

In The
Supreme Court Of The United States

John David Peterson, Petitioner,

v.

Nevada County, California, et al,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Appendix to the
Petition for Writ of Certiorari

Patrick H. Dwyer
Counsel of Record
P.O. Box 1705
17318 Piper Lane
Penn Valley, CA 95946
530-432-5407

Attorney for Petitioner
April 24, 2026

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN DAVID PETERSON,

Plaintiff-Appellant, v.

NEVADA COUNTY, California;
NEVADA COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellees.

FILED JAN 27, 2026 MOLLY C. DWYER, CLERK U.S.
COURT OF APPEALS
Case No. 23-16146

D.C. No. 2:19-cv-01243-JAM-JDP
Eastern District of California, Sacramento

ORDER

Before: PAEZ, BEA, and FORREST, Circuit Judges.

Judges Bea and Forrest voted to deny Plaintiff-Appellant's petition for panel rehearing. Judge Paez voted to grant Plaintiff-Appellant's petition for panel rehearing. The petition for panel rehearing (Dkt. 91) is DENIED. All judges voted to deny Defendants-Appellees' request for publication. The request for publication (Dkt. 90) is DENIED.

C.A. Case No. 23-16146

**UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

John David Peterson, Plaintiff – Appellant

vs.

Nevada County, et al., Defendants – Appellees.

Appeal From the United States District Court,
Eastern District Of California,
The Honorable James A. Mendez
Civil Case No. 2:19-CV-0949-JAM-JPD

PETITION FOR REHEARING

Of

The Memorandum Decision of the Ninth Circuit
Court of Appeals, Dated January 8, 2026

Patrick H. Dwyer, SBN 137743
Counsel for Plaintiffs – Appellants
P.O. Box 1705; 17318 Piper Lane
Penn Valley, California 95946
tel. 530-432-5407; fax. 530-432-9122
pdwyer@pdwyerlaw.com

January 22, 2026

APPENDIX 4

STATEMENT PURSUANT TO FRAP 40(B)(1)(A)

A petition for rehearing is appropriate in this case because the majority has misapprehended over a dozen crucial facts that, when viewed in a light most favorable to the Petitioner, would require that the decision of the District Court be overruled and the case remanded for a jury trial.

PETITION FOR REHEARING

I. Introduction

The panel was supposed to conduct a de novo review of the District Court's decision granting summary judgment. However, the majority's decision is devoid of any review of the contested facts. Even worse, every purported "factual" finding in the majority's decision is either contrary to uncontested facts or was made without any consideration of the contested evidence in a light most favorable to Petitioner as required by law. Quite simply, Petitioner has been unfairly denied his right to a jury trial.

Not only does the majority fail to conduct a meaningful factual review, it also places its personal medical opinions above those of Plaintiff's renowned medical expert. And, it is up to a jury, not the panel, to weigh the expert evidence and decide whether Petitioner received any medical treatment.

Further, the majority completely ignored the overwhelming evidence that Nevada County's policies and procedures for checking the medical

fitness of an inmate at the time of release were inadequate. These inadequate policies allowed Petitioner, who was gravely ill, to be released. The adequacy of these policies was a question for a jury.

Perhaps what is most shocking was the majority's blaming of Petitioner for not receiving any medical treatment, claiming he did not ask to be treated. Not only is this false, it is a disgraceful blaming of the victim for the failures of Nevada County.

The issues in this case extend far beyond what happened to Petitioner. Wellpath was dismissed from the action because of its bankruptcy which was the result of dozens upon dozens of claims by detainees from across the country for deliberate indifference to medical care. In many of these cases there were related claims against the responsible municipality, just as in this case.

It is imperative that this Court take a serious look at the adequacy of jail staff procedures for verifying medical fitness at the time of release. The cost of implementing adequate procedures is nominal. For example, there would be no measurable cost for the County and Wellpath to coordinate their release procedures at a series of staff meetings and then prepare a new Release Check List. Such a list could include, for example, if ambulatory assistance is required or if transfer to another medical provider is necessary, and should provide written discharge instructions. At most, it might take an extra one or two minutes for County jail personnel to perform a medical check.

APPENDIX 6

Petitioner implores the panel to take this case seriously. A full published decision that requires jail staff to verify fitness for release will protect the constitutional right to adequate medical care and it will save municipalities and taxpayers a lot of money.¹

II. Applicable Law for Summary Judgment

A. Right to Jury Trial

There is a right to a jury trial in all civil cases under the Seventh Amendment to the United States Constitution. All civil cases include causes of action that are created by Congress, which encompasses cases brought under 42 U.S.C. 1983. *Tull v. United States*, 481 U.S. 412, 417, 107 S.Ct. 1831, 1835 (1987).

Under our constitution, the jury must be maintained as the fact finding body and “any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988 (1959), quoting *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296 (1935).

¹ The cost of oral antibiotics would have been nominal, while the medical “tab” for California taxpayers for Plaintiff’s injuries was more than \$85,000.

B. A Jury Must Decide All Material Facts

This unquestionable right to have a jury decide all contested material facts is the basis for the rule that motions for summary judgment under 42 U.S.C. §1983 must be reviewed de novo. *Rice v. Moorehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021). And, summary judgment may be granted only when there are no issues of material fact in dispute” *Rice v. Moorehouse*, 989 F.3d at 1120.

As shown in Section III, there are many crucial material facts in dispute in this case that can only be resolved by a jury.

III. Factual Misapprehensions About the Evidence

1. Plaintiff Reported the Abrasions on His Right Leg at the Time of Booking

The Decision on page 2 found that Plaintiff stated “that he did not have any rashes/cuts/sores.” This is false. Plaintiff told the Wellpath nurse that he had been “roughed up” at the hospital and that he had scrapes on his right shin, which was hurting. [ER-V.2, 194, 200-202] Neither Defendant countered these specific factual allegations, and thus, they must be deemed true.

2. Plaintiff Did Request Treatment For His Infection

The majority Decision falsely concludes on page five that Plaintiff never sought medical treatment.

It was Plaintiff that first requested medical staff to look at his right leg. He was seen by medical at 9:38 am the morning after booking. The bright redness, tenderness to touch, and warmth on his right leg were noted in the jail medical record. Plaintiff requested follow up care and was seen again by medical staff at 11:37 am, 2:25 pm, 3:57 pm, and 8:24 pm. Plaintiff testified that nursing staff circled the rapidly expanding area of infection at each of these visits. [ER-V.2, 210-211, 213-217, 219-228, 267-272; ER-V.6, 1193-1195, 1202, 1209]

3. Jail Officers Were Aware of Plaintiff's Serious Medical Problem

At oral argument there was agreement expressed by the panel that there was a triable issue of fact regarding whether the County's jail staff saw Plaintiff limping badly at the time of his release, but this contested fact was never mentioned in the Decision. Instead, majority found on page 5 that jail staff "had no reason to be aware of the potential severity of his ailments." This finding goes directly against the evidence and opinion expressed by the panel at oral argument

Contrary to the majority's Decision, Plaintiff presented substantial evidence that jail staff were very aware of the Plaintiff's pain and limping, not just at the time of release, but over the two days that he was seen in the jail infirmary. Thus, whether jail staff were aware of Plaintiff's serious medical condition is a jury question. [ERV.2, 222-223, 229-230, 232, 275-280, 290-291; ER-V.3, 320-321, 377-379]

Plaintiff testified that at the time of his release, Officer Molloy walked about 300 feet alongside Plaintiff who was limping badly just before his release. Plaintiff further testified that Officer Stanley had to have seen him limping badly in the booking area because he was at close range, there were no obstructions, and Plaintiff first had to get his clothing, then limp to a room where he could change, then limp to the phone, then limp out the door when Officer Stanley hit the release buzzer. Plaintiff testified that Officer Stanley was rude and told Plaintiff to make it “snappy” when he asked to use the phone to find a ride. Plaintiff further testified that he felt like Officer Stanley was “throwing me out of there”. [ER-V.2, 223, 229-230, 232, 275-277; ER V.3, 320-321, 377-379] The jail medical record noted Appellant had a “pronounced limp”, thereby corroborating his testimony [ER-V.6, 1212] This evidence creates a triable issue of fact for a jury.

More importantly, the majority ignores the real question of whether the County is liable for deliberate indifference when its policy and procedure is so inadequate that jail officers: (a) do not actually learn whether an inmate is medically fit for release; and (b) ignore obvious signs that the inmate is in pain and needs ambulatory assistance and/or transport. See items 7-13, below.

4. Plaintiff, Like Any Detainee, Relied Upon the Jail Medical Staff for Treatment

Plaintiff was detained in a jail. It is self-evident that he had no ability to seek outside medical care and that he had to rely upon jail medical staff for care for his rapidly progressing infection. If Plaintiff was not supposed to be walking, but instead, keeping his leg raised while receiving antibiotics, that was the responsibility of medical and jail staff to inform Plaintiff and to provide the same for Plaintiff.

5. Plaintiff Did Not Receive Medical Treatment

Contrary to the majority's decision on pages 2, 5-6, Plaintiff testified that he was never treated by jail medical. There is no treatment noted in the jail medical record. Defendants claim that the x-ray of Plaintiff's leg on the second day was "treatment", but that characterization was solidly refuted by Plaintiff's medical expert, Dr. Witt, who opined that an x-ray is a diagnostic tool, not a treatment, and in obvious cases of cellulitis, the only treatment option was antibiotics. The x-ray served no medical treatment purpose. Dr. Witt further opined that the failure to treat with antibiotics for two days went far beyond medical malpractice and was clearly deliberate indifference to Plaintiff's urgent medical need. [ER-V.3, 609-610; ER-V.7, 1557-1560]

The majority took it upon themselves to act as both medical experts and the trier of fact when it found on page 5 of the Decision, without citation to any part of the factual record, that "Plaintiff received significant medical attention beyond what he had requested."² As just explained in item No. 2, above, Plaintiff did seek treatment of his infection because he was in significant pain and he observed the infection spreading rapidly. Furthermore, Plaintiff's medical expert explained that Plaintiff did not receive any medical "treatment" for the glaringly obvious cellulitis. Dr. Witt explained that making observations in the medical record about the rapidly spreading infection and the x-ray given a few hours before release were diagnostic measures, not treatment. Treatment for cellulitis consists primarily of prescribing antibiotics, plus keeping the patient quiet and the infected area clean and elevated. [ER-V.3, 512-513; ER-V.7, 1557] The origin of the cellulitis is not medically important.³ However, what is crucial is to start antibiotic treatment as soon as possible. [ER-V.3, 514-515, 526- 527; ER-V.7, 1559-1560]

² This finding is an obvious "blame the victim" tactic. Plaintiff had no ability to diagnose and treat his grave infection. He was at the mercy of the medical and jail staff.

³ Dr. Witt explained that the origin of Plaintiff's infection was not his surgical hardware, but the abrasion of Appellant's shin by the GVPD officer prior to booking. [ER-V.7, 1541-1542, 1628-1644]

If the majority does not want to consider Dr. Witt's 40 years of experience treating cellulitis as expert evidence, then they can look at on-line nursing websites that says the exact same thing as Dr. Witt:

<https://www.nursetogether.com/cellulitis-nursing-diagnosis-care-plan/>

The majority can see that this nursing website clearly differentiates between diagnosis and treatment (intervention) of cellulitis. It also says that starting the patient on oral antibiotics is the primary treatment. Here is another nursing website that says the same thing:

<https://straightnursingstudent.com/cellulitis/>

The majority's Decision went even further in its ruling on pages 6-7 of the Decision holding that "given Plaintiff was attended to by medical personnel nine times in two days, no triable issue of fact was presented that the medical personnel were deliberately indifferent to Plaintiff's medical needs." This is pure hubris. The Court has no authority under the constitution to substitute itself in place of the jury to decide this question.⁴

⁴ Even more shocking was the failure to treat Plaintiff after the x-ray was taken by Physician Assistant ("PA") Tirpak. As a PA, she had been trained how to diagnose and treat cellulitis and she was licensed to prescribe antibiotics. [ER-V.3, 517-518, 520-522; ER-V.7, 1557-1560] However she let Plaintiff be released from custody about 4 hours later without any medical treatment. That is deliberate indifference to an urgent

There are serious factual issues for a jury about whether: (a) any medical treatment was provided, (b) the County's medical policies and practices were adequate; and (c) the jail officers saw Plaintiff limping and/or otherwise knew that Plaintiff had a significant medical problem at the time of release. A jury could easily find that County was deliberately indifferent to Plaintiff's urgent need for medical care.

A. Applicable Law on Deliberate Indifference

Not only did Plaintiff present more than sufficient evidence to create triable issues of fact for the jury, Plaintiff presented a clear and correct statement of the law on deliberate indifference to medical needs of inmates. Plaintiff correctly argued that the law requires an inmate to receive the same professional medical standard of care as provided outside of the jail. Although mere negligence is not actionable under §1983, an action for deliberate indifference will be sustained when a Appellant can "prove more than negligence, but less than

medical issue. How did this happen? A jury could readily find that the County's policies, procedures, and training regarding the release of inmates with serious medical conditions was grossly inadequate. And, a jury could readily find that the County was the moving force behind Wellpath's deliberate indifference and/or that Wellpath and the County conspired to derive Plaintiff of medical care to save costs: i.e., they medically dumped Plaintiff.

subjective intent [to harm] – something akin to reckless disregard." *Russell v. Limitap*, 31 F.4th 729, 739 (2022). The Russell decision confirmed the rule that deliberate indifference is found where there is a "failure to treat a prisoner's condition [which] could result in further significant injury or the unnecessary and wanton infliction of pain." ⁵

In this case, there are multiple factual issues that have to be decided by a jury to determine whether the County's policies and practices resulted in deliberate indifference to Plaintiff's urgent medical situation.

6. Plaintiff Knew That He Needed Medical Attention When He Was Released

Contrary to the ridiculous finding by the majority on page 5, Plaintiff knew that he needed immediate medical attention and he testified that when he left the jail he started walking to get to the hospital. [ER-V.2; 237, 241-242]

⁵ Russell followed *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018). Gordon held that to prevail on a deliberate indifference claim under the Fourteenth Amendment, a plaintiff must show that a defendant's conduct "must be objectively unreasonable, a test that will necessarily turn on the facts and circumstances of each particular case." A plaintiff must "prove more than negligence but less than subjective intent — something akin to reckless disregard." Gordon, 888 F.3d at 1125. Contrary to the District Court's ruling, this is the same test as set out in Russell that Plaintiff relied upon.

7. The County Did Not Have Adequate Policies and Procedures for Handling Detainees with Medical Problems at the Time of Release

The majority ruled on page 5 that the County maintained adequate policies for taking care of inmate medical needs, including adequate procedures for medically clearing inmates for release and for requesting further medical support for an inmate they determined required medical assistance. The majority never discussed any of the evidence that Plaintiff presented to the contrary that questioned every aspect of the County's medical policies and practices.

Jail medical staff testified that when jail officers would call about an inmate's release, the medical staff understood that this only related to whether the inmate was on a 5150 hold, and not whether the inmate was physically fit for release. However, jail officers said that they called for medical, not mental, fitness for release. [ER-V.5, 1049-1053; -V.5, 1122-1125; ER-V.6, 1405; ER-V.4, 695-700, 702-703, 705-707, 714-716, 745-759] This is a crucial factual conflict that must be decided by a jury.

Jail medical staff also testified that they had no knowledge of the County's "Release Check List" or even that jail officers were supposed to call to confirm an inmate's physical fitness for release. PSUF 20-24. [ER-V.4, 695-700, 702-703, 705-707, 714-716, 745-759; 773-780; 831- 832; ER-V.5, 1171-1172]

In fact, jail medical staff (Tirpak, Boucher, Tindall) testified that it “is not at all up to medical when an inmate gets released. That’s up to custody. No matter what the medical issues they have, its up to custody when they are released.” Nurse Tindall testified that there was no medical consideration involved in deciding when an inmate was released. The jail officers would call medical and tell them what time the inmate was being released, regardless of physical fitness. [ER-V.4, 695-700, 702-703, 705-707, 714-716, 745-759; ER-V.4, 773-780; ER-V.4, 831-832; ER-V.5, 1171-1172]

Furthermore, the failure to treat Plaintiff with antibiotics when PA Tirpak clearly saw Plaintiff’s infection, followed by the County releasing Plaintiff onto the street to fend for himself, was outrageous. These facts provide strong circumstantial evidence upon which a jury could infer that Wellpath and the County conspired to medically dump inmates with serious medical issues to avoid costs of treatment.

8. The County Did Not Have Adequate Policies and Procedures for Providing Transfer of Medical Care to Another Provider, Ambulatory Assistance, or Medical Discharge Instructions

The majority also found on page 5 of its Decision that the County’s policies and practices that “maintained discretion to request further medical support for an inmate that they determined required further assistance” were constitutionally adequate.

However, medical staff testified that they had no knowledge of any “Release Check List”. Further, nurse Tindall testified that there was no medical discharge process like in a hospital and no procedures to transfer medical care to another provider at the time of release. She also testified that if an inmate needed ambulatory assistance, that was up to jail staff to handle at the time of release. [ER-V.5, 1171-1172]

The testimony of jail medical staff directly controverts the majority’s factual finding. Clearly, this is a matter of factual contention that only a jury is qualified to sort out.

**9. The County Did Not Make Any
Changes to its Policies and Practices
for the Release of Inmates with
Serious Medical Conditions after
the Howie Incident**

The majority on page five ignored the admitted fact that the County did not make any changes to its policies or practices for determining fitness for medical release after the Howie incident. [ERV. 6, 1397-1401]

**10. Howie’s Release from Custody Was
Eerily Similar to Plaintiff’s Release and
It Put the County on Notice About the
Inadequacy of its Medical Release
Policy and Practices**

The majority on page five failed to consider the factual similarities between the Howie incident and Plaintiff’s experience.

Plaintiff included the Howie incident as an example of the County's (1) inadequate policies and practices of checking on inmate fitness for medical release; and (2) failure to adequately train County jail officers to confirm that an inmate is fit for release, whether ambulatory assistance is needed, whether a transfer of medical care to another provider is necessary, and to observe inmates at the time of release for obvious medical issues (e.g., limping, bleeding, etc.).

The Howie incident is a glaring example of just how dangerous it is when a county jail fails to have adequate medical policies and practices for release. It demonstrates how a single instance of medical policy and practice failures can cause serious injury or even death that meet the "patently obvious" requirement of *Connick v. Thompson*, 563 U.S. 51, 63-64 (2011) for holding a municipality liable under §1983 without further proof of pattern of violations. It is just common sense that inmate physical fitness be properly checked before release to avoid further serious injury or death.

The majority never discusses any of the grounds asserted by the trial court about the Howie evidence being inadmissible. Thus, it must be assumed that the trial court's objection on the ground that the evidence was barred by the prior settlement agreement in the Howie case was without merit. See also, the dissent, footnote 2, which adopted Plaintiff's argument against the trial court's reasons for not admitting the Howie evidence.

The Howie case proves just what Plaintiff alleged in Count 1: that the County had inadequate

policies and practices. Just like Plaintiff, Howie's medical care was never transferred to another medical provider, even though just like Plaintiff, the need for transfer of medical care was obvious and urgent. Again, just like Plaintiff. Howie was not given any discharge instructions, ambulatory assistance or transport to a hospital.[ER-V.5, 911-912; ER-V.6, 1214-1215]

These parallel facts of what happened to Howie are undisputed. Moreover, it is obvious that the Howie and Peterson, whether looked at individually or collectively, show that it is "patently obvious" that the County's policies and practices are seriously inadequate and create such a serious risk of harm that a Monell violation should have been presented to a jury for a factual determination.

Indeed, these inadequacies are so likely to lead to serious medical injury or death (an it almost did with Plaintiff), that the single instance exception under Connick applies.

**11. The County Failed to Adequately
Train its Jail Staff How to
Communicate and Coordinate
with the Jail Medical Provider
Regarding the Medical Status of
a Detainee Set for Release**

The majority Decision never actually discussed any of the Plaintiff's factual allegations about the County's failure to train. It just ruled that Howie was inadmissible and that there was no deliberate indifference to Plaintiff because he purportedly did not ask for further medical care

when he was being released. This ignored the testimony and expert report of Plaintiff's medical expert who opined that neither the medical nor jail staffs were trained in how to deal with inmates with serious medical conditions at the time of release. [ER-V.4, 650- 653, 661-667, 671-674; ER-V.3, 521-524, 536-538; ER-V.7, 1557-1560] Plaintiff's evidence created a triable issue of fact for the jury.

Further, the majority's decision completely ignores prior decisions of this Court holding that a plaintiff only has to prove that there was a single failure to implement procedural safeguards to prevent constitutional violations" to sustain a claim for failure to have inadequate policies. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012). (Emphasis added.) Applying *Tsao* to this case, Plaintiff only had to show his single instance of how a failure to train caused serious medical harm, which he has done. Thus, his claim for a failure to train should go to the jury.

**12. There Is a Jury Question Whether
There Was a Working Agreement
Between the County and Wellpath,
or alternatively, that the County's
Policy and Practices Was the Moving
Force Behind the Failures of Wellpath**

The majority correctly states on page 7 of the Decision that a plaintiff must show "an agreement or meeting of the minds to violate constitutional rights". However, it fails to address the nature of the evidence that a plaintiff may present to show the existence of a conspiracy. And, the majority fails to discuss any of the significant testimony presented by

Plaintiff to support the Third or Fourth Causes of Action.

A plaintiff will rarely have a copy of a conspiratorial contract or recording of a secret meeting where such an agreement is reached. That is why prior decisions of this Court have held that a plaintiff may prove a conspiracy by showing that the defendants have "by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose of harming another which results in damage." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). Further, this Court has held that an unlawful agreement may be inferred from circumstantial evidence. *Mendocino Envtl. v. Mendocino City*, 192 F.3d 1283, 1301 (9th Cir. 1999). Plaintiff's evidence included the testimony of the Wellpath HSA (aka supervisor), Lori Adams, that when jail staff called to check on the medical fitness of an inmate for release (using the "Release checklist". , P Ex. 17), Wellpath understood that the County was not referring to the physical medical condition, but only to whether the inmate was on a 5150 hold. Nevada County jail staff testified just the opposite, that the call referred to the physical medical condition. However, when Plaintiff took the depositions of Wellpath medical staff, they all testified that when jail officers called them about a release of an inmate, it did not matter what physical condition the inmate was in – the inmate was going to be released at the time stated by the Nevada County booking officer. [ER-V.4, 695-700, 702-703, 705-707, 714-716, 745-759; ER-V.4, 773-780; ER-V.4, 831-832; ER-V.5, 1171-1172]

A jury could reasonably infer from this circumstantial evidence that there was a “concerted action” (a wink-wink) between Wellpath and Nevada County to systematically deny inmates with serious medical conditions the professional medical care that they are constitutionally guaranteed. Alternative, a jury could find that the County was the moving force behind deliberate indifference of Wellpath’s medical staff. This evidence should be presented to the jury and Plaintiff allowed to argue both the Third and Fourth Causes of action.

V. Conclusion

The majority’s decision was based upon multiple misapprehensions of the facts. As found by the dissent, when the facts are examined in a light most favorable to Petitioner, there are triable issues that can only be decided by a jury. The case should be remanded for trial.

Respectfully Submitted,

/s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel for Appellant

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN DAVID PETERSON,

Plaintiff-Appellant, v.

NEVADA COUNTY, California;
NEVADA COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellees.

FILED JAN 8, 2026 MOLLY C. DWYER, CLERK U.S.
COURT OF APPEALS
Case No. 23-16146

D.C. No. 2:19-cv-01243-JAM-JDP
Eastern District of California, Sacramento

MEMORANDUM

Before: PAEZ, BEA, and FORREST, Circuit Judges.

Plaintiff-Appellant John Peterson appeals the district court's order which granted summary judgment in favor of Nevada County, California on all four of Plaintiff's federal causes of action. We review de novo and view the evidence in the light most favorable to Plaintiff. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235 n.1 (9th Cir. 2012). We affirm.

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

Plaintiff was arrested on the afternoon on September 5, 2018, transported to Sierra Nevada Hospital Emergency Department for a medical evaluation due to concerns around his intake of alcohol and ibuprofen, and, after being medically cleared, brought to Nevada County Jail, Wayne Brown Correctional Facility. Upon his arrival, jail staff from the Nevada County Sheriff's Office completed a Medical Screening Report which stated that Plaintiff "d[id] not appear injured and in need of immediate medical attention" and reported Plaintiff's statement that he "did not have any rashes/cuts/sores." Plaintiff remained in custody for two days, over the course of which he was seen and evaluated by employees of Wellpath, a company with which the County contracted for medical services, at least nine times. Some of those visits regarded alcohol withdrawal protocol and others regarded Plaintiff's complaints about a pain in his right leg. At one appointment regarding his leg pain, a physician's assistant took detailed notes on his complaints, took x-rays of his leg, and scheduled a follow-up appointment.

Before Plaintiff could attend the follow-up appointment, an officer from the Nevada County Sheriff's Office notified Plaintiff that he would be released from custody, as required under Cal. Penal Code § 825 and Cal. Penal Code § 849, because the District Attorney had not filed charges against him within 48 hours. Plaintiff reports that he walked to the booking area with an obvious limp. He was then discharged by another officer, after that officer received clearance for his release. Plaintiff left the station without asking any further questions, asking for any medical assistance or transportation, or informing any officer that he was in serious pain. Plaintiff walked about a mile to a gas station and then asked to use the phone to call an ambulance due to the pain in his leg. Plaintiff was transported to Sierra Nevada Memorial Hospital, where he was diagnosed with sepsis. He underwent surgery and now has a significant limp and pain in his leg.

Plaintiff's second amended complaint alleges four federal causes of action. The district court properly granted summary judgment on all federal causes of action before the Court.

1. First, Plaintiff alleged that the County violated his constitutional right to timely and adequate medical care by failing to have adequate policies regarding discharge of inmates and failing to train its officers properly.

Under *Monell*, a county “may be liable under [§ 1983] if the [county] itself ‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’ to such deprivation.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978)). “Plaintiffs who seek to impose liability on local governments under [§ 1983] must prove that ‘action pursuant to official municipal policy’ caused their injury.” *Id.* at 60–61 (quoting *Monell*, 436 U.S. at 691). There are three categories of such policy: “[1] the decisions of a government’s lawmakers, [2] the acts of its policymaking officials, and [3] practices so persistent and widespread as to practically have the force of law.” *Id.* at 61 (citations omitted). Here, Plaintiff claims under the third category that the County had a pattern and practice of not training its jail employees to attend to the inmates’ medical needs adequately.

A decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983, but to satisfy the statute, it “must amount to ‘deliberate indifference to the rights of persons with whom the untrained employees come into contact.’” *Id.* at 61 (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). “A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference . . .” *Id.* at 62 (quoting *Bd. of Cnty. Comm’rs of Bryan Cnty.*

v. Brown, 520 U.S. 397, 409 (1997)).

Defendant, relying on a case in which the County reached a settlement without admission of fault with an inmate after he alleged that he had been deprived of adequate medical care, argues that there existed a pattern of similar constitutional violations by untrained employees. See *Howie v. Nev. County*, No. 2:18-cv-03146-JAM-KJN (E.D. Cal. Aug. 22, 2019), Dkt. No. 41. The district court correctly declined to consider the facts alleged in *Howie* in its analysis of Plaintiff's § 1983 claim. The facts in *Howie*, as alleged by Plaintiff, are significantly different from the facts in this case. See *Connick*, 563 U.S. at 62–63 (holding that violations must be sufficiently similar to put the County on notice that a course of training is deficient in a particular respect). *Howie* alleged that he sustained a serious knee injury at the hands of officers and repeatedly requested medical attention and a ride to a hospital upon his release, but he received neither medical support nor transportation and was dumped on the curb outside Wayne Brown Correctional Facility. Complaint & Demand for Jury Trial at 7–14, *Howie v. Nev. County*, No. 2:18-cv-03146-JAM-KJN (E.D. Cal. Nov. 30, 2018), Dkt. No. 1. Here, Plaintiff received significant medical attention beyond what he had requested; did not ask medical staff or officers (who had no reason to be aware of the potential severity of his ailments) for transport upon his departure; and walked a mile before deciding he needed further medical attention.

As Plaintiff could not provide any examples of misconduct at the jail outside of *Howie* for the County to be liable under *Monell*, Plaintiff's case must be one of single-incident liability. See *Connick*, 563 U.S. at 63–64 (recognizing that the Supreme Court has left open the possibility that in a narrow range of circumstances “unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983

without proof of a pre-existing pattern of violations” (emphasis added)).

This case does not present the rare example of single-incident liability. The County maintained a policy by which medical providers cared for inmates and had exclusive access to inmates’ medical records; officers confirmed with medical providers that those inmates were medically cleared to be released; and those officers maintained discretion to request further medical support for an inmate that they determined required further assistance. It cannot be said that it is obvious that these policies would lead to the release of inmates who require immediate emergency care.

2. Next, Plaintiff alleged that Wellpath violated his constitutional right to timely and adequate medical care by failing to have adequate policies regarding discharge of inmates and failing to train its employees properly. This cause of action is not on appeal because the Court previously dismissed the appeal only as to Wellpath under Fed. R. App. P. 42(b) due to Wellpath’s bankruptcy.

3. Next, Plaintiff alleged that the County is liable for Wellpath’s constitutional violations because the County was the primary “moving force” behind such constitutional violations. The Court rejects this novel theory of liability, as County policy explicitly states that the County is not responsible for the medical decisions of Wellpath employees, and, even if the County were responsible, given that Plaintiff was attended to by medical personnel nine times in two days, no triable issue of fact was presented that the medical personnel were deliberately indifferent to Plaintiff’s medical needs.

4. Finally, Plaintiff alleged that the County and Wellpath conspired together to have inmates released before they received adequate medical treatment. To allege a

conspiracy under § 1983, a plaintiff must show “an agreement or meeting of the minds to violate constitutional rights.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (internal quotation marks and citation omitted). There is no evidence in the record that might even suggest a triable issue of fact as to the existence of any such agreement.

AFFIRMED.

PAEZ, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority’s disposition of Peterson’s second and fourth causes of action. But I respectfully dissent from the majority’s decision to affirm the district court’s grant of summary judgment on Peterson’s first and third causes of action. In my view, Peterson’s first cause of action challenges not only Nevada County’s (“County”) failure to train its employees, but also its alleged inadequate medical discharge policy. Even as to the failure-to-train theory, I would hold that the objective notice inquiry must be answered by the trier of fact. And Peterson’s third cause of action is neither novel nor susceptible to summary judgment. I would thus reverse and remand.

1.a. The majority considers only Peterson’s failure-to-train theory within his first cause of action. But Peterson also challenges a County policy. “A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012). Operating a jail without sufficient safeguards for inmate health constitutes a policy of inaction. See *Castro v. County of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016) (en banc) (“The custom or policy, in summary, was to use a sobering cell that lacked adequate audio surveillance to

detain more than one belligerent drunk person while checking the cell visually only once every half hour.”).

Peterson challenges at least three facets of the County’s discharge policy: who decides medical fitness for release, how that decision is made, and what systems are employed to help make that decision.¹ First, Peterson claims that under County policy, County jail employees—not Wellpath health professionals—decide when patients are ready to be released and how they should be released. Second, Peterson challenges the limited scope of the County’s pre-release medical checks and discharge planning, alleging that the County asks Wellpath only if inmates must be held for mental health reasons and does not inquire about an inmate’s overall readiness for release or the need for discharge accommodations. Third, Peterson points to the County’s “Release Check List” and its one vague box for a “Medical Check,” alleging that the single check box is inadequate to ensure that appropriate discharge coordination occurs between Wellpath and the County. The above allegations are substantiated by three consistent depositions of Wellpath employees.

Properly viewing Peterson’s first claim for relief as including a challenge to a policy of inaction, it should have survived summary judgment. Deliberate indifference is an objective inquiry that asks whether the local government had “actual or constructive notice” that the alleged omission would cause its employees to violate citizens’ constitutional rights. *Castro*, 833 F.3d at 1076 (quoting *City of Canton v. Harris*, 489 U.S. 378, 396 (1989)). When a plaintiff challenges a policy of inaction, a trier of fact may infer such notice from a variety of evidentiary bases, including, but not limited to, written regulations and manuals forbidding the alleged conduct. *Id.* at 1076–77. A pattern of similar constitutional violations may suffice to support such an inference, but it is not necessary. See *Tsao*, 698 F.3d at 1145.

In my view, a finder of fact could reasonably infer the County's deliberate indifference. For example, Peterson asserts that it is the County's policy for jail officials to decide fitness for release, and that this decision-making arrangement contributed to his injury. But the County's regulations and manuals required deference to Wellpath medical judgments, "prov[ing] that the County knew of the risk of the very type of harm that befell [Peterson]." *Castro*, 833 F.3d at 1077. The Howie incident also supports an inference of notice. I would thus remand for a trier of fact to decide whether the County's inadequate discharge policies amounted to deliberate indifference.

1.b. I would also reverse the grant of summary judgment on Peterson's failure-to-train theory. In support of that theory, Peterson filed a declaration and deposition transcript of Christopher Howie, who was released from the same County jail, with serious medical needs and without discharge planning, eight months before Peterson's discharge. Howie's lawsuit was settled without admission of fault.

Howie's declaration and deposition are admissible to prove a pattern of similar constitutional violations, and the district court erred in excluding this evidence. "[D]eclarations" of third parties who have suffered similar mistreatment as the plaintiff can "raise genuine issues of material fact as to [a] municipal liability claim." See *Henry v. County of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997) (reversing grant of summary judgment for Shasta County). If the third party settles their own claim against the local

government, that does not render the facts underlying their settlement inadmissible.²

Howie's incident is also sufficiently similar to Peterson's. "Whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury." *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 1992). At the summary judgment stage, the only question is whether a reasonable fact finder could conclude that, objectively, the circumstances of Howie's discharge from the jail put the County on actual or constructive notice of the need for new discharge training or policies. *Connick v. Thompson*, 563 U.S. 51, 61 (2011); *Castro*, 833 F.3d at 1076. Viewing the evidence, and drawing all inferences, in the light most favorable to Peterson, Henry, 132 F.3d at 514 n.1, a reasonable trier of fact could so conclude.

Peterson alleges that the County failed to train its officers to confirm with Wellpath that inmates are medically fit for release, to observe inmates for obvious medical problems, and to plan for medically appropriate discharge, including ambulatory assistance and transportation to the hospital. In my view, a trier of fact could reasonably conclude that this same set of failures contributed to both Peterson's and Howie's incidents — discharged on foot, either struggling or unable to walk, with no discharge planning for their maladies or ambulatory assistance. A reasonable fact finder could therefore conclude that the Howie

² "Relevant evidence is admissible" unless otherwise provided by the Constitution, federal statutes, or other rules. Fed. R. Evid. 402. The Howie evidence is relevant, as it tends to prove that the County was on notice about the need for better policies. While Rule 408 provides that settlement offers and agreements are not admissible to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," neither prohibited use is

implicated here, as Peterson does not seek to introduce evidence of the settlement. Fed. R. Evid. 408(a)(1). incident put the County on at least constructive notice of the need for corrective action.³

The majority rests its contrary conclusion on dissimilarities that cannot relieve the County of liability as a matter of law. Whether Peterson asked for help is irrelevant, as Peterson's claim is about the County's policies, not the subjective culpability of the individual officers in this case. *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002). And whether he received medical attention during his confinement is irrelevant to the appropriateness of his discharge. So too with Peterson's ability to walk a mile before collapsing, which may be relevant to the relative seriousness of Peterson's and Howie's physical injuries, but not whether Howie's discharge should have put the County on notice that it was inappropriately discharging inmates by foot rather than by other means. To the extent that these dissimilarities are relevant and susceptible to conflicting inferences, that determination rests with the trier of fact.

2. I also dissent from the majority's disposition of Peterson's third cause of action. The majority gives three alternative reasons for affirming, but each is unsound.

First, Peterson's "moving force" claim is not novel. The "moving force" language comes from the foundational requirement of causation set out in *Monell v. Department of Social Services*, 436 U.S. 658, 692–94 (1978). And the basic

³ *Connick* sets out the requirement that prior violations must be similar to put a local government on notice, but "the [Connick] Court did not articulate how similar the constitutional violations must be to constitute a pattern." Martin A. Schwartz & Kris Markarian, *Section 1983 Litigation* (3d ed. 2014). We have filled that gap by clarifying that deliberate indifference is an objective notice inquiry that ordinarily belongs to the jury. *Castro*, 833 F.3d at 1076; *Oviatt*, 954 F.2d at 1478.

idea of Peterson's claim is that the County is liable for constitutional violations that it caused, by its policies, through the actions of its contractors. This theory flows from basic propositions. Because Monell liability is not vicarious liability, *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997), the nature of the employment relationship between a local government and individual tortfeasor—if any—is irrelevant. Rather, the key questions are the “culpability” of the County and the “direct causal link between the municipal action and the deprivation of federal rights.” *Id.* at 404.

Second, whether the County caused the alleged harmful conduct is a factual question that is both material and disputed. The majority is correct that County policy, as written, undercuts the claim that the County was responsible for Wellpath's conduct. But the written policy evidence is contradicted by the consistent depositions of three Wellpath employees, who testified that the County was ultimately responsible for deciding when patients were to be released, without regard to medical fitness. I would thus reverse and remand for a trier of fact to resolve this evidentiary conflict.

Third, even if we assume that no individual Wellpath employee was deliberately indifferent to Peterson's needs, that is neither here nor there. *Fairley*, 281 F.3d at 917 n.4. The only relevant question is whether the County was deliberately indifferent to the risk of Peterson's harm, which collapses with the notice analysis in the first cause of action.

I respectfully dissent.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

John David Peterson,

v.

Nevada County, et al.,

JUDGMENT IN A CIVIL CASE

Case No: 2:19-CV-0949-JAM-JPD

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED
IN ACCORDANCE WITH THE COURT'S
ORDER FILED ON 8/1/2023**

Keith Holland
Clerk of Court

Entered: August 1, 2023

by: /s/ M. York
Deputy Clerk

U.S. District Court
Eastern District of California] Live System

Notice of Electronic Filing

The following transaction was entered on 8/1/2023 at
7:11 PM PDT and filed on 8/1/2023

Case Name: Peterson v. Nevada County, CA et al
Case Number: 2:19-cv-00949]JAM]JDP
Filer:

Document Number:115(No document attached)

Docket Text:

MINUTES (Text Only) for MOTION HEARING and
BENCH ORDER before Senior District Judge John
A. Mendez held on 08/01/2023 re Plaintiff John
David Peterson's [99] Motion for Summary
Judgment; Defendants Nevada County Sheriff's
Department and Nevada County, California's [103]
Cross-Motion for Summary Judgment and
Opposition to [99] Motion for Summary Judgment;
and Defendant Wellpath Management, Inc.'s [104]
Cross-Motion for Summary Judgment and
Opposition to [99] Motion for Summary Judgment.
Plaintiff's counsel, Patrick Dwyer, present.
Defendant Nevada County, California and Nevada
County Sheriff's Department's counsel, Matthew
Gross. Present. Defendant Wellpath Management,
Inc.'s counsel, Jerome Varanini, present. The Court
and counsel discussed the pending motions.
Arguments heard. After careful consideration and
for the reasons stated on the record, the Court
DENIED Plaintiff's
Motion for Summary Judgment at ECF No. [99]. The

Court GRANTED County Defendants' Cross-Motion for Summary Judgment at ECF No. [103]. The Court GRANTED in PART and DENIED in PART Defendant Wellpath Management, Inc.'s Cross-Motion for Summary Judgment at ECF No. [104]. Specifically, the Court GRANTED summary judgment for Defendant Wellpath Management, Inc. on claims two and four; the Court, however, DENIED summary judgment for Defendant Wellpath Management, Inc. on claim six for medical malpractice under state law, finding there exists a dispute of material fact. The Court further DECLINED supplemental jurisdiction over Plaintiff's sixth claim for medical malpractice and DISMISSED claim six without prejudice. The Court DENIED Plaintiff's oral motion to amend complaint. The transcript will serve as the Court's written order.

Court Reporter: Maryann Valenoti. (York, M)

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**JOHN DAVID PETERSON,
Plaintiff,**

v.

**NEVADA COUNTY, California, et al,
Defendants.**

**TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. MENDEZ
SENIOR UNITED STATES DISTRICT JUDGE
APPEARANCES:**

For the Plaintiff:	PATRICK DWYER P.O Box 1705 17318 Piper Lane Penn Valley, CA 95946
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For the Defendant Nevada County, California:	PORTER SCOTT by MATTHEW W. GROSS 2180 Harvard St., # 500 Sacramento, CA 95815
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For the Defendant Wellpath Management:	JEROME M. VARANINI 641 Fulton Avenue, # 200 Sacramento, CA 95825
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Maryann Valenoti, RMR, CRR
501 I Street, Suite 4-200
Sacramento, CA 95814

Sacramento, California, Tuesday, August 1, 2023
(In open court.)

THE CLERK: Please remain seated. Come to order.
Court is now in session. The Honorable John A.
Mendez, Senior United States District Judge,
presiding. Calling civil case number 19-cv-949,
Peterson versus Nevada County, California, et al.

THE COURT: All right. Appearances, please.

MR. DWYER: Patrick Dwyer appearing for the
plaintiff John Peterson.

MR. GROSS: Good afternoon, Your Honor. Matthew
Gross appearing on behalf of the Nevada County
defendants.

MR. VARANINI: Good afternoon, Your Honor.
Jerome Varanini appearing for Wellpath
Management, Inc.

THE COURT: All right, good afternoon. We're here
on cross-motions for summary judgment. There are
six claims in this case. We'll go through each of
them. I'll have you answer some questions, and I am
prepared to rule today.

In terms of preliminary matters, there was a
request for judicial notice by Wellpath. They asked
the Court to take judicial notice of Exhibit Pin
Docket 111-1 which included records from the
California Secretary of State's website that
showed that California Forensic Medical Group, Inc.,
CFMG, is an active company, and Exhibit Q, which
shows or is CFMG's

Articles of Incorporation. The Court has taken judicial notice of those documents.

The County objected to plaintiff's expert witness, Dr. Witt arguing that Dr. Witt's report is impermissible under Rule 26 because it offered no opinions as rebuttal opinions. The County also has contended that Dr. Witt's reports are improper because the scope of his testimony exceeds or extends beyond his expertise.

In terms of Dr. Witt, for purposes of a motion for summary judgment, I'm going to deny and overrule the objections. It really goes to weight, not admissibility, for purposes of summary judgment. If I have to take it up at trial in terms of a motion in limine, I'll do it then, and it didn't really play a significant role in the Court's view of this case. So that takes care of the preliminary matters.

Let me jump right to an issue raised by Wellpath, which, Mr. Dwyer , I'm not sure why you thought you could late file documents. I did receive a number of documents from you. I don't know if the defendants got those supplemental exhibits. Did you get those; were you the aware of those?

MR. VARANINI: I received them today, Your Honor, yes.

THE COURT: Were you aware he was going to file them?

MR. VARANINI: No

THE COURT: That's my first question. What lead you to believe that you were allowed to file these?

MR. DWYER: Your Honor, I had no belief one way or the other. What I had was I've been ill, Your Honor, so I apologize. I have not been up to snuff in the last month. These documents came to mind. I found my notes as to why I originally drafted Paragraph 6 in the Second Amended Complaint the way I did. These are my notes referencing the actual evidence I used as the basis for Paragraph 6 in the Second Amended Complaint, I realized that, and I submitted them because the further documents put into the record on the reply by Wellpath continue to raise the issue as to whether or not Wellpath has responsibility for CFMG. And these documents, and particularly 30 and 31, are definitive on that question, Your Honor. They show that Wellpath specifically assumed -specifically told Nevada County that it is simply a name change, and it came in and extended all the contracts and took over the responsibility under the name "Wellpath" and those are highlighted in red boxes on 30 and 31.

THE COURT: It doesn't say that, though. That's your conclusion that you want me to draw, but the documents themselves don't say that. I would disagree with your conclusions as to what the documents say.

You never named CFMG as a defendant in any of your complaints, which I thought was interesting. You only named CMGC, and then you named Wellpath.

Wellpath doesn't deny that it assumed responsibility

for CMGC, but Wellpath in all its discovery answers – and I understand, I think they were playing games somewhat, not being completely forthcoming, but they never admitted that Wellpath assumed responsibility for CFMG, and obviously have contracts that were exhibits in the summary judgment motion and a declaration that clearly shows that the contracting corporation is between the County and CFMG. And CFMG is still an active corporation, which should have lead you to name CFMG as a defendant.

Now, where the confusion comes in, Mr. Varanini, is this manual, which you don't address at all, and this manual is the Correctional Medical Group Company's, CMGC's, policies and procedures manual that was in effect at the time of this incident. And on the first page, second page in, it's actually Page 9, it's a 180-page manual, the policy manual says that CMGC is a designated responsible health authority. This policy manual doesn't mention CFMG at all. I don't know why. So you've created confusion by allowing -- not allowing, but not addressing why the policy manual names this one corporation, which Wellpath clearly has assumed responsibility for, why it names CMGC as the provider to Nevada County, and then you have a contract which says no, no, no, it's CFMG. Explain that to me.

MR. VARANINI: Well, Your Honor, I think CMGC was an entity that was a support entity for CFMG, and as a support

entity, it would provide various documents that could be used by CFMG, but it did not employ the medical providers. It did not contract with the County. It had only one role and that is as a support agency and that's what Wellpath Management came in as a successor to CMGC. So I apologize for the confusion, but --

THE COURT: Why wouldn't I just allow Mr. Dwyer at this point to amend the Complaint to name the proper party rather than play this game, this corporate shell game? It's really just a matter of him naming CFMG as the defendant and not Wellpath.

MR. VARANINI: Well, that was his choice at the outset of the case. We've indicated in all the discovery that Wellpath was not, is not and has not been the employer.

THE COURT: Yeah, but you never gave that explanation, that's why I said you hid the ball. If you would have given him that explanation, that CMGC was the supporting company for CFMG, that the contract is between CFMG and Nevada County, you didn't do that. All you did was, We denied that Wellpath isn't involved in this contract at all and left it at that. I understand why, that's what defense lawyers tend to do.

You didn't do your job. You should have taken a 30(b)(6) deposition. You should have looked into this, made sure that you are suing the right entity, and you are in a bad position right now.

MR. DWYER: Your Honor, may I have a couple moments, please?

THE COURT: Go ahead.

MR. DWYER: I appreciate it. Thank you. First of all, the original Complaint, the First Amended Complaint Paragraph 8, has the operative language, and it basically alleges that CMGC and CFMG are alter egos of each other and the reason that was done is because at the time

THE COURT: I'm going to interrupt you, that's just an allegation.

MR. DWYER: I understand that.

THE COURT: I don't have any proof of alter ego in this case.

MR. DWYER: I understand that. I'm proceeding along. But what happened in the meantime was Mr. Varanini told me early on in litigation, "I represent Wellpath. Wellpath is the new name for these entities." That's what he represented to me a couple of times. Looking at the documents that were produced by Nevada County, and not by Wellpath, for example, exhibit what I submitted as 30 and 31 yesterday, those documents, clearly indicated that Wellpath had somehow purchased or acquired CFMG and –

THE COURT: They don't, that's your assumption. As a lawyer, you are supposed to look into that. You can't just take -- other than if you are raising an estoppel argument, I

understand that, but I completely disagree with you that that's what those documents say. They don't say that. I know you may have assumed certain things because of the settlement in the other case, which Wellpath paid the settlement. I get all that in terms of what you're assuming, but, you know, from his point of view, it's not my obligation to do the discovery that you should have done to name the proper party, and you didn't do it here.

It would have been simple, you know, if you just sent an interrogatory that said, "Explain the roles and responsibilities of these three entities," but you didn't do that.

It would have been simple if you had taken a 30(b)(6) deposition, but you didn't do that.

I don't have any evidence at this point of alter ego. At best, you might have an estoppel argument if you really want to take the position that the lawyer for these companies told you X, Y and Z, but you don't have any evidence that Wellpath is the proper defendant in this case, you don't.

MR. DWYER: Your Honor?

THE COURT: Go ahead.

MR. DWYER: I'm sorry, I don't disagree with you, but I do have one additional point I would like to point out -- two points. Number 1, fog of war of the pandemic. I understand we don't want to go into that any further, and Number 2 --

THE COURT: I'm sorry, you said what?

MR. DWYER: Fog of war of the pandemic. This was a very difficult time to keep these cases going and going forward. I had a half dozen of these cases to keep going without any staff or assistance. This was a very hard period of time to practice law. So that's one factor that I think the Court needs to consider. Number 2 --

THE COURT: Why do I need to consider that, Mr. Dwyer? Every lawyer could come in here and raise that. I'm not unsympathetic, but it's certainly not a defense or an excuse, a legal excuse that a Court can take notice of in a significant and serious case like this. I would not go down that path. My response to that path is perhaps maybe then you shouldn't have been the lawyer on this case. Perhaps you had an obligation to withdraw as counsel, which you didn't do. So that argument I'm not going to take seriously.

What's your second argument?

MR. DWYER: May I direct the Court's attention to one critical line in what I marked as Exhibit 30? It's an e-mail dated March 11, 2019, from the Deputy County Counsel Jamie Hogenson to Ben Rice, the counsel at CMG. I notice that's CMG, not CFGC. This is the first page, bottom of the first page on what's marked as 30. I have a copy for the Court if you need one.

THE COURT: No, I have it.

MR. DWYER: I'm not sure if the red underlining went through.

THE COURT: Exhibit what now again?

MR. DWYER: What I marked as P-30.

THE COURT: Exhibit 30. Go ahead.

MR. DWYER: Bottom of the first page there is an e-mail from Jamie Hogenson, Deputy County Counsel, to Ben Rice at CMGC, not CFMG, Number 1. And Number 2, it just says, "Hi, Ben. Hope all is well. Quick question. We want to get another year extension on our current contract with CFMG." So here she is writing to Ben Rice CMGC asking about a contract extension for CFMG.

"Hopefully that is okay," she says, "And the question is, how should I deal with the name change to Wellpath?"

If you go through all the e-mails I've attached here in 30 and 31, basically Deputy County Counsel is asking of Wellpath, "What is the change in legal ownership; what is the effect on the contract status?" And the top part of the first page, there's a response to Ms. Hogenson that said, "The good news is that California Forensic Medical Group, Incorporated did not change its name or structure. So no modification assignment will be necessary on that front."

Logically, if they haven't changed, it means that

Wellpath has bought them out and owns them, operates them and controls them.

THE COURT: No, it doesn't. It means exactly what it says. It means that CFMG is still the contracting entity. You don't have to change the contract to Wellpath. We still have a separate corporate structure.

Your argument really is more an alter ego that you should treat all three entities as the same, but that goes completely against the way you are reading that. That says we don't have to change the contract. The contract we have between the County and CFMG is fine. We don't have to change that to Wellpath. If I'm reading that, I'm thinking I sued the wrong defendant. Wellpath doesn't have anything to do with this. It's CFMG who is the contracting entity

MR. DWYER: Yes, but she's writing the general counsel for CMGC.

THE COURT: That's his e-mail address.

MR. DWYER: And it's on Wellpath letterhead essentially, e-mail letterhead.

THE COURT: Again, it might be evidence of alter ego, but it's not evidence that in any way Wellpath assumed responsibility for whatever wrongdoing you are alleging occurred.

The wrongdoing you are alleging occurred is wrongdoing by CFMG and its employees. The Monell claim that you are

bringing should have been brought against CFMG. You didn't do that. Now you are scrambling to get me to agree with you. At best -- and we could talk about it later.

At best, you might have raised a genuine issue of trial of fact, at best, but in terms of you arguing Wellpath is the correct defendant, I think you are absolutely wrong as a matter of law. You could disagree with me, but I don ' t see any evidence --and, again, all this could have been cleared up, as I said, very simply by deposition or an interrogatory, and let's leave it at that.

Let's get into the substance of the claims.

MR. DWYER: Your Honor, just briefly, would it be the appropriate time for me now to move the Court to allow an amendment to change the name to the actual real party?

THE COURT: No , you would have to bring a written motion and they would get a chance to respond to it.

Okay . Honestly, Mr. Dwyer, this is the first deliberate indifference case I've ever had where no individuals had been named, none. Your whole theory is a Monell theory. It's somewhat unique, but honestly, not really supported by the law.

Monell claims are very difficult to maintain and very difficult to prove. And my view of role -- and we'll go through each claim, my view of role is what you've tried to do here is turn, in effect, a medical malpractice claim into a

constitutional violation under Monell, and I don't think you succeeded, and I'll explain why as we go through each claim.

The first claim you bring is a Monell claim against the County itself, the facility, that it acted with deliberate indifference.

You argue, like most lawyers do in these claims, there is a lack of training and that -- and that your client had a constitutional right that he was deprived of, that he has a constitutional right to get medical treatment and not be exposed to, in effect, deliberate indifference.

If you focus just on the County itself, there really were only two individuals that interacted with your client. Your client was a pretrial detainee. Gordon versus Orange County, Ninth Circuit case in 2018, sets the standards for pretrial detainees who allege that jail officials failed to provide constitutionally-adequate medical care.

There's four elements that need to be shown under Gordon: First, that the jail in this case, the county jail, made an intentional decision with respect to the condition under which the plaintiff was confined, including decisions with respect to medical treatment; that those conditions put the plaintiff, your client, at substantial risk of suffering serious harm, that the County jail did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high

degree of risk involved making the consequence of defendant's conduct obvious, and then by not taking such measures, the defendant caused the plaintiff's injuries.

With respect to that third element, a pretrial detainee must show that a defendant's actions were objectively unreasonable, and that requires a showing of more than just negligence, but less than subjective intent, something akin to reckless disregard.

You don't cite any cases in your briefs both in support of your motion for summary judgment and in opposition. You relied primarily on one case, Russell. And then throughout your briefs you rely on the other case in which you served as counsel, I was the judge on the case, a case called Howie.

Here's your problem with Howie and how much you rely on Howie: Howie has no precedential value whatsoever. You settled that case, and you actually gave me the settlement agreement. I looked carefully to the settlement agreement, and in the settlement agreement it says exactly what I thought it would say, and that is that the defendants deny and dispute plaintiff's claims and allegations and admit no wrongdoing by entering into this agreement. You don't have any liability shown in the Howie case. You settled the case, but you allowed the County to deny any and all responsibility and liability.

Howie doesn't help you at all. It doesn't put the County on notice that something wrong occurred and that it

needs to be cleaned up. In fact, quite the opposite. The settlement agreement proves exactly what the County's position was all along, and that is, We don't have any liability here. So for purposes of your summary judgment motion, Howie doesn't move the ball forward at all.

So I have to look at the undisputed facts in this case, and see, first of all, whether there really was a constitutional violation, whether there was deliberate indifference shown here by the evidence, not just by the allegations.

The only thing the County -- the jail did was not provide transportation to your client to a medical facility. They released him. They had to release him because the law required them to release him. So your complaint against the County boils down to they should have transported him to the hospital, but that's not deliberate indifference. That's not a constitutional violation because the evidence also shows that they weren't aware.

You allege that they saw that he was limping badly, that's not supported again by the evidence whatsoever. I believe in the depositions Mr. Gross, correct me if I'm wrong -- but both of the witnesses absolutely denied seeing that he was limping, or, in effect, said, We didn't notice that he was limping.

MR. GROSS: Specifically with Officer Malloy who was

the female officer walking Mr. Peterson to the booking area to be released, she had no knowledge of even working that day, so there is -- it's not even -- it's a question as to whether she was even working that day. And then Officer Stanley, who was the booking officer that day, had no knowledge and denied ever seeing Mr. Peterson limping.

THE COURT: There's no evidence that they saw him while he was in the facility. There's no evidence that he complained to them. Unlike Howie, your client didn't say anything to them. He limped out of the facility. Again, that's not a constitutional violation in any way by the jail. There's no policy that that caused the alleged constitutional violation. I know you argued there is a lack of a policy, they should have had a policy, but that doesn't rise to the level of a Monell violation under the law.

You admit you relied on a directive that was passed after the incident. But I understand your argument that even though it's now in writing, that division or Subsection (h), you were already following that practice, or your client was already following that practice, which was to make sure that there was medical clearance for inmates before they were released.

As the County argues that your Monell claim against the County is factually distinct from Howie, if I thought Howie had any precedential value, and that undermines your argument,

the plaintiff's argument, that the County employed a policy or practice of acting with deliberate indifference towards pre-detention detainees, constitutional rights to adequate and timely medical care. The argument that the County failed to train its personnel and that caused plaintiff's alleged constitutional deprivation is just a conclusion, again, it's unsupported by any evidence whatsoever that there was a lack of training, and again, you can't rely on *Howie* because the County never admitted liability in that case.

Here's the bottom line on the first claim, and then I'll give you an opportunity, Mr. Dwyer, to respond and make a record: Because the alleged Mone11 liability in the first claim is based on the defendant County's purported deliberate indifference to the plaintiff's constitutional rights to adequate and timely medical care, the plaintiff must first satisfy the *Gordon* element and demonstrate that first element is met.

Although there is not a lot of discussion in either parties' briefs about the first *Gordon* element, the undisputed material facts do not show that the County officers made any intentional decision regarding plaintiff's confinement or medical treatment to expose him to a substantial risk of serious harm. They didn't interact with him other than at the time he was released. There's no facts to suggest that the

County officers, the jail officers had any input on the plaintiff's confinement or his medical treatment. It's undisputed that they don't have access to the plaintiff's medical records, and although the plaintiff alleges that these officers accompanied him to the infirmary for security purposes, he also admitted and he testified that he didn't have any conversations with these officers beyond exchanging pleasantries.

In addition, Officers Stanley and Malloy, those are the only two officers who plaintiff has identified that he interacted with, they did not have control over plaintiff's release from the facility. He was released under Penal Code Section 825 and 849 because the DA had not filed any charges against him.

It's undisputed that the plaintiff did not speak with Officers Stanley or Malloy about his medical concerns or the pain he was experiencing while he was being released from the jail. As a result, the undisputed facts do not show that these officers made any intentional decisions material to plaintiff's healthcare or confinement.

Even if I was able to somehow find that these officers had made a decision that might have put the plaintiff's health in jeopardy by releasing him from the jail with a severe limp, a reasonable official could not have been found to have appreciated the high degree of risk involved as set forth in

the third element of Gordon. For example, the plaintiff testified he entered the jail with a limp, and that's Exhibit B to the plaintiff's motion for summary judgment, his own deposition. The only visible symptom of the infection that we now know he had existed when he entered the jail.

Officer Stanley's testimony was that he believed that the plaintiff was fit for release since the health officer had told him that the plaintiff was cleared to leave the jail, that there was nothing else pending. Plaintiff's response to that is I shouldn't believe that, but credibility issues aren't a defense to summary judgment motion. There has to be evidence.

In short, because the plaintiff entered the jail with a limp, failed to inform any jail officers of his medical concerns, the jail officers were told that the plaintiff was cleared for release. These officers were not negligent or, alternatively, negligently unaware of plaintiff's medical conditions, and certainly there's no evidence to support that they acted with reckless disregard.

The conclusion is supported by cases where reckless disregard was found. Those all involved unambiguous symptoms of medical distress. Russell, the case that the plaintiff relied on, clearly is in opposite. In that case the Court found reckless disregard because the medical staff failed to escalate plaintiff's medical treatment after he complained of chest pain and exhibited hyperventilation, vomiting, dry

heaving, difficulty breathing, severe chest pain radiating to his arm and jaw, numbness in his hands and feet and tachycardia.

Another case is Sandoval versus County of San Diego, Ninth Circuit case, that found reckless disregard where the plaintiff was found dead after medical -- after prison staff failed to treat him for opioid withdrawals.

In short, the Monell claim fails for all these reasons, and, again, to the extent that the plaintiff relies on Howie , this case before this Court is factually dissimilar from of that.

Mr. Howie, as I mentioned, unlike the plaintiff in this case, Mr. Howie was denied medical attention at the same jail. Despite his requests for evaluation and treatment, he requested further medical attention, and he requested a ride, which he didn't get. He was totally immobile upon his release , and, again , his case is not sufficiently similar to establish any type of pattern of constitutional violations.

The argument that the County failed to adequately train its officers to observe and report inmate medical problems and confer with Wellpath about inmate fitness for release the Court finds both circular and conclusory. Again, the plaintiff has provided no evidence other than his own allegations to support the conclusion that he wants the Court to draw.

As stated previously, to establish a Monell claim for failure to train, the plaintiff must show that the County was deliberately indifferent to the need to train its officers by producing evidence that shows a pattern of similar constitutional violations resulting from a failure to train, or, as plaintiff points out, a single violation but with a high predictable consequence.

Plaintiff's case is dissimilar from Howie. He can't rely on Howie for the reasons I've stated, and the undisputed evidence clearly does not establish any type of pattern that's needed to prove this claim as a matter of law.

Plaintiff's case is not an example of a single violation with highly predictable consequences. The Supreme Court has stated that such a situation is rare, and exists only in a narrow range of circumstances, that's the Connick case, C-O-N-N-I-C-K.

Such situations have been found where a County failed to properly train a social worker so that a child was seized from the home with a warrant or exigent circumstances. Or another case, Kirkpatrick versus County of Washoe where a police officer with no mental health training whatsoever was sent to assist a suicidal man.

In this case before the Court in comparison, the crux of plaintiff's argument is that his limp was so bad that Officer Stanley and Malloy should have understood his medical

condition was dire, should have questioned his release without additional medical care and transport, but it's undisputed that the plaintiff didn't request any help getting out the door as he left.

He didn't request any medical assistance.

He didn't request any transportation from the jail to another location.

It's also undisputed that these officers didn't have access to the plaintiff's medical records. And there is testimony undisputed by Officer Malloy that she had no memory of plaintiff limping.

Unlike the Kirkpatrick and Garcia cases where the situation and severity was apparent on its face, plaintiff's medical situation was not. For these reasons, the Court denies plaintiff's motion for summary judgment on this claim, and the Court grants the defendant County's motion for summary judgment on this first cause of action. Mr. Dwyer, anything you want to add for purposes of the record?

MR. DWYER: Yes, Your Honor. I have a number of points of disagreement.

THE COURT: Go ahead.

MR. DWYER: So it will take me a few minutes. Let's begin with the Howie case. I disagree that there is no evidence in the record. Mr. Howie testified in his deposition

under oath as to what happened to him at the jail and that evidence is in the record.

What happened there was that he was released from booking by being wheeled out the backdoor of the jail and made to crawl out of a wheelchair. Why is that significant to this case with Mr. Peterson? It's significant because of Plaintiff's Exhibit 17, the checklist that Nevada County Sheriff's Department uses purportedly to verify that inmates are medically fit before they're released. Nevada County has stated on the record, and it's in the briefing, and it's in the evidence that they don't release inmates that are not medically fit to be released. So we have Howie being released when he has a fractured knee and can't even support his weight.

This, the only policy, practice and procedure in existence the time of Mr. Howie or Mr. Peterson is plaintiff's Exhibit 17, that's it. As shown by recent briefing, there were no policy, practices or procedures in place regarding the Nevada County's communication with Wellpath as to whether or not somebody is medically fit to be released.

Indeed, the testimony in this case is what's shocking. Wellpath testified, four nurses testified that the medical checklist, Plaintiff's Exhibit 17, only means to them, not that the County's calling him up to ask whether he's medically fit for release, but they testified that it was simply a clearance as to whether or not it was a 5150 mental hold, that was

actually Laurie Adams, the other testified -- one of the nurses testified like Ms. Boucher and others, they would simply get a call from the jail, booking staff saying, "They're being released," period. It didn't matter the medical fitness of the inmate. So we have the actual working practice and policy of the County was simply -- well, I don't even know what it was.

We haven't been able to determine it. They simply release people regardless of their medical fitness. When it came to Mr. Peterson --

THE COURT: Where is your evidence of that? It's one incident. One incident, that's not a pattern of practice. The Monell, it requires so much more.

MR. DWYER: I understand, Your Honor. Let me continue.

THE COURT: Okay.

MR. DWYER: The next instance with Mr. Peterson, he had a serious, life-threatening infection.

THE COURT: They didn't know that.

MR. DWYER: Officer Stanley called up and supposedly asked Laurie Adams --

THE COURT: You can't say "supposedly."

MR. DWYER: Well, he testified he called Laurie Adams, and she said he was medically fit, meaning physically fit to be released.

Laurie Adams tells the opposite story. She said, "No, I only told him that he wasn't on the 5150 hold." So we have completely opposite testimony. And that shows right then and there, that shows the weakness in the policy. All that they're doing is making a phone call, and obviously either the parties completely misunderstand each other or they never sat down to talk to each other or formulate a policy where booking can actually verify or confirm what is the medical state of the inmate, and are they ready for release physically? That doesn't exist, and because it didn't exist, Mr. Peterson was released when he should have been transported in a ambulance. That's the big policy problem here. Number 1.

Number 2, I disagree with the Court with the evidence about the limping. Mr. Peterson testified that it would be impossible for anyone not to see him limp. The medical records record "pronounced limp," and if there had been a proper policy and procedure in place, medical would have informed booking when they called him upon release saying, "He's got a serious limp. He has a serious infection. We need to either arrange for transfer of care or transport to ER, or something needs to be done because this patient is ill." That doesn't happen. It didn't happen because there are no policies in place.

With regard to training, the only policy that Nevada County could possibly have trained upon is Exhibit 17. That's it. That's the only policy they had. What kind of training

are officers going to have if the only thing they have is a checklist which Wellpath says means exactly something completely different than what Nevada County says it means.

You have a situation here where Mr. Peterson, who is gravely ill, almost died, was released from custody because there are no simple routine discharge procedures in place. All that a jail needs to do here is coordinate with the medical provider so that inmates are given proper discharge instructions. And when you create discharge instructions, you are going to say, "This person needs transport to ER. This person may be released on foot. This person is going to need transport to home," or, "This person needs to be notified they have this possible conditions, please see a doctor immediately." Something. Nothing like this exists. That is a very serious problem. It almost cost Mr. Peterson his life. He has severe bacteremia and sepsis. He almost died that firstday. Why? Because they don't care.

THE COURT: And the case you are relying on that says that's a constitutional violation that's deliberate indifference is what?

MR. DWYER: There are many cases I relied upon.

THE COURT: Give me one, I didn't find one. The only case you cited was Russell.

MR. DWYER: I cited Sandoval, I cited Tsao. I could go back to my list, but I have a good number of cases, Your

Honor, on policy, practice, procedures. I cited Garcia. I cited -- I can't remember all from the top of my head, but there is lots of law in place here. But the problem is the jail, the sheriff has responsibility, constitutional obligation to make sure the inmates receive proper medical care.

But then they have Exhibit 17 as the entirety of their policy, practice and procedure to see that inmates, when they're leaving the jail, are, in fact, medically fit to be released. Yes, under the statute on a 48-hour hold, the jail has to release them, however, they admitted on the record, both Nevada County and Wellpath, that they have policies in place, and they're not supposed to release people who are not medically fit.

As I pointed out in my reply brief, the simple solution here is right in front of everyone, you tell the inmate how sick they are. You tell them what you think they have. You could say, "Okay, you are due to be released. We could transport you to the ER. We could arrange a doctor's appointment, or you could sign a waiver and you could just walk out."

Asking an inmate to sign a waiver so he could walk out in a 48-hour timeline is of no burden to anyone. It's a single piece of paper saying, "I hereby waive any requirement or obligation on the part of Wellpath or the County to send me to the ER."

THE COURT: Did your client ask anyone at the jail to transport it?

MR. DWYER: I'm sorry, Your Honor, I have a hearing problem.

THE COURT: Did your client ask anyone at the jail to transport him?

MR. DWYER: No, he did not.

THE COURT: Did your client tell anyone at the jail, "I don't feel well. I need to be transported to the hospital"?

MR. DWYER: Yes.

THE COURT: And I need -- that I need to be transported to a hospital?

MR. DWYER: Yes, Your Honor.

THE COURT: Who did he tell?

MR. DWYER: Wellpath knew exactly --

THE COURT: No, no, at the jail, jail employees.

MR. DWYER: Let me finish.

THE COURT: Your first claim is against the jail.

MR. DWYER: I'm just going to that point. To go -- if you look at the medical record, my client went from a cell to the infirmary, probably half a dozen times.

THE COURT: Why don't you answer my question? Am I incorrect when I said the undisputed facts show that your client didn't tell anyone connected with the jail, Malloy and -- what's the other person's name?

MR. DWYER: Stanley.

THE COURT: Stanley.

MR. DWYER: Yeah.

THE COURT: He said nothing to them, so they're supposed to read his mind, and by not being able to read his mind or by seeing someone limp, they're supposed to figure, Oh, he needs to be transported, and because they didn't transport him, that now becomes a constitutional violation? That's your case, that's your argument. And the case law doesn't support that that's a constitutional violation that a policy caused some -- caused some type of constitutional violation, that isn't deliberate indifference under the case law and that's the problem. You haven't given me any case under similar facts that demonstrate as a matter of law that this was deliberate indifference by these two jail officers.

MR. DWYER: Two things, Your Honor. I'll be brief: Number 1, I think it's well known how intimidated inmates are of jail guards, and Mr. Peterson testified, it's in the record, he was afraid to speak, and Officer Stanley told him to, "Hurry up, move this along." In other words, he was curt to him and rude to him and told to, "Make your phone call and get out."

Number 2, going back to Exhibit 17, Wellpath should -- there should be a policy and practice between the two of them saying, "Yes, this inmate is seriously ill, he needs transport." What do we have? We have simple checklist which

one party says means this and the other party says means that. Obviously we have a complete policy, practice and procedure failure. There's an utter lack of procedures which they are constitutionally required to have that would have easily prevented Mr. Peterson from being released in critically ill condition, which is what happened.

All that's necessary is for them to institute -- particularly after the Howie case, it's kind of remarkable he didn't do an investigation saying, "How did we let this guy out of the door of the jail with a fractured knee; how did we let this guy crawl out of a wheelchair?"

THE COURT: You can't rely on Howie. I keep telling you that. Howie doesn't exist as far as this case is concerned. There would be a motion in limine brought that you probably wouldn't be able to mention Howie whatsoever, and I wouldn't allow you to. I can't consider Howie. It doesn't exist. I know you were the lawyer. We all know I was the judge. We all know what happened, but for purposes of Mr. Peterson's case, Howie doesn't exist. It doesn't. The County and/or Wellpath never admitted liability. In fact, they denied that they did anything wrong. There was no constitutional violation in Howie as far as the evidence shows.

MR. DWYER: Your Honor, that was a settlement agreement.

THE COURT: I know what it was, I know it's a

settlement agreement. You can't retry Howie now.

MR. DWYER: Mr. Howie could testify, and he did in this case, as to what happened to him, that establishes the first clear --

THE COURT: No, he can't. I wouldn't allow it. I wouldn't allow Mr. Howie to testify in this case because then I would be retrying Howie all over again. Howie settled. Howie's done. Mr. Howie made his decision to accept a settlement where there is no admission of liability. You got to live with that. I have to live with that as a matter of law. It has no value whatsoever to Mr. Peterson.

MR. DWYER: I respectfully disagree on the legal conclusion that Mr. Howie could not come back in and testify as to what happened to him. I understand your point. We don't need to debate more, but I just want to make my record that I disagree with you. I think Mr. Howie's evidence does come into this case, and when it does come into this case, it proves that, in fact, there was no policy in place when there was an obvious simple policy that should have been in place, especially after what happened to him, and that's why we have a constitutional violation.

THE COURT: Any other examples besides Mr. Howie or Mr. Peterson where you think someone who was ill or sick was released?

MR. DWYER: Your Honor, in the research I did, which

was rather extensive, I did not find cases closer on -- closer in facts than what I cited in my brief. There really isn't anything -- it's kind of a unique situation that I've come across, and I thought it deserved being brought to this Court's attention, which is why I filed the Complaint, and I think in good faith prosecuted that Monell claim and I think it's a good claim.

THE COURT: I understand.

MR. DWYER: We disagree.

THE COURT: Mr. Gross, it's your client who's the defendant on this first claim. Anything you want to respond to or anything you want to add for purposes of the record?

MR. GROSS: Just very briefly on the policies and practices.

THE COURT: Go ahead.

MR. GROSS: So there were numerous instances of practices and policies in place for the Monell claim, which would defeat plaintiff's claim. There is the County's Directive Number 9, which is Plaintiff's Exhibit 27, the written policy which was in effect at the time. That corrective Directives Number 9 covers A, medical emergencies; E, inmates who require hospitalization; F, transporting inmates to hospitals, and G, inmates being released from the hospital, so the County had that policy in place. The County also relies on Wellpath, CFMG, CMGC, its

contractor that provides the medical services within the jail to have more definitive medical policies because the County recognizes it's not the medical provider in the jail. It's going to defer to its contractor for those decisions and for those policies, and as cited in our brief, there are numerous policies covering the transport, release, providing ambulatory assistance.

The County had, as Mr. Dwyer mentions, the hard card release checklist identifying contacting medical staff before an inmate's release, and, finally, the County has its practices, which Officer Osborne and officer in charge – Officer in Charge Osborne and Officer Stanley testified to that it was the practice in the jail at the time to contact medical staff. So even though there wasn't a written policy in place that mentioned that specifically, it was the practice of the County to do that for every inmate.

THE COURT: Okay.

MR. DWYER: One last good point. I think it is a jury question whether or not there were policies, practices and procedures in place that were sufficient to provide appropriate medical care in situations like that, and Mr. Howie and Mr. Peterson, whether it was a serious illness, it was a complete failure to communicate between Wellpath and the County that lead to a very serious medical situation, Mr. Peterson's almost death, and I think that's something the jury could

decide as to whether or not this Exhibit 17 is sufficient policy, practice and procedure. Thank you, Your Honor.

THE COURT: Okay. I want to jump to the fourth claim, which is the conspiracy claim against both defendants. Again, a claim I've never seen brought in this type of case, and obviously a conspiracy requires evidence of some type of agreement or a meeting of the minds to violate the constitutional rights. There again is no law cited by the plaintiff to support this type of claim in either the brief or the oppositions.

The County and Wellpath argue that plaintiff's allegations and factual evidence does not allege sufficient facts to plausibly connect the County and Wellpath to any conspiracy to violate plaintiff's constitutional rights to medical care.

Again, the County points to the following undisputed facts: One, the plaintiff never asked Officer Stanley and Malloy for help. Correctional officers don't have access to the plaintiff's medical records. There's no evidence that any officer was aware of plaintiff's injury or purposely released him from custody to prevent him from receiving further medical care.

All that exists in this case is speculation that the officers knew his medical status, that they could see him

limping from his cell to the booking area.

The correctional officers were required to release the plaintiff under the penal code since he had not been charged or arraigned within 48 hours, and Wellpath actually had continued to provide medical treatment up to close to the time of plaintiff's release. Wellpath adds to the argument, in summary, arguing that the claim deficiencies and the existence of a conspiracy have no basis in fact, and defendant Wellpath was not the medical provider, we've already talked about that, but that there was no evidence of an agreement.

I, again, agree with the defendants. I don't see any evidence that would support even an inference of some type of agreement between these two defendants that they intended to violate the plaintiff's constitutional rights.

The claim also fails because I don't find that the evidence supports a claim that the plaintiff's constitutional rights were violated. This isn't a deliberate indifference case.

A claim for conspiracy requires an underlying constitutional deprivation. Again, plaintiff has failed to establish that, and the claim fails as a matter of law.

Again, for those reasons, the plaintiff's motion for summary judgment on this claim, the fourth claim, is denied. The Court grants the defendants' motion for summary judgment on

this fourth cause of action. I think it is brought against both defendants. It's an interesting theory. There's just no evidence, undisputed evidence to support it. If you think I missed something, Mr. Dwyer, please, you could supplement the record at this time, but other than Mr. Howie was released and your client was released and, therefore, the jury could conclude that there was this agreement to dump prisoners, I think you argued, that's not evidence of a conspiracy. That's a conclusion you want the Court to draw. And obviously all reasonable inferences and conclusions could be drawn, that's neither reasonable nor supported by the facts in this case.

MR. DWYER: Your Honor, I am completely out of water, moisture in my mouth. Is there any water available?

THE COURT: I don't know if we have any. Do we have any? We'll get you some.

MR. DWYER: Thank you, Your Honor.

THE COURT: No problem. We'll grab you a bottle of water. Okay, Mr. Dwyer.

MR. DWYER: Thank you, Your Honor.

I disagree. I'll be very short. I believe that it goes back to how in the world does a Mr. Howie, with a fractured knee, and a Mr. Peterson, who has bacteremia, sepsis, and is approaching death, how are they released from a jail

without any referral of medical care, any transport to an ER, they weren't even told what was wrong with them?

Mr. Peterson testified, it's in the record, nobody from Wellpath even said, "You are sick." They didn't even say you had an infection. They did not tell him to see a doctor, they did nothing. No discharge instructions for either one. Just simply the door is open and out they go left to fend for themselves. How does that happen?

Well, as a policy, it says it could retain people in custody beyond their time to be released in order to provide medical care as necessary. Nevada County did not disagree with that. In fact, they would agree they have the ability to keep someone on a short-term basis to make sure that they're medically stable and/or transfer of care to another medical provider is put in place.

THE COURT: So you would agree that policy, or those policies in and of themselves show that the County and Wellpath aren't deliberately indifferent, that there really are policies in place to prevent what you say happened to your client here, right?

MR. DWYER: Well, yes, and, Your Honor, then what happened is you get the testimony, and Wellpath nurses, four of them say, No, no, that's not the way it works at all. We're told we simply -- the phone call from the booking office is simply telling us that somebody's going to be released. It's

not a real medical check at all. Boucher, Tirpak, Dean Falltrick, Laurie Adams, they basically are saying that doesn't exist. The County relies on this one little piece of paper, a little box that says, "Medical," check, uncheck.

The problem is if you have an event as serious as Mr. Howie's, what investigation or changes in policies, implementations, what's changed? Nothing. So yes, to me that indicates there is a working agreement. They're all happy with the way it works. They're fine together. They both know what's going on. They both know that Mr. Howie was released because Nevada County broke his knee in the jail.

THE COURT: Let's assume Howie doesn't exist, how does it evidence an agreement?

MR. DWYER: Again, the law's pretty clear, and I cited it doesn't have to be a speaking agreement handshake. By conduct you could have an agreement. I think there was a working arrangement here.

THE COURT: I know you "think." What you think doesn't matter. What's the evidence to show there is an agreement between these two defendants to dump prisoners?

MR. DWYER: I think a jury could reasonably find that you don't let someone out of jail near-death condition without some kind of agreement between the medical and the jail.

THE COURT: How could they find that? How could they reach that conclusion from one incident? I don't know how many

prisoners there are in Nevada County jail, but you are honestly -- you honestly believe that you have a right to ask a jury to find that there was a conspiracy between these two defendants based on the one incident?

MR. DWYER: Well, Your Honor, I know we disagree because I have the opposite question: How could you not think that there was some kind of agreement because how do you let somebody out of jail who is almost dying without some kind of agreement?

THE COURT: Negligence. I told you from the beginning, Mr. Dwyer, you're trying to turn what was possibly a negligence case into a constitutional case, and this isn't that case. It is, at best, a medical malpractice case, at best, but it's not a Monell case, and it certainly doesn't rise to the level of a deliberate indifference case. I understand your argument. Let me let the defendant --

MR. DWYER: Thank you, Your Honor.

THE COURT: Do you want to respond at all on the conspiracy claim, either of you?

MR. VARANINI: I don't think there is anything necessary in response.

MR. GROSS: Nothing from the County.

THE COURT: Okay. Let's go to the second claim, which is against Wellpath. Again, it's a deliberate indifference claim. It is against the medical provider. I'm not going to

deny plaintiff's motion for summary judgment on the grounds that Wellpath is the wrong party who was sued. As I said, there is at least enough evidence -- I do believe you sued the wrong party, I want to make it clear on the record, but I think he's produced enough evidence to create a triable issue on that, and given the likely ability of the plaintiff to file a motion to amend to name the proper party, I don't think it's proper to grant or deny summary judgment on the issue raised by Wellpath.

But on the merits, again, I've said this over and over again, this isn't deliberate indifference. This isn't Monell. This is clearly a claim where you should have named individuals and you didn't. If there was evidence to support that an individual was deliberately indifferent, and what I think is the most telling evidence, Mr. Dwyer, against your claim, is the undisputed fact that from the time your client entered that jail, he was seen nine times. I can't tell you how much that demonstrates that that's the opposite of deliberative indifference.

When you look at the deliberate indifference claims that survive and then go forward, or the type of claim under Monell that should go forward, plaintiffs don't get seen nine times by medical providers. Plaintiffs get put in a jail cell, and they complain, and a jailer tells him the doctor will come along or a nurse, the nurse never shows up, and they sit there

and they develop serious conditions. That's not this case. He was seen, again, undisputed, nine times, and perhaps given what we now know, that he was unable to make it even to the ER, that he had a serious infection, certainly you have an argument that they shouldn't have released him -- well, they had to release him, that they shouldn't have sent him out of the jail without taking him to the ER, that's what this case is about. But that, again, is, at best, negligence. It's not in the cases that I am aware of and I've seen over the years. It doesn't rise to the level of a Monell claim. You haven't demonstrated that there was a constitutional right that your client was deprived of.

You haven't demonstrated that there was a policy that was the moving force behind any constitutional violation, and it's hard to be a moving force behind a constitutional violation when the Court can't find that there was a constitutional violation. For those reasons, and in the absence of any individual providers who were named in this claim, it can't go forward.

Summary judgment, again, as a matter of law, has to be granted in favor of Wellpath, or if you amend the Complaint, it would be CFMG, but the case can't -- that claim can't go forward.

The Wellpath providers were receptive to plaintiff's concern. He was examined, as I said, over nine times. X-rays

were ordered. They were aware of his discomfort. They were attempting to diagnose his ailment. And yes, I mean, there is an argument to be made that someone should have driven him down to the ER, that's not deliberate indifference, that is at best negligence. So for those reasons I would deny plaintiffs motion for summary judgment on this claim and grant defendant Wellpath/CFMG's motion for summary judgment on this claim. Let me start with Wellpath, anything you want to add or disagree?

MR. VARANINI: No, Your Honor.

THE COURT: Did I miss anything?

MR. VARANINI: No, I think there was medical care. It was approached to Mr. Peterson. Tirpak herself had set in motion a process by which he would have been seen and examined further except for the fact that he had to be released. So I think, of course, discussion about there not being any deliberate indifference is correct

.
THE COURT: Essentially, Mr. Dwyer, even your own expert testified that Wellpath, the plaintiff shouldn't have been released from custody with nowhere to go and no medical discharge instructions. But he says that violated professional standards of care. That's, again, a negligence case, it's not a deliberate indifference case. I read that, and I thought he's not supporting deliberate indifference. He's supporting what is your sixth claim for relief, not the second claim for

relief. Go ahead if you want to add something for the record.

MR. DWYER: Let me go back just on the record, generally a point that needs to be made, and, Your Honor, I don't remember the ECF number, but let me give you some background. I filed the case. I thought this case may be something that ought to be settled out of court quickly, if we could. We arranged for a settlement conference. The pandemic hit. We did get to a settlement conference and no settlement reached. It was then very hard to get the discovery and the case moving. At the same time there was a pending motion, 12(b)(6), to dismiss I believe the sheriff from Nevada County. The Court came back and granted the 12(b)(6) motion, it issued an order, scheduling order which said all Does are eliminated, et cetera, and at that point you cut off my ability to name any individuals. And unfortunately --

THE COURT: Let me stop you there. Why do you think it cut off your ability?

MR. DWYER: You said no Does. I would have to amend and name a Doe.

THE COURT: You could file a motion to amend the Complaint to name a Doe.

MR. DWYER: Yeah, and the other problem was we had passed the two-year statute on that limitation, so it's a big problem as to whether or not it's going to be able to serve

anybody and claim based on the statute of limitations the amount of time it took to rule on the 12(b)(6), plus the motion to strike all Does, that was a problem, Your Honor. I decided it was actually -- I really think this is, frankly, better as a Monell claim than a malpractice, but I did both.

Now, going back to the Monell, why do I think it's deliberate indifference? I think it's deliberate indifference when you, A, as the record supports, you don't even tell the person that they have an infection or that it's serious. B, you give them no discharge instructions. C, you don't arrange for any transfer of medical care, you don't call up their doctor, call someone else, and you don't arrange for any transport to a medical provider.

You have someone who's seriously ill who's going to die within hours if he doesn't get care, and they just let him out on the street. That is what changes this from malpractice to deliberate indifference.

THE COURT: What case did you cite?

MR. DWYER: I've never read such a callus case. I didn't find anything that callus. I haven't seen anything that shocking.

THE COURT: So you are making new law here is what you are telling me?

MR. DWYER: Not new law, it's just the particular facts of this case. I don't think it requires new law, it's

just the facts of this case. They're rather unique and shocking, as they were with the Howie situation. They shocked my conscience, and obviously we had different reactions to what happened. We could respectfully disagree about that.

So, again, I think it rose to unconscionable shocking behavior to release him in the manner they did. They took an X-ray like 11:00 or 11:15, something like that, in the morning. He wasn't released until just about 4:00 o'clock. He sat there in his cell. Nobody spoke to him. Nobody told him what was wrong with him. No one came to him and said, Gee, you need to get a doctor as soon as you get out here. Nothing. They just let him go. They didn't care what happened to him. That was an outrageous thing to do to anybody, and a doctor should never do that to a patient. Medical personnel should never do that to a patient, that's deliberate indifference.

With regard to the pattern of behavior, I won't review it. We disagree about the Howie case and whether or not the evidence comes in or not, so I won't go back over that argument, but based upon in my view that Howie comes in, and I think a very shocking failure to take care of Mr. Peterson, that count stands.

THE COURT: Either of you disagree that if this case went to trial, you would file a motion in limine to eliminate any evidence regarding Mr. Howie?

MR. VARANINI: We would, Your Honor.

THE COURT: Either of you want to make a record as to why you think or agree with the Court's view that Howie is irrelevant in this case?

MR. GROSS: I think the Court has summarized well that you have Mr. Howie who testified he was requesting medical attention. He was requesting ambulatory assistance. Mr. Peterson requested neither of those. You have Mr. Howie who -- I was not counsel in that case, so I do not have the background that some of the other attorneys have. As Mr. Howie tells it, that he was dumped onto the sidewalk and unable to crawl into a taxi, versus Mr. Peterson who is able to walk out of the jail and walk another mile to a gas station before requesting an ambulance. These cases are simply very factually distinct, as well as not relevant to the discussion on Monell or deliberate indifference.

THE COURT: Let me be clear for the record. With respect to this claim, the undisputed material facts do not, the Court finds, substantiate a finding that Wellpath deprived the plaintiff of adequate and timely medical care under the Gordon case's third prong of objective reasonableness.

This Court has said over and over again that plaintiff was seen nine times while at the jail. The undisputed facts demonstrate that medical staff were attempting to address his medical concerns and needs, and the undisputed facts show that

defendant Wellpath's providers acted receptively to plaintiff's concerns by examining his leg and tracking its redness with a pen at least three times.

Plaintiff's care was escalated to the Physician Assistant Tirpak, who ordered an X-ray on plaintiff's leg following plaintiff's assertion that his discomfort may have resulted from the Grass Valley Police Department knocking the hardware in his leg ajar. The undisputed facts show that defendant Wellpath's medical providers were attempting to diagnose plaintiff's ailment, and to the extent that plaintiff argues that Wellpath providers' actions were objectively unreasonable when they released him without discharge, plaintiff's condition had not been found to require emergent care prior to his mandated release pursuant to the Penal Code Sections 825 and 849.

Again, the Court finds that the undisputed facts show that Wellpath did not act with deliberate indifference towards plaintiff's constitutional right to adequate and timely medical care, and his Monell claim fails as a matter of law. The Court grants summary judgment. That leaves --

MR. DWYER: Your Honor, may I just make one comment for the record?

THE COURT: Absolutely. Yeah, go ahead

MR. DWYER: Just for the record, I disagree. I think

there is more-than-sufficient factual information for a jury to make a determination, quite reasonably, that there was deliberate indifference, and that that was part of a pattern and practice of behavior as I've described before, and I won't go back over it.

THE COURT: Okay.

MR. DWYER: Thank you, Your Honor.

THE COURT: And then the third claim, again somewhat unique, it's only against the County. The argument being that the County is or was the moving force behind Wellpath's deliberate indifference, and, therefore, the County has separate liability under this theory. Again, it's a theory I've never seen in these types of cases, and the Court does not find that there is any evidence to support that the County was a moving force behind defendant's Wellpath's deliberate indifference. Also, the Court has found already that Wellpath did not engage in any deliberate indifference to Mr. Peterson.

The case relied on by the plaintiff is a case called Hagan versus CFMG, Eastern District case in 2009. Hagan is not binding on this Court. The County argues Hagan also involved constitutionally adequate policies, that the County has always had adequate policies, and, therefore, the County could not have been there to sit in support an argument that the County was somehow a moving force behind Wellpath's alleged constitutional

violation.

The County has referenced a case *George versus Sonoma County Sheriff's Defendant*. It's a Northern District case, also not binding on this Court, but there were similar allegations to those involved in the case before this Court, and that Court made the following finding: That plaintiffs rely on no binding authority for the position that the regulations would impose liability on the County defendants based on CFMG's policies, practices and manuals. Plaintiffs failed to raise a triable issue of fact as to County defendant's liability based on actions by in that case CFMG.

Castillo versus Solano County Jail, another Eastern District California case from 2011. In that case the Court found no basis to hold the County liable for the medical decisions that were delegated to a contracted medical provider when the policies and practices at issue were those of the medical provider, and the unconstitutional -- alleged unconstitutional conduct concerned whether the medical provider's employees followed those policies.

Based on this case, the Defendant County has argued that this Court cannot find it liable in the Peterson matter because plaintiff alleges this Monell claim's moving force is the failure of Nevada County to have appropriate medical policies and practices, or trained its personnel, or take action to enforce Wellpath's medical policies and procedures.

It's undisputed that medical decisions at the jail are under the sole province of Wellpath pursuant to the respective policy manuals in California law. These facts together prove that the issue in this case are medical policies which are the sole provision of Wellpath. So the County can't be found and the evidence doesn't support a finding that the County was somehow the moving force behind an alleged unconstitutional violation that the Court has already found did not occur.

In sum, the undisputed evidence does not demonstrate that the County or Wellpath exhibited deliberate indifference to plaintiff's constitutional rights to adequate and timely medical care under the Gordon standards, and for that reason alone this claim fails, but, again, there's also lack of any evidence showing that somehow the County could be found to be a moving force behind an alleged constitutional violation. It's a novel theory. There's no law to support it, and the Court, as a matter of law, cannot allow it to go forward. So on the third claim the Court would deny plaintiff's motion for summary judgment and grant the defendant's motion for summary judgment on that claim. Mr. Dwyer, want to make a record?

MR. DWYER: Yes, Your Honor. For the record, the testimony again of the Wellpath medical personnel was that although they had a specific policy in place that allowed them to provide care and withhold the release of an inmate pending

satisfactory, you know, arrangements to be made, that, in fact, the actual practice was the Nevada County booking officer would simply call up and say, Johnson or Smith, whatever the inmate's name, and they're being released. And they made it clear that it was not a medical question that they could discuss or they could not go there. They simply said, We were told an inmate's being released, they got released regardless of their medical condition. That's why I've argued that the County's actual policy and practice and procedure, which was simply to release someone if they wanted to release them regardless of the medical condition, caused Wellpath to violate its own policy and procedures.

Wellpath said, Yes, people who are too sick or need transport or arrangements at the time of the release, we have the power to hold them, but all the witnesses -- Wellpath testified that we don't do that because it's clear when the booking officer calls, that inmate's being released, period, and they were actually rather angry about that.

I think that there's more-than-sufficient grounds to support that the County's actual practices is being the basis for liability here.

THE COURT: Other than this case, what other cases are there to support your belief or your theory or your allegation that there was this practice in policy?

MR. DWYER: Well, I cited the Hagan case, I do believe

this supports this. The logic there is identical.

THE COURT: I'm talking about at the jail. What other instances; what other evidence is there, despite the policy manuals, which contain constitutional policies and actually are designed to prevent any type of deliberate indifference or injury, what evidence is there that those policies as a matter of course are ignored, aren't followed other than your client's case?

MR. DWYER: Well, again --

THE COURT: Other than the single instance?

MR. DWYER: Again, you refuse to acknowledge it, but the Howie case is the perfect example. It's the epitome.

THE COURT: I can't acknowledge Howie. I can't. It doesn't exist. Let's put Howie aside. Tell me what else there is out there that gives me some type of comfort that there is evidence to submit to a jury that despite these beautiful policy manuals and statements in writing that what really went on was ignoring these policies and not following them and that the real policy was let's just dump prisoners; where is the evidence of that?

MR. DWYER: I cited to you the testimony of four Wellpath personnel. You just simply don't want to acknowledge that they so testified.

THE COURT: Did they give specific examples?

MR. DWYER: I didn't go into specific examples.

THE COURT: Well, you understand you need specific examples for a Monell claim; you understand that, right?

MR. DWYER: I do.

THE COURT: Okay.

MR. DWYER: We disagree about Howie, and I just -- I'll be very brief, 30 seconds. I think Howie is the epitome of what I mean by the County being the motivating force. They broke his knee. They knew it was fractured. They should have called an ambulance at the booking room.

THE COURT: Let's not talk about Howie. Let's not talk about Howie.

MR. DWYER: I just want to make the record. That's it, Your Honor. I appreciate it. We disagree respectfully. Thank you.

THE COURT: For purposes of the record, I just want to end this, a municipality's failure to train employees may also rise to the level of an official policy under Monell when the omission amounts to "deliberate indifference to the rights of persons with whom the untrained employees come into contact," close quote. That's Connick versus Thompson, a U.S. Supreme Court case.

To establish such deliberate indifference, the need for training must be, quote, "So obvious and the inadequacy so likely to result in the violation of constitutional rights,

that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need," close quote. That's Supreme Court case City of Canton, Ohio versus Harris.

Absent a single violation with a high predictable consequence -- that's the County Commissioners of Bryan County, Oklahoma versus Brown, so absent a single violation with a highly predictable consequence, a pattern of similar constitutional violations is necessary to demonstrate deliberate indifference and that's what's missing, among other things, from this case.

The fifth claim is that the County's liable under a doctrine of respondeat superior for the actions of Officers Stanley and Malloy. The County points out that these two officers have immunity under California Government Code Section 845.6. The Court agrees as a matter of law under the facts of this case, these two individuals do have immunity and, therefore, the County can't be found liable. The Court finds that plaintiff has tried to make a distinction where there is none to avoid the immunity argument raised by the County.

The plaintiff has argued that Officer Stanley and Molly -- Malloy, I'm sorry, are liable under Government Code Section 820(a) because they did not provide ambulatory assistance and transport to the local ER. That's in the plaintiff's opposition to the County's motion for summary judgment at Page 18. While at the same time the plaintiff

tries to assert that these failures to provide the ambulatory assistance and transport to the ER are not, quote, "medical aid," close quote.

Despite plaintiff's assertion, the Court does find that providing ambulatory assistance and transport to the ER both constitute medical aid under Section 845.6, that's a Central District, California case, Belden versus County of San Bernardino, in which the Court characterized calling an ambulance for an inmate as "summoning" medical care under Section 845.6, and Durio -- D-U-R-I-O -- versus California Department of Correction Rehabilitation, finding immunity under Section 845.6 where the prison staff have summoned an ambulance.

The Court doesn't accept plaintiff's argument that the withholding of such services could not be a failure of the employees to furnish or obtain medical care for a prisoner, and discussed the, as plaintiff erroneously asserts, Section 845.6 clearly applies in this situation. Given the officer's immunity, the claim cannot be maintained against the County on a respondeat superior theory.

Finally, Claim 6, I think I made it clear, there are too many genuine issues of material fact for the Court to grant summary judgment on either side of this claim, and it really is the gist of the guts of this claim. But having said that, I'm not going to hear this sixth claim because it's a state law

claim and this is a federal court. Although I understand this case is now four-years old, this case should be tried in Superior Court not in a federal court. The Court has the authority to not exercise jurisdiction over state law claims. I'm exercising that discretion in this case, and I am dismissing the claim without prejudice. It won't be affected by the statute of limitations. It can be refiled in Superior Court and the case could go forward, but it's not going to be tried in a federal court.

So the Court grants, as I indicated, summary judgment in favor of the defendants on the federal claims, first, second, third and fourth claim.

The fifth claim, which was the state law claim, can't go forward as a matter of law. The Court grants summary judgment motion for the County on the fifth claim. The sixth claim remains, but the Court is dismissing it without prejudice, declining its right to exercise pendent jurisdiction and the plaintiff has the right to refile that in Superior Court. I'm not going to issue a written order. The transcript -- I'll let you, hang on.

MR. DWYER: I'm sorry.

THE COURT: The transcript will serve as the Court's order in this case, but there won't be any further written order issued by the Court with respect to this case.

Go ahead.

If you want some type of written order that summarizes the Court's rulings, we'll issue a minute order, but if you want something else, go ahead and prepare one, run it by the plaintiff's counsel, and if he approves it, then I'll enter it on the docket, but otherwise, the transcript serves as the Court's ruling on the docket. Go ahead, Mr. Dwyer.

MR. DWYER: Thank you, Your Honor. In light of the Court's ruling, I think -- I'll confer with my client, but I presume my client would want to appeal the federal claim, so they're now ripe. I would presume that's going to be a question for the Court. I think it's what, Rule 54, we would sever the state claim, and stay it while we appeal the federal. I think that's appropriate procedure. So I would file a motion 54 to sever the federal claims, take them on appeal, and then this Court would stay the malpractice claim.

THE COURT: Go ahead and file it.

MR. DWYER: And hold it here.

THE COURT: Go ahead and file it. I'm not going to rule on an oral motion.

MR. DWYER: I understand.

THE COURT: But I understand where you are headed. You are probably correct. If that's the procedure you want to

pursue, then, yeah, it makes more sense, but I got to see it in writing. I have to give them an opportunity too.

MR. DWYER: I understand. I have to confer with my client as to whether they want to just go back to state court in malpractice or whether they want to file a federal appeal on hold, I want the Court to understand that --

THE COURT: I appreciate the heads up. Anything further from the defendants?

MR. GROSS: Nothing further from the County, Your Honor.

MR. VARANINI: No, Your Honor. Thank you.

THE COURT: All right. Thank you, all.

MR. DWYER: One last question that came to mind, will the Court entertain at this time a motion to amend on the party on the malpractice claim, and I would file at the same time the Rule 54 motion to sever and to take the federal claims up?

THE COURT: Well, I'll entertain it when you file it, but yeah.

MR. DWYER: I understand that, I just meant I'm trying to explain to the Court. It sounds like the appropriate procedure. Okay, thank you.

THE COURT: File what you think you need file. I have to wait to see if they oppose it or maybe even get them to stipulate, but I have to wait until I have it in front of me, but I appreciate the heads up.

MR. DWYER: I didn't expect a rule, I'm just trying to confer with the Court ahead of time to try to avoid any miscommunication.

THE COURT: I'm not precluding any argument they want to make in terms of is it timely, is it untimely, those types of things, but I do appreciate the fact that you let me know you are going to probably include that in whatever motions you are going to file.

MR. DWYER: Thank you.

MR. VARANINI: Thank you, Your Honor.

(Proceedings adjourned at 3:01 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled matter.

August 16, 2023
MARYANN VALENOTI, RMR, CRR DATE
Official Court Reporter
CA CSR #11266