Ex. 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
ASHLAND

Civil Action NO. 18-93-HRW

JULIE HELPHENSTINE,
Administratrix of the Estate of
CHRISTOPHER DALE HELPHENSTINE
and *Guardian of B.D.H.* **PLAINTIFF,**

v. **MEMORANDUM OPINION AND ORDER**

LEWIS COUNTY KENTUCKY,
JEFF LYKINS, *Individually,*
ANTHONY RUARK, *Individually,*
ANDY LUCAS, *Individually,*
BEN CARVER, *Individually,*
AMANDA MCGINNIS, *Individually,*
SANDY BLOOMFIELD, *Individually,*
MARK RILEY, *Individually,*
MELINDA MOORE, *Individually,*
JEFFREY THROUGHMAN, *Individually,*
and
TOMMY VON LUHURTE, D.O., *Individually,* **DEFENDANTS.**

On April 14, 2017, Christopher Helphenstine was arrested and transported to the Lewis County Detention Center. He died five days later while in detention. This case is about what unfolded during those five days.

Plaintiff Julie Helphenstine, the wife and Administratrix of the Estate of Christopher Helphenstine, and guardian of their minor child, filed this lawsuit against Lewis County and a number of Lewis County officials and employees in their individual capacities, including Jailer Jeff Lykins; Deputy Jailers Anthony Ruark, Andy Lucas, Ben Carver, Amanda McGinnis, Sandy

Bloomfield, Mark Riley, and Jeffrey Thoroughman; Sheriff Johnny Bivens; and Deputy Sheriff John Byard (collectively, "Lewis County Defendants") and Tommy Von Luhrte, D.O. [Docket No. 1]. Pursuant to 42 U.S.C. § 1983, Plaintiff alleges that the Defendants were deliberately indifferent to Helphenstine's medical needs, thereby violating his rights under the Eighth and Fourteenth Amendments. In addition, Plaintiff asserts claims of negligence, gross negligence, and wrongful death under Kentucky law.

Defendants seek summary judgment. For the reasons set forth herein, the Court finds that Defendants are entitled to judgment as a matter of law as to the §1983 claims.

I.

The facts are mostly undisputed. On February 12, 2017, Christopher Helphenstine sold three bins of heroin to a person who was cooperating with the Lewis County Sheriff's Office. [Arrest Warrant, Docket No. 96-1]. On March 7, 2017, he sold four bins of heroin to another person who was cooperating with the Lewis County Sheriff's Office. *Id.* A warrant was obtained and on Friday, April 14, 2017, Helphenstine was arrested for trafficking in a controlled substance, first degree. *Id.*

At the time of his arrest, Helphenstine had a pill he said was Xanax without indicia that the pill had been prescribed to him; thus, the arresting officer also charged Helphenstine with possession of a controlled substance, third degree. [Citation, Docket No. 96-3].

A. Friday, April 14, 2017.

Helphenstine was taken to the Lewis County Detention Center ("LCDC") at 2:10 p.m. [Facility Admission Report, Docket No. 96-4]. Helphenstine remained at the LCDC without incident until approximately 8:30 p.m. on Sunday, April 16, 2017. [Incident Report, Docket No. 96-5].

B. Sunday, April 16, 2017.

On Sunday, April 16 around 8 p.m., Deputy Jailer Mark Riley was conducting rounds when an inmate called out to him about someone being sick in a cell. [Deposition of Mark Riley, Docket No. 107, p. 8-9]. Deputy Riley entered the cell, saw Helphenstine and saw vomit on the floor. *Id.* Deputy Riley asked Helphenstine if he wanted to see the doctor or go to the hospital, but Helphenstine said no. *Id.* at p. 10. Riley testified that Helphenstine told him that he was "dope sick" and "just wanted to be in a cell by hisself [sic] so he can get over it." *Id.* and Docket No. 95-5. Deputy Riley moved Helphenstine to a medical isolation cell where he could be monitored and completed an Incident Report in order to advise other jail personnel about the reasons for the move. [Docket No. 96-5].

Helphenstine was placed in the medical isolation cell at approximately 9:00 p.m. [Medical Watch Sheet, Docket No. 96-6].

C. Sunday, April 16, 2017, 9:00 p.m. – Tuesday, April 18, 2017, approximately 9:30 a.m.

Beginning at 9:20 p.m. on Sunday, April 16, deputies Sandy Bloomfield, Jeffrey Thoroughman, Ben Carver, Anthony Ruark, and Amanda McGinnis took turns, during their respective shifts, checking on Helphenstine approximately every 20 minutes, by opening a flap in the door to the isolation cell, looking into the cell, and talking to Helphenstine. [Deposition of Sandy Bloomfield, Docket No. 108, p. 41]. They then noted their observations on a Medical Watch sheet that hung from the door of the isolation cell. [Docket No. 96-6]. At various times through the early morning of April 18, deputy jailers noted that Helphenstine was laying down,

sitting up, eating, talking, moving, or, occasionally, vomiting.[1] *Id*. There are a total of 173 entries from 9:20 a.m. on April 16 to 3:30 a.m. on April 19.

Shortly after midnight on April 18, Deputy McGinnis completed a Medical Request Form and faxed it to Dr. Tommy Von Luhrte, a local physician under contract with the Lewis County Fiscal Court to provide medical services to inmates at the LCDC [2]. [Deposition of Amanda McGinnis, Docket No. 98, p. 40-41]. On the form, she noted that Helphenstine was soiling himself, vomiting and refusing to eat or drink. [Medical Request Form, Docket No. 96-7].

Helphenstine's arraignment was scheduled for mid-morning on April 18. Because he had vomited, deputy jailers took him down the hall so he could shower. [Docket No. 98, p. 22]. The medical log sheets show he was in the shower from 6:10 -7:05 and back in his cell, sitting up at 7:35. [Docket No. 96-6].

As Helphenstine was getting ready to shower, Deputy McGinnis spoke with him. [Docket No. 98, p. 22]. He told her he did not feel well. *Id.* She also knew he had been vomiting, but also that he had consumed some juice and some water that morning. *Id.* at p. 30. While he showered, Deputy McGinnis retrieved a new set of clothes and bedding for him. *Id.* at p. 22.

The log sheet reflects that before showering, at 5:45 a.m., Helphenstine drank some juice; at 6 a.m. he drank some water. [Docket No. 96-6]. After showering , at 7:50 a.m. he ate part of a breakfast tray. *Id.*

D. Tuesday, April 18, 2017, between 9:22 a.m. and 11:10 a.m.

Shortly thereafter, jail staff began gathering those inmates who were due in court for their arraignments, including Helphenstine. [Deposition of Jeff Lykins, Docket No. 103, p. 56]. Jailer

[1] When a log sheet became completely filled, that sheet was removed from the door and placed in an inmate's file. [Deposition of Ben Carver, Docket No. 101, p. 16-17]. A new log sheet was then placed on the door of the cell for deputies to continue noting their observations. *Id.*
[2] *See* Medical Services Agreement, Docket No. 96-8.

Jeffrey Lykins called Helphenstine's name to get him to come to the door of his cell. *Id.* He opened the cell door, handcuffed Helphenstine, and walked with him and other inmates to the back door of the LCDC to meet the bailiffs who would take the inmates approximately 20 feet to the courthouse. *Id.* Lycans testified that Helphenstine "looked okay. I mean he looked fine where he was in his jumpsuit. Nothing noticeable about how he was walking." *Id.* at 59, 60-61.

Among the bailiffs who received the group of inmates was Lewis County Deputy Sheriff John Byard. [Deposition of John Byard, Docket No. 105, p. 10]. Byard noted that Helphenstine was lethargic in his movement and in his speech. *Id.* at p. 18. After escorting the inmates, including Helphenstine, to the courtroom, Deputy Byard approached Lewis County District Judge McCloud and told him that Helphenstine was "out of it" and appeared to be in withdrawal. Judge McCloud told Deputy Byard to return Helphenstine to the LCDC. [Video of Arraignment, Docket No. 97]. Immediately thereafter, Deputy Byard returned Helphenstine to the LCDC. [Docket No. 105, p. 19]. A deputy was present at the LCDC to receive Helphenstine, but Deputy Byard cannot recall whom. *Id.* at p. 21. Deputy Byard told the deputy jailer that Helphenstine's arraignment had been canceled by the judge but did not specify the basis for the cancellation. *Id.* The medical log sheet reflects that Helphenstine was observed back in his cell at 10:38, laying down. [Docket No. 96-6].

At 11:10 am, Defendant Melissa Potter, the Jail's "medical coordinator," directed that deputy jailer Melinda Monroe fill out another medical request for Helphenstine and fax it to Dr. Von Luhrte's office. [Deposition of Melissa Potter, Docket No. 121, p. 20 and 35]. In that request, Monroe said that Helphenstine was "detoxing from drug use," was "vomiting badly," and had "not [been] able to eat or drink for a few days now." She added: "He needs to be seen by

Dr. Tommy [Von Luhrte]." [Docket No. 124-11]. Dr. Von Luhrte testified he never received this fax. [Deposition of Tommy Von Luhrte, D.O., Docket No. 102, p. 108-109].

E. Tuesday, April 18, 2017, late morning through end of the day.

At some point during the day on April 18, 2017, Dr. Von Luhrte reviewed the Medical Request Form that Deputy McGinnis had completed. *Id.* at p. 81. He then contacted the jail and spoke with someone whose identity he does not know. He told the person to take Helphenstine to the emergency room. *Id.* at 85. Dr. Von Luhrte testified that he was informed that Helphenstine refused to go to the hospital. *Id.*

He further testified that because Helphenstine would not go to the emergency room, he completed the "Doctor's Orders" section of the form and returned it to jail staff, advising them to encourage Helphenstine to sip Kool Aid and eat popsicles, to administer Reglan, and give him bland foods such as saltine crackers, bread, or chicken noodle soup. *Id.* at p. 81, 83 and Docket No. 96-10.

At 3:00 p.m. on April 18, 2017, jail staff, following Dr. Von Luhrte's orders, gave Helphenstine a generic form of Reglan, as well as Zofran, which is used to treat nausea. [Medication Dispense Form, Docket No. 96-11].

Dr. Von Luhrte testified that he received another call from someone who identified themselves as the "Jailer" regarding Helphenstine. [Docket No. 102, p. 116, 127]. He stated that he told the "Jailer" to transport Helphenstine to the hospital two times but, again, that he refused to go. *Id.* It is unclear from the record to whom Dr. Von Luhrte spoke as none of the defendants recall this conversation and County Jailer Jeff Lykins specifically denies it. [Docket No. 103, p. 65].

Dr. Von Luhrte testified that he typically visits the LCDC on Tuesdays. [Docket No. 102, p. 48]. However, although April 18, 2017, was a Tuesday, and there is no record that he came to the LCDC on that day. At various times between 3:00 p.m. and 11 p.m., deputy jailers noted that Helphenstine was sitting up, talking, lying down, or standing in the medical observation cell. [Docket No. 96].

At approximately 9:00 p.m. Deputy Andy Lucas saw Helphenstine in the isolation cell. [Docket No.22]. Helphenstine was sitting up and alert but told Deputy Lucas that he was "not going to drink anymore whiskey again." *Id.* Two hours later, at 11:00 p.m. on Tuesday, Deputy Lucas was going off shift for the evening and he walked past the medical isolation cell on his way out of the facility. [Deposition of Andy Lucas, Docket No. 99, p. 7]. He saw Helphenstine standing near the cell door talking with Deputy Ruark. *Id.* Deputy Lucas asked Helphenstine how he was feeling, and Helphenstine said he was "feeling a whole lot better. And he said he'd like to have something cold to drink." *Id.* Lucas further testified that "I brought him a Mountain Dew. And he took – he drank some of that, and he said, 'I'm feeling pretty good now' and I said, 'Okay.' " *Id.* at p. 8-10.

Deputy McGinnis arrived for her shift at 11 p.m. and was told that Dr. Von Luhrte had prescribed Helphenstine anti-nausea and anti-vomiting medicine, and that he seemed to be doing better. [Docket No. 98, p. 61-62]. She observed that he appeared better, as he was up and moving around more than he had been the previous night. *Id.*

F. Wednesday, April 19, 2017.

The record contains a video of the events occurring on April 19. [Docket No. 126]. The video shows that shortly after midnight, Helphenstine is lying face down on the bunk in the medical observation cell. For approximately two hours, he remained laying down, his legs

twitching periodically, and he can be seen raising and shaking his feet. [Docket No. 126]. According to medical log sheet, he was observed at 12:03 "sitting and shaking," at 12:15 "laying down," at 12:30 "laying down," at 12:43 "laying down," at 1:01 "laying down," at 1:25 "moving," at 1;53 "moving," at 2:04 "laying down with legs moving," and at 2:15 "laying down," and at 2:35 "laying down." *Id.*

Around 2:42 a.m., Deputy Ruark entered the cell to manually check on Helphenstine. [Docket No. 126]. After doing so, Deputy Ruark left the cell briefly to retrieve a pair of gloves and a drink, which he offered to Helphenstine. While Helphenstine turned his head to the left to interact with Deputy Ruark, he refused the drink. *Id.* He laid his head down again, and the deputy exited the cell at around 2:45 a.m. *Id.*

At approximately 2:46 a.m., Deputy Ruark re-entered the cell, leaned down very close to Helphenstine, and offered him something to drink. *Id.* Deputy Ruark spoke with Helphenstine, and, on video, Helphenstine shakes his head very slightly to indicate "no" during parts of the conversation. *Id.*

At 2:50 a.m., Deputy McGinnis entered the cell, and within seconds, a third deputy jailer appears – from the shadow and shoe that are visible in the camera frame – to be standing in the doorway to the cell. *Id.*

Deputy McGinnis left the cell briefly to retrieve a bottle of Ensure, and, upon returning to the cell, knelt down beside Helphenstine, spoke to him, and offered him a drink through a straw. Helphenstine consumed a small amount of the Ensure. *Id.* and Docket No. 98, p. 37-38. The deputies left the cell at around 2:53 a.m. [Docket No. 126].

At approximately 2:56 a.m. Deputy McGinnis re-entered the cell, knelt down next to Helphenstine, and he took a drink through a straw from a white bottle. *Id.*

At 3:13 a.m., Deputy McGinnis went to the door of the cell and looked through the window to check on Helphenstine, noting that he had consumed some Ensure. [Docket No. 96-6].

At approximately 3:29 a.m., Deputy Ruark asked Deputy Thoroughman to open the door to the cell and try to get Helphenstine to respond to him. Deputy Thoroughman stood in the doorway and yelled "Chris" four or five times. Deputy Ruark and Deputy McGinnis joined Thoroughman in the cell at approximately. Deputy Ruark told Deputy Thoroughman to relieve Deputy Bloomfield from the Control Room, so that Deputy Bloomfield could enter the cell to try and get a response from Helphenstine. She could not. Bloomfield testified that Helphenstine was blue, cold, and unresponsive. [Docket No.108, p. 81, 97].

They summoned an ambulance and Ruark, McGinnis and Thoroughman performed CPR on Helphenstine until it arrived at approximately 3:40 a.m.

Unfortunately, moments later, Helphenstine died in the ambulance on the way to the emergency room. The immediate cause of death is listed as "acute (fentanyl) and chronic drug abuse." [Kentucky Certificate of Death, Docket No. 96-21].

G. LCDC Polices

As Plaintiff points out, Lewis County has a statutory responsibility to attend to the medical needs of inmates in its jail. KRS 71.040, 441.025. Kentucky law requires that inmates in county jails be provided "[e]mergency medical, vision, and dental care ... commensurate with the level of care available to the community," and further states that "[i]f emergency medical care is needed, it shall be provided." 501 KAR 3:090(13) and (21). To that end, Lewis County had written policies and procedures in place that addressed the medical needs of inmates in its Jail. In her response to Defendants' dispositive motions, Plaintiff attaches three documents which

pertain to LCDC's policies for medical care for inmates. The first is the "EMS" Policy which provides:

> Emergency Medical Services are available 24 hours a day to inmates of the Lewis County Jail to ensure prompt emergency medical attention. All deputies are trained to respond to medical emergencies since an inmate's life may depend on appropriate first aid.

[Docket No. 124-3].

"Emergency" is defined in the policy and incudes "drug or alcohol withdrawal." *Id.* The Policy states that a deputy confronted with an emergency will "administer first aid" and "call the Jail Medical Coordinator and the Facility Physician." *Id.* It further states that "when necessary and/or possible, jail deputy shall move the inmate to a holding cell or remove other inmates from the scene…." *Id.*

The other two documents pertain to prisoner transportation and court security. Both provide that in the event of a medical emergency, deputies are to summon EMS or "seek medical attention". [Docket Nos. 124-9 and 124-10]. "Medical emergency" is not defined in either document.

II.

A set forth *supra*, Helphenstine's estate filed this lawsuit and the parties have conducted extensive discovery. The Lewis County Defendants seek summary judgment as to all claims alleged against them [Docket No. 96]. Dr. Von Luhrte seeks summary judgment as to the § 1983 claim and as to Plaintiff's claims for the destruction of power to earn income [Docket Nos. 74 and 94]. All motions have been fully briefed and are ripe for review.

III.

Under Federal Rule of Civil Procedure 56, a court may grant summary judgment if it finds 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). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Winkler v. Madison County*, 893 F.3d 877, 890 (6th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317. 323 (1986). That burden may be satisfied by demonstrating that there is an absence of evidence to support an essential element of the non-moving party's case for which he or she bears the burden of proof. *Id*.

Once the moving party satisfies this burden, the non-moving party thereafter must produce "specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial." *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 205 (6th Cir. 1995) (citation omitted). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. However, the Court is not obligated to "search the entire record to establish that it is bereft of a genuine issue of material fact." *In re Morris*, 260 F.3d 654, 655 (6th Cir. 2001). Rather, "the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Id.*

Further, the non-moving party must do more than merely show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citations omitted). Instead, the non-moving party is required to present specific facts showing that a genuine factual issue exists by "citing to particular parts of materials in the record including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence ... of a genuine dispute." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

IV.

"[P]retrial detainees have a constitutional right to be free from deliberate indifference to serious medical needs under the Due Process Clause of the Fourteenth Amendment." [3] *Greene v. Crawford Cnty.*, 22 F.4th 593, 605 (6th Cir. 2022).

[3] In a §1983 analysis, convicted prisoners and pretrial detainees have different protections. Convicted prisoners' claims are analyzed under the Eighth Amendment, whereas pretrial detainees' claims are analyzed under the Fourteenth Amendment. *See generally*, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). In *Kingsley*, the Court rejected the subjective component of the deliberate-indifference standard under the Eighth Amendment, holding that the relevant inquiry is whether the force purposely or knowingly used against the prisoner was objectively unreasonable. *Id.* at 398; *Kingsley* however left confusion in its wake. After *Kingsley*, courts struggled with whether the new, objective standard of *Kingsley* applied to Eighth Amendment claims other than claims of excessive force. Until last fall, the Sixth Circuit routinely applied the Eight Amendment's deliberate indifference standard to claims made by detainees. *See e.g., Richmond v. Huq, et al.,* 885 F.3d 928 (6th Cir. 2018). But in *Brawner v. Scott Cnty.*, 14 F.4th 585 (6th Cir. 2021), the Sixth Circuit considered if and how *Kingsley* applied in a case involving allegations of inadequate medical care for a pretrial detainee. The court held that *Kingsley* required a modification of the deliberate-indifference standard for pretrial detainees, because the deliberate-indifference standard flowed from the Eighth Amendment's prohibition on cruel and unusual punishments and, as such, is not automatically applicable to the Fourteenth Amendment. *Id*. at 596. In applying *Kingsley*, however, the Sixth Circuit did not impose a strictly objective test for conditions-of-confinement claims; it modified the subjective component of the test. The court held that, as with Eighth Amendment claims, negligence is not enough. *Id.* at 597. Instead, a recklessness standard applies. *Id.* Nevertheless, that recklessness standard is different than the recklessness standard observed in Eighth Amendment cases, which is taken from the criminal law.

The Sixth Circuit recently clarified what, exactly, is required in order to maintain an inadequate-medical-care claim under the Fourteenth Amendment. "A plaintiff must satisfy three elements: (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official knew that his failure to respond would pose a serious risk to the pretrial detainee and ignored that risk." *Trozzi v. Lake County Ohio*, 29 F.4th 745, 757 (6th Cir. 2022).

A.

The objective component of the Fourteenth Amendment analysis requires proof that the detainee had a sufficiently serious medical need. *See generally, Griffith v. Franklin County,* 975 F.3d 544, 567 (6th Cir. 2020). Plaintiff appears to contend that withdrawal, from any substance, at any stage and for every detainee, qualifies as a "sufficiently serious medical need." The line is not so bright. Helphenstine's condition was not static for the entire time he was detained. It fluctuated. However, reviewing the evidence in the light most favorable to Plaintiff, the objective prong has been met and the Court will proceed with the Fourteenth Amendment analysis. *See Hinneburg v. Miron*, 676 F. App'x 483, 486-487 (6th Cir. 2017)("The objective prong is usually met in overdose cases where death results" where "several of the inmates, through sworn affidavits and depositions, testified as to the extreme nature of Hinneburg's intoxication, and [an inmate] specifically testified that she believed Hinneburg needed medical attention"). *See also Border v. Trumbull County*, 414 F. App'x 831, 837 (6th Cir. 2011) (detainee's medical need was sufficiently serious and obvious where he appeared "severely

intoxicated," "huddled and slumped over," had red and glazed eyes, "had difficulty walking and staying awake," "slurr[ed] his speech," and later died from a drug overdose).

B.

The subjective component turns upon the modified deliberate-indifference test articulated in *Trozzi*. The Court must determine whether Plaintiff has presented sufficient evidence for a reasonable jury to conclude that: (1) a reasonable officer (knowing what the particular jail official knew at the time of the incident) would have known that Helphenstine was suffering from a serious medical need that posed an excessive risk to his health; and (2) the individual Defendants knew that non-intervention would create an unjustifiably high risk of harm to Helphenstine's health and ignored that risk. *Trozzi*, 29 F.4th at 757 - 758. As set forth in *Trozzi*, this standard "ensur[es] that there is a sufficiently culpable mental state to satisfy the 'high bar' for constitutional torts grounded in a substantive due process violation. *Id.* at 758.

The Court notes that a deputy's awareness that a detainee is experiencing withdrawal does not automatically trigger constitutional protection. Nor does it, in and of itself, "establish a triable issue of fact over deliberate indifference." *Speers v. County of Berrien*, 196 Fed. Appx. 390 (6th Cir. 2006).

Moreover, symptoms of withdrawal do not always warrant hospitalization. Indeed, the Sixth Circuit has observed that withdrawal "typically may be managed in a prison setting and indeed frequently is managed there." *Id.* It is well established in the Sixth Circuit that sending an inmate to the hospital is not the only way withdrawal may be treated within constitutional boundaries. *See e.g., Winkler v. Madison County*, 893 F.3d 877 (6th Cir. 2018).

Caselaw in this context recognizes the spectrum of symptoms of withdrawal and measures those symptoms against the acts or omissions of the deputies involved. The Court has

found deliberate indifference in cases in which an officer "was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, that he drew that inference, and chose to disregard the risk." *Spears v. Rutrh*, 589 F.3d 249, 255 (6th Cir. 2009).

For example, in *Burwell v. City of Lansing*, 7 F.4th 456 (6th Cir. 2021), the Sixth Court found that a detention officer acted with deliberate indifference when he admitted that he observed the detainee unconscious in a pool of his own vomit not one, but twice, yet rendered no aid until directed by another officer to do so. *Id*. at 472. *See also, Bertl v. City of Westland*, 2009 WL 247907 (6th Cir. 2009) at *6–7 (finding sufficient proof to establish deliberate indifference where a defendant nurse "observed [the detainee] lying face down on the floor of his cell, almost comatose, unresponsive and having seizure-like spasms" but "refused to enter the cell and take his vital signs" and "thereafter left the cell and did not return"); *Speers*, 196 F. App'x at 398 (concluding that jury could find defendant officers deliberately indifferent for failing to seek medical assistance for detainee who had collapsed and was "foaming at the mouth").

Conversely, the Sixth Circuit has declined to find deliberate indifference in situations in which an officer was perhaps negligent and imprudent but whose conduct did not rise to recklessness. For example, in *Burwell*, an officer who knew a detainee had epilepsy, observed him lying on the ground and failing to react to a restless cellmate and could not determine whether he was breathing, was not deemed to have acted with deliberate indifference. *Burwell*, 7 F.4th at 468-469. The Court noted that "[a] prudent officer likely would have taken further steps to ensure a detainee's safety….But her negligence does not establish a constitutional violation." *Id.* at 469.

In the same case, the Court found another officer to have negligently prolonged a detainee suffering but that her conduct did not "amount to a constitutional violation." *Id.* at 470.

That officer had four interactions with the detainee, including three cell checks. *Id.* During the second cell check, the detainee was unconscious on the floor. *Id.* During the next check, she observed no change and "assumed he was sleeping." *Id.* She later found him unresponsive and immediately called another officer for assistance. *Id.* at 462. That officer performed CPR; EMS arrived 8 minutes later. *Id.* The detainee was pronounced dead shortly after arriving at the hospital, about 25 minutes later. *Id.* The Court observed that this officer left the detainee unconscious in a pool of vomit for 42 minutes because she failed to check on him at regular intervals, per the jail's policy. *Id.* at 471. The Court further stated that "she certainly should have investigated further when she realized that [the detainee] had not moved in the roughly 85 minutes" between her cell checks. *Id.* However, the Court affirmed the district court's granting of summary judgment in her favor, stating "[s]uch cavalier treatment of detainees she had an obligation to protect was certainly negligent, maybe grossly so" but declined to find a constitutional violation. The Court concluded, "[h]er 'failure to alleviate a significant risk that [s]he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id*., *citing Winkler*, 893 F.3d at 898.

Similarly, in *Winkler*, the Sixth Circuit held that an officer was not deliberately indifferent for failing to take any further steps to care for a detainee who did not get up for breakfast, and later died of a perforated ulcer, although the officer knew that the detainee was withdrawing from drugs. 893 F.3d at 898. The Court noted that the "the better practice" would have been for the officer to determine why the detainee did not get up, and "her failure to do so might very well amount to negligence" but not deliberate indifference. *Id*.

With these precedents in mind, this Court will address the subjective component of Plaintiff's deliberate indifference claim for each officer individually. *Greene*, 22 F.4th at 607.

i. Deputy Marc Riley

As set forth *supra*, on April 16, Deputy Riley entered Helphenstine's cell and observed vomit on the floor. He asked Helphenstine if he wanted to see the doctor or go to the hospital, but Helphenstine said no. Instead, Helphenstine told Deputy Riley that he was "dope sick" and "just wanted to be in a cell by hisself so he can get over it." In accordance with Helphenstine's wishes, Deputy Riley moved Helphenstine to an isolation cell where Helphenstine could be monitored. He completed an Incident Report in order to advise other jail personnel about the reasons for the move. That was Deputy Riley's one and only interaction with Helphenstine. Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

In arguing to the contrary, Plaintiff misstates Riley's testimony. She claims Riley testified "that [Dr.] Von Luhrte should have been called [when Helphenstine was found vomiting], and if he couldn't be reached, Helphenstine should have been taken to the hospital." [Docket No. 124]. That is incorrect. To the contrary, during his deposition, Riley was asked, "Well, … had you been unable to reach Dr. Von Luhrte, would you have taken Mr. Helphenstine to the hospital?" Riley replied, "I don't know." [Docket No. 107]. No reasonable juror could construe that testimony to be unequivocally demonstrative of deliberate indifference.

ii. Deputy Ben Carver

Deputy Ben Carver saw Helphenstine twice. On Tuesday, April 18, at 11:20 a.m., Carver observed Helphenstine in the medical isolation cell and thought "he looked good … his face, his color, it looked pretty good." [Deposition of Ben Carver, Docket No. 101, p. 10-13]. Helphenstine was not pale or bright red, was not sweating, was not shaking or trembling, and

was not complaining of nausea, vomiting or diarrhea. *Id.* Rather, Helphenstine was "just sitting up like he felt good." *Id.*

When Carver saw Helphenstine the second time, at 1:40 p.m., Helphenstine was still sitting up on a bench beside the door to the cell. *Id.* Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

Plaintiff maintains that Carver knew Helphenstine was in withdrawal and, therefore, he should have arranged for him to go to the hospital and by not doing so, acted deliberately indifferent and outside of constitutional bounds. Yet, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

iii. Deputy Jeffrey Thoroughman

Deputy Jeffery Thoroughman was one of the deputies who monitored Helphenstine and logged his observations on the Medical Watch Sheet. He also participated in administering CPR on Helphenstine. Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

In her response to Defendants' dispositive motion with respect to Deputy Thoroughman, Plaintiff maintains that Thoroughman knew Helphenstine was in withdrawal and, therefore, he should have arranged for him to go to the hospital and by not doing so, acted deliberately indifferent and outside of constitutional bounds. Yet, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

iv. Deputy Anthony Ruark

Deputy Anthony Ruark worked three shifts during the relevant time period. Like Deputy Thoroughman, Deputy Ruark was part of the team of deputies who monitored Helphenstine and recorded their observations on the Medical Watch Sheet. During Ruark's shifts, he checked on Helphenstine 21 times, 39 times and 22 times. During his final check, when he could not get a response from Helphenstine, he, along with others, called an ambulance and administered CPR. It would appear from the record that Deputy Ruark merely did his job as the tragedy unfolded. Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine and failed to act accordingly. *Trozzi*, 29 F.4th at 758.

In her response to Defendants' dispositive motion with respect to Deputy Ruark, Plaintiff argues that because he knew Helphenstine was experiencing withdrawal, he should have gotten him medical attention. Yet, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

v. Deputy Amanda McGinnis

As set forth *supra*, Deputy Amanda McGinnis had quite a bit of interaction with Helphenstine. Yet nothing in the record establishes that was reckless or deliberately indifferent. Indeed, viewing the facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine and failed to act accordingly. *Trozzi*, 29 F.4th at 758.

Further, Deputy McGinnis reached out to the facility's physician. It would seem that this was the appropriate thing to do. *See Berry v. Delaware County*, 796 Fed. Appx. 857, 861 (holding

that a deputy "did precisely what he should have done – he perceived something might be medically wrong [with a detainee] and he conveyed that to a medical professional).

Plaintiff, again, argues that because Deputy McGinnis knew Helphenstine was experiencing withdrawal, she should have gotten him medical attention. Yet, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

Plaintiff also maintains that because Helphenstine's condition worsened in the early hours of April 19 and because Deputy McGinnis was on duty and interacting with Helphenstine during that time, she is automatically deemed to have acted with deliberate indifference. However, there is no evidence that Deputy McGinnis perceived Helphenstine's condition was getting worse. To the contrary, she testified that she perceived that Helphenstine was stabilizing.

vi. Deputy Sandy Bloomfield

From the time Helphenstine was moved to the medical isolation cell until April 17, Deputy Sandy Bloomfield observed him a few times, during he was either laying down or siting up and talking with her. She did not interact with him again until sometime after 3:30 a.m. on April 19, when the deputies who found Helphenstine unresponsive, summoned her to assist. Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine and failed to act accordingly. *Trozzi*, 29 F.4th at 758.

In her response to Defendants' dispositive motion with respect to Deputy Bloomfield, Plaintiff argues that because he knew Helphenstine was experiencing withdrawal, he should have gotten him medical attention. Yet, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

Plaintiff further asserts that Deputy Bloomfield "personally observed Helphenstine's deterioration in the early hours of April 19." [Docket No. 124]. This is a mischaracterization of Deputy Bloomfield's testimony. The four pages of deposition testimony cited by Plaintiff, p. 82-86, do not suggest such knowledge. Rather, on those pages, Plaintiff's counsel repeatedly asks Bloomfield to confirm what various entries on the observation log say. However, those entries were made by other deputies, not Deputy Bloomfield. Further, it is undisputed that she did not have any personal interaction with Helphenstine until sometime after 3:30 a.m. on April 19, by which time other deputies had already found Helphenstine unresponsive in the isolation cell. At best, the referenced pages from Bloomfield's deposition demonstrate she was aware that Helphenstine laid face-down on a bench after drinking some Ensure, but Bloomfield testified that did not signify to her that his condition was deteriorating; rather, she believed he laid face-down on the bench to prevent himself from choking, in the event the Ensure caused him to vomit. [Docket. No. 108, p. 82-86]. This simply does not rise to the level of culpability required by *Brawner* and *Trozzi*.

vii. Deputy John Byard

Deputy John Byard is a bailiff; he does not work at the LCDC. He was involved in transporting Helphenstine to his arraignment on April 18. According to his testimony, he spent approximately six minutes with Helphenstine in this context. As seen on the video of the arraignment, he approached Lewis County District Judge McCloud and told him that Helphenstine was "out of it" and probably detoxing from some drug, prompting Judge McCloud to instruct Deputy Byard to return Helphenstine to the LCDC. Immediately thereafter, Deputy Byard spent approximately five minutes walking Helphenstine back to the LCDC, where an unknown deputy jailer received Helphenstine from Byard. Viewing these facts in a light most

favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

In seeking to cast Deputy Byard as acting with deliberate indifference in his limited interaction with Helphenstine, Plaintiff argues that he failed to follow the policy of seeking medical attention when transporting a sick detainee. Yet, it is well established that a failure to follow policies, without more, does not establish deliberate indifference. *Griffith*, 975 F.3d at 578.

viii. Deputy Andy Lucas

Deputy Andy Lucas had limited interaction with Helphenstine. He testified that his final interaction with Helphenstine ended with Helphenstine telling him he felt "pretty good now." Viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

Moreover, as set forth *supra*, awareness of withdrawal is not tantamount to deliberate indifference.

To the extent that Plaintiff suggests that Lucas' involvement with the training of other deputies, the training which she alleges was deficient, this argument cannot be the basis upon which to assess individual liability on Deputy Lucas. *See Sexton v. Kenton County*, 702 F.Supp.2d 784, 793 (E.D.Ky. 2010).

ix. Jailer Jeff Lycans

Jailer Jeff Lycans had one interaction with Helphenstine on the morning of his arraignment. He testified that Helphenstine looked ok. Based upon this limited interaction and

his testimony, viewing these facts in a light most favorable to Plaintiff, these undisputed facts do not demonstrate that this Defendant knew of any "unjustifiably high risks of harm" to Helphenstine. *Trozzi*, 29 F.4th at 758.

x. Lewis County Sheriff Johnny Bivens

Plaintiff does not oppose the dismissal of her § 1983 claims against Lewis County Sheriff Johnny Bivens.

C.

There is much testimony in the record regarding the policies at the LCDC and which officers knew what those policies required, and which officers followed the policies. Plaintiff contends she easily overcomes summary judgment because of the confusion as to the policies. However, failing to follow internal policies, without more, does not constitute deliberate indifference. *Griffith*, 975 F.3d at 578. Like the officer in *Burwell*, *supra*, failing to follow policies may be deemed negligent but does not amount to a constitutional violation. *See also Young v. Campbell Ctny.*, 846 F. App'x 314, 328 (6th Cir. 2021) ("Most assuredly, Deputy Fassler could have and should have perceived [the plaintiff's] injuries if he had followed CCDC protocol[,] ... [b]ut there is no liability under a deliberate-indifference standard for what is arguably only negligent conduct."); *Martin v. Warren Cnty.*, 799 F. App'x 329, 340 (6th Cir. 2020), *reh'g denied* (Feb. 4, 2020) ("The failure to adhere to policies, without more, is only negligence." (*quoting Winkler*, 893 F.3d at 891–92)). "Under § 1983, the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

D.

To the extent that Plaintiff seeks to impose liability of Jailer Jeff Lykins in his individual capacity based upon his role as supervisor, her claim cannot withstand summary judgment.

It is well established that the doctrine of *respondeat superior* does not apply in the context of § 1983 *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978). The Sixth Circuit has explained, "[s]upervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act." *Reed v. Speck*, 508 F. App'x 415, 421 (6th Cir. 2012) (quoting *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006)) (internal quotation marks omitted). To prove liability, the plaintiff must demonstrate "[m]ore than simple negligence and a right to control employees." *Id.* (citing *Gregory*, 444 F.3d at 751). "To succeed on a failure to train or supervise claim, a plaintiff must show that the supervisor 'encouraged the specific incident of misconduct or in some other way directly participated in it.' " *Id.* (quoting *Comstock v. McCrary*, 273 F.3d 693, 712–13 (6th Cir. 2001)). In other words, the plaintiff "must prove that [the supervisors] did more than play a passive role in the alleged violations or show mere tacit approval of the goings on." *Gregory*, 444 F.3d at 751 (citation omitted).

Accordingly, the Sixth Circuit has declined to impose supervisory liability where the supervisor-defendant was unaware of his employees' allegedly unconstitutional conduct and there was no evidence to show his direct participation or encouragement. *See Reed v. Speck*, 508 F. App'x 415, 421 (6th Cir. 2012).

There is no evidence that Lycans personally participated in any deputy jailer's alleged failures. Further, there is no evidence that he authorized, directly or implicitly, in any deputy jailers' alleged deprivation of proper medical care. Nor do the facts establish "a breakdown in the proper workings of the department," and Lycans' knowledge of such a breakdown. *See*

Taylor v. Mich Dept. of Corrections, 69 F.3d 76 (6th Cir. 1995)(holding a prison warden liable under §1983 for an inmate's rape where the warden had actual knowledge of a breakdown in the proper workings and procedures of the jail).

As such, Lycans is entitled to summary judgment in this regard.

VI.

Plaintiff alleges that the customs and policies of the LCDC were the "moving force" behind Helphenstine's tragic death. [Complaint, Docket No. 1, ¶ 24]. She maintains that Lewis County is the Defendant who bears the most liability in this case.

Lewis County can be liable only if it itself committed a constitutional violation; it cannot be vicariously liable for its employees. *Lipman v. Budish*, 974 F.3d 726, 747 (6th Cir. 2020). Further, it could commit that violation only if it has a policy or custom that caused the injury in question. *Id*. Plaintiff can demonstrate that Lewis County had such a policy or custom, by alleging facts that show one of the following circumstances: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Id.*

As Lewis County points out, for the most part, the individual officers had an understanding what qualifies as a medical emergency and when, and if, a detainee experiencing withdrawal requires additional care. Deputy McGinnis testified that she would look for uncontrollable vomiting, uncontrollable diarrhea, unresponsiveness, "talking out of their head," and not eating or drinking as an indication that an inmate experiencing withdrawals had a medical emergency, and that such an inmate should be transported to the hospital. [Docket No. 98, p. 22-28].

Deputy Ruark testified that he knew to perform observation checks on inmates in the isolation cell (which is usually used for inmates going through withdrawal) every twenty minutes, "keep a close eye on them," and watch for signs such as vomiting severely or not responding to know whether the inmate presented a medical emergency, and, if so, to call Dr. Von Luhrte or paramedics. [Docket No. 100, p. 18-22].

Deputy Thoroughman testified that he knew to watch a withdrawing inmate for excessive vomiting, diarrhea, any kind of indication that their withdrawal was becoming lifethreatening, "and they don't want to really eat or do nothing. They just kind of want to lay around." He knew to take such an inmate to the hospital. [Docket No. 104, p. 5-9].

Deputy Carver knew to make sure a withdrawing inmate was not laying on his back, and to watch such an inmate for shaking, sweats and vomiting; if an inmate exhibited such symptoms, Deputy Carver knew to either call Dr. Von Luhrte, call EMS, or take the inmate to the hospital, depending on how bad the inmate's symptoms appeared to be. [Docket No. 101, p. 22-25].

This is not to say that the deputy jailers were one hundred percent clear about their obligations under the EMS policy nor do they proclaim expert medical knowledge. But their testimony does not establish an unawareness pertaining to withdrawal.

Even assuming that Plaintiff could show that the County's training of its jail personnel was inadequate, she has not presented proof of causation. To-wit, that this inadequacy resulted from deliberate indifference. *Winkler*, 893 F.3d at 902. To establish that the inadequate training resulted from deliberate indifference, a plaintiff must establish (1) "prior instances of unconstitutional conduct demonstrating that the County ... was clearly on notice that the training in this particular area was deficient and likely to cause injury," or (2) "a single violation of

federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation," *Plinton v. County of Summit*, 540 F.3d 459, 464 (6th Cir. 2008). The evidence in the record does not establish either.

The Court also notes that in this Circuit, training deputies in CPR and first-aid only does not create a genuine dispute of material fact in the § 1983 context. *See Berry,* 796 Fed. Appx. at 866.

Viewing the record in the light most favorable to Plaintiff, she has not presented facts from which a jury could find that Lewis County had a policy or a custom that caused a violation of Helphenstine's constitutional right to adequate medical care.

VII.

Dr. Von Luhrte seeks summary judgment as to the §1983 claim asserted against him.

"A plaintiff alleging deliberate indifference must show more than negligence or the misdiagnosis of an ailment. When a prison doctor provides treatment, albeit carelessly or inefficaciously, to a prisoner, he has not displayed a deliberate indifference to the prisoner's needs, but merely a degree of incompetence which does not rise to the level of a constitutional violation." *Bowles v. Advanced Correctional Care*, 2020 WL 7048274, *8 (E.D. Ky. 2020). (internal citations omitted). The Court can only "judge [Dr. Von Luhrte's] actions based on the information that was available to [him at the time." *Id.*

Viewing the facts in a light most favorable to Plaintiff, she has not established that Dr. Von Luhrte acted with deliberate indifference. He testified that he suggested Helphenstine go the hospital. He further testified that he was told Helphenstine refused to go. On that basis, he testified that he directed another form of treatment, including prescribing medication to alleviate

Helphenstine's symptoms. Notably, the sick call sent sheet to him from the LCDC on April 17 does **not** include Helphenstine. [Sick Call Sheet, Docket No. 127-7].

Although Dr. Von Luhrte's decision not to investigate further may have been negligent, this is not tantamount to deliberate indifference. *See Winkler,* 893. F3d at 894. Moreover, there is no evidence that Dr. Von Luhrte had reason to suspect that Helphenstine was going through anything but opiate withdrawal. In similar circumstances, the Sixth Circuit did not find constitutional liability. *Id.*

Plaintiff argues that Dr. Von Luhrte's testimony that he was told that Helphenstine refused to go to hospital is not credible, at best. She maintains that Defendant Lykins testified that an inmate would not be permitted to refuse transport to a hospital. Plaintiff misstates Lykins' testimony. Contrary to what Plaintiff asserts in her responsive brief, Lykins testified that if an inmate is "bleeding profusely", he would tell him to go to the emergency room. [Docket No. 103, p. 66-67]. He stated, "if he's bleeding that bad, then he needs to be seen by medical." *Id.* at p. 67. He further testified that he would summon an ambulance if an inmate has a "seizure or heart attack, something like that." *Id.* at p. 16.

The Court does not "weigh the evidence and determine the truth of the matter" at the stage of the proceedings. *Anderson*, 477 U.S. at 249. However, the Court must consider whether the respondents have identified more than "[t]he mere existence of a scintilla of evidence in support of [the respondent's] position." *Id.* at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 250 (citations omitted). "The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Alba v. Marietta Memorial Hospital,* 202 F.3d 267, *3 (6th Cir.

2020). With respect to Plaintiff's theory that Dr. Von Luhrte is not to be believed and that he never ordered that Helphenstine be taken to a hospital and/or Helphenstine refused to go, the Court finds that Plaintiffs have failed to produce more than a mere scintilla of evidence to support that theory.

VIII.

As Judge Caldwell concluded in *Bowles*,

> Having found no constitutional violations, summary judgment has been granted on all § 1983 claims in favor of the remaining defendants in this case. The § 1983 claims served as the sole basis for federal jurisdiction. Now without a federal hook, the Court declines to exercise supplemental jurisdiction over Bowles's state law claims. As has been shown above, there are significant state-law related issues in this case all related to complex and sensitive issues regarding negligence and medical care for prisons. The state courts, as a "surer-footed read[er] of applicable law," are best suited to resolve them.

Bowles, 2020 WL 7048274 at *10 (internal citations omitted).

Helphenstine may pursue his remaining claims in state court.

IX.

The "Constitution ... erects a series of hurdles that allegations of prisoner mistreatment must clear before they proceed to a jury." *Id.* This case is indeed a tragedy. Helphenstine's death may well have been avoided had the deputies made different decisions in the crucial days and hours. However, "the Fourteenth Amendment does not permit claims against jail officials [and medical professionals] for negligence, that is, claims regarding what [they] *should* have known or *should* have done." *Id.* A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as a violation of the constitution. On this narrow question—whether any of the defendants acted with deliberate indifference in their care of Chris Helphenstine—this Court cannot answer in the

affirmative. This is not to say that Plaintiff is without any remedy. But under the facts in the record and considering them in the light most favorable to her, such a remedy cannot be found under the rights afforded by the Constitution.

Accordingly, **IT IS HEREBY ORDERED**:

1) Defendant Tommy Von Luhrte's Motion for Partial Summary Judgment [Docket No. 74] be **OVERRULED WITHOUT PREJUDICE**;
2) Defendant Tommy Von Luhrte's Motion for Summary Judgment [Docket No. 94] be **SUSTAINED**;
3) Defendants' Motion for Summary Judgment [Docket No. 96] be **SUSTAINED** as to the 42 U.S.C. §1983 claims and **OVERRULED WITHOUT PREJUDICE** as to the state law claims; and
4) Defendant Tommy Von Luhrte's Motion for Joinder be **OVERRULED AS MOOT**.

A Judgment will be entered contemporaneously herewith.

This 5th day of May 2022.

Signed By:
Henry R Wilhoit Jr.
United States District Judge

Ex. 2

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0024p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JULIE HELPHENSTINE, Administratrix of the Estate of Christopher Dale Helphenstine and Guardian of B.D.H., the minor son of Christopher Dale Helphenstine,

Plaintiff-Appellant,

v.

LEWIS COUNTY, KENTUCKY; JEFF LYKINS, ANTHONY RUARK, ANDY LUCAS, BEN CARVER, AMANDA MCGINNIS, SANDY BLOOMFIELD, MARK RILEY, MELINDA MONROE, JEFFERY THOROUGHMAN, TOMMY VON LUHRTE, D.O., JOHNNY BIVENS, and JOHN BYARD, individually,

Defendants-Appellees.

No. 22-5407

Appeal from the United States District Court for the Eastern District of Kentucky at Ashland.
No. 0:18-cv-00093—Henry R. Wilhoit, Jr., District Judge.

Argued: December 7, 2022

Decided and Filed: February 9, 2023

Before: SUTTON, Chief Judge, COLE and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Gregory A. Belzley, BELZLEY, BATHURST & BENTLEY, Prospect, Kentucky, for Appellant. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Lewis County Appellees. Clayton L. Robinson, ROBINSON & HAVENS, PSC, Lexington, Kentucky, for Appellee Tommy von Luhrte, D.O. **ON BRIEF:** Gregory A. Belzley, BELZLEY, BATHURST & BENTLEY, Prospect, Kentucky, James L. Thomerson, ROSE GRASCH CAMENISCH MAINS PLLC, Lexington, Kentucky, for Appellant. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Lewis County Appellees. Clayton L. Robinson, Courtney L. Soltis, ROBINSON & HAVENS, PSC, Lexington, Kentucky, for Appellee Tommy von Luhrte, D.O.

OPINION

GRIFFIN, Circuit Judge.

Christopher Helphenstine was arrested and charged with drug crimes in Lewis County, Kentucky. While detained, he began to withdraw from alcohol or drugs. Despite severe vomiting and diarrhea, the only medical care he received was two doses of antiemetics, prescribed via fax machine by a doctor who never saw him. He died five days after his arrest. His estate sued several jail employees, the doctor contracted to provide medical care at the jail, and Lewis County for deliberate indifference to his serious medical needs in violation of the Fourteenth Amendment, and for negligence in violation of state law. The district court ruled that no defendant violated Helphenstine's constitutional rights, declined to exercise jurisdiction over the state-law negligence claim, and granted summary judgment in favor of all defendants. We affirm in part, reverse in part, and remand for further proceedings.

I.

Christopher Helphenstine was arrested and charged with drug offenses on April 14, 2017 and taken to the Lewis County Detention Center (the "jail"). He was detained there until he died en route to the hospital on April 19.

April 16, 2017. Around 8:30 p.m. on Sunday, April 16, Helphenstine "vomit[ed] all over the floor" in general population, so defendant Deputy Jailer Mark Riley moved him to a single-man "detox" cell. Helphenstine told Riley that he was "dope sick" and "wanted to be by hisself [sic] so he can get over it." Riley testified that he asked Helphenstine if he wanted to see a doctor or go to the hospital, but Helphenstine responded that he did not.

At the time of Helphenstine's detention, no jail employee had medical training beyond first aid and CPR. Instead, the jail contracted with local doctor Tommy von Luhrte, D.O., to provide medical care to inmates. Dr. von Luhrte was contractually obligated to visit the jail at least once a week, but he did not always do so if the jail did not report that any inmates were

sick. When he visited, he came on Tuesday nights. So when Helphenstine began feeling ill on Sunday evening, the jailers knew he would not receive any medical care for at least two days unless someone reached out to Dr. von Luhrte.

Beginning at 9:20 p.m., the jailers took turns checking on Helphenstine about every twenty minutes by opening a flap in the door to the isolation cell, looking into the cell, and occasionally talking to him. They recorded their observations on a log sheet that hung on the door of the cell. Helphenstine vomited again at 10:34 p.m.

April 17, 2017. According to the log sheet, Helphenstine was observed vomiting at 12:17 a.m. and 2:44 a.m. by defendant Deputy Jailer Anthony Ruark, and again at 5:42 a.m. by defendant Deputy Jailer Melinda Monroe.[1] He was "sitting up" for a brief period between 10:23 a.m. and 11:30 a.m., "talking" at 9:23 p.m., and "moving" at 11:12 p.m., but the log sheet otherwise notes him as "laying down" all day.

By midnight, Helphenstine's condition had deteriorated. Defendant Deputy Jailer Amanda McGinnis prepared a non-emergency but "urgent" medical request for Helphenstine, stating that he was in withdrawal (though she did not know from what), vomiting and soiling himself, refusing to eat or drink, and had not gotten out of bed for twenty-four hours. McGinnis faxed this request to Dr. von Luhrte's office, even though she knew the office was closed due to the late hour.

April 18, 2017. Between 6:00 a.m. and 7:00 a.m., Helphenstine was sweaty and smelled of vomit and feces, so he showered for almost an hour while jail staff cleaned his cell.

Helphenstine was scheduled to be arraigned that morning, so at about 9:15 a.m., defendant Deputy Sheriff John Byard escorted Helphenstine on the short walk from the jail to the courthouse. Byard noticed that Helphenstine was lethargic and drooling. Before the arraignment began, Byard approached the bench and told the judge that Helphenstine was "acting like he's just clear out of it," had "[s]tuff coming out of his mouth," and was "really not coherent."

[1]Apparently, Monroe has not been located, and thus not deposed.

The judge postponed the arraignment after speaking with deputies about his condition. Byard walked Helphenstine back to the jail, apparently without incident.

McGinnis's overnight fax was brought to Dr. von Luhrte's attention by mid-morning. Dr. von Luhrte testified that he called the jail and directed that Helphenstine be taken to a hospital to receive IV fluids, but he was told that Helphenstine refused to go to the hospital. Dr. von Luhrte could not remember with whom he spoke, and he did not document the call. There is no record of this call at the jail, and no defendant recalls taking a call from Dr. von Luhrte. Further, no jailer recalls Helphenstine ever refusing treatment (with the exception of Riley's question on April 16, after Helphenstine first vomited).

Regardless, Dr. von Luhrte testified that, because he believed Helphenstine had refused to go to the hospital, he faxed a prescription to the jail for Reglan (an antiemetic), and he encouraged Helphenstine to rest, sip liquids, and eat bland food. Dr. von Luhrte was concerned Helphenstine "might be getting dehydrated," but he did not instruct the jailers to monitor Helphenstine's food or fluid intake.

Around 3:00 p.m., Helphenstine received a dose of Reglan. Dr. von Luhrte testified that he received a call around that time from someone who identified themself only as "the jailer," whom Dr. von Luhrte thought might be defendant Jailer Jeff Lykins. Dr. von Luhrte testified that he again informed the jailer that Helphenstine needed to go to the hospital, but was told that Helphenstine refused again. Dr. von Luhrte told the jailer to try again, but Helphenstine purportedly refused a third time. As with the first call from Dr. von Luhrte, there is no record of this call taking place, and Lykins specifically denies ever speaking with Dr. von Luhrte. Dr. von Luhrte then prescribed Zofran, a stronger antiemetic, for Helphenstine.

Although April 18 was a Tuesday (his normal night to visit the jail) and although he knew of Helphenstine's condition, Dr. von Luhrte did not visit the jail that evening. There is a dispute over whether the jail sent a "Sick Call List" to Dr. von Luhrte's office. The doctor claims he did not receive one. But the jail produced a Sick Call List dated April 17, 2017, listing three inmates that needed medical attention. Nonetheless, Dr. von Luhrte failed to go to the jail to treat Helphenstine.

At 9:00 p.m., Helphenstine received doses of both Reglan and Zofran. About that time, defendant Deputy Jailer Andy Lucas checked on Helphenstine, who told Lucas "that he was not going to drink any more whiskey again." Lucas testified that Helphenstine was standing and alert at that time. Around 11:00 p.m., Helphenstine asked for something cold to drink, so Lucas brought him a Mountain Dew. Helphenstine drank some of the soda and then said, "I'm feeling all right now."

April 19, 2017. At about midnight, Helphenstine laid face-down on his mat. For the next few hours, he remained there, largely motionless. Video shows him occasionally twitching and raising or shaking his feet.

At 2:42 a.m., a deputy entered Helphenstine's cell to check on him. McGinnis testified that this was Ruark, but Ruark was unsure whether he did this. The jailer twice offered Helphenstine a drink, but he refused. At 2:50 a.m., McGinnis also entered Helphenstine's cell. While the first deputy lifted Helphenstine's head, McGinnis put a straw to his mouth and encouraged him to drink. At about 2:56 a.m., McGinnis helped Helphenstine drink a small amount again. And at 3:13 a.m., McGinnis observed Helphenstine through the window and noted that he had consumed some liquid. Defendant Deputy Jailer Sandy Bloomfield, the shift supervisor, watched this entire interaction on video from the control room.

Around 3:30 a.m., Ruark looked through the window into Helphenstine's cell, where it "appeared to [him] that something may be wrong[.]" Helphenstine did not respond to his name, so Ruark asked another jailer to get Bloomfield from the control room and see if she could get Helphenstine to respond. McGinnis also came to help; she could not locate Helphenstine's pulse. They observed Helphenstine as cold, blue, and unresponsive, and began CPR while Bloomfield called 911. EMTs described Helphenstine as "warm and drenched in sweat" when they arrived. They took over CPR and transported Helphenstine to the hospital. He was pronounced dead en route.

Plaintiff's experts testified that Helphenstine died either from withdrawal or from severe dehydration caused by withdrawal. But Helphenstine's death certificate lists his cause of death as "acute (fentanyl) and chronic drug abuse," with the interval between onset and death listed as

minutes. The medical examiner who performed the autopsy, Dr. Meredith Frame, testified that fentanyl was present in Helphenstine's blood at a level of 1.8 ng/ml. This was within her understanding of the therapeutic levels of fentanyl (1 to 3 ng/ml). However, there is no evidence that Helphenstine took fentanyl at any time while at the jail.

Plaintiff Julie Helphenstine, the decedent's wife and administratrix of his estate,[2] sued, bringing a deliberate indifference claim under 42 U.S.C. § 1983 against all defendants and a negligence claim under Kentucky law against the individual defendants. In addressing defendants' motion for summary judgment, the district court analyzed plaintiff's § 1983 claim against each defendant individually, concluded that none were deliberately indifferent, and declined to exercise jurisdiction over the state-law negligence claim. Accordingly, the court granted summary judgment in favor of all defendants. Plaintiff timely appealed.[3]

II.

We review the district court's summary judgment rulings de novo. *Wilmington Tr. Co. v. AEP Generating Co.*, 859 F.3d 365, 370 (6th Cir. 2017). "Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," when ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The parties quibble regarding our standard of review. Plaintiff argues that we must view defendants' "self-serving testimony" with "a heightened degree of skepticism." The Lewis County defendants respond that we need not do so because plaintiff forfeited this argument and because she relies on nonbinding out-of-circuit precedent for this proposition.

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[2]Because the couple shares a surname, we refer to decedent Chris Helphenstine as Helphenstine, and Julie Helphenstine as plaintiff.

[3]Plaintiff has not appealed the district court's grant of summary judgment in favor of defendant Johnny Bivens, and on appeal, she has waived any opposition to the grant of summary judgment in favor of defendants Ben Carver and Jeffrey Thoroughman.

While plaintiff did not characterize the Lewis County defendants' testimony as "self-serving" before the district court, the thrust of her argument was the same: because all reasonable inferences must be drawn in her favor, we need not accept defendants' statements or arguments as true if there is conflicting evidence to the contrary. Thus, she has not forfeited this argument. But the Lewis County defendants are correct when they note that, in our circuit, we do not "disregard evidence merely because it serves the interests of the party introducing it." *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 239 (6th Cir. 2010). True, we may disregard self-serving statements when they are "blatantly contradicted by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007). But we need not apply any special scrutiny to defendants' statements simply because they are self-serving. *See, e.g.*, *Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*, 42 F.4th 568, 589 (6th Cir. 2022). Of course, the general rules—that we must take all reasonable inferences in plaintiff's favor and may not make any credibility determinations—still apply. *Liberty Lobby*, 477 U.S. at 255.

A.

Plaintiff claims that defendants were deliberately indifferent to a serious risk of harm to Helphenstine, in violation of his constitutional rights.

1.

Until recently, we analyzed both pretrial detainees' and prisoners' claims of deliberate indifference "under the same rubric." *Brawner v. Scott Cnty.*, 14 F.4th 585, 591 (6th Cir. 2021) (citation omitted). A prisoner's deliberate indifference claim arises from the Eighth Amendment and has objective and subjective components. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The "objective component" addresses the conditions leading to the alleged violation: it "requires a plaintiff to prove that the alleged deprivation of medical care was serious enough to violate the Constitution." *Griffith v. Franklin Cnty.*, 975 F.3d 554, 567 (6th Cir. 2020) (citation and brackets omitted). The "subjective" component, meanwhile, addresses the officials' state of mind and requires a plaintiff to show that a defendant "kn[ew] of and disregard[ed] 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." *Farmer*, 550 U.S. at 837.

But in *Brawner*, we considered whether the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), required "modification of the subjective prong of the deliberate-indifference test for pretrial detainees," like Helphenstine. 14 F.4th at 596. In *Kingsley*, the Court addressed the standard for excessive force claims brought by both pretrial detainees and convicted prisoners. 576 U.S. at 400–02. The Court concluded that a pretrial detainee need demonstrate "only that the force purposely or knowingly used against him was objectively unreasonable," rather than *both* objectively and subjectively unreasonable, like a prisoner must. *Id.* at 396–97, 400–02. It based its decision largely on the difference between the Due Process Clause of the Fourteenth Amendment (from which a pretrial detainee's claim arises) and the Cruel and Unusual Punishments Clause of the Eighth Amendment (from which a prisoner's claim arises). *Id.* at 398–402. The Court did not, however, address whether an objective-only standard applies to other pretrial-detainee claims, such as deliberate indifference. *See Brawner*, 14 F.4th at 592.

Brawner answered the question left open by *Kingsley*, holding that *Kingsley* required modification of the subjective component of a pretrial detainee's deliberate indifference claim: "Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable." *Id.* at 596. We modified the subjective prong as follows: "A pretrial detainee must prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (internal quotation marks omitted). In other words, a plaintiff must prove that a defendant "acted deliberately (not accidentally), [and] also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* (quoting *Farmer*, 511 U.S. at 836).

Recently, however, a panel of this court called this reading of *Brawner* into question. *See Trozzi v. Lake Cnty.*, 29 F.4th 745 (6th Cir. 2022). In *Trozzi*, the panel agreed that *Brawner* modified the subjective element. *Id.* at 753–54. But based on the *Brawner* opinion itself,

"post-*Brawner* decisions, and background principles," *id.* at 754, it concluded that the subjective inquiry "still requires consideration of an official's actual knowledge of the relevant circumstances." *Id.* at 755. It then framed the test this way: "Reading *Farmer*, *Kingsley*, *Brawner*, and *Greene* [*v. Crawford Cnty.*, 22 F.4th 593 (6th Cir. 2022)] together, a plaintiff must satisfy three elements for an inadequate-medical-care claim under the Fourteenth Amendment: (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official *knew* that his failure to respond would pose a serious risk to the pretrial detainee and *ignored* that risk." *Id.* at 757–58 (emphasis added).

We hold that this framing of the elements is irreconcilable with *Brawner*. We appreciate that our sister circuits are all over the map on this issue. As an initial matter, four circuits have rejected the extension of *Kingsley* to deliberate indifference claims. *See Cope v. Cogdill*, 3 F.4th 198, 207 n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 989–93 (10th Cir. 2020); *Dang by & through Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Three more circuits continue applying the pre-*Kingsley* framework, though without ruling out a future switch. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016); *Moore v. Luffley*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); *Mays v. Sprinkle*, 992 F.3d 295, 300–01 (4th Cir. 2021). As to the circuits that extend *Kingsley*'s objective inquiry to deliberate indifference, they disagree on the question to ask. One circuit asks what "a reasonable official in the [defendant's] circumstances would have appreciated" about the risks facing a detainee. *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). One circuit asks what the defendant himself knew or should have known about the risks. *Darnell v. Pinerio*, 849 F.3d 17, 34–35 (2d Cir. 2017). And a third circuit asks if the defendant displayed "purposeful, knowing, or reckless disregard of the consequences." *Miranda v. Cnty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018); *Pittman by & through Hamilton v. Cnty. of Madison*, 970 F.3d 823, 827 (7th Cir. 2020) (same).

Whatever the merits of these approaches to *Kingsley*, we do not think that *Brawner* leaves the question open. Simply put, *Brawner* held that *Kingsley* required us to lower the subjective

component from actual knowledge to recklessness. Indeed, several panels of our court have interpreted *Brawner* in this way. *See Greene*, 22 F.4th at 610 ("A jury could find that Greene's need for immediate medical attention was 'known or so obvious that it should [have been] known to [defendant.]'" (first alteration in original)); *Britt v. Hamilton Cnty.*, No. 21-3424, 2022 WL 405847, at *2 (6th Cir. Feb. 10, 2022) ("The key question in this case goes to deliberate indifference: Did the officers act 'recklessly in the face of an unjustifiably high risk' that is either 'known or so obvious that it should be known'?" (quoting *Brawner*, 14 F.4th at 596–97)).

Because *Brawner* was decided before *Trozzi*, *Brawner* controls. *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017); *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Accordingly, plaintiff must show (1) that Helphenstine had a sufficiently serious medical need and (2) that each defendant "acted deliberately (not accidentally), [and] also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Brawner*, 14 F.4th at 596 (quoting *Farmer*, 511 U.S. at 836).

2.

Defendants do not challenge the district court's finding that Helphenstine suffered an objectively serious medical need. Thus, our focus rests exclusively on the subjective prong.

Greene v. Crawford County is instructive for the subjective analysis. There, Dwayne Greene was booked into the county jail. 22 F.4th at 601. He was drunk, and the booking staff suspected he would experience alcohol withdrawal. *Id.* But by the time Greene was booked, the jail nurse had left and would not return to the jail for four days. *Id.* Greene was detained without incident for a few days until jailers observed him hallucinating. *Id.* at 601–02. A jailer requested a mental health evaluation for Greene, so a mental health counselor evaluated Greene and determined he was experiencing delirium tremens (a severe form of alcohol withdrawal). *Id.* at 602–03. The counselor did not encourage jail staff to seek medical treatment. *Id.* at 603. By the end of that day, "Greene had been in the jail for three days and had not received any basic medical care. He had not seen a medical professional, had not received any medication, had not had his blood pressure, temperature, or any vitals checked, had not received an IV, and had not

been offered any fluids beyond water." *Id.* Greene was found unresponsive in his cell at 7:38 a.m. the next morning and taken to the hospital, where he later died. *Id.* at 603–04.

Greene's estate brought deliberate indifference claims against several jailers. *Id.* at 604. The district court granted summary judgment in favor of some and denied as to others. *Id.* at 607–08. On appeal, we held that "a jury could find that Greene was in 'obvious' need of *some* medical attention in the hours following [the] evaluation." *Id.* at 608–09 (quoting *Brawner*, 14 F.4th at 597). Despite Greene's hallucinations and the fact that he "had not slept in over 24 hours prior to his incapacitation[,]" the "County Defendants nonetheless failed to seek any basic medical assistance." *Id.* at 609. "At a certain point, [that] bare minimum observation ceases to be constitutionally adequate." *Id.* We left the question of when that point occurred "for the jury to determine." *Id.* We then applied these principles to each defendant and held that a jury could find that several defendants recklessly failed to act reasonably by not seeking medical assistance for Greene. *Id.* at 609–13.

3.

With this framing in mind, we review each defendant's actions individually. *Id.* at 607.

Mark Riley. Riley moved Helphenstine from general population to the detox cell on April 16, knew that Helphenstine was "dope sick," and knew that he vomited at least once. Riley admitted that "somebody needed to call Dr. [v]on Luhrte" at that time. Because he neither placed that call nor asked another defendant to call Dr. von Luhrte on April 16, a reasonable jury could find that Riley acted with deliberate indifference.

Riley resists, arguing that during his shift, no reasonable officer would understand that Helphenstine was experiencing an objectively serious medical need. "A sufficiently serious medical need 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." *Griffith*, 975 F.3d at 567 (internal quotation marks removed). Vomiting is "a clear manifestation of internal physical disorder." *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 899 (6th Cir. 2004). Further, that jailers "deem[] [a detainee]'s condition sufficiently serious to place him in an observation cell" tends to show a sufficiently serious medical need. *Id.*

When Helphenstine began to fall ill on April 16, Riley knew he needed medical attention: Riley knew he had vomited, moved him to an observation cell, and testified that someone needed to call a doctor. Thus, a reasonable jury could conclude that Helphenstine's medical need was, at this point, so obvious that a lay person like Riley should—and did—recognize the need for medical attention. *See id.*

Because Riley, a lay person, recognized that Helphenstine's condition was serious enough that he needed medical attention, a jury could also reasonably conclude that Riley recklessly disregarded that known risk to Helphenstine's health via his inaction. Accordingly, we reverse the district court's grant of summary judgment in favor of Riley.

Amanda McGinnis. Defendant McGinnis had, comparatively, a large amount of contact with Helphenstine. Late in the evening on April 17, she knew he was going through withdrawal, and she sent the initial fax to Dr. von Luhrte early on April 18, noting that Helphenstine was vomiting and soiling himself, refusing to eat or drink, and had not gotten out of bed for 24 hours. She knew that other deputies cleaned Helphenstine's cell of vomit and feces while he showered that morning and that he was not feeling well at that point. In the early morning hours of April 19, another jailer had to help McGinnis hold Helphenstine's head up for him to drink. McGinnis even admitted that she consciously treated Helphenstine's medical needs differently on account of his being detained:

> Q: If—and I understand that you were constrained by your employment and the things—the way things worked at the jail but if you'd come home one night and seen a family member or a loved one in Mr. Helphenstine's condition that you saw the night of the 17th when you sent the medical request form to Dr. [von Luhrte], would you have taken them to the hospital?
>
> A: Yes.

A reasonable jury could find that McGinnis acted with deliberate indifference.

Despite McGinnis's admission that she would have taken "a family member or a loved one" in Helphenstine's condition to the hospital, she took no action to help him beyond faxing Dr. von Luhrte—which she knew would not result in a response for at least several hours. The district court concluded that McGinnis had done enough, relying on the general principle that it is often sufficient for a jailer to contact a medical professional when they perceive a medical

issue with an inmate or detainee. *See Winkler v. Madison Cnty.*, 893 F.3d 877, 903 (6th Cir. 2018). But that general rule applies when a jailer contemporaneously contacts a medical professional who can provide *near-immediate* treatment. Indeed, we have found that as little as a one-hour delay in treatment could be enough for a jury to conclude that a jailer was indifferent to an inmate's medical needs. *See Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 845 (6th Cir. 2002) (holding that "although she knew about the decedent's serious medical condition, [the defendant] chose to wait [almost an hour] for Dr. Said instead of immediately contacting another physician or the emergency team," from which a jury could impose liability). The same is true here: A jury could conclude that McGinnis's choice to send a fax in the middle of the night, when no one would be present at Dr. von Luhrte's office and no one would respond for several hours, was deliberately indifferent to Helphenstine's medical needs.

Moreover, McGinnis was with Helphenstine shortly before his death and observed that he was effectively unresponsive. Around 3 a.m. on April 19, Helphenstine could not even lift his head to drink. McGinnis knew that Helphenstine had not received any medical attention or care beyond two doses of antiemetics. Despite this personal observation and knowledge, she did not seek medical attention for him.

We have held that similar facts were enough to establish a constitutional violation under the pre-*Brawner* standard, so they are certainly enough to defeat summary judgment now. *See Smith v. Cnty. of Lenawee*, 505 F. App'x 526 (6th Cir. 2012). In *Smith*, a defendant shift commander was only present at the jail for a detainee's final hours of life before the detainee died of delirium tremens. *Id.* at 534–35. The commander knew that the detainee was medicated, and that she was "resting more quietly . . . than she had during the previous day." *Id.* at 535. However, when he went into the detainee's cell, he did not check the detainee's vitals, and she was largely unresponsive. *Id.* at 534–35. We found that the commander "was on notice that [the detainee] was very ill and yet did nothing to make sure that [the detainee] had not taken a turn for the worse." *Id.* at 535.

We cited *Smith* approvingly in *Greene*: "[A defendant] did not observe Greene in a near-lifeless state like [the] officer in *Smith* observed. However, worse than the officer in *Smith*, [that defendant] knew on December 8 that Greene had not received any medication—or any basic

medical assistance—in four days." 22 F.4th at 611. Given this information, which the defendant actually knew, a jury could infer that the defendant was on notice of Greene's serious illness and yet did nothing—enough to satisfy *Brawner* and defeat summary judgment. *Id.*

The same is true here: McGinnis observed Helphenstine in a near-lifeless state, knowing that Helphenstine had not received even basic medical observation or assistance. A jury could reasonably conclude that she recklessly failed to act reasonably by not seeking medical assistance for Helphenstine. The district court erred in concluding otherwise.

Anthony Ruark and Sandy Bloomfield. The *Smith*/*Greene* analysis is equally applicable to Ruark and Bloomfield, and a reasonable jury could conclude that they acted with deliberate indifference.

Ruark knew that Helphenstine was in withdrawal and observed him vomiting at least twice in the early morning hours of April 17. Ruark testified that he could not recall if Helphenstine could "hold[] anything down" at the time. And a jury could conclude that around 3 a.m. on April 19, Ruark saw Helphenstine lying face down, barely moving, and had to physically lift his head for McGinnis to help him to drink. But Ruark did not seek medical attention for Helphenstine.

Similarly, Bloomfield knew Helphenstine was in the observation cell because he was "dope sick," and she knew he was going through withdrawal. Bloomfield was aware that he had diarrhea and had been vomiting and sweating. She saw Helphenstine lie face-down on his mat via the jail cameras on the morning of April 19. And she watched McGinnis and the other officer try to get Helphenstine to drink some liquid, but instead observed him lying down without moving. Yet Bloomfield did not seek medical attention for Helphenstine.

As in *Smith* and *Greene*, these defendants observed Helphenstine in a near-lifeless state after days of illness. A jury could reasonably conclude that they recklessly failed to act reasonably by not seeking medical assistance for Helphenstine.

To avoid this conclusion, Bloomfield argues that she believed Helphenstine was, at various times, "coherent," responsive, and improving. Thus, she argues, she did not *know* of any

risk, so she could not disregard that risk and she is not liable. But these observations are of no moment when we apply *Brawner*. Although Bloomfield observed Helphenstine's condition fluctuate, the record demonstrates that she should have known that he was urgently in need of medical care—at the very least, when she observed Helphenstine unmoving and unable to lift his own head to drink, she *should* have recognized a serious need for medical care. Reckless inaction in the face of that obvious need is enough to proceed to a jury under *Brawner*. The district court erred in concluding otherwise.

Jeff Lykins. Lykins is Lewis County's elected Jailer. Plaintiff brings a deliberate indifference claim against Lykins both in his individual and supervisory capacities, which we address in turn.

Lykins first learned of Helphenstine's condition on April 17, when he reviewed Riley's report (dated April 16) that Helphenstine had vomited and was moved to an observation cell. He interacted with Helphenstine on April 18 around the time of the scheduled arraignment, when he thought Helphenstine "looked okay." And Lykins agreed that at that time, there was no one at the jail "who could determine whether Mr. Helphenstine's condition was a medical emergency, other than Dr. [v]on Luhrte."

Further, Dr. von Luhrte testified that he called the jail on the afternoon of April 18 and spoke with someone who identified himself only as "the jailer," whom Dr. von Luhrte believed to be Lykins. The doctor testified that he instructed the jailer to take Helphenstine to the hospital twice, which Helphenstine refused. But Lykins testified that he did not speak to Dr. von Luhrte that day (as did all other Lewis County defendants). And no defendant ever heard Helphenstine refuse treatment. This leaves a material dispute of fact, from which a jury could conclude that Dr. von Luhrte told Lykins to take Helphenstine to the hospital, but Lykins did not act on that advice. If the jury believed Dr. von Luhrte, it could also reasonably conclude that Lykins knew Helphenstine's condition needed hospital care. Under such circumstances, a trier of fact could reasonably conclude that Lykins acted at least recklessly by disregarding that advice.[4]

[4]True, Lykins would have been entitled to *rely* on Dr. von Luhrte's medical advice. *See Winkler*, 893 F.3d at 895. However, he is not entitled to ignore or reject Dr. von Luhrte's advice.

Accordingly, the district court erred when it granted summary judgment in favor of Lykins in his individual capacity.

However, for plaintiff's supervisory-liability claim to succeed, she must show that Lykins was actively involved in offensive conduct, and that his conduct caused Helphenstine's injuries. *Crawford v. Tilley*, 15 F.4th 752, 761–62 (6th Cir. 2021). She has not done so.

We begin and end with active involvement. "To succeed on a supervisory liability claim, a plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Id.* at 761 (brackets and quotation marks omitted). This requires active unconstitutional conduct by the supervisor because supervisory liability will not attach for a failure to act. *Id.* But plaintiff's claim rests entirely on Lykins's purported failure to act: she argues that Lykins "failed to effect [Dr. v]on Luhrte's order that Helphenstine be taken to the hospital"; "did not check on Helphenstine"; and "conducted no investigation at all into what had happened to Helphenstine, or the performance of his staff or [Dr. v]on Luhrte." There is no evidence that he directed any subordinate to act in a way that violated Helphenstine's rights, nor is there evidence that he authorized or acquiesced in any unconstitutional conduct. Thus, the district court properly granted summary judgment in Lykins's favor on the supervisory-liability claim against him.

John Byard and Andy Lucas. The two remaining individual Lewis County defendants had no reason to know that Helphenstine was suffering a serious medical need. Accordingly, the district court properly granted summary judgment in their favor.

Byard merely walked Helphenstine from the jail to the courthouse on April 18; informed the judge that Helphenstine was "acting like he's just clear out of it," had "[s]tuff coming out of his mouth," and was "really not coherent"; and walked Helphenstine back to the jail.

Lucas had only two brief contacts with Helphenstine. Around 9:00 p.m. on April 18, he saw Helphenstine in the isolation cell, when Helphenstine told Lucas he "was not going to drink anymore whiskey again." Around 11:30 p.m., he brought Helphenstine a Mountain Dew to drink. There is no evidence that Lucas was aware of Helphenstine's medical condition over the

previous days, particularly since Lucas spent most of his shift physically separated from the part of the jail where Helphenstine was housed.

Neither Byard nor Lucas observed vomiting, diarrhea, shaking, sweating, or any other manifestation of illness. Neither had any "reason to appreciate the seriousness of [Helpenstine's] condition." *Speers v. Cnty. of Berrien*, 196 F. App'x 390, 396 (6th Cir. 2006). Although both Byard and Lucas knew that Helphenstine was going through withdrawal, that knowledge alone did not require either of them to seek medical care for Helphenstine, particularly since withdrawal "typically may be managed in a prison setting and indeed frequently is managed there." *Id.* at 395. While it may have been prudent for Byard and Lucas to seek some medical care for Helphenstine, no reasonable jury could conclude that they were aware of a serious medical need, nor that they recklessly disregarded a known or obvious risk to Helphenstine's health.

In response, plaintiff highlights Lucas's admission that if he knew the jail's policy that classified withdrawal as a medical emergency, he would have called an ambulance for Helphenstine on April 18. Unlike McGinnis's similar admission, though, this question was not premised on Lucas's personal knowledge of Helphenstine's condition. It was based only on the jail's policy, which Lucas failed to follow. Alone, the failure to follow an internal policy does not give rise to a deliberate indifference claim. *Griffith*, 975 F.3d at 578.

For these reasons, we affirm the district court's grant of summary judgment in favor of Byard and Lucas.

Dr. von Luhrte. Because Dr. von Luhrte is a physician, the subjective component of plaintiff's claim against him is slightly different than that of the other defendants. Generally, "a patient's disagreement with his physicians over the proper course of treatment alleges, at most, a medical-malpractice claim, which is not cognizable under § 1983." *Darrah v. Krisher*, 865 F.3d 361, 372 (6th Cir. 2017). But "a doctor's provision of 'grossly inadequate medical care' to an involuntary detainee may amount to deliberate indifference." *Miller v. Calhoun Cnty.*, 408 F.3d 803, 819 (6th Cir. 2005) (quoting *Terrance*, 286 F.3d at 844). "Grossly inadequate medical care is medical care that is 'so grossly incompetent, inadequate, or excessive as to shock the

conscience or to be intolerable to fundamental fairness.'" *Id.* (quoting *Terrance*, 286 F.3d at 844). And when the medical need is obvious, "medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference." *Terrance*, 286 F.3d at 843 (citation omitted).

Dr. von Luhrte was never physically present at the jail, but he received a fax explaining that Helphenstine was in withdrawal, "soiling himself and vomiting [and] refusing to eat and drink due to upset stomach." This led him to believe that Helphenstine "might be getting dehydrated." But in response, Dr. von Luhrte merely faxed two prescriptions to the jail and encouraged Helphenstine to rest, sip liquids, and eat bland food. He testified that by the afternoon of April 18, Helphenstine's condition may have been a medical emergency and he required treatment that only a hospital could provide. Nonetheless, Dr. von Luhrte neither visited the jail, nor provided medical care or direction for Helphenstine's treatment.

To be sure, Dr. von Luhrte maintains that he called the jail twice and advised that Helphenstine must be taken to the hospital immediately. However, the jail does not have record of either telephone call and no Lewis County defendant recalls ever speaking to Dr. von Luhrte. Thus, there is a genuine issue of material fact as to whether the phone calls occurred.

On this record, a reasonable jury could conclude that Dr. von Luhrte acted with deliberate indifference. Dr. von Luhrte knew that Helphenstine was in distress and knew that he needed treatment that only a hospital could provide. With this knowledge, a reasonable jury could conclude that he did not direct the jail staff to transport Helphenstine to the hospital, and thus find that this inaction in the face of Helphenstine's serious medical need was deliberately indifferent. *See Gibson v. Muskowitz*, 523 F.3d 657, 662–63 (6th Cir. 2008).

Moreover, a jury could conclude that the treatment Dr. von Luhrte *did* provide was "so cursory as to amount to no treatment at all[.]" *Terrance*, 286 F.3d at 843 (citation omitted). Despite acknowledging that Helphenstine needed IV fluid replacement and hospital-grade care, he only prescribed antiemetics and advised the jailers to help Helphenstine orally rehydrate. A reasonable jury could conclude that Dr. von Luhrte knew that treatment plan would be inadequate. *See id.*; *cf. Rouster v. Cnty. of Saginaw*, 749 F.3d 437, 448 (6th Cir. 2014)

("Had [the defendant] been subjectively aware of the seriousness of [the inmate's] medical condition, her decision to treat him only with over-the-counter medication might have been so cursory as to amount to a conscious disregard of his needs."). Thus, the question of "whether that course of treatment constituted deliberate indifference is a question best suited for a jury." *Darrah*, 865 F.3d at 370. The district court erred when it granted summary judgment in Dr. von Luhrte's favor.

Lewis County. Plaintiff also seeks to impose municipal liability on Lewis County. "A municipality is a 'person' under 42 U.S.C. § 1983, and so can be held liable for constitutional injuries for which it is responsible." *Morgan v. Fairfield Cnty.*, 903 F.3d 553, 565 (6th Cir. 2018) (citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978)). A municipality cannot be liable under a theory of respondeat superior; it can only be held liable for "its own wrongdoing." *Id*. This requires plaintiff to demonstrate that the alleged federal violation occurred because of a municipal "policy or custom." *Monell*, 436 U.S. at 694. A municipality may be held liable under one of four recognized theories: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). Plaintiff argues that Lewis County failed to adequately train and supervise its jailers regarding medical emergencies. We agree.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). There are two ways to support a claim that a failure to train or supervise is the result of a municipality's deliberate indifference. Plaintiff may prove (1) a "pattern of similar constitutional violations by untrained employees" or (2) "a single violation of federal rights, accompanied by a showing that [the municipality] has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation." *Shadrick v. Hopkins Cnty.*, 805 F.3d 724, 738–39 (6th Cir. 2015) (internal quotation marks omitted). Plaintiff has not identified any other constitutional violations, so she must demonstrate that the single violation (Helphenstine's death)

was accompanied by Lewis County's failure to train the jailers to handle this potentially recurring situation. This sort of claim is available only "in a narrow range of circumstances," where a federal rights violation "may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations." *Board of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

The question here is whether the County's failure to train its employees amounted to deliberate indifference, on behalf of the County, to the rights of detainees. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Such a claim has three elements. Plaintiff must show (1) that the County's "training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Winkler*, 893 F.3d at 902 (citation omitted). Here, a reasonable jury could conclude that she has met her burden.

First, the adequacy of the training program. Drug and alcohol withdrawal was common among people housed at the jail. The jail's written policies stated that "[d]rug or alcohol withdrawal" constituted an emergency. But the written policies contained no instructions or guidelines for how staff should care for an inmate in withdrawal beyond contacting the "Jail Medical Coordinator and the Facility Physician[.]"[5]

The record is mixed on whether the jailers ever received any training or instruction regarding withdrawal or medical emergencies. McGinnis testified that she had received training on what constituted an alcohol-withdrawal-related medical emergency, identifying uncontrollable vomiting, diarrhea, or unresponsiveness. Most jailers agreed that an inmate experiencing a medical emergency should be sent to the hospital, but the deputy jailers also testified that they had not received any training regarding withdrawal or how to identify medical emergencies. Indeed, Lykins agreed that no one at the jail had specific "training to determine whether someone going through alcohol or drug withdrawal was experiencing signs or symptoms that indicated that their withdrawal was about to be fatal." And several Lewis County defendants

[5]The medical coordinator is not a medically trained position. Rather, the medical coordinator is responsible for corresponding with Dr. von Luhrte, making appointments, and medical billing.

professed ignorance when asked if they knew that a jail policy identified drug or alcohol withdrawal as a medical emergency—some had never even seen the policy.

The Lewis County defendants argue (and the district court held) that they received sufficient training because some defendants testified that they knew what to look for to identify a medical emergency. We find this argument unpersuasive for two reasons. First, defendants testified that they did *not* receive training on how to identify a withdrawal-related medical emergency. The fact that they could identify some symptoms of medical emergencies likely came from some other source (perhaps experience or common sense). It did not come, on this record, from a training provided by the jail. And second, even if they were able to identify signs of a medical emergency in the abstract, they were unable to do so when one presented itself. For example, McGinnis and Ruark testified that severe vomiting could be an emergency. But these defendants observed Helphenstine vomiting—Ruark even testified that he was not sure that Helphenstine could hold anything down—and did not seek medical intervention. Given this, a reasonable jury could conclude that their training, to the extent they were trained, was insufficient.

Finally, the district court held that the fact that the jailers received only CPR and first aid training cannot create a question of fact on a failure-to-train claim in this circuit. That statement of the law is inaccurate. True, we have held that jailers trained in CPR and first aid received adequate training to respond to medical emergencies. *See Winkler*, 893 F.3d at 903; *Berry v. Delaware Cnty. Sheriff's Off.*, 796 F. App'x 857, 864 (6th Cir. 2019). But in *Winkler*, the jail had trained medical staff on site forty hours per week, and medical staff was "available to jail personnel, either in person or by phone, for consultation about an inmate 24 hours a day, 7 days a week." 893 F.3d at 885, 903. And in *Berry*, the jail had "nursing coverage 24 hours a day, seven days a week," so the jailers' training was sufficient. 796 F. App'x at 864. Those jailers could immediately contact medically trained staff, so first aid and CPR training was sufficient to bridge the short gap between contacting a medical professional and medical treatment. Not so here, where a detainee was almost wholly reliant on the jailers for medical care.

At bottom, it appears that defendants were not trained on how to identify or address a medical emergency. A jury could easily conclude that this training program, to the extent that it existed, was insufficient.

Second, Lewis County's deliberate indifference. "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (brackets and quotation marks omitted). If the "unconstitutional consequences of failing to train" employees are "patently obvious," the county "could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id.* at 64. Asking employees to use professional judgment that lies outside their area of expertise may demonstrate deliberate indifference. *See Canton*, 489 U.S. at 390 & n.10. For example, absent specific training on the use of deadly force, armed police officers would not be "equipped with the tools" necessary to make the relevant legal determination. *Connick*, 563 U.S. at 70.

The inadequacy of the training and supervision at the jail demonstrates that it results from the County's deliberate indifference to the rights of its inmates because the possible unconstitutional consequences are patently obvious. This is particularly palpable when viewing Lewis County's woeful training policy against the backdrop of Dr. von Luhrte's performance and the County's lack of supervision.

Begin with the written policies: The County hired Dr. von Luhrte to provide medical care to inmates, but required him to visit the jail only once a week. This violates Kentucky's administrative regulations, which mandate that a jail conduct at least two sick calls per week. 501 Ky. Admin. Regs. 3:090(10)(a), 3:170. And the County had a policy that the elected jailer, Lykins, was to publish a quarterly report on the jail's medical services. But Lykins did not do so. Indeed, Lykins had *never actually seen* Dr. von Luhrte visit the jail, and explicitly testified that the County did not supervise Dr. von Luhrte's performance in any way.

Further, Dr. von Luhrte was unaware of the policies and regulations that did exist, including the ones regarding the standard of care he owed to the inmates. He agreed that he had no knowledge of the specific "medical services that are supposed to be provided to inmates in Kentucky jails." Dr. von Luhrte testified that he often treated minor ailments over the phone

without examining the patient. And he admitted that he did not have the experience to treat an inmate in withdrawal.

The jail doctor was unable to deal with common medical conditions at the jail, and he was rarely present at the jail. The deputy jailers did not have any medical training or medical knowledge, so often, no one at the jail could recognize or treat a medical emergency. But with no medical professionals on site, the County effectively asked the jailers to make determinations about what constituted a medical emergency—a requirement well outside their area of expertise. And the County did not supervise the jailers or Dr. von Luhrte at all. A reasonable jury could easily conclude that these policies were the result of the County's deliberate indifference to inmate health and safety. *See Shadrick*, 805 F.3d at 742 ("Because it is so highly predictable that a poorly trained [County employee] working in the jail setting 'utterly lacks an ability to cope with constitutional situations,' a jury reasonably could find that [the County]'s failure to train reflects 'deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights.'" (quoting *Connick*, 563 U.S. at 64, 67 (brackets omitted))).

Third, relation to Helphenstine's death. There is a dispute of material fact as to Helphenstine's cause of death. It is not clear whether he died from fentanyl intoxication (as set forth on the death certificate), alcohol withdrawal (as asserted by one of plaintiff's experts), or severe dehydration due to alcohol withdrawal (as identified by another of plaintiff's experts). On this record, a jury could conclude that he died from withdrawal (or related complications), which was mismanaged and ignored by defendants.

In sum, a jury could conclude that Helphenstine's death was the result of the County's deliberate indifference. Helphenstine fell ill on April 16 and received no medical attention or care until his death three days later. No Lewis County defendant tried to effect Dr. von Luhrte's advice that Helphenstine be provided with rehydrating food or drink. County employees gave him two doses of antiemetics, but no County employee ever checked his vitals; provided him with rehydration beyond sips of Mountain Dew, water, Ensure, or juice; or sought hospital-level care. The County offered little more to Helphenstine than observation, and "[a]t a certain point, bare minimum observation ceases to be constitutionally adequate." *Greene*, 22 F.4th at 609. Plaintiff has demonstrated that a reasonable jury could conclude that the County's training and

supervision was inadequate, that the inadequacy was caused by Lewis County's indifference, and that the inadequacy caused Helphenstine's death. The district court improperly granted summary judgment in favor of Lewis County.

B.

The Lewis County Defendants also argue that they are entitled to qualified immunity on plaintiff's claims. Qualified immunity shields public officials from personal liability under § 1983 unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether defendants are entitled to qualified immunity, we must ask two questions: (1) "whether the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citation omitted).

The inquiry is simple for defendants Byard and Lucas. Having concluded above that their conduct did not rise to the level of deliberate indifference, they are entitled to qualified immunity because they did not violate Helphenstine's constitutional rights. But for the remaining defendants, who may have violated a constitutional right, we must consider whether the right they allegedly violated was clearly established. *See, e.g.*, *Burwell v. City of Lansing*, 7 F.4th 456, 476 (6th Cir. 2021).

"For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (brackets and internal quotation marks omitted). "The unlawfulness must be apparent in the light of pre-existing law, but we need not find a case in which the very action in question has previously been held unlawful." *Id.* at 476–77 (brackets, ellipses, and citation omitted). In this case, we look to see how clearly the right to be free from deliberate indifference was established at the time Helphenstine died in 2017. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

It has been true since 1972 that "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process." *Greene*, 22 F.4th at 615 (citation omitted); *see also Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972). "Furthermore, we reiterated in 2013 that it is clearly established that a prisoner has a right not to have his known, serious medical needs disregarded by a medical provider or an officer." *Greene*, 22 F.4th at 615 (brackets, ellipses, and citation omitted). For example, over a decade ago, we "denied qualified immunity to an officer who failed to seek medical assistance for an individual suffering from [severe alcohol withdrawal] in a situation of obvious illness even when the officer knew that the detainee was on withdrawal medication and being observed." *Id.* (citing *Smith*, 505 F. App'x at 535).

Just like in *Greene*, Helphenstine experienced a dangerous medical condition for at least a day before his death. The Lewis County defendants did not provide any medical assistance during that time beyond two doses of antiemetics. Helphenstine's right not to have his serious medical needs disregarded by the Lewis County defendants was clearly established in this scenario. *Id.* Accordingly, none of the remaining Lewis County defendants are entitled to qualified immunity.

C.

The district court declined to exercise supplemental jurisdiction over plaintiff's state-law negligence claim once it granted summary judgment in favor of defendants on plaintiff's § 1983 claim. Because we reverse the district court's grant of summary judgment as to the § 1983 claim in part, we also reverse the district court's dismissal of the state-law claim in part: on remand, the district court should reconsider whether it should now exercise supplemental jurisdiction over the negligence claim against the remaining defendants. *See, e.g.*, *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 538–39 (6th Cir. 2010).

III.

For these reasons, we reverse the district court's grant of summary judgment in favor of Riley, McGinnis, Ruark, Bloomfield, Lykins (in his individual capacity), Dr. von Luhrte, and Lewis County. We affirm the district court's judgment as to Byard, Lucas, and Lykins (in his supervisory capacity), and remand for further proceedings consistent with this opinion.

Ex. 3

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0077p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JULIE HELPHENSTINE, Administratrix of the Estate of Christopher Dale Helphenstine and Guardian of B.D.H., the minor son of Christopher Dale Helphenstine,

Plaintiff-Appellant,

v.

LEWIS COUNTY, KENTUCKY; JEFF LYKINS, ANTHONY RUARK, ANDY LUCAS, BEN CARVER, AMANDA MCGINNIS, SANDY BLOOMFIELD, MARK RILEY, MELINDA MONROE, JEFFERY THOROUGHMAN, TOMMY VON LUHRTE, D.O., JOHNNY BIVENS, and JOHN BYARD, individually,

Defendants-Appellees.

No. 22-5407

On Petitions for Rehearing En Banc.
United States District Court for the Eastern District of Kentucky at Ashland.
No. 0:18-cv-00093—Henry R. Wilhoit, Jr., District Judge.

Decided and Filed: April 18, 2023

Before SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Lewis County Appellees. Clayton L. Robinson, Courtney L. Soltis, ROBINSON & HAVENS, PSC, Lexington, Kentucky, for Appellee Tommy von Luhrte, D.O. **ON RESPONSE:** Gregory A. Belzley, Prospect, Kentucky, James L. Thomerson, ROSE GRASCH CAMENISCH MAINS PLLC, Lexington, Kentucky, for Appellant.

The court issued an order denying the petitions for rehearing en banc. READLER, J. (pp. 3–12), delivered a separate statement respecting denial of rehearing en banc.

ORDER

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

STATEMENT

READLER, Circuit Judge, statement respecting denial of rehearing en banc. As an inferior court, *see* U.S. Const. art. III, § 1, we must be attentive to the pronouncements of the Supreme Court. Sometimes, a fresh decision requires us to grapple with how broadly the opinion sweeps. But that was not the case for *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). In *Kingsley*, the Supreme Court told us it was deciding a narrow issue: whether federal courts should consider a defendant's subjective intent in "the context of excessive force claims brought by pretrial detainees." *Id.* at 402 (declining to address claims "not confront[ing]" this issue).

Yet rather than ending the legal debate, *Kingsley* marked just the beginning. In a classic example of mission creep, at least four circuit courts (arguably five, depending on who you ask) read *Kingsley* as requiring a change to the circuit's law for Fourteenth Amendment pre-trial conditions of confinement claims, otherwise known as deliberate indifference claims. *Compare Kemp v. Fulton County*, 27 F.4th 491, 495 (7th Cir. 2022) (counting five), *with Helphenstine v. Lewis County*, 60 F.4th 305, 316 (6th Cir. 2023) (counting four). An odd conclusion, one has to say, when excessive force by definition involves active misconduct while deliberate indifference concerns inaction. *Brawner v. Scott County*, 14 F.4th 585, 605, 608–09 (6th Cir. 2021) (Readler, J., dissenting); 18 F.4th 551, 551 (6th Cir. 2021) (*Brawner II*) (Readler, J., dissenting from denial of rehearing en banc). That is likely why the Supreme Court tailored *Kingsley* as it did. *See also Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (holding that the deliberate indifference standard utilized for a conditions of confinement claim "is inappropriate . . . when officials stand accused of using excessive physical force.")

This frolic led to even other detours. In the circuits that upended the law for deliberate indifference post-*Kingsley*, those courts have split internally across the board over how to apply these new standards. *Compare Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (framing the inquiry as "objective reasonableness"), *and Charles v. Orange County*, 925 F.3d 73, 87 (2d Cir. 2019) (similar), *with Fraihat v. ICE*, 16 F.4th 613, 636–37 (9th Cir. 2021) (requiring more than an "inadvertent failure to provide adequate medical care") (citation

omitted); *and Darby v. Greenman*, 14 F.4th 124, 129 (2d Cir. 2021) (requiring a "conscious disregard of a substantial risk of serious harm") (citation omitted); *Pittman ex rel. Hamilton v. County of Madison*, 970 F.3d 823, 827–28 (7th Cir. 2020) (Barrett, J.) (framing the post-*Kingsley* inquiry into the objective reasonableness of a prison official's action as separate from whether the defendant acted "purposefully, knowingly, or . . . recklessly," the latter of which is shown when a prison official "'strongly suspect[s]' that [her] actions would lead to harmful results"); *McGee v. Parsano*, 55 F.4th 563, 569 (7th Cir. 2022) (imposing a "reason to know" standard for non-medical jail staff) (citation omitted); *see also Helphenstine*, 60 F.4th at 317 (describing the split amongst the *Kingsley* circuits as adopting three distinct approaches). Still other circuits have rejected the idea that *Kingsley*'s resolution of excessive force claims has anything to say about deliberate indifference claims, given the obvious difference between the conduct underlying the two. *See Cope v. Cogdill*, 3 F.4th 198, 207 & n.7 (5th Cir. 2021) (rejecting that *Kingsley* changed the deliberate indifference standard); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (same); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020) (same); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same); *see also Brawner*, 14 F.4th at 601 (Readler, J., dissenting); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1086 (9th Cir. 2016) (en banc) (Ikuta, J., dissenting).

Our Court was one that took *Kingsley* as a veiled call to action to rewrite our deliberate indifference standard. *Brawner*, 14 F.4th at 597 (maj. op.). How to do so, however, has divided us once again. All agree that a deliberate indifference plaintiff must prove an objectively serious harm. But what about the claim's state of mind component? The *Brawner* majority opinion concluded that *Kingsley* "modifi[ed]" our former subjective standard so that the defendant's inaction had to be "deliberate[] (not accidental[])" and "reckless[] in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 596 (citation omitted). At least three of us understood that standard to require a plaintiff to prove an objectively serious harm and two states of mind—one with respect to the harm suffered by the plaintiff and one with respect to the defendant's response to that harm. *Trozzi v. Lake County*, 29 F.4th 745, 757–58 (6th Cir. 2022). Now, a separate panel of our Court reads *Trozzi* as in tension with *Brawner*, meaning *Brawner* controls. *See Helphenstine*, 60 F.4th at 317; *see also United States v. Abboud*, 438 F.3d 554, 567 (6th Cir. 2006) (observing that the prior panel rule governs

when "two lines of cases directly conflict and cannot be reconciled"). And still other members of our Court have confessed understandable confusion over the issue. *See Westmoreland v. Butler County*, 35 F.4th 1051, 1052 (6th Cir. 2022) (Bush, J., dissenting from denial of rehearing en banc) (listing the many struggles our Circuit has had with applying *Brawner*); *Britt v. Hamilton County*, No. 21-3424, 2022 WL 405847, at *6 (6th Cir. Feb. 10, 2022) (Clay, J., dissenting) (lamenting the majority for misapplying *Brawner* and arguing that post-*Brawner* all that is left of the "deliberate indifference test for pretrial detainees is . . . the objective test"); *see also Westmoreland*, 29 F.4th at 729 (maj. op.) (adopting for the analogous failure-to-protect claim an intentional state of mind requirement concerning the "decision" made by the officer separate and apart from the *Brawner* inquiry); *see also Buetenmiller v. Macomb Cnty. Jail*, 53 F.4th 939, 945–46 (6th Cir. 2022) (same). Simply put, that so many have said so much in so little time is both an acknowledgement that *Brawner* has left ample room for debate over its holding as well as a recognition of the frequency with which these cases appear on our docket. *See Brawner II*, 18 F.4th at 556 (Readler, J., dissenting from denial of rehearing en banc).

In an area of law that deserves precision, our approach reflects more of a shotgun blast. The original sin in this legal drama, it bears noting, was not ours. It was the Supreme Court's decision to divine constitutional rights for inmates who have been harmed in prison. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); *see also Brawner II*, 18 F.4th at 552–55 (Readler, J., dissenting from denial of rehearing en banc) (tracing how both our pre- and post-trial detainee deliberate indifference jurisprudence and the establishment of a "nebulous" reasonableness standard have their roots in *Estelle*). No one condones mistreating prisoners, no matter their underlying offense. But state law can easily account for that mistreatment, with both causes of action and remedies. *See Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting). Yet for many years now, these garden variety tort claims have also been deemed matters of constitutional significance.

The Supreme Court could return all of these actions to state court. *See Hudson v. McMillian*, 503 U.S. 1, 28–29 (1992) (Thomas, J., dissenting). And there are grounds to do so. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) (recognizing that a decision's poor reasoning, unworkability, inconsistency with other decisions, along with a lack of reliance

interests, provide "special justification" for overruling constitutional precedent). Start with *Estelle*'s reasoning, which leaves much to be desired. *Estelle* began by evaluating whether the Fourteenth Amendment's Due Process Clause, together with the incorporated Eighth Amendment's prohibition on cruel and unusual punishments, had any relevance to a prisoner's complaint that he received insufficient medical care after being injured on a prison work assignment. 429 U.S. at 98–102. The ensuing legal analysis made only passing references to those constitutional provisions, however, let alone the debate underlying their enactment. Instead, reflecting the period's atextual approach to constitutional interpretation, *Estelle* expressly eschewed any consideration of the Constitution's original meaning, today's touchstone for constitutional interpretation. 429 U.S. at 102–03. *Estelle* instead favored "more recent cases" that, in its view, better embodied the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Id.* at 102 (citation omitted). From these preferred views of life and law, an affirmative constitutional right to medical care for the incarcerated was born. *Id.* at 104–05.

In the ensuing decades, the Supreme Court has largely repudiated this manner of constitutional interpretation. *Trozzi*, 29 F.4th at 751 (discussing how the Supreme Court has since rejected *Estelle*'s understanding of the Eighth Amendment and the notorious "evolving standards of decency" rubric). And as *Estelle*'s progeny (including the experiment in applying the *Kingsley* standard to deliberate indifference claims) has shown, this entire constitutional regime has proved wholly unworkable. *See Brawner II*, 18 F.4th at 552–55 (Readler, J., dissenting from denial of rehearing en banc) (discussing the extended and convoluted "efforts in this Circuit to tortify the Constitution" that all rest on the same amorphous approach). With precedents pointing in all directions, the disharmony in the case law in this setting is as extreme as any. Especially when the standard is more or less reduced to "reasonableness," this legal regime lacks any manner of predictability for officers and detainees alike. Given this state of affairs, and with state law as an adequate backdrop against which to litigate deliberate indifference claims, reliance interests are minimal at best. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 637 (2007) (Scalia, J., concurring) (observing there is "no relying on the random and irrational").

Yet this flawed interpretative path continues. As backdrop for today's case, *Farmer v. Brennan* set the general standard for lower federal courts to follow in deliberate indifference claims. *Farmer* explained that a detainee pursuing a substantive due process claim for insufficient medical care must satisfy both an objective component (a sufficiently serious medical need) and a subjective component (a sufficiently culpable state of mind—specifically, that the "official knows of and disregards an excessive risk to inmate health or safety"). 511 U.S. at 834, 837. *Brawner*, however, concluded that *Kingsley* necessitated a "modification of the subjective prong of the deliberate indifference test" for pre-trial detainees. 14 F.4th at 596. Cobbling together a hodgepodge of legal terminology, the new test in our Circuit for finding liability requires that a defendant's:

> action (or lack of action) was intentional (not accidental) and . . . [the defendant] either acted intentionally to ignore [the detainee's] serious medical need [or] recklessly failed to act reasonably to mitigate the risk the serious medical need posed to [the detainee], even though a reasonable official in [the defendant's] position would have known that the serious medical need posed an excessive risk to [the detainee's] health or safety.

Id. at 597.

I dissented in *Brawner*. Setting aside the fact that *Kingsley* has no applicability in the deliberate indifference setting, *id.* at 605, 608–09 (Readler, J., dissenting), to the extent it is applicable, it was not "entirely clear" to me how *Brawner*'s new standard "differ[red] from our traditional subjective indifference test," *id.* at 610. Consider the following: although *Kingsley* adopted an objective standard for the *nature* of the force being used by the state officer, it expressly rejected the view that liability could be imposed without some intent by the officer to use force in the first place. 576 U.S. at 395–96. In *Kingsley*'s words, echoed in the new *Brawner* standard, a defendant must still act "deliberately (not accidentally)." 14 F.4th at 596 (maj. op.). In "terms of proof necessary to make out" the claim, I understood the majority opinion for its part, to be doing very little. *Id.* at 610 (Readler, J., dissenting). The *Brawner* majority opinion said nothing to contradict this observation.

More broadly, I recognized our circuit's tendency to water down deliberate indifference claims into a more general "right to be free from jailhouse . . . malpractice." *Id.* And an

aggressive reading of *Brawner*, I worried, would erode that standard even more, relinquishing "any serious inquiry into the subjective intentions of the sued government official" in favor of a nebulous inquiry into the reasonableness of the defendant's failure to take appropriate action. *Brawner II*, 18 F.4th at 555 (Readler, J., dissenting from denial of rehearing en banc). After all, once it is determined that a plaintiff had an "objectively, sufficiently serious" medical need under *Farmer*'s first prong, 511 U.S. at 834, if *Brawner* replaced all subjective inquiries with a civil recklessness standard, a plaintiff would need only show that the defendant was objectively "unreasonable" in not taking action to abate such a risk, *id.* at 836 (describing civil recklessness as failing to act reasonably in the face of a high risk of harm).

Reasonable minds could read *Brawner* in different ways. *See Hyman v. Lewis*, 27 F.4th 1233, 1237 (6th Cir. 2022) ("*Brawner* is far from clear[.]"). To my mind, *Brawner* did not clarify what it means for a defendant officer to "act[] deliberately (not accidentally), but also recklessly" in failing to act, thereby giving rise to liability. 14 F.4th at 596. Instead, *Brawner* left the issue for future panels to ponder. One was *Trozzi*. There, a unanimous panel held that a pre-trial deliberate indifference claim required a showing that:

> (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official knew that his failure to respond would pose a serious risk to the pretrial detainee and ignored that risk.

29 F.4th at 757–58. Where did this three-part test come from? *Brawner*. The first prong is the old objective prong cited in *Brawner*. 14 F.4th at 597 ("(1) that she had an objectively serious medical need . . ."). The second prong parrots *Brawner*'s modification of the old subjective prong and its focus on the harm facing the detainee, *id.* at 596 (observing that a defendant must, at the very least, face "an unjustifiably high risk of harm that is . . . so obvious that it should be known" (citation omitted)), albeit with the caveat that we judge reasonability from the perspective of the jail official in question, a principle acknowledged in *Brawner*, *id.* at 597 ("[A] reasonable official in Nurse Massengale's position would have known . . . ."). The final prong, admittedly, introduces into the mix a state of mind beyond civil recklessness. But the emphasis is not on the nature of the risks to the detainee's health or safety (i.e., the subject of *Farmer*'s

subjective prong that *Brawner* modified), but rather the defendant's *response* to those risks. *Brawner* is replete with references to that separate state-of-mind inquiry. Its formulation, remember, still requires that a defendant's behavior be "deliberate[] (not accidental[])," *id.* at 596; *see also id.* at 597 (requiring defendant's conduct to be "intentional (not accidental)"), language echoing *Kingsley* and its maintenance of a subjective state of mind requirement, 576 U.S. at 395–96.

Following a thorough discussion, *Trozzi* adopted a confined understanding of *Brawner*. And for good reason. Reading *Brawner* as eliminating any state-of-mind inquiry would ignore language in *Brawner* itself requiring that the actor's "lack of action" be "intentional (not accidental)." 14 F.4th at 597. A nebulous "reasonableness" approach would likewise turn a blind eye to *Brawner*'s repeated assertions that it was not imposing a negligence standard, but merely "modif[ying]" *Farmer*'s subjective prong. *Id.* at 593, 596. Above all, *Brawner*'s raison d'être, *Kingsley*, itself maintained the foundational rule that a constitutional tort must take into consideration the subjective state of mind at play. 576 U.S. at 395–96. Accepting *Brawner*'s conclusion that *Kingsley* governs, *Trozzi* attempted to translate the "two separate state-of-mind questions" in the excessive force context to this new frontier. *Trozzi*, 29 F.4th at 757. It did so by explaining that civil recklessness governs the external question of the degree of harm facing the detainee, while criminal recklessness, at the very least, governs the behavior of the government official. *See id.* at 757–58. Any other understanding of *Brawner* would simply adopt the plaintiff-friendly part of *Kingsley* and omit the rest, contrary to longstanding precedent restraining our substantive due process jurisprudence. *See Kingsley*, 576 U.S. at 396; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 848–49 (1998); *Daniels v. Williams*, 474 U.S. 327, 331–32 (1986).

That takes us to today's case. The panel opinion read the three-part test from *Trozzi* as "irreconcilable with *Brawner*." *Helphenstine*, 60 F.4th at 316. I, of course, disagree. Either way, *Helphenstine*'s main point of emphasis was to recite the various disagreements among the circuits on the *Kingsley* question. *Id.* After having done so, the panel concluded that *Brawner* settled all of these disagreements by "requir[ing] us to lower the subjective component from actual knowledge to recklessness." *Id.* at 316. In many respects, this feels like two ships passing

in the night. *Trozzi* did not hold that *Brawner* refrained from lowering the subjective component. Instead, *Trozzi*'s second prong expressly incorporated the civil recklessness standard from *Brawner*'s modified subjective approach with a caveat about its appropriate focus. 29 F.4th at 757–58. What *Brawner* (and, more to the point, *Kingsley*) did not do was say that the *only* state of mind at issue was with respect to the risks to the detainee. There still needed to be an examination of whether the defendant's inaction was accidental, *see Brawner*, 14 F.4th at 597, which *Trozzi* held cannot be supported tautologically by simply pointing to the inaction itself, *see* 29 F.4th at 757. That approach also bears out in the analogous failure-to-protect claim, where we require an intentional state of mind concerning the officer's "decision," separate and apart from the *Brawner* inquiry. *Westmoreland*, 29 F.4th at 729 (maj. op.)*; see also Buetenmiller*, 53 F.4th at 945–46 (explaining *Westmoreland*'s intentionality prong).

Otherwise, there is nothing left for a court to do save for applying a generic "reasonableness" standard. Which, in all candor, leads to results hard to square with one another. *Helphenstine* is a good example. We held that it is normally reasonable for prison officials to manage a detainee going through drug or alcohol withdrawal without seeking outside medical assistance. *Helphenstine*, 60 F.4th at 321. That is so even if the official sees "[s]tuff coming out" of the detainee's mouth. *Id.* But if the "stuff" is "vomit[]" that occurs "at least once," it is now unreasonable for a prison official not to recognize the need for immediate outside medical help. *Id.* at 317–18. Or consider *Greene v. Crawford County*, 22 F.4th 593 (6th Cir. 2022). There, we held, it is unreasonable not to seek medical help based on hearsay from a coworker about a detainee's lack of sleep and delusional thoughts, *id.* at 610–11, but it is reasonable if you only hear about the detainee's delusions, *id.* at 613.

So where does that leave us? Three judges in *Trozzi* thought a narrow interpretation of *Brawner* was not only possible but indeed necessary. Prior opinions had largely said the same. *See Hyman*, 27 F.4th at 1237 (noting the opacity of *Brawner*'s new standard). Then, in response to an en banc petition asserting that *Trozzi* was irreconcilable with *Brawner*, "[l]ess than a majority of the judges" ultimately voted in favor of rehearing. *Trozzi v. Lake County*, 2022 WL 2914589, at *1 (6th Cir. July 12, 2022). And now a different panel reads *Trozzi* as irreconcilable with *Brawner*, yet laments the deep confusion these issues have caused "all over the map."

Helphenstine, 60 F.4th at 316. Meanwhile, all sides to the en banc briefing in this case—including the detainee's estate—agree that *Brawner* was wrongly decided and confusing. *See* Lewis County's Pet. at 3–4, 7–12 (discussing the "tremendous confusion in attempting to consistently apply the nebulous" *Brawner* standard by both this Court and by the district courts in our Circuit); Von Luhrte's Pet. at 1, 7–15 (describing the "discordant approaches to analyzing deliberate indifference" in this Circuit); Helphenstine's Resp. at 11–13 (refusing to defend *Brawner* and the "confusion" it "caused among the panels of and district courts in this Circuit").

With signs pointing in all directions, even the most careful reader would likely find herself at a crossroads. For judges and academics, these are theoretical concepts to debate. But for prison officials, these decisions—as incongruent as they are—govern their everyday conduct. *See Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (describing the "Herculean obstacles" prison officials face in "effective[ly] discharg[ing] . . . the[ir] duties"). And as we continue to lower the bar for liability, we increasingly put these officials in impossible situations, ones the Constitution surely was never contemplated to resolve. *See Brawner II*, 18 F.4th at 557 (Readler, J., dissenting from denial of rehearing en banc). For all involved, we must do better.

* * * * *

A year and a half into the experience, *Brawner*'s promise that "[m]ere negligence is insufficient" appears to be an empty one. 14 F.4th at 596. I can understand our en banc court's reluctance to take up the issue here, given the many competing views on the underlying legal standard in our circuit and others along with the high bar for convening en banc proceedings. But at some point, intervention is needed. With confusion rampant coast-to-coast, the Supreme Court would appear to be the proper forum. For the sake of litigants and courts alike, the Supreme Court should soon grant certiorari in a case involving allegedly unconstitutional deliberate indifference toward a pretrial detainee.

It may be too much to ask for the Supreme Court to revisit the application of substantive due process principles in this context, but reconsidering *Estelle* would not be a bad place to start. At the very least, the Supreme Court can resolve whether *Kingsley*'s excessive force analysis

should be grafted on to deliberate indifference claims. And, if *Kingsley* sweeps so broadly, what test are the inferior courts to use in resolving those cases? As both *Trozzi* and this panel decision recognize, the *Kingsley* circuit split is more than mature—it is having offspring. *Trozzi*, 29 F.4th at 754; *Helphenstine*, 60 F.4th at 316 (noting three circuit splits to emerge in the "circuits that extend *Kingsley*'s objective inquiry to deliberate indifference"). Disagreements abound, from whether to apply *Kingsley* to deliberate indifference claims, to the test to apply if so, to whether the same test applies in various settings for conditions of confinement claims. This is no small matter. As court records reflect, these cases populate every docket across the federal courts. *See IDB Appeals 2008–Present*, Fed. Jud. Ctr., https://www.fjc.gov/research/idb/interactive/21/IDB-appeals-since-2008 (last visited Apr. 18, 2023) (listing more than 76,000 "prisoner civil rights" and "prison condition" claims in the federal appellate courts since 2008, approximately 16.8% of all civil appeals); *see also* Zhen Zeng, Bureau of Justice Statistics, NCJ 251774, Jail Inmates in 2017, at 1 (2019) (reporting that almost two-thirds of jail inmates were "unconvicted"). But until Supreme Court intervention comes to pass, we are left to muddle on, following paths leading in any and all directions.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk