APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit (June 7, 2018) . . . . . App. 1

Appendix B Order Denying Plaintiffs' Motions to Continue, Granting in Part Defendants' Motions for Summary Judgment, Declining to Exercise Supplemental Jurisdiction, and Remanding/Dismissing State Law Claims in the United States District Court, Western District of Washington at Tacoma (December 8, 2015) . . . . . App. 6

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit (July 16, 2018) . . . . . App. 20

Appendix D Plaintiffs' Combined Response in Opposition to Motions for Summary Judgment (Dkt. Nos. 107, 109, 120, 122, 134 & 138) in the United States District Court, Western District of Washington at Tacoma (Excerpts) (October 5, 2015) . . . . . App. 22

Appendix E Order in the United States Court of Appeals for the Ninth Circuit (April 30, 2018) . . . . . App. 29

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35992
D.C. No. 3:14-cv-05153-BHS

[Filed June 7, 2018]

JULE CROWELL, individually and as Personal Representative of the estate of Stephanie Deal; DAVID NELSON, Guardian ad litem on behalf of E.M. on behalf of J.A.; LISA SULLY, as Personal Representative of the estate of Jenny Lynn Borelis; KIMBERLY BUSH, as Personal Representative of the estate of Daniel D. Bush,
Plaintiffs-Appellants,

v.

COWLITZ COUNTY; MARIN FOX HIGHT, in her offiical capacity; JOHN DOES, 1-5,
Defendants-Appellees,

v.

CONMED, INC.,
Third-party-defendant-Appellee.

App. 2

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted April 10, 2018
Seattle, Washington

Before: TASHIMA and GRABER, Circuit Judges, and MIHM,[**] District Judge.

Plaintiffs[1] appeal from the district court's entry of summary judgment in favor of Defendants Cowlitz County and Conmed, Inc.[2]

1. We have jurisdiction over the appeals brought by Plaintiffs Borelis and Bush. Although the Notice of Appeal referred to a judgment that involved only Plaintiff Deal, it is clear that Plaintiffs intended to appeal from the earlier order granting summary judgment to Defendants on the § 1983 claims brought by Deal, Borelis, and Bush. Furthermore, Defendants

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois, sitting by designation.

[1] Plaintiffs are the personal representatives of the estates of three persons who died while incarcerated in the Cowlitz County Jail. We refer to the deceased persons themselves as "Plaintiffs" for the sake of clarity.

[2] Though we refer to Conmed as a defendant, Conmed intervened in the case brought by Plaintiff Deal and was impleaded by the County in the case brought by Plaintiffs Borelis and Bush.

were not prejudiced by the erroneous designation in the Notice of Appeal. We therefore construe the Notice of Appeal as an appeal of the earlier summary judgment order. United States v. One 1977 Mercedez Benz, 708 F.2d 444, 451 (9th Cir. 1983). Because Deal, Borelis, and Bush all were entitled to appeal from that order, the filing of a joint notice of appeal was proper. Fed. R. App. P. 3(b)(1).

2. Reviewing for abuse of discretion, Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105 (9th Cir. 2001), we conclude that the district court did not abuse its discretion by refusing to exclude Dr. Cummins' reports even though they were disclosed late and the late disclosure was neither substantially justified nor harmless. See Fed. R. Civ. P. 37(c)(1) (providing that a district court may impose a lesser sanction for a failure to disclose). Defendants' remaining discovery and evidentiary challenges were not addressed by the district court, and we decline to address them in the first instance. See Oswalt v. Resolute Indus., Inc., 642 F.3d 856, 863 n.3 (9th Cir. 2011) ("On remand, the district court may . . . address the sufficiency of [the expert's] qualifications in the first instance.").

3. Reviewing de novo, Mortimer v. Baca, 594 F.3d 714, 721 (9th Cir. 2010), we affirm the district court's grant of summary judgment to Defendants on Plaintiff Bush's § 1983 claim. Bush—who was, at the time of his death, serving out a sentence in the Cowlitz County Jail after having been convicted of a felony—has not pointed to evidence that would allow a reasonable trier of fact to conclude that his death was caused by a policy or custom of Defendants that posed a substantial risk

of serious harm to him. Gibson v. County of Washoe, 290 F.3d 1175, 1190 (9th Cir. 2002), overruled in other part by Castro v. County of Los Angeles, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 831 (2017). Nor can Bush point to any individual who was subjectively aware of the seriousness of his condition and whose indifference to that condition can be traced to a policy or custom of Defendants. Id. at 1186.

4. In light of our recent decision in Gordon v. County of Orange, 888 F.3d 1118 (9th Cir. 2018), we vacate the district court's entry of summary judgment in favor of Defendants on the § 1983 claims brought by Plaintiffs Borelis and Deal. Defendants are correct that Gordon changed only the individual liability standard for § 1983 medical-needs claims brought by pretrial detainees. But Gordon still bears on this case because, under its newly-announced standard for individual liability, Borelis and Deal may be able to show that one or more individuals violated their rights by exhibiting "reckless disregard" for their well-being, Gordon, 888 F.3d at 1125, and that those violations are attributable to Defendants. See Gibson, 290 F.3d at 1194 n.19 (noting that a plaintiff need not bring a claim against an individual defendant for that defendant's unconstitutional actions to form the basis of a claim against a municipal entity). We remand to the district court for further proceedings, including a determination as to whether Borelis and Deal should be allowed to conduct additional discovery and/or amend their pleadings in light of Gordon. See Wilcox v. First Interstate Bank of Or., N.A., 815 F.2d 522, 530 (9th Cir. 1987) ("Changes in the law since the district

court's decision prompt us to allow the [plaintiffs] the opportunity to amend on remand.").[3]

AFFIRMED in part, VACATED in part, and REMANDED. The parties shall bear their own costs on appeal.

[3] The district court may also want to consider whether to dismiss Marin Fox Hight as a defendant given that the claims against her in her official capacity appear to be duplicative of the claims against the County itself. Melendres v. Arpaio, 784 F.3d 1254, 1260 (9th Cir. 2015).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C14-5153 BHS
CONSOLIDATED FOR PRETRIAL PURPOSES WITH
C14-5385BHS
C14-5672BHS

[Filed December 8, 2015]

JULE CROWELL, et al.,
Plaintiffs,

v.

COWLITZ COUNTY, et al.,
Defendants

CONMED, INC.,
Intervener/Third-Party Defendant.

ORDER DENYING PLAINTIFFS' MOTIONS TO CONTINUE, GRANTING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION, AND REMANDING/DISMISSING STATE LAW CLAIMS

This matter comes before the Court on Intervenor and Third-Party Defendant Conmed, Inc. ("Conmed"), Defendants and Third-Party Plaintiffs Cowlitz County ("County") and Marin Fox Hight's ("Hight") motions for summary judgment on Borelis claims (Dkts. 107 & 109), Bush claims (Dkts. 120 & 122), and Deal claims (Dkts. 134 & 138); and Plaintiffs Jule Crowell, Kele Kuanoni, David Nelson, Lisa Sully and Kimberly Bush's ("Plaintiffs") motions to continue Defendants' motions for summary judgment (Dkt. 130, 158). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On February 6, 2014, Plaintiffs Jule Crowell, individually and as personal representative of the estate of Stephanie Deal, decedent, and David Nelson, guardian ad litem for E.M. and J.A., minor children ("Deal Plaintiffs") filed a complaint against the County and Hight in Cowlitz County Superior court for the State of Washington. Dkt. 1. The Deal Plaintiffs assert a federal cause of action for civil rights violations and a state cause of action for negligence. *Id*.

On August 25, 2014, Plaintiffs Lisa Sully, as personal representative of the estate of Jenny Lynn Borelis ("Borelis"), deceased, and Kimberly Bush, as personal representative of the estate of Daniel D. Bush ("Bush"), deceased, filed a complaint in this Court against the County and Hight asserting federal civil rights violations and state law negligence. Cause No. 14-5672BHS, Dkt. 1.

On November 21, 2014, the Court granted Conmed's motion to intervene in these actions and consolidated the matters for pretrial issues. Dkt. 44.

On September 17, 2015, Conmed, the County, and Hight (collectively "Defendants") filed motions for summary judgment on Borelis's claims. Dkts. 107 & 109. On September 24, 2015, Defendants filed motions for summary judgment on Bush's claims. Dkts. 120 & 122. On September 30, 2015, Conmed filed a motion for summary judgment on Deal's claims. Dkt. 134. On October 1, 2015, the County and Hight filed a motion for summary judgment on Deal's claims. Dkt. 138. On October 5, 2015, Borelis, Bush, and Deal filed a combined response. Dkt. 143. Defendants filed multiple replies. Dkts. 149, 150, 152, 160, 162, & 163.

On September 28, 2015, Plaintiffs filed a motion to continue the motions for summary judgment. Dkt. 130. On October 6, 2015, Conmed filed a response (Dkt. 147) in which the County and Hight joined (Dkt. 148). Plaintiffs did not reply.

On October 16, 2015, Plaintiffs filed a second motion to continue the summary judgment motions. Dkt. 158. On October 26, 2015, Conmed filed a response (Dkt. 165) in which the County and Hight joined (Dkt. 166).

II. FACTUAL BACKGROUND

Although Defendants take issue with some of Plaintiffs' experts, they do not contest Plaintiffs' recitation of the facts regarding the individual injuries.

Thus, the Court recites the facts as set forth in Plaintiffs' combined response.[1]

A. Jenny Borelis

On May 12, 2013, Borelis was booked into the Cowlitz County jail on a misdemeanor warrant. Prior to her booking, she was seen at the St. John Medical Center for a closed head injury and multiple abrasions to her face that she received at the time of her arrest. The discharge instructions indicated that she should be returned to the emergency department immediately if she had "severe headache, nausea, vomiting, weakness, numbness, vision or hearing changes, decreased alertness or increased confusion."

Upon arriving at the Cowlitz County Jail, Borelis informed the booking officer that she had hit her head on the ground during the arrest and that she would be detoxing from heroin. As a result of her medical status and health history, she underwent a neurological examination and was placed under a detox protocol. According to the physician's orders, Borelis was to receive continuous care, including observations of her fluid intake, multivitamins and other medications, a vital signs assessment every 8 hours, and staff was ordered to observe her for insomnia, nightmares, hallucinations, anxiety, psychosis, paranoia, and muscle spasms, among other symptoms of heroin

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[1] Defendants argue that addressing all the claims at the same time is confusing and prejudicial. *See*, *e.g.*, Dkt. 152 at 2-3. Despite Defendants' concerns, the Court is not confused and Defendants are not prejudiced by combined consideration of the issues. Therefore, the Court denies their motions to strike and/or proceed on an individual basis.

detoxification. While it is unclear whether staff dispensed the medications, the record does reflect that staff conducted a vital signs assessment approximately every 8 hours. Dkt. 108-1 at 81 (Borelis refused the first assessment).

On May 15, 2013, jail staff called medical staff to Borelis's cell because she had fallen off her bunk. Medical staff found Borelis lying on the floor, and she complained to them that she was in pain. According to the nurse's notes, Borelis had a temperature of 102.1 degrees, was in a stupor, had jumbled speech, and had vomited. The nurse verified that Borelis was on a detox protocol and noted that she would consult the provider for review. *Id*. Borelis's condition deteriorated. At 2:30 pm, the nurse contacted a physician who ordered a urinary analysis for a possible urinary tract infection and prescribed Tylenol for Borelis's fever. *Id*. At 2:55 pm, the jail staff called the nurse to Borelis's cell. The nurse found Borelis non-responsive and could not detect a pulse. Staff called 911, and Borelis was transported to the hospital. Borelis never recovered, and she died the next day.

B. Stephanie Deal

On August 3, 2013, Deal was booked into Cowlitz County Jail. The next day, Deal submitted a sick request claiming that she was detoxing from heroin and methamphetamine. Dkt. 139 at 17. A doctor then prescribed a detox protocol, which was similar to Borelis's protocol. *Id*. at 18.

Beginning on August 6, 2013, Deal exhibited symptoms of withdrawal. She was found unresponsive on multiple occasions and was having stomach

problems. Dkt. 22-2 at 25-26. On August 7, 2015, Dr. Gorecki attended to Deal. The doctor noted acute herion withdrawal and gave directions to continue the detox protocol. *Id*. Early in the morning of August 10, 2013, the nurse checked on Deal, and Deal was slurring her words, the nurse had difficulty obtaining a pulse, and Deal's mental status had significantly changed. The nurse asked the jail staff to call the ambulance, and the ambulance arrived shortly thereafter. Deal was awake when the EMTs arrived, was able to move without assistance, and answer questions with slurred speech. Deal was transferred to a gurney, and resisted efforts by the EMTs to give her an IV. Deal vomited face up, but the EMTs did not have a portable suction unit available and had to retrieve it from their vehicle. Deal suffered a cardiac arrest and lost consciousness. The EMTs began giving Deal chest compressions, ventilating her with oxygen, and began driving her to the hospital. *Id*. at 39-55. Deal was pronounced dead shortly after arriving at the hospital.

C. Daniel Bush

On January 13, 2014, Bush was booked into the Cowlitz County Jail. Upon being booked, Bush informed the booking officer that he was suffering from back pain and indicated that he was being prescribed medications for nausea, anxiety and back pain. On the second day of his incarceration, Bush complained to medical staff of chronic back pain and requested ibuprofen; he also expressed concern about getting his regular prescriptions while he was incarcerated, which his family had dropped off for him. Nursing staff asked Dr. Gorecki, the jail's physician, whether Mr. Bush

could have his medications dispensed to him; this request was denied. Dkt. 121-1 at 29.

On January 15, 2014, Bush complained to medical staff of shortness of breath, achy bones and a sharp pain in his ribs. During this visit he was also unable to move or lift his arms without giving the appearance of extreme pain, then fell to the floor, stating that he could not move. Eventually, Bush was able to get up off the floor and walk back to his unit without assistance. *Id*. at 30.

On January 16, 2014, Bush, upon his request, was seen by a mental health clinician. He reported that he had a chest injury, depression, anxiety, and that he missed his family. The clinician determined that these complaints were the result of manipulative behaviors and noted that he was "okay." Later that day, jail staff placed Bush in a restraint chair in his cell in response to a threat of self-harm. When medical staff arrived, they found him unresponsive with blood on his face. After he responded to the smell of ammonia, he immediately passed out again, before responding a second time to ammonia. There is no indication that further medical attention was ordered in response to this episode. That day, however, the jail received Bush's medical records, which indicated an addiction to herion. Bush was placed on a detox protocol.

On January 18, 2014, Bush complained to medical staff that he had chest pain and difficulty breathing when sitting up, and that his left breast felt like "pins and needles." Later that night, he complained of severe back pain, stated that he had been coughing up blood and his lungs hurt, and he was sweating profusely.

Early the next morning, jail staff found Bush screaming in his cell because he had severe pain in his back and while inhaling. The clinician noted that Mr. Bush had blood in the back of his throat and "continue[d] to monitor" Bush. Dkt. 121-1 at 32-33. During another assessment later that day, the clinician noticed that Bush had diminished sound in his lower lobes, but that his blood pressure and blood oxygenation were normal.

At 5:22 am on the morning of January 20, 2015, jail staff found Bush in his cell and unresponsive. The staff called for medical attention and started to perform CPR. Resuscitation was unsuccessful, and Bush was declared dead at the scene. The medical examiner found that Bush suffered from bilateral pneumonia and a staph infections, which likely had become septic.

III. DISCUSSION

A. Motions to Continue

Plaintiffs move to continue Defendants' motions because they are premature and should be renoted for a date after the close of discovery. Dkts. 130 & 158. "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion . . . ." Fed. R. Civ. P. 56(d). "A party requesting a continuance pursuant to Rule 56(f) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).

In this case, Plaintiffs concede that a continuance is not necessary. For example, Plaintiffs assert that, "[a]lthough the evidence before the Court is already more than sufficient to warrant denial of the summary judgment motions, Plaintiffs must still be permitted to complete the depositions of these additional witnesses." Dkt. 130 at 3. A Rule 56(d) continuance is proper when a party does not possess facts essential to justify his opposition. Plaintiffs concede they have sufficient facts to justify their opposition, and, therefore, the Court need not grant a Rule 56(d) continuance. Plaintiffs' motion are denied.

B. Summary Judgment

Defendants move for summary judgment on the remaining federal and state law claims.

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some

metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc*., 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc*., 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

2. 42 U.S.C. § 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983, a plaintiff must demonstrate that (1) the conduct

complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

In this case, Plaintiffs' Eighth Amendment rights are at issue. "The Eighth Amendment's proscription against cruel and unusual treatment is violated when officials remain deliberately indifferent to the serious medical needs of convicted prisoners." *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). "[D]eliberate indifference entails something more than mere negligence, [and] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). "The inmates must demonstrate that they were confined under conditions posing a risk of 'objectively, sufficiently serious' harm and that the officials had a 'sufficiently culpable state of mind' in denying the proper medical care." *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (quoting *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995)). "Thus, there is both an objective and a subjective component to an actionable Eighth Amendment violation." *Clement*, 298 F.3d at 904.

In this case, Plaintiffs' federal claims fail because they fail to identify or assert claims against individuals. Section 1983 claims require proof of acts committed by persons acting under color of state law. Moreover, Eight Amendment claims require proof of

specific mental states. Plaintiffs assert unlawful acts on behalf of generic jail staff or medical staff and fail to identify or allege acts on behalf of any specific individual. In other words, Plaintiffs attempt to articulate group liability instead of submitting evidence to show that a particular person acted with deliberate indifference to a named plaintiff. In the absence of such evidence or arguments, Plaintiffs fail to meet their burden in opposition to summary judgment.

Even if Plaintiffs named and identified specific individuals, the Court concludes that Plaintiffs have failed to show deliberate indifference. At most, Plaintiffs have shown either misdiagnosis or failures to timely identify medical need. Plaintiffs have failed to submit evidence of a culpable state of mind in denying medical needs. For example, Plaintiffs assert that Bush was "labeled a 'faker' and subsequently ignored." Dkt. 143 at 12. While there is evidence to support the assertion that Bush exaggerated his symptoms to manipulate staff, there is no evidence to support the assertion that he was ignored. Even though Bush refused the final detox assessment, staff checked on him every half hour until they discovered him unresponsive. In light of this and other evidence, Plaintiffs have failed to show a deliberate indifference to a serious medical need. Therefore, the Court grants Defendants' motions as to all federal individual liability claims.

With respect to entity liability, if "there is no constitutional violation, there can be no municipal liability." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 957 (9th Cir. 2008). While there are a few instances where an entity may be liable in the absence

of individual liability, Plaintiffs fail to identify how any of those exceptions apply to this case. Plaintiffs simply argue that because the injured were on the same detox protocol or in the same jail seen by the same medical staff, then the County and/or Conmed must be liable. This is not the law and, therefore, Plaintiffs' federal claims against all Defendants fail. The Court grants Defendants' motions on all federal claims.

C. Supplemental Jurisdiction

The Court may decline to exercise supplemental jurisdiction over pendant state law claims if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In this case, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. While the Court recognizes the parties' concerns with being close to trial and then being either remanded or dismissed, the issues of negligence under state law are best addressed by the state courts. Absent constitutional violations, the federal court need not interfere with the operations of local jails under state laws. These issues are best addressed in the local courts. Moreover, Plaintiffs will have additional time to complete the discovery that they claim still needs to be completed.

IV. ORDER

Therefore, it is hereby **ORDERED** that Plaintiffs' motions to continue Defendants' motions for summary judgment (Dkt. 130, 158) are **DENIED**; Defendants' motions for summary judgment on Borelis's claims (Dkts. 107 & 109), Bush's claims (Dkts. 120 & 122), and Deal's claims (Dkts. 134 & 138) are **GRANTED in part** on the federal claims; the Deal complaint is

remanded to Cowlitz County Superior Court; and the Borelis and Bush complaint is dismissed.

Dated this 8th day of December, 2015.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35992
D.C. No. 3:14-cv-05153-BHS
Western District of Washington, Tacoma

[Filed July 16, 2018]

JULE CROWELL, individually and as Personal Representative of the estate of Stephanie Deal; DAVID NELSON, Guardian ad litem on behalf of E.M. on behalf of J.A.; LISA SULLY, as Personal Representative of the estate of Jenny Lynn Borelis; KIMBERLY BUSH, as Personal Representative of the estate of Daniel D. Bush,
Plaintiffs-Appellants,

v.

COWLITZ COUNTY; MARIN FOX HIGHT, in her offiical capacity; JOHN DOES, 1-5,
Defendants-Appellees,

v.

CONMED, INC.,
Third-party-defendant-Appellee.

ORDER

Before: TASHIMA and GRABER, Circuit Judges, and MIHM,[*] District Judge.

Judge Graber has voted to deny Appellees' joint petition for rehearing en banc, and Judges Tashima and Mihm have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellees' joint petition for rehearing en banc is DENIED.

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[*] The Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX D

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. 3:14-cv-5153-BHS

[Filed October 5, 2015]

JULE CROWELL, et al.,
Plaintiffs,

v.

COWLITZ COUNTY, et al.,
Defendants.

KELE KUANONI,
Plaintiff,

v.

COWLITZ COUNTY, et al.,
Defendants.

LISA SULLY, et al.,
Plaintiffs,

v.

COWLITZ COUNTY, et al.,

Defendants.)
_____)

PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT (Dkt. Nos. 107, 109, 120, 122, 134 & 138)

CONNELLY LAW OFFICES, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100 Phone - (253) 593-0380 Fax

* * *

B. Defendant Cowlitz County had a non-delegable constitutional and common law duty to provide adequate medical care to the Plaintiffs in this case.

Claims for inadequate medical are analyzed under the Fourteenth Amendment Due Process Clause. *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998). It has long been recognized that the government has an obligation under the Eighth Amendment to provide adequate medical care for those whom it incarcerates. *See Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (citing *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). Government entities violate the Eighth Amendment's proscription against cruel and unusual punishment when they exhibit "deliberate indifference to serious medical needs of prisoners." *Estelle*, 429 U.S. 97 at 104. "In order to comply with their duty not to engage in acts evidencing deliberate indifference to inmates' medical and psychiatric needs, jails must

provide medical staff who are 'competent to deal with prisoners' problems.'" *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982)).

In the Ninth Circuit, the test for deliberate indifference consists of two parts. *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* at 1059 (citing *Estelle*, 429 U.S. at 104). Courts have found examples of serious medical needs to include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Id.* at 1059-60; *see e.g. Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (holding that an inmate with a broken and wired-shut jaw had "clear" and "serious" medical needs); *Lolli v. County of Orange*, 351 F.3d 410, 419-20 (9th Cir. 2003) (taking judicial notice that Type 1 diabetes is a common and serious illness); *Wilhelm v. Rotman*, 680 F.3d 1113 (9th Cir. 2012) (holding that a hernia was a serious medical need).

Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. *McGuckin*, 974 F.2d at 1060. This second prong is

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[95] Id., p. 34:4-9.

satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. *Id.* "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also Gibson*, 290 F.3d at 1197 (acknowledging that a plaintiff may demonstrate that officers "must have known" of a risk of harm by showing the obvious and extreme nature of a detainee's abnormal behavior). Deliberate indifference to a pretrial detainee's serious medical needs violates the Fourteenth Amendment, whether the indifference is manifested by doctors, guards, or other personnel. *Erickson v. Pardus*, 551 U.S. 89, 90, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam); *Estelle*, 429 U.S. at 104-05.

While medical negligence, alone, will not automatically trigger claims under 42 U.S.C. § 1983, deliberate indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *McGuckin* at 1059 (quoting *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988)). To establish deliberate indifference, a detainee "need not prove that he was completely denied medical care." *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc); *see also Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012) (overruled on other grounds by *Peralta v.*

Dillard, 681 F.3d 978 (9th Cir. 2014)) (finding medical and custodial prison staff deliberately indifferent to prisoner's serious medical needs even though prisoner was "provided [with] medical care, medications, and specialist referrals ... during the period in question"). Moreover, Ninth Circuit cases have held that the deliberate indifference standard is "less stringent in cases involving a prisoner's medical needs ... because 'the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.'" *McGuckin*, 974 F.2d at 1060 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)).

In this case, there is ample evidence of deliberate indifference to the serious medical needs of Ms. Borelis, Ms. Deal, and Mr. Bush. For example, although Cowlitz and ConMed staff were notified that Stephanie Deal was very sick and was withdrawing from heroin, they failed to follow even their own inadequate protocols, denying Ms. Deal intramuscular injections of the medicine that would have quelled her nausea and ended her refractory vomiting.[96] And although they were aware that she was getting more and more sick, and that her vital signs were deteriorating, and that Ms. Deal had lost roughly seventeen percent of her body weight during the week she was in jail, they waited until they could no longer feel a pulse before summoning an ambulance.[97] The first responders arrived to find a lifeless corpse that was too far gone to be resuscitated.

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[96] Cummins Decl. ¶ 9(a), Dkt. #55 p. 8

[97] Progress Notes, Ex. 3 to Roberts Decl., Dkt. # 54 p. 16

Likewise, in the cases of Ms. Borelis and Mr. Bush, Cowlitz and ConMed staff knew that both of these young people were extremely sick to the point of incoherence, loss of consciousness, and deterioration of basic vital signs.[98] Each of the deaths could have been easily prevented with provision of even the most basic medical care.[99] Instead, Cowlitz and ConMed personnel "ignor[ed] their symptoms until they were dead or nearly dead (and unsalvageable)" before summoning aid.[100]

Here in the United States of America, all persons in custody have "the established right" not to have officials remain deliberately indifferent to their serious medical needs. *Carnell v. Grimm*, 74 F.3d 977 (9th Cir. 1996). Because that right was clearly violated in this case, summary judgment is not appropriate.

C. The Cowlitz Defendants and ConMed have engaged in a clear pattern and practice of deliberate indifference.

Municipalities are "persons" under § 1983 and thus subject to liability for causing a constitutional injury or deprivation. *Monell v. Department of Social Servs.*, 436

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[98] See, e.g., Conmed Progress Notes for Bush, Dkt. #121-1, pp. 30-32 (Ex. 5 to Rosenberg Decl.); Various Records for Borelis, Dkt. #108-1 (Exs. 7-13 to Rosenberg Decl.); Leff Decl., Dkt. # 132; Cummins Decl. Re: Borelis, Dkt. #145; Cummins Decl. Re: Bush, Dkt. # 146.

[99] Leff Decl., Dkt. # 132; Cummins Decl. Re: Deal, Dtk. #55; Cummins Decl. Re: Borelis, Dkt. #145; Cummins Decl. Re: Bush, Dkt. # 146.

[100] Leff Decl. ¶ 4, Dkt. #132.

U.S. 658, 690 (1978). It is well-established that "liability may attach where the municipality itself causes the constitutional violation through the execution of an official policy, practice or custom." *Id.* at 690-691. In addition, "[a] defendant may be held liable as a supervisor under § 1983 if there

* * *

Because Plaintiffs have made such a showing here, Defendants are not entitled to summary judgment.

IV. CONCLUSION

Plaintiffs have standing to sue and are entitled to full compensatory damages under the law. They have also produced substantial and overwhelming evidence of negligence, proximate cause, and a pattern and practice of deadly deliberate indifference within the Cowlitz County jail. And because any arguments to the contrary are for the jury to decide, the Court should deny the motions for summary judgment.

Respectfully submitted this 5th day of October, 2015.

CONNELLY LAW OFFICES, PLLC

By /s/ Nathan P. Roberts
Nathan P. Roberts, WSBA No. 40457
2301 North 30th Street
Tacoma, WA 98403
Phone: (253) 593-5100
E-mail: nroberts@connelly-law.com
Attorneys for Plaintiffs

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35992
D.C. No. 3:14-cv-05153-BHS
Westem District of Washington, Tacoma

[Filed April 30, 2018]

JULE CROWELL, individually and as Personal Representative of the estate of Stephanie Deal; et al.,
Plaintiffs-Appellants,

v.

COWLITZ COUNTY; et al.,
Defendants-Appellees,

v.

CONMED, INC.,
Third-party-defendant-Appellee.

ORDER

Before: TASHIMA and GRABER, Circuit Judges, and MIHM,[*] District Judge.

[*] The Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois, sitting by designation.

On or before May 22, 2018, the parties shall file simultaneous briefs, not to exceed 15 pages, addressing the following two questions:

(1) Should the panel vacate the summary judgment and remand for the district court to consider, in the first instance, the effect of this court's recent decision in Gordon v. County of Orange, No. 16-56005, slip op. at 1 (9th Cir. Apr. 30, 2018)?

(2) Regardless of your answer to Question 1: What effect does Gordon have on the claims still at issue in this case?