APPEAL NO. 19-4120

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN CROWSON,

Plaintiff/Appellee

vs.

JUDD LAROWE, M.D., ET. AL.,

Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
THE HONORABLE Tena Campbell PRESIDING
CASE NO. 2:15-CV-00880-TC

DEFENDANT/APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

None.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C § 1331, because Plaintiff asserted claims under laws of the United States. The district court issued a Summary Judgment Order on July 19, 2019. Judd LaRowe ("Dr. LaRowe") appeals the District Court's denial of summary judgment. Dr. LaRowe timely filed his Notice of Appeal on August 28, 2019. Jurisdiction in the Court of Appeals is proper under 28 U.S.C. § 1291.

This case comes before this Court on an interlocutory appeal, based upon the denial of qualified immunity on summary judgment as to the Plaintiff's claims against Dr. LaRowe. The United States District Court for the District of Utah, by the Honorable Tena Campbell, denied in part, and granted in part, Defendant Judd LaRowe's Motion for Summary Judgment, by Order dated July 19, 2019. (Order and Mem. Decision, Aplt. App. at 204).[1] Dr. LaRowe filed a Notice of Interlocutory Appeal on August 19, 2019. (Notice of Interlocutory Appeal, Aplt. App. at 225).

[1] To provide as much clarity as possible, Defendants provide dual citations to record cites throughout this Brief – the document name and the appendix page number.

"A denial of qualified immunity is an appealable 'final' order under the test set forth in *Cohen v. Beneficial Indust. Loan Corp*., regardless of whether that denial takes the form of a refusal to grant a defendant's motion to dismiss or a denial of summary judgment." *Cohen v. Beneficial Indust. Loan Corp*., 337 U.S. 546 (1949).

Section 1291 of Title 28, § U.S.C., gives courts of appeals jurisdiction over "all final decisions" of district courts, except those for which appeal is to be had to this Court. Section 1291 of Title 28, § U.S.C. The requirement of finality precludes consideration of decisions that are subject to revision, and even of "fully consummated decisions that are but steps towards final judgment in which they will merge." *Cohen v. Beneficial Indust. Loan Corp*., 337 U.S. 546 (1949). However, it does not bar review of all prejudgment orders. (*Id*.). In *Cohen*, the Court held that in certain situations, some non-final district court decisions would still be immediately appealable because they, "finally determined claims of right separable from, and collateral to, rights asserted in the action." (*Id*.). The Court held that these actions were too important to be denied review and could not be deferred until the entire case was adjudicated. (*Id*.).*; See also Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc*., 506 U.S. 139, 142-145 (1993) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Qualified immunity has been held to result in "entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal immunity question."

v. Forsyth, 472 U.S., at 526. This Court has held that "a district Court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." (Id. at 530); See also *Johnson v. Jones*, 515 U.S. 304, 317 (1995).

Mitchell establishes that an order rejecting the defense of qualified immunity at either the dismissal or summary judgment stage is a "final" judgment subject to immediate appeal. (Id.). The issue in the present case involves an appeal of the denial of summary judgment for qualified immunity based on whether certain conduct constituted a violation of clearly established law. Accordingly, this case—which involves the denial of governmental officers' assertions of qualified immunity—is squarely within the *Cohen* category of appealable decisions. This court has jurisdiction under the collateral order doctrine, 28 U.S.C. § 1291.

Federal appellate courts typically lack "jurisdiction to review denials of summary judgment motions." *Cox v Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015)(quoting *Serna v. Colo. Dept. of Corr.*, 455 F.3d 1146, 1150) (10th Cir. 2006)). However, they may review "[t]he denial of qualified immunity to a public official to the extent the denial involves abstract issues of law." (*Id.*) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013)); see also *Henderson v. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015). This court has interlocutory "jurisdiction 'to review

(1) whether the facts that the district court rule a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation."' *Cox*, 800 F.3d at 1242 (quoting *Roosevelt-Hennix v. Pricket*, 717 F.3d 751, 753 (10th Cir. 2013)). "Although an order denying a motion for summary judgment based on qualified immunity is not a final judgment, this court has jurisdiction under 28 U.S.C. § 1291 to review the order to the extent that it turns on an issue of law. 28 U.S.C. § 1291; *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013).

In response to this Court's order directing the parties to address the jurisdictional issue, Dr. LaRowe asserts this appeal turns on an issue of law because the facts alleged by Crowson are taken as true for purposes of summary judgment. The issue of whether the district court erred is a pure question of law over which this Court has jurisdiction. "[W]hether a given constitutional or statutory right was clearly established at the time the defendant acted presents a purely legal question." See *Garrett v. Stratman*, 254 F.3d 946, 951 (10th Cir. 2001).

This court may review the legal question of whether Dr. LaRowe's conduct, as alleged by Crowson, violates clearly established law. *Cox*, 800 F.3d at 1242 (quoting *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186) (10th Cir. 2001)).

Dr. LaRowe challenges the district court's findings of which facts a reasonable jury could accept as true, given the undisputed record evidence. Those findings include whether the law was established at the time of the alleged incident and whether Dr. LaRowe's conduct amounts to a violation.

Based on the foregoing, this court has jurisdiction to review the district court's denial of summary judgment based on qualified immunity.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court mischaracterized record evidence when holding a reasonable jury could conclude that Dr. LaRowe's alleged misdiagnosis of Crowson amounted to deliberate indifference.

II. Whether the district court disregarded record evidence and caselaw when holding Dr. LaRowe is ineligible for qualified immunity.

III. Whether Dr. LaRowe's conduct, as alleged by Crowson, violated clearly established law.

STATEMENT OF THE CASE

Crowson, an inmate at Washington County Purgatory Correctional Facility in Utah, asserts claims under 42 U.S.C. § 1983, alleging the lack of medical care provided to him by Dr. LaRowe violated the Eighth Amendment's ban on cruel and unusual punishment. (Am. Compl. ¶ 14, Aplt. App. Vol. I at 33). Dr. LaRowe moved for summary judgment, based on Crowson's failure to make a showing on an

essential element of the case for which he had the burden of proof. (LaRowe Motion for Sum. J. Aplt. App. Vol. I at 94).

On July 19, 2019, the District Court entered an Order denying Dr. LaRowe's motion for summary judgment. (Order and Mem. Decision, Aplt. App. Vol. 1 at 204). The District Court found that Dr. LaRowe "failed to conduct diagnostic tests that would have informed him of Mr. Crowson's medical needs" and that "a reasonable jury could find that Dr. LaRowe's failure to seek an accurate diagnosis amounted to deliberate indifference." (*Id.*). Furthermore, the District Court held that this Court's precedent makes "clear that the particular conduct in this case could amount to a constitutional violation." (*Id.*). Without providing any factual support, the District Court stated that "Dr. LaRowe did not simply misdiagnose Mr. Crowson, he refused to assess or diagnose his condition at all." (*Id.*). The District Court denied summary judgment, reasoning that a jury could determine Dr. LaRowe was deliberately indifferent and therefore ineligible for qualified immunity. (*Id.*).

Dr. LaRowe appeals the denial of summary primarily based on qualified immunity.

STATEMENT OF FACTS

Plaintiff Martin Crowson was a convicted prisoner incarcerated at the Washington County Jail in Washington County Utah from June 11 to July 1, 2014, for a parole violation. (Am. Compl. ¶ 14, Aplt. App. Vol. 1 at 33). He was housed

in the general population area of the Jail for the first few days of his incarceration, but after a disciplinary violation where he put semen in another inmate's peanut butter, Plaintiff was moved to a more restricted cell block. (Jail Log, Aplt. App. Vol. 2 at 345-46).

On the morning of June 25, 2014, Deputy Lyman noticed Crowson was acting "lethargic and slow." (Jail Log, Aplt. App. Vol. 2 at 389). As a result, Lyman had Deputy Dolgnar escort Crowson to the Jail's booking area. (*Id.*).

Michael Johnson, one of the staff nurses at the Jail, was working in the booking area that morning. Johnson interviewed Crowson at about 7:00 a.m. and observed that Crowson seemed quiet and reserved, which was different from how he normally acted. (Declaration of Michael Johnson ¶ 9, Aplt. App. Vol. 2 at 316). Johnson checked Crowson's vital signs, which were within normal limits. (Johnson Decl. ¶ 10, Aplt. App. Vol. 2 at 316).

Johnson instructed jail deputies to move Crowson to a medical housing cell in the booking area so that his health and safety could be better monitored by staff. Medical housing cells are in the booking area of the Jail. There, prisoners are observed on a more frequent basis than the rest of the Jail. Johnson also requested that his supervisor, Jon Worlton, further evaluate Crowson's mental health. (Johnson Decl. ¶ 11, Aplt. App. Vol. 2 at 317; Jail Medical Records, Aplt. App. Vol. 2 at 354). Worlton was the health service administrator at the Jail and was also in charge of

mental health problems and concerns. (Deposition of John Worlton 4:5-10, Aplt. App. Vol. 2 at 476; Deposition of Judd LaRowe 9:17-10:5, Aplt. App. Vol. 2 at 425-426).

Crowson was scheduled to have contact from the medical nursing staff once per shift, and was to be observed by jail deputies at least every 30 minutes. (Jail Medical Records, Aplt. App. Vol. 2 at 354; *see also* Johnson Depo. 46:6-25, 47:4-16, Aplt. App. Vol. 2 at 508; LaRowe Depo. 39:17-19, Aplt. App. Vol. 2 at 433). It was routine practice at the jail for inmates in the booking area to be checked on at least once per shift per day, and to be observed by deputies at least every 30 minutes. (LaRowe Depo. 39:13-22, Aplt. App. Vol. 2 at 433; Worlton Depo. 45:9-25, Aplt. App. Vol. 2 at 486). This meant vital signs were checked at least twice a day. (Johnson Depo. 109:6-9, Aplt. App. Vol. 2 at 523).

Johnson did not work at the jail on June 26 or 27, but observed Crowson again on June 28, 2014 at approximately 2:00 p.m. At that time, Crowson was confused, disoriented, and had elevated blood pressure. However, Crowson seemed to be making a little more sense than when Johnson had observed him on June 25. After meeting with Crowson, Johnson reported his observations to Dr. LaRowe, the doctor hired by the Jail to provide medical care to inmates.

Dr. LaRowe ordered that Crowson be given a chest x-ray to rule out any lung issues and have blood drawn for testing. However, Johnson was not able to draw

Crowson's blood due to vein scarring and his uncooperative nature. Johnson reported this to Dr. LaRowe. (Johnson Decl. ¶ 13, Aplt. App. Vol. 2 at 317).

Dr. LaRowe thought that Crowson was in booking when he received the call from Johnson. (LaRowe Depo. 44:15-17, Aplt. App. Vol. 2 at 434). Dr. LaRowe asked Johnson "for a history of what we were doing since [Crowson's] under observation." (Johnson Depo. 102:15-24, Aplt. App. Vol. 2 at 522). Johnson communicated information to Dr. LaRowe. Dr. LaRowe then ordered diagnostic testing. (LaRowe Depo. 13:14-22, Aplt. App. Vol. 2 at 426; LaRowe Depo 16:15-22, Aplt. App. Vol. 2 at 427; LaRowe Depo 19:1-4, Aplt. App. Vol. 2 at 428). Dr. LaRowe ordered the tests because it "might [help] explain a lot of the symptoms he [Crowson] was having." (LaRowe Depo. 13:15-14:20, Aplt. App. Vol. 2 at 427). Dr. LaRowe ordered a CBC as a general evaluation and diagnostic tool, "because of the patient's vague complaints" and in hopes of getting "some clue as to where to go next." (*Id*. at 16:8-17:11). Dr. LaRowe testified that sometimes bloodwork can provide a clue in the diagnosis of metabolic encephalopathy, stating that "if the acid base is out of norm, that can be reflected in a comprehensive metabolic panel." (*Id*. at 35:3-6.). Dr. LaRowe also ordered a chest x-ray to rule out a potential "lower respiratory infection that might explain a lot of the symptoms that the was having." (*Id*. at 17:18-25)

Before Johnson's shift ended on June 28, he took Crowson's vital signs again and noted them in the system. This was at approximately 4:00 p.m. (Johnson Decl. ¶ 14, Aplt. App. Vol. 2 at 317).

The next day, June 29, 2014, at approximately 7:45 a.m., Johnson visited Crowson again. Johnson took his vitals and noted an elevated heart rate. Johnson also observed that Crowson was still acting dazed and confused. Johnson reported his observations to Dr. LaRowe, who prescribed medication and instructed Johnson to administer 2 milligrams of Ativan to Crowson. (Johnson Decl. ¶ 15, Aplt. App. Vol. 2 at 317). Johnson checked on Crowson about an hour later. He was sleeping peacefully, and his vital signs had returned to normal. (Johnson Decl. ¶ 16, Aplt. App. Vol. 2 at 318).

On July 1, 2014, Dr. LaRowe received a call from Ryan Borrowman, RN, who stated "at that time, the vital signs had changed. They had gone outside of the normal range. And at that point, you know I elected to have him transported to an emergency room." (*Id*. at 14:4-9; see also Borrowman Decl. ¶ 8, Aplt. App. Vol. 2 at 313).

Dr. LaRowe testified that symptoms "of being dazed and confused, not oriented, over a period of three days" may be symptoms of "the terrible side effects of some drug use [seen at the jail]…. [M]any patients can start up normal, and they start using—you know, the worst drug we see is methamphetamines. And they can develop psychoses. And we see that on a routine basis. So, this is not something that

is an isolated event." LaRowe Depo. 27:16-24, Aplt. App. Vol. 2 at 430). "We deal with withdrawal all the time in the prison setting." (*Id*. at 67:11-17).

Crowson subsequently brought suit in the United States District Court for the District of Utah, alleging that Dr. LaRowe violated his Eighth Amendment right to be free from cruel and unusual punishment.

District Court Findings and Conclusions:

Dr. LaRowe moved the district court for summary judgment, asserting he was entitled to qualified immunity. The district court denied the motion, holding that a reasonable jury could find that his failure to seek an accurate diagnosis amounted to deliberate indifference. (Order and Mem. Decision, Aplt. App. Vol. 1 at 215). This appeal followed the district court's summary judgment decision.

ARGUMENT

Crowson seeks to elevate a claim of simple negligence to a constitutional violation. Despite receiving medical care and treatment for underlying symptoms over the course of three days, Crowson asserts claims against Dr. LaRowe regarding the adequacy of healthcare he received. However, because his negligence claims have long been dismissed, Crowson alleges Dr. LaRowe acted with deliberate indifference, in violation of his Eighth Amendment rights, when assessing his medical condition. Although it is undisputed Crowson eventually required admission to a hospital and was diagnosed with metabolic encephalopathy, prior to

admission, Dr. LaRowe remained vigilant in his efforts to treat, diagnose, and stabilize Crowson's condition.

Dr. LaRowe filed a motion for summary judgment based on Crowson's failure to provide evidence of deliberate indifference, and upon qualified immunity grounds. However, the district court rejected Dr. LaRowe's right to qualified immunity. The district court erred in its application of caselaw and case specific facts when reaching its holding. Furthermore, the district court erred in holding that established law put Dr. LaRowe on notice that a misdiagnosis would rise to the level of an Eighth Amendment violation. Accordingly, the district court's denial of summary judgment should be overturned.

I. THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT BY MISCHARACTERIZING RECORD EVIDENCE AND HOLDING A REASONABLE JURY COULD CONCLUDE THAT DR. LAROWE'S ALLEGED MISDIAGNOSIS OF CROWSON AMOUNTED TO DELIBERATE INDIFFERENCE

Standard of review for all issues:

This matter arises out of a denial of qualified immunity on summary judgment in the district court. The Tenth Circuit reviews "the presence or absence of qualified immunity de novo." *Pino v. Higgs*, 75 F.3d 1461, 1467 (10th Cir. 1996) (*citing Langley v. Adams Cty.*, 987 F.2d 1473, 1476 (10th Cir. 1993)).

On interlocutory appeal, the Tenth Circuit "may review: (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal

violation, or (2) whether that law was clearly established at the time of the alleged violation." *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 409 (10th Cir. 2014) (citations and quotations omitted).

However, "when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' [the Tenth Circuit] may assess the case based on [its] own *de novo* view of which facts a reasonable jury could accept as true." *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (*quoting* *Scott v. Harris*, 550 U.S. 372, 380 (2007)). "[T]he blatantly-contradicted exception imposes, by its very terms, a heavy burden, requiring that the district court's findings 'constitute visible fiction.'" *Spencer v. Abbott*, 731 F. App'x 731, 736 (10th Cir. 2017) (*quoting* *Lynch v. Barrett*, 703 F.3d 1153, 1160 n.2 (10th Cir. 2013)).

Summary judgment is appropriate when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Rule 56(e) of the Federal Rules of Civil Procedure requires a party opposing a supported motion for summary judgment to submit affidavits and admissible evidence showing a dispute of material fact on every essential element of a plaintiff's claim which he will bear the burden at trial. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). When a defendant points out an absence of proof on an essential element of the plaintiff's case, the

burden shifts to the plaintiff to submit admissible evidence that will create a question of fact. *Id*. at 322-323.

A. Deliberate Indifference Objective Component

The Eighth Amendment prohibits deliberate indifference to an inmate's serious medical needs. *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). This prohibition under the Eighth Amendment contains both an objective and subjective component. (*Id*.). In order to show objective deliberate indifference, the deprivation must involve a sufficiently serious medical need. (*Id*.); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). "A medical need is sufficiently serious 'if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999) (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)).

Here, the district court held that "the determination of whether a medical need is sufficiently serious should not 'be made exclusively by the symptoms presented at the time the prison employee has contact with the prisoner'; rather, the court must consider the 'ultimate harm' as alleged by the plaintiff." (Order and Mem. Decision Aplt. App. Vol 1 at 204).

The district court reasoned that Crowson was eventually diagnosed with encephalopathy, a serious condition warranting immediate care. (*Id*.). The district

court held that, given the serious nature of encephalopathy, a reasonable jury could find that the objective component of the deliberate indifference test was satisfied, "despite an absence of obvious symptoms or an accurate diagnosis." (Id.).

The district court's holding is incorrect. In *Requena v. Roberts*, the plaintiff (a prisoner) suffered a head injury with alleged vision and hearing loss as a result of an attack by a fellow prisoner. *Requena v. Roberts*, 893 F.3d 1195, 1215 (2018). The plaintiff alleged that an audiologist told him he had significant hearing loss, but it could not be determined whether it was related to the head injury. (*Id*.). The plaintiff requested a hearing aid, but was informed his hearing loss was of such a mild and low frequency that a hearing aid was not indicated. (*Id*. at 1216). The Court held that, to the extent the plaintiff alleged he was denied a hearing aid, he presented a mere disagreement with the diagnosis and prescribed course of treatment—which does not constitute an Eighth Amendment claim. *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 811(10th Cir 1999).

Like *Requena*, the ultimate diagnosis—whether hearing loss or encephalopathy—cannot be charged to Dr. LaRowe. It cannot be determined whether Crowson's subsequent diagnosis was related to the treatment he received by Dr. LaRowe. To determine otherwise requires hindsight, coupled with mere speculation. Crowson's claim represents a mere disagreement as to whether he was

experiencing encephalopathy in the days prior to his admission to the hospital, which cannot provide a basis for an Eighth Amendment violation.

In *Toler v. Troutt*, a prison doctor changed the medication of a prisoner based on the prisoner's symptoms. *Toler v. Troutt*, 631, 637 Appx, 545 (10th Cir. 2015). The Court held that where a doctor orders treatment consistent with the symptoms presented, and then continues to monitor the patient's condition, an inference of deliberate indifference is unwarranted. *Toler at 637* (citing *Self v. Crum*, 439 F.3d 1227, 1232-33 (10th Cir. 2006).

Here, like *Toler*, Dr. LaRowe based Crowson's treatment on his current symptoms. Dr. LaRowe continued to receive information regarding Crowson's condition and responded accordingly. Crowson's treatment was based on his current symptoms, his response to medications, and the medical judgment of Dr. LaRowe. Such a reasoned course cannot constitute an Eighth Amendment violation, even where a prisoner later develops a serious condition. See *Ledoux v. Davies*, 961 F.2d 1536, 1537 (10th Cir. 1992) (involving a dispute as to what medications were prescribed and noting that matters of medical judgment do not give rise to a § 1983 claim).

Based on the foregoing, the district court erred in holding that Dr. LaRowe's course of treatment and working diagnosis constituted deliberate indifference. Dr. LaRowe used his medical expertise and judgment to assess the vague symptoms

presented by Crowson. Simply being incorrect regarding the ultimate diagnosis—especially where symptoms may be explained by multiple maladies—goes against precedent and does not constitute deliberate indifference. Therefore, the district court's ruling should be overturned.

B. Deliberate Indifference Subjective Component

In order to satisfy the subjective prong of the deliberative indifference standard, a prison official must have a sufficiently culpable state of mind. A plaintiff is required to establish that the prison official "knew and disregarded an excessive risk to an inmate's health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), see also *Mata v. Saiz*, 427 F.3d 745, 752 (2005) (citing *Farmer* for the same premise). The subjective component requires proof that the defendant official was both "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists" and that the official actually "drew the inference." *Farmer*, 511 U.S. at 837. "Allegations of 'inadvertent failure to provide 'adequate medical care' or of a negligent diagnosis simply fail to establish the requisite culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (citation omitted); accord *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (explaining that a medical provider's "negligent diagnosis or treatment of a medical condition does not constitute a medical wrong under the Eighth Amendment." (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)).

U.S. 294, 299 (1991) (citation omitted); accord *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008) (explaining that a medical provider's "negligent diagnosis or treatment of a medical condition does not constitute a medical wrong under the Eighth Amendment." (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980))). "[A] prison medical professional who serves 'solely as a gatekeeper for other medical personnel capable of treating the condition' may be held liable under the deliberate indifference standard [only] if the professional 'delays or refuses to fulfill that gatekeeper role.'" *Mata*, 427 F.3d at 751 (quoting *Sealock*, 218 F.3d at 1211).

"Deliberate indifference does not require a finding of express intent to harm," nor must a plaintiff "show that a prison official acted or failed to act believing that harm actually would befall an inmate." *Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996); *Mata*, 427 F.3d at 752 (quoting *Farmer* 511 U.S. at 842). Rather, a plaintiff must show that "the official acted or failed to act despite his knowledge of a substantial risk of serious harm." (*Id.)* (quoting *Farmer*, 511 U.S. at 841). "An official 'would not escape liability if the evidence showed he merely refused to verify underlying facts that he strongly suspected to be true or declined to confirm inferences of risk that he strongly suspected to exist.'" *Id*. (quoting *Farmer*, 511 U.S. at 843).

In denying Dr. LaRowe's summary judgment, the District Court reasoned that Dr. LaRowe's alleged misdiagnosis was indicative of deliberate indifference. (Order

and Mem. Decision, Aplt. App. Vol I at 204). However, there is nothing in the record indicating Dr. LaRowe suspected encephalopathy and deliberately chose to decline testing or treating Crowson. Rather, the record indicates Crowson presented with vague and varying degrees of non-specific symptoms, which Dr. LaRowe actively treated.

In *Mathison v. Wilson*, a plaintiff prisoner was denied a consultation with an orthopedic specialist and was instead treated with non-steroidal anti-inflammatory drugs for his degenerative joint knee disease from October 2012 until his release in October 2014. *Mathison v. Wilson*, 719 Fed. Appx. 806, 807 (2017). He filed suit against prison agents, claiming they violated his Eighth Amendment rights by being indifferent to his knee pain. (*Id* at 808). The district court ruled that Plaintiff failed to show the defendants knew or disregarded an excessive risk to Plaintiff's health and safety, entitling them to qualified immunity. (*Id*.). This Court agreed with the district court, stating: a "delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm." *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993).

Like *Mathison*, where the defendants provided prompt, ongoing, and continuous treatment, Dr. LaRowe received reports and treated Crowson's symptoms. Over the course of three days (the timeframe in which Dr. LaRowe was aware of Crowson's symptoms and initiated treatment), Dr. LaRowe ordered

bloodwork and x-rays, spoke to prison staff, received reports with updates on vital signs, provided oral medication, and ordered Crowson's transfer and admission to the hospital. There is nothing indicating Dr. LaRowe knew Crowson had a serious condition and deliberately failed to provide treatment. Rather, Dr. LaRowe reasonably believed Crowson was suffering from withdrawal symptoms. When the clinical picture changed, Dr. LaRowe sent Crowson to the hospital immediately. Because there is no evidence indicating Dr. LaRowe deliberately ignored a serious medical need, the Court should reverse the district court's ruling and apply qualified immunity to Dr. LaRowe.

C. Dr. LaRowe Immediately Began Treating Crowson

In order to establish the subjective component, a plaintiff must show the defendant had a "sufficiently culpable state of mind." *Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006). To show such a state of mind, Crowson must have evidence indicating Dr. LaRowe knew there was a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it. *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999). However, an inadvertent failure to provide adequate medical care, or a negligent diagnosis, "fail[s] to establish the requisite culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297, 111 S.Ct 2321, 115 L.Ed.2d 271 (1991). The fact that a physician was negligent in diagnosing or treating a medical

condition does not state a valid claim of medical mistreatment under the Eighth Amendment. *Self*, 439 F.3d at 1232.

In *Olson v. Stotts*, the plaintiff prisoner alleged he was made to suffer for 18 months while the prison failed to provide him with a heart specialist and surgery. *Olson v. Stotts*, 9F.3d 1475, 1477 (1993). The Court held that, "at most, plaintiff differs with the medical judgment of the prison doctor, believing that he should have received his elective surgery sooner than he did. (*Id*.). Such a difference of opinion does not support a claim of cruel and unusual punishment." *Olson* at 1477 (citing *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). "[D]elay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm." *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993).

Like *Olson*, Crowson contends he should have been admitted to the hospital sooner. However, such allegations represent a mere disagreement with medical treatment. There is no evidence Dr. LaRowe knew that Crowson was suffering from encephalopathy and disregarded the serious nature of his condition.

In *Oxendine*, the prison doctor repaired a severed finger, but failed to diagnose the onset of gangrene. See *Oxendine v. Kaplan*, 241 F.3d at 1277-78. In finding the allegations sufficient to satisfy the subjective component of the deliberate-indifference inquiry, the court found that the inmate repeatedly claimed to be

suffering from considerable pain and informed the doctor that his finger had turned jet black. The doctor recognized and noted the necrosis, but took no action. (*Id*. at 1278-79). Given the seriousness of the plaintiff's injury, the court reasoned that the situation involved more than a mere disagreement between the parties regarding the proper course of medical treatment. (*Id*. at 1277). The court held that a reasonable jury could find that the doctor was both aware of facts from which the inference of serious medical injury could be drawn, and that the doctor actually drew the inference. *Farmer*, 511 U.S. at 837.

In *Blackmon*, an eleven-year old child at a juvenile detention facility exhibited mental health issues. The unit supervisor and a counselor knew of his "obvious" condition, knew that his incarceration exacerbated the condition, and knew that their response to his condition—strapping him in a restraint chair—offered no help. *Blackmon v. Sutton*, 734 F.3d 1237, 1244-45. Nevertheless, the officials denied him, or caused delay in is his receipt of, access to mental health treatment—despite his known and "serous suicidal and self-harm problems" (*Id*. at 1245). Considering these striking circumstances, the court determined that the records were sufficient "to suggest conscious disregard of a substantial risk of serious harm," because the officials "failed to provide him with access to obviously needed medical care for what was clearly a life-threatening condition." (Id. at 1245-46).

In *Walton v. Gomez*, officers put an arrestee in a "carotid restraint"—a technique that "compresses the carotid arteries and the supply of oxygenated blood to the brain" and renders "a person unconscious within 10-20 seconds." *Walton v. Gomez*, 745 F.3d 405, 413 (10th Cir. 2014). The officers' training materials warned that "brain damage or death could occur" if used "for more than one minute." (*Id.*). Nevertheless, officers applied the technique to a prisoner for nearly three minutes and then turned to other "pain compliance techniques," all while the prisoner remained "motionless on the floor." (*Id.* at 413-15). The officers then carried his "limp and unconscious" body to a holding cell and "placed him face down on the cell floor" without checking his vital signs or attempting to determine whether he needed medical attention. (*Id.*). When the nurse finally arrived approximately five minutes later, attempts to resuscitate the prisoner proved unsuccessful, and an autopsy reported the cause of death as "cardiorespiratory arrest during physical restraint." (*Id.* at 416).

In affirming the denial of qualified immunity, the *Gomez* court reasoned that the officers "had a front-row seat to the prisoner's rapid deterioration" and knew the "substantial risk" their pain compliance techniques posed to the prisoner's "health and safety." Yet, the officers delayed providing obviously necessary medical attention. (*Id.* at 431-33). Accordingly, the court held a factfinder could "conclude that the officers subjectively knew of the substantial risk of harm by the

circumstantial evidence or by the obviousness of the risk." (*Id*. at 433) (quoting *Martinez v. Beggs*, 563 F.3d 1082, 1089 (10th Cir. 2009).

The *Oxendine*, *Blackmon*, and *Gomez* courts concluded a reasonable jury could find that the defendant official possessed a culpable state of mind. In those cases, there were "facts from which the inference could be drawn that a substantial risk of serious harm exists were remarkably obvious and the defendant, as stated in *Gomez*, had a front row seat to observe them." *Farmer*, 511 U.S. at 837; see also *Gomez* 745 F.3d at 431.

Though the parties do not dispute that Crowson was later diagnosed with a "sufficiently serious" medical issue, the facts from which Dr. LaRowe could have inferred the existence of that medical issue, and consequently known the "substantial risk" and "serious harm" that would befall Crowson, were not obvious when analyzed under *Oxendine*, *Blackmon*, and *Gomez*. Unlike the facts presented in those cases, Dr. LaRowe was not aware Crowson was suffering from a serious medical condition. Crowson's history, symptoms, and response to treatment indicated he was suffering from substance withdrawal.

Moreover, unlike the physicians in these precedent cases, Dr. LaRowe continued to treat Crowson. On June 25, 2014, Crowson presented to prison nurses with a gambit of symptoms, including confusion and lethargy. (Johnson Decl. Aplt. App. Vol II at 315). However, while exhibiting these symptoms, Crowson was noted

to initially have normal vital signs. (Id.). It was not until June 28, 2014 that Crowson appeared confused and disoriented with an elevated blood pressure. Dr. LaRowe was thereafter notified by prison nurses that there was a medical concern and immediately took action.(LaRowe Dep. 44:1-17, Aplt. App. Vol II at 422).

On the afternoon of June 28, 2014, Dr. LaRowe ordered that Crowson undergo a chest x-ray and a complete blood count. (LaRowe Dep. 13:18-14:3, Aplt. App. Vol. II at 422). However, numerous attempts to draw blood were unsuccessful due to venous scarring and Crowson's lack of cooperation. (Johnson Decl., at ¶ 13, Aplt. App. Vol II at 315). On the morning of June 29, 2014, Nurse Johnson reported that Crowson had an elevated heart rate, was dazed and confused, and was experiencing delirium tremens—classic symptoms of withdrawal. (LaRowe Dep. 41:14-23, Aplt. App. Vol. II at 422). Upon learning of these symptoms, Dr. LaRowe prescribed Librium and Ativan, common medications to treat substance withdrawal.(*Id*. at 41:19-42:13). After the administration of Ativan, Nurse Johnson observed that Crowson was sleeping, and his vital signs had returned to normal. (Johnson Decl. ¶¶ 15-16, Aplt. App. Vol II at 315). Later that afternoon, Crowson was able to verbalize his thoughts and his vital signs remained stable—making it reasonable to presume that Crowson was responding well to the treatment. (Id.). Unlike *Oxendine*, where the patient's condition declined, Crowson experienced symptomatic relief form Dr. LaRowe's administration of Ativan. (Johnson Decl. ¶¶ 15-16, Aplt. App. Vol. II at

315); See *Oxendine*, 241 F.3d at 1278 (noting that the inmate repeatedly claimed to be suffering considerable pain and informed the doctor that the reattached portion of his finger had begun to fall off); *Gomez* 745 F.3d at 431 (noting that officers "had a front row seat" to the plaintiff's rapid deterioration); *Blackmon*, 734 F.3d at 1245 (observing that the defendants were aware those mental health problems of the plaintiff grew worse during his stay).

Given the positive clinical response to the medications, Dr. LaRowe reasoned that withdrawal was the likely cause of Crowson's medical issues. Unlike the defendants in *Oxendine*, *Blackmon*, and *Gomez*, Dr. LaRowe did not ignore the medical needs that Crowson presented; rather, Dr. LaRowe affirmatively acted to address Crowson's medical issues by ordering radiographs, blood work, and treating with medications based on the reported observations he received from prison nurses. Dr. LaRowe's treatment was also based on his knowledge of Crowson's history of drug abuse.

Dr. LaRowe's potential misdiagnosis of Crowson is perhaps a medical negligence question. Dist. Ct. Order, Feb. 22, 2017, Dkt. No. 49 (Stating Crowson originally filed negligence claims against Dr. LaRowe. However, those claims were dismissed by the district court).

However, misdiagnosis cannot satisfy the subjective component of the deliberate-indifference standard. See

("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical Malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006). ("[M]isdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim."); *see also* *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("even if the conclusion the prison official drew from his investigation was erroneous or negligent, it does not rise to the level of an Eighth Amendment violation based on deliberate indifference. Deliberate indifference requires more than a showing of simple or heightened negligence."); *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (rejecting the plaintiff's subjective-component argument by noting that her "complaints suggest negligence-not a wanton and obdurate disregard for inmate health and safety").

Our caselaw firmly establishes that a doctor's exercise of "considered medical judgment" fails to fulfill the subjective component, "absent an extraordinary degree of neglect" viz., where a prison physician "responds to an obvious risk" with "patently unreasonable" treatment. *Self*, 439 F.3d at 1232. "In the circumstances of a missed diagnosis or delayed referral, we have only found a sufficiently extraordinary degree of neglect under three circumstances: first, where a doctor

recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but refuses or unnecessarily delays a referral; second, where a doctor fails to treat a medical condition so obvious that even a layman would recognize the condition; and finally, where a doctor entirely denies care although presented with recognizable symptoms which potentially create a medical emergency." (*Id.*).

Crowson contends, and the district court agrees, that his loss of memory and elevated blood pressure constituted an obvious sign of metabolic encephalopathy. (Order and Mem. Decision, Aplt. App. Vol I at 204). However, these lay opinions ignore the fact that such symptoms may be indicative of a host of other issues, including: hypertension, coronary artery disease, heart attack, alcohol withdrawal, or a multitude of other possible illnesses. Metabolic encephalopathy includes various pathological conditions such as alcohol and drug intoxication, metabolic imbalances, and systemic infections. (LaRowe Dep. 33:20-34:7, Aplt. App. Vol II at 422). The district court advances the view that Dr. LaRowe should have recognized Crowson's symptoms as being more consistent with metabolic encephalopathy, and contends that his failure to do so constitutes deliberate indifference. (Order and Mem. Decision, Aplt. App. Vol I at 204).

However, the Court must limit the subjective inquiry "to consideration of the medial professional's knowledge at the time he prescribed treatment for the

symptoms presented, not to the ultimate treatment necessary." *Self*, 439 F.3d at 1233. The fact that Crowson's symptoms could have also pointed to other, more serious conditions fails "to create an inference of deliberate indifference" on Dr. LaRowe's part. *Id*. at 1235. See also *Farmer*, 511 U.S. at 838 (noting that an "official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment"); *Self*, 439 F.3d at 1234 ("where a doctor faces symptoms that could suggest indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively unreasonable."). Where the medical professional "provides a level of care consistent with the symptoms presented by the inmate, absent evidence of actual knowledge or recklessness, the requisite state of mind cannot be met." *Self*, 439 F.3d at 1233. In this case, Crowson has presented no evidence of actual knowledge or recklessness, and the "negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation." *Id*. (quoting *Perkins* 165 F.3d 803, 811 (10th Cir. 1999).

A reasonable factfinder is unlikely to infer that Dr. LaRowe possessed the requisite culpable state of mind to satisfy the deliberate-indifference standard, even if he misdiagnosed Crowson's condition. Crowson was required to present evidence, not conjecture or speculation, that Dr. LaRowe displayed a conscious disregard of a

substantial risk of serious harm arising from Crowson's symptoms. Crowson has failed to do so. See *Self*, 439 F.3d at 1235 (finding evidence of the subjective component wanting where a doctor treated a plaintiff for a respiratory condition (a misdiagnosis), when his symptoms also suggested a heart condition called endocarditis (the actual condition of the plaintiff)). See also *Sealock*, 218 F.3d at 1208-12 (finding the subjective component not met where a prison nurse misdiagnosed an inmate's chest pains because the facts indicated "at most' negligent diagnosis or treatment); *Heidtke v. Corr. Corp. of Am.*, 489 F. App'x 275, 282-85 (10th Cir. 2012)(unpublished)(citing *Self*, and finding that a medical professional's misdiagnosis did not evidence deliberate indifference, because the medical professional took measures to address the symptoms he perceived).

Crowson has failed to establish the subjective component of the deliberate-indifference standard. Dr. LaRowe exercised reasonable medical judgment in determining Crowson was experiencing substance withdrawal, and there is no significant ground for the contrary view that Dr. LaRowe "consciously disregarded a substantial risk of harm" to Crowson. *Self*, 439 F.3d at 1235. Because Crowson's claims of an Eighth Amendment violation are unfounded, the district court's denial of summary judgment based on these assumptions was improper.

Like the plaintiff in *Self*, Crowson argues he was denied medical treatment. (Id. at 1234). Nurse Johnson and Dr. LaRowe both administered ongoing treatment

to Crowson through observation, checking vital signs, and prescribing medications. (Johnson Decl., at ¶ 13, Aplt. App. Vol. II at 315; LaRowe Dep., 13:18-14:3, 17:18-25, Aplt. App. Vol. II at 422). Considering Crowson remained functional, though somewhat confused regarding certain matters (such as past work experience), and only occasionally experienced an elevated blood pressure or heart rate throughout the assessments, Dr. LaRowe inferred Crowson was likely experiencing alcohol withdrawal—a common problem within the prison population. (LaRowe Dep. at 41:19-42:13, Aplt. App. Vol. II at 422) Even after treatment with Ativan, Crowson's elevated pulse, vitals, and confused state improved, suggesting his symptoms were not emergent. (*Id*. at 37:21-38:11) However, upon a sudden return of symptoms, Dr. LaRowe immediately ordered a transport to a hospital for emergency care. Even with the benefit of all favorable inferences, these facts fail to rise to the level of deliberate indifference. (Id. at 14:4-9; Borrowman Decl. ¶¶ 8-10, Aplt. App. Vol. II at 312).

Crowson contends Dr. LaRowe failed to fulfill his gatekeeper function by improperly denying him access to further medical treatment. See *Sealock*, 218 F.3d at 1211 (explaining that a medical professional may act with deliberate indifference if he serves "as a gatekeeper for other medical personnel capable of treating the condition and delays or refuses to fulfill that gatekeeper role" in the face of an obvious need for additional treatment or referral); see also *Self*, 439 F.3d at 1232. Gatekeeper liability only attaches "where the need for additional treatment or

referral to a medical specialist is obvious." *Self*, 439 F.3d at 1232. Here, Crowson cannot show that the symptoms he demonstrated were inconsistent with substance withdrawal. Cf. *Mata*, 427 F.3d at 755, 758 (finding that a nurse "completely refused to fulfill her duty as a gatekeeper" where she observed obvious signs of a medical emergency (e.g. unexplained chest pains), but "neither administered first aid nor summoned medical assistance despite the inmate's plea for medical attention"). The decision of Dr. LaRowe not to initially refer Crowson for an additional medical assessment or treatment fails to meet the high evidentiary hurdle for deliberate indifference under a gatekeeper theory. *Self*, 439 F.3d at 1232.

Because the district court relied on incorrect information when applying the deliberate indifference standard, this Court should reverse the district court's order.

II. THE DISTRICT COURT MISAPPLIED THE FACTS OF THE CASE AND ERRED WHEN DENYING DR. LAROWE QUALIFIED IMMUNITY

In denying summary judgment for qualified immunity, the district court relied on this Court's decision in *Estate of Booker*. However, the facts in *Estate of Booker* are so materially different from the case at hand that the decision could not sufficiently put Dr. LaRowe on notice that his actions were violating Crowson's constitutional rights. *Estate of Booker*, 745 F.3d at 434.

Estate of Booker involved an allegation of "positional asphyxiation," wherein officers applied a carotid restraint for approximately two and half minutes, put 140 pounds of pressure to the suspect's back, and initiated an eight second Taser stun

after the suspect was restrained. (*Id*.). The *Estate of Booker* court held that the officers' actions provided them with a "front row seat to Mr. Booker's rapid deterioration." (*Id*. at 431) The *Estate of Booker* defendants had been trained on the use of a carotid restraint and had been warned that brain damage or death could occur if the technique is applied for more than a minute. (*Id*. at 427). Additionally, the officers were trained on the risks associated with carotid restraint and the steps required should an inmate become unconscious. (*Id*. at 431). The *Estate of Booker* court denied the defendants qualified immunity due to: (1) the existence of clearly established law with regard to the use of carotid restraint; and (2) defendants' training, which required vital sign monitoring and medical attention for suspects rendered unconscious by the use of force. (*Id*. at 431-32) ("considering the training and Mr. Booker's limp appearance, a reasonable jury could conclude the Defendants inferred that Mr. Booker was unconscious and needed immediate medical attention. If a jury concludes the Defendants made this inference, then it could also conclude they were deliberately indifferent in failing to respond sooner").

The decision in *Estate of Booker* did not put Dr. LaRowe on notice that his actions would violate the Constitution. Unlike *Estate of Booker*—where the officers contributed to the injury and could have reasonably concluded that the limpness of the plaintiff was caused by their actions—Dr. LaRowe did not engage in any conduct that worsened Crowson's health. Even the administration of Ativan caused a

dissolution of symptoms. Failing to provide medical treatment (especially after contributing to or causing the injury) is completely different than providing well-reasoned treatment based on a differential diagnosis.

The dispositive question in determining whether a defendant is entitled to qualified immunity is whether the violative nature of the particular conduct considered in context is clearly established. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("We have repeatedly told courts not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." (quotations, citations, and alteration omitted)).

Here, the district court deduced that "Dr. LaRowe did not simply misdiagnose Mr. Crowson, he 'refused to assess or diagnose his condition at all and simply assumed he was experiencing substance withdrawals.'" (Order and Mem. Decision, Aplt. App. Vol. I at 204). However, the district court misapplies the facts of the case in making this assessment. As noted earlier in the district court's ruling, "Dr. LaRowe made only minimal efforts to diagnose Mr. Crowson's condition. [He] ordered a blood test, an effective tool. Yet after learning that Nurse Johnson could not perform the blood draw, he ended his inquiry and wrongly assumed that Mr. Crowson was experiencing drug withdrawals." (*Id*.). Furthermore, the district court

inaccurately proffers that Dr. LaRowe "prescribed a benzodiazepine drug that worsened Mr. Crowson's encephalopathy," but provides no evidence that the administration of this drug had any effect on Crowson's encephalopathy. (*Id*.).

The district court found that, unlike the nurse in *Mata v. Saiz*, Dr. LaRowe "failed to assess, diagnose, or even visit Mr. Crowson." (*Id*.). While it is true that the nurse in *Mata* had direct interaction with the patient, whereas Dr. LaRowe relied upon prison medical staff to directly interact with Crowson due to his prison schedule, Dr. LaRowe ordered tests, prescribed medications, and found Crowson's symptoms to be alleviated with medication—providing reasonable belief that the medication was indicative of substance withdrawal. Like *Mata*, Dr. LaRowe made a good faith effort to diagnose and treat Crowson's medical condition. *Mata*, 427 F.3d at 760-61.

Because the district court made broad allegations that contradict previous statements in its order denying summary judgment, its denial of summary judgment should be reversed.

III. THE DISTRICT COURT ERRED IN DECLARING THE CONSTITUTIONAL RIGHT WAS CLEARLY ESTABLISHED

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

"A Supreme Court or Tenth Circuit Decision on point or the weight of authority from other courts can clearly establish a right," *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018), cert. denied, 139 S. Ct. 1347 (2019). A case directly on point is not required so long as "existing precedent has placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); See *York v. City of Las Cruces*, 523 F.3d 1205, 1212 (10th Cir. 2008) (reporting that clearly established law does not mean that there must be a published case involving identical facts; the dispositive question in all cases is whether the violative nature of the particular conduct at issue is clearly established. *Mullenix*, 136 S. Ct. at 308; see *Halley*, 902 F.3d at 1144.

The district court broadly held that the law defining deliberate indifference to an inmate's serious medical need is a *clearly* established constitutional right. (Order and Mem. Decision, Aplt. App. Vol. I at 204). However, there is no Supreme Court or Tenth Circuit decision holding that a physician's misdiagnosis of a patient's ultimate illness or disease constitutes deliberate indifference where the physician has treated the patient in good faith. In fact, the caselaw supports the contrary proposition, stating that a physician's attempts to treat and diagnose a patient, albeit incorrectly, may rise to the level of medical malpractice but does not suggest deliberate indifference. *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006). ("[M]isdiagnosis, even if rising to the level of medical malpractice, is simply

insufficient under our case law to satisfy the subjective component of a deliberate indifference claim."); *see also* *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("even if the conclusion the prison official drew from his investigation was erroneous or negligent, it does not rise to the level of an Eighth Amendment violation based on deliberate indifference. Deliberate indifference requires more than a showing of simple or heightened negligence.").

The district court failed to cite any controlling precedent indicating Dr. LaRowe knew he was violating Crowson's constitutional rights. It is not disputed that treatment of an inmate's serious medical need is a clearly established right. *Mata*, 427 F.3d at 749. However, based upon the vague intermittent symptoms presented by Crowson during the time that Dr. LaRowe was notified of the medical issue, combined with the alleviation of symptoms following Ativan treatment prescribed by Dr. LaRowe, Crowson's medical issues were not deemed an emergency or high-risk situation until the morning of July 1, 2014. At that time, Dr. LaRowe immediately ordered Crowson be transported to the hospital for further evaluation.

The district court states that a jury could find that Crowson's medical needs were sufficiently serious to satisfy the objective prong of the deliberate indifference test, even in the face of multiple potential diagnoses. (Order and Mem. Decision, Aplt. App. Vol I at 204). At the same time, the district court holds that while there

is no direct law on point, the unlawfulness of Dr. LaRowe's conduct is apparent. (Id.). There is nothing in the record indicating Dr. LaRowe acted in an unlawful manner over the three days he treated Crowson. Rather, Dr. LaRowe appropriately ordered tests, administered medication, and received reports regarding Crowson's condition. There is no evidence Dr. LaRowe inflicted cruel and unusual punishment upon Crowson under the deliberate indifference standard. To hold otherwise would elevate all medical negligence claims to constitutional violations.

CONCLUSION

Negligence claims do not amount to cruel and unusual punishment. The "deliberate indifference" standard was intended to address this distinction by establishing a high hurdle. The district court erred in its analysis of the facts of the case and misapplied the objective and subjective components of deliberative indifference when denying Dr. LaRowe's motion for summary judgment. Dr. LaRowe's chosen treatment and alternative diagnosis does not give rise to an Eighth Amendment claim. Because Dr. LaRowe's treatment of Crowson does not constitute deliberate indifference, this Court should reverse the district court's ruling, providing Dr. LaRowe with qualified immunity.

REQUEST FOR ORAL ARGUMENT

Defendant Dr. LaRowe respectfully requests oral argument in this case to more clearly explain these issues to this Honorable Court. The Court's question and answer format will aid the Court in this decision.

DATED this 18th day of December, 2019.

KIPP AND CHRISTIAN, P.C.

/s/ *Gary T. Wight*
GARY T. WIGHT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December 2019 a true and correct copy of the foregoing **BRIEF OF THE DEFENDANT/APPELLANT** was served by the Court's CM/ECF system to the following:

KIPP AND CHRISTIAN, P.C.

/s/ Gary T. Wight
GARY T. WIGHT

CERTIFICATE OF COMPLAINCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,039 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in Times New Roman size 14 font.

DATED this 18th day of December 2019.

KIPP AND CHRISTIAN, P.C.

/s/ Gary T. Wight
GARY T. WIGHT

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I HEREBY CERTIFY that the foregoing Appellant's Brief was scanned for viruses using Super Anti-Spyware, and that according to that program, it is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Gary T. Wight
GARY T. WIGHT

CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that the copy of the foregoing Appellant's Brief that was submitted in digital form via the court's ECF system is an exact copy of the written document filed with the Clerk of Court.

/s/ *Gary T. Wight*
GARY T. WIGHT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MARTIN CROWSON, Plaintiff, vs. WASHINGTON COUNTY, UTAH, CORY C. PULSIPHER, acting Sheriff of Washington County, JUDD LAROWE, and MICHAEL JOHNSON, Defendants.	ORDER AND MEMORANDUM DECISION Case No. 2:15-cv-00880-TC

While an inmate at the Washington County Purgatory Correctional Facility, Plaintiff Martin Crowson began suffering from symptoms of toxic metabolic encephalopathy, a degenerative neurologic disorder caused by exposure to toxic substances. Rather give him medical care, medical staff wrongly assumed that he was withdrawing from drugs or alcohol and placed him in an observation cell for seven days without treatment. Mr. Crowson brings claims under 42 U.S.C. § 1983, alleging that the lack of medical care violated the Eight Amendment's ban on cruel and unusual punishment, as applied to him as a pre-hearing detainee by the Fourteenth Amendment. The remaining Defendants in the case—Michael Johnson (a nurse), Dr.

Judd LaRowe, and Washington County—have moved for summary judgment. For the reasons below, the court denies their motions in most respects.

BACKGROUND FACTS

This case arises from Mr. Crowson's stay in the Washington County Purgatory Correctional Facility (the Jail) from June 11, 2014, when he was booked for a parole violation, until July 1, 2014, when he was taken to the hospital for what would be diagnosed as metabolic encephalopathy.

On June 17, 2014, Mr. Crowson was placed in solitary confinement, known as the "A Block," because of a disciplinary charge. On the morning of June 25, while still in solitary confinement, Jail Deputy Brett Lyman noticed that Mr. Crowson was acting slow and lethargic. The deputy alerted Defendant Michael Johnson. As a registered nurse, Nurse Johnson could not formally diagnose and treat Mr. Crowson. His role was to assess inmates and communicate with medical staff who could make diagnoses—in this case, Jon Worlton, a physician assistant (PA), and Judd LaRowe, the Jail's physician.

Nurse Johnson evaluated Mr. Crowson that morning. He noted normal vital signs, but also memory loss: Mr. Crowson could not remember the kind of work he did before his arrest. Nurse Johnson instructed jail deputies to move Mr. Crowson to a medical observation cell, and entered a request in the medical recordkeeping system for PA Worlton to conduct a psychological evaluation.

While being moved to the medical observation cell, another deputy, Fred Keil, noticed that Mr. Crowson appeared unusually confused. Deputy Keil performed a body cavity search on

Mr. Crowson; when ordered to re-dress himself, Mr. Crowson first put on his pants, then put his underwear on over his pants.

Nurse Johnson checked Mr. Crowson again that afternoon. He observed that Mr. Crowson's pupils were dilated but reactive to light, and that Mr. Crowson appeared alert and oriented. He left the Jail at the end of his shift without conducting further physical or mental assessments, and without contacting Dr. LaRowe. PA Worlton never received Nurse Johnson's request for a psychological examination and, according to the Jail's medical recordkeeping system, no medical personnel checked on Mr. Crowson for the next two days.

Nurse Johnson returned to work on June 28 and visited Mr. Crowson in the early afternoon. Mr. Crowson seemed confused and disoriented and had elevated blood pressure. He gave one-word answers to Nurse Johnson's questions, and understood, but could not follow, an instruction to take a deep breath. After his visit, Nurse Johnson relayed his observations to Dr. LaRowe by telephone. Dr. LaRowe ordered that Mr. Crowson undergo a chest x-ray and a blood test. The blood test, known as a complete blood count, could have detected an acid-base imbalance in Mr. Crowson's blood, a symptom of encephalopathy.

Mr. Crowson never received the x-ray or the blood test. Nurse Johnson tried to draw Mr. Crowson's blood on June 28, but couldn't because of scarring on Mr. Crowson's veins and because Mr. Crowson would not hold still. Nurse Johnson reported his unsuccessful attempt to Dr. LaRowe, who made no further attempts to diagnose Mr. Crowson.

On the morning of June 29, Nurse Johnson again took Mr. Crowson's vital signs and noted an elevated heart rate. He also observed noted in the medical recordkeeping system that Mr. Crowson was still acting dazed and confused, and was experiencing delirium tremens, a

symptom of alcohol withdrawal. He again reported his observations to Dr. LaRowe, who prescribed Librium and Ativan—medicines used to treat substance withdrawal—and instructed Nurse Johnson to administer a dose of Ativan. An hour later, Nurse Johnson checked on Mr. Crowson, who was sleeping, and noted that his vital signs had returned to normal.

Nurse Johnson visited Mr. Crowson again that afternoon. He noted that Mr. Crowson was better able to verbalize his thoughts and that his vital signs remained stable. But Mr. Crowson again reported memory loss, telling Nurse Johnson that he could not remember the last five days. Nurse Johnson, who still assumed that that Mr. Crowson was suffering from substance withdrawal, told Mr. Crowson that he was in a medical observation cell, and that he would begin taking medication to help his condition.

The following day, Nurse Ryan Borrowman was assigned to the medical holding area. Nurse Borrowman first saw Mr. Crowson on July 1 and noted that his physical movements were delayed and that he struggled to focus and would lose his train of thought. As Nurse Borrowman recounted in his declaration, "[d]ue to the severity of [Mr. Crowson's] symptoms and the length of time he had been in a medical holding cell, I immediately called Dr. LaRowe for immediate medical care." (Decl. of Ryan Borrowman ¶ 9 (ECF No. 67).) Dr. LaRowe ordered Nurse Borrowman to send Mr. Crowson to the hospital, and Mr. Crowson was transported to the Dixie Regional Medical Center.

The parties' summary judgment briefs allude to, but do not explain, Mr. Crowson's circumstances before and after his incarceration at the Jail. The amended complaint refers to a hospitalization at Dixie Regional Medical Center "a few weeks before being arrested and detained" at the Jail, and states cryptically that medical history "would have revealed to Facility

staff that Crowson should not have been given any drug categorized as a benzodiazepine" (such as Librium). (Am. Compl. ¶ 37 (ECF No. 7).) The hospitalization appears to have been the result of a heroin overdose. (Dep. of Martin Crowson at 5:15–6:19, 49:19–22 (ECF No. 66-2) [hereinafter "Crowson Dep."].)

The parties also do not discuss the after-effects of Mr. Crowson's encephalopathy. According to the amended complaint, Mr. Crowson remained in the hospital until July 7, 2014, and continued to suffer from "residual effects of encephalopathy, liver disease, and other problems." (Am. Compl. ¶ 43.) He testified in his deposition that he spent months recovering at his mother's house in Hooper, Utah before returning to the Jail on September 7, 2014:

> And then I really don't have a memory for like the next two-and-a-half months until my brain—it's like my brain checked out sometime. Because I guess—I guess I was still eating food and I was still doing stuff because—and my mom and my girl was changing my diaper, and my little brother. They were changing my diaper the whole time I was in Hooper until like—I don't even—I don't even—I can't even say necessarily a certain time that I checked back in to my brain locker.

(Crowson Dep. at 19:7–15.)

PROCEDURAL BACKGROUND

Mr. Crowson filed this case against Washington County, the Jail and Jail personnel (including Sheriff Pulsipher in his individual and official capacities), alleging negligence under state law, violations of the Utah Constitution, and violations of the Eighth and Fourteenth Amendments. A number of parties and claims have already been dismissed, both by court order and stipulation of the parties. Most recently, the court, at the December 19, 2019 hearing on the present motions, dismissed PA Worlton from the case because of Mr. Crowson's failure to serve

him. Mr. Crowson's only remaining claims are his § 1983 claims against Washington County (including Sheriff Pulsipher in his official capacity), Nurse Johnson, and Dr. LaRowe.

These remaining Defendants have moved for summary judgment. Nurse Johnson and Dr. LaRowe argue that their care did not violate constitutional standards, and that they are, consequently, entitled to qualified immunity. Washington County[1] seeks summary judgment on the grounds that none of its employees committed an underlying constitutional violation, and that Mr. Crowson cannot show that a County policy or custom caused Mr. Crowson's injuries.

The Defendants also argue that Mr. Crowson's claims should be dismissed because he failed to comply with the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), which requires that prisoners exhaust all available administrative remedies before filing suit under § 1983.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Judgment as a matter of law is appropriate when the nonmoving party has failed to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof." Koch v. City of Del City, 660 F.3d 1228, 1238 (10th Cir. 2011) (quoting Shero v. City of Grove, Okl., 510 F.3d 1196, 1200 (10th Cir.2007)). When

[1] Sheriff Pulsipher only remains in this case in his official capacity, and "an official-capacity suit brought under § 1983 . . . is, in all respects other than name, to be treated as a suit against the entity." Moss v. Kopp, 559 F.3d 1155, 1168 n.13 (10th Cir. 2009). Accordingly, and to avoid confusion about the manner in which he is being sued, the court will omit reference to Sheriff Pulsipher when discussing the liability of Washington County.

evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. Id.

Nurse Johnson and Dr. LaRowe both raise the defense of qualified immunity, so the burden on summary judgment shifts somewhat. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). It provides "immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted). Though the court must still view the evidence in a light most favorable to Mr. Crowson, he bears the two-part burden of demonstrating (1) that Nurse Johnson and Dr. LaRowe violated his constitutional rights, and (2) that the law supporting the violations was clearly established when the alleged violations occurred. Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015).

ANALYSIS

Individual Defendants

The Eight Amendment imposes an obligation on the government "to provide medical care for those whom it is punishing by incarceration." 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." Id. And sufficiently egregious failures—those reflecting "deliberate indifference to serious medical needs of prisoners"—violate the Eight Amendment and are actionable under § 1983. Id. This constitutional protection "applies to

pretrial detainees through the due process clause of the Fourteenth Amendment." Howard v. Dickerson, 34 F.3d 978, 980 (10th Cir. 1994).

The deliberate indifference test has two parts—one objective, the other subjective. First, "the deprivation alleged must be, objectively, 'sufficiently serious.'" Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). "[A] medical need is sufficiently serious 'if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999) (quoting Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir.1980)).

The subjective component requires that a prison official "knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837. That is, "the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference"—a standard equivalent to criminal-law recklessness. Id.

I. Sufficiently Serious

Nurse Johnson and Dr. LaRowe argue that Mr. Crowson cannot show that his medical need was sufficiently serious because he "was not known to be suffering from a serious medical ailment by anybody," and "nobody noticed [that he] had a serious injury after being examined by multiple medical personnel." (Cnty. Defs.' Mot. Summ. J. at 12 (ECF No. 66).) Their argument misses the mark.

The determination of whether a medical need is sufficiently serious should not "be made exclusively by the symptoms presented at the time the prison employee has contact with the

prisoner." Mata v. Saiz, 427 F.3d 745, 753 (10th Cir. 2005). Rather, the court must consider "the ultimate harm" as alleged by the plaintiff. Id. at 754.

In this case, Mr. Crowson suffered from metabolic encephalopathy, an undisputedly serious condition warranting immediate care. He suffered from debilitating aftereffects for months. A reasonable jury could find that his medical needs were sufficiently serious to satisfy the objective prong of the deliberate indifference test, even absent obvious symptoms or an accurate diagnosis.

II. Deliberate Indifference

The subjective prong of the deliberate indifference test asks whether Nurse Johnson and Dr. LaRowe were aware of a substantial risk of serious harm. "Whether a prison official has the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Farmer, 511 U.S. at 842. While actual knowledge would certainly suffice, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id.

A. Nurse Johnson

The Tenth Circuit recognizes two ways in which healthcare providers may be deliberately indifferent. "First, a medical professional may fail to treat a serious medical condition properly." Sealock v. Colorado, 218 F.3d 1205, 1211 (10th Cir. 2000). Second, a prison official may "prevent an inmate from receiving treatment or deny him access to medical personnel capable of evaluating the need for treatment." Id. In the Jail's healthcare scheme, Nurse Johnson acted as a "gatekeeper" for further medical care, implicating the second theory of liability.

Nurse Johnson did not know that Mr. Crowson was suffering from encephalopathy. Still, there is evidence that he was aware of the need for prompt medical care. The two deputies who interacted with Mr. Crowson on the morning of June 25 noticed alarming symptoms. Deputy Lyman, who summoned Nurse Johnson, observed Mr. Crowson acting with uncharacteristic lethargy. Deputy Keil recalled that Mr. Crowson was disoriented to the point that he could not properly dress himself.

Nurse Johnson himself noted that Mr. Crowson was "dazed and confused," and "unable to remember what kind of work he did prior to being arrested." (Medical Records at 28 (ECF No. 71) [hereinafter "Medical Records"].) He admitted in his declaration that, despite recording normal vital signs, he "was concerned [Mr. Crowson] may be suffering from some medical problem." (Decl. of Michael Johnson ¶ 11 (ECF No. 68).) But, despite his gatekeeper role, Nurse Johnson placed Mr. Crowson in an observation cell and left his shift without ensuring that Mr. Crowson would receive further care. He did not alert Dr. LaRowe, and PA Worlton never received Nurse Johnson's request for a mental health evaluation. According to medical records, Mr. Crowson did not receive any follow-up evaluation or care from medical staff for the next two days.

When Nurse Johnson returned to work on June 28, Mr. Crowson's symptoms had persisted beyond the expected timeframe for substance withdrawal. Though Nurse Johnson did then alert Dr. LaRowe to Mr. Crowson's condition, he failed to tell Dr. LaRowe that Mr. Crowson had already been in a medical observation cell for three days and in solitary confinement for nine days before that. (See Dep. of Judd LaRowe at 44:1–17 (ECF No. 91-2).) Mr. Crowson is entitled to the inference that Nurse Johnson, by failing to provide even this basic

patient history, again prevented Mr. Crowson from receiving an accurate diagnosis or appropriate treatment.

This is not to say that all of Nurse Johnson's conduct suggests deliberate indifference. When Nurse Johnson tried and failed to take Mr. Crowson's blood, he informed Dr. LaRowe—shifting the impetus to the doctor to order Mr. Crowson to the hospital for a blood draw. Under a theory of gatekeeper liability, Nurse Johnson satisfied his obligation to pass on key information to the treating physician. Nonetheless, a reasonable jury could conclude that Nurse Johnson's earlier inactions—the failures to seek medical care and provide Dr. LaRowe with a full accounting of Mr. Crowson's symptoms—amounted to deliberate indifference.

B. Dr. LaRowe

Dr. LaRowe never visited the Jail during Mr. Crowson's stay in the medical observation cell. Still, as Mr. Crowson's treating physician, he may be liable for his "fail[ure] to treat a medical condition properly." Sealock, 218 F.3d at 1211. While Dr. LaRowe "has available the defense that he was merely negligent in diagnosing or treating the medical condition," id., there is sufficient evidence in the record from which a jury could conclude that he instead acted with deliberate indifference.

Nurse Johnson alerted Dr. LaRowe to Mr. Crowson's condition on June 28; according to that day's medical records, Mr. Crowson continued to appear confused and disoriented, gave one-word answers to questions, and had elevated blood pressure. Despite knowing of these symptoms, Dr. LaRowe made only minimal efforts to diagnose Mr. Crowson's condition. He ordered a blood test, an effective diagnostic tool. Yet after learning that Nurse Johnson could not perform the blood draw, he ended his inquiry and wrongly assumed that Mr. Crowson was

experiencing drug withdrawals. Without an accurate diagnosis in hand, he prescribed a benzodiazepine drug that worsened Mr. Crowson's encephalopathy.

Dr. LaRowe argues that there is no evidence that he "was aware, drew any inferences, or strongly suspected that Plaintiff could be suffering from encephalopathy or any other serious condition." (LaRowe Reply in Supp. of Mot. Summ. J. at 13 (ECF No. 86).) Instead, he argues that "the undisputed facts show that [he] understood that Mr. Crowson exhibited nonspecific—or vague—symptoms, which could have been characterized any number of diagnoses, one of which being substance withdrawal—a common occurrence in the jail." (LaRowe Mot. Summ. J. at 7 (ECF No. 73).)

In support, Dr. LaRowe cites to Mata v. Saiz, a case in which an inmate suffered a heart attack. A nurse in that case, Donna Quintana, performed an EKG test on the inmate after the inmate reported chest pain, but the test produced normal results. Trusting the test results, she released the inmate from the infirmary with instructions to return if the pain worsened. The panel found that Nurse Quintana had not acted with deliberate indifference because she subjectively believed that the inmate was not suffering a heart attack, and "made a good faith effort to diagnose to diagnose and treat [the plaintiff's] medical condition." Mata, 427 F.3d at 760–61.

Unlike Nurse Quintana, Dr. LaRowe failed to assess, diagnose, or even visit Mr. Crowson. Though he saw reason to order a blood test, he did not follow up to ensure the test occurred after Nurse Johnson's unsuccessful attempt to draw Mr. Crowson's blood. Instead, and despite vague and nonspecific symptoms, he prescribed medication based on his unverified suspicion that Mr. Crowson was suffering from withdrawals. He did not misdiagnose Mr.

Crowson, but rather failed to conduct diagnostic tests that would have informed him of Mr. Crowson's medical needs. A reasonable jury could find that Dr. LaRowe's failure to seek an accurate diagnosis amounted to deliberate indifference.

III. Qualified Immunity

As discussed above, Mr. Crowson has presented sufficient evidence from which a reasonable jury could find that Nurse Johnson and Dr. LaRowe acted with deliberate indifference. But because Nurse Johnson and Dr. LaRowe raise the defense of qualified immunity, the court must consider whether the alleged constitutional violations were clearly established at the time they occurred—that is, "whether 'the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Id. at 427 (quoting Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008)).

As the Tenth Circuit has recognized, "there is little doubt that deliberate indifference to an inmate's serious medical need is a clearly established constitutional right." Mata, 427 F.3d at 749. Further, Tenth Circuit law makes clear that the particular conduct in this case could amount to a constitutional violation. Nurse Johnson is a "medical professional [who] knows that his role in a particular medical emergency is solely to serve as a gatekeeper for other medical personnel capable of treating the condition," but who, a reasonable jury could find, "delay[ed] or refuse[d] to fulfill that gatekeeper role due to deliberate indifference." Sealock, 218 F.3d at 1211. Dr.

LaRowe "did not simply misdiagnose" Mr. Crowson, he "refused to assess or diagnose [his] condition at all" and simply assumed he was experiencing substance withdrawals. Mata, 427 F.3d at 758. Neither Nurse Johnson nor Dr. LaRowe are entitled to qualified immunity.

Washington County

Mr. Crowson also seeks to hold Washington County liable under § 1983. Local governments can be held liable for constitutional violations, but not simply for the unconstitutional acts of their employees. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978). Rather, a plaintiff "must show 1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury alleged." Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (quoting Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir.1993)). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Connick v. Thompson, 563 U.S. 51, 61 (2011).

A plaintiff must also "demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 407 (1997). Importantly, the deliberate indifference standard used to determine municipal liability differs from the deliberate indifference standard used to determine individual liability. With individual liability, "deliberate indifference is a subjective standard requiring actual knowledge of a risk by the official." Barney v. Pulsipher, 143 F.3d 1299, 1308 n.5 (10th Cir. 1998). But here, "[i]n the municipal liability context, deliberate

indifference is an objective standard which is satisfied if the risk is so obvious that the official should have known of it." Id.

Mr. Crowson alleges that Washington County is liable for its failure to train Jail nurses—specifically, for its failure to promulgate written policies for Jail nurses to follow. To prevail on such a failure-to-train theory, a plaintiff must typically show "a pattern of tortious conduct by inadequately trained employees." Brown, 520 U.S. at 407–08. The "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." Id. at 407 (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10 (1989)).

Mr. Crowson has not alleged—or proffered evidence to show—a pattern of constitutional violations. But "in a narrow range of circumstances," a pattern of violations may not be necessary to establish liability. Id. at 409. Instead, a single violation "may be a highly predictable consequence of a failure to equip [municipal employees] with specific tools to handle recurring situations." Id. "The high degree of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable." Id. at 409–10.

Based on the evidence submitted by the parties, the County's healthcare policies at the time of Mr. Crowson's incarceration seem severely lacking. There are no written policies in the record. Instead, the County describes the Jail's general customs and practices for providing

medical care to inmates using the deposition testimony of various medical personnel.[2] Dr. LaRowe was responsible for diagnosing and treating inmates, but only visited the Jail one or two day a week, for two to three hours at a time. He relied heavily on the Jail's deputies and nurses. When an inmate was placed in a medical observation cell, Jail deputies observed inmates at least once every thirty minutes, and would notify a Jail nurse when "this guy is not acting right or this guy is having problems." (Dep. of Michael Johnson at 32:4–10 (ECF No. 76-7).) Jail nurses—who, by law, could not diagnose inmates—generally spent five to ten minutes with the inmate once every twelve-hour shift, to take the inmate's vital signs and conduct follow-up checks. If an inmate exhibited symptoms of a cognitive problem (as did Mr. Crowson), the nurse would inform Dr. LaRowe and PA Worlton, who, in addition to his role as the Jail's health services administrator, handles mental health care.

Within this framework, nurses were left largely to their own devices. Nurse Johnson testified that the Jail has no guidelines or written policies for assessing brain injuries, such as the type suffered by Mr. Crowson. He testified that Dr. LaRowe provided training for alcohol withdrawal, but that he could not remember a protocol or standards for assessing withdrawal symptoms (the parties have not cited to a written policy in the record). PA Worlton testified that the Jail does not have a written policy or procedure for nurses to follow when placing an inmate in an observation cell to detox, or a written protocol for evaluating inmates once in detox. Additionally, Dr. LaRowe testified that the Jail had no set policy to determine when an inmate should be transported to the hospital. Such a decision was usually based on a discussion between

[2] After the hearing on the present motions, Nurse Johnson and Washington County filed a motion (ECF No. 91) to supplement the record with additional pages of deposition testimony. Mr. Crowson has not filed an opposition, and court will grant the motion.

Dr. LaRowe and the nurses. Remarkably, it appears from the record that Washington County failed to promulgate written policies pertaining to the Jail's core healthcare functions.

A reasonable factfinder could conclude that these policy deficiencies caused Mr. Crowson's injury. Mr. Crowson required immediate hospitalization on June 25, but instead spent days in a medical observation cell with only intermittent medical attention. Later, the Jail's medical staff treated Mr. Crowson as if he were withdrawing from drugs or alcohol, and without a diagnosis in hand. The drug protocol for withdrawal may have worsened Mr. Crowson's actual condition. This maltreatment can be seen as an obvious consequence of the County's reliance on a largely absentee physician, and an attendant failure to promulgate written protocols for monitoring, diagnosing, and treating inmates.[3] In light of these policy deficiencies, the County is not entitled to summary judgment.

Prison Litigation Reform Act

As a final matter, the Defendants contend that Mr. Crowson has not complied with the Prison Litigation Reform Act (PLRA), which states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). But the court cannot resolve this issue based on the present record.

[3] As an additional basis for county liability, Mr. Crowson challenges County's failure to provide access to medical treatment to inmates in solitary confinement. But Mr. Crowson has not presented any evidence that he suffered symptoms of encephalopathy before June 25, when Deputy Lyman observed him acting strangely and summoned Nurse Johnson. Without such evidence, a factfinder cannot infer that a County policy or custom concerning solitary confinement actually caused Mr. Crowson's injury. Washington County is entitled to summary judgment on this theory of liability.

Though the PLRA requires exhaustion, "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007). The court must evaluate the precise grievance procedures in place at the time of the inmate's detention, see Cantwell v. Sterling, 788 F.3d 507, 509 (5th Cir. 2015), and consider whether the procedures were available to the inmate—that is, "'capable of use' to obtain 'some relief for the action complained of.'" Ross v. Blake, 136 S. Ct. 1850, 1859 (2016) (quoting Booth v. Churner, 532 U.S. 731, 738 (2001)).

Washington County has not provided its actual grievance procedures to the court. Instead, it cites to Sheriff Pulsipher's declaration, in which he gives a general overview of "a comprehensive grievance system" available to inmates:

> Any grievances or complaints are handled by the first line supervisor, and any appeals are handled by the next line supervisor (e.g. a complaint against a deputy would be handled by a sergeant and the appeal would be handled by a lieutenant), after two levels of appeals, an inmate has exhausted their administrative remedies and the issue would be ripe for a lawsuit. I would only receive an appeal for a grievance or complaint if it was made against a chief or undersheriff. Any policy issues related to prisoners, jail staff, or any other issues related to the jail are appealed to me. If an inmate appellant disagrees with my decision, he or she can file a lawsuit.
>
> The grievance policy was always available for inmates to file grievances and complaints to address any type of harm.

(Decl. of Cory Pulsipher ¶¶ 10–11 (ECF No. 69).)

From this bare description, the court cannot determine the process an inmate would use to lodge a grievance, or whether Mr. Crowson could have effectively used the procedure during his incarceration. The Defendants have not met their burden of showing that Mr. Crowson failed to exhaust his available remedies.

ORDER

For the foregoing reasons, the court orders as follows:

1. Nurse Johnson's and Washington County's Motion to Supplement the Record (ECF No. 91) is GRANTED;
2. Nurse Johnson's and Washington County's Motion for Summary Judgment (ECF No. 66) is GRANTED IN PART AND DENIED IN PART—Washington County is entitled to summary judgment on Mr. Crowson's § 1983 claim based on its solitary confinement policy (see note 3, supra), but the Motion is otherwise denied;
3. Dr. LaRowe's Motion for Summary Judgment (ECF No. 73) is DENIED; and
4. Defendant Jon Worlton is hereby DISMISSED from this case for Mr. Crowson's failure to effect timely service.

DATED this 19th day of July, 2019.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge