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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3359

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED,
Plaintiff-Appellant,

v.

MEND CORRECTIONAL CARE INC.,
Defendant,

CROW WING COUNTY, MINNESOTA; HEATH FOSTESON, INDIVIDUALLY AND IN HIS CAPACITY AS CROW WING COUNTY JAIL ADMINISTRATOR; CO ROBERT ANDERSON; CO RAYNOR BLUM; CO CHEROKEE DELEON; CO CHRISTINE GHINTER; CO RONALD J. IMGRUND; CO LUKASZ ORGANISTA,
Defendants-Appellees.

Submitted: May 9, 2024

Filed: August 16, 2024

Before COLLOTON, Chief Judge, BENTON and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Joshua A. Vogt died of a drug overdose while detained in a county jail. His daughter, Molly Vogt, sued under 42 U.S.C. § 1983, claiming that three officers deliberately disregarded his medical condition.

The magistrate judge recommended summary judgment for the officers. The district court[1] agreed. Vogt appeals, arguing that a pending adverse-inference instruction against the officers creates a material factual dispute whether the officers deliberately disregarded Mr. Vogt's medical condition. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Joshua Vogt was arrested on January 2, 2020. According to the arresting officer's report, Mr. Vogt "behave[d] normally through the entire stop" and "did not appear to be . . . under the influence."

Arriving at the Crow Wing County Jail around midnight, Mr. Vogt was strip-searched. No drugs were found. Officers stated he was "cooperative and responsive." At some point before the search, Mr. Vogt had swallowed two bags of methamphetamine.

At 12:21 a.m., Officer Raynor Blum began booking Mr. Vogt. Observing him sweating, fidgeting, and shaking, Blum repeatedly asked if he was on drugs. Mr. Vogt denied being on drugs, explaining the symptoms as part of an anxiety episode. At 12:34 a.m., he stumbled and about ten minutes later, required assistance moving to his individual holding cell (Holding Cell 2). Vogt never asked for medical attention.

Since Blum believed that Mr. Vogt was on drugs, he reported the behavior to Sergeant Ronald J. Imgrund. Imgrund talked with Mr. Vogt, who denied he was on drugs, again blaming a panic attack. Imgrund performed breathing exercises with him to help him calm

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[1] The Honorable Wilhelmina M. Wright, United States District Judge for the District of Minnesota, now retired, adopting the report and recommendations of The Honorable Tony N. Leung, United States Magistrate Judge.

down. The officers testified that once he was in his holding cell at 12:46 a.m., they performed "no fewer than eight" wellness checks.

At 1:29 a.m., Imgrund saw Mr. Vogt raising his hand. Finding him on his back shaking, the officers ordered an ambulance. Within minutes, he was no longer breathing. Officers conducted CPR. Mr. Vogt was pronounced dead at 2:20 a.m.

Footage from Camera 18—showing Mr. Vogt's (about) eight-minute stay in Group Holding and an angle of his (about) hour in Holding Cell 2—was not preserved. Mr. Vogt's daughter, Molly Vogt, sued, claiming that the officers deliberately disregarded her father's medical condition. She also alleged that the county had not disclosed all relevant footage. Finding that the county had intentionally destroyed Camera 18's footage, the magistrate judge recommended a permissive adverse-inference instruction, allowing (but not requiring) the jury to "infer that the footage from Camera 18 would have been favorable to Plaintiff." *See Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) ("A permissive inference suggests to the jury a possible conclusion to be drawn . . . but does not require the jury to draw that conclusion."), *modified*, *Boyde v. California*, 494 U.S. 370, 378-79, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

The officers moved for summary judgment, invoking qualified immunity. The magistrate judge recommended granting summary judgment, because, even with the spoliation inference, the testimony and available videos would not allow a jury to find that the officers deliberately disregarded Vogt's medical condition. The district court adopted all the recommendations. Vogt appeals, contending that the spoliation inference defeats summary judgment.

II.

"This court reviews de novo a grant of summary judgment." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). Summary judgment is proper where the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.*

To establish a § 1983 medical indifference claim, the plaintiff must show that officers acted with "deliberate indifference to a pretrial detainee's objectively serious medical needs." *Ivey v. Audrain Cnty.*, 968 F.3d 845, 848 (8th Cir. 2020). "Deliberate indifference has both an objective and a subjective component." *Vaughn v. Gray*, 557 F.3d 904, 908 (8th Cir. 2009), *quoting Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir.2006). "To succeed on this kind of claim, a plaintiff must demonstrate that a pretrial detainee had an objectively serious medical need that the defendants knew of and yet deliberately disregarded." *Ivey*, 968 F.3d at 848. *See also Thompson v. King*, 730 F.3d 742, 750 (8th Cir. 2013) ("The Supreme Court has declared that it is unconstitutional for prison officials to act deliberately indifferent to an inmate's serious medical needs."), *citing Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "A medical need is objectively serious if it has been diagnosed by a physician as requiring treatment or if it is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Barton v. Taber*, 908 F.3d 1119, 1124 (8th Cir. 2018) (internal quotations omitted). "In order to demonstrate that a defendant actually knew of, but deliberately disregarded, a serious medical need, the plaintiff must establish a mental state akin to criminal recklessness: disregarding a known risk to the [detainee's] health." *Vaughn*, 557

F.3d at 908 (internal quotation omitted). "This onerous standard requires a showing more than negligence, more even than gross negligence, but less than purposefully causing or knowingly bringing about a substantial risk of serious harm to the [detainee]." *Thompson*, 730 F.3d at 747 (internal quotations omitted).

On appeal, Vogt argues that the adverse inference, combined with the record evidence, would allow a rational jury to find that the officers were deliberately indifferent to Mr. Vogt's objectively serious medical need, precluding summary judgment. The magistrate judge assumed "for purposes of summary judgment . . . that Joshua Vogt was suffering from an objectively serious medical need obvious to a lay person. . . ." Relying heavily on *Reece v. Hale*, 58 F.4th 1027 (8th Cir. 2023), the magistrate judge concluded, however, that there was no genuine issue of material fact that any of the officers deliberately disregarded Mr. Vogt's medical condition. *See Reece*, 58 F.4th at 1034 ("Perhaps [the officer] could have done more. But we cannot consider [plaintiff's] claim through the lens of hindsight's perfect vision, as she must demonstrate more than mere negligence or ordinary lack of due care for the prisoner's safety to succeed on her [deliberate indifference] claim.") (internal quotations omitted). *See also id.* at 1033 (finding qualified immunity for a deliberate-disregard claim where even though "[t]here is some question . . . whether [the officer] should have contacted medical staff earlier," "we don't think the record shows that [the officer] was deliberately indifferent to a serious medical need" because "[t]his [wasn't] a situation where officers essentially ignored an injured inmate for hours as he lay motionless and unresponsive" and "[t]he incident report

reflects that members of the jail staff . . . checked on [the detainee] at least eleven times . . .").

Analyzing each of the three officers separately, the magistrate judge concluded:

- "Arguably, perhaps Defendant CO Blum could have done more—such as taking Joshua Vogt's vitals or not following the chain of command. He did not, however, fail to assess the situation, ignore his observations, or do nothing in response to the circumstances before him. Based on the record before the Court, a reasonable jury could not find that Defendant CO Blum "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley [v. Pulford]*, 2020 WL 6064577, at *11 [(D. Minn. Oct. 14, 2020)] (quoting *Saylor v. Nebraska*, 812 F.3d 637, 644 (8th Cir. 2016)); *see Reece*, 58 F.4th at 1033-34."
- "[P]erhaps Defendant CO Imgrund arguably could have done more—such as taking Joshua Vogt's vitals, consulting medical personnel, or summoning emergency medical services sooner. He did not, however, ignore Defendant CO Blum's concerns, fail to assess the situation, disregard what Joshua Vogt himself was telling him was happening, or do nothing in response to the circumstances before him. Based on the record before the Court, like Defendant CO Blum, a reasonable jury could not find that Defendant CO Imgrund "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley*, 2020 WL 6064577, at *11 (quoting *Saylor*, 812 F.3d at 644); *see Reece*, 58 F.4th at 1033-34."

- "[P]erhaps Defendant CO Anderson arguably could have done more—such as taking Joshua Vogt's vitals or not following the chain of command. Defendant CO Anderson did not, however, ignore Joshua Vogt when he stumbled or do nothing in response to the circumstances before him. Based on the record before the Court, like Defendant COs Blum and Imgrund, a reasonable jury could not find that Defendant CO Anderson "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley*, 2020 WL 6064577, at *11 (quoting *Saylor*, 812 F.3d at 644); *see Reece*, 58 F.4th at 1033-34."

The magistrate judge then considered the impact of the adverse inference instruction on these three conclusions. The magistrate judge correctly reasoned: "The absence of footage from Camera 18, though understandably frustrating and disheartening for Plaintiff and Joshua Vogt's family and friends, does not alter the Court's analysis."

Vogt emphasizes that a permissive adverse inference permits a jury to "hypothesize[]" what the missing evidence would have shown, in the context of the evidentiary record, to "create a genuine dispute of material fact." *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018).[2]

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[2] As the separate opinion notes, an adverse inference instruction can defeat summary judgment when coupled with sufficient record evidence. To do so, however, it must "create a genuine dispute of material fact on at least some of [plaintiff's] claims." *Auer*, 896 F.3d at 858. An adverse inference instruction "standing alone" is insufficient to defeat summary judgment. *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998). As discussed in this opinion, the district court was correct in finding that the

As hypotheses, Vogt argues, "The jury could conclude, for example, that Mr. Vogt experienced more severe symptoms than the officers disclosed in their testimony, such as cardiac distress (e.g., clutching at his chest), delirium, or an inability to stay upright or conscious." Camera 18's view into Holding Cell 2 was partly obscured by the partitioned wall and door. The top halves of the wall and door are glass, while the lower halves are solid, obstructing a view of the floor and bed. Even if Camera 18 could capture some hypothesized footage, it would not allow an inference that "the officers recognized that a substantial risk of harm existed *and* knew that their conduct was inappropriate in light of that risk," when considering the rest of the record. *Letterman v. Does*, 789 F.3d 856, 862 (8th Cir. 2015) (emphasis in original), *quoting Krout v. Goemmer*, 583 F.3d 557, 567 (8th Cir. 2009). "When evaluating whether an [officer] deliberately disregarded a risk, [courts] consider [the officer's] actions in light of the information he possessed at the time, the practical limitations of his position and alternative courses of action that would have been apparent to an official in that position." *Id.* (internal quotation omitted). Here, throughout his detention, individual officers repeatedly checked on Mr. Vogt, questioned him about his condition (he replied he was having an anxiety attack), moved him to a private holding cell, reported his behavior to superiors, performed exercises with him to calm him down, and called for emergency medical help when his condition worsened. Any hypothesis about Camera 18's footage would fail to satisfy the "onerous standard" of culpability required

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record evidence (even when combined with the plaintiff's posited hypotheses) does not support a conclusion that the officers deliberately disregarded a risk to Mr. Vogt's medical condition.

for a deliberate indifference claim. *Thompson*, 730 F.3d at 747.

Courts "must avoid determining the question [of deliberate indifference] with hindsight's perfect vision." *Letterman*, 789 F.3d at 862 (internal quotation omitted). As in *Reece*, the officers did not "essentially ignore[] an injured inmate for hours" or "fail[] to seek medical attention even though an inmate had screamed, howled, and banged his head." *Reece*, 58 F.4th at 1033 (where officers repeatedly checked on Mr. Reece while detained). "Perhaps [officers Blum, Imgrund, and Anderson] could have done more. But we cannot consider [Vogt's] claim through the lens of hindsight's perfect vision." *Id.* at 1034 (internal quotation omitted). Based on the officers' conduct throughout the detention, any hypothesis about Camera 18's (obstructed) view into Holding Cell 2 would not permit a reasonable jury to conclude that the officers' conduct reached the "onerous standard" of deliberate indifference, "requir[ing] a showing more than negligence, more even than gross negligence." *Thompson*, 730 F.3d at 747.

The district court properly granted summary judgment to the officers.

* * * * * * *

The judgment is affirmed.

SHEPHERD, Circuit Judge, dissenting.

"An adverse inference instruction is a powerful tool in a jury trial. When giving such an instruction, a federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury." *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir. 2004). Here, by affirming the district court's grant of summary judgment to defendants

based on qualified immunity, the majority renders this "powerful tool" meaningless. Because I think an adverse-inference instruction, if it is to mean anything at all, must be given its proper weight in the context of the summary judgment record, I dissent.

The district court determined that an adverse-inference instruction was warranted, making the specific findings—which defendants do not challenge on appeal—that the County had an obligation to preserve the footage from Camera 18 following Joshua Vogt's death; that the County failed to take reasonable steps to preserve the footage; that the County acted in bad faith, evidenced by the fact that the jail administrator knew the video footage would be relevant to any investigation and litigation and that footage from other cameras in the area was preserved while the footage from the camera with the most relevant angle was not; and that, while neither the district court nor Molly Vogt could know what the footage from Camera 18 would show and how beneficial it would be to her case, Camera 18 would have captured another perspective of the incident, and Molly Vogt was prejudiced by the County's failure to preserve it. While the district court ruled that an adverse-inference instruction was appropriate, the critical inquiry remains how entitlement to an adverse-inference instruction intersects with consideration of a motion for summary judgment. The district court and the majority conclude that the adverse-inference instruction "does not alter the . . . analysis," which I believe is in error.

This Court has not directly addressed the interplay between entitlement to an adverse-inference instruction and the consideration of a summary judgment motion; however, it has recognized that an adverse-inference instruction should carry some weight and

factor into the summary judgment analysis. *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018) ("[I]f [plaintiff] was entitled to the presumption she sought, it was premature to grant summary judgment without evaluating whether the presumption itself could create a genuine dispute of material fact on at least some of [plaintiff's] claims."). Other courts have addressed the issue directly, concluding that the existence of an adverse-inference instruction, coupled with other record evidence—even circumstantial—can defeat summary judgment. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (stating that "[a]lthough we believe, like the district court, that a jury might be skeptical of plaintiff's claim that he was drugged by [a CIA officer], we also believe, contrary to the district court, that a jury should be permitted (but not required) to draw an adverse inference against [the officer] based on the destruction of MKULTRA documents," and concluding that, "when combined with the possibility that a jury would choose to draw such an adverse inference, plaintiff's circumstantial evidence that he may have been one of the victims of the CIA's drug tests was enough—barely enough, but enough nonetheless—to entitle him to proceed to trial"); *Van Winkle v. Rogers*, 82 F.4th 370, 382 (5th Cir. 2023) (reversing grant of summary judgment because "[a]n inference of spoliation, in combination with some (not insubstantial) evidence for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment" (citation omitted)).

Here, I believe Molly Vogt has presented sufficient evidence to defeat summary judgment. This is not a case where the adverse-inference instruction is the sole basis for the claim. *See Kronisch*, 150 F.3d at 128 ("We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has

produced no evidence—or utterly inadequate evidence—in support of a given claim to survive summary judgment on that claim."). Molly Vogt points to record evidence of Joshua Vogt's deteriorating condition, including that Vogt was observed acting strangely at the time he was booked; that officers suspected he was under the influence due to his fidgeting, sweating, and rapid speech; that he stumbled while having his booking photo taken; that he had to be helped into the holding cell; and that at some point, he signaled officers for help before becoming unresponsive. Viewing this evidence in the light most favorable to Molly Vogt, combined with the adverse-inference instruction, a jury could conclude that Joshua Vogt had an observably deteriorating condition and that the destroyed footage from Camera 18 shows that Vogt exhibited additional symptoms that were visible to officers, demonstrating that he was suffering from a serious medical need of which officers were aware but deliberately disregarded. *See Ryan v. Armstrong*, 850 F.3d 419, 425 (8th Cir. 2017) ("In order to succeed on a deliberate indifference claim, a pretrial detainee must show that he 'suffered from an objectively serious medical need' and that one or more defendants 'had actual knowledge of that need but deliberately disregarded it.'" (citation omitted)). This is "enough" to entitle Molly Vogt to proceed to trial. *See Kronisch*, 150 F.3d at 126.

The majority references Molly Vogt's "hypotheses" about what Camera 18's footage would show, concluding that there is no hypothesis that would allow a reasonable jury to conclude that the officers were deliberately indifferent. But this conclusion invades the province of the jury in considering the adverse-inference instruction: if we accept the majority's speculation about what the destroyed video does or

does not show, then the adverse-inference instruction is rendered a nullity. This cannot be the case, as entitlement to an adverse-inference instruction requires a finding of intentional destruction of evidence and prejudice to the opposing party, *see Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 463 (8th Cir. 2016), and the remedy for this conduct, in the form of the instruction, must have some effect in order to be a remedy at all.

In sum, I believe the grant of summary judgment to defendants makes the adverse-inference instruction meaningless. I would reverse the district court on the basis that the adverse-inference instruction, coupled with the record evidence, precludes qualified immunity because it creates a material factual dispute about whether the defendants were deliberately indifferent to Joshua Vogt's serious medical needs. I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 21-cv-1055 (WMW/TNL)

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED,
Plaintiff,

v.

MEND CORRECTIONAL CARE INC.; CROW WING COUNTY, MINNESOTA; HEATH FOSTESON, INDIVIDUALLY AND IN HIS CAPACITY AS CROW WING COUNTY JAIL ADMINISTRATOR; CO ROBERT ANDERSON; CO RAYNOR BLUM; CO CHEROKEE DELEON; CO CHRISTINE GHINTER; CO RONALD J. IMGRUND; AND CO LUKASZ ORGANISTA,
Defendants.

Signed September 15, 2023

Filed September 25, 2023

ORDER ADOPTING REPORT AND RECOMMENDATION

Wilhelmina M. Wright, United States District Judge

This matter is before the Court on the July 28, 2023 Report and Recommendation (R&R) of United States Magistrate Judge Tony N. Leung. (Dkt. 103.) Because no objections have been filed, this Court reviews the R&R for clear error. *See* Fed. R. Civ. P. 72(b); *Grinder*

v. Gammon, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Having reviewed the R&R, the Court finds no clear error.

Based on the R&R and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. The July 28, 2023 Report and Recommendation, (Dkt. 103), is **ADOPTED**.

2. The Corrections Officer Defendants' Motion for Summary Judgment, (Dkt. 83), is **GRANTED** on the basis of qualified immunity.

3. The Corrections Officer Defendants' Daubert Motion to Exclude Plaintiff's Expert Karen Mollner, (Dkt. 74), is **DENIED as moot**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 21-cv-1055 (WMW/TNL)

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED,
Plaintiff,

v.

MEND CORRECTIONAL CARE INC.; CROW WING COUNTY, MINNESOTA; HEATH FOSTESON, INDIVIDUALLY AND IN HIS CAPACITY AS CROW WING COUNTY JAIL ADMINISTRATOR; CO ROBERT ANDERSON; CO RAYNOR BLUM; CO CHEROKEE DELEON; CO CHRISTINE GHINTER; CO RONALD J. IMGRUND; AND CO LUKASZ ORGANISTA,
Defendants.

Signed July 28, 2023

REPORT & RECOMMENDATION

Tony N. Leung, United States Magistrate Judge

I. INTRODUCTION

This matter is before the Court on Defendant COs Robert Anderson, Raynor Blum, and Ronald J. Imgrund's[1] (collectively, "CO Defendants") Daubert

[1] As the Court previously noted, the CO Defendants are the only remaining defendants in this litigation. *See generally Vogt v. Crow Wing Cty.*, No. 21-cv-1055 (WMW/TNL), 2022 WL 37512 (D. Minn. Jan. 4, 2022) [hereinafter *Vogt I*]; ECF Nos. 22, 25. The CO Defendants are or were employed by Defendant Crow Wing County ("the County") at the time of the events giving rise to this litigation. *See*, *e.g.*, First Am. Compl. ¶¶ 10, 12-13, 16,

Motion to Exclude Plaintiff's Expert Karen Mollner, ECF No. 74, and Motion for Summary Judgement, ECF No. 83. These motions have been referred to the undersigned for a report and recommendation to the district court, the Honorable Wilhelmina M. Wright, District Judge for the United States District Court for the District of Minnesota, under 28 U.S.C. § 636 and D. Minn. LR 72.1. ECF No. 73.

A hearing was held. ECF No. 94. Nicholas Sweeney appeared on behalf of Plaintiff Molly Vogt. Jessica Schwie appeared on behalf of the CO Defendants.

Based upon the record, memoranda, and proceedings herein, **IT IS HEREBY RECOMMENDED** that the CO Defendants' summary-judgment motion be **GRANTED** on basis of qualified immunity and their Daubert motion be **DENIED AS MOOT**.

ECF No. 67; Answer to First Am. Compl. ¶ 7, ECF No. 71; *see also* Decl. of Jessica Schwie ¶ 1, ECF No. 53 [hereinafter First Schwie Decl.]. Plaintiff brought claims against the CO Defendants in their individual and official capacities as well as against the County. *See generally* First Am. Compl. "A suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent." *Elder-Keep v. Aksamit*, 460 F.3d 979, 986 (8th Cir. 2006) (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)); *accord Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978). Thus, Plaintiff's claims against the CO Defendants in their official capacities are essentially claims against the County and therefore subsumed within her claims against the County. *See Thiel v. Korte*, 954 F.3d 1125, 1129 (8th Cir. 2020) ("The official-capacity claim against Korte is essentially a claim against the county itself."). Following a prior motion to dismiss, only Plaintiff's claim against the CO Defendants in their individual capacities remains. *See generally Vogt I*, 2022 WL 37512. Accordingly, although the County has not been formally terminated from this litigation, it is no longer a party for all practical purposes.

II. BACKGROUND

A. Death of Joshua Vogt on January 3, 2020

On January 2, 2020, around 11:00 p.m., Joshua Vogt[2] was arrested for an outstanding warrant during a traffic stop. *See generally* Ex. A to Decl. of Nicholas S. Sweeney, ECF No. 90-1.[3] The arresting police officer "knew [Joshua] Vogt to have previous law enforcement contacts involving drugs." Ex. A to Sweeney Decl., ECF No. 90-1 at 3. The arresting police officer observed that Joshua "Vogt did not appear to be currently under the influence." Ex. A to Sweeney Decl., ECF No. 90-1 at 3. The arresting police officer twice searched Joshua Vogt, once on the scene and again when they arrived at the County's jail. Ex. A to Sweeney Decl., ECF No. 90-1 at 2-3.

Joshua Vogt arrived at the County's jail at or around 12:00 a.m. on January 3, 2020. Compilation Video at 00:00-32, ECF No. 70-1.[4] Joshua Vogt was met by

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[2] Plaintiff is Joshua Vogt's daughter. First Am. Compl. ¶ 6. The Court will use Joshua Vogt's first and last name to avoid confusion with Plaintiff.

[3] *See also generally* Ex. E to First Schwie Decl., ECF No. 53-2 at 122-24 (Depo. Ex. 14). A number of the parties' exhibits are duplicative of one another. *Compare*, *e.g.*, Ex. A to Sweeney Decl. (January 2, 2020 Nisswa Police Department Incident Report), ECF No. 90-1, *with* Ex. E to First Schwie Decl., ECF No. 53-2 at 122-24 (Depo. Ex. 14) (same). The Court will endeavor to provide a tandem citation to the other side's corresponding exhibit, identifying such exhibit, in a footnote.

[4] The parties have in part relied on existing filings to comprise the relevant record for the CO Defendants' motion for summary judgment. *See*, *e.g.*, Defs.' Mem. in Supp. at 2 n.1, ECF No. 87; Pl.'s Mem. in Opp'n at 2 n.2, ECF No. 89. One of those things is a compilation video created by the parties following a hearing on a prior motion at the Court's request. *See generally* ECF No. 70-1. At that hearing, the Court noted there were approximately

Defendant CO Anderson, who conducted a pat search at the jail's threshold before he entered the facility. Compilation Video at 00:32-1:07; Depo. of Ronald J. Imgrund 65:2-8, Ex. B to Sweeney Decl., ECF No. 90-2:[5] *see* Depo. of Robert Anderson 37:3-41:7, Ex. C to Sweeney Decl., ECF No. 90-3.[6] No contraband was found. Anderson Depo. 45:14-17.

Around 12:05 a.m., Joshua Vogt entered the facility and proceeded to the shower area, out of Defendant CO Anderson's sight for a period of time. Compilation Video at 1:19-23; Imgrund Depo. 67:13-68:8; Anderson Depo. 43:1-20. Defendant CO Anderson joined Joshua Vogt in the shower area and conducted a strip search. Anderson Depo. 43:21-45:13. No contraband was found during this search either. Anderson Depo. 45:14-17. Defendant CO Anderson could not recall whether Joshua Vogt took a shower, but testified he would have watched Joshua Vogt do so if he had. Anderson Depo. 47:21-48:2. Defendant CO Anderson did not recall Joshua Vogt being particularly sweaty during this time, having difficulty holding a conversation,

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11 exhibits (Deposition Exhibits 18-A through 18-K contained in Exhibit E to the First Schwie Declaration) consisting of video footage from the jail, which themselves had anywhere from a single video clip to more than 100 video clips in the individual exhibit. The Court inquired as to whether it was technically possible to create a compilation of the video clips that the parties agreed reflected the events in question for the Court's review. This compilation was then provided to the Court following the hearing. Like Plaintiff, the Court cites to the compilation video using "run time" citations versus the timestamps in the frames for ease of reference. *See* Pl.'s Mem. in Opp'n at 2 n.2.

[5] *See generally* Ex. B to First Schwie Decl., ECF No. 53-1 at 22-77.

[6] See generally Ex. D to First Schwie Decl., ECF No. 53-1 at 130-62.

or having difficulty following commands. Anderson Depo. 47:9-20.

By 12:11 a.m., Joshua Vogt had changed into jail-issued clothing. Compilation Video at 2:27-31. After performing some other screening tasks, Defendant CO Anderson escorted Joshua Vogt to a cell known as "Group Holding" in the jail's booking area. Compilation Video at 2:35-2:58; Anderson Depo. 50:9-22. It appears that Joshua Vogt was in "Group Holding" for approximately eight minutes before he began the booking process with Defendant CO Blum. *See* Compilation Video at 2:35-2:59; Ex. E to First Schwie Decl., ECF No. 53-8 at 12:12-21 a.m. (Depo. Ex. 18F) [hereinafter Camera 19].[7]

At 12:21 a.m., Joshua Vogt began the booking process with Defendant CO Blum. Compilation Video at 2:59-3:16; *see* Depo. of Raynor Blum 64:21-24, Ex. E to Sweeney Decl., ECF No. 90-5;[8] *see also* Ex. E to First Schwie Decl., ECF No. 53-4 at 30 (Depo. Ex. 19). During the booking process, Defendant CO Blum noticed that Joshua Vogt was sweaty, which he considered "abnormal." Blum Depo. 65:6-11; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 31 (Depo. Ex. 19).

As part of the booking process, individuals are asked whether they had been using drugs. Blum Depo. 65:12-19; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). Defendant CO Blum testified that it was common for individuals to not be truthful

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[7] Plaintiff has referred to portions of the jail's Camera 19, which are part of the record, but not included on the Compilation Video. *See* Pl.'s Mem. in Opp'n at 4-5 & n.3. Because of the nature of the video files, *see supra* n.4, the Court has cited to the time stamp at the top of the frame when referring to Camera 19.

[8] *See generally* Ex. C to First Schwie Decl., ECF No. 53-1 at 78-129.

in answering this question. Blum Depo. 65:20-66:7; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). Defendant CO Blum testified that, when he asked this question, Joshua Vogt told him "that he hadn't taken any drugs; at least recently." Blum Depo. 66:8-12; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). Blum testified that, based on the "behavior [he] observed including [Joshua Vogt] sweating, also [Joshua Vogt's] fidgety motions, to [him] it appeared more fidgety than [he] would consider normal," and he did not believe that Joshua Vogt was telling the truth. Blum Depo. 66:13-19; *see* Blum Depo. 68:22-24 ("So, coming off the street, I thought he was under the influence of something at the time."), 73:3-4 ("Fidgety, anxious, sweaty."); *see also* Compilation Video at 3:02-5:05; Ex. E to First Schwie Decl., ECF No. 53-4 at 31 (Depo. Ex. 19). Defendant CO Blum testified that Joshua Vogt had "more sweat than [he] would expect from a normal person that just walked in off the street" and would develop "[b]eads of sweat on his forehand that after he wiped away would reappear." Blum Depo. 69:2-14; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 31 (Depo. Ex. 19). Defendant CO Blum described Joshua Vogt's fidgeting as "[r]apid either body twitching or arm movements that don't have a purpose." Blum Depo. 69:15-19. Defendant CO Blum testified that Joshua Vogt's speech was "more on the rapid side," "kind of a stop-and go." Blum Depo. 68:2-10. Defendant CO Blum testified that he encountered Joshua Vogt a handful of times at the jail on prior occasions and Joshua Vogt seemed different this time. Blum Depo. 56:16-57:2, 57:24-59:15, 68:11-14.

Defendant CO Blum followed up with Joshua Vogt regarding his answer, mentioning the fidgeting and sweating. Blum Depo. 70:4-15; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19).

Joshua Vogt did not "admit to being on any illegal controlled substances," and "mentioned he has anxiety and takes a medication for it." Blum Depo. 70:23-71:7; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). Defendant CO Blum testified that while, "some of the behaviors [he observed] could be attributed to anxiety," these behaviors were "not to the extent" exhibited by Joshua Vogt. Blum Depo. 71:8-72:2.

As part of the booking process, Defendant CO Blum completed a booking information sheet. Blum Depo. 118:18-25; *see generally* Ex. F to Sweeney Decl., ECF No. 90-6.[9] The information sheet contained a series of questions. Ex. F to Sweeney Decl., ECF No. 90-6 at 2-3. The first question was whether Joshua Vogt was "cooperative at the time of booking." Ex. F to Sweeney Decl., ECF No. 90-6 at 3; *see* Blum Depo. 120:13-17. Defendant CO Blum checked "Yes." Ex. F to Sweeney Decl., ECF No. 90-6 at 3; *see* Blum Depo. 120:13-17. Another question asked whether Joshua Vogt had "any known medical problems." Ex. F to Sweeney Decl., ECF No. 90-6 at 3; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 31-32 (Depo. Ex. 19). Defendant CO Blum checked "Yes" and wrote "Anxiety." Ex. F to Sweeney Decl., ECF No. 90-6 at 3; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). As for current medications, Defendant CO Blum checked "Yes" and wrote "Clonopin [sic]."[10] Ex. F to Sweeney

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[9] *See generally* Ex. E to First Schwie Decl., ECF No. 53-2 at 162-64 (Depo. Ex. 15).

[10] Klonopin is a brand name for clonazepam, a medication used to treat, among other things, "panic attacks (sudden, unexpected attacks of extreme fear and worry about these attacks)." *Clonazepam*, MedlinePlus, Nat'l Lib. of Med., https://medlineplus.gov/druginfo/meds/a682279html (last accessed July 28, 2023).

Decl., ECF No. 90-6 at 3; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 31-32 (Depo. Ex. 19); *see also* Ex. F to Sweeny Decl., ECF No. 90-6 at 2 (noting treatment provider for anxiety).

One of the questions asked, "When was the last time you consumed any drugs? What type?" Ex. F to Sweeney Decl., ECF No. 90-6 at 3; *see* Blum Depo. 121:4-6; Ex. E to First Schwie Decl., ECF No. 53-4 at 32 (Depo. Ex. 19). Defendant CO Blum checked "Yes," and wrote: "On something right now, but he's unsure what he took. He's sweating heavily." Ex. F to Sweeney Decl., ECF No. 90-6 at 2; *see* Blum Depo. 121:14-22. In response to whether there were any "[b]ehavior [a]bnormalities," Defendant CO Blum again checked "Yes" and wrote "tremors, sweating profusely." Ex. F to Sweeney Decl., ECF No. 90-6 at 2; *see* Blum Depo. 121:23-13.

The questions on the booking information sheet are numbered 1 through 28 and then 50 through 57. Ex. F to Sweeney Decl., ECF No. 90-6 at 2-3. Defendant CO Blum testified that the "standard procedure was to ask from 1 through 28," and "stop at Question 28." Blum Depo. 123:10-124:2; *see* Imgrund Depo. 85:15-86:10. Question 50 asks whether the individual "need[s] urgent (right now) medical attention." Ex. F to Sweeney Decl., ECF No. 90-6 at 2. This question was not asked of Joshua Vogt. Blum Depo. 123:23-124:2.

In his role as sergeant, Defendant CO Imgrund was the ranking officer in charge of the jail on January 3. Imgrund Depo. 32:24-33:7, 59:9-13; Blum Depo. 100:18-23. If a corrections officer is concerned about an individual, the procedure is to bring that concern to the attention of the sergeant. Imgrund Depo. 58:24-59:8, 96:13-22. It is then up to the sergeant to determine how to handle the situation. Imgrund Depo.

59:14-17. Defendant CO Imgrund had encountered Joshua Vogt "[n]umerous times" in his professional capacity as Joshua Vogt "had been in custody many times, from the time that [Imgrund] was a CO all the way through as—[he] was a sergeant." Imgrund Depo. 62:24-63:11. Defendant CO Imgrund testified that he "had a good relationship" with Joshua Vogt and described Joshua Vogt as "[r]espectful" and a "[l]ow key inmate who didn't cause very many problems." Imgrund Depo. 63:12-14; *see* Imgrund Depo. 87:6-7 ("I haven't known Josh to ever cause a problem.").

At 12:24 a.m., Defendant CO Blum went to talk with Defendant CO Imgrund. *See* Compilation Video at 5:05-19. Based on his observations, Defendant CO Blum was concerned that Joshua Vogt "was high." Blum Depo. 67:2-8. Whether it was during this conversation or during a subsequent conversation they had approximately 10 minutes later, Defendant CO Blum "relayed to [Defendant CO Imgrund his] concerns that [Joshua Vogt] was under the influence of something." Blum Depo. 80:4-13; *see* Blum Depo. 80:14-81:2 ("I'm not specific on timing. You had pointed out the part in the video earlier where it looked like I had walked into the sergeant's office, so I could've told him then. Or I could've told him right after I observed the stumble. At some point during the booking process is when I notified my sergeant that I thought it was abnormal."), 83:10-12 ("The timing, if it was right before he stumbled or after, I don't recall."); *see also* Blum Depo. 76:18-77:1 ("But that [stumbling], in this instance, in conjunction with the sweating and with the what I would call, you know, fidgety, jittery behavior those were all kind of indications as a sum to me that he was under a con—a controlled substance. And enough to the point that it caused me to notify my sergeant."). Defendant CO

Blum told Defendant CO Imgrund that he thought Joshua Vogt "was high, really high, shaking like a leaf." Blum Depo. 83:5-9; *see* Blum Depo. 81:3-14; Ex. E to First Schwie Decl., ECF No. 53-4 at 33 (Depo. Ex. 19).

By 12:27 a.m., Defendant CO Blum was back out at the main desk continuing the booking process. *See* Compilation Video at 5:08-5:54; Camera 19 at 12:27 a.m. Joshua Vogt can be seen continuing to dab his brow and shift around. *See* Compilation Video at 5:54-7:29. He also can be seen completing what appears to be paperwork at Defendant CO Blum's direction. *See* Compilation Video at 5:54-7:29.

At 12:34 a.m., Defendant CO Blum directed Joshua Vogt to stand by the wall to have his booking photos taken and Joshua Vogt complied. *See* Compilation Video at 7:29-44; Blum Depo. 73:5-74:5. While turning for the side-profile photo, Joshua Vogt lost his balance and stumbled out of his shoes, catching himself on the wall. Compilation Video at 7:37-7:44; Blum Depo. 74:10-75:5. Joshua Vogt stumbled approximately "six to eight feet." Imgrund Depo. 93:8-94:2. Defendant CO Blum testified that it was "not uncommon" for individuals to "possibly stumble if taking a step backwards during a booking photo." Blum Depo. 76:1-17. Defendant CO Blum testified that, in Joshua Vogt's case, the stumble "was another indication . . . that he was under the influence of something." Blum Depo. 75:10-16; *see also* Blum Depo. 76:1-5 ("I had thought he was under a controlled substance."). It is at this point Plaintiff asserts that Joshua "Vogt was suffering from an obvious medical condition that was worsening during booking before he fell down while having his picture taken at 12:34 [a.m.]." Pl.'s Mem. in Opp'n at 12.

Defendant CO Anderson was present at the main desk the entire time from when Defendant CO Blum began the booking process to when Joshua Vogt stumbled, primarily working at another computer. Compilation Video at 3:00-7:52 (corrections officer wearing black, longer-sleeved undershirt with the sleeves near his elbows). Along with another corrections officer, Defendant CO Anderson went to Joshua Vogt's aid after he stumbled. Compilation Video at 7:29-54; *see also* Camera 19 at 12:30-35 a.m.

At 12:34 a.m., Defendant CO Blum went to Defendant CO Imgrund's office for a second time. Imgrund Depo. 95:6-96:4; Camera 19 at 12:34-36 a.m.; *see* Ex. E to First Schwie Decl., ECF No. 53-4 at 33 (Depo. Ex. 19). While Defendant CO Imgrund could not recall exactly what was said, he testified that Defendant CO Blum "indicated that he thought [Joshua] Vogt was on something and needed help." Imgrund Depo. 95:11-15; *see* Imgrund Depo. 95:16-25; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). Their conversation lasted approximately two minutes. *See* Camera 19 at 12:34-36 a.m.

At 12:41 a.m., Defendant CO Imgrund exited the office and went in to talk with Joshua Vogt in "Group Holding." Imgrund Depo. 99:10-19; Camera 19 at 12:40-41 a.m.; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 174 (Depo. Ex. 19). Defendant CO Imgrund was in with Joshua Vogt for approximately two minutes. Imgrund Depo. 105:8-14; Camera 19 at 12:41-43 a.m.; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). Defendant CO Imgrund observed that Joshua Vogt "was shaking and sweating." Imgrund Depo. 99:20-22; *see* Imgrund Depo. 100:25-2 (agreeing Joshua Vogt was "particularly sweaty"); Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18), 174 (Depo. Ex. 19). Defendant CO

Imgrund described the shaking as "mostly his legs at this time," "[t]hey were just bouncing up and down, kind of, very anxious." Imgrund Depo. 100:20-24. Defendant CO Imgrund acknowledged he had received "information at some trainings" regarding methamphetamine overdoses, and recalled that "some shaking and—and sweating profusely" would be some of the symptoms. Imgrund Depo. 102:7-14.

Defendant CO Imgrund asked Joshua Vogt if he had taken any drugs and Joshua Vogt "said no." Imgrund Depo. 99:20-23; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18), 174 (Depo. Ex. 19). Defendant CO Imgrund then asked Joshua Vogt "how did he explain his behavior." Imgrund Depo. 99:20-25. Joshua Vogt told Defendant CO Imgrund that "he thought he was having an anxiety attack" and that he had previously had an anxiety attack "the last time he was arrested." Imgrund Depo. 100:1-7; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18), 174 (Depo. Ex. 19).

Defendant CO Imgrund "asked [Joshua Vogt] to take some deep breaths." Imgrund Depo. 100:8-9; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). Joshua Vogt "took a number of deep breaths, and the shaking immediately stopped." Imgrund Depo. 100:9-11; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). As they continued talking, Joshua Vogt "started shaking again." Imgrund Depo. 100:12-14. Defendant CO Imgrund "reminded him to do the deep breathing," and, when Joshua Vogt "started deep breathing," "the shaking stopped again." Imgrund Depo. 100:15-19; *see* Imgrund Depo. 10:12-16 ("He—he stopped shaking with the breathing techniques. When—then when he would stop doing the breathing techniques, he would start shaking again."); *see also* Ex. E to First Schwie

Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). Throughout the time Defendant CO Imgrund was speaking with him, Joshua Vogt was "very clear in his communications and speaking." Imgrund Depo. 101:7-8; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Dep. Ex. 18), 173, 175 (Depo. Ex. 19). Defendant CO Imgrund decided "to help Josh[ua Vogt] to a bed" in an effort to help him relax by laying down. Imgrund Depo. 106:16-107:21; *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 175 (Depo. Ex. 19).

At 12:46 a.m., Defendant COs Imgrund and Anderson escorted Joshua Vogt from "Group Holding" to "Court Holding 2." Compilation Video at 7:55-8:06; Imgrund Depo. 108:4-8, 109:18-110:12; Anderson Depo. 68:18-25; Blum Depo. 88:1-8, 93:25-95:7; Ex. E to First Schwie Decl., ECF No. 53-3 at 154 (Depo. Ex. 18). Defendant CO Imgrund described Joshua Vogt as "[s]haky and unsteady." Imgrund Depo. 109:9-17. Defendant CO Imgrund testified that the transport technique they used—wherein each man had a hand under one of Joshua Vogt's armpits and another on his waist—was to guard against an individual from falling. Imgrund Depo. 109:22-111:3; *see* Blum Depo. 92:1-93:21, 97:9-98:16.

Defendant CO Imgrund testified that he had not seen Joshua Vogt shake like this before, but dealt with anxiety "a lot in jail" and had seen individuals shake before as well as "a lot of weird things attributed to anxiety." Imgrund Depo. 111:4-20. Defendant Imgrund testified that he again asked Joshua Vogt after he was in "Court Holding 2" whether he had taken drugs that night and Joshua Vogt assured him he had not and that it was just anxiety. Imgrund Depo. 111:21-112:11.

Between 12:48 a.m. and 1:29 a.m., jail staff, including Defendant COs Anderson and Blum, performed

well-being checks on Joshua Vogt no fewer than eight times: 12:48, 12:51, 12:56, 12:57, 1:09, 1:13, 1:22, and 1:26. Compilation Video at 8:19-9:57; *see* Imgrund Depo. 113:6-114:9; Anderson Depo. 74:10-23; Blum Depo. 101:11-105:6. These well-being checks consist of looking in on the individual and verifying that the individual is "alive and not in distress." Imgrund Depo. 113:17-114:3; *see* Anderson Depo. 74:21-23 (monitoring for "[b]reathing and movement"). Sometimes these checks are logged by scanning a barcode; other times they are not logged. Imgrund Depo. 114:8-19; Blum Depo. 105:7-10. Defendant CO Blum testified that he recalled Joshua Vogt "being roughly the same" during his well-being checks, lying down. Blum Depo. 103:8-22.

At 1:29 a.m., Defendant CO Imgrund was out in the booking area and noticed Joshua Vogt had raised his hand. Imgrund Depo. 116:10-117:8; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19); *see* Compilation Video at 10:04-34; *see also* Blum Depo. 109:9-25. Defendant CO Imgrund walked over to check on Joshua Vogt to see if he was okay. Ex. E to First Schwie Decl., ECF No. 53-3 at 175 (Depo. Ex. 19); *see* Compilation Video at 10:04-34. Joshua Vogt may have been shaking more at this point. Compare Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19) with Imgrund Depo. 117:5-25. Defendant CO Imgrund asked Joshua Vogt if he could hear him. Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19). Joshua Vogt responded that he could, but then "kinda rolled over." Ex. E to First Schwie Decl., ECF No. 53-3 at 175 (Depo. Ex. 19); *see* Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18); Imgrund Depo. 117:5-13.

Defendant CO Imgrund went in to check on Joshua Vogt and asked again whether he could hear him.

Imgrund Depo. 117:14-16; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19); *see* Compilation Video at 10:29-11:08. Joshua Vogt's responses became "garbled." Imgrund Depo. 117:14-17; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19). At this point, Defendant CO Imgrund directed that staff "call an ambulance." Imgrund Depo. 117:14-19; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19).

At 1:31 a.m., Defendant CO Imgrund exited "Court Holding 2" and went to call the on-call nurse. Compilation Video at 11:06-18; Imgrund Depo. 118:1-9; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19). Defendant CO Blum and another corrections officer went to "Court Holding 2." Blum Depo. 110:5-20; *see* Compilation Video at 11:19-12:14.

Approximately 30 seconds later, at or about 1:32 a.m., Defendant CO Blum "noticed [Joshua Vogt's] face . . . started turning a bluish color," indicating that he was no longer breathing. Blum Depo. 110:21-25. Joshua Vogt's chest was not moving and he had no pulse. Blum Depo. 111:1-10. Defendant CO Blum radioed Defendant CO Imgrund to tell him that Joshua Vogt stopped breathing. Blum Depo. 111:11-15; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18), 175 (Depo. Ex. 19).

Defendant CO Blum began CPR and Defendant CO Imgrund returned to assist with life-saving measures. Blum Depo. 111:16-114:17; Imgrund Depo. 122:21-123:20, 129:14-130:12. Joshua Vogt "was blueish in color and not breathing on his own." Imgrund Depo. 123:20-23. Defendant CO Blum performed CPR continuously until emergency medical services arrived

at approximately 1:38 a.m. Blum Depo. 113:16-19, 116:9-12; Ex. E to First Schwie Decl., ECF No. 53-3 at 155 (Depo. Ex. 18); *see* Compilation Video at 15:25-40.

Emergency medical services took over with life-saving measures. Ex. H to Sweeney Decl., ECF No. 90-8 at 3; Ex. E to First Schwie Decl., ECF No. 53-4 at 95 (Depo. Ex. 20). Tragically, these were not successful and Joshua Vogt was pronounced dead at 2:20 a.m. Ex. H to Sweeney Decl., ECF No. 90-8 at 3; Ex. E to First Schwie Decl., ECF No. 53-4 at 95 (Depo. Ex. 20).

An autopsy was conducted by the Ramsey County Medical Examiner. See generally Ex. I to Sweeney Decl., ECF No. 90-9.[11] It was determined that Joshua Vogt died from methamphetamine toxicity. Ex. I to Sweeney Decl., ECF No. 90-9 at 1; Ex. E to First Schwie Decl., ECF No. 53-4 at 131 (Depo. Ex. 22). Two small, plastic, Ziploc-style bags were found in Joshua Vogt's stomach "admixed with white particulate material." Ex. I to Sweeney Decl., ECF No. 90-9 at 1.

B. Camera 18

Throughout this litigation, Plaintiff continued to pursue what she believed to be missing video footage. *Vogt v. MEnD Correctional Care, PLLC*, No. 21-cv-1055 (WMW/TNL), 2023 WL 2414551, at *2-7 (D. Minn. Jan. 30, 2023) [hereinafter *Vogt II*], *report and recommendation adopted*, 2023 WL 2414531 (D. Minn. Mar. 8, 2023) [hereinafter *Vogt III*]. It was subsequently determined that the footage from Camera 18, a "booking"-area camera, was not preserved after it had been viewed by the captain of the jail (the jail's administrator) and a Department of Corrections inspector. *Id.* at *6-7.

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[11] *See generally* Ex. E to First Schwie Decl., ECF No. 53-5 at 1-9 (Depo. Ex. 36).

The Court previously found that "[t]here is no dispute that Camera 18 would have captured at least a partial view of the 'Court Holding 2' cell where Joshua Vogt was for 45 minutes before his condition deteriorated to the point that Defendant CO Imgrund called for emergency medical services." *Id.* at *8. "Camera 18 captured footage different from other cameras in the booking area and would have had a view into the 'Court Holding 2' cell, where Joshua Vogt was leading up to and at the time of his death." *Id.* at *9. "Camera 18 would have captured another perspective of the incident in question." *Id.* at *11 (quotation omitted).

The Court "conclude[d] that the County had a duty to preserve the footage from Camera 18 immediately following Joshua Vogt's death." *Id.* at *8. "The County preserved footage from Cameras 17 and 19 but not Camera 18, which, like Cameras 17 and 19, was also described as a 'booking'-area camera." *Id.* "No explanation—credible or otherwise—ha[d] been offered for why the footage from Camera 18 was available for [the captain of the jail] to review with the Department of Corrections inspector but not preserved with the other footage." *Id.* at *9.

The Court observed that "[n]either the Court nor Plaintiff can know what the footage from Camera 18 showed or how significant that footage was to this litigation," and "[i]t [wa]s impossible to determine precisely what the destroyed footage contained or how severely the unavailability of this footage prejudiced Plaintiff's ability to prove her claim." *Id.* at *11 (quotation omitted). The Court observed that it was possible "[t]he footage may have given the viewer an idea of what was visible during the well-being checks conducted on Joshua Vogt and any deterioration (or lack thereof) in his condition." *Id.* The Court observed

that "[i]t [wa]s also possible that the footage from Camera 18 would have showed Joshua Vogt raising his hand and the nature of that gesture, which is what prompted Defendant CO Imgrund to go into 'Court Holding 2' and ask if he was okay." *Id.*

The Court ultimately found "that a permissive adverse inference instruction [wa]s a remedy commensurate with the loss of the footage from Camera 18," and

> recommend[ed] that the parties be allowed to present evidence and argument regarding the loss of the footage from Camera 18 and that the jury be instructed that the County had a duty to preserve the footage from Camera 18, another County employee at the jail (and not the CO Defendants) failed to preserve the footage from Camera 18, and that the jurors may, but are not required to, infer that the footage from Camera 18 would have been favorable to Plaintiff.

Id. at *16 (quotation omitted). The Court also "recommend[ed] that Plaintiff be awarded her reasonable attorney fees and costs that she would not have incurred but for the County's failure to preserve the footage from Camera 18." *Id.* at *17. These recommendations were adopted.[12] *See generally Vogt III*, 2023 WL 2414531.

Plaintiff asserts that Camera 18 would have shown Joshua Vogt in "Group Holding" and "his deteriorating condition," which "necessitate[ed]" him being moved to "Court Holding 2." Pl.'s Mem. in Opp'n at 5; *see also* Pl.'s Mem. in Opp'n at 3, 8.

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[12] The amount of attorney fees and costs has been addressed in a separate order issued today.

III. MOTION FOR SUMMARY JUDGMENT

The CO Defendants have moved for summary judgment, asserting, among other things, that they are entitled to qualified immunity.

A. Legal Standards

1. Summary Judgment

Under Rule 56(a), courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *accord Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 792 (8th Cir. 2012). "If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial." *Gannon Int'l*, 684 F.3d at 792.

"To establish a genuine issue of material fact, . . . [the non-moving party] may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in his favor." *Turner v. Mull*, 784 F.3d 485, 489 (8th Cir. 2015) (quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." (quotation omitted)). "To show a genuine dispute of material fact, a party must provide more than conjecture and speculation." *Rusness v. Becker Cty.*, 31 F.4th 606, 614 (8th Cir. 2022) (quotation omitted).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Thus, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation omitted); *see Anderson*, 477 U.S. at 248-49; *see also*, *e.g.*, *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011).

On a motion for summary judgment, courts "view the record most favorably to the nonmoving party and draw all reasonable inferences in that party's favor." *Johnson v. Safeco Ins. Co. of Illinois*, 983 F.3d 323, 329 (8th Cir. 2020); *see also Scott v. Harris*, 550 U.S. 372, 378 (2007). Thus, "[a]s the non-moving party, [Plaintiff] is entitled to all reasonable inferences—those that can be drawn from the evidence without resort to speculation." *Turner v. XTO Energy, Inc.*, 989 F.3d 625, 627 (8th Cir. 2021) (quotation omitted).

2. Deliberate Indifference to Medical Needs

"Prison officials violate the Due Process Clause of the Fourteenth Amendment when they show deliberate indifference to a pretrial detainee's objectively serious medical needs." *Ivey v. Audrain Cty.*, 968 F.3d 845, 848 (8th Cir. 2020); *accord Reece v. Hale*, 58 F.4th 1027, 1030 (8th Cir. 2023); *see also*, *e.g.*, *Presson v. Reed*, 65 F.4th 357, 366-67 (8th Cir. 2023); *McRaven v. Sanders*, 577 F.3d 974, 979-80 (8th Cir. 2009);

Vaughn v. Gray, 557 F.3d 904, 908 n.4 (8th Cir. 2009); *Grayson v. Ross*, 454 F.3d 802, 808 (8th Cir. 2006). "To succeed on this kind of claim, a plaintiff must demonstrate that a pretrial detainee had an objectively serious medical need that the defendants knew of and yet deliberately disregarded." *Ivey*, 968 F.3d at 848; *accord Reece*, 58 F.4th at 1030.

"Deliberate indifference has both an objective and a subjective component." *Vaughn*, 557 F.3d at 908 (quotation omitted); *see*, *e.g.*, *Ryan v. Armstrong*, 850 F.3d 419, 425 (8th Cir. 2017); *Thompson v. King*, 730 F.3d 742, 746 (8th Cir. 2013); *McRaven*, 577 F.3d at 980. "The objective component requires a plaintiff to demonstrate an objectively serious medical need." *Vaughn*, 557 F.3d at 908. "A medical need is objectively serious if it has been diagnosed by a physician or if it is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Barton v. Taber*, 908 F.3d 1119, 1124 (8th Cir. 2018) [hereinafter *Barton II*] (quotation omitted); *see also*, *e.g.*, *Ryan*, 850 F.3d at 425.

"The subjective component requires a plaintiff to show that the defendant actually knew of, but deliberately disregarded, such need." *Vaughn*, 557 F.3d at 908. "In order to demonstrate that a defendant actually knew of, but deliberately disregarded, a serious medical need, the plaintiff must establish a mental state akin to criminal recklessness: disregarding a known risk to the [pretrial detainee's] health." *Id.* (quotation omitted); *accord Thompson*, 730 F.3d at 746-47. "This onerous standard requires a showing more than negligence, more even than gross negligence, but less than purposefully causing or knowingly bringing about a substantial risk of serious harm to the [pretrial detainee]." *Thompson*, 730 F.3d at 747 (quotations and citations omitted); *see also*, *e.g.*,

Presson, 65 F.4th at 366; *Letterman v. Does*, 789 F.3d 856, 862 (8th Cir. 2015); *Vaughn*, 557 F.3d at 908. "Even acting unreasonably in response to a known risk is insufficient to prove deliberate indifference." *Thompson*, 730 F.3d at 474. "[T]he evidence must show that the [defendants] recognized that a substantial risk of harm existed *and* knew that their conduct was inappropriate in light of that risk." *Letterman*, 789 F.3d at 862 (quotation omitted); *accord Presson*, 65 F.4th at 367.

"The factual determination that a [defendant] had the requisite knowledge of a substantial risk may be inferred from circumstantial evidence or from the very fact that the risk was obvious." *Presson*, 65 F.4th at 367 (quotation omitted); *see also*, *e.g.*, *Thompson*, 730 F.3d at 748; *Letterman*, 789 F.3d at 862; *Vaughn*, 557 F.3d at 909. As relevant here, a defendant "manifests deliberate indifference by intentionally denying or delaying access to medical care." *Letterman*, 789 F.3d at 862; *accord Presson*, 65 F.4th at 367; *Vaughn*, 557 F.3d at 909.

3. Qualified Immunity

"Qualified immunity shields government officials from liability when their conduct does not violate clearly established rights of which a reasonable person would have known." *Rusness*, 31 F.4th at 614 (quotation omitted); *see also*, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Ryan*, 850 F.3d at 424. An analysis of qualified immunity "involves two inquires: (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the violation." *Rusness*, 31 F.4th at 615; *see also*, *e.g.*, *Ivey*, 968 F.3d at 849. As applicable to the instant motion for summary judgment, "qualified immunity shields a law enforcement officer from liability in a § 1983 action unless: (1) the

facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Barton II*, 908 F.3d at 1124. "Courts have the liberty to choose the order of addressing the inquires." *Rusness*, 31 F.4th at 615; *accord Ivey*, 968 F.3d at 849. "The party asserting immunity always has the burden to establish the relevant predicate facts, and at the summary judgment stage, the nonmoving party is given the benefit of all reasonable inferences." *Rusness*, 31 F.4th at 615 (quotation omitted).

"A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Presson*, 65 F.4th at 369. "This means that existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quotation omitted); *see*, *e.g.*, *Ivey*, 968 F.3d at 849; *Ryan*, 850 F.3d at 427; *Casler v. MEnD Corr. Care, PLLC*, No. 18-cv-1020 (WMW/LIB), 2020 WL 6886386, at *4 (D. Minn. Nov. 24, 2020). "Showing that a right was clearly established requires identifying controlling precedent with close correspondence to the particulars of the present case." *Rusness*, 31 F.4th at 615; *accord Presson*, 65 F.4th at 369. "This means that the right in question must be construed fairly narrowly and the facts in the present case must align with facts in precedent." *Rusness*, 31 F.4th at 615; *accord Presson*, 65 F.4th at 369; *see Ivey*, 698 F.3d at 849 ("The Supreme Court has cautioned courts not to define clearly established law at too high a level of generality." (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam)); *see also Ryan*, 850 F.3d at 426-27 ("It is a 'longstanding principle that clearly established law should not be defined at a high level of generality.'" (internal

quotation marks omitted) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)); *cf. Casler*, 2020 WL 6886386, at *4.

The Eighth Circuit Court of Appeals has recognized this context-specific focus "in cases involving deliberate indifference to a pretrial detainee's objectively serious medical needs." *Ivey*, 968 F.3d at 849 (citing *Ryan*, 850 F.3d at 426-27); *Barton v. Taber*, 820 F.3d 958, 966 (8th Cir. 2016) [hereinafter *Barton I*]; *accord Presson*, 65 F.4th at 369. "[A]n officer does not lose the protections of qualified immunity merely because he does not react to all symptoms that accompany intoxication." *Thompson*, 730 F.3d at 748. Thus, while the Eighth Circuit has recognized and "deemed it clearly established by 2008 that a pretrial detainee has a right to be free from deliberately indifferent denials of emergency medical care," *Ryan*, 850 F.3d at 427 (quotation omitted), and stated that "a reasonable officer in 2011 would have recognized that failing to seek medical care for an intoxicated arrestee who exhibits symptoms substantially more severe than ordinary intoxication violates the arrestee's constitutional rights," *Barton I*, 820 F.3d at 967, courts must nevertheless engage in a "close examination of the facts to determine what right is at issue and thus whether qualified immunity is appropriate," *Rusness*, 31 F.4th at 615; *accord Presson*, 65 F.4th at 369; *see Ivey*, 968 F.3d at 849; *cf. Reece*, 58 F.4th at 1030.

B. Analysis

As stated above, it is Plaintiff's position that, as of 12:34 a.m., Joshua Vogt was suffering from an objectively serious medical need when he stumbled while having his booking photo taken and his condition was such that it would have been obvious to a lay person that he needed medical care. The CO Defendants assert that it was not clearly established that Joshua

Vogt had an objectively serious medical need as of 12:34 a.m. and, in any event, they were not deliberately indifferent.

1. Objectively Serious Medical Need

Between approximately 12:21[13] and 12:34 a.m., Joshua Vogt was observed to be sweating excessively, fidgety/jittery, and speaking rapidly to a degree that Defendant CO Blum did not believe he was truthfully answering questions regarding his drug use and suspected that he was high. Joshua Vogt was cooperative and followed instructions. When his booking photos were taken, Joshua Vogt stumbled several feet, out of his shoes, catching himself along the wall. While Defendant CO Blum suspected that Joshua Vogt was under the influence of a controlled substance, there is no dispute that it was not known that Joshua Vogt had consumed methamphetamine until after his death.

The CO Defendants argue Joshua Vogt's sweating and stumbling are not sufficient for it to have been obvious that he needed medical care, relying on *Jones*. In *Jones*, an inmate was "fine" until told of a transfer to another facility, "at which point she became 'violently sick' and 'uncooperative.'" 512 F.3d at 479. Extra officers were needed to help the inmate exit the vehicle upon arrival and she was "mumbling and exhibiting a blank stare." *Id.* The inmate did not respond to the officers' instructions and, at one point, was described as "grunting and rolling around on the

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[13] The earliest point in time in which Plaintiff argues Joshua Vogt was exhibiting an objectively serious medical need was when "Defendant [CO] Blum was aware that [Joshua] Vogt was suffering from an obvious medical condition that was worsening during booking before he fell down while having his picture taken at 12:34 AM." Pl.'s Mem. in Opp'n at 12. It is undisputed that Defendant CO Blum began the booking process at 12:21 a m.

floor." *Id.* at 479-80. She was also breathing rapidly "as if she had been exerting herself." *Id.* Several officers noted that the inmate "had an unpleasant odor, like urine or body odor," and "dried blood on her mouth and lips" was observed during a medical screening. *Id.* at 479-80. The Eighth Circuit held that, based on this combination of symptoms and the fact that the inmate "never expressed a need for medical attention," "a reasonable jury could not find that [the inmate] had a medical need so obvious that a lay-person would easily recognize the need for a doctor's immediate attention." *Id.* at 483. The CO Defendants argue that Joshua "Vogt . . . did not even present the more egregious symptoms that were still held not to be enough in *Jones*" and "was able to speak clearly, carry out a conversation, express his own rights (denying drug consumption and need for medical), and generally walking about although he had a stumble and subsequent assist to a cell." Defs.' Mem. in Supp. at 17-18.

Plaintiff likens this case to *Barton* and *Plemmons*. In *Barton*, the arrestee was involved in a single-vehicle accident. *Barton II*, 908 F.3d at 1122. He "could not stand without assistance." *Id.* When the arrestee arrived at the detention center, "he appeared highly intoxicated, his speech was slurred, and he was having trouble standing alone." *Id.* (quotation omitted). "After numerous attempts, [the arrestee] was able to provide only one adequate sample [for testing his blood alcohol concentration], which indicated a blood alcohol concentration of .115." *Id.* When asked to stand beside one of the deputies, the arrestee "walked over to [the deputy] and held the handrail before collapsing to the ground." *Id.* The deputy "instructed [the arrestee] three times where to sign the document, but [the arrestee] did not seem to

understand the instructions, and he did not sign the document." *Id.* The "arrest-disposition report noted that [the arrestee] was under the influence of alcohol and hydrocodone upon his arrival." *Id.* The jail administrator "could not recall whether he had ever run into somebody that was in [the arrestee's] particular shape, and he didn't know if any of his officers had either." *Id.* at 1124 (quotation omitted). Based on the car accident, inability to follow instructions and stand without assistance, "severe intoxication," and "drug ingestion," the Eighth Circuit concluded that "a jury could find that [the arrestee] was experiencing a medical need so obvious that a layperson would recognize that he needed prompt medical attention." *Id.*

In *Plemmons*, the arrestee informed the jail in the morning during booking that he had a history of heart problems, including two heart attacks. 439 F.3d at 820. That afternoon, the arrestee "began suffering chest and arm pain and was sweating profusely." *Id.* The arrestee's cell mate informed jail staff that the arrestee "was ill a number of times via a 'call box' in their cell." *Id.* When one of the jailers came to check on the arrestee, the arrestee told him "he was having heart trouble, but . . . the jailer left without doing anything." *Id.* There was evidence that one of the jailers "dismissed [the arrestee's] symptoms as an anxiety attack." *Id.* at 824.

The arrestee's "condition worsened, and he experienced increased chest pain and nausea." *Id.* at 820. The jailer and another jailer "came back twenty-five minutes after . . . [the] first visit, and the [arrestee] told them he thought he was having a heart attack." *Id.* The arrestee was taken to the booking area and sat "on a bench while [the jailers] finished processing a prisoner." *Id.* at 821. An ambulance was called after the processing was complete, "roughly ten to fifteen

minutes after [the arrestee] was removed from his cell, and more than fifty minutes from the time the jailers were first notified of [the arrestee's condition]." *Id.*

In light of the arrestee telling "the booking officer he was a heart patient, and, roughly six hours later began experiencing classic heart attack symptoms, including arm and chest pain, profuse sweating, and nausea—symptoms corroborated by his cell mate," the Eighth Circuit held "that a genuine fact dispute exist[ed] regarding whether [the arrestee] suffered objectively serious medical needs." *Id. at* 824. Based on the fact that the arrestee had notified the jail "he was a heart patient"; "[i]t was patently clear to [the arrestee], [his cell mate], and [a jail trustee who reported the arrestee was having trouble breathing] that [the arrestee] was having a heart attack"; and the arrestee and his cell mate "asked for assistance for at least fifteen to twenty minutes, but possibly for as long as fifty-one minutes," the Eighth Circuit concluded that "any reasonable officer would have known that a delay in providing prompt, appropriate medical care" would violate the arrestee's constitutional rights. *Id.*

Plaintiff contends that Joshua Vogt's condition went beyond mere intoxication akin to the arrestee's inability to stand in Barton and the attribution of his symptoms to anxiety when they should have been easily recognized as a need for medical care is analogous to *Plemmons*. The Court is hard pressed to conclude that, as of 12:34 a.m., a lay person would have recognized that Joshua Vogt was exhibiting symptoms substantially more severe than ordinary intoxication and needed medical attention.

In *Grayson*, the jail was told by the arresting officer that "he was 'pretty sure' [the arrestee] was under the influence of some narcotic." 454 F.3d at 806. While paperwork was being completed, the arrestee was

"calmly sitting on the bench, coherently answering questions from the jailers about his name, address, date of birth, and social security number." *Id.* "[H]e appeared normal, was responsive and attentive, and did not display any signs that he was having hallucinations." *Id.* Jail staff also called the arrestee's mother, "who explained that [her son] had a history of methamphetamine use." *Id.* When the supervising corporal "asked the arrestee if he had been doing drugs, . . . [the arrestee responded] that he lost his straw." *Id.* The corporal admitted the arrestee, "stating that the jail had booked detainees in worse condition." *Id.* at 807. As to the corporal, the Eighth Circuit concluded that the arrestee's "behavior at the time of intake did not suggest a high degree of intoxication," and, "[c]onfronted with a calm, non-combative person sitting on a bench answering questions, a layperson would not leap to the conclusion that [the arrestee] needed medical attention, even if he were aware that [the arrestee] had taken methamphetamine." *Id.* at 810.

Based on his observations, Defendant CO Blum was concerned that Joshua Vogt was under the influence of drugs and pressed the issue. Joshua Vogt, however, told both Defendant COs Blum and Imgrund that he had not used drugs recently. *Contra McRaven*, 577 F.3d at 978. While Joshua Vogt was sweating heavily, fidgety, and speaking rapidly, and subsequently stumbled while having his photo taken, he was also coherent, responding appropriately, and following instructions. *See Thompson*, 730 F.3d at 747-48; *Grayson*, 454 F.3d at 809-10; *Kelley v. Pulford*, No. 18-cv-2805 (SRN/TNL), 2020 WL 6064577, at *8-9 (D. Minn. Oct. 14, 2020); *cf. Reece*, 58 F.4th at 1030-31; *contra Barton II*, 908 F.3d at 1124-25; *Thompson*, 730 F.3d at 749. Although still sweating heavily and

shaking, Joshua Vogt continued to be clear in his communications when speaking with Defendant CO Imgrund after he stumbled. He told Defendant CO Imgrund that he was having an anxiety attack. *See Ivey*, 968 F.3d at 849-50; *contra Plemmons*, 439 F.3d at 820-21; *Gordon*, 454 F.3d at 860-61. When Joshua Vogt performed deep-breathing exercises with Defendant CO Imgrund, his shaking improved. Nevertheless, for purposes of summary judgment, the Court will assume without deciding that Joshua Vogt was suffering from an objectively serious medical need obvious to a lay person as of 12:34 a.m.

2. CO Defendants

The Court next turns to whether a reasonable jury could find that Defendant COs Anderson, Blum, and Imgrund had subjective knowledge of Joshua Vogt's serious medical need and deliberately disregarded it. When considering whether a defendant could be found to have been deliberately indifferent, the Eighth Circuit has distinguished between defendants who "fail[] to take any responsive action," *Vaughn*, 557 F.3d at 909; *see*, *e.g.*, *Ryan*, 850 F.3d at 426; *Letterman*, 789 F.3d at 863-64; *see also Reece*, 58 F.4th at 1033, and those that take "steps to abate . . . [the] risk of harm," *Letterman*, 789 F.3d at 865; *see*, *e.g.*, *Reece*, 58 F.4th at 1033-34; *cf. Ivey*, 968 F.3d at 849-50.

The Eighth Circuit's recent decision in *Reece* involved a similar situation to the one faced by Defendant COs Anderson, Blum, and Imgrund. Like Joshua Vogt, Amos Reece was arrested and booked into a county detention facility. 58 F.4th at 1029-30. "Over the next few hours, his medical condition deteriorated to the point that he was taken to a nearby hospital where he died." *Id.* at 1030. Like Joshua Vogt, the autopsy indicated that Reece "had orally consumed metham-

phetamine within a small plastic bag," which "subsequently opened within [his] stomach, leading to acute methamphetamine toxicity and his subsequent death." *Id.* (quotation omitted). Like Joshua Vogt, Reece "never told anyone at [the county detention facility] about the bag." *Id.*

The arresting officer told jail staff that Reece stated he was thirsty "multiple times during transport and "that even a puddle of rain water would suffice." *Id.* The arresting officer also told jail staff that Reece "was acting as if he was having a seizure in the back of his cruiser" and "was under the influence of methamphetamine."[14] *Id.* Reece likewise told jail staff "that he was very thirsty." *Id.* After being "informed . . . that he had to complete the intake process before [he] could enter the facility," Reece "gave the impression that he understood completely but repeated how thirsty he was multiple times." *Id.* (quotation omitted). Jail staff "informed [Reece] that he needed to sign some forms regarding his property, and [Reece] nodded signifying that he understood and signed both sheets and begged [jail staff] to take him in for a drink of water." *Id.* (quotation omitted). After the booking process was complete, Reece was escorted to a cell and told "that he could drink from the sink there." *Id.*

As relevant here, after having "witnessed [Reece's] booking, [a sergeant] reported that a short while later [Reece's] behavior changed in that he became more obnoxious and his demeanor was more off-putting." *Id.* at 1031 (quotation omitted). The sergeant "also observed that [Reece] was sweating profusely, all over

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[14] The parties disputed whether the arresting officer informed jail staff about Reece being under the influence of methamphetamine, "but for purposes of th[e] appeal [the Eighth Circuit] . . . assume[d] that he did." *Reece*, 58 F.4th at 1030.

his face, head, arms, chest and back and began making statements about 'just shoot me now.'" *Id.* (quotation omitted). The sergeant "explained that [Reece's] remarks were not of conversation flow but were absurd, random and quickly forgotten when a question was asked in reference to the comment made." *Id.* (quotation omitted). Approximately "two hours after [Reece] was booked into [the facility], he threw his breakfast tray at the cell window a number of times." *Id.* Reece "complied with a deputy's request to stop throwing things and to calm down. About thirty minutes later, however, he threw his tray at the window again and punched the cell wall multiple times." *Id.* at 1031-32. "Concerned that [Reece] might hurt himself, [the sergeant] ordered him placed in a restraint chair in an area that allowed jail staff to monitor [him] better." *Id.* at 1032. Once Reece was situated in the chair, medical personnel were summoned to evaluate him. *Id.*

Like Plaintiff, Reece's mother sued jail employees under 42 U.S.C. § 1983, alleging deliberate indifference to Reece's medical needs. *Id.* at 1029. In considering whether the sergeant was deliberately indifferent to Reece's medical needs in the context of qualified immunity and "whether she should have contacted medical staff earlier in the morning," the Eighth Circuit reasoned:

> There is some question, though, whether she should have contacted medical staff earlier in the morning (assuming that would've helped [Reece] anyway), but we don't think the record shows that she was deliberately indifferent to a serious medical need. This isn't a situation where officers essentially ignored an injured inmate for hours as he lay motionless and unresponsive, *see Letterman v. Does*, 789 F.3d 856, 864 (8th Cir. 2015), or failed to seek

> medical attention even though an inmate had "screamed, howled, and banged his head against the door of his cell for some eight hours." *See Ryan v. Armstrong*, 850 F.3d 419, 425-26 (8th Cir. 2017). The incident report reflects that members of the jail staff, including [the sergeant], checked on [Reece] at least eleven times in the two-and-a-half hours between booking and [the sergeant's] decision to place him in a restraint chair. *Cf. Krout v. Goemmer*, 583 F.3d 557, 569 (8th Cir. 2009). Even though [Reece's] behavior during that time may have been odd, none of the other five nonparty officers who checked on him requested a medical evaluation either. And even though [Reece] was making absurd, random comments and was "obnoxious" and sweating profusely at this time, that doesn't serve to distinguish him from many others who enter the jail under the influence of alcohol or drugs. *See Thompson*, 730 F.3d at 748. He also had no external injuries, nor was he struggling to breathe, bleeding, vomiting, or choking. *See id.* Up to the point a medical evaluation was requested, moreover, [Reece] complied with instructions.
>
> Perhaps [the sergeant] could have done more. But we cannot consider [the plaintiff's] claim through the lens of "hindsight's perfect vision," as she must demonstrate more than mere negligence or "ordinary lack of due care for the prisoner's safety" to succeed on her claim. *See Letterman*, 789 F.3d at 862. The record would not support a finding that [the sergeant's] failure to act differently was a product of deliberate indifference. She is therefore entitled to qualified immunity.

Id. at 1033-34.

With this in mind, the Court turns to the CO Defendants and whether a reasonable jury could

conclude that they were deliberately indifferent to Joshua Vogt. In doing so, each defendant's conduct must be assessed individually. *Id.* at 1030; *see also*, *e.g.*, *Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006). "When evaluating whether [a defendant] deliberately disregarded a risk, [courts] consider [that defendant's] actions in light of the information he possessed at the time, the practical limitations of his position and alternative courses of action that would have been apparent to an official in that position." *Letterman*, 789 F.3d at 862 (quotation omitted). Courts "must avoid determining the question with hindsight's perfect vision." *Id.* (quotation omitted); *see Reece*, 58 F.4th at 1034.

a. Defendant CO Blum

From the outset, Defendant CO Blum was concerned that Joshua Vogt was under the influence of a controlled substance. Based on his observations, which he documented during the booking process, Defendant CO Blum pressed Joshua Vogt regarding his drug use. Viewing the record in the light most favorable to Plaintiff, Defendant CO Blum also twice raised his concerns with Defendant CO Imgrund, his supervising officer. *See Letterman*, 789 F.3d at 895 ("Instead, Jennings took other steps to abate Daniel's risk of injury. Jennings began making phone calls to supervisors to determine how to proceed."). Members of the jail staff, including Defendant CO Blum, checked on Joshua Vogt at least 8 times in the approximately 45 minutes between when Joshua Vogt was escorted to "Court Holding 2" and when Defendant CO Imgrund saw him raise his hand. *See Reece*, 58 F.4th at 1033-34.

Viewed in the light most favorable to Plaintiff, Joshua Vogt was sweating profusely, fidgety, and speaking rapidly, and subsequently stumbled several

feet while having his booking photo taken. He did not pass out, he was coherent, and he answered questions both before and after he stumbled. *Contra Barton II*, 908 F.3d at 1124-25; *Thompson*, 730 F.3d at 749. "He also had no external injuries, nor was he struggling to breathe, bleeding, vomiting, or choking." *Reece*, 58 F.4th at 1034. While Defendant CO Blum suspected that Joshua Vogt was under the influence of a controlled substance, he did not know what that substance was, how much Joshua Vogt had taken, or when Joshua Vogt had taken it as, despite his questions, Joshua Vogt did not disclose to Defendant CO Blum the information needed to assess accurately his degree of intoxication. *See Grayson*, 454 F.3d at 810; *cf. Thompson*, 730 F.3d at 749; *contra McRaven*, 577 F.3d at 978, 981-82. Arguably, perhaps Defendant CO Blum could have done more—such as taking Joshua Vogt's vitals or not following the chain of command. He did not, however, fail to assess the situation, ignore his observations, or do nothing in response to the circumstances before him. Based on the record before the Court, a reasonable jury could not find that Defendant CO Blum "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley*, 2020 WL 6064577, at *11 (quoting *Saylor v. Nebraska*, 812 F.3d 637, 644 (8th Cir. 2016)); *see Reece*, 58 F.4th at 1033-34.

b. Defendant CO Imgrund

Viewing the evidence in the light most favorable to Plaintiff, Defendant CO Blum twice alerted Defendant CO Imgrund, the supervising officer, that he was concerned Joshua Vogt was under the influence of a controlled substance and "needed help." Defendant CO Imgrund had encountered Joshua Vogt numerous times in his corrections career and "had a good

relationship" with him. From his training, Defendant CO Imgrund knew that shaking and sweating profusely could be signs of a methamphetamine overdose.

Five minutes after Defendant CO Blum left the second time and less than ten minutes after Joshua Vogt stumbled, Defendant CO Imgrund went into "Group Holding" to check on Joshua Vogt. Like Defendant CO Blum, Defendant CO Imgrund observed Joshua Vogt to be sweating profusely and jittery, with his legs shaking. Defendant CO Imgrund had not seen Joshua Vogt shake like this in the past. Like Defendant CO Blum, Defendant CO Imgrund asked Joshua Vogt whether he had taken any drugs and Joshua Vogt told him no. Like Defendant CO Blum, Defendant CO Imgrund pressed Joshua Vogt to explain his behavior in light of that response.

Joshua Vogt told Defendant CO Imgrund that he thought he was having an anxiety attack. *Cf. Ivey*, 968 F.3d at 849-50. Defendant CO Imgrund had Joshua Vogt do some deep-breathing exercises and his shaking improved. Throughout the time Defendant CO Imgrund was speaking with Joshua Vogt, he was coherent and responded appropriately. Defendant CO Imgrund decided to move Joshua Vogt from "Group Holding" to "Court Holding 2" in an effort to try to get him to relax by laying down. As noted above, in the approximately 45 minutes Joshua Vogt was initially in "Court Holding 2," jail staff checked on him at least 8 times.

Just before 1:30 a.m., while out in the booking area, Defendant CO Imgrund noticed that Joshua Vogt had raised his hand and went over to check on him. While Joshua Vogt initially responded to Defendant CO Imgrund, he "kinda rolled over" and his responses became "garbled" when Defendant CO Imgrund went

into "Court Holding 2." At this point, Defendant CO Imgrund directed jail staff to call emergency medical services and went to call the on-call nurse.

Viewed in the light most favorable to Plaintiff, Defendant CO Imgrund was informed by Defendant CO Blum twice that he was concerned Joshua Vogt was under the influence of a controlled substance and "needed help." Defendant CO Imgrund observed Joshua Vogt to be shaking and sweating profusely. The shaking he observed was different than his prior interactions with Joshua Vogt and, from his training, Defendant CO Imgrund knew that shaking and sweating profusely could be signs of a methamphetamine overdose.

When Defendant CO Imgrund went in to talk with Joshua Vogt after he stumbled, Joshua Vogt did not pass out, he was coherent, and he answered questions. *Contra Barton II*, 908 F.3d at 1124-25; *Thompson*, 730 F.3d at 749. "He also had no external injuries, nor was he struggling to breathe, bleeding, vomiting, or choking." *Reece*, 58 F.4th at 1034. Joshua Vogt also denied that he was under the influence of a controlled substance when asked by Defendant CO Imgrund. Here again, Joshua Vogt did not disclose the information needed to assess accurately his degree of intoxication. *See Grayson*, 454 F.3d at 810; *cf. Thompson*, 730 F.3d at 749; *contra McRaven*, 577 F.3d at 978, 981-82.

Instead, Joshua Vogt told Defendant CO Imgrund that he was experiencing an anxiety attack. Defendant CO Imgrund observed deep-breathing exercises to have a positive effect on Joshua Vogt's shaking. Defendant CO Imgrund determined that Joshua Vogt should be moved to "Court Holding 2" in an effort to promote relaxation through lying down and an attempt to abate the medical condition Joshua Vogt told him

he was experiencing. *See Ivey*, 968 F.3d at 849-50; *Letterman*, 789 F.3d at 865. Here too, perhaps Defendant CO Imgrund arguably could have done more—such as taking Joshua Vogt's vitals, consulting medical personnel, or summoning emergency medical services sooner. He did not, however, ignore Defendant CO Blum's concerns, fail to assess the situation, disregard what Joshua Vogt himself was telling him was happening, or do nothing in response to the circumstances before him. Based on the record before the Court, like Defendant CO Blum, a reasonable jury could not find that Defendant CO Imgrund "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley*, 2020 WL 6064577, at *11 (quoting *Saylor*, 812 F.3d at 644); *see Reece*, 58 F.4th at 1033-34.

c. Defendant CO Anderson

Defendant CO Anderson conducted the initial pat search before Joshua Vogt entered the facility and subsequent strip search when Joshua Vogt changed into jail-issued clothing. Defendant CO Anderson did not recall Joshua Vogt being particularly sweaty during this time, having difficulty holding a conversation, or having difficulty following commands.

Viewing the evidence in the light most favorable to Plaintiff, Defendant CO Anderson was present during the booking process. Defendant CO Anderson saw Joshua Vogt stumble and went to his aid. After Defendant CO Imgrund talked with Joshua Vogt in "Group Holding," Defendant CO Anderson assisted Defendant CO Imgrund in escorting Joshua Vogt from "Group Holding" to "Court Holding 2." A reasonable jury could find that Defendant CO Anderson was aware of Joshua Vogt's excessive sweating and shaking given his close proximity when Defendant CO

Blum was booking Joshua Vogt and his assistance in escorting Joshua Vogt to "Court Holding 2." Like Defendant CO Blum, Defendant CO Anderson was among the members of the jail staff who checked on Joshua Vogt at least 8 times in the approximately 45 minutes between when Joshua Vogt was escorted to "Court Holding 2" and when Defendant CO Imgrund saw him raise his hand. *See Reece*, 58 F.4th at 1033-34.

Again, Joshua Vogt was sweating profusely, fidgety, and speaking rapidly, and subsequently stumbled several feet while having his booking photo taken. He did not pass out, he was coherent, and he answered questions both before and after he stumbled. *Contra Barton II*, 908 F.3d at 1124-25; *Thompson*, 730 F.3d at 749. "He also had no external injuries, nor was he struggling to breathe, bleeding, vomiting, or choking." *Reece*, 58 F.4th at 1034. Like Defendant CO Blum, perhaps Defendant CO Anderson arguably could have done more—such as taking Joshua Vogt's vitals or not following the chain of command. Defendant CO Anderson did not, however, ignore Joshua Vogt when he stumbled or do nothing in response to the circumstances before him. Based on the record before the Court, like Defendant COs Blum and Imgrund, a reasonable jury could not find that Defendant CO Anderson "acted with the culpable state of mind necessary to meet the 'extremely high standard' of deliberate disregard." *Kelley*, 2020 WL 6064577, at *11 (quoting *Saylor*, 812 F.3d at 644); *see Reece*, 58 F.4th at 1033-34.

3. Summary

In sum, having assumed that Joshua Vogt was suffering from an objectively serious medical need that would have been obvious to a lay person at 12:34 a.m. based on his excessive sweating, fidgeting, rapid

speech, and stumble, *see supra* Section III.B.1, a reasonable jury could not on this record conclude that by not immediately doing more for Joshua Vogt after he stumbled—whether that was taking vitals, consulting medical personnel, or summoning emergency medical services—the CO Defendants exhibited a state of mind akin to criminal reckless. The absence of footage from Camera 18, though understandably frustrating and disheartening for Plaintiff and Joshua Vogt's family and friends, does not alter the Court's analysis. Even assuming Camera 18 captured at least a partial view of the approximately eight minutes he was in "Group Holding" before Defendant CO Blum began the booking process, Imgrund Depo. 80:21-81:14, Depo. of Heath Fosteson 31:7-20, 35:2-6, Ex. D to Sweeney Decl., ECF No. 90-4,[15] it was the combined observations of Joshua Vogt by Defendant CO Blum during booking and his subsequent stumble that Plaintiff claims would have made it obvious to a lay person that he needed medical care—not before. As the facts viewed in the light most favorable to Plaintiff do not demonstrate that the CO Defendants were deliberately indifferent to Joshua Vogt in violation of his constitutional rights, the CO Defendants are entitled to qualified immunity and the Court recommends that their motion for summary judgment be granted on that basis. *See Barton II*, 908 F.3d at 1124; *see also Reece*, 58 F.4th at 1033-34. Because the Court has concluded that the CO Defendants are entitled to qualified immunity, the Court declines to address their causation argument and additionally recommends that their Daubert motion be denied as moot.

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[15] *See generally* Ex. A to First Schwie Decl., ECF No. 53-1 at 1-21.

IV. RECOMMENDATION

Based upon the record, memoranda, and the proceedings herein, and for the reasons stated above, **IT IS HEREBY RECOMMENDED** that:

1. The CO Defendant's Motion for Summary Judgement, ECF No. 83, be **GRANTED** on the basis of qualified immunity.

2. The CO Defendant's Daubert Motion to Exclude Plaintiff's Expert Karen Mollner, ECF No. 74, be **DENIED AS MOOT**.

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 21-cv-1055 (WMW/TNL)

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED,
Plaintiff,

v.

MEND CORRECTIONAL CARE INC.; CROW WING COUNTY, MINNESOTA; HEATH FOSTESON, INDIVIDUALLY AND IN HIS CAPACITY AS CROW WING COUNTY JAIL ADMINISTRATOR; CO ROBERT ANDERSON; CO RAYNOR BLUM; CO CHEROKEE DELEON; CO CHRISTINE GHINTER; CO RONALD J. IMGRUND; AND CO LUKASZ ORGANISTA,
Defendants.

Signed March 8, 2023

ORDER ADOPTING REPORT AND RECOMMENDATION

Wilhelmina M. Wright, United States District Judge

This matter is before the Court on the January 30, 2023 Report and Recommendation (R & R) of United States Magistrate Judge Tony N. Leung. (Dkt. 88.) The R & R recommends granting in part and denying in part Plaintiff Molly Vogt's motion for default judgment and other sanctions. No objections to the R & R

have been filed. In the absence of timely objections, this Court reviews an R & R for clear error. *See* Fed. R. Civ. P. 72(b) advisory committee's note to 1983 amendment; *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Having reviewed the R & R, the Court finds no clear error.

Based on the foregoing analysis, the R & R, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. The January 30, 2023 Report and Recommendation, (Dkt. 88), is **ADOPTED**.

2. Plaintiff Molly Vogt's motion for default judgment and other sanctions, (Dkt. 57), is **GRANTED IN PART and DENIED IN PART** as follows:

a. The motion is **GRANTED** with respect to the provision of an adverse-inference instruction regarding the footage from Camera 18, as set forth in the Report and Recommendation. Vogt will be awarded reasonable attorney fees and costs for the expenses that she would not have incurred but for the Defendants' failure to preserve the footage from Camera 18, including those expenses incurred in connection with her present motion, in an amount to be determined at a later date.

b. The motion is **DENIED** in all other respects.

UNITED STATES DISTRICT COURT
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Defendants.

Signed January 30, 2023

REPORT & RECOMMENDATION

Tony N. Leung, United States Magistrate Judge

I. INTRODUCTION

This matter comes before the Court on Plaintiff Molly Vogt's Rule 37(e) Motion for Default Judgment and Other Sanctions, ECF No. 57. A hearing was held. ECF No. 66. Nicholas Sweeney appeared on behalf of Plaintiff. Jessica E. Schwie appeared on behalf of Defendants CO Robert Anderson, CO Raynor Blum, and CO Ronald J. Imgrund (collectively, "CO Defen-

dants").[1] In light of the Court's conclusion on the disposition of Plaintiff's motion, the Court has issued its decision in the form of a report and recommendation to the district court, the Honorable Wilhelmina

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[1] The CO Defendants are the only remaining defendants in this litigation. *See generally Vogt v. Crow Wing Cty.*, No. 21-cv-1055 (WMW/TNL), 2022 WL 37512 (D. Minn. Jan. 4, 2022); ECF Nos. 22, 25. The CO Defendants are or were employed by Defendant Crow Wing County ("the County") at the time of the events giving rise to this litigation. *See*, *e.g.*, First Am. Compl. ¶¶ 10, 12-13, 16, ECF No. 67; Answer to First Am. Compl. ¶ 7; *see also* Decl. of Jessica Schwie ¶ 1, ECF No. 53. Plaintiff brought claims against the CO Defendants in their individual and official capacities as well as against the County. *See generally* First Am. Compl. "A suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent." *Elder-Keep v. Aksamit*, 460 F.3d 979, 986 (8th Cir. 2006) (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)); *accord Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978). Thus, Plaintiff's claims against the CO Defendants in their official capacities are essentially claims against the County and are therefore subsumed within Plaintiff's claims against the County. *See Thiel v. Korte*, 954 F.3d 1125, 1129 (8th Cir. 2020) ("The official-capacity claim against Korte is essentially a claim against the county itself.").

Following a prior motion to dismiss, only Plaintiff's claim against the CO Defendants in their individual capacities remains. *See generally Vogt*, 2022 WL 37512; *see also* First Am. Compl. ¶¶ 31-36 (Count I brought against "all Defendants except Crow Wing County"); Pl.'s Mem. in Supp. at 1-2 ("mov[ing] for reinstatement of [the] County into this lawsuit"), ECF No. 59; *cf.* Defs.' Mem. in Opp'n to Punitive Damages at 2 ("Denying dismissal to only these 3 individual defendants, the court held that dismissal was not available until there was discovery and development of the record as to whether [the CO Defendants] were actually aware of a serious medical need or deliberately disregarded a medical need as apparent to a layperson."), ECF No. 52. Thus, while the County has not been formally terminated from this litigation, it is no longer a party for all practical purposes.

M. Wright, District Judge for the United States District Court for the District of Minnesota.

Based upon the record, memoranda, and proceedings herein, **IT IS HEREBY RECOMMENDED** that Plaintiff's motion be **GRANTED IN PART** and **DENIED IN PART**.

II. BACKGROUND

A. Death of Joshua Vogt on January 3, 2022

As alleged in the First Amended Complaint, Joshua Vogt[2] was arrested on January 2, 2020, and transported to the County's jail. First Am. Compl. ¶¶ 19-20. Joshua Vogt arrived at the jail close to midnight. First Am. Compl. ¶ 20. Upon his arrival, he was transported to the booking area where an officer removed his "handcuffs and performed a pat down search." First Am. Compl. at 20. After this pat-down search, Joshua Vogt "enter[ed] a bathroom by himself from 11:53 PM to 12:03 AM," during which time Plaintiff alleges that Joshua Vogt "ingested two baggies of [m]ethamphetaine that eventually led to his death." First. Am. Compl. ¶ 20. After he was done in the bathroom, Joshua Vogt "showered and changed into orange jail clothing." First Am. Compl. ¶ 21.

Around 12:12 AM, Joshua Vogt "was booked into the" jail by Defendant CO Robert Anderson. First Am. Compl. ¶ 22. During the booking process, Defendant CO Anderson noted on a form that Joshua Vogt "was exhibiting 'tremors, sweating profusely.'" First Am. Compl. ¶ 22. There was a question that asked: "When was the last time you consumed any drugs? What type?" First Am. Compl. ¶ 22. Defendant CO Anderson

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[2] Plaintiff is Joshua Vogt's daughter. First Am. Compl. ¶ 6. The Court will use Joshua Vogt's first and last name to avoid confusion with Plaintiff.

reported that Joshua Vogt was "[o]n something right now, but he's unsure what he took. He's sweating heavily." First Am. Compl. ¶ 22.

Joshua Vogt remained in the booking area for approximately 20 minutes. *See* First Am. Compl. ¶¶ 22-23. During this time, he "was shaking, sweating heavily and pacing around the room." First Am. Compl. ¶ 23. Shortly after 12:30 AM, Joshua Vogt lost his balance and fell over as he turned to the side for a profile picture. First Am. Compl. ¶ 23. Three County deputies "rush[ed] to assist him." First Am. Compl. ¶ 23.

At some point, Defendant CO Raynor Blum "informed" Defendant CO Ronald J. Imgrund that Joshua Vogt "was on drugs and was shaking violently." First Am. Compl. ¶ 24. Around 12:45 AM, Defendant COs Anderson and Imgrund "carried [Joshua] Vogt into Court Holding Cell 2." First Am. Compl. ¶ 24. Joshua Vogt was "shaking and not able to walk on his own." First Am. Compl. ¶ 24.

Joshua Vogt was "left alone in the holding cell," where he remained until approximately 1:30 AM, when Defendant CO Imgrund entered the holding cell and noticed he "was incoherent" and "shaking worse than he was earlier." First Am. Compl. ¶ 26. Defendant CO Imgrund "instructed staff to call for an ambulance" and also telephoned an on-call nurse. First Am. Compl. ¶ 27. A few minutes later, Joshua Vogt stopped breathing. First Am. Compl. ¶ 27. Defendant COs Blum and Imgrund began life-saving measures. First Am. Compl. ¶ 27. Emergency medical services arrived approximately six minutes later and took over. First Am. Compl. ¶ 28. Less than an hour later, Joshua Vogt was pronounced dead. First Am. Compl. ¶ 28.

B. January 3, 2020 Meeting with the County & Autopsy of Joshua Vogt

Later in the morning on January 3, the same day that Joshua Vogt died, members of his family met with a County investigator. Pl.'s Mem. in Supp. at 4; *see* Ex. 39 at 13,[3] ECF No. 53-6. "Portions of this conversation were recorded" and a transcript of this meeting was made by defense counsel. Pl.'s Mem. in Supp. at 4; *see generally* Ex. 39; *see also generally* Exs. 38-1, 38-2 (audio recordings on DVD). During this conversation, the County investigator told Joshua Vogt's family that part of the investigation process involved watching video and that, with respect to the jail, "there's obviously the jail there's not an inch of that facility that's not under constant surveillance." Ex. 39 at 3; *see also* Ex. 39 at 4 ("[B]ut the guys who are on the ground doing the talking, analyzing, looking, watching the videos and things like that."). Joshua Vogt's family asked whether they would be able to watch the videos as well and were told by the County investigator that they "eventually" would. Ex. 39 at 3.

Throughout this conversation, members of Joshua Vogt's family discussed consulting with counsel about the events that happened. At one point, someone stated: "I think we need to get a hold of somebody." Ex. 39 at 3; *see also* Ex. 39 at 8 ("I think we need to talk to somebody about that."). At another point, someone asked the County investigator whether he "would recommend us getting an attorney right now?" Ex. 39 at 9. The County investigator responded that he "can't provide legal advice." Ex. 39 at 9. Later in

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[3] Unless otherwise noted, all exhibits are to the Schwie Declaration, ECF No. 53. *See also* Pl.'s Mem. in Supp. at 4 n.1 (referring to exhibits in the Schwie Declaration).

the meeting, someone commented: "I think we need to get an attorney and I think we need to talk to some people from not around this county because I believe that things happened and they're trying to cover it up, that's what I think." Ex. 39 at 10; *see also* Ex. 39 at 11 ("I think we need to go to an attorney").

C. Second Meeting with County

"A few weeks later," members of Joshua Vogt's family met with another County investigator, which was also recorded. Pl.'s Mem. in Supp. at 6. This meeting was likewise transcribed by defense counsel. Pl.'s Mem. in Supp. at 6; *see generally* Exs. 40, 41.

During this meeting, the County investigator "played portions of the surveillance video." Pl.'s Mem. in Supp. at 6. Members of Joshua Vogt's family asked questions about the availability of other video, including the cell "that they took [Joshua Vogt] out of." Ex. 41 at 3. The County investigator responded: "The core holding, or the one yeah, the group holding the first one that they went in. Not that I'm aware of, I wasn't provided any cameras [inaudible] and I'm sure they would have gave us that one since he was in there." Ex. 41 at 3.

Joshua Vogt's family continued to press about cameras in the holding cells. *See* Ex. 41 at 3-4. The County investigator told them that "[t]here's cameras in our pods, this is the booking area"; the "pods are different from the booking area"; and "there aren't cameras in any cell in the pods even, just in the common area." Ex. 41 at 3. The County investigator further explained that he was not aware of any cameras covering the area in question, but would "double[]check." Ex. 41 at 4. The County investigator reiterated, "But I am positive that I would have that footage had there been a camera in there." Ex. 41 at

4. The County investigator added, "I mean they've given me footage of everything, you saw how I have them step by step by step by every camera angle so they're not going leave that one out. And I do know, that nowhere in any of our cells do we have cameras." Ex. 41 at 4.

D. Pre-Litigation Events

In a letter dated June 17, 2020, Plaintiff's counsel sent the County a request under the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. § 13.01 *et al.*, seeking, among other things, "[a]ny and all video surveillance [between 11:00 PM on January 2, 2020 through 4:00 AM on January 3, 2020], where [Joshua] Vogt is visible." Ex. A at 1 to Decl. of Nicholas S. Sweeney, ECF No. 60-1. Approximately 30 days later, the County's county attorney responded to Plaintiff's counsel, enclosing, among other things "5 [d]ifferent discs containing video from the [jail]." Ex. B at 2 to Sweeney Decl., ECF No. 60-2. Included among the footage was video from the jail's Cameras 17 and 19, but not Camera 18. Pl.'s Mem. in Supp. at 8. Plaintiff's counsel followed up with the County, specifically requesting "[a]ll video footage from Camera 18." Ex. C at 1 to Sweeney Decl., ECF No. 60-3. Defense counsel responded on behalf of the County. *See generally* Ex. D to Sweeney Decl., ECF No. 60-4. After discussing the matter with the County, defense counsel stated that the County "confirmed the fact[] that . . . there is no video camera in the jail holding cell." Ex. D at 1 to Sweeney Decl.

Plaintiff subsequently filed this suit in April 2021. *See generally* ECF No. 1. Plaintiff noted in her pleading that there appeared to be missing video footage. *See*, *e.g.*, ECF No. 1 ¶¶ 18, 23, 25.

E. Litigation

Throughout this litigation, Plaintiff continued to pursue what she believed to be the missing footage.

1. Motion to Dismiss

The issue was discussed at the hearing on Defendants' prior motion to dismiss, at which another attorney with defense counsel's office explained that it was his understanding that "the video that the County offered to make available to [Plaintiff's counsel] was all of the video that they had in their possession from the time period, and it was, in my understanding, stored." ECF No. 34 at 31:10-14; *see* ECF No. 34 at 27:21-29:23, 31:4-32:8.

The attorney explained that the County "had to change how the video was stored based on a new system they put in place," and the video would "just have to be done through a different method," "accessed through a different manner." ECF No. 34 at 31:15-19. The attorney emphasized that he did not believe video had been deleted. ECF No. 34 at 31:17-18 ("I really don't believe it was deleted."), 24-25 ("I just want to make that clear. I really don't believe it was deleted.").

Following the motion hearing, Plaintiff's counsel followed up with the County, again requesting, among other things, "[a]ll video footage from Camera 18." Ex. G at 1 to Sweeney Decl., ECF No. 60-7. In response, defense counsel provided a link to "responsive information reproduced to you again, including the video," noting that the County has "produced the responsive data on multiple occasions" and "the repetitive requests should come to an end." Ex. H at 1 to Sweeney Decl., ECF No. 60-8.

2. Written Discovery

In written discovery, Plaintiff requested that "all surveillance cameras that cover the holding cell that

[Joshua Vogt] was in when he died" be identified. Ex. I at 9 to Sweeney Decl., ECF No. 60-9. Cameras 17 and 19 were identified. Ex. I at 9 to Sweeny Decl. Similarly, Plaintiff requested "[a]ll video, photographic, or audio depictions of Joshua Vogt at the [jail] in January 2020," and was told, in relevant part, "[n]one other than the . . . [jail] video surveillance data previously provided to Plaintiff." Ex. J at 3 to Sweeney Decl., ECF No. 60-10.

3. Depositions

a. Defendant CO Imgrund

Defendant CO Imgrund's deposition was taken in this matter. *See generally* Ex. B. During his deposition, Defendant CO Imgrund identified himself as "[l]ieutenant of jail operations," Ex. B at 6:4-7, and testified that he was in charge of the jail at the time Joshua Vogt came in, Ex. B at 59:9-13. During Defendant CO Imgrund's deposition, footage from Cameras 17 and 19 was played. *See*, *e.g.*, Ex. B at 75:20-23, 108:9-11.

Defendant CO Imgrund testified that Camera 19 faced the "jail booking area" and, at 12:11 AM, Camera 19 showed Joshua Vogt "at the top of the screen," having changed into "jail-issued clothing." Ex. B at 76:2-14. When Joshua Vogt went "off the screen to the left," Defendant CO Imgrund testified that "[h]e went into group holding." Ex. B at 76:15-19. Defendant CO Imgrund was asked if there was "any camera that allows you to look into group holding." Ex. B at 80:21-22. Defendant CO Imgrund testified that he believed one camera had "a partial view of group holding," describing it as "a view of the door, but if the door is open, you can see what's in there" and adding that "the room is mostly glass." Ex. B at 80:21-81:11. Defendant CO Imgrund also testified that

what could be seen also "depend[ed] on where [people] were sitting in group holding." Ex. B at 98:16-99:2. Continuing to watch Camera 19, Defendant CO Imgrund testified that it appeared Joshua Vogt "stumbled on his shoes" shortly after 12:30 AM while having his booking photos taken, over to or near "group holding." Ex. B at 92:8-94:11.

Defendant CO Imgrund testified that, approximately 10 minutes later, he went into "group holding" and talked to Joshua Vogt. Ex. B at 99:10-19. Defendant CO Imgrund testified that Joshua Vogt was "shaking and sweating." Ex. B at 99:20-22. He further testified that he asked whether Joshua Vogt had taken any drugs and Joshua Vogt said no. Ex. B at 99:21-23. Defendant CO Imgrund testified that Joshua Vogt told him he was having an anxiety attack and such attacks had happened before. Ex. B at 99:24-100:7. Defendant CO Imgrund testified that he asked Joshua Vogt to "take some deep breaths" and, after "a number of deep breaths," "the shaking immediately stopped." Ex. B at 100:8-11. Defendant CO Imgrund testified that, although Joshua Vogt continued to shake, the shaking would stop when he performed deep breathing. Ex. B at 100:12-19. Defendant CO Imgrund was with Joshua Vogt in "group holding" for approximately two minutes. Ex. B at 105:8-14. A few minutes later, Defendant COs Imgrund and Anderson returned to take Joshua Vogt over to "Court Holding 2." Ex. B at 107:2-108:7; *see* Ex. B at 109:18-112:11.

With Camera 17, Defendant CO Imgrund testified that this camera captures "a shot of the second door to group holding and the exit door . . . to the jail and the booking desk." Ex. B at 108:14-19. When asked if Camera 17 was the other camera he was talking about earlier that could "see inside group holding,"

Defendant CO Imgrund testified that it was not "the one [he] was thinking of." Ex. B at 108:20-24. Defendant CO Imgrund testified that Joshua Vogt appeared "[s]haky and unsteady" as he and Defendant CO Anderson transported him from "group holding" to "Court Holding 2." Ex. B at 109:15-111:3.

When they reached approximately 1:30 AM on Camera 17 during the deposition, Defendant CO Imgrund asked if this is where Joshua Vogt "raised his hand." Ex. B at 116:10-17. Plaintiff's counsel responded that he did not "have any video showing whether or not [Joshua Vogt] raised his hand." Ex. B at 116:18-20. Defendant CO Imgrund testified that he believed Joshua Vogt "raised his hand" and then Defendant CO Imgrund "asked him if he was okay." Ex. B at 117:5-9. Defendant CO Imgrund testified, at this point, Joshua Vogt was no longer speaking clearly and Defendant CO Imgrund directed that emergency medical services be called. Ex. B at 117:5-19.

The following exchange occurred with respect to possible footage of "group holding" and "Court Holding 2":

Q. Okay. Do you know, is there a camera that shows into Court Holding 2?

A. Not inside it.

Q. What about outside enough that you could see inside the window?

A. Not that you can see inside the window, no.

Q. Okay. Is there a better view of the front of Court Holding 2 than this camera angle that I'm using right now?

A. Yes, there is.

Q. Okay. Any idea what that camera number is, top of your head?

A. [18].

Q. [18]? Doesn't look like I've got that one. Have you seen Camera Angle 18—well, first, prior to coming here today, had you reviewed these videos?

A. Some parts of them, yes.

Q. Had you reviewed Camera—had you seen Camera 18 on this?

A. On these videos, I did not see it.

Q. Okay. All right. We'll talk more about the cameras a little later. And that camera that showed into group holding that we had kind of talked about, that I asked questions about, where you could see part of group holding, what camera is that?

A. I don't—I don't know the number. I don't think it's 18. But it—it could be.

Q. Okay.

A. I—I think it—I think the other angle is in here.

Ex. B at 119:4-120:14.

When looking at a schematic of the jail, Defendant CO Imgrund testified that Camera 18 would show "the booking desk and towards the exit door" as well as "Court Holding 2." Ex. B at 150:10-21, 153:9-19. Defendant CO Imgrund also examined the jail's "DVR chart," which consisted of "a list of cameras and what [digital video recorders] they're saved to." Ex. B at 155:18-156:4. This chart showed that Cameras 17, 18, and 19 were all identified as "Booking" cameras. Ex. 49 at 1, ECF No. 53-6. Defendant CO Imgrund agreed that Camera 18 was identified as "Booking 2." Ex. B at 156:11-14; *see* Ex. 49 at 1.

Defendant CO Imgrund was not in charge of saving the video from the night in question and burning it onto discs. Ex. B at 145:4-19; 158:5-159:6.

b. County's 30(b)(6) Deposition

Heath Fosteson was the designee for the County's 30(b)(6) deposition. *See* Pl.'s Mem. in Supp. at 14. Fosteson is the captain of the jail and the jail's administrator. Ex. A at 8:12-17, 9:6-9, ECF No. 53-1. In his role as jail administrator, Fosteson is responsible for investigating major incidents at the jail, such as an in-custody death, "collect[ing] all the information," and "submit[ting] it to the Department of Corrections." Ex. A at 11:21-12:11, 20:3-24, 21:11-24.

Fosteson described the procedure following an in-custody death:

> Well, from the moment that I'm notified that there has been an incident in the jail, we would initiate an investigation; which would mean investigators are called, either from our sheriff's office or from an outside agency if it need be.
>
> Those investigators would respond right away to the jail and take over the scene and begin their investigation.
>
> So that would be documenting the area of the incident, taking statements from officers, taking photographs. Just basically documenting the scene.
>
> My responsibilities as far as the Department of Corrections are concerned, I have ten days to gather up the information related to the incident.
>
> Within the first 24 hours, I have to notify the Department of Corrections that there was an incident, what the nature was, who was involved, et cetera.
>
> Within those ten days, I have to submit officer reports, any videos, logs, autopsy, general information that's required by the Department of Corrections.

Ex. A at 12:18-14:1.

As for what took place following Joshua Vogt's death, Fosteson testified that "County investigators came on the scene immediately after the incident," while emergency services "was still there working o[n Joshua] Vogt." Ex A at 18:11-24. Fosteson testified that "[o]ne of our sergeants recorded the videos and gave them to me," which he then forwarded along to the County's county attorney and the Department of Corrections. Ex. A at 21:16-24; *see* Ex. A at 48:19-49:2. Fosteson did not recall which sergeant recorded the videos in this case. Ex. A at 21:25-22:2.

A Department of Corrections inspector came to meet with Fosteson after having received all of the information gathered up and sent to the Department by Fosteson. Ex. A at 20:21-21:3. Fosteson testified that the Department of Corrections inspector "watched all the video with [him] in person, in [Fosteson's] office." Ex. A at 21:4-5.

Fosteson testified that Camera 18 is "one of the cameras in the booking area." Ex. A at 27:21-23; *see also* Ex. A at 31:2-6 ("Camera 18 shoots toward the exit door from the booking area to the court hallway."). Fosteson testified that Camera 18 would depict "Court Holding 2" and possibly a portion of "group holding." Ex. A at 31:7-23, 35:2-22. Fosteson agreed that Camera 18 would show Joshua Vogt being transported from "group holding" to "Court Holding 2" by Defendant COs Imgrund and Anderson. Ex. A at 36:4-13. Fosteson also testified that the wall of "Court Holding 2" has a "partition," meaning "the lower portion of the wall, it's a closed-off wall, you can't see through" whereas the upper portion of the wall is "glass" that "you can see through." Ex. A at 49:8-18. Fosteson testified that if a person were laying down in "Court Holding 2," they would not be visible by Camera 18. Ex. A at 49:19-21.

Fosteson testified that he did not believe footage from Camera 18 had been provided to Plaintiff or her counsel. Ex. A at 28:24-29:2. Fosteson believed Cameras "17 and 19 were the two angles that we had there from the booking room." Ex. A at 29:2-4. Fosteson further testified that Camera 18 was not provided to the County's county attorney, nor was it viewed by County investigators. Ex. A at 29:5-8, 30:2-6. And, while Camera 18 was not provided to the Department of Corrections, Fosteson testified that the Department of Corrections inspector reviewed footage from Camera 18 when he came to meet with Fosteson. Ex. A 29:9-13, 30:7-9; *see* Ex. A at 48:4-8. Fosteson testified that the Department of Corrections inspector came "within a month of" Joshua Vogt's death. Ex. A at 48:9-18.

Fosteson was asked whether he still had a copy of the footage from Camera 18. Fosteson testified that he did not and they "did not record it for some reason." Ex. A at 30:10-12, 18-19; *see also* Ex. A at 32:8-11 (Q. "Even though [Joshua Vogt] was there in that cell, Court Holding 2, that footage was not saved?" A. "No, it was not."). When asked why the footage from Camera 18 was not recorded, Fosteson theorized: "I—when the sergeants recorded the videos, I think the two angles that they had were the ones that they—they thought they needed to record, that depicted that area where [Joshua Vogt] was." Ex. A at 30:20-31:1. Fosteson testified that, by the time Plaintiff's MGDPA request came, the footage from Camera 18 "would have been recorded over already" because of "how busy those cameras are" and the system "overwrites itself when it gets to capacity." Ex. A at 39:4-12, 40:6-14. Fosteson estimated that the footage from Camera 18 would have been overwritten by the end of March 2020 and could have been overwritten as soon as the end of

February 2020. Ex. A at 47:13-21. Fosteson additionally testified that the jail got a "new camera system" and the system being used when Joshua Vogt died "is no longer in place in the jail" and had "been removed." Ex. A at 30:13-17; *see* Ex. A at 40:2-5 (system switch between August and November 2020).

III. ANALYSIS

There is no dispute that the footage from Camera 18 is no longer available. Defs.' Mem. in Opp'n to Punitive Damages at 9 n.5 ("Camera 18 footage is not available having been overwritten within 30-60 days of the incident."). Pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, Plaintiff seeks sanctions for the failure to preserve the footage from Camera 18. The CO Defendants oppose the motion.[4]

A. Legal Standard

The Federal Rules of Civil Procedure require that parties take reasonable steps to preserve electronically stored information that is relevant to litigation. Fed. R. Civ. P. 37(e). The Court may sanction a party for failure to do so, provided that the lost information cannot be restored or replaced through additional

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[4] The CO Defendants' response to Plaintiff's motion was due within 7 days. D. Minn. LR 7.1(b)(2). The response was filed more than six weeks later. *See generally* ECF No. 63. In their response, the CO Defendants incorporated by reference their response to Plaintiff's "motion for leave to amend the complaint to add a claim for punitive damages," wherein "Plaintiff first referenced the claimed spoliation." ECF No. 57 at 1; *see* ECF No. 49 at 3. Local Rule 7.1(g) sets forth a number of options the Court may take when "a party fails to timely file and serve a memorandum of law," including "tak[ing] any other action that the [C]ourt considers appropriate." Because the CO Defendants' untimely memorandum does not raise any new arguments not previously articulated in their prior memorandum, the Court has, in its discretion, considered their opposition.

discovery. *Id.* Rule 37(e) makes two types of sanctions available to the Court. Under Rule 37(e)(1), if the adverse party has suffered prejudice from the spoliation of evidence, the Court may order whatever sanctions are necessary to cure the prejudice. But under Rule 37(e)(2), if the Court finds that the party "acted with the intent to deprive another party of the information's use in the litigation," the Court may order more severe sanctions, including, among other things, a presumption that the lost information was unfavorable to the party, an instruction to the jury that it "may or must presume the information was unfavorable to the party," or entry of default judgement. "Federal courts also have inherent authority to impose sanctions against a party when that party destroys evidence that it knew or should have known is relevant to potential litigation and, in doing so, prejudices the opposing party." *Kelley ex rel. BMO Litig. Trust v. BMO Harris Bank, N.A.*, Case Nos. 19-cv-1756 (WMW), 19-cv-1869 (WMW), —— B.R. ——, 2022 WL 2801180, at *4 (D. Minn. July 18, 2022) (citing *Dillion v. Nissam Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993)); *see also*, *e.g.*, *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004); *E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 586 (D. Minn. 2005).

B. County's Obligation to Preserve & Failure to Take Reasonable Steps

A party is obligated to preserve evidence once the party knows or should know that the evidence is relevant to future or current litigation. *E*Trade Secs.*, 230 F.R.D. at 588; *see also* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment (preservation of evidence required when litigation is reasonably foreseeable). "A variety of events may alert a party to the prospect of litigation." Fed. R. Civ. P. 37(e),

advisory committee's note to 2015 amendment. "The duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence." *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 740 (N.D. Ala. 2017).

The Court concludes that the County had a duty to preserve the footage from Camera 18 immediately following Joshua Vogt's death. The County was in control of all of the video footage from its jail regarding the events in question. Fosteson testified as to the importance of documenting what took place following a major incident at the jail, such as an in-custody death, not only for the County's own investigation but also for submission to the Department of Corrections. *See LaJocies v. City of North Las Vegas*, No. 2:08-cv-00606-GMN-GWF, 2011 WL 1630331, at *2 (D. Nev. Apr. 28, 2011) ("Defendants' own protocols provide procedures for the preservation of such evidence."). Fosteson testified that he had ten days in which to gather up all of the information regarding Joshua Vogt's death, including videos, and submit it for review. There is no dispute that Camera 18 would have captured at least a partial view of the "Court Holding 2" cell where Joshua Vogt was for 45 minutes before his condition deteriorated to the point that Defendant CO Imgrund called for emergency medical services. *See*, *e.g.*, Defs.' Mem. in Opp'n to Punitive Damages at 18 ("That footage would have captured some of court holding and group holding from angles different than the camera angles in the record."); *see also* Ex. 50 at 1, ECF No. 53-6. Additionally, the County was not an unsophisticated party. *Blazer v. Gall*, No. 1:16-cv-01046-KES, 2019 WL 3494785, at *4 (D. S.D. Aug. 1, 2019); *see also* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment (taking into account "party's sophistication with regard to

litigation in evaluating preservation efforts"); *cf. Taylor v. Null*, No. 4:17-CV-0231-SPM, 2019 WL 4673426, at *6 (E.D. Mo. Sept. 25, 2019) ("Defendants had general knowledge that the security footage of the alleged excessive use of force against Plaintiff would be important to any litigation that would potentially ensue."). Further, the very day of Joshua Vogt's death, members of his family met with the County, expressed interest in watching the video footage, and repeatedly made reference to speaking with an attorney over what had occurred.

The Court similarly concludes that the County failed to take reasonable steps to preserve the footage from Camera 18. Notably, the County preserved footage from Cameras 17 and 19 but not Camera 18, which, like Cameras 17 and 19, was also described as a "booking"-area camera. Ex. 49 at 1. *See Estate of Hill ex rel. Grube v. NaphCare, Inc.*, No. 2:20-cv-00410-MKD, 2022 WL 1464830, at *11 (E.D. Wash. May 9, 2022) ("Notably, portions of the 2W27 hallway video were preserved, demonstrating that reasonable measures were available and were taken to preserve these portions. Plaintiffs have established that the missing portion of the 2W27 video is lost because Spokane County failed to take reasonable steps to preserve it."). Fosteson did not know why the footage from Camera 18 was not preserved. Moreover, Fosteson was the person *both* in charge of gathering all of the video evidence and submitting it to the relevant authorities *and* the person who later met with the Department of Corrections inspector to watch the video. Even if it could be said that the footage from Camera 18 was inadvertently not included in the materials Fosteson previously provided to the County's

county attorney and the Department of Corrections,[5] the subsequent meeting with the Department of Corrections inspector in which Fosteson reviewed the footage from Camera 18 along with the inspector should have alerted him to the fact that there was additional footage available that he had not previously preserved and provided. The Court is skeptical of the fact that the footage of Camera 18 was shared with the Department of Corrections, yet Fosteson could not explain why it had not been preserved along with the other footage.

C. Intent

Spoliation is the "intentional destruction [of evidence] indicating a desire to suppress the truth." *Stevenson*, 354 F.3d at 746; *see Fair Isaac Corp. v. Fed. Ins. Co.*, No. 16-cv1054 (WMW/DTS), 2020 WL 9179259, at *3 (D. Minn. May 15, 2020); *see also Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) ("The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth . . . ."). "Mere negligence, a finding that a party knew or should have known not to destroy relevant evidence, is not enough." *Fair Isaac Corp.*, 2020 WL 9179259, at *3; *see Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018); *Morris v. Union Pacific R.R.*, 373 F.3d 896, 901 (8th

[5] The Court appreciates that there was likely a significant amount of footage involved in this investigation. Indeed, at the hearing, the Court noted that Exhibits 18-A through 18-K, which contained video footage from the jail, had anywhere from a single video clip to more than 100 video clips in the individual exhibit. The Court inquired as to whether it was technically possible to create a compilation of the video clips that the parties agreed reflected the events in question for the Court's review. This was provided to the Court following the hearing. *See generally* ECF No. 70-1.

Cir. 2004); *see also* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment (negligence and gross negligence not enough); *cf. Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011) ("Severe spoliation sanctions, such as an adverse inference instruction, are only appropriate upon a showing of bad faith."). "[T]here must be evidence of 'a serious and specific sort of culpability' regarding the loss of the relevant ESI." *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 236 (D. Minn. 2019) (quoting *Auer*, 896 F.3d at 858). Because "[i]ntent rarely is proved by direct evidence, . . . a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motivations of the witnesses in a particular case and other factors." *Morris*, 373 U.S. at 901; *accord Greyhound Lines*, 485 F.3d at 1035; *Kelley*, 2022 WL 2801180, at *6.

The CO Defendants characterize the County's failure to preserve the footage from Camera 18 as an "unfortunate" "mistake" by "jail administration." Defs.' Mem. in Opp'n to Punitive Damages at 19. The Court disagrees. Under the circumstances of this case, the County's failure to preserve the footage from Camera 18 warrants a finding of bad faith. First, the County, and Fosteson as the jail administrator, knew that video footage of the events surrounding a major jail incident like Joshua Vogt's in-custody death would be relevant to the ensuing investigation and any potential litigation arising therefrom. *See Stevenson*, 354 F.3d at 748; *Taylor*, 2019 WL 4673426, at *6.

Second, the County preserved footage from other camera angles generally covering this area of the jail, such as Cameras 17 and 19, but not Camera 18. Based on the record before the Court, Camera 18 captured footage different from other cameras in the booking area and would have had a view into the "Court

Holding 2" cell, where Joshua Vogt was leading up to and at the time of his death. *See Stevenson*, 354 F.3d at 748; *Taylor*, 2019 WL 4673426, at *6. Courts have found the requisite intent to deprive based on selective preservation of evidence, whereby a litigant "allow[ed] some portions [of relevant evidence] to be overwritten by automatic procedures" "without a credible explanation." *Estate of Hill*, 2022 WL 1464830, at *12 (citing *Culhane v. Wal-Mart Supercenter*, 364 F. Supp. 3d 768, 774 (E.D. Mich. Jan. 10, 2019)); *see Stevenson*, 354 F.3d at 748. No explanation—credible or otherwise—has been offered for why the footage from Camera 18 was available for Fosteson to review with the Department of Corrections inspector but not preserved with the other footage. *See Estate of Hill*, 2022 WL 1464830, at *12 ("The absence of any explanation for preserving less relevant video while permitting the destruction of the most relevant video is notable given Lieutenant Hooper's testimony that Spokane County Detention Services' standard operating procedure would have been to preserve the video related to Ms. Hill's confinement from the day of her death.").

Third, this was not a "passive failure" by the County. *See Estate of Bosco ex rel. Kozar v. Cty. of Sonoma*, No. 20-cv-04859-CRB, —— F. Supp. 3d ——, 2022 WL 16927796, at *10 (N.D. Cal. Nov. 14, 2022). Fosteson was aware of the footage from Camera 18 because he viewed it with the Department of Corrections inspector as part of the follow-up investigation into Joshua Vogt's death. *See id.* ("But here, more than a failure to halt an automatic deletion process is at issue: Defendants undertook a criminal investigation of Bosco's death that included a thorough review of the video in question while the automatic deletion process could still be halted."); *contra Auer*, 896 F.3d at 858; *Stepnes*, 663 F.3d at 965. Fosteson, and thus

the County, was therefore on notice of the existence of the Camera 18 footage at a time when it could be saved.

In sum, the Court finds it reasonable to infer that, under this combination of circumstances, the act of allowing the footage from Camera 18 to be overwritten "creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding" Joshua Vogt's death at the jail. *Stevenson*, 354 F.3d at 748; *accord Taylor*, 2019 WL 4673426, at *6; *see also Estate of Hill*, 2022 WL 1464830, at *13; *Culhane*, 364 F.3d at 774.

D. Prejudice to Plaintiff[6]

Prejudice exists when spoliation prohibits a party from presenting evidence that is relevant to its underlying case. Prejudice can also be established "by the nature of the evidence destroyed." *Stevenson*, 354 F.3d at 748. In *Stevenson*, the Eighth Circuit Court of Appeals found that "[t]he requisite element of prejudice" had been satisfied when the evidence destroyed

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[6] In connection with the 2015 amendments to Rule 37(e), the advisory committee noted:

> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

The Court has made the requisite finding of intent. *See supra* Section III.C. Nevertheless, the parties have each addressed the issue of prejudice and the Court finds it prudent to do so as well. *See*, *e.g.*, Pl.'s Mem. in Supp. at 25-26; Defs.' Mem. in Opp'n to Punitive Damages at 20.

was "the only contemporaneous recording of conversations at the time of the accident" at a train crossing. *Id.* "While there [wa]s no indication that the voice tape destroyed contained evidence that could be classified as a smoking-gun, the very fact that it [wa]s the only recording of conversations between the engineer and dispatch contemporaneous with the accident render[ed] its loss prejudicial to the plaintiffs." *Id.*

Plaintiff asserts that her "case centers on the inference that Joshua Vogt's condition would have been severe, unrelenting, worsening, and obvious, and that [the CO Defendants] deliberately disregarded [his] deteriorating condition until it was too late." Pl.'s Mem. in Supp. at 25; *see Vogt v. Crow Wing Cty.*, No. 21-cv-1055 (WMW/KMM), 2021 WL 6275271, at *5 (D. Minn. Nov. 1, 2021) ("While he had not been diagnosed by a physician, these symptoms and behaviors would suggest to even a layperson that [Joshua] Vogt was undergoing a medical emergency and in need of immediate attention—especially given how rapidly they set on and worsened."), *report and recommendation adopted*, No. 21-cv-1055 (WMW/TNL), 2022 WL 37512 (D. Minn. Jan. 4, 2022). Plaintiff asserts that the footage from Camera 18 "would have been the best evidence" that the CO Defendants were aware of Joshua Vogt's serious medical needs and deliberately disregarded them. Pl.'s Mem. in Supp. at 25. Plaintiff asserts that "[t]here is no substitute for the visual impact of video." Pl.'s Mem. in Supp. at 26.

The CO Defendants counter that "[t]he contents of Camera 18 would be of little value to Plaintiff." Defs.' Mem. in Opp'n to Punitive Damages at 20. According to the CO Defendants, "Camera 18 would not have captured [Joshua Vogt] during any moments where at least two other angles of footage did not also cover

him." Defs.' Mem. in Opp'n to Punitive Damages at 20. In light of both Defendant CO Imgrund and Fosteson's deposition testimony that Camera 18 would have at least a partial view of the "Court Holding 2" cell, this does not appear to be the case. *See* also Defs.' Mem. in Opp'n to Punitive Damages at 18 ("That footage [from Camera 18] would have captured some of court holding and group holding from angles *different* than the camera angles in the record." (emphasis added)). At the hearing, defense counsel also acknowledged that Camera 18 would have captured the cell where Joshua Vogt died. Moreover, "one party to a lawsuit does not 'possess the unilateral ability to dictate the scope of discovery based on their own view of the parties' respective theories of the case.'" *Kelley*, 2022 WL 2801180, at *11 (quoting *Sentis Grp., Inc. v. Shell Oil Co.*, 763 F.3d 919, 925 (8th Cir. 2014)).

As stated above, destroyed evidence need not amount to the proverbial smoking gun before its loss can be deemed prejudicial. *See Stevenson*, 354 F.3d at 748; *accord Kelley*, 2022 WL 2801180, at *10. Camera 18 "would have captured another perspective of the incident in question." *Culhane*, 364 F. Supp. 3d at 775; *see LaJocies*, 2011 WL 160331, at *2 ("Despite the limited viewing angle of the videotape which may have captured only the threshold of the door but not inside the cell, it is likely that it did still capture at least some of the altercation (whether sights or sounds) and could have potentially assisted the jury to understand the tenor of the event and to evaluate the credibility of the witnesses who are providing conflicting descriptions."); *see also Woods v. Scissons*, No. CV-17-08038-PCT-GMS, 2019 WL 3816727, at *3 (D. Ariz. Aug. 14, 2019) ("Even if the exact angle was not perfect such that the recordings did not actually capture images of the incident, it is enough that the

cameras may have captured any footage of the incident."); *cf. Kelley*, 2022 WL 2801180, at *11 ("Even if the spoliated evidence is cumulative to some extent, the availability of the same or similar evidence from third parties or other sources does not necessarily demonstrate a lack of prejudice.").

Neither the Court nor Plaintiff can know what the footage from Camera 18 showed or how significant that footage was to this litigation. "[I]t is impossible to determine precisely what the destroyed [footage] contained or how severely the unavailability of [this footage] prejudiced [Plaintiff's] ability to prove [her] claim[]." *Paisley Park Enters.*, 330 F.R.D. at 236 (quotation omitted); *see Kelley*, 2022 WL 2801180, at *10. The footage may have given the viewer an idea of what was visible during the well-being checks conducted on Joshua Vogt and any deterioration (or lack thereof) in his condition. *See* Defs.' Mem. in Opp'n to Punitive Damages at 5-6; *see also* Minn. R. 2911.5000, subp. 5 ("A written policy and procedure shall provide that all inmates are personally observed by a custody staff person at least once every 30 minutes."); *cf. Estate of Hill*, 2022 WL 1464830, at *14. Indeed, in the video compilation provided to the Court, jail staff can be seen peering into "Court Holding 2" to check on Joshua Vogt regularly—at least seven times—in the approximately 45 minutes between when he was placed in "Court Holding 2" and when Defendant CO Imgrund entered around 1:30 a.m. to speak with him. *See* ECF No. 70-1 at 8:30-9:58. It is also possible that the footage from Camera 18 would have showed Joshua Vogt raising his hand and the nature of that gesture, which is what prompted Defendant CO Imgrund to go into "Court Holding 2" and ask if he was okay.

The sad circumstances of this lawsuit mean that Joshua Vogt is not available to testify as to any symptoms he was exhibiting or interactions he had with the CO Defendants on the night in question. While other camera angles, including Cameras 17 and 19 are available to Plaintiff, Camera 18 is the only one capturing at least a partial view of "Court Holding 2," where Joshua Vogt was being held at the time of his death. The Court concludes that "there is a reasonable probability that the loss of . . . [Camera 18's footage] has materially prejudiced [Plaintiff] in [her] case against [the CO Defendants]." *E*Trade Secs.*, 230 F.R.D. at 592; see Kelley, 2022 WL 2801180, at *10.

E. Imputed to the CO Defendants

There appears to be no real dispute that the CO Defendants themselves were not involved in the preservation of the video footage of the night in question. It was the County, through Fosteson, the jail administrator, who was ultimately responsible for gathering and preserving the footage.

Recognizing that it was the County's duty to preserve the footage from Camera 18, Plaintiff has moved for reinstatement of the County. Plaintiff asserts that the County failed to comply with Minnesota law by not turning over the footage from Camera 18 to the county attorney or the Department of Corrections, citing Minn. R. 2911.3700, subp. 4. But, even assuming for sake of argument that this were true, "Minnesota courts do not recognize an independent tort for spoliation of evidence." *Horde v. Elliot*, No. 17-cv-800 (WMW/SER), 2018 WL 987683, at *11 (D. Minn. Jan. 9, 2018) (citing cases), *report and recommendation adopted*, 2018 WL 985294 (D. Minn. Feb. 20, 2018); *see also*, *e.g.*, *Berget v. City of Eagan*, No. 08-cv-4728 (MJD/FLN), 2010 WL 11602636, at *9 (D. Minn. Mar.

23, 2010) ("Neither Minnesota nor the Eighth Circuit, however, recognizes an independent tort for spoliation of evidence."); *Ansari v. NCS Pearson, Inc.*, No. 08-cv-5351 (JRT/JJG), 2009 WL 10678873, at *2 (D. Minn. Mar. 30, 2009) ("Minnesota law provides no civil claim for negligent or intentional spoliation of evidence."), *objections overruled*, 2009 WL 2337137 (D. Minn. July 23, 2009). Additionally, the Eighth Circuit has explained that "a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters." *Sherman v. Rinchem Co.*, 687 F.3d 996, 1006 (8th Cir. 2012) (quoting *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009)); cf., *e.g.*, *Turner v. United States*, 736 F.3d 274, 282 n.5 (4th Cir. 2013) ("Spoliation of evidence, standing alone, does not constitute a basis for a civil action under either federal or admiralty law."); *Johns v. Gwinn*, 503 F. Supp. 3d 452, 465 (W.D. Va. 2020) ("[T]here is no standalone cause of action for destruction of evidence.").

The CO Defendants maintain that, because none of them "had any control over the storage of the camera footage," they should not be sanctioned. Defs.' Mem. in Opp'n to Punitive Damages at 19. In *Burris v. Gulf Underwriters Insurance Co.*, the Eighth Circuit considered an adverse-inference instruction against an insurer arising out of conduct by its insured. 787 F.3d 875, 879-880 (8th Cir. 2015). The alleged spoliation at issue related to a letter purportedly sent by the plaintiff's attorney to the insured in 2003, which would have triggered coverage under the insurance policy. *Id.* at 877. The insurer denied that its insured ever received the letter. *Id.* Whether the letter was received within the coverage period was a question of fact for the jury. *Id.* at 878. The plaintiff requested an adverse-inference instruction against the insurer on

the basis that its insured spoliated evidence by destroying more than 30 boxes of records from a third-party claims handler a year prior to the litigation, boxes which the plaintiff argued may have contained the letter. *Id.* at 877, 879. The request was denied. *Id.* at 878.

The plaintiff appealed, "arug[ing] that the district court erred in declining to issue the spoliation instruction." *Id.* The Eighth Circuit held that the evidence was insufficient to establish that the insured "destroyed the boxes to suppress the truth regarding [the plaintiff's] claim." *Id.* at 879. The evidence did not show that the insured knew the letter was in the boxes or suggest that the insured "destroyed the boxes because [it] knew litigation would be forthcoming." *Id.* Additionally, the insured testified that it was no longer using that third-party claims handler at the time the letter was purportedly sent and therefore the letter would not have been in the boxes. *Id.*

The Eighth Circuit further stated that

> even if [the plaintiff] had presented evidence that [the insured] intentionally destroyed the files to suppress the truth, and that this destruction prejudiced [the plaintiff], an adverse instruction would not be warranted against [the insurer] because [the insurer] had no involvement in the alleged spoliation of the documents, nor any access, or control, over the destroyed files.

Id. at 880. The Eighth Circuit explained that

> [s]ince the imposition of an adverse inference instruction for spoliation is a kind of sanction meant, in part, to shift the burden to the spoliating party to prove the destroyed evidence was not favorable to them, it defies the purpose of the sanction to impose it on a party that played no part in the alleged spoliation of evidence.

Id. (citation omitted). An analogy could arguably be made between the CO Defendants in this case and the insurer in *Burris*.

Because they were not responsible for preserving the footage from Camera 18, the CO Defendants maintain that they should not be held accountable for the County's failure to preserve it. Essentially, the CO Defendants "would have the Court conclude that Plaintiff has no remedy." *Taylor*, 2019 WL 4673426, at *5. Such an argument was rejected by a federal district court in this Circuit in *Taylor*. *Taylor* involved an inmate's claim of excessive force against corrections officers at a state-run facility. *Id.* at *1, 3. The facility's response to a grievance sent by the inmate "reveal[ed] that video records existed of the areas in which the incidents allegedly occurred and for the timeframe in which they happened." *Id.* at *3. "However, while evidence indicate[d] that such footage did exist," the footage was apparently destroyed "in accordance with a routine retention policy, whereby the Missouri Department of Corrections' recording system writes-over such footage if it is not affirmatively preserved." *Id.* at *3. The inmate sought sanctions for spoliation, arguing that the defendants "should have been aware that litigation related to [his] complaints of unauthorized use of force was likely, and that the footage should have been preserved, as [he] filed several timely complaints about the alleged abuse, and affirmatively requested the video footage on more than one occasion." *Id.*

The defendants cited *Burris* "to support their contention that the Court may not impute the destruction of evidence to parties who did not personally cause the alleged spoliation." *Id.* at *5. The district court in *Taylor*, however, concluded that "*Burris* [wa]s distinguishable from the case at hand in two salient ways."

Id. First, the relationship between the alleged spoliator and the recipient of the sanctions was different. *Id.* The defendant corrections officers were employees of the state department of corrections, which "had ultimate control of the video evidence." *Id.* Second, whereas the insurer in *Burris* "had no control over the evidence, and did not participate in the spoliation in even a tangential manner," the evidence before the district court showed that the defendant corrections officers in *Taylor* "had the ability to preserve the video by requesting its preservation," even though they "did not personally maintain or control the security video footage at [the facility]." *Id.* The district court pointed out that, according to state department of corrections' policy, "only employees of [the facility] could have undertaken to preserve the video, and facility employees, including [the defendant corrections officers], were aware that they must request the retrieval and preservation of video footage when they thought it necessary." *Id.* Accordingly, the district court in *Taylor* found "reason to impute the spoliation to the [defendant corrections officers], as they were in a position to have the video footage preserved, had reason to foresee its importance to potential litigation, and yet failed to request its preservation." *Id.*

"Courts have imputed spoliation by the state or its agencies to named officer defendants in [§] 1983 actions." *Id.* (citing cases); *see also*, *e.g.*, *Stanbro v. Westchester Cty. Health Care Corp.*, Nos. 19 Civ. 10857 (KMK) (JCM), 20 Civ. 1591 (KMK) (JCM), 2021 WL 3863396, at *5-9 (S.D. N.Y. Aug. 27, 2021); *Johns*, 503 F. Supp. 3d at 462-65; *Mizzoni v. Nevada*, No. 3:15-cv-00499-MMD-WGC, 2017 WL 4284597, at *6 (D. Nev. Sept. 27, 2017), *report and recommendation adopted*, 2018 WL 485873 (D. Nev. Jan. 19, 2018); *Muhammad v. Mathena*, No. 7:14cv00529, 2016 WL

8116155, at *7-8 (W.D. Va. Dec. 12, 2016), *report and recommendation adopted*, 2017 WL 395225 (W.D. Va. Jan. 27, 2017); *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105-06, 1108-11 (D. Ariz. 2014); *cf. Woods*, 2019 WL 3816727, at *4 (imputing spoliation by police department to city).

In doing so, these courts have focused on the fact that, while the defendant officer-employees were not individually responsible for the evidence at issue, their employing state-agency corrections departments did control the evidence and who had access to it. *Pettit*, 45 F. Supp. 3d at 1106; *see also*, *e.g.*, *Stanbro*, 2021 WL 3863396, at *6; *Johns*, 503 F. Supp. 3d at 463; *Mizzoni*, 2017 WL 4284597, at *6; *Muhammad*, 2016 WL 8116155, at *8; *cf. Woods*, 2019 WL 3816727, at *4. The defense of the defendant officer-employees was also funded by the state and they would be indemnified from liability based on acts and omissions occurring within the scope of their employment. *Pettit*, 45 F. Supp. 3d at 1106; *see also*, *e.g.*, *Stanbro*, 2021 WL 3863396, at *6; *Johns*, 503 F. Supp. 3d at 463; *Muhammad*, 2016 WL 8116155, at *8; *cf. Woods*, 2019 WL 3816727, at *4. As a result, the state agency was not "merely a disinterested third party with no duty to preserve evidence." *Pettit*, 45 F. Supp. 3d at 1106; *see Johns*, 503 F. Supp. 3d at 463 ("Any sanction against [the defendant corrections officer] will be in many important respects a sanction felt most acutely by the [state department of corrections]."); *see also*, *e.g.*, *Stanbro*, 2021 WL 3863396, at *6; *Mizzoni*, 2017 WL 4284597, at *6.

"In all practical respects, [the state agency] [was] in the same position as parties on whom courts routinely impose a duty to preserve—it [wa]s an agency of the [s]tate that funds the defense and pays any judgment, its employees are subject to suit for their actions while

in its employ, and it has sole custody and control over most of the relevant evidence." *Pettit*, 45 F. Supp. 3d at 1106; *see also*, *e.g.*, *Stanbro*, 2021 WL 3863396, at *6; *cf. Woods*, 2019 WL 3816727, at *4. These "special circumstances" warranted imputation of the state agency's failure to preserve to the individual defendant officer-employees. *See Pettit*, 45 F. Supp. 3d at 1106, 1110; *see also*, *e.g.*, *Stanbro*, 2021 WL 3863396, at *6 (noting "unique relationship between [state department of corrections] and its correctional officers in the context of spoliated evidence"); *Johns*, 503 F. Supp. 3d at 463 (state department of corrections "has a uniquely intertwined relationship" with defendant corrections-officer employees).

A contrary result, one court cautioned, "would present a dilemma in the context of prison litigation . . . where the responsibility for preserving evidence may be spread out among multiple officials within an institution." *Muhammad*, 2016 WL 8116155, at *7 (footnote omitted). Another noted that "refusal to recognize a special relationship would lead to the absurd result that a state-run correctional facility could wrongly destroy any piece of evidence in its control with near-zero risk of consequence in prisoner suits," and "would encourage barriers to accountability for failure to preserve material evidence and undermine the integrity of the judicial process that depends on the adversarial presentation of evidence in order to uncover the truth." *Johns*, 503 F. Supp. 3d at 464-65 (quotation omitted).

This logic is equally applicable to the County and the CO Defendants. The County had sole custody and control over the footage from Camera 18. The CO Defendants are in a similar special relationship with the County based on their employment. The CO Defendants are represented by the same counsel as

the County. *See generally* Ex. D to Sweeney Decl. The County has similar indemnification responsibilities. *See*, *e.g.*, Minn. Stat. §§ 466.02, .07. And, comparable concerns exist with respect to the preservation of evidence in the context of alleged violations of constitutional rights in county-run jails and corrections facilities. Therefore, while the County will not be "reinstated," the Court concludes that the County's failure to preserve the footage from Camera 18 is properly imputed to the CO Defendants under the circumstances.

In doing so, the Court agrees with and echoes the words of the district court in *Stanbro*: "[C]ommon sense cautions against endorsing a bright line rue that [a state agency or county's] spoliation of evidence should always be imputed to correctional officers by virtue of the unique relationship between them." 2021 WL 3863396, at *7. "Imposing a rule to cover every such situation would impose an added burden on prison employees and force prison employees to constantly second-guess their employer's ability to maintain potential evidence for possible litigation." *Id.* (quotation omitted); *see also Adkins*, 692 F.3d at 506. "[T]he more prudent path is to consider instances raising spoliation questions on a case-by-case basis." *Stanbro*, 2021 WL 3863396, at *7 (quotation omitted); *see also Adkins*, 692 F.3d at 506.

F. Appropriate Sanctions

The Court has concluded that (1) the County had an obligation to preserve the footage from Camera 18 and failed to take reasonable steps to do so; (2) this failure to preserve warrants a finding of bad faith and an intent to deprive Plaintiff of evidence surrounding the facts of Joshua Vogt's death at the jail; (3) Plaintiff was prejudiced as a result of the failure; and (4) the

County's failure should be imputed to the CO Defendants. Fashioning an appropriate sanction to address this discovery violation rests within the Court's discretion. *See Burris*, 787 F.3d at 879; *Stevenson*, 354 F.3d at 745; *Dillion*, 986 F.2d at 267; *see also* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment ("Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong . . . .").

1. Adverse-Inference Instruction

Under Rule 37(e)(2) of the Federal Rules of Civil Procedure, "upon finding that the party acted with the intent to deprive another party of the information's use in the litigation," the Court may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."

Plaintiff requests the terminating sanctions of 37(e)(2)(C), namely, entry of default judgment as to liability against the CO Defendants. "Because there is a 'judicial preference for adjudication on the merits,' the law generally disfavors default judgments." *United States v. Yennie*, 585 F. Supp. 3d 1194, 1198 (D. Minn. 2022) (quoting *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 661 (8th Cir. 2015)). "The entry of default judgment should be a rare judicial act." *Comiskey v. JFTJ Corp.*, 989 F.2d 1007, 1009 (8th Cir. 1993) (quotation omitted); *accord Belcourt Pub. Sch. Dist.*, 786 F.3d at 661. As default judgment is among the harshest of sanctions a court can impose, it is the rare case where a party's misconduct justifies entry of default judgment.

Plaintiff likens the instant case to *Estate of Hill*, in which the district court entered default judgment as a sanction under Rule 37(e)(2). *Estate of Hill* similarly involved alleged deliberate indifference to the medical needs of an individual confined at a county jail resulting in death. 2022 WL 14648630, at *3. The decedent was transferred to a cell used for medical watch a little after 9:00 a.m. and, at 9:30 a.m., the defendant nurse initiated a medical watch, "direct[ing] corrections officers to check on [the decedent] every 30 minutes." *Id.* at *2. Video from the hallway outside the cell was preserved and produced "for an approximately 32-minute period between 8:43 a.m. and 9:15 a.m. and an approximately 2-hour-and-30-minute period between 4:00 p.m. and 6:30 p.m." *Id.* at *4. The video "for the period between 9:15 a.m. and 4:00 p.m., which is when the documented 30-minute medical watch checks would have occurred and when [the defendant nurse] stated she visited [the decedent]," was not preserved. *Id.*; *see id.* at *5. This video "would have shown the identity of any person that came to [the decedent's] cell on the day of her death, the time at which any visits occurred, and for how long any visit lasted." *Id.* at *5. There was no explanation for why the defendant county "preserv[ed] less relevant video while permitting the destruction of the most relevant video." *Id.* at *12.

The defendants in *Estate of Hill* were a nurse employed by "a private correctional healthcare company to provide medical services to individuals confined at the [county's] jail," the employing correctional healthcare company, and the county. *Id.* at *1. The district court declined to impose an adverse-inference instruction against the county because it would "be unreasonable to expect that jurors" could comply with such an instruction given the "analytical conundrum" created

by the nature of the parties. *Id.* at *16. The district court explained:

> The events in the missing video about which the Court would instruct the jury to draw an adverse inference *against [the county]* include the conduct of [the nurse]. Because [the nurse] is acting as an arm of [the county] when providing medical care to detainees and her actions are attributed to [the county] under the non-delegable duty doctrine, an adverse inference against [the county] can equate to an adverse inference about [the nurse's] conduct. For example, one adverse inference the jury could draw against [the county] is that [the nurse's] account of visiting [the decedent] at 3:00 p.m. is inaccurate. An instruction would permit or require the jury to apply that adverse inference *against [the county]* when evaluating the negligence and § 1983 claims against it. However, the jury would *not* be permitted to apply the same adverse inference about [the nurse's] conduct to the claims *against [the nurse] herself or her employer, [the correctional healthcare company].* Thus, the jury would be permitted to assume facts that could establish [the nurse's] own liability in negligence and potentially under § 1983 (that she did not check on [the decedent] as she claimed) but would be prohibited from applying that fact to the determination about whether [the nurse] or her employer are liable.

Id. (footnotes omitted) (emphasis added).

Here, the loss of the footage from Camera 18 is not of the same magnitude as the loss of the video in *Estate of Hill*. Other footage, such as from Cameras 17 and 19, albeit at different angles, remains available to Plaintiff. Moreover, this case does not suffer from the same "analytical conundrum" present in *Estate of Hill*.

In the alternative, Plaintiff requests an adverse-inference instruction that the jury must infer the footage from Camera 18 was unfavorable to the CO Defendants. "A district court's adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other relevant evidence." *LaJocies*, 2011 WL 1630331, at *4. There are "three types of adverse inference instructions." *Hall v. Ramsey Cty.*, No. 12-cv-1915 (DSD/LIB), 2013 WL 12141435, at *3 (D. Minn. Apr. 8, 2013); *accord Taylor*, 2019 WL 4673426, at *7.

> In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.
>
> The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the most innocent party, in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a "spoliation charge" to distinguish it from a charge where the jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.

Hall, 2013 WL 12141435, at *3 (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 470-71 (S.D. N.Y. 2010), *abrogated on other grounds by Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012)); *accord Taylor*, 2019 WL 4673426, at *7.

While Plaintiff moves for a "second-tier" instruction, "[t]he Court finds that a permissive adverse inference instruction is a remedy that is commensurate with the loss of the [footage from Camera 18]." *Jones v. Hirschbach Motor Lines, Inc.*, No. 1:21-CV-01004-MAM, 2022 WL 4354586, at *5 (D. S.D. Sept. 20, 2022). Accordingly, the Court recommends that the parties be allowed to present evidence and argument regarding the loss of the footage from Camera 18 and that the jury be instructed that the County had a duty to preserve the footage from Camera 18, another County employee at the jail (and not the CO Defendants) failed to preserve the footage from Camera 18, and that the jurors may, but are not required to, infer that the footage from Camera 18 would have been favorable to Plaintiff. *See Mizzoni*, 2017 WL 4284597, at *7; *Pettit*, 45 F. Supp. 3d at 1114; *see also Blazer*, 2019 WL 3494785, at *5; *cf. Jones*, 2022 WL 4354586, at *5.

2. Attorney Fees

Plaintiff also requests an award of attorney fees and costs "for all of her efforts to locate the missing video," including bringing this motion. Pl.'s Mem. in Supp. at 26. "In addition to any other sanctions expressly contemplated by Rule 37(e), as amended, a court has discretion to award attorneys' fees and costs to the moving party, to the extent reasonable to address any prejudice caused by the spoliation." *Lokai Holdings LLC v. Twin Tiger USA LLC*, No. 15cv9363 (ALC) (DF), 2018 WL 1512055, at *9 (S.D. N.Y. Mar. 12, 2018);

accord Jones, 2022 WL 4354586, at *5 ("Among the available sanctions for ESI spoliation, a court may order the spoliating party to pay the aggrieved party's attorney's fees and expenses relating to the ESI loss."); *see* Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendment (noting "[t]he remedy should fit the wrong . . . ."); *see also* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). "[F]ederal courts also have inherent power to award attorneys' fees as a sanction." *Stevenson*, 354 F.3d at 751; *see Schlafly v. Eagle Forum*, 970 F.3d 924, 936-39 (8th Cir. 2020); *see also Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107-11 (2017); *Kelley*, 2022 WL 2801180, at *4; *Estate of Hill*, 2022 WL 1464830, at *17.

In addition to the adverse-inference instruction, the Court recommends that Plaintiff be awarded her reasonable attorney fees and costs that she would not have incurred but for the County's failure to preserve the footage from Camera 18, including those she incurred in connection with the instant motion. The Court further recommends that the amount of such an award be determined by the undersigned upon further briefing following a ruling on this Report & Recommendation.

IV. RECOMMENDATION

Based upon the record, memoranda, and the proceedings herein, and for the reasons stated above, **IT IS HEREBY RECOMMENDED** that Plaintiff's Rule 37(e) Motion for Default Judgment and Other Sanctions, ECF No. 57, be **GRANTED IN PART** and **DENIED IN PART** as follows:

1. The Court recommends that Plaintiff's motion be **GRANTED** with respect to the provision of an adverse-inference instruction regarding the footage from Camera 18 as set forth herein as well as an award of reasonable attorney fees and costs for those expenses she would not have incurred but for the County's failure to preserve the footage from Camera 18, including those she incurred in connection with the instant motion.

2. The Court additionally recommends that the amount of such an award be determined by the undersigned upon further briefing following a ruling on this Report & Recommendation.

3. The Court further recommends that Plaintiff's motion otherwise be **DENIED**.

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3359

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED

Appellant

v.

MEND CORRECTIONAL CARE INC.

CROW WING COUNTY, MINNESOTA, ET AL.

Appellees

CIVIL PROCEDURE AND EVIDENCE LAW PROFESSORS

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court
for the District of Minnesota
(0:21-cv-01055-WMW)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Smith, Judge Shepherd, Judge Kelly, Judge Erickson, and Judge Grasz would grant the petition for rehearing en banc.

October 16, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Maureen W. Gornik

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. 42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

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

2. Federal Rule of Civil Procedure 37(e) provides:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

3. Federal Rule of Civil Procedure 56 provides:

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) 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

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time

to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.