No. 19-7050

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUSTIN LANCE,	)
	)
Plaintiffs/Appellant,	)
	)
v.	)
	)
CHRIS MORRIS, in his official capacity, et al.,	)
	)
Defendants/Appellees.	)

On Appeal from the United States District Court
for the Eastern District of Oklahoma
The Honorable Ronald White, United States District Judge
D.C. No. 17-cv-00378-RAW

APPELLEES/DEFENDANTS CHRIS MORRIS, DANIEL HARPER, AND DAKOTA MORGAN'S CORRECTED RESPONSE BRIEF

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February 26, 2020 **ORAL ARGUMENT IS NOT REQUESTED**

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APPELLEES/DEFENDANTS CHRIS MORRIS, DANIEL HARPER, AND DAKOTA MORGAN'S CORRECTED RESPONSE BRIEF

Appellees/Defendants (collectively referred to herein as the "Appellees") Chris Morris, in his Official Capacity, Daniel Harper, in his Individual Capacity ("Harper"), and Dakota Morgan, in his Individual Capacity ("D. Morgan")[1] respectfully submit this brief in response to Appellant Dustin Lance's Opening Brief filed herein on January 21, 2020.

STATEMENT OF PRIOR OR RELATED APPEALS

Appellees are not aware of any prior or related appeals regarding this matter.

STATEMENT OF JURISDICTION

Plaintiff/Appellant Dustin Lance ("Lance") commenced this action on September 18, 2017 in the District Court of Pittsburg County, Oklahoma, asserting state law claims[2] and claims arising under 42 U.S.C. § 1983. On October 10, 2017,

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[1] The Board of County Commissioners of Pittsburg County, Oklahoma ("Board") and Stephen Sparks, in his individual capacity, were also parties to this suit and both filed Motions for Summary Judgment. (Appx. Vol. I, 11, 17, 237-269; Supp. Appx. 11-44). In his respective Responses to these motions, Appellant stated he was either no longer pursuing or had abandoned his claims against these parties. (Appx. Vol. II, 371, 698-699, 738-739). Based on these statements, the District Court granted summary judgment to Board of County Commissioners of Pittsburg County, Oklahoma and Stephen Sparks. (Appx. Vol. III, 760, 778 n.21). Appellant did not address any claims against the Board or Sparks in in his Opening Brief, any such claims are now waived on appeal. *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011).

[2] Appellant stated he was no longer pursing any state law claims against Appellees

Appellee Chris Morris removed the suit to the United States District Court for the Eastern District of Oklahoma. On September 20, 2019, the District Court issued an Order granting summary judgment to the Appellees[3], and issued a Judgment in favor of Appellees.[4] Lance filed a timely Notice of Appeal in the District Court on October 4, 2019.[5] This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred granting summary judgment to Appellees Harper and D. Morgan?

2. Whether the District Court erred in finding Appellees Harper and D. Morgan were entitled to qualified immunity?

3. Whether the District Court erred in granting summary judgment to Appellee Morris?

STATEMENT OF THE CASE/STATEMENT OF THE FACTS

A. Lance's Priapism.

On November 11, 2016, Lance was booked into the Pittsburg County

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in his Responses to their respective Motions for Summary Judgment, and the District Court granted Appellees summary judgment on Appellant's state law claims. (Appx. Vol. II, 343; Appx. Vol. III, 712, 760). Appellant did not address any claims against the Board or Sparks in in his Opening Brief, any such claims are now waived on appeal. *Cooper*, 654 F.3d at 1128.

[3] Appx. Vol. III, 755-788.

[4] Appx. Vol. III, 789-790.

[5] Appx. Vol. III, 791-792.

Criminal Justice Center ("PCCJC").[6] Lance had been an inmate in PCCJC before November 11, 2016 and during those previous stays he experienced no issues or problems or felt mistreated in any way.[7] When Lance arrived at PCCJC on November 11, 2016, he was not taking or prescribed any medications.[8] Moreover, before he was placed in general population, a medical questionnaire was completed for and signed by Lance.[9] As shown in that medical questionnaire, Lance indicated he was not currently taking any prescription medications or medications otherwise prescribed by a doctor nor was he aware of any medical problems PCCJC should know about.[10] Lance was then placed in A-Pod, per his request, where he was housed until his release from PCCJC.[11]

At no point during Lance's incarceration at PCCJC was Lance prescribed Trazadone, nor was Lance provided Trazadone by PCCJC staff.[12] Yet, at around 5:00 or 6:00 p.m. on December 15, 2016, Lance took approximately three-fourths of a Trazadone pill.[13] Lance knew he was taking Trazadone and knew it was against PCCJC rules to take another inmate's medication.[14]

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[6] Appx Vol. I, 274-276; Appx. Vol. III, 761; Supp. Appx. 68, 72.
[7] Appx. Vol. III, 762; Supp. Appx. 68-71.
[8] Appx. Vol. III, 761; Supp. Appx. 68-71.
[9] Appx. Vol. III, 761; Supp. Appx. 45-47, 72-73.
[10] Appx. Vol. III, 761; Supp. Appx. 45-47, 72-73.
[11] Appx. Vol. III, 762; Supp. Appx. 74-75.
[12] Appx. Vol. II, 407, 424-431; Supp. Appx. 77-78.
[13]Appx. Vol. II, 407, 424-431; Appx. Vol. III 762; Supp. Appx. 77, 79.
[14]Appx. Vol. I, 426; Supp. Appx. 89.

At some point after taking the Trazadone on December 15, 2016, Lance fell asleep; when he awoke at around midnight or one a.m. on December 16, 2016 to use the restroom, he discovered he had an erection.[15] Lance's unauthorized use of another inmate's prescription medication (Trazadone) resulted in a priapism, which is a prolonged erection without stimulation that will not dissipate or go away without medical intervention.[16] At this point, Lance was not concerned about the erection and did not alert anyone else to his condition.[17] Lance awoke one or two more times in early morning hours of December 16, 2016, still with an erection, but was not alarmed until the last time he awoke which was some time before breakfast on December 16, 2016.[18] Lance claims his erection lasted from roughly midnight on December 16, 2016 until he was taken to the emergency room on December 19, 2016.[19] Before this period, an inmate had not experienced a persistent erection at PCCJC before.[20]

Lance did not alert anyone about his hours-long erection until approximately twelve hours after he ingested the Trazadone pill.[21] Specifically, Lance testified

[15]Appx. Vol. II, 431; Appx. Vol. III, 763.
[16]Appx. Vol. I, 270-273, 281; Appx. Vol. II, 406, 408-409, 455-458; Appx. Vol. III, 764.
[17] Appx. Vol. I, 431-432, 440-441; Appx. Vol. III 763.
[18] Appx. Vol. I, 432, 440-441; Appx. Vol. III 763-4.
[19] Appx. Vol. I, 29-33, 270-273; Appx. Vol. II, 424-25, 427-428, 456-458; Appx. Vol. III 763.
[20] Supp. Appx. 97, 112, 137-138, 148, 212.
[21] Appx. Vol. I, 424-435; Appx. Vol. III, 764; Supp. Appx. 77-78.

that at around breakfast time on December 16, 2016, he used the intercom inside his cell and informed PCCJC sergeant Edward Morgan ("E. Morgan") that he had taken "that pill I found on the floor" the previous night and had an erection, but did not tell E. Morgan how long he had had an erection and claimed he had consumed ibuprofen, not Trazadone.[22]

Lance claims his alleged communication with E. Morgan at around breakfast time on December 16, 2016 was the first time he told anyone about his prolonged erection, but not the last time.[23] Lance also claims he told PCCJC sergeant Mike Smead ("Smead") about his erection at around lunchtime on December 16, 2016, when he allegedly told Smead that he "took a pill, I've had a hard on for longer than I should, and I need[] to see the nurse," but did not tell Smead how long his erection had persisted or that he had taken Trazadone.[24] Smead was also a sergeant at PCCJC in December of 2016; Smead did not work December 18 or 19, 2016, but did work three day shifts, which were from six a.m. to six p.m., on December 15-17, 2016.[25]

Lance testified he asked Smead to see a nurse or doctor at other, unspecified times throughout December 16-17, 2016.[26] In December 2016, registered nurse

[22] Appx. Vol II, 427-435, 440, 467; Appx. Vol. III, 763-764; Supp. Appx. 80, 83.
[23] Appx. Vol. II, 440-441.
[24] Appx. Vol. II, 389, 582; Supp. Appx. 84.
[25] Appx. Vol II, 581-582.
[26] Appx. Vol. II, 445-448, 470-471.

Doris Crawford ("Nurse Crawford") worked at PCCJC typically from eight a.m. until five p.m. Monday through Friday, including on December 16, 2016.[27] Nurse Crawford was on-call, both on weekdays when she was not already present at PCCJC and on weekends, if a situation arose that required consulting with her.[28] Nurse Crawford was not informed of Lance's condition until Monday, December 19, 2016.[29]

Approximately eight to twelve hours after consuming the Trazadone, Lance took off his pants due to discomfort but did wear boxers and a shirt, which he kept untucked.[30] Lance testified that his fellow inmates told him they could not see his erection through his boxers, causing Lance to show them his penis.[31] Lance did not recall showing any detention officer, aside from Smead, his penis before he was taken to the emergency room.[32]

During December 16-18, 2016, Lance spent his time either in the day room or in his cell.[33] When in his cell, Lance was usually alone, as he had no cellmate during the relevant period (December 15-19, 2016).[34] Throughout this period, Lance claims he told any detention officer he encountered, either face-to-face or

[27] Appx. Vol. II, 546.
[28] Supp. App. 104-105.
[29] Appx. Vol II, 546.
[30] Appx. Vol. II. 482-486.
[31] Appx. Vol II, 499-500.
[32] Supp. Appx. 87.
[33] Appx. Vol. II, 452, 492.
[34] Supp. Appx. 76.

via an intercom, that he had taken a pill, he had an erection that would not go away, and that he wished to see a doctor or the nurse.[35] Lance did not recall who these detention officers were, aside from "Mickey,"[36] E. Morgan, and Smead.[37]

On December 19, 2016, at approximately 9:15 a.m., a PCCJC detention officer became aware of Lance's priapism and immediately took Lance to Nurse Crawford.[38] Lance believes this detention officer was "Mickey," and that Lance and Mickey spoke while Lance passed breakfast trays.[39] When Nurse Crawford saw Lance on December 19, 2016, she had to drag it out of Lance what medication he took and when he took said medication.[40] Nurse Crawford was the first PCCJC staff-member he told that he took Trazadone; he had been hesitant to disclose this information because he did not want to get Lloyd in trouble.[41] After Lance finally disclosed to Nurse Crawford that he had taken Trazadone and when he took the Trazadone, Nurse Crawford examined Lance's erection and immediately arranged Lance's transport to McAlester Regional Hospital's

[35] Appx. Vol. II, 450-51; Supp. Appx. 85-86.
[36] This may be a reference to PCCJC detention officer Homer McOwen, who worked December 18 and 19, 2016 and who took Lance to see Nurse Crawford at 9:15 a.m. on December 19, 2016. (Appx. 292, 382).
[37] Appx. Vol. II, 447, 449, 503, 503.
[38] Appx. Vol I. 292; Appx. Vol. II, 406, 555-558; Supp. App. 120-121.
[39] Appx. Vol. II, 449, 502-03.
[40] Appx. Vol. II, 406, 446, 518; Supp. App. 117-119.
[41] Appx. Vol. II, 406, 446, 518.

emergency room for further treatment.[42] Nurse Crawford testified Lance's erection was not visible through his clothing.[43]

At approximately 9:30 a.m., PCCJC detention officer Stephen Sparks ("Sparks") transported Lance to McAlester Regional Health Center ("MRHCC").[44] At 11:47 a.m. on December 19, 2016, Lance was seen at MRHCC by Gary R. Lee, M.D. ("Dr. Lee"), who diagnosed Lance with priapism and treated him with injections, which failed to remedy his priapism resulting in Dr. Lee referring Lance to an urologist in Tulsa at St. Francis Medical Center between 12:01 pm and 12:50 pm.[45] Dr. Lee directed Lance be transferred to Saint France immediately although Dr. Lee did not indicate on the Transfer Request form the means by which Lance was to be transported to Tulsa (i.e., by ambulance, helicopter, or other).[46]

By 1:15 pm, Lance was returned to the PCCJC to be discharged on a medical recognizance bond ("Medical OR").[47] While Nurse Crawford understood that Lance needed to go to St. Francis as soon as possible, she did not believe he

[42] Appx. Vol. II, 406, 552-555, 557-560; Appx. Vol. III 765.
[43] Appx. Vol II, 554.
[44] Appx. Vol. II, 652-653, 766; Supp. Appx. 63, 81-82, 214-214.
[45] Appx. Vol. I, 270-273; Appx. Vol. II, 454-459; Appx. Vol. III, 766; Supp. Appx. 66, 120-121.
[46] Appx. Vol. II, 569-571; Appx. Vol. III 766; Supp. App. 66, 120-123.
[47] Appx. Vol. I, 270-273; Appx. Vol. II, 406, 459-460, 568-571; Supp. App. 66.

required an ambulance.[48] At 2:42 pm, Lance was released from the PCCJC on a Medical OR and discharged to his father, who Nurse Crawford personally told to take Lance to the urologist "now."[49] After being discharged, Lance accompanied his father and stepmother on several errands before his father drove him to Tulsa where he arrived at St. Francis Medical Center nearly five (5) hours later at 7:16 p.m. and underwent surgery for his priapism around 9:00 pm some seven (7) hours after being released from the PCCJC.[50]

As pursuant to PCCJC policy, jail staff kept a detailed log, often referred to as "the bible," that detailed the daily activity within the male pods and booking such as site checks, medication and meal passes, and significant occurrences.[51] There are no entries in these logs with regard to Lance's medical condition until Monday, December 19, 2016 at 9:15 a.m. when detention officer Homer McOwen takes "one male inmate from A-Pod to Booking."[52]

B. Dakota Morgan and Daniel Harper.

In December of 2016, D. Morgan and Harper were detention officers at

[48] Appx. Vol. III, 767; Supp. App. 122-123.
[49] Appx. Vol. I, 274-276, 460, 463-64; Appx. Vol. III, 767; Supp. App. 113-115.
[50] Appx. Vol. I, 277-281, 408-409, 460, 462-466; Appx. Vol. III, 767.
[51] Appx. Vol. I, 282-295; Appx. Vol. III, 643, 767-8; Supp. App. 52-65, 132, 140-143, 149, 153-156, 160-161, 171-174.
[52] Appx. Vol. I, 282-295; Appx. Vol. III, 643, 767-8; Supp. App. 52-65, 132, 140-143, 149, 153-156, 160-161, 171-174.

PCCJC.[53] D. Morgan worked December 15, 16, and 17 from six a.m. to six p.m. and did not work December 18 or 19, 2016.[54] Lance had no recollection of speaking with D. Morgan at any point during his November 11, 2016 to December 19, 2016 incarceration at PCCJC.[55] Moreover, D. Morgan testified he had no knowledge of nor was he informed about Lance's erection during these shifts and that he did not receive an intercom call from Lance.[56]

Harper did not work December 15, 16, or 17, 2016, but did work the night shift starting at December 18, 2016 at six p.m. and ending at six a.m. on December 19, 2016.[57] Harper testified his only possible interaction with Lance on December 19, 2016 would have been when Harper passed breakfast trays to inmates.[58] However, Lance and Harper did not interact during Lance's November 11, 2016 to December 19, 2016 incarceration at PCCJC and in fact, Lance did not even know who Harper was during his deposition for this case.[59] Harper did not hear of Lance's medical condition during his shift before Lance was taken to Nurse Crawford.[60]

C. PCCJC Policy, Procedure, and Custom.

[53] Appx. Vol. III, 625, 628-629, 641, 773-4; Supp. Appx. 183-184.
[54] Appx. Vol. III, 625-626, 628.
[55] Appx. Vol. II, 427-428, 526; Supp. App. 168-170.
[56] Supp. App. 168-170, 180-181.
[57] Appx. Vol. II, 377; Supp. App. 185-187.
[58] Supp. App. 188-191.
[59] Appx. Vol. II, 526; Supp. Appx. 74, 192-196.
[60] Supp. App. 192-196.

During Lance's November 11, 2016 through December 19, 2016 incarceration at PCCJC, Joel Kerns was the Sheriff of Pittsburg County and as Sheriff, he oversaw the operation and supervision of the PCCJC.[61] Sheriff Kerns performed his normal duties as Sheriff and maintained his normal office hours in December of 2016.[62] At all relevant times, PCCJC had a policy requiring all inmates be medically screened upon entering the facility "and before being placed in the general population or housing area," which was done for Lance.[63] PCCJC also had a policy, in reference to the Oklahoma State Jail Standards: "to provide adequate medical care in a jail facility by maintaining an established healthcare plan that states what is to be done in situations involving the health and medical care of inmates in this facility."[64] Pursuant to PCCJC policy, the MRHC and the ambulance service provided PCCJC with the necessary medical services to inmates and Sheriff's Office personnel on an as needed basis. "Due to the close proximity to this facility, medical care [was] less than five minutes away and available to use twenty-four-hours daily."[65] The PCCJC had a policy requiring the administration of inmate prescription medication in compliance

[61] Supp. App. 91.
[62] Supp. App. 94-95, 116.
[63] Appx. Vol. II, 395, 400-401; Supp. Appx. 45-47, 72-73, 92.
[64] Appx. Vol. II, 395, 402-405; Appx. Vol. III, 768; Supp. App. 92.
[65] Appx. Vol. II, 402; Appx. Vol. III, 769; Supp. App. 92.

with the orders of a licensed physician or designated medical authority.[66]

Also pursuant to PCCJC policy, inmates are informed upon admission to PCCJC the process for gaining access to medical and healthcare services.[67] This information is given to said inmates in writing along with a copy of the jail rules.[68] PCCJC policy also required that inmates are informed that a medical request form can be filled out and submitted to the jailers or to jail staff if an inmate is in need of a medical issue or "sick call."[69] Lance was informed of PCCJC's rules at his book-in[70] and before taking the Trazadone on December 15, 2019, Lance knew Nurse Crawford worked at PCCJC and also knew he could request medical care via a "medical request" form.[71] In fact, on November 25, 2016, Lance filled out a "medical request" form requesting that his wisdom teeth be pulled and on November 28, 2016, Lance was taken to the Indian Clinic for dental treatment as per his request.[72] Subsequently, Lance was prescribed Ibuprofen and penicillin, which PCCJC staff administered to Lance without incident.[73]

PCCJC policy further indicated that supervisors determined the immediacy

[66] Appx. Vol. I, 403-404; Appx. Vol. III, 771; Supp. App. 92.
[67] Appx. Vol. II, 403; Appx. Vol. III, 770; Supp. App. 92.
[68] Appx. Vol. II, 403-405; Appx. Vol. III, 770; Supp. App. 92.
[69] Appx. Vol, II, 403; Appx. Vol. III, 770; Supp. App. 92.
[70] Supp. Appx. 89
[71] Appx. Vol. II, 445-446; Supp. Appx. 70-71, 88.
[72] Appx. Vol. III, 762; Supp. Appx. 51, 70-71.
[73] Appx. Vol. II, 407; Appx. Vol. III, 762; Supp. App. 70-71.

of medical complaints and take appropriate action.[74] PCCJC policy required jailers to address an inmate's medical request by using their own discretion and common sense to assess the severity of the medical need, by referring all such requests up the "chain-of-command" to their shift sergeant, Nurse Crawford, and the Jail Administrator or, depending on necessity or severity, by directly contacting emergency medical services to request an ambulance.[75] If a jailer disagreed with his sergeant's evaluation of an inmate's medical condition, jailers were encouraged to by-pass the sergeant and contact Nurse Crawford.[76] PCCJC policy further indicated that jailers are responsible for ensuring inmates who requested medical attention were given the proper form to fill out and that the appropriate supervisor was notified so said supervisor could determine if the inmates requesting medical attention required transport to the McAlester Regional Hospital emergency room.[77] Jailers could call an ambulance without going through the chain-of-command in the event of an immediate emergency.[78]

All jail staff were provided PCCJC's policy and procedure manual.[79] Harper, D. Morgan, E. Morgan, and Smead knew and understood the procedure of

[74] Appx. Vol. II, 404; Appx. Vol. III, 770; Supp. App. 92.
[75] Appx. Vol. II, 403-405; Appx. Vol. III, 770; Supp. Appx. 93, 98-99, 144, 150-151.
[76] Appx Vol. III, 630
[77] Appx. Vol. II, 402-404; Appx. Vol. III, 770-771; Supp. App. 92.
[78] Appx. Vol. II, 589; Supp. App. 129, 134-135, 143, 145-146, 165-166, 200-205.
[79] Supp. App. 100-102, 135-136.

reporting an inmate's medical needs as outlined by the PCJ's policy.[80] They recognized that ***if*** Lance had, in fact, made a jailer aware of his medical condition ***prior to*** Monday, December 19, 2016, but was not granted access to medical care, such conduct would have violated the PCCJC's policy.[81] Jailers completed a state mandated training course administered, which included lessons in basic First Aid and CPR.[82] In addition to the state course, the PCCJA also utilized a mentoring or shadowing on-the-job training practice whereby newly hired jailers would shadow or be mentored by a more experienced jailer on policies and practices, which may last anywhere from a month to two months.[83] Also in addition to the state course, PCCJA held monthly safety meetings for jail staff.[84]

SUMMARY OF THE ARGUMENT

The District Court did not err in applying the well-established deliberate indifference standard, as opposed to the objective-only deliberate indifference standard, to the claims against Harper and D. Morgan. Furthermore, there is no evidence D. Morgan and Harper were subjectively aware of any substantial risk of serious harm to Lance or that they were deliberately indifferent to any such risk of

[80] Appx. Vol. II, 591-596; Appx. Vol. III, 612, 620, 630-632, 771; Supp. App. 100, 109-110, 128-131, 134-137, 140-143, 149, 153-156, 160-161, 163, 197-199, 207-209, 211-212.
[81] Appx. 771; Supp. App. 133, 147, 176-177.
[82] Appx. 578-580, 772; Supp. App. 125-127, 136, 164, 207.
[83] Supp. App. 96, 124-125, 173-175, 212-213.
[84] Appx. 772; Supp. App. 96.

harm. The District Court did not err in finding that Harper and D. Morgan were entitled to qualified immunity because Lance failed to shoulder his burden to demonstrate that it was clearly established that Harper and D. Morgan's actions amounted to a constitutional violation. Lastly, The District Court did not err in granting summary judgment to Morris because there is no evidence that any alleged constitutional violation was caused by a policy, practice, or custom of the PCCJC.

ARGUMENT AND AUTHORITY

STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed *de novo*, applying the same legal standard employed by the District Court pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Rife v. Okla. Dep't of Pub. Safety,* 854 F.3d 637, 647 (10th Cir. 2017); *see also Koch v. City of Del City*, 660 F.3d 1228, 1237-38 (10th Cir. 2011). "Summary judgment should be granted if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Koch*, 660 F.3d at 1238 (citing Fed. R. Civ. P. 56(a)). Likewise, this Court reviews the denial of qualified immunity on summary judgment *de novo*. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003) (quoting *Baptiste v. J.C. Penney Co.*, 147 F. 3d 1252, 1255 (10th Cir. 1998)).

DISCUSSION

I. The District Court Did Not Err In Granting Summary Judgment to Appellees Harper and D. Morgan.

Lance asserts that although the District Court correctly determined a jury could find that "Harper and D. Morgan were deliberately indifferent to Lance's medical needs," he still challenges the District Court's grant of summary judgment to Harper and D. Morgan arguing that the court committed error because it applied the incorrect standard to Lance's denial of medical care claims. (Opening Brief, pp. 16, 22-23). However, Lance has failed to demonstrate the District Court erred by applying the subjective deliberate indifference test for pretrial detainee medical claims. Moreover, despite Lance's assertion otherwise, District Court incorrectly concluded that genuine issues of material fact existed as to whether Harper and D. Morgan knew about Lance's prolonged erection.

A. The District Court Applied the Correct Standard.

Lance argues that the District Court erred in applying the well-established "subjective" deliberate indifference standard to his § 1983 denial of medical care claims. More specifically, Lance argues that the U.S. Supreme Court's decision in *Kingsley v. Hendrickson*, --- U.S. ---, 135 S.Ct. 2466 (2015) and this Court's decision in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019) mandate the application of an "objective" deliberate indifference standard to such claims which does not take into consideration an individual defendant's subjective knowledge of

the alleged risk of harm.[85] However, neither *Kingsley* nor *Colbruno* mandate the application of such an objective standard as Lance contends.

In *Kingsley*, the Supreme Court held that pretrial detainees' Fourteenth Amendment excessive force claims are governed by an objective reasonableness standard, and not the Eight Amendment standard for excessive force claims by convicted prisoners which requires proof of a subjectively culpable state of mind on the part of the defendant officer (*i.e.* an intent to punish) and proof of an objectively serious harm. *Kingsley*, 135 S.Ct. at 2472-76; *see also Hudson v. McMillian*, 503 U.S. 1 (1992)). *Kingsley* was limited to the analysis of pretrial detainee excessive force claims, and did not address, or even mention, deliberate indifference claims of any sort. Likewise, *Colbruno* also did not involve a pretrial deliberate indifference claim. Rather, the pretrial detainee appellant in that case alleged that the deputies violated his constitutional right to privacy by walking him through a hospital while he was nude, not that they were deliberately indifferent to any substantial risk of harm to him. *Colbruno*, 928 F.3d at 1159.

[85] Lance asserts that review of this issue is relevant, in part, because "Kingsley's heightened protection for pretrial detention conditions makes the district court's extreme application of qualified immunity in this case all the more indefensible." (Opening Brief, p. 42). However, even if this Court were to adopt the objective deliberate indifference standard advocated by Lance, it would have no effect on the qualified immunity analysis for the individual appellees as that standard would not have been clearly established law at the time of the alleged violations of Lance's constitutional rights. *See Crocker v. Glanz*, 752 Fed.Appx. 564, 569 (10th Cir. 2018) (unpub).

Citing *Colbruno*, Lance asserts that the Tenth Circuit is one of "four federal courts of appeal [that] apply an objective standard to non-force claims brought by pretrial detainees." (Opening Brief, p. 35). Lance further quotes *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) for the proposition that with *Colbruno* "the Tenth Circuit has joined those [circuits] that apply *Kingsley*'s objective inquiry to a claim other than excessive use of force." (Opening Brief, p. 44, internal quotation marks omitted). As such, it appears that Lance is attempting to imply that this Court's decision in *Colbruno* has already settled the issue currently before the Court – *i.e.* whether *Kingsley* requires the application of an objective deliberate indifference standard to pretrial inmate denial of medical care claims.

However, after the *Colbruno* decision, this Court released its opinion in *Burke v. Regaldo*, 935 F.3d 960 (10th Cir. 2019), a denial of medical care case, wherein it continued to utilize the traditional, two-pronged, subjective/objective deliberate indifference analysis. *Id*. at 992. Further, in a footnote, the *Burke* opinion noted that there is a split of authority as to "whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claim brought by pretrial detainees" and acknowledged that the issue remains unresolved in the Tenth Circuit. *Id*. at 991, n.9 (quoting *Estate of Vanilla v. County of Teller Sheriff's Office*, 757 F.App'x 643, 646 (10th Cir. 2018) (unpub); internal quotation marks omitted). *See also Crocker v. Glanz*, 752 Fed.Appx. 564, 569 (10th Cir. 2018)

(unpub) (discussing the uncertainty that *Kingsley* would apply to pretrial detainee medical indifference claims). Clearly, this Court does not consider this issue to have been resolved by *Colbruno*.

Furthermore, Lance's reference to *Colbruno* as a "non-force" claim is highly disingenuous. At least some amount of force must necessarily have been used by the officers in *Colbruno* to walk the plaintiff through the hospital naked against his will. Indeed, if the appellant in *Colbruno* had willingly exposed himself without some coercive pressure by the officers, no violation of his constitutional rights would have been implicated. Regardless, the unique nature of the *Colbruno* plaintiff's claim simply does not lend itself to traditional deliberate indifference analysis. In this regard, *Colbruno* is more akin to an excessive force claim, such as at issue in *Kingsley*, in which an officer violates constitutional rights through active conduct, rather than to traditional deliberate indifference claims which are typically predicated on the failure to take constitutionally required actions (*e.g.* denial of medical care, failure to protect, *etc*.).

Thus, *Colbruno*'s discussion regarding state of mind concerned the subjective intent to punish, not the subjective knowledge required in a deliberate indifference claim:

> [*Bell v. Wolfish*, 441 U.S. 520 (1979)] and [*Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013)] are not entirely clear about whether a pretrial detainee could sustain a due-process claim for mistreatment without showing that the custodians intended their actions as

> punishment. Both opinions could be read as requiring an intent to punish the pretrial detainee although allowing such intent to be inferred from the absence of a legitimate purpose behind the offensive conduct. *See Kingsley v. Hendrickson*, —– U.S. ——–, 135 S. Ct. 2466, 2477–78, 192 L.Ed.2d 416 (2015) (Scalia, J., dissenting) (discussing *Bell*). But, the Supreme Court in *Kingsley* eliminated any ambiguity. Reviewing a claim of excessive force brought by a pretrial detainee, the Court declined to read *Bell* as meaning "that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated." *Id.* at 2473. Rather, a pretrial detainee can establish a due-process violation by "providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Id.* at 2473–74. In particular, there is no subjective element of an ***excessive-force claim*** brought by a pretrial detainee. *See id.* at 2476.

Colbruno, 928 F.3d at 1163 (emphasis added).[86]

Because the officers in *Colbruno* acted affirmatively, their intent to punish could be inferred objectively if their actions were not rationally related to a legitimate governmental objective or were excessive in relation to that purpose. *See Bell*, 441 U.S. at 537-39 (where defendant's affirmative acts are shown to be "excessive in relation" to any "legitimate governmental objective," a court "permissibly may infer" that they are punitive in nature). However, *Kingsley*'s holding in this regard is not new law. Rather, it is drawn directly from *Bell* itself. *Kingsley*, 135 S.Ct. at 2473-74. What was new in *Kingsley* was the application of this *Bell* standard to excessive force claims by pretrial detainees. In this regard,

[86] The emphasized language above indicates that *Colbruno* itself was acknowledging the limitations of the application of *Kingsley*.

despite its assertion of ambiguities in *Bell*, it appears that *Colbruno*'s discussion of *Kingsley* is merely dicta as it could have relied on *Bell* alone to reach the same conclusion – as the *Colbruno* dissent notes, "[b]ecause the complaint [at issue] does not allege excessive force, the relevance of *Kingsley*—beyond its restatement of the general principles articulated in *Bell*—is not obvious." *Colbruno*, 928 F.3d at 1168, n.3 (Tymkovich, CJ, dissenting).

Lance ignores this important distinction between pretrial detainee Fourteenth Amendment claims which are premised upon active conduct as opposed to such claims that are premised upon a failure to act. However, *Kingsley* itself speaks only in terms of the *actions* of governmental officers: "[I]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the ***actions*** are not rationally related to a legitimate nonpunitive governmental purpose or that the ***actions*** appear excessive in relation to that purpose." *Kingsley*, 135 S.Ct. at 2473. (Emphasis added, citation and internal quotation marks omitted). Likewise, this Court has previously noted this distinguishing feature of *Kingsley* and has expressed skepticism that the *Kingsley* standard would apply to § 1983 claims which are premised upon an alleged failure to act:

> First, the claim in that case was an excessive-force claim where there was no question about the intentional use of force against the prisoner. The analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action. Indeed, the Court reiterated the proposition that "liability for negligently inflicted harm is categorically beneath the threshold of

> constitutional due process." 135 S.Ct. at 2472 (internal quotation marks omitted).

Crocker, 752 Fed.Appx. at 569. Moreover, this Court has recently noted that "a claim of deliberate indifference to serious medical needs by its very terminology seems to require both a subjective and an objective test. 'Deliberate' certainly invokes a subjective analysis and 'serious medical needs' invokes an objective analysis." *McCowan v. Morales*, 945 F.3d 1276, 1291, n.12 (10th Cir. 2019) (emphasis in original).

Regardless, this distinction between pretrial detainee claims premised upon actions and those premised upon a failure to act is important and dispositive of the issue currently before this Court. As this Court recognized in *Colbruno*, according to *Bell*, when a pretrial detainee asserts a claim for violation of constitutional rights under the Fourteenth Amendment, the relevant question is whether the circumstances at issue amount to punishment of the detainee:

> Although the full scope of protection provided by the Due Process Clauses to pretrial detainees may be to some extent uncertain, the Supreme Court has been categorical in one respect: "[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (emphasis added). Thus, in analyzing a condition of pretrial confinement, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id*. at 538, 99 S.Ct. 1861.

Colbruno, 928 F.3d at 1162. There are four ways for pretrial detainees to establish that they were unconstitutionally punished under established Supreme Court precedent, the first three of which are simply inapplicable to the type of claim at issue herein. The first approach requires showing "that a government official's action was taken with an 'expressed intent to punish."' *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1084 (9th Cir. 2016) (Ikuta, J., Callahan, J., and Bea, J., dissenting) (quoting *Kingsley*, 135 S.Ct. at 2473). Using the second approach, "a pretrial detainee can show that a government official's deliberate action was objectively unreasonable," meaning it "is not reasonably related to the government's legitimate interests." *Castro*, 833 F.3d at 1084 (Ikuta, J., Callahan, J., and Bea, J., dissenting). Excessive force claims fall within this category. *Id.* The third approach requires establishing "that a restriction or condition of confinement, such as a strip search requirement, is not reasonably related to a legitimate government purpose." *Id.*

None of the above approaches for demonstrating unconstitutional punitive intent are readily applicable to pretrial detainee Fourteenth Amendment claims which are premised upon an alleged failure to take a constitutionally required action. Rather, unconstitutional punitive intent with regard to such claims is shown by demonstrating deliberate indifference to a substantial risk of harm. *Castro*, *supra*. ("Finally, a pretrial detainee can show that a governmental official's failure

to act constituted punishment if the detainee can establish that the official was deliberately indifferent to a substantial risk of harm.") However, the Supreme Court has held that the failure to act to alleviate a substantial risk of harm simply *does not constitute punishment* unless the defendant officer had actual knowledge of the risk and still failed to action to abate it:

> An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis...**But an official's failure to alleviate a significant risk that he should have perceived but did not**, while no cause for commendation, **cannot under our cases be condemned as the infliction of punishment**.

Farmer v. Brennan, 511 U.S. at 837-38 (1994) (emphasis added).

> While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. *See Farmer*, 511 U.S. at 837–38, 114 S.Ct. 1970. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. *Id*. And the Supreme Court has made clear that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Kingsley*, 135 S.Ct. at 2472 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)).

Castro, 833 F.3d at 1086 (Ikuta, J., Callahan, J., and Bea, J., dissenting).

Furthermore, in *Daniels v. Williams*, 474 U.S. 327, 331 (1986), the Supreme Court explained that "[h]istorically, this guarantee of due process has been applied to ***deliberate*** decisions of government officials to deprive a person of life, liberty, or property." (Emphasis added). However, an official's failure to act to alleviate a

substantial risk of harm of which the officer was genuinely unaware cannot reasonably be considered a deliberate decision which implicates Fourteenth Amendment concerns.

Thus, the only way to determine whether an officer's failure to protect an inmate from a risk of harm rises to the level of unconstitutional punishment sufficient to implicate Fourteenth Amendment concerns is to inquire into the officer's subjective knowledge regarding the existence of that risk of harm. Consequently, not only does *Kingsley* itself not expressly support the application of its rationale to such deliberate indifference claims, but careful consideration of the constitutional principles underlying *Kingsley*'s decision demonstrates that extension of its rationale to pretrial detainee deliberate indifference claims would be in contravention of other well-established Supreme Court precedent as set forth by *Bell* and *Farmer*.

Lance may argue that *Kingsley* states that:

> *Bell*'s focus on "punishment" does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.

Kingsley, 135 S.Ct. at 2473-74. However, *Kingsley* is again speaking here in terms of affirmative acts from which unconstitutional punitive intent could be inferred on

the basis of objective unreasonableness without the necessary of inquiry into actual intent. Indeed, none of the other cases which *Kingsley* relied on in support of this assertion – *Block v. Rutherford*, 468 U.S. 576 (1984), *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), *United States v. Saalerno*, 481 U.S. 739 (1987) – involved deliberate indifference claims which were premised upon a failure to act. More importantly, the subjective deliberate indifference standard itself also does not require proof of a subjective intent to punish. Rather, it requires proof of subjective knowledge of the existence of a substantial risk of harm from which such intent may be inferred. As such, application of the subjective deliberate indifference standard to pretrial detainee medical deliberate indifference claim is not inconsistent with the *Kingsley* decision in this regard.[87]

In support of his argument that pretrial detainee deliberate indifference claims under the Fourteenth Amendment must necessarily be adjudicated under a different standard than similar claims by convicted prisoners under the Eighth Amendment, Lance states that "the Supreme Court has never applied a subjective test to a case about treatment in pretrial detention." (Opening Brief, p. 45).

[87] On a related note, Lance cites *Darnell v. Pineiro*, 849 F.3d 17, 35 (7th Cir. 2017) for the proposition that "[a]fter *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause." (Opening Brief, p. 47, citation and internal quotation marks omitted). However, for the reasons discussed above, *Darnell*'s conclusion in this regard is unwarranted with regard to pretrial detainee claims which are premised upon a failure to act.

However, although not a pretrial detainee case, the Supreme Court demonstrated its approval of the use of the subjective deliberate indifference standard for pretrial detainee medical claims in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In that case, the court stated that "[s]ince it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners…it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial…" (Citations omitted). *Id*. at 850. In support of this assertion, the Supreme Court relied upon *Barrie v. Grand County, Utah*, 119 F.3d 862, 867 (10th Cir. 1997) and *Weyant v. Okst*, 101 F.3d 845, 856 (2nd Cir. 1996), both of which were pretrial detainee medical cases applying the subjective deliberate indifference standard. Consequently, Lance's assumption that a different standard must necessarily be applied to pretrial detainee deliberate indifference claims under the Fourteenth Amendment as opposed to such claims arising under the Eighth Amendment is without legal support.

Lance argues that an objective deliberate indifference standard would require "pretrial detainees to prove more than negligence but less than subjective intent—something akin to reckless disregard." (Opening Brief, p. 50, citations and internal quotation marks omitted). However, in *Kingsley*, the court expressly declined to determine whether recklessness would suffice as a basis for imposing

liability in the case of an alleged mistreatment of a pretrial detainee. *Kingsley*, 135 S.Ct. at 2472. As *Kingsley* itself declined to consider the application of such a recklessness standard this Court should likewise refrain from adopting such a standard. Moreover, Lance's assertion that his proposed objective deliberate indifference standard would require more proof than mere negligence is simply wrong. As discussed above, "a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most." *Castro*, *supra*. (citing *Farmer*, 511 U.S. at 837–38).

Lance further asserts that "the objective test asks whether a defendant disregarded an obvious risk of substantial harm to a plaintiff, irrespective of whether the defendant subjectively knew of the risk" and argues that such a standard "strikes an appropriate balance," ensuring that jail officials receive more protection…than in mere tort actions," and ensuring that "reasonable safety of pretrial detainees…" (Opening Brief, p. 51). Again, Lance's assertion that the objective standard would ensure officials receive more protection than mere tort actions is erroneous. Moreover, Tenth Circuit law already allows the jury to infer subjective knowledge of a risk of harm if that risk is obvious. *See Tafoya v. Salazar*, 516 F.3d 912, 916-17 (10th Cir. 2008). "[I]f a risk is obvious, so that a reasonable man would realize it, we might well infer that [the prison official] did in fact realize it." *Id*. at 917 (quoting *Garrett v. Stratman*, 254 F.3d 946, 950 (10th

Cir. 2001); internal quotation marks omitted). The Tenth Circuit's current jurisprudence which allows inference of subjective knowledge of a risk from its objective obviousness is the functional equivalent of an objective standard for deliberate indifference claims. The only appreciable difference is that, under the Tenth Circuit's established deliberate indifference jurisprudence, a defendant would be allowed to argue that he was not, in fact, subjectively aware of the risk of harm despite its obviousness (*Id*.), while the objective standard proposed by Lance would presumably not allow such evidence. However, there is no good reason for the disallowance of such evidence. To the contrary, disallowing evidence of actual ignorance of a risk of harm is contrary to the Supreme Court's recognition that Fourteenth Amendment due process claims require more proof than mere negligence. *Lewis*, 523 U.S. at 849.

Unlike the claims in *Kingsley* and *Colbruno*, which were premised upon affirmative conduct, deliberate indifference claims are premised on a failure to act to prevent some harm. As such, pursuant to *Bell* and *Farmer*, inference of the required punitive intent cannot be determined with regard to such claims without inquiry into the subjective knowledge of the defendant regarding the existence of the risk of harm. After all, an officer cannot be reasonably be said to have intended to punish a detainee by subjecting him to a risk of harm of which the officer was unaware. Thus, application of the subjective deliberate indifference standard to

pretrial detainee medical indifference claims is not inconsistent with the Supreme Court's holding in *Kingsley*, and extension of the *Kingsley* rationale to such claims would be in contravention of *Bell* and *Farmer*.

This Court should not abandon well-established Tenth Circuit precedent on this issue absent clear instruction from the Supreme Court. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Indeed, this Court is bound to adhere to established Tenth Circuit precedent absent intervening Supreme Court authority which clearly undermines, contradicts or invalidates the Court's prior analysis. *See Green Solution Retail v. United States*, 855 f.3d 1111, 1115-16 (10th Cir. 2017). As discussed above, *Kingsley* does not clearly undermine, contradict or invalidate the Tenth Circuit's well-established precedent with regard to the subjective deliberate indifference test for pretrial detainee medical claims. Consequently, this Court is bound to adhere to that established precedent herein, and must therefore conclude that the District Court did not err in applying that standard below.

B. Harper and D. Morgan Were Not Deliberately Indifferent to Lance's Serious Medical Needs.

The Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court…" *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (citations omitted); *see also Naylor Farms, Inc. v. Chaparrall Energy, LLC*, 923 F.3d 779, 793 (10th Cir. 2019). Here, the District Court incorrectly determined that genuine issues of material fact existed as to whether Harper and D. Morgan were deliberately indifferent to Lance's serious medical needs.[88] Thus, even assuming that the District Court erred in applying the subjective/objective deliberate indifference standard or that it erred in finding Harper and D. Morgan were entitled to qualified immunity, there is ample basis in the record from which the Court can affirm the District Court's grant of summary judgment to Appellees Harper and D. Morgan.

Lance was a detainee in PCCJC at the time of the alleged incident, and thus his claims are governed by the Fourteenth Amendment's Due Process clause. *Burke v. Regalado*, 935 F.3d 960, 991 (10th Cir. 2019). However, the "analysis [is] identical to that applied in Eighth Amendment cases." *Id*. (quoting *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999)). "[D]eliberate indifference to a pretrial detainee's serious medical condition" may amount to a violation of the Fourteenth Amendment and state a cause of action under 42 U.S. 1983. *Burke*, 935 F.3d at 991. However, mere negligence – even gross negligence – is insufficient to

[88] Appx. Vol. III, 784-785.

support a deliberate indifference claim. *Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489, 1495 (10th Cir. 1990) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 and n. 7 (1989)); *see also Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 410 (1997) ("[D]eliberate indifference is a stringent standard of fault, requiring proof that [an] actor disregarded a known or obvious consequence of his action."). "It is obduracy and wantonness, not inadvertence or error in good faith," that violate the Constitution with regard to the "supplying of medical needs..." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

"[D]eliberate indifference contains both an objective and a subjective component." *Blackmon v. Sutton*, 734 F.3d 1237, 1244 (10th Cir. 2013). As to the objective component, a medical need is considered sufficiently serious if a physician has diagnosed the condition and mandated treatment, or the condition '"is so obvious that even a lay person would easily recognize the medical necessity for a doctor's attention."' *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1112 (10th Cir. 2016) (quoting *Al-Turki v. Robinson*, 762 F.3d 1188, 1192-93 (10th Cir. 2014)). As to the subjective prong of the deliberate indifference test, Lance must establish that Harper and D. Morgan knew of a substantial risk of harm and failed to take reasonable measures to abate it. *Id.* (quoting *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999)).

In that regard, Lance must show that Harper and D. Morgan were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Burke*, 935 F.3d at 992 (quoting *Self v. Crum*, 439 F.3d 1227, 1231 (10th Cir. 2006)) (quotations omitted). Yet, Lance contends that "an officer's refusal to provide access to medical care in the face of 'pain and suffering' is sufficient to establish the subjective prong of deliberate indifference." (Opening Brief, p. 20, citing *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000)). Lance primarily relies on *Mata v. Saiz*, 427 F.3d 745 (10th Cir. 2005), *Garrett v. Stratman*, 254 F.3d 946 (10th Cir. 2001), and *Sealock* to support this contention. This is reliance is misplaced.

First, Lance's citation to supporting case law on his theory that Harper and D. Morgan "knew of a substantial risk from the very fact that the risk was "obvious," (Opening Brief, p. 18), excludes a key caveat to the rule wherein "the obviousness of a risk is **not conclusive** and a prison official may show that the obvious escaped him." *Rife*, 854 F.3d at 647 (emphasis added) (citing *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994)); *see also Durkee v. Minor*, 841 F.3d 872, 875-76 (10th Cir. 2016) (Restating *Farmer* that the inference of a risk cannot be conclusive because "people are not always conscious of what reasonable people would be conscious of.").

Additionally, the cases cited by Lance were against medical providers with a greater knowledge and awareness of medical risks. *See Mata*, 427 F.3d at 750, 755-761 (defendants/medical providers attempting to diagnose chest pain); *see also Garrett*, 254 F.3d at 950 (physician treating shoulder pain while waiting for inmate's referral to a specialist to go through.). Only *Sealock* also involved a layperson, a prison guard, and there the plaintiff demonstrated more severe symptoms of pain and the Court found it significant that the guard told the inmate not to die on his watch, showing the defendant recognized there was a risk. *Sealock*, 218 F.3d at 1210-11 (plaintiff was "very pale, sweating, and ha[d] been vomiting" and believed he was having a heart attack.) Lance has failed to provide a case where a layperson's subjective awareness of a comparable health risk was filled in via the "obvious" contour. *See also Rife*, 854 F.3d at 647 (noting "[o]ur court applies specialized standards to deliberate indifference claims against medical professionals [and] . . . [the Court has] not applied these standards to deliberate indifference claims against laypersons such as police officers" because the "correct" standard stems from cases concerning "deliberate indifference claims against laypersons"); *see also Rife v. Jefferson (Rife II)*, 742 Fed. Appx. 377, 388 (10th Cir. 2018) ("[T]o the extent that *Mata* and *Sealock* involved defendants who were medical professionals . . . we held in *Rife I* that such cases don't establish the deliberate-indifference standards that apply to laypeople").

The record does not show that either Harper or D. Morgan were aware of any substantial risk of serious harm to Lance, "obvious" or not, associated with Lance's lingering erection. Even so, the District Court found genuine issues of material fact did exist because while Lance did not "make any allegations with regard to speaking to Harper specifically," Harper could have known of Lance's persistent erection since he passed breakfast trays and performed welfare checks while working in the tower and cleaning.[89] As for D. Morgan, the Court noted he could have known of Lance's erection because D. Morgan worked in the tower on December 16, 2016, during a period Lance allegedly called the tower about his condition, and also would have performed site checks while in the tower.[90]

However, there is absolutely no evidence in the record that either D. Morgan or Harper were told Lance was in severe pain or even that he had an erection. Lance (and the District Court) assume that D. Morgan and Harper were told about Lance's erection simply because D. Morgan may have been near an intercom and Harper may have passed a tray to Lance.[91] However, Lance himself directly rebutted this assertion when he testified that he did not recall speaking with neither D. Morgan nor Harper.[92] D. Morgan and Harper supported this assertion when they testified they did not speak with Lance about his condition nor have any

[89] Appx. Vol. III, 784-785.
[90] Appx. Vol. III, 784-785.
[91] Appx. Vol. III, 784-785.
[92] Appx. Vol. II, 427-428, 526; Supp. App. 168-170.

knowledge whatsoever about it. Moreover, Lance only recalled showing his penis to Smead, not Harper or D. Morgan.[93] Also, that Lance and Harper may have otherwise seen Lance's erection is further unsupported; Lance testified that he showed inmates his penis because they claimed not to be able to see Lance's erection through his boxers.[94]

As for the argument that because Harper and D. Morgan were on-duty at times Lance suffered from a persistent erection and that Lance was physically doing things which *may* have communicated pain to onlookers, (Opening Brief, pp. 22-23), this is insufficient to establish the subjective prong of the deliberate indifference standard. Indeed, the *Sealock* case Lance cites show a situation accompanied with much more than "pain" to show the seriousness of the event. *See Sealock*, 218 F.3d at 1210 (noted that the plaintiff's symptoms were "sufficiently serious" where he was "very pale, sweating, and ha[d] been vomiting" combined with the plaintiff's broadcasted belief he was having a heart attack.).

In contrast, Lance states his pain was demonstrated to Harper and D. Morgan because other inmates swore it was clear he was in "obvious" pain and because Lance, not wearing pants, walked around with wadded up clothing between his legs. (Opening Brief, p. 22). These items do not obviously convey great pain. They do not rise to the level of some combination of collapsing,

[93] Supp. App. 87, 168-170, 180-181, 192-196.
[94] Appx. Vol. II, 499-500.

vomiting, paleness, sweating or a repeatedly stated belief his condition was life threatening. *See Sealock*, 218 F.3d at 1210. The behaviors may be strange but not singularly indicative of pain.

Accordingly, because there is no evidence that Harper and D. Morgan were subjectively aware of any substantial risk of serious harm to Lance, there is ample basis in the record from which the Court can affirm the District Court's grant of summary judgment to the Appellees.

II. The District Court Correctly Determined Harper and D. Morgan Are Entitled To Qualified Immunity.

Qualified immunity protects public officials from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curium) (citations and quotation marks omitted). Qualified immunity is an entitlement not to stand trial or face the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Qualified immunity is more than a defense to liability: it is immunity from suit that is effectively lost if a case is erroneously permitted to go to trial. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

It has long been the law that once a defendant asserts a qualified immunity defense in a dispositive motion, the responsibility shifts to the appellant to "meet a 'heavy two-part burden.'" *Case v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir. 2007). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Wilson v. Falk*, 877 F.3d 1204, 1209 (10th Cir. 2017) (quoting *Keith v. Koerner*, 843 F.3d 833, 837 (10th Cir. 2016). The *Wilson* Court stated:

> If, and **only if**, the **[appellant] meets** this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.

(emphasis added) (quoting *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008)).

Deciding when a right is "clearly established" is a crucial part of qualified immunity analysis. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citations and quotations omitted). "The question of whether a right is clearly established must be answered in light of the specific context of the case, not as a broad general proposition." *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012)

(internal quotations omitted). "The Supreme Court has 'repeatedly told courts not to define clearly established law at a high level of generality since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014), alterations omitted); *see also White v. Pauly*, 137 S.Ct. 548, 552 (2017). Thus, "a general statement of law...is not sufficient to show that the law was clearly established." *Gillen*, 761 F.3d at 1106.

Here, as the District Court correctly found,[95] Harper and D. Morgan are entitled to qualified immunity because Lance has not shouldered his heavy burden of demonstrating that it was clearly established that D. Morgan and Harper's actions amounted to a constitutional violation. Yet, in his Opening Brief, Lance cites *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019), *Sealock*, *Mata*, and *Al-Turki* for the broad proposition "that total inaction in the face of severe pain violates the Constitution." (Opening Brief, pp. 25-29). However, this statement of law is too broad and general to have put Harper and D. Morgan on notice that their specific actions in this case amounted to a violation of Lance's constitutional rights.

[95] Appx. Vol. III, 784-785.

The legal principle that inmates are entitled to medical care for sufficiently serious medical needs is indeed well established; however, the qualified immunity analysis in this regard is analyzed "in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 655, 640 (10th Cir. 1987). Specifically, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* The question is not whether Lance had such a right, but whether it was clearly established that Appellees Harper and D. Morgan's alleged actions violated that right. *Id.*

"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 [appellant] maintains." *Klein v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. "[T]he [appellant's] burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the [district] court can determine whether the right allegedly violated was clearly established." *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (citation

and quotation marks omitted). While the court need not point to any prior authority which has precisely the same facts of this case in order to find clearly established law, existing precedent must "squarely govern" the case and "must have placed the statutory or constitutional question beyond debate." *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (citations and internal quotation marks omitted). "[C]learly established law must be 'particularized' to the facts of the case." *White*, 137 S.Ct. at 552.

Lance hangs his clearly established argument on the existence of severe pain and alleged complaints about that pain to jail staff and relies on *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019). (Opening Brief, pp. 25-29). However, *McCowan* was decided after December 2016, when the events at issue in this case transpired and therefore is '"of no use in the clearly established inquiry."' *Rife II*, 742 Fed. Appx. at 382 (quoting *Kisela v. Hughes*, 138 S.Ct. 1148, 1154 (2018)).

As for *Mata* and *Sealock*, this Court has previously held "to the extent that *Mata* and *Sealock* involved defendants who were medical professionals . . . such cases don't establish the deliberate-indifference standards that apply to laypeople." *Rife (II)*, 742 Fed. Appx. at 388 (internal citations omitted); *see also Mata*, 427 F.3d at 750, 755-761. *Al-Turki v. Robinson* also involved a defendant who was a medical professional, not layperson-jailers. *See Al-Turki*, 762 F.3d at 1193 (defendant/nurse delayed treating an inmate with kidney stones). Moreover,

as discussed above, while *Sealock* involved a lay person-jailer as well as medical providers, there the plaintiff demonstrated more severe symptoms of pain and the the guard even told the inmate not to die on his watch. *Sealock*, 218 F.3d at 1210-11.

Additionally, Lance's claim that the existence of severe pain and alleged inaction in the face of it shows a marked disconnect between a) the vague, inherently subjective concept of and b) a detainee having an erection for an extended period of time and the conduct of jailers in response. This shifting of the focus and the topic is telling, as it points to the dearth of clearly established law and the reason for Lance's misplaced reliance on *McCowan*, *Al-Turki*, *Mata*, and *Sealock*. Lance implicitly argues for a qualified immunity analysis that departs from the factual circumstances facing officers. (Opening Brief, pp. 25-29). Diluting the qualified immunity standard in this way is directly undercut by a spate of recent decisions from the Supreme Court. *White*, 137 S.Ct. at 552; *Mullenix*, 136 S.Ct. at 308; *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018); *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1775-76 (2015). It is now overwhelmingly clear that all courts must not "define clearly established law at a high level of generality" *Kisela*, 138 S.Ct. at 1152. Here, the issue is much more specific than whether Lance was generally in "severe pain" regardless of the circumstances or jailer interactions. As such, Lance has failed to shoulder his

burden to demonstrate that it was clearly established that D. Morgan and Harper's alleged actions amounted to a constitutional violation.

Additionally, Lance's argument that Harper and D. Morgan are not entitled to qualified immunity, because Lance's pain was "obvious" and as such they had "fair warning" their alleged conduct was unconstitutional, (Opening Brief p. 30), fails to mention that this approach has been gradually disfavored and eroded since *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). *See Aldaba v. Pickens*, 844 F.3d at 876; *see also Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017). In *N.E.L. v. Douglas County, Colorado*, 740 Fed. Appx 920, 928 n.18 (10th Cir. 2018), this Court stated "*Hope v. Pelzer* appears to have fallen out of favor, yielding to a more robust qualified immunity." Accordingly, it is inappropriate to apply "fair warning" test here, as the test does not comport with the evolved qualified immunity analysis in this circuit, which focuses primarily instead on specificity.

Finally, Lance's argument that this Court should not "expand" the qualified immunity doctrine because of "widespread satisfaction" with it was not raised with the district court, and as such, Lance has failed to preserve any challenge to that issue on appeal. *Simpson v. Carpenter*, 912 F.3d 542, 567 n.10 (10th Cir. 2018) (citation omitted). Moreover, Lance merely contends that qualified immunity has become disfavored, citing to a law review journal, Amicus Brief, and two statements made in a concurring and dissenting opinion, and then briefly states

"this Court should not expand the doctrine by replicating the district court's error—taking qualified immunity to an extreme" without any other argument or support. (Opening Brief, pp. 32-3). It is well-settled that "[a]rguments inadequately briefed in the opening brief are waived." *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) (quoting *Adler v. Wal-Mart Store, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998). Accordingly, the District Court did not err in granting summary judgment to Appellees Harper and D. Morgan.

III. The District Court Did Not Err in Granting Summary Judgment to Sheriff Morris, in his Official Capacity.

In order to establish municipal liability under 42 U.S.C. § 1983, Lance must establish both an underlying constitutional violation and that such violation was caused by a policy, practice or custom of the PCCJC or that an official with final policy-making authority for the PCCJC (*i.e.* former Pittsburg County Sheriff Joel Kerns) personally participated in the alleged constitutional violation(s). *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 402-406 (1997). Here, there is no allegation or evidence that former Sheriff Kerns personally participated in the alleged violations Lance's constitutional rights. (Opening Brief, pp. 15-17). As such, Lance's § 1983 claim against Morris must be premised on the existence of some policy, practice, or custom of PCCJC.

Morris may not be held liable simply because he "employs a tortfeasor." *Brown*, 520 U.S. at 403. Additionally, "[t]hat [an appellant] has suffered a

deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation." *Id* at 406-07. Rather, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-95 (1978), requires Lance to establish that a policy or custom of PCCJC exists and that it caused the alleged constitutional violations. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821-22 (1985).

It is not enough for a § 1983 appellant merely to identify conduct properly attributable to the municipality. *Brown*, 520 U.S. at 408. The appellant must also demonstrate that, through its *deliberate conduct*, the municipality was the "*moving force*" behind the injury alleged. *Id* (emphasis added). Furthermore, "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id* at 405.

A. Failure to Train.

Lance contends "a jury could find that if a jail does not have on-site medical coverage for long periods of time, a total absence of training on recognizing medical emergencies creates an obvious risk . . . that a detainee will experience an emergency medical condition and no one will recognize the need to call for medical help over the weekend." (Opening Brief, p. 46). Lance relies on *Olsen v.*

Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002) in support of this argument. However, *Olsen* is distinguishable since it concerned a mental disorder, "OCD", and "OCD does not rival Halley's Comet in its infrequency of appearance." *Olsen*, 312 F.3d at 1319. Lance, however, has made no contention that priapism is a frequent medical condition jailers should expect to see at the PCCJC. (Opening Brief, pp. 48-50). In contrast, Nurse Crawford, the Sheriff, and various jailers testified they had not had an inmate experience a priapism before.[96]

Lance also ignores that there are limited circumstances where inadequacy in training can be a basis for § 1983 liability. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Inadequacy in training may serve as the basis for municipal liability under § 1983 "only where the failure to train amounts to deliberate indifference . . ." to inmate rights. *City of Canton*, 489 U.S. at 388. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id*. at 389.

To establish deliberate indifference to a need for training, Lance must show that former Sheriff Kerns knew of and disregarded the substantial risk of inadequate training of PCCJC employees. *Canton*, 489 U.S. at 388. It isn't enough

[96] Supp. App. 97, 112, 137-138, 212.

to "show that there were general deficiencies in the county's training program for jailers." *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999). Rather, Lance must "identify a specific deficiency" that was obvious and "closely related" to his injury. *Id.* To establish deliberate indifference, Lance must show that former Sheriff Kerns knew of and disregarded a substantial risk to the Lance's safety and well-being. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Here, Lance cannot demonstrate a specific deficiency in the training of PCCJC employees that was obvious and closely related to the alleged violations of the Lance's constitutional rights. *See Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010). Instead, undisputed facts demonstrate that PCCJC staff were adequately trained. The jailer Appellees received both state mandated training, on-the-job training, including that included more experienced jailers mentoring new jailers, and monthly staff safety meetings.[97] Also, the jailers Appellees received and knew PCCJC's policies and knew that ***if*** Lance had, in fact, made a jailer aware of his serious medical condition ***before*** Monday, December 19, 2016, but was not granted access to medical care, such conduct would have violated the PCCJC's policy.[98]

Additionally, Lance has no evidence of any persistent and widespread

[97] Appx. Vol. II, 572, 578-580; Appx. Vol. III, 772; Sup. App. 96, 124-125, 173-175, 212-213.
[98] Appx. Vol. II, 771; Supp. App. 133, 147, 176-177.

pattern of denial of medical care to inmates that would have placed former Sheriff Kerns on notice of the need for additional or different training. (Opening Brief, pp. 44-50). Without notice that a course of training is deficient in a particular respect, decision-makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62.

Lance briefly contends that the alleged "failures in training were compounded by failures of supervision," without any legal argument or further argument. (Opening Brief, pp. 47-8). It is well-settled that "[a]rguments inadequately briefed in the opening brief are waived." *Cooper*, 654 F.3d at 1128 (quoting *Adler*, 144 F.3d at 679). Accordingly, the District Court did not err in granting summary judgment to Appellee Morris on Lance's failure-to-supervise claim. Accordingly, the District Court did not err in granting summary judgment to Appellee Morris on Lance's failure-to-train and failure-to-supervise claim.

B. Policy, Practice, or Custom.

> Municipal liability may be based on a formal regulation or policy statement, or it may be based on an informal custom so long as this custom amounts to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.

Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189 (10th Cir. 2010) (citations and internal quotation marks omitted).

In order for a municipality to be held liable for an un-official practice under

§ 1983, the practice must be "so permanent and well settled as to constitute a custom or usage with the force of law. . . . In order to establish a custom, the actions must be persistent and widespread . . . practices of [city] officials." *Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996) (internal citations and quotation marks omitted). In determining what level of persistent and widespread conduct will be sufficient to establish municipal liability, it is clear that "normally random acts" and "isolated incidents" fall short. *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994); *see also Carter v. Morris*, 164 F.3d 215, 220 (4th Cir. 1999) (a "meager history of isolated incidents" is insufficient). Furthermore, the court in *Lytle v. Doyle*, 326 F.3d 463, 473 (4th Cir. 2003), required evidence of "'numerous particular instances' of unconstitutional conduct."

Lance argues Morris is liable claiming PCCJC had a practice of disregarding a physician's orders that a detainee be taken directly to a hospital, instead requiring the detainee be taken back to PCCJC and the OR process be completed. (Opening Brief, pp. 51-55). This is totally unsupported by the record. Instead, it is undisputed PCCJC had implemented policies and practices aimed at preventing the denial or delay of medical care to inmates.[99] The Jail had a policy to provide

[99] Appx. Vol. II, 395, 402-405; Appx. Vol. III, 768; Supp. App. 92.

adequate health care services to all inmates.[100] PCCJC policy provided that outside medical resources, namely from MRHC, were available to inmates as needed.[101] Since MRHC was less than five minutes away, medical care for PCCJC inmates was quickly available twenty-four hours daily.[102] Per policy, inmates were informed in writing, upon admission to PCCJC about the process for accessing healthcare services, including that inmates may complete a medical request form if in need of medical services.[103] According to policy, Jailers addressed an inmate's medical request by using their own discretion and common sense to assess the severity of the inmate's medical need.[104] However, jailers were required to submit the medical request form up their chain-of-command, i.e., to their shift sergeant, Nurse Crawford, the Jail Administrator, or, depending on the situation's necessity or severity, by directly contacting emergency services.[105] Jailers were allowed to call for an ambulance without going through their chain-of-command.[106]

Clearly, these policies and practices of PCCJC did not cause the alleged violations of the Lance's constitutional rights. To the contrary, all of the alleged

[100] Appx. Vol. II, 402; Appx. Vol. III, 768; Supp. App. 92.
[101] Appx. Vol. II, 402; Appx. Vol. III, 769; Supp. App. 92.
[102] Appx. Vol. II, 402; Appx. Vol. III, 769; Supp. App. 92.
[103] Appx. Vol. II, 403-405; Appx. Vol. III, 770; Supp. App. 92.
[104] Appx. Vol. II, 402; Appx. Vol. III, 769; Supp. App. 92, 93, 98-99, 144, 150-151.
[105] Appx. Vol. II, 403-404; Appx. Vol. III, 770; Supp. App. 92.
[106] Appx. Vol. II, 404; Appx. Vol. III, 770; Supp. App. 92, 129, 134-135, 143, 145-146, 165-166, 200-205.

deprivations of Lance's constitutional right were in violation of PCCJC's policies.[107] The jailers knew and understood the procedure for reporting an inmate's medical needs and. understood that if Lance had made them aware of his priapism before Monday, December 19, 2016, yet Lance was not granted access to healthcare, this would undoubtedly have violated PCCJC policy.[108]

Even so, Lance cites *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) to argue that because PCCJC staff relied on civilian facilities, and because of this alleged practice, "Lance can show deliberate indifference" because violating his rights was "highly predictable" or "plainly obvious" consequence of this practice. (Opening Brief, pp. 52-53). However, this is not a class action challenging the entire system of health care at the PCCJC. *Ramos*, 639 P.2d at 575 (discussing the deliberate indifference standard in the context of "class actions challenging the entire system of health care"). Regardless, Lance has not presented evidence of "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Id*. This case is nothing like the conditions in *Ramos*. While the PCCJC relies on outside physicians, Lance

[107] Appx. Vol. III, 771; Supp. App. 133, 147, 176-177.
[108] Appx. Vol. II, 591-596; Appx. Vol. III, 612, 620, 630-632, 771-772; Supp. App. 100, 109-110, 128-131, 133-137, 140-143, 147, 149, 153-156, 160-161, 163, 176-177, 197-199, 207-209, 211-212.

ignores the fact that he was taken to Dr. Lee by transport officers while in custody. Also, while Lance alleges that jail employees refused to follow Dr. Lee's orders, the hospital discharge form shows otherwise.[109]

Lance attempts to spin the PCCJC's medical OR process as a known cause for delaying treatment to inmates. However, Nurse Crawford clarified that inmates were usually given a medical OR for any hospitalization and the determination of whether the medical OR was processed before the inmate was released from the PCCJC to go to the hospital or after the inmate was already admitted to the hospital depended upon various factors including the nature of the inmate's charges as well as the inmate's medical needs. According to Nurse Crawford, Lance's priapism did not require that he be transported directly to St. Francis by jail employees.[110] Lance has not presented any evidence close to establishing some sort of system-wide failure addressed in *Ramos*.

Moreover, Lance has no evidence of any persistent and widespread pattern of denial of medical care to inmates that would support a claim of an informal unconstitutional custom or practice. *Cf Connick*, 563 U.S. at 62 (holding that a pattern of similar constitutional violations is typically necessary to prove deliberate indifference). In fact, when Lance submitted a medical request to have his wisdom teeth pulled, PCCJC complied with that request, showing PCCJC had a pattern of

[109] Appx. Vol. I, 569-571; Appx. Vol. III 766. Supp. App. 66, 120-123.
[110] Supp. Appx. 120-122.

providing medical care to its inmates.[111] Accordingly, for these reasons, the District Court did not err in granting summary judgment in favor of Morris, and its decision in that regard should be affirmed.

CONCLUSION

As set forth herein, the District Court did not commit error in granting summary judgment in favor of these Appellees. Accordingly, the Judgment in this case should be AFFIRMED with regard to these Appellees.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not materially assist in the determination of this appeal. Therefore, the Appellees assert that this cause should be submitted without oral argument.

Respectfully submitted,

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[111] Appx. Vol. II, 407; Appx. Vol. III, 761; Supp. App. 51, 70-71.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. Appx. P. 32(a)(7)(C), I certify that this brief complies with Fed. R. Appx. P. 32(a)(7)(B), in that it is proportionally spaced and contains 12,958 words. I relied upon my word processor, Microsoft Word 2010, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Michael L. Carr
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I further certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

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s/ Michael L. Carr
Michael L. Carr

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Appx. P. 25(d)(2), I hereby certify that on February 26, 2020, the foregoing brief was filed electronically the CM/ECF system with the Court and that the requisite number of true and correct copies of the foregoing brief is being forwarded by first class mail to the Court within two days of the date of electronic transmission:

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Further, pursuant to Fed. R. Appx. P. 25(d)(1), I hereby certify that on February 26, 2020, which caused the following parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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