Case No. 19-4118

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARTIN CROWSON,

PLAINTIFF/APPELLEE;

vs.

MICHAEL JOHNSON, WASHINGTON COUNTY, and
SHERIFF CORY PULSIPHER, in his official capacity,

DEFENDANTS/APPELLANTS;

JUDD LAROWE,

DEFENDANT.

APPELLANTS' OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
The Honorable Tena Campbell, Judge Presiding
Trial Court Case No. 2:15-cv-880-TC

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STATEMENT OF JURISDICTION

The district court has "federal question" jurisdiction, pursuant to 28 U.S.C. § 1331, because Plaintiff alleges that Defendants Michael Johnson, Washington County, and Sheriff Cory Pulsipher, in his official capacity, (hereinafter Washington County Defendants) violated his Eighth Amendment rights by failing to provide constitutionally necessary medical care while he was incarcerated at the Washington County Jail. Plaintiff brings this suit under 42 U.S.C. § 1983.

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 Michael Johnson. The United States District Court for the District of Utah, by the Honorable Tena Campbell, denied in part, and granted in part, Washington County Defendants' Motion for Summary Judgment, by Order dated July 19, 2019. (Order and Mem. Decision at 1, Aplt. App. at 204).[1] Washington County Defendants County filed a Notice of Interlocutory Appeal on August 16, 2019. (Notice of Interlocutory Appeal, Aplt. App. at 223).

[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.

This Court has jurisdiction over this appeal because 28 U.S.C. § 1291 provides jurisdiction to the Courts of Appeals to all final decisions of the district courts of the United States. A denial of a claim of qualified immunity is an appealable 'final decision' within the statute's meaning. *Brown v. Montoya*, 662 F.3d 1152, 1161 (10th Cir. 2011); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The denial of summary judgment on qualified immunity may be appealed if the immunity issue can be decided on appeal as a matter of law. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

"Under the collateral-order doctrine a limited set of district-court orders are reviewable 'though short of final judgment.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (*quoting Behrens*, 516 U.S. at 305). "[P]retrial orders denying qualified immunity generally fall within the collateral order doctrine." *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). "This is so because such orders conclusively determine whether the defendant is entitled to immunity from suit; this immunity issue is both important and completely separate from the merits of the action and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Id*.

Johnson is appealing the district court's denial of qualified immunity. Therefore, it is appropriate for this Court to determine whether he is entitled to qualified immunity as a matter of law.

Further, the Court may consider claims against Defendant Washington County because civil rights claims against a governmental entity, including official capacity suits, that are "inextricably intertwined" with a valid qualified immunity appeal may be heard based upon the doctrine of pendent appellate jurisdiction. *Moore v. City of Wynnewood*, 57 F.3d 924,929-931 (10th Cir. 1995).

STATEMENT OF ISSUES ON APPEAL

1. Whether a reasonable jury could conclude, based upon the trail court decision or the record, that Johnson violated Crowson's Eighth Amendment rights for failure to provide necessary medical care.

2. Whether the District Court erred in failing to grant qualified immunity in that a reasonable Jail Nurse, standing in Mike Johnson's shoes, would not know that he was violating Plaintiff's Constitutional rights.

3. Whether the District Court erred in failing to grant summary judgment in favor of Washington County, and Sheriff Pulsipher in his official capacity, when a reasonable jury could not find an underlying constitutional violation that was directly caused by a county policy.

STATEMENT OF THE CASE

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 Plaintiff was acting "lethargic and slow." (Jail Log, Aplt. App. Vol. 2 at 389). As a result, Lyman had Deputy Dolgnar escort Plaintiff to the Jail's booking area. (*Id.*).

Defendant/Appellant Michael Johnson, one of the staff nurses at the Jail was working in the booking area that morning. Johnson interviewed Plaintiff at about 7:00 a.m. and observed that Plaintiff 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 Plaintiff's vital signs which were within normal limits. (Johnson Decl. ¶ 10, Aplt. App. Vol. 2 at 316).

Johnson instructed jail deputies to move Plaintiff to a medical housing cell in the booking area so that his health could be better monitored by staff. Medical housing cells are in the booking area of the Jail where they are observed on a more frequent basis than the rest of the Jail. Johnson also requested further evaluation for Plaintiff for mental health with his supervisor Jon Worlton. (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 inmate mental health treatment. (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). Johnson reasonably believed that Worlton would see Plaintiff. The Jail also had a scheduler, and it was not Johnson. (Worlton Depo. 10:6-17, Aplt. App. Vol. 2 at 478).

Johnson checked on Plaintiff later on the 25th around 3 p.m. Johnson observed that Plaintiff's pupils were dilated but were reactive to light. Johnson also observed that Plaintiff was alert and oriented. Because of this Johnson thought Plaintiff was not in need of any other medical care at that time and left the Jail after his shift ended. (Johnson Decl. ¶ 12, Aplt. App. Vol. 2 at 317).

Because Johnson placed Plaintiff in medical observation on June 25, Plaintiff was scheduled to have contact from the medical nursing staff once per shift and 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 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 Plaintiff again on June 28, 2014 at approximately 2:00 p.m. At that time, Plaintiff was confused and disoriented and had elevated blood pressure. However, he seemed to be making a little more sense than when Johnson had observed him on June 25. After meeting with Plaintiff, Johnson reported his observations to Dr. Judd LaRowe, the doctor

hired by the Jail to provide medical care to inmates. Dr. LaRowe asked that Plaintiff 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 Plaintiff'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).

LaRowe thought that Plaintiff 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 [Plaintiff's] under observation." (Johnson Depo. 102:15-24, Aplt. App. Vol. 2 at 522). Johnson communicated enough clear information to LaRowe that caused LaRowe to order reasonable diagnostic testing to discover what was wrong with Plaintiff. (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). LaRowe ordered the testing because it "might [help] explain a lot of the symptoms he [Plaintiff] was having." (LaRowe Depo. 13:15-14:20, Aplt. App. Vol. 2 at 427). Before Johnson's shift ended on June 28, he took Plaintiff's vital signs again, which were in normal range, and noted them in the system. (Jail Medical Records, Aplt. App. at 374) This was 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 assessed Plaintiff again. Johnson took his vitals and noted an elevated heart rate. Johnson also

observed that Plaintiff was still acting dazed and confused. Johnson reported his observations to Dr. LaRowe who prescribed two medications and instructed Johnson to administer 2 milligrams of Ativan and also Librium to Plaintiff. (Johnson Decl. ¶ 15, Aplt. App. Vol. 2 at 317, Order and Mem. Decision at 4, Aplt. App. Vol. 1 at 207). Johnson checked on Plaintiff 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). Johnson checked on Plaintiff a third time that day at 3:30 p.m. Plaintiff was better able to verbalize his thoughts and his vital signs remained stable. Plaintiff related to Johnson that he couldn't remember the last five days. Johnson informed Plaintiff he was in a medical cell and that the Jail doctor had prescribed him medications that he would be receiving on a regular basis to help his condition. Plaintiff agreed to take the medications as they were disbursed and prescribed. (Johnson Decl. ¶ 17, Aplt. App. Vol. 2 at 318).

Johnson did not interact with Plaintiff after the third visit on June 29 because he was assigned to a different section of the Jail. (Johnson Decl. ¶ 18, Aplt. App. Vol. 2 at 318). A different nurse, Ryan Borrowman, saw Plaintiff on July 1. (Borrowman Decl. ¶ 8, Aplt. App. Vol. 2 at 313). This nurse also called Dr. LaRowe and reported Plaintiff's symptoms. (Borrowman Decl. ¶ 9, Aplt. App. Vol. 2 at 313). Dr. LaRowe then had Plaintiff sent to the hospital for further evaluation. (Borrowman Decl. ¶ 10, Aplt. App. Vol. 2 at 313).

Plaintiff subsequently brought suit in the United States District Court for the District of Utah alleging that Nurse Johnson and Washington County violated his Eighth Amendment right to be free from cruel and unusual punishment.

District Court Findings and Conclusions:

Defendants Johnson and Washington County moved the district court for summary judgment, with Johnson asserting he was entitled to qualified immunity. The district court denied this motion. With regards to Johnson it found that he failed to seek medical care for Plaintiff and to communicate to Dr. LaRowe a full accounting of Plaintiff's symptoms, and that a jury could determine this amounted to deliberate indifference. (Order and Mem. Decision at 11, Aplt. App. Vol. 1 at 214). With regards to Washington County, the district court found a reasonable jury could find the County's policies were deficient. (Order and Mem. Decision at 17, Aplt. App. Vol. 1 at 220). This appeal followed the district court's summary judgment decision.

SUMMARY OF ARGUMENT

This is a misdiagnosis case, yet the district court blames a line staff nurse for this honest mistake, that he did not make. The Defendant, Nurse Johnson, all of the other medical professionals, and all of the Corrections officers believed Plaintiff was detoxing from some substance. In fact, he likely was detoxing based on his behavior and even the district court points out in the first page of its decision that his condition

was "caused by exposure to toxic substances." (Order and Mem. Decision at 1, Aplt. App. Vol. 1 at 204). Whether he was detoxing or not, the belief that he was diverted the attention to treat Plaintiff as if he were detoxing and, in the process, nobody at the Jail, or Dr. LaRowe, believed Plaintiff was suffering from "toxic metabolic encephalopathy."

This case is a prime example of Plaintiff raising a negligence claim in the guise of a constitutional claim. Nurse Johnson was a staff nurse at the Washington County Jail where he worked with several other nurses, nurse practitioners, a medical doctor, and a medical director. The district court incorrectly concluded that he was responsible for the Plaintiff on days he did not work at the Jail, when he worked in another area of the Jail, and when Plaintiff was incorrectly diagnosed as withdrawing from alcohol or drugs. Moreover, the lower court attributed knowledge from other corrections staff to Nurse Johnson with no evidence that he ever knew those facts. The district court even blames Johnson when he referred Plaintiff to have a mental health evaluation because the appointment never happened. The trial court further defined the Eighth Amendment standard, for purposes of qualified immunity, with too high a degree of generality, contrary to United States Supreme Court precedents. Consequently, the lower court never really assessed whether Nurse Johnson's conduct was clearly unconstitutional. It failed to determine whether a

reasonable jail nurse, "standing in Johnson's shoes," would know beyond a doubt that he was violating Plaintiff's Eighth Amendment rights by his specific conduct.

Finally, the claims against Washington County are inextricably intertwined with the claims of Johnson in that Johnson did not violate the Constitutional rights of Plaintiff and was not acting pursuant to an unconstitutional county policy. For these reasons, the district court's decision must be reversed.

ARGUMENT

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.

Discussion:

I. Nurse Johnson is entitled to qualified immunity.

Qualified immunity has two prongs: (1) whether there was a violation of the Constitution and (2) whether an objectively reasonable officer, standing in defendant's "shoes," would know beyond a doubt that he was violating that clearly

established right. *See* *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.") (*citing* *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

The facts found by the district court cannot, as a matter of law, show that Nurse Johnson violated Crowson's constitutional rights. Moreover, no reasonable jury could find facts that would show liability for Johnson. In addition, clearly established law does not show constitutional liability for Johnson based upon Johnson's actions. Therefore, Johnson is entitled to qualified immunity.

A. Nurse Johnson did not violate Crowson's constitutional rights.

Nurse Johnson took reasonable steps to provide medical care for Plaintiff and therefore Plaintiff's constitutional rights were not violated. Although the district court focused on the concept of "gatekeeper" liability, that is not a separate source of potential liability under the Eighth Amendment. The real question, regardless of the role of the defendant, is whether he or she acted with deliberate indifference to a serious medical need. For example, officers or nurses could fail a gatekeeper role and still not be deliberately indifferent based upon what they knew and what they did.

A prisoner's sole source of protection for failure to provide necessary medical care is the Eighth Amendment[2] which requires a determination that each defendant acted with deliberate indifference to plaintiff's serious medical needs. *See generally* *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To show an Eighth Amendment violation, a plaintiff must prove both an objective and subjective component: (1) that the plaintiff suffered from an objectively serious medical need and (2) that a specific individual acted with a sufficiently subjectively culpable state of mind known as "deliberate indifference." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000).

Plaintiff did not suffer from an objectively serious medical need prior to June 29, 2014 and Defendant Johnson never acted with the required mental state of "deliberate indifference."

1. Plaintiff was not suffering from an objectively serious medical condition up through June 29, 2014.

The objective component of a claim for inadequate medical care is met if the medical care deprivation is "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825,

[2] The district court made a passing statement that the Eighth Amendment only applied to Plaintiff through the Fourteenth Amendment because Plaintiff was a "pre-hearing detainee." (Order and Mem. Decision at 1, Aplt. App. Vol. 1 at 204). However, Plaintiff was incarcerated due to a parole violation, so he was a convicted prisoner and only the Eighth Amendment would apply. (Am. Compl. ¶ 14, Aplt. App. Vol. 1 at 33). Regardless, the standard is the same under either amendment. *See* *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002).

834 (1994). 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). However, just because an inmate dies or experiences some serious medical tragedy at some later point, does not mean that he was always suffering from an objectively serious medical need.

The district court erred in holding that the "ultimate harm" is determinative as to whether the objective prong is established even "absent obvious symptoms or an accurate diagnosis." (Order and Mem. Decision at 9, Aplt. App. Vol. 1 at 212). Although this issue has been confused in some appellate decisions, timing has a crucial impact on the determination of the objective standard. In this case, Plaintiff was not diagnosed with "metabolic encephalopathy" until he was evaluated at the hospital on July 1, 2014. It is factually unclear in the record when he may have actually had metabolic encephalopathy. He was treated for substance abuse withdrawals prior to that time, and that may also have been accurate. At some point, arguably, the objective signs must be met by showing objective symptoms. For example, nobody alleges that Plaintiff had a serious medical need when he was booked on June 11, 2014. Nor is there any evidence that the need was objectively serious prior to the morning of June 25. There is further no reason to state the medical need was serious on June 25, when he was initially seen by Nurse Johnson because

his vitals were normal, his pupils were reactive to light, and he was "alert and oriented." (Johnson Decl. ¶ 12, Aplt. App. Vol. 2 at 317).

Plaintiff was observed as not looking or acting "normal" on the morning of June 25, 2014. He was moved to the Jail medical cell so he could be more closely observed. He was not vomiting or having diarrhea. He did not have an elevated temperature. He did not have a headache and was not experiencing tremors or shakes. He was not known to be suffering from a serious medical ailment by anybody at that time. He did not need to see a doctor by anyone's standard and he had not been diagnosed by a doctor with metabolic encephalopathy at that time. As a matter of law, his objective symptoms do not warrant an automatic finding that the objective prong was met just because he ultimately was diagnosed and treated for a serious condition.

The only relevant finding by the trial court was that Plaintiff had "lethargy" and some memory loss on June 25. He was not acting as he normally did. Although at some point, on June 28 and the morning of June 29, he was doing slightly worse, a doctor was consulted, and treatment was provided at those times. On June 28 and 29, however, it was not an objectively serious medical need. There were no "alarming symptoms." There are no records that he was doing worse on June 26 and 27. Therefore, Plaintiff did not show the objective prong needed to prove an Eighth Amendment violation for failure to provide medical care by Johnson prior to July 1.

For purposes of appeal, Johnson will not argue whether or not the need was objectively serious after June 29, 2014, because Nurse Borrowman observed more deterioration and called Dr. LaRowe, who ordered that he be sent to the hospital for further evaluation. At the hospital, he was diagnosed for the first time with metabolic encephalopathy. But prior to June 30, 2014, Dr. LaRowe provided his professional experience and discretion in treating Plaintiff on June 28 and 29, but Plaintiff was not ordered to the hospital at that time because his condition was not thought to be urgent. He was treated for withdrawal symptoms which is not necessarily a serious medical need. In fact, Dr. LaRowe's treatment seemed to be helping by the end of Johnson's shift where Plaintiff had normal vitals and was communicative. Plaintiff had improved on June 29 when Johnson left the Jail and could not be considered to be in need of any further care at that time. Therefore, the medical need was not objectively serious up through June 29, 2014.

2. Johnson was not deliberately indifferent to Plaintiff's serious medical need.

Even if Plaintiff could show he was suffering from an objectively serious medical need before June 30, he still cannot show an Eighth Amendment violation unless he also shows that Nurse Johnson acted with deliberate indifference to Plaintiff's known serious medical need on June 25, 28, or 29, which were the only days he could have cared for Plaintiff. The subjective test is only met when a plaintiff shows each defendant "knows of and disregards an excessive risk to inmate health

or safety," (i.e., acts with "deliberate indifference"). *Sealock*, 218 F.3d at 1209 (*quoting Farmer*, 511 U.S. at 837). Johnson is not responsible for harm that Plaintiff may have suffered in general, since "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834.

Under *Farmer*, Plaintiff must show that Johnson had actual knowledge of a substantial risk of serious harm to Plaintiff's health or safety. *Id.* The civil law "should have known" standard is insufficient. An inmate must prove that the official,

> knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837. However, if a defendant knew of the risk, but took reasonable action to avert it, even if unsuccessful, he cannot be found to have acted with deliberate indifference. *Id.* "[I]nadvertent or negligent failure to provide medical care, however serious the consequences, does not rise to deliberate indifference to serious medical needs and is not a constitutional violation." *Hood v. Prisoner Health Servs.*, 180 F. App'x 21, 25 (10th Cir. 2006) (internal quotations omitted). Moreover, a court cannot "infer knowledge of an excessive risk to inmate health or safety" unless that defendant has faced the same issues on multiple occasions prior to the incidents alleged by Plaintiff. *See Farmer*, 511 U.S. at 842. The district court did not find facts to support this heavy burden as a matter of law.

The Supreme Court opined about an example of a circumstance under which a plaintiff could "infer" actual knowledge based upon the "obviousness" of a substantial risk of serious harm stating that a plaintiff would have to present evidence that the same problem alleged in the complaint was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find the defendant-official had actual knowledge of the risk." *Id.* at 843. There are no findings by the trial court to support a jury's potential inference of imputed knowledge of the severity of the risk to Plaintiff because there is no evidence Johnson ever faced this same situation.

This Court must individually examine Defendant Johnson to see whether he knew of a "substantial risk of serious harm" to Plaintiff's health. "To establish deliberate indifference, a plaintiff must present evidence that an individual defendant intentionally disregarded an excessive risk to inmate health or safety. A defendant with knowledge of a risk need not take perfect action or even reasonable action[,] . . . his action must be reckless before § 1983 liability can be found." *Collins v. Seeman*, 462 F.3d 757, 762 (7th Cir. 2006) (internal citations and quotation marks omitted).

The standard articulated by the district court is incorrect insofar as it presumes that an inmate is entitled to perfect or non-negligent medical care. (Order and Mem. Decision at 9, Aplt. App. at 212). "A negligent failure to provide adequate medical care, even one constituting medical malpractice, does not give rise to a constitutional violation. Moreover, a prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation." *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999) (*citing Estelle*, 429 U.S. at 105-07). Plaintiff cannot meet the subjective requirements as a matter of law based upon both the trial court findings and the evidentiary record.

a) There are no legal grounds to find Johnson deliberately indifferent.

Even with the facts exactly as determined by the district court, there is no basis as a matter of law to conclude that Johnson acted with deliberate indifference toward Plaintiff. As stated above, the Court cannot infer Nurse Johnson's knowledge of an excessive risk of inmate harm because there are no findings that the issues confronting Johnson had ever occurred previously. The Court can further not infer knowledge based upon what somebody else knew or if somebody saw Plaintiff when Johnson was not working in the booking area or not at work at all.

The few findings made by the District Court are inadequate to conclude that Johnson was deliberately indifferent toward Plaintiff Crowson. The following facts were found by the district court: Nurse Johnson first evaluated Plaintiff on June 25,

2014. (Order and Mem. Decision at 2, Aplt. App. Vol. 1 at 205). Johnson noted normal vital signs, but also noted memory loss. (*Id*.). Johnson moved Plaintiff "to a medical observation cell and entered a request in the medical recordkeeping system for PA Worlton to conduct a psychological evaluation." (*Id*.).[3] Johnson checked on Plaintiff a second time later that day and noted that Plaintiff's pupils were dilated but reactive to light and that Plaintiff appeared alert and oriented. (Order and Mem. Decision at 3, Aplt. App. Vol. 1 at 206). (These results are not inconsistent with a patient who is withdrawing from drugs or alcohol and they do not show an objectively serious medical need). Johnson did not work at the Jail on June 26 and 27. These facts are insufficient for this Court to conclude that Johnson violated the constitution prior to June 28, 2014.

When he returned to the Jail on June 28, Johnson again visited Plaintiff. (*Id.*). Plaintiff seemed confused and had elevated blood pressure. (*Id*.). Plaintiff gave one-word answers to Johnson's questions and did not follow an instruction to take a deep-breath. (*Id*.). Johnson relayed these observations to Dr. LaRowe, who ordered a chest x-ray and blood test for Plaintiff. (*Id*.). Johnson was not able to draw blood because of scarring and Plaintiff would not hold still. (*Id*.). He reported this to Dr. LaRowe.

[3] While not specifically mentioned by the district court, Worlton was also the health services administrator at the Jail. (Worlton Depo. 4:5-7, 19:16-25).

(*Id*.). These actions show both that Johnson was not deliberately indifferent, but that he fully fulfilled his "gatekeeper" role by simply communicating with Dr. LaRowe.

On the morning of June 29, Johnson again took Plaintiff's vital signs and noted an elevated heart rate at the start of his shift. (*Id*.). Johnson documented that Plaintiff was experiencing delirium tremens, a symptom of alcohol withdrawal. (Order and Mem. Decision at 3-4, Aplt. App. Vol. 1 at 206-207). Johnson again reported these observations to Dr. LaRowe, who prescribed Librium and Ativan for Plaintiff. (Order and Mem. Decision at 4, Aplt. App. Vol. 1 at 207). Johnson visited Plaintiff an hour later and observed he was sleeping and had normal vital signs. (*Id*.).

That afternoon Johnson visited Plaintiff a third time and noted that he could better verbalize his thoughts and his vital signs were stable. (*Id*.). Johnson assumed Plaintiff was suffering from substance withdrawal and told Plaintiff he was in a medical observation cell and that he was going to begin taking medication to help his condition. (*Id*.).[4] Again, as a matter of law, Johnson did not violate the constitution because he sought Dr. LaRowe's guidance, obtained two prescriptions and provided them to Plaintiff and actually noted that he was doing well by the time he left the Jail. He again fulfilled any possible gatekeeper role, but more importantly, he documented with objective findings, that Plaintiff was improving when he left for

[4] Also not mentioned by the district court, Johnson never saw Plaintiff Crowson after his third assessment of him on June 29, 2014. (Johnson Decl. ¶ 18).

the day. Johnson did not violate the constitution on June 29, and he could not possibly be liable after he left the Jail for the day as a matter of law.

Nurse Borrowman was another nurse working in the Jail Booking area the next day. (*Id*.). Borrowman saw Plaintiff on July 1, 2014 and was concerned about his symptoms. He called Dr. LaRowe, who ordered that Plaintiff be transported to the hospital for evaluation (*Id*.).

The district court also found that not all of Johnson's "conduct suggests deliberate indifference." (Order and Mem. Decision at 11, Aplt. App. Vol. 1 at 214). Specifically, the district court found Johnson satisfied his obligation to pass key information on to Dr. LaRowe and when Johnson tried and failed to draw Crowson's blood, he told Dr. LaRowe. (*Id*.). However, the Court specifically found that Johnson was deliberately indifferent because of "the failures to seek medical care and provide Dr. LaRowe with a full accounting of Mr. Crowson's symptoms." (*Id*.). However, there is nothing in the record to suggest that Johnson failed to give a "full accounting." It appears the district court is demanding perfect care from Johnson.

As a matter of law, analyzing only the factual findings of the district court, Johnson cannot be deliberately indifferent. First, Johnson referred Plaintiff to "PA Worlton to conduct a psychological evaluation" on June 25. (Order and Mem. Decision at 2, Aplt. App. Vol. 1 at 205). This fulfilled any possible gatekeeper role and was action taken to care for Plaintiff. The Court seems to blame Johnson for the

fact that this evaluation was never completed. However, even Worlton stated in his deposition that he would not normally assess a withdrawing inmate until they sobered up. (Worlton Depo. 47:9-48:13, Aplt. App. Vol. 2 at 487). In any event, there is no basis in the record to fault a line nurse (Johnson) for the fact that Worlton never saw Plaintiff on June 25 or at any other time. There is no evidence that Johnson was responsible to follow up on scheduled referrals. In fact, the only evidence is that another person was in charge of scheduling referrals, other than Johnson. (Worlton Depo. 10:6-17, Aplt. App. Vol. 2 at 478).

Next, the trial court faults Johnson for not telling Dr. LaRowe how long Plaintiff had been in the medical observation cell. However, there is no evidence to suggest that Johnson failed in such a manner. In any event, the failure to pass on some information is in the form of negligence and not "deliberate indifference." The mere fact that a nurse calls the doctor to get input and direction will almost all of the time absolve the nurse of liability. There are no findings that Johnson violated a Jail policy by either not personally taking on the job of the scheduler or by not telling Dr. LaRowe how long Plaintiff was in the medical observation cell (Again, there is no evidence that he did not tell this to Dr. LaRowe). Such findings by the district court are insufficient as a matter of law to support a conclusion of deliberate indifferent.

Mata v. Saiz, 427 F.3d 745 (10th Cir. 2005), illustrates why there is no liability for Johnson's actions. In *Mata*, the plaintiff, who suffered a heart attack, brought suit against four members of the nursing staff of the Colorado state prison where she was incarcerated. *Id.* at 748-49. The Court ruled that one of the nurses was not entitled to qualified immunity, but the other three were because they properly fulfilled their roles as gatekeepers and therefore were not deliberately indifferent. *Id.* at 755-760.

Defendant Weldon was a nurse who talked briefly to the plaintiff one evening when the inmate was complaining of severe chest pain. Weldon simply told the plaintiff "there was nothing she could do because the infirmary was closed" and that she would have to return in the morning. *Id.* at 750. "In other words, Ms. Weldon neither administered first aid nor summoned medical assistance despite [the plaintiff's] plea for medical attention." *Id.* at 755. She even failed to take any vitals.

Weldon was "a gatekeeper required to notify either a physician, physician assistant, or nurse practitioner of [the plaintiff's] chest pain." *Id.* at 757. Weldon "did not simply misdiagnose [the plaintiff]; rather, she completely refused to assess or diagnose [the plaintiff's] medical condition at all by, for instance, taking her blood pressure, listening to her heart with a stethoscope, and performing a cardiac work-up. Instead, Ms. Weldon completely refused to fulfill her duty as gatekeeper in a potential cardiac emergency." *Id.* at 758. For these reasons, summary judgment was

denied for Weldon because a jury could reasonably find Weldon's actions were deliberately indifferent. *Id*. at 759.

By contrast, the other three nurses were not deliberately indifferent. The plaintiff returned to the infirmary the next day and nurse Quintana, "administered an EKG, which the machine printout 'read' as normal." *Id.* While Quintana violated protocol by failing to call a doctor after complaints of severe chest pain, Quintana's notes documented that she thought the plaintiff "was not having a heart attack." *Id.* at 760. Quintana was not deliberately indifferent towards the plaintiff because the record showed Quintana "made a good faith effort to diagnose and treat [the plaintiff's] medical condition." *Id*. Even though she violated policy by not calling a medical provider, she was not deliberately indifferent because the EKG report showed no heart attack and she did not believe the inmate was suffering from a serious medical need at that time.

The plaintiff came back again the next day still complaining of chest pain. Nurse Hough took the plaintiff's vital signs and performed another EKG which she read as normal, but the computer read it as abnormal. *Id*. at 759. As a result, Hough reported the EKG results to defendant Saiz, who was a Nurse Practitioner. *Id*. The Court found "Ms. Hough fulfilled her gatekeeper duty by reporting [the plaintiff's] symptoms to a nurse practitioner" and thus Hough was not deliberately indifferent. *Id*.

Finally, defendant Saiz performed an independent assessment of the plaintiff and faxed what she believed to be normal results to a doctor. *Id.* The doctor instructed that the plaintiff should be sent to the hospital, which Defendant Saiz did. *Id.* at 759-60. The Court found Saiz "fulfilled her gatekeeper duty by faxing [the plaintiff's] EKG printout to a physician . . . ." *Id.* at 760. *See also Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006) (where a jail doctor was not deliberately indifferent even though the plaintiff's medical condition was misdiagnosed).

Mata demonstrates well why there is no basis for liability against Johnson, since Johnson made a "good faith effort" to provide medical care to Plaintiff and did not turn him away. Johnson is not comparable to defendant Weldon in *Mata*, who "completely refused to assess or diagnose [the plaintiff's] medical condition at all." 427 F.3d at 758. The facts reveal Johnson took several steps every day he saw Plaintiff to provide him with medical care. He took his vital signs on multiple occasions. He further referred him to Worlton on June 25 and called Dr. LaRowe several times on June 28 and 29. He got two medications for Plaintiff that were prescribed by Dr. LaRowe. He tried to take his blood sample so it could be tested. He told Dr. LaRowe when he could not get a blood sample. On the other hand, Plaintiff improved greatly by the time Johnson last saw him at the end of his shift on June 29. The district court even stated that Johnson "wrongly assumed that [Plaintiff] was withdrawing from drugs or alcohol . . . ." (Order and Mem. Decision at 1, Aplt.

App. Vol. 1 at 204). However, a misdiagnosis cannot be a basis for a finding of "deliberate indifference." *Self*, 439 F.3d at 1234. To some degree, the opposite is true; that Johnson was not deliberately indifferent because he believed Plaintiff was being appropriately treated for drug withdrawals.

The district court's factual findings show Johnson did not ignore Plaintiff but fulfilled his gatekeeper role and provided Plaintiff substantial care. Rather, Johnson is more like the other three defendants in *Mata*. For example, like defendant Quintana in *Mata*, Johnson made a good faith effort to assess and "treat [the plaintiff's] medical condition." *Mata*, 427 F.3d at 760. Similarly, like defendant Saiz in *Mata*, Johnson "fulfilled [his] gatekeeper duty" by contacting both Dr. LaRowe and referring Plaintiff to Worlton. *Id*. Based strictly upon the trial court's brief findings, Johnson cannot be deliberately indifferent as a matter of law and no reasonable jury could make that conclusion either.

b) No reasonable jury could find deliberate indifference with the facts available in record.

Some of the factual conclusions referenced by the district court are either irrelevant, blatantly contradict the actual record, or are plainly contrary to what a reasonable jury could conclude, requiring this Court to conduct its own factual review. Such a factual review will show no basis exists in the record for liability against Johnson. As stated in the standard of review section above, "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)).

In assessing whether a jury could find liability against Johnson, the law states, "a delay in medical care 'only constitutes an Eighth Amendment violation where the plaintiff can show the delay resulted in substantial harm.'" *Mata*, 427 F.3d at 751 (10th Cir. 2005) (*quoting Oxendine v. Kaplan*, 241 F.3d 1272, 1276 (10th Cir. 2001)). There is no evidence in the record that shows any delay in Plaintiff's treatment caused any additional injury than he would not have otherwise experienced. Under the summary judgment standard, this was Plaintiff's burden. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Plaintiff even undercuts his burden of showing harm from the delay by alleging in his amended complaint that the drug Librium was a "significant aggravating factor, of Crowson's serious medical needs." (Am. Compl. ¶ 38, Aplt. App. Vol. 1 at 38). Plaintiff was not prescribed Librium until after Johnson talked with Dr. LaRowe on June 29, that is, until after he received medical treatment. (LaRowe Depo. 54:5-10, Aplt. App. Vol. 2 at 437). Regardless, the undisputed material facts show that Johnson thought Plaintiff was responding better after medications were prescribed to him based upon Plaintiff's improved symptoms.

(Johnson Decl. ¶ 17, Aplt. App. Vol. 2 at 318). When Johnson saw Plaintiff for the third time on June 29, Plaintiff had improved and there is no reason to conclude that he needed any further medical attention from Johnson at that point. Additionally, certain factual statements referenced by the district court are blatantly contradicted by the factual record as follows:

(1) The record does not suggest Johnson was aware of any "alarming symptoms" of Plaintiff.

First, while the district court noted that "two deputies who interacted with Mr. Crowson on the morning of June 25" may have "noticed alarming symptoms," it does not state that all of these symptoms were communicated to Johnson or that either of these two officers thought the symptoms were "alarming." (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). The district court reached this conclusion because Deputy Lyman saw Plaintiff "acting with uncharacteristic lethargy," and Deputy Keil saw Plaintiff "disoriented to the point that he could not properly dress himself." (*Id.*). Both are not uncommon in a jail.

The evidence in the record shows that on the morning of June 25, 2014, Deputy Lyman noticed Plaintiff was acting "lethargic or slow," so Lyman had Deputy Dolgnar escort Crowson to the Jail's booking area where he was checked by Nurse Johnson. (Deposition of Brett Lyman 75:23-24, Aplt. App. Vol. 2 at 389). There is nothing in the record indicating Deputy Lyman ever shared observations of "alarming symptoms" to Deputy Dolgnar, Nurse Johnson, or anybody else. No

officer ever used these words. Instead, what was communicated to Nurse Johnson was that Crowson was "acting different than he normally does." (Johnson Depo. 44:23-24, Aplt. App. Vol. 2 at 507). Similarly, there is absolutely nothing in the record that Johnson was aware of Kiel's observations about Plaintiff being unable to dress himself. At no time was Nurse Johnson ever informed about Deputy Kiel's observation that Crowson could not dress himself. (Johnson Depo. 59:11-20, 70:13-71:18, Aplt. App. Vol. 2 at 511, 514).

There is simply no evidence in the record that a reasonable jury could find that Johnson was aware of Plaintiff's "alarming symptoms." As a matter of law, "lethargy" is not an "alarming symptom." The record shows Nurse Johnson found Crowson's vitals were normal. (Jail Medical Records, Aplt. App. Vol. 2 at 374). At most, Johnson observed that Plaintiff was not acting like his normal outgoing self, but this, by itself, is insufficient to show Johnson was aware of "alarming symptoms." (Johnson Depo. 45:9-18, Aplt. App. Vol. 2 at 507). Johnson always attempted to give Plaintiff the best medical care possible for his situation and did not feel there was any urgency to Plaintiff's medical condition. (Johnson Decl. ¶¶ 19-20, Aplt. App. Vol. 2 at 318). Therefore, a jury could not conclude that Johnson was aware of "alarming symptoms" of Plaintiff on June 25.

(2) Johnson sought further care for Plaintiff.

Second, the district court also found that Johnson placed Plaintiff "in an observation cell and left his shift without ensuring that Mr. Crowson would receive further care." (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). Yet, Nurse Johnson requested that his supervisor, Jon Worlton, evaluate Plaintiff's mental health. (Johnson Depo. 46:6-13, Aplt. App. Vol. 2 at 508; Jail Medical Records, Aplt. App. Vol. 2 at 354; Jail Medical Records, Aplt. App. Vol. 2 at 374). There is nothing in the record that shows Johnson believed Worlton would not see Plaintiff. In fact, the Jail has a scheduler and it was not Johnson. (Worlton Depo. 10:6-17, Aplt. App. Vol. 2 at 478). It was reasonable for Johnson to assume Plaintiff would be seen by Worlton when he was referred. The district court seems to blame Johnson for the fact that Worlton did not see him. However, Worlton testified that he would not see an inmate for mental health reasons if they were still detoxing. (Worlton Depo. 47:9-48:13, Aplt. App. Vol. 2 at 487). There is no evidence in the record by which a reasonable jury could conclude Johnson was deliberately indifferent for Worlton's failure to examine Plaintiff.

(3) Plaintiff received medical care throughout his incarceration.

Third, the district court found that Plaintiff "did not receive any follow-up evaluation or care from medical staff for the next two days." (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). Although Johnson cannot be liable for

what takes place when he does not work at the Jail, he did nonetheless have an expectation that Plaintiff would receive care. Johnson placed Plaintiff in medical observation, beginning June 25, 2014 at 7:15 a.m., Crowson was scheduled to have contact from the medical staff once per shift and 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). A reasonable jury could only conclude, based upon the record, that Johnson assumed Plaintiff would be seen by the night nurse and the day nurse on June 26 and 27. No evidence is to the contrary.

The district court found that Plaintiff did not receive medical care on June 26 or 27 because there were no medical records documenting this. (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). However, this lack of records does not indicate Plaintiff was not receiving medical attention or that it was the expectation that he would not receive medical attention those two days. There is no evidence that Johnson knew Plaintiff might not receive medical care for two days while he was off work after he left the Jail on June 25. But Johnson cannot be liable for what is done or not done when he is not at work. He was not the medical director.

Dr. LaRowe was asked specifically about the lack of records from June 26 and 27. He said if Crowson was in the medical detox area, was being observed, was stable, and his vital signs were normal, there would be no reason for anyone to

contact him or for there to be a record of contact at that time. (LaRowe Depo. 63:8-18, Aplt. App. Vol. 2 at 439; *see also* Borrowman Depo. 19:1-25, Aplt. App. Vol. 2 at 460).

Supporting the conclusion that Plaintiff was seen by medical staff during these days, there is an entry indicating Joshua Billings, another Jail nurse, attempted to have a medical visit with Crowson prior to 10:00 p.m. on June 28. Crowson either refused the visit or was sleeping at the time Billings checked on him. (Jail Medical Records, Aplt. App. Vol. 2 at 370-371). Nurse Billings would have monitored Crowson during his night shifts. (Worlton Depo. 37:14-19. Aplt. App. Vol. 2 at 484). Plaintiff never even deposed nor sued Nurse Billings who worked every evening. Johnson cannot be liable for what Billings did or did not do. It seems Johnson was sued because he did take action and documented what he did. Johnson saw Plaintiff two to three times a day on his day shifts when he worked in booking. That is not deliberate indifference. Johnson had the same expectation that other nurses would see Plaintiff at least twice a day per shift when he was not there. (Johnson Depo. 109:6-9, Aplt. App. Vol. 2 at 523).

It was routine practice at the Jail for inmates in the booking area to be checked on at least once per shift and 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). Plaintiff even admits that the practice of the Jail is that a nurse should check on an inmate at least every twelve hours. (Pl.'s Mem. in Opp'n at 9, Aplt. App. Vol. 1 at 114). Johnson had a right to rely upon that policy and there is no evidence to suggest he should not have.

Nurses typically spent five to ten minutes each shift with each inmate on medical observation, "depending on what's going on." During these checks, nurses were "following up, checking blood pressures on patients that have issues with those concerns, head colds, various aspects of that." (Johnson Depo. 12:22-24, Aplt. App. Vol. 2 at 499; Johnson Depo 21:19-22:8, Aplt. App. Vol. 2 at 501). If something happened during the medical rounds or if medical staff was notified of something by a deputy, the medical staff would call Dr. LaRowe. (LaRowe Depo. 39:20-22, Aplt. App. Vol. 2 at 433).

Additionally, beyond the medical care Plaintiff would have received, for the four days from June 25-29, 2014, "every 30 minutes there's a guard checking on [Crowson]" and "medical staff is in there periodically throughout the shift." Moreover, "[i]t would have been noted if he was not eating or drinking." (Johnson Depo. 96:25-97:12, Aplt. App. Vol. 2 at 520).

Based on all the undisputed facts in the record, no reasonable jury could find that Plaintiff did not receive any medical care on June 26 or 27. More importantly, as a matter of law, no reasonable jury could conclude that Johnson could be liable

for what happened when he was not working at the Jail and when he assumed, as per policy and practice, that other nurses and staff were monitoring Plaintiff. He was not responsible for medical care when he was not present at the Jail and there is no evidence in the record to suggest that Johnson would think Plaintiff would not be seen by other nurses, Worlton, and corrections officers to meet all of Plaintiff's medical needs in Johnson's absence. As a matter of law, Johnson cannot be liable for whether or not Plaintiff was seen on June 26 and 27.

(4) The record does not show that Johnson's statements to Dr. LaRowe were incomplete.

Fourth, the district court also found that Johnson, while alerting Dr. LaRowe on June 28, "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."[5] (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). The district court improperly extrapolated from a statement of Dr. LaRowe who said he "didn't know at that time how long [Plaintiff] had been in booking." (LaRowe Depo. 44:8-9, Aplt. App. Vol. 2 at 434). LaRowe thought that Plaintiff was in booking when he received the call from Johnson. (LaRowe Depo. 44:15-17, Aplt. App. Vol. 2 at 434).

[5] It is completely irrelevant what housing assignment Plaintiff had prior to be in medical observation in booking. Whether he was in general population, administrative segregation, or housed in a more secure area of the Jail has no relevance to any of the claims in this suit and there is no evidence that a Doctor would ever be notified of an inmate's housing assignment when he is called by a nurse.

This was the same phone call that resulted in Dr. LaRowe ordering an x-ray and blood work for Plaintiff. Johnson did communicate enough clear information to LaRowe that caused him to order reasonable diagnostic testing to discover what was wrong with Plaintiff. (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). LaRowe ordered the testing because it "might [help] explain a lot of the symptoms he [Plaintiff] was having." (LaRowe Depo. 13:15-14:20, Aplt. App. Vol. 2 at 427). Johnson, then, did tell LaRowe about Plaintiff's multiple symptoms and Johnson could reasonably expect that Plaintiff was receiving constitutionally adequate care as a result of speaking with Dr. LaRowe.

No reasonable jury could determine that what Johnson told or did not tell Dr. LaRowe amounted to deliberate indifference. Even if the specific number of days that Plaintiff had been in booking were not communicated, such actions sound more in negligence than in deliberate indifference. Additionally, the record reveals that Dr. LaRowe asked Johnson "for a history of what we were doing since [Plaintiff's] under observation." (Johnson Depo. 102:15-24, Aplt. App. Vol. 2 at 522). No reasonable jury could then decide that Johnson violated Plaintiff's constitutional rights by failing to communicate important symptoms and other medical information to Dr. LaRowe during one of the June 28 phone calls. In fact,

there is no evidence in the record that Johnson did not provide an adequate account of Plaintiff's symptoms.

(5) No evidence in the record suggests Crowson's symptoms persisted beyond the normal timeframe.

Fifth, the district court makes a brief comment that when Johnson returned to work on June 28, Plaintiff's "symptoms had persisted beyond the expected timeframe for substance withdrawal." (Order and Mem. Decision at 10, Aplt. App. Vol. 1 at 213). Yet, there is nothing in the record that supports this conclusory statement. Worlton testified that it could take a week or more for a person to "clear up from drug-induced problems." (Worlton Depo. 48:8-13, Aplt. App. Vol. 2 at 487). Similarly, Borrowman testified that it could take inmates up to nine days to go through opioid withdrawal. (Borrowman Depo. 35:5-20, Aplt. App. Vol. 2 at 464). Plaintiff had only been observed to be acting abnormally since June 25, therefore when Johnson saw him on June 28, the expected timeframe for substance withdrawal had not yet run its course. Moreover, the Court found on page one of its opinion that Plaintiff was exposed to "toxic substances." (Order and Mem. Decision at 1, Aplt. App. Vol. 1 at 204). Whatever the toxic substance was, there is no evidence it would have run its course in 3 days. No reasonable jury could then conclude that Johnson was deliberately indifferent for treating Plaintiff as someone who was still withdrawing from drugs or alcohol.

B. Even if Johnson did violate Plaintiff's constitutional rights, his actions were not clearly unconstitutional at the time.

Neither the district court nor Plaintiff identified any caselaw showing Nurse Johnson is not entitled to qualified immunity. Qualified immunity shields an officer from suit "when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). It is further important to emphasize that the inquiry must be made in light of the specific context of the case and not as a broad proposition. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The inquiry is the more "particularized" acts of the defendants in the case at hand. *Id*. at 199.

Plaintiff cannot show clarity of the law in 2014 as it relates to Johnson's actions in response to the symptoms Johnson was aware Plaintiff was experiencing. To the contrary, a basic referral to a nurse practitioner for a mental health evaluation and to a doctor are sufficient to shield him from liability. The fact that he saw Plaintiff two to three times each day he worked, took his vital signs each time he saw him, obtained to drug prescriptions and provide them to him, and repeatedly consulted the doctor cannot be considered as violative of the constitution under any case law in the Tenth Circuit or anywhere else in the country.

The symptoms Plaintiff exhibited were not commonly considered to present an excessive risk of serious harm in that drug withdrawal is not necessarily a serious medical need. If anything, "flu-like symptoms," may not be a "serious medical

need." *See* *Allen v. Sic*, 2013 U.S. Dist. LEXIS 41286, *28-*29 (D. Colo. 2013) (collecting cases). Additionally, some cases have found that "opioid withdrawals" are not necessarily a "serious medical need. *See* *Shaver v. Brimfield Twp.*, 2014 U.S. Dist. LEXIS 180571 (N.D. Ohio 2014). Johnson's attorneys could not find any appellate cases in the country that have decided a metabolic encephalopathy issue. In fact, no other district court cases could be found within the Tenth Circuit addressing metabolic encephalopathy under Section 1983. For this reason, it is reasonable to look at the withdrawal or flu-like symptoms that Plaintiff was experiencing in relationship to appellate precedents to help guide the qualified immunity determination.

Qualified immunity "does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citation omitted). The Supreme Court has repeatedly told courts "not to define clearly established law at a high level of generality." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (internal citation omitted). Hence, it is insufficient for Plaintiff to claim that all prisoners have a right to necessary medical care at a broad level. This was established in *Estelle v. Gamble*, 429 U.S. 97 (1976). However, caselaw is also clear that this Court must look to what Johnson actually knew about Plaintiff and what actions he took to help him.

Nurse Johnson took significant actions in response to the symptoms he perceived Plaintiff was suffering. As stated above, lethargy and not acting like oneself, are not evidence that an inmate is exhibiting symptoms that he is at an excessive risk to suffer serious medical harm. Yet Johnson took action in response by moving Plaintiff to the booking area so he could be observed by multiple nurses and corrections officers on both the day and night shifts, every day. Johnson took Plaintiff's vitals and assessed him. He saw him a second time on June 25 and his symptoms again were not alarming. In fact, his vital signs were normal. He further referred Plaintiff for a psychological evaluation with Worlton before he left for the day. No case law holds that a line nurse is required to care for an inmate when he was not at the jail for two days or that he was responsible if a provider did not see an inmate after he was referred. When Johnson returns to the Jail on June 28, there is no evidence to assume that Plaintiff's symptoms did not become more pronounced that day. Nevertheless, Johnson again took action, found some concerning symptoms, and called Dr. LaRowe. He attempted to follow Dr. LaRowe's instructions and called the doctor when he could not get Plaintiff's blood drawn. As a matter of law, these actions cannot be considered clearly unconstitutional in 2014.

On June 29, Johnson again found more symptoms indicative of substance withdrawal, but again called the doctor. The doctor prescribed medication for withdrawals. Johnson saw Plaintiff at least two more times that day and notes that

he is doing better before he leaves for the day. Johnson never saw Plaintiff again because he did not work in booking the next few days. He cannot be liable for the time period after he last saw Plaintiff on June 29.

A nurse standing in Johnson's shoes could not think he is deliberately indifferent when the inmate was doing much better when he left for the day, after having given him medication that the doctor ordered. Another nurse worked in booking the next day and that nurse called Dr. LaRowe on July 1. Dr. LaRowe, after hearing the more concerning symptoms, ordered Plaintiff transported to the hospital. No appellate decision in the country would find Nurse Johnson responsible for what did or did not happen on June 30 or July 1, 2014. Rather, case law is clear that Johnson could assume Plaintiff was doing well when he left on June 29. For these reasons, Johnson's actions did not violate clearly established law and this Court must reverse the district court.

II. Washington County's liability is inextricably intertwined in Johnson's actions.

The district court's decision, denying Washington County's motion for summary judgment, must also be reversed since there is no underlying constitutional violation as a matter of law. The Tenth Circuit has "discretion to exercise pendent appellate jurisdiction over an otherwise nonfinal and non-appealable order if it is 'inextricably intertwined' with an appealable decision or where review of the non-appealable decision is 'necessary to ensure meaningful review' of the

appealable decision." *Bame v. Iron County*, 566 F. App'x 731, 737 (10th Cir. 2014) (*quoting Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995)). "[A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal . . . when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995).

County liability is inextricably intertwined because Plaintiff must first show an underlying constitutional violation by at least one Washington County employee and that the underlying constitutional violation was directly caused by a county policy before the County itself can be held liable. *See Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), *and Mann v. Hyler*, 918 F.3d 1109, 1117 (10th Cir. 2019) ("A municipality may not be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights.")

Plaintiff cannot show an underlying constitutional violation by Michael Johnson as explained above or any other Washington County employee. No findings by the district court decision support a finding of deliberate indifference on behalf of any county employee. Moreover, the district court never found that a county policy directly caused a constitutional violation. Therefore, the district court's order denying the County summary judgment must be reversed.

Further, the district court already dismissed Sheriff Pulsipher from this suit with prejudice so the Sheriff could not have caused the constitutional violation suffered by Plaintiff. (Order and Mem. Decision at 6 n. 1, Aplt. App. at 209). There is no other evidence that any county employee violated Plaintiff's rights based upon both the district court's decision and the evidentiary record. Therefore, no reasonable jury could conclude that Washington County violated Plaintiff's constitutional rights.

No evidence exists that Johnson was acting pursuant to an unconstitutional policy that directly caused a constitutional deprivation. Plaintiff must demonstrate that the policy defect was "so obvious, and the inadequacy so likely to result in the violation of [plaintiff's constitutional] right, that the policymakers of the [county] can reasonably be said to have been deliberately indifferent . . . ." *See* *Porro v. Barnes*, 624 F.3d 1322, 1327-28 (10th Cir. 2010) (*quoting* *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996)). A plaintiff must "identify a specific deficiency" that was obvious and "closely related" to his injury so that the official policy or custom was both deliberately indifferent to the plaintiff's constitutional rights and the moving force behind his injury. *Id*. at 1328 (*quoting* *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999)).

Sheriff Pulsipher is the sole final policymaker regarding law enforcement issues for the county as a matter of law in that he is required to "take charge of and

keep the county jail and the jail prisoners within his county." Utah Code Ann. § 17-22-2(1)(g). *See also* *Morro v. City of Birmingham*, 117 F.3d 508, 510 (11th Cir. 1997). Plaintiff is required to show that Sheriff Pulsipher acted with "deliberate indifference" toward Plaintiff's Eighth Amendment right to necessary medical care. However, Plaintiff fails to identify a constitutionally defective policy that the Sheriff implemented with the mental state of deliberate indifference and that the policy directly caused a constitutional injury. The Sheriff was not aware of any problems relating to Plaintiff's care and no one notified him of any problems. (Pulsipher Decl. ¶ 4, Aplt. App. Vol. 2 at 321). An official is not responsible to take action to protect against an unknown risk. *See generally* *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Therefore, this Court should reverse the district court decision denying the County summary judgment.

CONCLUSION

The district court found that Johnson was deliberately indifferent to Plaintiff's serious medical needs because it wrongfully claimed he did not tell Dr. LaRowe how long he had been in the booking medical cell. It further faulted him because his referral to a mental health provider was never scheduled by the Jail and because Johnson did not provide coverage for Plaintiff on June 26 and 27, when he was not working at the Jail. However, other nurses such as Joshua Billings, Ryan Borrowman, and others worked day and night shifts. Further, Worlton was also a

nurse and was at the Jail every day. The district court further vaguely concluded that Plaintiff had "alarming symptoms" on June 25, but nothing in the record supports such claims. Based upon the district court's findings, Johnson was not deliberately indifferent. Based upon the available lower court record, it is even more obvious that Johnson did not violate Plaintiff's Eighth Amendment rights.

The County cannot be liable if Johnson did not violate Plaintiff's constitutional rights. Further, there is no mention by the lower court of an unconstitutional policy that "directly caused" Johnson to violate the constitution. For these reasons, this court should reverse the trial court's judgment and enter summary judgment in favor of Johnson and Washington County on all claims.

REQUEST FOR ORAL ARGUMENT

The Washington County Defendants 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 10th day of December, 2019.

/s/ Frank D. Mylar

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December 10, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,254 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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ADDENDUM OF RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983:

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

CERTIFICATE OF SERVICE

I certify that on this 10th day of December, 2019, a true and correct copy of the foregoing Appellants' Opening Brief was served by the Court's CM/ECF system, to the following:

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CERTIFICATE OF DIGITAL SUBMISSION

a. All required privacy redactions have been made.

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December 10, 2019

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