: Suicide and the Eighth Amendment, 35 U.C. DAVIS L. REV. 1227, 1228 (2002) ("Suicide is the leading cause of death in jails nationwide."). It is important to note that the difference between local jails and state prisons is that local jails hold unsentenced offenders, also known as pretrial detainees, offenders sentenced to a year or less and offenders awaiting transfer to state prisons whereas state prisons hold offenders who have been convicted and sentenced for more than one year. See Mumola, supra (distinguishing between local jails and state prisons). State prisons have always had lower suicide rates than local jails. See id. at 2 ("State prison suicide rates have historically been much lower than those of jails."); see also Susan D. Fahey, Jailhouse Suicides—Where is the Abuse of Power?, 14 MISS. C. L. REV. (1133)
jails was nine times greater than that of the general population. In 2002, however, the latest year for which there is data, the suicide rate in jails dropped to a third of what the rate was in 1983-47 suicides per 100,000 inmates in 2002, compared to 129 suicides per 100,000 inmates in 1983. In spite of the decrease in suicides over the last twenty years, the suicides that do occur today share similar characteristics. For example, the majority of suicide victims are pretrial detainees as opposed to convicted prisoners. Most suicide victims also tend to be young, unmarried, Caucasian males arrested for the first time, either intoxicated or under the influence of drugs, who usually kill themselves within the first twenty-four hours of imprisonment.

77, 79 (1993) (noting that in Mississippi, out of forty-six total suicides, only four occurred in state prisons while forty-two occurred in local jails).

6. See Suicide Screening/Prevention 1 (2003), http://www.tcleose.state.tx.us/GuideInstr/bc3/approved_1-105/15.%20suicide%20screening%20&%20prevention.pdf (last visited Mar. 3, 2006) (distinguishing suicide rate in county jails from that of general population); see also Robertson, supra note 5, at 808 (noting that suicide in jails occurs at rate “several times” greater than in general public); Johnson, supra note 5, at 1228 (“The jailhouse suicide rate is nine times greater than that of the general civilian population.”). But see Mumola, supra note 5, at 2 (presenting data that indicated that even if suicide rate in jails was higher than in general population, that from 1983 to 1993, suicide rate was cut by more than half (129 suicides per 100,000 inmates in 1983 to 54 suicides per 100,000 inmates in 1993)).

7. An inmate is “[a] person confined in a prison, hospital, or other institution.” BLACK'S LAW DICTIONARY, supra note 3, at 803 (defining inmate). In this Casebrief, inmate will be used to refer to both pretrial detainees and convicted prisoners.

8. See Mumola, supra note 5, at 2 (comparing suicide statistics in jails).

9. For a further discussion of the common characteristics of jail suicides, see infra notes 10-12 and accompanying text.

10. See THE JAILHOUSE LAWYER’S HANDBOOK: HOW TO BRING A FEDERAL LAW-SUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 27 (Center for Constitutional Rights & The National Lawyer’s Guild eds., 4th ed. 2003) (1974), available at http://www.nlgl.org/resources/JLHFinal.pdf (defining pretrial detainee as person who was incarcerated in jail but who was not yet convicted). Because pretrial detainees have not been convicted, conditions in jails for pretrial detainees are reviewed under the Fourteenth Amendment’s Due Process Clause rather than the Eighth Amendment’s Cruel and Unusual Punishment Clause. See id. (distinguishing between pretrial detainees and convicted prisoners); see also George J. Franks, The Conundrum of Federal Jail Suicide Case Law Under Section 1983 and Its Double Bind for Jail Administrators, 17 LAW & PSYCHOL. REV. 117, 120-21 (1993) (noting that pretrial detainees’ rights are evaluated under Fourteenth Amendment).

11. See Fahey, supra note 5, at 79 (contemplating that this difference between pretrial detainees and convicted prisoners is result of better training on state level, over-crowding in local facilities, structures in local facilities, like metal bars and pipes that are accessible for pretrial detainees to commit suicide with and fact that local pretrial detainees are usually drunk when arrested).

12. See Hayes, supra note 4, at 260 (reciting characteristics of jail suicides including statistic that victims are normally found hanging by their bedding or clothing); see, e.g., Suicide Screening/Prevention, supra note 6, at 2 (listing other characteristics of jail suicides such as prior suicide by close family member, mental illness, isolation and/or recent loss); see also Cropsey, supra note 4, at 214-15 (dis-
The suicide of any individual, especially a pretrial detainee whose every need is dependent upon the jail, is a tragedy. When pretrial detainees commit suicide, their estates often want to hold someone liable. Thus, the estate has the option of suing the jail’s custodial officers—either in their individual or official capacity—the jail’s warden, and/or the municipality, pursuant to Title 42, Section 1983 of the United States Code (“Section 1983”). Indeed, Section 1983 permits individuals to sue a governmental entity for violating a constitutional right.

Even though pretrial detainees are guaranteed a safe and protective custodial setting and the right to adequate medical care, custodial officials cannot guarantee that those in their custody will not commit suicide. As a result, to hold individual custodial officers liable for a pretrial detainee’s suicide, the United States Supreme Court and most federal courts have chosen the “deliberate indifference” standard. To prove “deliberate in-

...
difference" in Section 1983 litigation, the plaintiff must show that the custodial officers knew of the pretrial detainee's vulnerability to suicide and did not affirmatively act to prevent the suicide.\(^{19}\) Proponents of the "deliberate indifference" standard argue that the standard is reasonable because it is not feasible to expect that all suicides would be prevented and that if the standard was mere negligence, litigation would erupt.\(^{20}\) Opponents of the standard argue that it is too narrowly tailored, too difficult to meet and that with proper training programs, almost all jail suicides can be prevented.\(^{21}\) Due to the demanding nature of the "deliberate indifference" standard, plaintiffs in these cases rarely prevail.\(^{22}\)

Despite the circuit courts' wide acceptance of the "deliberate indifference" standard, the United States Court of Appeals for the Third Circuit has neither strictly adopted it as the standard for proving Section 1983 liability in the case of pretrial detainee suicides nor strictly defined the

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(1st Cir. 1992) ("[W]hen liability for serious harm or death, including suicide, is at issue, a plaintiff must demonstrate deliberate indifference . . . ."); Rellergert v. Cape Girardeau County, 924 F.2d 794, 796 (8th Cir. 1991) (holding that "deliberate indifference" is difficult standard and if inmate's estate cannot demonstrate it, estate will lose); Belcher v. Oliver, 898 F.2d 32, 34 (4th Cir. 1990) (requiring "deliberate indifference" for constitutional violations against pretrial detainees as well as convicted prisoners); Popham v. City of Talladega, 908 F.2d 1561, 1563 (11th Cir. 1990) ("Because jail suicides are analogous to the failure to provide medical care, deliberate indifference has become the barometer by which suicide cases involving convicted prisoners as well as pretrial detainees are tested."); Danese v. Asman, 875 F.2d 1239, 1243 (6th Cir. 1989) (discussing that pretrial detainees' rights are violated if prison officials exhibit "deliberate indifference" to pretrial detainees' medical needs); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (holding that "deliberate indifference" standard applies in context of jail suicide); see also Franks, supra note 10, at 122-23 (explaining that "deliberate indifference" standard requires "strong likelihood" that suicide would occur and in jail suicide cases, most discussion revolves around inadequate jail screening procedures). For a further discussion of the development of the "deliberate indifference" standard, see infra notes 29-78 and accompanying text.

19. For a further and in-depth discussion of the "deliberate indifference" standard, see infra notes 29-78, 115-40 and accompanying text.

20. See Colburn I, 838 F.2d at 669 (discussing how it is impossible for custodial officials to prevent all suicides); see also Fahey, supra note 5, at 77-78 (noting that jail suicide litigation has exploded recently and that if standard for liability is negligence, Section 1983 would then be designed to "federalize state tort principles").

21. See Franks, supra note 10, at 121-22 (discussing how it is virtually impossible for plaintiff in jail suicide case to win because plaintiff has to demonstrate that official or governmental entity had obvious knowledge of suicidal risk); Robertson, supra note 5, at 829-30 (arguing that suicide is not "inevitable aspect of incarceration" and that federal courts have "narrowly defined constitutional duty to safeguard inmates").

22. See Franks, supra note 10, at 121 (theorizing that pretrial detainee plaintiffs do not prevail in jail suicide cases because "[t]here is a tension inherent between regulating the conduct of the governmental entity versus making the jail and jailers per se liable for the safety of the inmates"). But see Fahey, supra note 5, at 78 (asserting that Section 1983 is for abuse of governmental power and not "designed to federalize state tort principles," thus, standard should not be negligence and it should be difficult to prevail).
standard when discussing it in cases. In light of the precedents from the United States Supreme Court, the Third Circuit will most likely choose "deliberate indifference" when faced with the task of defining the standard.

To explain this likelihood, Part II of this Casebrief discusses both Supreme Court precedent and Third Circuit precedent regarding Section 1983 liability for pretrial detainee suicides. Part III details the facts, the procedural posture and the Third Circuit's analysis in the most recent pretrial detainee suicide case, Woloszyn v. County of Lawrence. Part IV predicts how the Third Circuit will most likely define the Section 1983 pretrial detainee standard in the future, as well as factors that lawyers in the Third Circuit should consider when litigating these cases. Part V concludes with a brief summary of why the Third Circuit should adopt the "deliberate indifference" standard.

II. Background

A. Section 1983 and Supreme Court Precedent

Section 1983 of Title 42 of the United States Code permits individuals to recover damages for the violation of their constitutional rights. To

23. For a further discussion of the United States Court of Appeals for the Third Circuit precedent regarding the standard for liability of a pretrial detainee suicide, see infra notes 29-52 and accompanying text.

24. For a further discussion of why the Third Circuit will most likely adopt this rendition, see infra notes 115-40 and accompanying text.

25. For a further discussion of the background of Section 1983 liability for pretrial detainee suicides, see infra notes 29-78 and accompanying text.

26. 396 F.3d 314 (3d Cir. 2005). For a further discussion of the Third Circuit case Woloszyn v. County of Lawrence, see infra notes 79-114 and accompanying text.

27. For a further discussion of what standard the Third Circuit will most likely select and suggestions for Third Circuit practitioners, see infra notes 115-35 and accompanying text.

28. For a further discussion of why the Third Circuit should select "deliberate indifference" as the standard, see infra notes 136-40 and accompanying text.

29. 42 U.S.C.A. § 1983 (West 2006). The current language reads as follows: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. (setting forth exact language of statute).

30. See Weinman, supra note 15, at 1042 ("[S]ection 1983 would become the principal means by which plaintiffs could hold governmental officials accountable for the deprivation of constitutional rights.")
state a claim under Section 1983, an individual must allege a violation of a federally protected right by someone acting "under the color of state law." 31 "Under the color of state law" refers to individuals who work for the state and thus have their authority as a result of state law. 32 Individuals can recover damages from governmental officials either in their individual or official capacity. 33 Individuals can also recover from municipalities because they are considered individuals for the purposes of Section 1983. 34 Municipalities can be sued for the unconstitutional implementation of a policy or custom 35 or the failure to train governmental employees. 36 A claim for failure to train governmental employees, however, is actionable

31. See Andrew J. Schwartz, Section 1983 Authorizes Municipal Liability for Failure to Train Employees in Limited Circumstances, City of Canton v. Harris, 109 S. Ct. 1197 (1989), 20 SETON HALL L. REV. 886, 886 (1990) ("Section 1983 provides a federal civil remedy for individuals whose constitutional rights are violated 'under color of' state law.").

32. See Weinman, supra note 15, at 1042 ("The Court clarified the meaning of 'under color of state law'... as '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'... ").

33. See Franks, supra note 10, at 118-19 ("A public official may not be held personally liable unless a clearly established constitutional right is violated or the fact situation suggests that the public official might reasonably believe that he or she violated a... constitutional right... ").

34. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that Congress intended for municipalities and other local governmental entities to be encompassed in definition of "persons" under Section 1983). The United States Supreme Court in Monell v. Department of Social Services also noted that a municipality cannot be held liable on a respondeat superior theory, meaning that under Section 1983, a municipality cannot be held liable for the constitutional violations of its employees. See id. at 691 (explaining that only time municipalities should be held liable under Section 1983 is when municipalities engaged in constitutional tort, not when its employees did). In Monell, female plaintiffs brought a class action lawsuit against the Department of Social Services, the Board of Education of New York, the city, the mayor and other individuals alleging that the governmental entities and individuals forced pregnant women to take unpaid leaves of absence before it was "medically necessary to do so." See id. at 660-61 (setting forth facts of case). The Supreme Court ruled on the issues of whether local governmental officials sued in their official capacity and municipalities were "persons" under Section 1983. See id. at 662 (listing issues in case).

35. See id. at 690-91 (describing how governmental entities, such as municipalities, can be sued where "the action that is alleged to be unconstitutional implementations or executes a policy statement... officially adopted and promulgated by that body's officers" or where constitutional deprivation results from governmental "custom").

36. See City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that municipality could be liable if employee's inadequate training results in "deliberate indifference" to person's constitutional rights). In City of Canton v. Harris, the plaintiff was arrested by the defendants, city police officers, and following the arrest, she fell repeatedly rendering her incoherent. See id. at 381 (setting forth plaintiff's injury). Despite this, the officers did not request medical assistance and as a result, following her release from jail, she was diagnosed with emotional illnesses that required hospitalization. See id. (laying foundation for plaintiff's claim against city police officers). Plaintiff filed suit against the city under Section 1983 alleging that the city's failure to train its police officers violated her constitutional
only when “the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact.”

In the context of prisoners, Section 1983 protects several rights that prisoners are guaranteed to have, including the right to adequate medical care. In *Estelle v. Gamble*, the United States Supreme Court held that the Eighth Amendment prohibition against cruel and unusual punishment is violated if there is “deliberate indifference to [a prisoner’s] serious medical needs.” The Supreme Court extended the right to medical care to pretrial detainees in 1983 in *City of Revere v. Massachusetts General Hospital*. One major difference, however, between convicted prisoners right to necessary medical attention. See *id.* at 381, 386 n.5 (reciting plaintiff’s claim).

The Supreme Court held that a failure to train police can be a basis for holding a municipality liable under Section 1983 but that the failure to train has to amount to “deliberate indifference.” See *id.* at 388 (reciting holding of case); see also Anne Elizabeth Albers, *Municipal Liability Under 42 U.S.C.A. Section 1983 for Failure to Train: Michigan Municipalities are Stripped of Immunity*, Rushing v. Wayne County, 8 T.M. COOLEY L. REV. 703, 707 (1991) (summarizing *Harris* and noting that it was not until this case that Supreme Court adequately defined municipal liability under Section 1983).

37. See *Harris*, 489 U.S. at 388 (citing standard for failure to train claim); see also Colburn v. Upper Darby Twp. ("Colburn II"), 946 F.2d 1017, 1028 (3d Cir. 1991) (citing “deliberate indifference” standard as standard for municipal liability under Section 1983).

38. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death’ . . . .”).


40. See *id.* at 106 (emphasizing that negligence in diagnosing or treating condition does not qualify as lack of adequate medical care or as cruel and unusual punishment). In *Estelle v. Gamble*, the convicted prisoner suffered an injury as a result of prison work and despite the plethora of medication he was put on, the prison officials brought him before the disciplinary committee several times for not completing his work. See *id.* at 98-101 (reciting facts of case). In addition, on several occasions, the plaintiff alleged that he asked the guards if he could see a doctor and on two occasions they refused. See *id.* at 101 (same). After four months, the plaintiff filed a complaint claiming that he was subjected to cruel and unusual punishment. See *id.* (describing plaintiff’s cause of action). The Supreme Court held that the appropriate standard to prove a violation of the Eighth Amendment was the “deliberate indifference” standard and that the plaintiff in this case did not meet the standard because he had been treated on seventeen separate occasions by the physician on duty. See *id.* at 107 (reciting holding of case).

41. 463 U.S. 239 (1983). In *City of Revere v. Massachusetts General Hospital*, a suspect was shot and wounded by a city police officer while he was fleeing the scene of a breaking and entering. See *id.* at 240-42 (delineating facts of case). The suspect was brought to Massachusetts General Hospital and treated for nine days and upon release, he was arrested and arraigned. See *id.* at 240-41 (same). The hospital sent the City of Revere the bill for the medical expenses and Revere refused to pay it. See *id.* at 241 (same). The Supreme Court held that even though the Due Process Clause of the Fourteenth Amendment requires governmental entities to provide medical care to detained persons, the United States Constitution does not provide for how the medical care is paid for but rather that is left up to
and pretrial detainees in the Section 1983 context is that the latter's asserted constitutional claim for lack of adequate medical care falls under the Fourteenth Amendment rather than the Eighth Amendment. Despite this difference, the "deliberate indifference" standard in Supreme Court cases applies in cases involving both convicted prisoners and pretrial detainees.

What Estelle and City of Revere did not address, however, was what constituted "deliberate indifference" and whether "serious medical needs" included suicidal vulnerability. The Supreme Court in Farmer v. Brennan elaborated on the "deliberate indifference" standard in the Eighth Amendment context, stating that a custodial official is not liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Thus, in order to impose liability for a constitutional violation, a prisoner must prove that the prison official knew of a serious medical need and disregarded it.

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42. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

43. Id. at amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see Revere, 463 U.S. at 244 ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . [T]he State does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt . . . ." (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977))); see also Estelle, 429 U.S. at 101 (noting that with convicted prisoners their claim is violation of Eighth Amendment, made applicable to states by Fourteenth Amendment); Amanda A. Johnson & Megan Geunther, Prisoners' Rights, 90 GEO. L.J. 2005, 2042-43 (2002) ("The Due Process Clause [rather than the Eighth Amendment] prohibits punishment of pretrial detainees and protects them from excessive force that amounts to punishment."); The Jailhouse Lawyer's Handbook, supra note 10, at 27 (indicating that Eighth Amendment prohibits cruel and unusual punishment for convicted prisoners and because pretrial detainees have not been convicted, they cannot be punished, and thus, pretrial detainees' claims are reviewed under Fourteenth Amendment's Due Process Clause and not Eighth Amendment).

44. See Franks, supra note 10, at 121 ("Since a jail suicide is considered a subset of deliberate indifference to a serious medical need, the test is identical for pretrial detainees and sentenced prisoners.").

45. See Robertson, supra note 5, at 814 ("[T]he Estelle Court failed to define 'deliberate indifference' or indicate whether 'serious medical needs' encompassed the risk of suicide.").


47. See id. at 837 (noting that this holding comports best with Eighth Amendment jurisprudence). The Supreme Court noted, however, that one can indirectly prove a custodial official's knowledge of a risk via circumstantial evidence. See id. at 842 (elaborating on standard). In Farmer v. Brennan, the petitioner was a male transsexual who was incarcerated with male prisoners despite his feminine characteristics. See id. at 829-30 (reciting facts of case). At one point in 1989, petitioner
vicited prisoner’s suicide, a party has to prove that the custodial official being sued knew that the prisoner was suicidal and failed to act affirmatively to protect the prisoner. As a result, the inquiry will be extremely fact sensitive in order to prove what the custodial official knew or did not know. As for whether the risk of suicide is a “serious medical need,” the circuit courts, including the Fifth Circuit in Partridge v. Two Unknown Police Officers, have held that under Section 1983, custodial defendants can be held liable for an inmate’s suicide because inmates’ mental health is just as important as their physical health. The Third Circuit, in addition to the Fifth Circuit, was one of the first circuits to find that suicide is a “serious medical need” encompassed within the right to adequate medical care.

B. Third Circuit Section 1983 Precedent

In analyzing jail suicide cases involving pretrial detainees, the Third Circuit has tried to logically delineate factors based on the Supreme Court’s aforementioned precedent and the “deliberate indifference” stat-
standard. The Third Circuit first analyzed Section 1983 liability for a pretrial detainee’s suicide in *Colburn v. Upper Darby Township* ("Colburn I"). The Third Circuit in *Colburn I* held that if custodial officials "know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." The court in *Colburn I*, however, did not explain what "reckless indifference" meant or why it was not using the "deliberate indifference" standard from *Estelle*. If there is or was a distinction between the two standards, the court in *Williams v. Borough of West Chester* also declined to delineate one, stating that the terms "deliberate indifference," "reckless indifference," "gross negligence" and "reckless disregard" should all be used interchangeably to refer to the same state of mind.

53. For a further discussion of Third Circuit precedent regarding pretrial detainees and jailhouse suicide, see infra notes 54-78 and accompanying text.

54. 838 F.2d 663 (3d Cir. 1988), rev’d on other grounds, 946 F.2d 1017 (3d Cir. 1991).

55. *See Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005) ("We [Third Circuit] first examined liability under § 1983 for such suicides in *Colburn v. Upper Darby Township*."").

56. *See Colburn I*, 838 F.2d at 669 (agreeing that custodial officials cannot "guarantee" against pretrial detainee’s suicide). In *Colburn I*, Upper Darby Township police arrested and searched a girl who was "visibly intoxicated" before placing her in a jail cell. *See id.* at 664-65 (reporting facts of case). Even though the police did not find anything in their search, the girl shot herself four hours later with a concealed handgun. *See id.* at 665 (same). The administrator of the girl’s estate filed a Section 1983 claim alleging that the officers recklessly performed the search and supervision, that there was a lax custom regarding supervision and monitoring of jail cells, that there was a lack of training and that this failure led to the inability of defendants to observe that the detainee was a suicide risk. *See id.* (recounting plaintiff’s claims). On appeal, the Third Circuit identified the requisite standard for Section 1983 pretrial detainee suicide cases and held that the district court erred in dismissing the complaint against four of the defendants because the allegations were sufficient enough to state a claim. *See id.* at 669, 672 (detailing holding of case).

57. *See Woloszyn*, 396 F.3d at 319 (discussing how *Estelle* defined standard as "deliberate indifference" whereas *Colburn I* interpreted standard as "reckless indifference" and how neither case elaborated on those terms).

58. 891 F.2d 458 (3d Cir. 1989).

59. *See id.* at 464 n.10 (noting that custodial officials would be liable for pretrial detainee’s suicide if they acted with "deliberate indifference," that court would not distinguish between different standards and that "deliberate indifference" would be used to "refer to the type of conduct or state of mind described by these terms collectively"). In *Williams v. Borough of West Chester*, the detainee was arrested, along with his brother, after a shoplifting incident and was brought to the police station where police immediately put him in a cell after he assumed a "combative position" when his handcuffs were removed. *See id.* at 462 (recounting facts). The detainee later hung himself by his belt, an item that officers customarily remove from detainees before placing them in their cells. *See id.* (same). On appeal, the Third Circuit held that the officers did not know about the detainee’s suicidal tendencies and that neither the dispatcher, who is not responsible for prisoners, nor the municipality, were liable for his suicide. *See id.* at 465-67 (explaining application of Section 1983 test and holding); *see also Woloszyn*, 396 F.3d at 321
In Colburn v. Upper Darby Township60 ("Colburn II"), the Third Circuit elaborated on the standard for Section 1983 cases involving pretrial detainees who committed suicide.61 In an effort to clarify Colburn I, the court in Colburn II stated that a detainee has the burden to prove three elements in a suicide case: "(1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, [and] (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability."62 Regarding the first requirement, the court explained that a particular vulnerability to suicide cannot be just a "mere possibility," but rather it has to be a "strong likelihood."63 As for the second condition, the court declared ways that a custodial official would "know" of a detainee's vulnerability to suicide, including actual knowledge of a serious suicidal threat, past suicidal attempts or a psychiatric diagnosis specifying suicidal tendencies.64 Moreover, concerning whether a custodial officer "should have known" about the suicidal vulnerability, the court emphasized that the vulnerability has to be "so obvious that a lay person would easily recognize the necessity for preventative action."65 Finally, with regard to the "reckless indifference" standard versus the "deliberate indifference" standard, the Third Circuit in Colburn II once again declined to distinguish or define the con-

(“We referred to that level of culpability as ‘reckless indifference’ in Colburn I. In Williams v. Borough of West Chester . . . we referred to the heightened culpability that is required as ‘deliberate indifference.’ However, we did not elaborate upon those terms in either case.”) (citations omitted).

60. 946 F.2d 1017 (3d Cir. 1991). Colburn II arose because in Colburn I, even though the Third Circuit vacated the district court's order granting the defendant's motion, the district court granted the defendant's motion for summary judgment, on remand and after full discovery. See id. at 1020 (explaining procedural posture of case). As a result, Colburn appealed the summary judgment decision in favor of the defendant to the Third Circuit. See id. (same).

61. See Woloszyn, 396 F.3d at 319 ("We later elaborated upon that standard in Colburn v. Upper Darby Township ("Colburn II") . . . .") (citation omitted).

62. See Colburn II, 946 F.2d at 1023 (clarifying standard already established in Colburn I).

63. See id. at 1024 (examining first condition as analogous to "degree of risk" inherent in detainee's actions or conditions); see also Robertson, supra note 5, at 816-17 (analyzing cases where dangerous jail environment, banging head against wall, suicide hesitation cuts, weeping and intoxication did not indicate strong likelihood that suicide would occur and that only real predictors that courts accept are evidence of suicide threats or past attempts).

64. See Colburn II, 946 F.2d at 1025 n.1 (citing Buffalo v. Baltimore County, 913 F.2d 1183 (4th Cir. 1990) and Partridge v. Two Unknown Police Officers, 791 F.2d 1182 (5th Cir. 1986)); see also Robertson, supra note 5, at 818 (recounting case where even though custodial officials knew of detainee's suicidal tendencies, custodians were not found liable because no evidence existed to discount their testimony denying knowledge).

65. See Colburn II, 946 F.2d at 1025 (quoting Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987)) (distinguishing tort law, where "should have known" connotes "negligent failure to appreciate the risk of suicide").
cepts, instead choosing to define the level of culpability as "higher than a negligent failure to protect from self-inflicted harm."66

In addition to the standard for individual liability, Colburn II articulated the standard for municipal liability in cases dealing with a claim for failure to train governmental employees.67 Colburn II defined the standard as "deliberate indifference" to an inmate's constitutional rights where "the identified deficiency in the training program must be closely related to the ultimate injury."68 In the context of jail suicide under Section 1983, the court articulated that a plaintiff has to "(1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that . . . it can reasonably be attributed to a deliberate indifference."69

After it decided Colburn I and Colburn II, the Third Circuit further defined "deliberate indifference" in Beers-Capitol v. Whetzel.70 Whetzel is a case involving prisoners, specifically former female residents of a state juvenile detention center, who brought an Eighth Amendment claim under Section 1983.71 The court, partly basing its reasoning on Farmer, held that "deliberate indifference" refers to a situation in which a custodial official both knows of and disregards an excessive risk to an inmate's health or safety.72 In addition, Whetzel also held that the "deliberate indifference" standard does not include the element that the official "should have known."73

Even though cases like Farmer and Whetzel do not control the Third Circuit's analysis in Section 1983 pretrial detainee suicide cases, the Third Circuit's most recent decision relied heavily on Supreme Court and Third Circuit court precedents that interpreted Eighth Amendment jurisprudence.74 Despite the fact that a pretrial detainee's Section 1983 claim arises under the Fourteenth Amendment and not the Eighth, the Third

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66. See id. at 1024 (recognizing that neither Fourteenth Amendment nor Eighth Amendment impose liability for mere negligence).
67. See id. at 1028 (defining standard).
68. See id. (requiring plaintiff asserting failure to train claim to prove that specific deficiency in training caused constitutional violation).
69. See id. at 1029-30 (articulating more definite standard for prison suicide cases).
70. 256 F.3d 120 (3d Cir. 2001).
71. See id. at 130 (alleging that plaintiff suffered sexual assaults by one of defendants while incarcerated at juvenile facility).
72. See id. at 133 (instructing that defendants in Section 1983 case can counter claim of "deliberate indifference" in two ways: either establish that their knowledge did not rise to level of "deliberate indifference" or even if they did know, they attempted to prevent harm via reasonable actions).
73. See id. (reciting what is not included in standard).
74. See Woloszyn v. County of Lawrence, 396 F.3d 314, 321 (3d Cir. 2005) (discussing how in Farmer, Supreme Court defined more precisely "deliberate indifference" and how Third Circuit in Whetzel further defined that standard).
Circuit in Woloszyn announced that this reliance is permissible.\textsuperscript{75} The reliance is permissible because the Third Circuit’s “[Section] 1983 jurisprudence, in custodial suicides, borrows the term ‘deliberate indifference’ from Eighth Amendment jurisprudence.”\textsuperscript{76} In Woloszyn, the Third Circuit posited that “deliberate indifference” might be similar to the “should have known” element in Section 1983 jurisprudence.\textsuperscript{77} Even though the Third Circuit announced this possible connection between the two terms, similar to past cases, it decided that it did not need to reconcile the differences between “deliberate indifference,” “reckless indifference” and “should have known.”\textsuperscript{78}

III. Third Circuit’s Decision in Woloszyn v. Lawrence County

A. Facts and Procedural Posture

On July 21, 1999, police arrested Richard Lee Woloszyn (“Woloszyn”) after he attempted to burglarize a home and brought him to the Ellwood City Police Station.\textsuperscript{79} After arraignment, two police officers drove Woloszyn to the Lawrence County Correctional Facility.\textsuperscript{80} In an Incident Investigation Report, Officer List, an officer who drove Woloszyn to the police station, wrote that Woloszyn was in “good spirits and was joking” and that he did not exhibit any signs of depression.\textsuperscript{81}

Correctional Officer Hartman-Swanson interviewed Woloszyn at his booking, and indicated in her affidavit that he was “very remorseful and distant,” kept talking about “how he had failed as a father” and was happy

\textsuperscript{75} See id. (discussing why adoption of term from Eighth Amendment jurisprudence was permissible).

\textsuperscript{76} See id. (noting how in Whetzel, court basically borrowed “deliberate indifference” definition from Supreme Court’s Farmer decision but “placed a gloss” on it).

\textsuperscript{77} See id. (“[D]eliberate indifference’ may be equivalent to the ‘should have known’ element required for § 1983 liability under the Fourteenth Amendment pursuant to Colburn I and II.”).

\textsuperscript{78} See id. (deciding that because plaintiff in case could not prove that pretrial detainee had particular vulnerability to suicide that first two requirements of Colburn I and Colburn II were not met, thus, court did not need to differentiate terms because plaintiff never got to third requirement).

\textsuperscript{79} See id. at 316 (indicating that at police station, Woloszyn voluntarily waived his right to counsel and gave statement admitting that he attempted to rob residence in Ellwood City, Pennsylvania).

\textsuperscript{80} See id. (noting that Officer List and Lieutenant Gilchrist spoke with Woloszyn).

\textsuperscript{81} See id. (detailing contents of conversation between officers and Woloszyn). Woloszyn indicated during the conversation that he was cheating on his wife with a neighbor and that if they had a gun in his house, his wife probably “would have shot him years ago.” See id. (noting that in response to Woloszyn’s statements about cheating on his wife, one officer replied that Woloszyn “better watch [because] his wife might kick his butt”). After the officer’s statement, Woloszyn replied “[M]aybe that [his wife shooting him] might have been the best thing for everybody.” See id. (quoting Officer List as replying not to talk like that).
they caught him because "he wanted it to stop."82 As a result, she recom-
mended that Woloszyn be held in the booking area rather than in a jail cell; however, the officers placed him in a jail cell and allegedly checked him every five minutes.83 After Hartman-Swanson's observations, Nurse Houck interviewed Woloszyn and reported to the captain on duty that even though she did not believe he was suicidal, they should check him hourly.84 Other officers on duty also reported that they observed nothing unusual about Woloszyn's behavior and he was subsequently placed in Housing Unit B ("HB Unit").85

Despite the aforementioned observations by correctional officers, Wayne Shaftic, an inmate in the cell next to Woloszyn's, reported that Woloszyn "requested a counselor . . . [and] was yelling, screaming, and kicking for more than 45 minutes, but that no one responded."86 At 8:52 p.m., Officer Graziani found Woloszyn hanging in his cell and called a code blue.87 Two officers arrived at the scene and began performing cardiopulmonary resuscitation ("CPR") while another officer went to find the protective breathing mask that was supposed to be kept in the HB Unit, but was missing.88 Although officers initially inserted the breathing

82. See id. at 316-17 (reporting Hartman-Swanson's affidavit that Woloszyn was on "24 hour rampage," had done multiple drugs from heroin to crack and that Woloszyn told her he was not suicidal).
83. See id. at 317 (declaring that after Hartman-Swanson's recommendation, Nurse Annette Houck, nurse on-duty, cleared Woloszyn for "Housing Unit B," which is where prisoners are observed before being placed in general jail population).
84. See id. (reciting observations from Nurse Houck's report that Woloszyn be checked for "alcohol withdrawal"). The nurse also questioned Woloszyn about his psychiatric history and asked whether he needed to see a counselor and Woloszyn responded that he was not being treated and he did not need to see a therapist. See id. (asserting that as result of her conversation with him, Nurse Houck did not believe Woloszyn would harm himself).
85. See id. (describing two officers' statements, Officer Sainato and Officer Graziani, that Woloszyn's mood or behavior was not unusual, that Woloszyn was able to "state and spell his name" and that Woloszyn requested juice as drink he wanted in morning).
86. See id. (quoting inmate's unsworn statement). The inmate also stated that when Woloszyn requested a counselor he was told to "go to his cell, 'lay it down' and they would contact a counselor in the morning." See id. at 317-18 (same). The inmate continued to report that "[Woloszyn] said he needed help, he didn't belong here . . . I hear the kid in the cell going nuts, yelling and screaming and punching the metal top bunk." See id. at 318 (same). As per the officer's reactions to Woloszyn, the inmate was quoted as saying, "[t]he guard at the desk all of this time . . . was looking thru vacation brochures . . . That day Graziani never even looked in our cells . . . He walked past us, went to the end, turned around and walked past us a second time." See id. (same).
87. See id. (reporting that prisoners in HB Unit were supposed to be checked every thirty minutes and that Officer Graziani started one round at 8:14 p.m., ended at 8:20 p.m. and on another round found Woloszyn at 8:52 p.m.).
88. See id. (detailing how Officers Graziani and Stiles first propped Woloszyn on his bed to alleviate pressure on his neck, untied sheet around his neck, checked his pulse and took alternating turns performing CPR even though there was no protective breathing mask available at time).
mask incorrectly, it was finally corrected and the officers continued CPR until the ambulance arrived to take Woloszyn to the hospital, where he eventually died.89

Patricia Woloszyn, Woloszyn's widow, filed a Section 1983 and wrongful death action against Lawrence County; William Hall, the warden of Lawrence County Correctional Facility; and Officer Graziani, claiming violations of Woloszyn's Eighth and Fourteenth Amendment rights.90 The United States District Court for the Western District of Pennsylvania granted the defendants' motion for summary judgment and the plaintiff's widow appealed, arguing that summary judgment was incorrect for two reasons.91 First, she claimed that the district court erred because Officer Graziani failed to make five-minute checks on Woloszyn and failed to have the breathing mask in the HB unit.92 Second, she alleged that the summary judgment in favor of Lawrence County and Warden Hall was incorrect because the correctional facility "failed to have adequate policies, procedures and training in place."93

B. Third Circuit's Analysis

The Third Circuit upheld the district court's grant of summary judgment for Officer Graziani, Lawrence County and Warden Hall.94 The court began its analysis with an overview of Supreme Court and Third Cir-

89. See id. (presenting events of incident). Hartman-Swanson, one of the first officers to observe Woloszyn on in-take, arrived at the scene of the incident and noticed that the mask was turned backwards, thus, not getting any air into Woloszyn, and reported that she turned the mask around. See id. at 318 n.3 (reporting Hartman-Swanson's statement from her affidavit). Officer Graziani, however, reported in his deposition that he was the one that corrected the mask's position. See id. (reporting Graziani's statement from his deposition).

90. See id. at 318-19 ("To state a claim under § 1983, a plaintiff 'must allege both a deprivation of a federally protected right and that this deprivation was committed by one acting under color of state law.'" (quoting Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997))). A claim under the Fourteenth Amendment is applicable to pretrial detainees because pretrial detainees have not been convicted of any crime, and thus, the Fourteenth Amendment prohibits the state from imposing punishment on them. See id. at 319 n.5 (quoting Bell v. Wolfish, 441 U.S. 520, 535 (1979)). Although an Eighth Amendment claim is not applicable in this situation, the Third Circuit announced that in developing pretrial detainee suicide jurisprudence, the court relied on Eighth Amendment cases because "the due process rights of pretrial detainees are at least as great as the Eighth Amendment rights of convicted and sentenced prisoners." See id. at 319-20 n.5 (citing Boring v. Kozakiewicz, 833 F.2d 468, 471-72 (3d Cir. 1987)).

91. See id. at 319 (asserting that defendants denied all liability).

92. See id. (listing Woloszyn's widow's arguments on appeal).

93. See id. (listing arguments of Woloszyn's widow on appeal). To overcome summary judgment on appeal, the plaintiff "must introduce more than a scintilla of evidence showing that there is a genuine issue for trial." See id. (quoting Colburn v. Upper Darby Twp., 946 F.2d 1017, 1020 (3d Cir. 1991)).

94. See id. at 326 (stating holding).
cuit precedent and the standards that developed as a result.95 Even though the claim in this case relied on a Section 1983 violation of the Fourteenth Amendment, the court based its reasoning on Eighth Amendment Supreme Court precedent because it held that pretrial detainees’ due process rights are at least equivalent to the Eighth Amendment rights of convicted prisoners.96 Moreover, despite the Third Circuit’s apparent adoption of the Colburn I test, it refused to distinguish once again between “deliberate indifference” and “reckless indifference” or adequately define what “should have known” means.97 The Third Circuit reasoned that the plaintiff in this case did not establish that Woloszyn had a “particular vulnerability” to suicide.98 Therefore, she did not meet the first criteria under Colburn I and, thus, the court did not have to more adequately define the proper standard.99

Although the court held that the plaintiff’s case did not meet the first criterion of Colburn I, it still analyzed the liability of Officer Graziani, Lawrence County and Warden Hall.100 First, regarding Officer Graziani, the court reasoned that the evidence that Mrs. Woloszyn proffered did not demonstrate “a strong likelihood, rather than a mere possibility, that self-inflicted harm [would] occur.”101 To further support her claim, Mrs. Woloszyn presented Hartman-Swanson’s affidavit in which Officer Graziani was quoted as saying, “[Woloszyn’s suicide] was no big thing, it was just another druggy.”102 The court concluded that this statement, although “callous and unsympathetic,” did not establish Officer Graziani’s knowl-

95. See id. at 319 (noting that Colburn I was first time Third Circuit dealt with Section 1983 liability for pretrial detainee suicide). For a further discussion of Supreme Court and Third Circuit precedent regarding Section 1983 liability for a pretrial detainee’s suicide, see supra notes 29-78 and accompanying text.

96. See Woloszyn, 396 F.3d at 319-20 n.5 (citing Boring v. Kozakiewicz, 833 F.2d 468, 471-72 (3d Cir. 1987)) (reasoning that it has not been decided whether pretrial detainees should receive not only equivalent protection but more protection than convicted prisoners). For a further discussion of the distinction between pretrial detainees and convicted prisoners, see supra notes 10-11, 43-44 and accompanying text.

97. See Woloszyn, 396 F.3d at 321 (stating that Third Circuit does not have to reconcile terms “deliberate indifference” and “should have known”).

98. See id. ("We need not attempt to reconcile those two phrases here because there is no evidence on this record that Woloszyn had a particular vulnerability to suicide.").

99. See id. ("Accordingly, his wife can not establish the first element under Colburn I and [Colburn] II.").

100. See id. at 322-26 (analyzing liability). For a further discussion of the court’s analysis with respect to the liability of Officer Graziani, Lawrence County and Warden Hall, see infra notes 101-14 and accompanying text.

101. See Woloszyn, 396 F.3d at 322-23 (reasoning that Mrs. Woloszyn misinterpreted record because Woloszyn was not under any five-minute suicide checks because, even though Hartman-Swanson recommended them on intake, Nurse Houck felt they were not necessary).

102. See id. at 323 (quoting Hartman-Swanson’s affidavit, which quotes Graziani as saying that he was supposed to do five-minute checks but never did them).
edge of Woloszyn's possible vulnerability to commit suicide. The court concluded that the only statement that could indicate Officer Graziani knew of Woloszyn's possible vulnerability to suicide was the unsworn statement of Woloszyn's neighbor-inmate Shafic. The Third Circuit affirmed the district court's decision to exclude this evidence on the basis that it was not in affidavit form and thus was not reliable. Mrs. Woloszyn's final argument as to Officer Graziani's liability was that he failed "to maintain a breathing mask in a proper location." The court, however, concluded that not only was it not Officer Graziani's duty to maintain the breathing mask in the unit, but also that he completely disregarded his own health when he initiated CPR without the breathing mask. Moreover, the court concluded that even if it was Officer Graziani's duty to keep the breathing mask in the area, there was no proof that it would have prevented Woloszyn's death.

Second, Mrs. Woloszyn argued that Lawrence County was liable because it failed to train employees and to provide "readily available" breathing masks. The Third Circuit held that although Mrs. Woloszyn's expert testified to training deficiencies at the jail, he did not identify the specific training the personnel should have received to recognize that Woloszyn was suicidal. Regarding the allegation that the city failed to

103. See id. (arguing that only thing judge or jury could deduce from statement was that Graziani was supposed to be checking on Woloszyn, not that Woloszyn was suicidal).

104. See id. (noting that Mrs. Woloszyn's counsel could not obtain sworn statement from inmate Shafic because he was either fugitive or released from jail, although it is unclear which one).

105. See id. (noting that unsworn statement does not satisfy Federal Rule of Civil Procedure 56(e)). The Third Circuit discussed how Mrs. Woloszyn's counsel filed a Federal Rule of Civil Procedure 56(f) motion to prevent the entry of summary judgment claiming that the inmate's affidavit was unattainable. See id. (discussing that counsel asked court not to grant defendant's motion for summary judgment because counsel could not locate inmate to get his sworn statement). In denying the Rule 56(f) motion, the district court emphasized that the statement was over three years old. See id. (discussing district court's ruling). The Third Circuit noted that in the current case, Mrs. Woloszyn did not claim that the district court abused its discretion in denying the motion and she also did not claim that she could have located and deposed the inmate Shafic. See id. at 324 (discussing Mrs. Woloszyn's arguments).

106. See id. (arguing this was independent basis for denying summary judgment).

107. See id. (rendering court's decision).

108. See id. (indicating that mask's unavailability is immaterial because no proof was proffered that had it been present, Woloszyn would have survived if it was used immediately and properly).

109. See id. (claiming that failure to train resulted in employees not having ability to identify and prevent suicide).

110. See id. at 325 (identifying alleged training deficiencies such as facility not having proper intake documents, facility lacking policy about where to place suicidal prisoners, staff lacking qualifications to assess and prevent suicide and assigning Woloszyn to cell with vented bunk and blanket, which he used to commit suicide).
provide readily available breathing masks or proper training on how to use them, the court reasoned that because the officers began CPR immediately, the fact that the breathing mask was initially absent was irrelevant.\textsuperscript{111}

Finally, Mrs. Woloszyn claimed that Warden Hall was individually liable because he failed to “implement proper training, policies and procedure.”\textsuperscript{112} To establish Warden Hall’s liability, Mrs. Woloszyn relied again on her expert’s testimony about training deficiencies, which was similar to the testimony used against Lawrence County.\textsuperscript{113} The Third Circuit held that even if these deficiencies existed, it was irrelevant because she did not allege what type of training would have forewarned the officers of Woloszyn’s impending suicide.\textsuperscript{114}

IV. PREDICTIONS AND SUGGESTIONS

A. The Third Circuit Will Likely Choose the “Deliberate Indifference” Standard

In several cases that specifically addressed Section 1983 liability for a pretrial detainee suicide, the Third Circuit has declined to distinguish between “reckless indifference,” “deliberate indifference” and “should have known.”\textsuperscript{115} The Third Circuit declined to do this because the plaintiffs did not meet the first element of proving a particular vulnerability to suicide and, thus, the third element of the Colburn I test never became an issue.\textsuperscript{116} When faced with this issue, however, the Third Circuit will most likely rule that “deliberate indifference,” rather than “reckless indifference,” is the proper standard.\textsuperscript{117} The Third Circuit will also most likely define “deliberate indifference” as a custodial official having knowledge of

\textsuperscript{111} See id. at 325-26 (noting that Mrs. Woloszyn’s expert testified that Lawrence County’s failure to train employees resulted in mask not being available when needed and employees not being able to use it properly when needed).

\textsuperscript{112} See id. at 326 (discussing Warden Hall’s liability as warden of facility and indicating that he can be personally liable under Section 1983).

\textsuperscript{113} See id. (referring to affidavit that was previously entered on record as proof of Lawrence County’s liability).

\textsuperscript{114} See id. (comparing liability of Warden Hall to liability of Lawrence County).

\textsuperscript{115} See Colburn v. Upper Darby Twp. (“Colburn II”), 946 F.2d 1017, 1024 (3d Cir. 1991) (“In Colburn I, we referred to ‘reckless indifference’ as the standard for judging the defendant’s conduct. In Williams, we referred to ‘deliberate indifference.’ Both panels expressly declined to distinguish or precisely define these two concepts. We find it unnecessary to do so in this case.”) (citations omitted). For a further discussion of Third Circuit cases where the court chose not to define the standard, see supra notes 53-69, 74-78 and accompanying text.

\textsuperscript{116} See Woloszyn, 396 F.3d at 321 (“[W]e need not attempt to reconcile those two phrases here because there is no evidence on this record that Woloszyn had a particular vulnerability to suicide.”). For a further discussion of Third Circuit cases that articulated why the court chose not to define the standard, see supra notes 53-69, 74-78 and accompanying text.

\textsuperscript{117} For a further discussion of why the “deliberate indifference” standard will be adopted by the Third Circuit, see infra notes 118-25 and accompanying text.
a pretrial detainee's particular vulnerability to suicide and affirmatively disregarding it. 118

The first reason why the Third Circuit will likely adopt the "deliberate indifference" standard is because the court admitted that when it previously used the undefined term "deliberate indifference," the court borrowed the term from Eighth Amendment jurisprudence. 119 In Eighth Amendment jurisprudence, the Third Circuit has already defined "deliberate indifference" as a prison official knowing of and disregarding "an excessive risk to inmate health or safety." 120 Thus, because the Third Circuit admitted that it borrowed the term, it will most likely adhere to the same meaning when it finally chooses to define the term in Section 1983 pretrial detainee suicide cases. 121

Second, the Third Circuit has used the term "deliberate indifference" interchangeably with "reckless indifference" on many occasions. 122 Thus, the official adoption of "deliberate indifference" would not seem extraordinary given its recurrent appearance in Third Circuit cases. 123 Finally, the Third Circuit will most likely adopt the "deliberate indifference" standard because it has become the trend in the law. 124 The Supreme Court and several circuit courts of appeal have adopted this standard, including the First, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. 125

118. For a further discussion of why the "deliberate indifference" standard will be defined this way, see infra notes 119-25 and accompanying text.

119. See Woloszyn, 396 F.3d at 321 (discussing how in Whetzel, Third Circuit defined "deliberate indifference" and how Section 1983 jurisprudence borrowed "deliberate indifference" from cases like Whetzel); see also Colburn II, 946 F.2d at 1024 (citing Eighth Amendment Supreme Court cases such as Estelle that have "fashioned the standard of Section 1983 liability in detainee suicide cases").

120. See Beers-Capitol v. Whetzel, 256 F.3d 120, 133 (3d Cir. 2001) (arguing that custodial officials "must know" and that "should have known" standard is not sufficient).

121. Cf. Woloszyn, 396 F.3d at 321 (theorizing that because "deliberate indifference" was adopted from Eighth Amendment jurisprudence that it could be equivalent to "should have known" element under Section 1983). But cf. Colburn II, 946 F.2d at 1025 (defining "should have known" as something more than negligence but something less than knowing risk, which is different from "deliberate indifference" because "deliberate indifference" requires knowledge of risk).

122. See, e.g., Colburn II, 946 F.2d at 1023-24 (referring to standard of liability on numerous occasions as "reckless or deliberate indifference"); see also Williams v. Borough of West Chester, 891 F.2d 458, 464 n.10 (3d Cir. 1989) (using "reckless" and "deliberate indifference" interchangeably).

123. For a further discussion of when "deliberate indifference" has been used interchangeably with "reckless indifference," see supra notes 58-59, 122 and accompanying text.

124. See, e.g., Franks, supra note 10, at 123 ("The First Circuit, in Manarite v. City of Springfield, effectively described the deliberate indifference standard in jail suicide cases under Section 1983. This standard is followed by all the circuits, either directly or indirectly.").

125. For a further discussion of the cases in the other circuit courts of appeal that have adopted this standard, see supra note 18 and accompanying text.
B. Suggestions for Third Circuit Practitioners

If the Third Circuit adopts the “deliberate indifference” standard, practitioners in the Third Circuit will have an increasingly difficult time proving Section 1983 liability.126 One of the only factors that is relatively determinative of “deliberate indifference” is a pretrial detainee’s prior suicide attempt(s).127 If a custodial official or governmental entity knows of past suicide attempts, present suicide threats or a diagnosis of suicidal tendencies and does not affirmatively act to monitor the prisoner, this could be one factor evidencing “deliberate indifference.”128 Because most intake screening includes questions regarding a pretrial detainee’s history of mental illness or suicide, records exist to demonstrate both the official’s and the jail’s awareness.129

Neither a custodial official nor a governmental entity will be held liable for a detainee’s suicide if those attempts are too far in the past or if the official or jail took necessary precautions to prevent the suicide.130 Failure to take preventative measures, such as asking the detainee about past sui-

126. See also Franks, supra note 10, at 121 (“Plaintiffs usually do not prevail in jail suicide cases based on [S]ection 1983 . . . .”).
127. See Robertson, supra note 5, at 816 (noting that previous suicide attempts or threats are only indicators that court takes into account when finding that custodial official acted with “deliberate indifference”).
128. See id. (quoting Schmelz v. Monroe County, 954 F.2d 1540, 1544-45 (11th Cir. 1992)) (“In the absence of a previous threat of or an earlier attempt at suicide, we know of no federal court that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference.”); see also Fahey, supra note 5, at 87 (“In the absence of previous suicide attempts or a medical diagnosis of suicidal tendencies, a plaintiff must establish that an inmate’s suicidal tendencies were so obvious that a lay person would easily recognize the need for medical treatment.”). Fahey described one particular case where “deliberate indifference” was found. See id. at 90 (describing case of Lewis v. Parish of Terrebonne, 894 F.2d 142 (5th Cir. 1990)). The inmate in Lewis, after being arrested, told the nurse and jail warden that he wanted to die and that he swallowed a number of pills. See id. (describing case). He was transferred to a local hospital where the psychiatrist on staff diagnosed him as suicidal, wrote instructions down for the warden and placed them in an envelope for him. See id. (same). The warden never opened the envelope and, thus, never read the instructions and the inmate committed suicide. See id. (same). The Fifth Circuit held that the warden knew or should have known that the inmate expressed a suicidal wish, that the inmate took the pills and that the inmate was brought to a hospital. See id. (same). Thus, the court held that the warden acted with “indifferen[ce] to the serious medical needs of the plaintiff.” See id. (same).
129. See Johnson, supra note 5, at 1251-52 (noting that intake records could lead jury to believe that if jail knows about previous suicide attempts, and does not act accordingly, that constitutes “deliberate indifference”). But cf. Robertson, supra note 5, at 817-18 (noting case where police knew of inmate’s several bizarre suicide attempts and yet court granted summary judgment for defendant because no evidence existed to disprove defendant’s statement denying knowledge of suicide attempts).
130. See Robertson, supra note 5, at 818-19 (citing two cases where courts held that even though jailers knew of inmate’s attempted suicides that occurred two years prior, attempts were not predictive of present suicide because attempts were too remote in time).
cidual attempts, however, is only deemed mere negligence, and does not rise to the level of "deliberate indifference." 131 In addition to past suicide attempts, the practitioner in the Third Circuit might also be able to prove "deliberate indifference" if the jail has a history of inmate suicides and has not developed procedures to prevent them. 132

For a practitioner representing the custodial officials or governmental entities, defending them is not a difficult task. 133 So long as there is not gross or blatant disregard for an inmate’s health, no liability will be found. 134 To bolster the defense's case, the practitioner should provide evidence of the following: 1) the municipality’s adequate training and supervision in suicide detection and prevention; 2) policies and procedures for screening potential suicide victims such as questions regarding use of alcohol, drugs and hospitalization for suicide; 3) policies and procedures for monitoring potential suicide victims; 4) sufficient inmate searches and removal of dangerous items, such as shoe laces and belts; and 5) continuous inspections of the cell area. 135

V. CONCLUSION

Even though suicide in jails is common, the heightened standard of "deliberate indifference" is necessary. 136 It is crucial to comport with the Supreme Court’s holding that mere negligence is not enough to prove a Fourteenth Amendment Due Process violation. 137 Moreover, it is also crucial because, given the lack of adequate staffing in jails and the overcrowding of prisons, it is practically impossible to monitor every single instance

131. See id. at 818 (“Courts have also refused to impose liability because jailers neglected to make inquiries about suicidal tendencies.”); see also Franks, supra note 10, at 132 (noting that jail administrators are in difficult situation because if they screen and do so ineffectively or if pretrial detainee is identified suicidal but jail does not prevent suicide, jail administrators are worse off than had they not screened at all).

132. See Fahey, supra note 5, at 95 (highlighting Third Circuit case where city knew of large number of suicides, but did not take measures to prevent them and, thus, was held to have been acting deliberately indifferent).

133. See, e.g., id. at 91 (citing very few cases where “deliberate indifference” was found and arguing that winning Section 1983 suicide case is difficult).

134. See id. (citing only few cases that found “deliberate indifference”).

135. See id. at 95 (listing several recommendations that officials could use to help decrease suicide rate in jail); see also Franks, supra note 10, at 131-32 (arguing that jail personnel should be required to screen detainees for mental health status); Johnson, supra note 5, at 1257 (proposing that evaluations should absolutely be conducted to ascertain detainee’s mental health history and that qualified jail personnel should be on staff to diagnose suicidal tendencies).

136. See generally Fahey, supra note 5 (arguing throughout paper that courts have correctly declined to allow Section 1983 claims when mere negligence is alleged and that proper standard is heightened standard of “deliberate indifference”).

137. For a further discussion of Supreme Court cases holding that negligence is an inadequate standard, see supra notes 38-52 and accompanying text.
of potential suicidal behavior. As a result of this and prior Third Circuit and other circuit court precedent, the Third Circuit will most likely adopt the “deliberate indifference” standard for Section 1983 pretrial detainee jail suicides. This will be the correct decision because even qualified mental health professionals frequently disagree about whether a person is suicidal; so a custodial official, not adequately trained in the area, could not reasonably be expected to identify an inmate who is anything but blatantly suicidal.

Shevon L. Scarafile

138. See, e.g., Fahey, supra note 5, at 79 (reporting that in municipal and county jails, overcrowding and “antiquated structures” make it easier for inmates to commit suicide). But see Franks, supra note 10, at 181-83 (arguing that some suicides are preventable if effective screening and training policies are implemented).

139. For a further discussion of why the Third Circuit will most likely adopt this standard, see supra notes 115-25 and accompanying text.

140. See Johnson, supra note 5, at 1251 (noting that if suicidal tendency is not sufficiently obvious and mental health professionals would even disagree, that courts may not impose liability); see also Fahey, supra note 5, at 89 (arguing that hindsight is 20-20 and thus finding person at fault or to blame is easy after fact).