UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

Estate of BLAIR AUSTIN NELSON, deceased, by and through PAUL NELSON individually and as Personal Representative, Plaintiff, v. CHELAN COUNTY, Washington, a municipal corporation; d/b/a CHELAN COUNTY REGIONAL JUSTICE CENTER; CHRISTOPHER SHARP; and KAMI ALDRICH, L.P.N., Defendants.	NO. 2:22-CV-0308-TOR ORDER GRANTING IN PART DEFENDANTS' MOTION TO STRIKE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are Defendants' Motion to Strike (ECF No. 32) and Defendants' Motion for Summary Judgment (ECF No. 15). The Court has reviewed the record and files herein, determined that oral argument is unnecessary in this matter, and is fully informed. For the reasons discussed below, Defendants'

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Motion to Strike (ECF No. 32) is GRANTED in part and Defendants' Motion for Summary Judgment (ECF No. 15) is DENIED,

BACKGROUND

This matter arises out of the medical treatment of Ms. Blair Nelson, a 42-year-old woman who was in the custody of the Chelan County Regional Justice Center ("CCRJC") when she died on November 21, 2021. ECF No. 26 at 8. The Wenatchee Police Department arrested Ms. Nelson on November 20, 2021, for suspicion of Driving Under the Influence. ECF No. 16 at 3. At the time of her arrest, Ms. Nelson agreed to submit to a portable breath test, which recorded a reading of 0.256 blood alcohol level. *Id*. at 4. She was then taken to the CCRJC for DUI processing, but because the breath samples taken upon her arrival recorded above 0.250, per jail policy, she was transported to Central Washington Hospital to be medically cleared before booking. *Id*. During her emergency room visit, Ms. Nelson indicated that while she was not in any pain, she was routinely drinking 70 shots of liquor per week. *Id*. at 5. She was treated by Dr. John Crane for a contusion above her eye, and after submitting a breathalyzer test with a 0.249 result, was medically cleared for jail. *Id*. at 6. Upon her discharge, she was sent with instructions for the onset for withdrawal symptoms, which included, "[c]all your doctor now or seek immediate medical care if: You have trembling, restlessness, sweating, and other withdrawal symptoms that are new or that get

worse." ECF No. 26 at 3.

Relevant for the facts of the matter moving forward, CCRJC relies on a combination of Lexipol Policies, which are a national set of policies for corrections practice, to provide a framework for operation. ECF No. 19 at 3. The pertinent provisions at issue here are Lexipol Policy 711 and Policy 717. The Court does not have before it a formal copy of Lexipol Policy 711, and instead must rely on parties' retelling of the contents, which the Court understands to mean that individuals who are brought to the facility in need of emergency medical attention are required to be taken promptly to a medical facility. ECF No. 19-1 at 23. It appears that was accomplished, as Ms. Nelson was taken to a hospital prior to booking.

Lexipol Policy 717 deals with detoxification and withdrawal. Policy 717.1 states that "newly incarcerated individuals may enter the facility while under the influence of a substance or they may develop symptoms of alcohol or drug withdrawal. This policy is intended to ensure that the staff is able to recognize the symptoms of intoxication and withdrawal from alcohol or drugs" for appropriate medical treatment. ECF No. 30-10 at 2. Policy 717.2 requires that staff "respond promptly to medical symptoms presented by inmates" because withdrawal can be life-threatening. *Id*. And Policy 717.5 requires that:

> Inmates who are observed experiencing severe, life-threatening intoxication (overdose) or withdrawal symptoms will be promptly seen

> by a physician or referred to an off-site emergency facility for treatment . . . If the qualified health care professional determines that an inmate is at risk for progression to a more severe level of withdrawal, the inmate will be appropriately housed in an area where he/she can be kept under constant observation by qualified health care professionals or trained correctional staff.

Id. at 3.

Additionally, CCRJC has its own internal policy regarding withdrawal which states, among other things, that an assessment for withdrawal should be conducted "when an inmate reports a history of alcohol and/or withdrawal or is identified by staff as having potential for alcohol withdrawal if known history or alcohol use . . . or if the inmate has a high index of suspicion for potential withdrawal." ECF 30-16 at 8. After withdrawal treatment has begun, inmates will be "monitored in medical observation by staff until stable and cleared by medical staff." *Id*.

After being medically cleared by the hospital, Ms. Nelson was then transported back to CCRJC in the early hours of November 21, 2021 and filled out a Medical Screening Form upon her arrival. ECF No. 16 at 6–7. Because of the early hour, she was observed by Corrections Deputy Christopher Norse rather than a medical professional at her initial medical intake.[1] *Id*. at 8. Ms. Nelson told

[1] CCRJC does not have a 24-hour medical staff, instead the on-site nurses begin work sometime around 6 a.m. ECF No. 26 at 10. CCRJC instead relies on non-

Deputy Norse that she would be "detoxing from alcohol," and Deputy Norse checked a box stating that Ms. Nelson appeared "under the influence of alcohol," and made a note that she would be withdrawing from alcohol on the Medical Receiving Screening Form. ECF No. 26 at 10. All other boxes on the form were checked "no," and Deputy Norse noted that Ms. Nelson was not currently displaying withdrawal symptoms. ECF No. 16 at 7. Deputy Norse then provided Ms. Nelson with a pitcher of Gatorade, and placed her in a holding cell at 3:14 a.m. *Id*. at 7–8. He then deposited all of Ms. Nelson's screening paperwork in a box for medical staff to review when they arrived for their shift. *Id*. at 8. There is no surveillance video of her time in the holding cell. ECF No. 26 at 10.

Ms. Nelson was moved from the holding cell to a private cell at 6:25 a.m. *Id.* From this point onward, parties generally disagree on many of the material facts. Defendants assert that Ms. Nelson was properly monitored by correction staff between 7:45 a.m. and 11:38 a.m., as evidenced by the surveillance footage of her cell. *Id*. During that time, according to Defendants, Ms. Nelson was altogether peaceful, sleeping comfortably and showing no sign of agitation. *Id*. at 9. Plaintiff asserts that because no check was performed on Ms. Nelson, despite the presence

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medical staff to do after hour intake and requires that they be trained via Lexipol Policy 711 and Lexipol Policy 717.

of medical staff during this time, there is no way to substantiate the statement that she was not distressed based on surveillance footage. ECF No. 26 at 3. Further, while Defendants state that Ms. Nelson used the phone and walked without trouble during this time, Plaintiff asserts that she did have difficulty and agitation using the telephone in her cell and was having difficulty reaching anyone on the other end. ECF Nos. 16 at 8 and 26 at 3.

At approximately 12:15 p.m., two corrections deputies entered Ms. Nelson's cell to distribute her lunch. ECF No. 16 at 9. Ms. Nelson was unable to stand to retrieve her sack lunch and had visible tremors. ECF No. 26 at 11. Because she "was not doing well," and the correction officers suspected alcohol withdrawal, they alerted LPN Kami Aldrich, a member of CCRJC's medical staff. *Id*. LNP Aldrich examined Ms. Nelson at 12:25 p.m., and based on her agitation, anxiety, nausea, and "severe tremors," gave her a Clinical Institute Withdrawal Assessment ("CIWA") score of 10 or 11. ECF Nos. 16 at 11 and 26 at 13. The parties disagree as to whether LPN Aldrich meant to categorize the tremors as "severe," but Plaintiff offers that the shaking was so apparent that LPN Aldrich was unable to take Ms. Nelson's blood pressure and persisted even when the arms were relaxed rather than raised. ECF Nos. 16 at 11, ¶ 47 and 26 at 12, ¶¶ 21– 22. Based on the CIWA assessed score of at least 10, CCRJC's internal policy either permitted or required LNP Aldrich to take certain action, including administering Tylenol,

Librium, thiamine, and folic acid.[2] ECF Nos. 16 at 11, ¶¶ 45–46 and 26 at 13, ¶ 25. Plaintiff asserts that LPN Aldrich did not contact a medical provider as is required by the internal policy, and likewise administered a "loading dose" of 100 milligrams of Librium, twice the permitted amount. ECF No. 26 at 13, ¶¶ 26, 28. Defendants dispute this contention, asserting that LPN Aldrich did in fact contact a medical provider, though Plaintiff disputes this fact as no documentation exists showing contact with a provider. ECF No. 28 at 7. Librium is a narcotic and can result in oversedation which in turn may compromise respiration due to its interaction with the liver. ECF No. 26 at 13, ¶¶ 29–30. According to Plaintiff, LPN Aldrich had to steady Ms. Nelson's hands to administer the medications due to her shaking. *Id*. at 14, ¶ 32.

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[2] CCRJC's internal policy requires that after a CIWA is completed, inmates shall be subject to monitoring by medical staff until cleared. ECF No. 30-16. Provision two of the Alcohol Withdrawal Policy states that Thiamine, Folic Acid, and Tylenol "may be initiated," for inmates with a potential for or active withdrawal. *Id*. However, provision three has no modifier, and instead simply states "[f]or a CIWA score of [greater than] 8 start Librium and contact provider." *Id*. Medical staff is permitted to dose 50 milligrams of Librium every 6–12 hours on the first day. *Id*.

LPN Aldrich left Ms. Nelson's cell at 12:29 p.m. ECF No. 26 at 12, ¶ 19. Defendants assert that Ms. Nelson made two phone calls outside of her cell, and returned at 12:44 p.m., appearing without any major withdrawal symptoms. ECF No. 16 at 12, ¶¶ 49–50. After interacting with a corrections officer, who stated that she "appeared fine," Ms. Nelson laid down in her bunk, and was observed reaching for what appeared to be a tissue that she placed in her mouth at 12:45 p.m. *Id*. at 13, ¶ 53.

Both parties agree at 12:58 p.m., Ms. Nelson experienced a noticeable movement. ECF Nos. 16 at 13, ¶ 54 and 26 at 15, ¶ 36. Defendants insist that Ms. Nelson's movement was comprised of four separate myoclonic movements, indicating cardiac arrest, rather than a tonic-clonic seizure as demonstrated in alcohol withdrawal. ECF No. 16 at 13–14, ¶¶54–55. Plaintiff maintains that Ms. Nelson experienced a seizure. ECF No. 26 at 15, ¶ 36. Both parties agree that there was no more movement from Ms. Nelson until she was found dead in her cell at 5:17 p.m. ECF Nos. 16 at 14, ¶ 56 and 26 at 16, ¶ 41. Plaintiff asserts that in the hours between 12:58 p.m. and 5:17 p.m., Ms. Nelson was not placed on medical monitoring, per jail protocol, received no additional assessment for medical staff, and received inadequate check-ins from non-medical jail staff, thus no one was alerted to the fact that she was in distress. ECF No. 26 at 15–16, ¶¶ 39–40. Further, according to Plaintiff, LPN Aldrich falsified Ms. Nelson's medical

1 documentation, recording that 50 milligrams of Librium was administered between
2 8 a.m. and 11 a.m., and that another 50-milligram dose was given between 1 p.m.
3 and 3 p.m., rather than one "loading dose" around 12:25 p.m. *Id*. at 14, ¶ 34.
4 Defendants assert that adequate check-ins were performed, and at all times Ms.
5 Nelson was monitored by video surveillance. ECF No. 15 at 6.

6 Jail staff was unable to wake Ms. Nelson for dinner at 5:17 p.m. ECF No. 16
7 at 14, ¶ 56. Resuscitation of Ms. Nelson was called off at 5:28 when she was
8 pronounced dead. ECF No. 17 at 9. Rigor mortis had set in. ECF No. 26 at 16, ¶
9 41. An autopsy was performed, and parties disagree as to its specific findings.
10 The autopsy report states that the cause of death is "chronic ethanolism with
11 steatohepatitis, dilated cardiomyopathy, and probable withdrawal." ECF No. 20-5
12 at 1. At her deposition, the medical examiner who performed the autopsy stated
13 that in her opinion, the ultimate cause of death was chronic alcoholism. ECF No.
14 30-8 at 4. When asked, the medical examiner discussed the possibility that Ms.
15 Nelson's death could have been caused by alcohol withdrawal, fatty liver
16 (steatohepatitis), or dilated cardiomyopathy individually, or in some combination,
17 as each is a symptom of chronic ethanolism. ECF No. 20-4 at 23.

18 Plaintiff brought this lawsuit on behalf of Ms. Nelson's estate, claiming
19 negligence and a violation of 42 U.S.C. § 1983 against Chelan County Jail Director
20 Christopher Sharp, LPN Kami Aldrich, and Chelan County under a *Monell* theory

of liability. Defendants brought a Motion for Summary Judgment and subsequently a Motion to Strike Plaintiff's expert witnesses attached to the Response to the Motion for Summary Judgment. ECF Nos. 15 and 32.

DISCUSSION

I. Motion to Strike

Defendants request the Court strike the testimony given from three of Plaintiffs' expert witnesses: Dr. Richard Cummins, Dr. Lori Roscoe (PhD), and Catherine Fontenot, prior to considering the Motion for Summary Judgment. ECF No. 33 at 2. Expert testimony is admissible if it meets the standards set forth in Federal Rule of Evidence 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In addition to specific issues with each expert, Defendants take umbrage with all three witnesses' reference to the September 7, 2021, death of Joseph A. Verville. ECF No. 33 at 4, 6, 7. Mr. Verville was booked into CCRJC on September 5, 2021, with noted signs of opioid withdrawal. ECF No. 1 at 18; ECF

No. 21 at 10, ¶ 41. LPN Aldrich first assessed him for withdrawal and gave detox medications at dinner the following evening, September 6. *Id*. Surveillance footage showed Mr. Verville vomiting at least six times after taking the withdrawal medication, but he was not assessed again by medical staff until he was found dead at 8:50 a.m. on September 7. *Id*. at 8; ECF No. 26 at 17. After his death, LPN Aldrich was notified of potential discipline on September 27, 2021, and was given a verbal warning on November 23, 2021, after the death of Ms. Nelson. *Id*. at 19. Defendants object to the expert testimony inclusion of Mr. Verville's death as impermissible character evidence. ECF No. 33 at 5. Plaintiff asserts that each of the expert witnesses can discuss the death of Mr. Verville because it establishes a notice of a pattern of conduct by CCRJC, Director Sharp, and LPN Aldrich. ECF No. 42 at 4.

On summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The Court must only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). "A district court's rulings on the admissibility of expert testimony ... will be reversed only if 'manifestly erroneous.'" *United States v. Cazares*, 788 F.3d 956, 976 (9th Cir. 2015). In considering whether expert testimony is based on a sufficient foundation, the Court performs a "gate-keeping" role by evaluating the

relevance and reliability of all expert testimony, and examining whether the testimony offered is "scientific." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). While "[a]n opinion is not objectionable just because it embraces an ultimate issue," Federal Rule of Evidence 704(a), "an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court identified four non-exclusive factors that may be helpful to the court in assessing the relevance and reliability of expert testimony, including (1) whether a theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate and the existence and maintenance of standards controlling the theory or technique's operation; and (4) the extent to which a known technique or theory has gained general acceptance within a relevant scientific community. *Id*. at 593–94.

However, the *Daubert* factors do not constitute a "definitive checklist or test." *Id*. at 150. Indeed, the court's fundamental objective is to generally evaluate, based on whatever factors are important to the particular case, the relevancy and reliability of the testimony and not necessarily to explore factors that might not be relevant to a particular case, such as whether the expert's methods are subject to empirical testing. *Id*. at 151. The proponent has the burden of establishing that the

pertinent admissibility requirements have been met by a preponderance of the evidence. Fed. R. Evid. 104.

A. Dr. Richard Cummins

Dr. Cummins is a Washington State licensed medical doctor who is board certified in both internal medicine and emergency medicine. ECF No. 27 at 6. Dr. Cummins has been a member of the University of Washington Department of Internal Medicine and Emergency Medicine since 1981, when he became an attending physician. *Id*. He was promoted to full professorship in 1985 where he remained for 28 years until retiring from clinical work in July 2020 to Professor Emeritus. *Id*. During his tenure at the University of Washington Medical Center, he practiced and taught other physicians in the field of emergency medicine, as well as supervised nurses, medical students, and residents in training. *Id*. Over the course of his career, Dr. Cummins has authored more than 150 articles and book chapters on emergency care, including cardiac care. *Id*.

Dr. Cummins reviewed the entire case file, including medical reports, video footage, discovery related documents, and deposition transcripts. ECF No. 27 at 8. In doing so, he determined that CCRJC has a substandard training program and procedures in place which led to; failure to medically assess Ms. Nelson when she was booked into jail, failure to follow the internal alcohol withdrawal policy, and failure to provide a proper level of assessment, monitoring, and care. *Id*. at 15. Dr.

Cummins determined that had CCRJC rectified any of the failures in care, Ms. Nelson would not have died. *Id*.

Defendants assert that Dr. Cummins is not qualified to give expert testimony on the operations of medical procedures inside a corrections facility because his experience is with emergency departments in hospitals. ECF No. 33 at 3–4. Defendants also object to Dr. Cummins statements on the basis that he is offering impermissible character evidence in his discussion of LPN Aldrich's conformity with past negligence, which is inadmissible character evidence. *Id*. at 4. Finally, Defendants argue that Dr. Cummins should not be able to opine on causation relating to the practice of jail staff and the death of Ms. Nelson. *Id.* Plaintiff asserts, in part, that Dr. Cummins is not offering opinions about the correction facility's practices, but whether or not a standard of medical care was met while Ms. Nelson was incarcerated, and therefore is within his sphere of expertise. ECF No. 42 at 7. As to impermissible character evidence, Plaintiff offers that Dr. Cummins' opinion is valid under Federal Rule of Evidence 404(b)(2) as evidence of a notice, pattern of conduct, knowledge, or absence of mistake. *Id*. at 17. Further, Plaintiff asserts that Dr. Cummins is allowed to opine on the ultimate issue of causation per Federal Rule of Evidence 704(a) and provides testimony in the same scope as Defendants' experts.

First, the Court finds that Dr. Cummins is qualified to give an expert opinion

on medical care, given his "knowledge, skill, experience, [and] education[.]" *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1153 (E.D. Wash. 2009). Despite the fact that Nelson's death took place in a corrections facility rather than a hospital, Dr. Cummins has extensive knowledge of treating patients in various stages of medical stability, including alcohol withdrawal, given his career in the emergency department. *United States v. Garcia*, 7 F.3d 885, 890 (9th Cir. 1993) (finding that an expert's experience in a field but lacks particularized knowledge in the specific facts of a case, goes to the weight of the testimony rather than the admissibility of the expert opinion). He is qualified to discuss how and when medication should be administered, and allowed to give his opinion about the initial medical intake and ongoing monitoring of inmates who are under the care of jail medical staff. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019) (internal citations omitted) ("Accepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable."). While Dr. Cummins is not necessarily familiar with medical practices in a correctional facility, he is familiar with the standard practice regarding medical care for individuals receiving treatment for alcohol withdrawal.

As an expert witness, Dr. Cummins is permitted to testify on causation. *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237–38 (9th Cir. 2017) ("That

defendants may be able to offer other equally qualified medical opinion opposing causation also does not support the idea that *Daubert* should bar the admission of the testimony of the doctors offered as experts by Plaintiffs. Instead, the testimony of [both expert doctors] should have been admitted as expert testimony under Federal Rules of Evidence 702."). Based on his own medical background and review of the record, Dr. Cummins's opinion on the ultimate issue, that Ms. Nelson's death was caused by failure in treatment for alcohol withdrawal syndrome, is permissible.

Next, Defendants assert that Dr. Cummins' testimony amounts to impermissible character evidence, based on his comparison of the facts at hand with the death of Mr. Verville. ECF No. 33 at 4. Specifically, Defendants assert that Dr. Cummins' report draws a comparison between Nurse Aldrich's treatment of Ms. Nelson and the treatment of Mr. Verville, improperly concluding that Nurse Aldrich has a propensity to behave in a medically negligent manner. *Id*. at 5. Plaintiff asserts that a comparison is not offered in violation of Federal Rule of Evidence 404(b), but instead is offered to show a pattern of administering lower than the established standard of care to inmates, or lack of knowledge or mistake that a particular mode of operation would result in the death of an inmate under the care of CCRJC. ECF No. 42 at 17–18.

In relevant part, Rule 404(b) provides that, "[e]vidence of any other crime,

wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Dr. Cummins' report references the Verville incident twice, and not in great detail. ECF No. 27 at 8 and 12. The second reference in the report does seem to suggest that a connection is being drawn between the incident involving Nelson and the incident involving Mr. Verville:

> Note that two months earlier 38-year-old Joseph A. Verville also died in custody at the Chelan County Regional Justice Center. Like Blair Nelson he was under the care of Kami Aldrich, LPN.

ECF No. 27 at 12.

While this evidence could be construed as character evidence suggesting that jail medical staff may have engaged in substandard care, the Court agrees that evidence of Mr. Verville's death, and the circumstances surrounding it, are indicative of lack of mistake or absence of notice. Regardless, under Federal Rule of Evidence 703, a court is vested with the discretion to allow otherwise inadmissible facts or data if the "probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

Here, CCRJC's internal policy requires a specific assessment and monitoring framework for inmates withdrawing from alcohol dependence and opioid dependence. ECF Nos. 30-10 at 2 and 30-16 at 8. Though not completely analogous, the inclusion of the similar circumstances surrounding Mr. Verville's

death may be indicative of absence of mistake or lack of accident via noncompliance with the internal protocol, which would result in the death of an unmonitored detoxing inmate. Fed. R. Evid. 404(b)(2). The Lexipol policy lists alcohol withdrawal and drug detox under the same heading, requiring an inmate experiencing either to be under "constant observation." ECF No. 30-10 at 3. Because Dr. Cummins is an expert being offered to opine on the standard of medical care provided by CCRJC and the potential cause of Ms. Nelson's death, the Court declines to strike his expert testimony as it does not amount to impermissible character evidence.

B. <u>Dr. Lori Roscoe, PhD</u>

Dr. Roscoe is a Certified Correctional Health Professional and a Certified Correctional Health Professional – Registered Nurse. ECF No. 28 at 4. Dr. Roscoe holds a bachelor's degree in education, a bachelor's degree in nursing, a master's degree in public administration with a healthcare concentration, a master's degree in nursing, a Doctorate Degree in Healthcare Administration, and a Doctor of Nursing Practice degree. *Id*. She began work in correctional healthcare in 1995 and today is the principal of Correctional HealthCare Consultants LLC and The Correctional Nurse LLC. *Id*. Dr. Roscoe holds an active registered nurse license in the states of Florida, California, Washington, and Georgia, and is licensed as a nurse practitioner in Florida, California, Virginia, Georgia, and

Kentucky. *Id*. Over the course of her nearly 30-year career, Dr. Roscoe has worked in a variety of correctional center settings relating to healthcare. *Id*.

Dr. Roscoe reviewed much of the information currently in the record, including the Chelan County Coroner Report, medical documents, the Complaint, discovery related information, and depositions. ECF No. 28 at 5–6. Based on this review, she determined that Ms. Nelson received substandard nursing care. *Id*. at 11–12. As part of her finding, she determined that LPN Aldrich's administration of 100 milligrams of Librium without consulting a provider was illegal but opines no further on this statement except to state that it deviates from the scope of practice of a licensed practical nurse. *Id*. at 9–10. She also included Mr. Verville's death in determining that CCRJC has a substandard practice of care based on its failure to take corrective action after Mr. Verville's death. *Id*. at 11.

Defendants assert that Dr. Roscoe's testimony that LPN Aldrich "illegally" administered Librium without contacting a medical provider should be disregarded pursuant to Rule 401 and 403. ECF No. 33 at 6. Further, Defendants allege that her discussion of Mr. Verville amounts to character evidence and is therefore inadmissible. *Id*. Plaintiff argues that Dr. Roscoe's discussion of Mr. Verville's death is admissible for many of the same reasons as discussed under Dr. Cummins, and that her characterization of the Librium dose as "illegal" is factual and should therefore be permitted. ECF No. 42 at 21–22.

As an expert on nursing practice, Dr. Roscoe is permitted to opine on whether the standard of care administered from a nursing perspective. Much like Dr. Cummins, the Court finds that her discussion on the treatment received by Mr. Verville is relevant to Plaintiff's argument that CCRJC's medical care of inmates is substandard. Fed. R. Evid. 704(a).

As to her statement that LPN Aldrich's administration of Librium was illegal, Plaintiff offers additional support that any nurse would understand that they are not permitted to administer the narcotic without first contacting a provider. ECF No. 28 at 9–10 ("When LPN Aldrich decided to administer 100 mg of Librium, double the protocol dose, without consulting a provider, she was acting far beyond her scope of practice as an LPN and illegally . . . The administration of 100 mg of Librium at that time significantly deviated from the standard of nursing care and the decision by LPN Aldrich to do so greatly exceeded the scope of practice of a licensed practical nurse."). Federal Rule of Evidence 401 states that evidence is relevant if, "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." And Rule 403 states that a Court may exclude evidence if it presents the danger of, "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." While potentially dangerous, against the stated internal policy, and seemingly in a

general lexicon of knowledge that it should not be done, Plaintiff offers no additional information that administering Librium without first contacting a doctor is "illegal." As such, the Court shall disregard the notion that LPN Aldrich's conduct was "illegal" based on Dr. Roscoe's testimony, because Plaintiff has provided no additional information to support this statement. However, the rest of her report is admissible.

C. Catherine Fontenot

Ms. Fontenot is the Director of the Reception and Diagnostic Unit for VitalCore Health Strategies and was retained for her expertise in correctional practice. ECF No. 29 at 5. Ms. Fontenot has had a lengthy career in the field of corrections. She obtained her Bachelor of Science in criminal justice in 1992 and has worked in a variety of correctional settings since that time. *Id*. at 4. Ms. Fontenot obtained her master's degree in criminology from Grambling State University in 2006, and became an adjunct professor at various institutions, teaching courses covering Criminal Law, Criminalistics, Emergency Management, Criminology, Juvenile Justice, Corrections Process, Drugs and Substance Abuse, and the Death Penalty. *Id*. at 5. In her current role, Ms. Fontenot was hired to streamline the inmate intake process and to implement an evidence-based health and safety classification. *Id*.

In reaching her conclusion surrounding this case, Ms. Fontenot reviewed

much of the record, including the Complaint, medical records, discovery materials, and deposition transcripts. ECF No. 29 at 5–9. She ultimately determined that CCRJC was not proactive in rectifying standards of care that led to the death of Mr. Verville, and these gaps in care led to the death of Ms. Nelson. *Id*. at 29.

Defendants' object to the inclusion of Ms. Fontenot's testimony because it alleges her testimony is based on medical information, impermissible under Federal Rule of Evidence 702 based on her background. ECF No. 33 at 7. They also allege that the language used, and the conclusions drawn run afoul of the character evidence requirement under Federal Rule of Evidence 401 and 402. *Id*. Instead, Defendants urge that the Court look to a report prepared by its expert on correctional facility practice, Penny Bartley, which refutes much of the contents of Ms. Fontenot's report. ECF No. 19-1 at 28–37. Plaintiff contends that Ms. Fontenot's testimony is not being offered for a medical purpose, but instead is offered to demonstrate best corrections practices against the opinion of Defendants' expert witness. ECF No. 42 at 22. Plaintiff also rejects the characterization of Ms. Fontenot's report as containing "personal attacks." *Id*. at 23.

First, the Court determines that Ms. Fontenot is permitted to provide expert testimony in the field of correctional practices per Federal Rule of Evidence 702. Not only has she provided similar expert testimony in other legal matters, but her

education, experience, and training in the field, including her extensive background in both academia and in a correction setting, provides a foundation for her perspective on what constitutes safe and effective jail practices. ECF No. 29 at 4–5. As demonstrated both by Defendants' own expert witness and additional filings, many times jail officials without a formal medical background must nevertheless be able to render rudimentary care, including identifying withdrawal symptoms, and continued monitoring of inmates. ECF Nos. 19 at 5, 19-1 at 19–20, 23, 24. The facts of this case demonstrate that in a jail system, staff must work together to keep everyone safe, inmates and each other alike, and as such non-medical staff is asked to do initial medical intake of inmates after hours and provide ongoing monitoring to recognize withdrawal and alert medical staff. *Id.*; ECF No. 29 at 13. In this spirit, the Court determines that no part of Ms. Fontenot's opinion runs afoul of Rule 702. She does not make a medical diagnosis of withdrawal beyond the scope of what would have been asked of officials without a medical background working in the jail and recognizes the difference between medical and non-medical staff. ECF No. 29 at 15.

Further, while the language used by Ms. Fontenot is passionate at times, it is not excludable under Federal Rule of Evidence 403. Many of the facts discussed by all of Plaintiff's expert witnesses are disputed by Defendants' expert witnesses. The solution to this predicament is not to strike the expert testimony, but rather it

should be subjected to "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" for a jury determination. *Daubert*, 509 U.S. at 596.

With the exception of Dr. Roscoe's reference to the administration of Librium being "illegal," Defendants motion to strike is denied.

II. Motion for Summary Judgment

Defendants move for summary judgment because they allege that Plaintiff will be unable to satisfy the requirements of 42 U.S.C. § 1983, both Director Sharp and LPN Aldrich are entitled to qualified immunity, and that the County cannot be held liable under a *Monell* theory of liability given the facts of this case. ECF No. 15 at 5, 11, 14, 15.

Summary judgment may be granted to a moving party who demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier-of-fact] could

reasonably find for the plaintiff." *Id*. at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id*. at 248. A dispute concerning any such fact is "genuine" only where the evidence is such that the trier-of-fact could find in favor of the non-moving party. *Id*. "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial." *Id*. (internal quotation marks omitted); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co*., 391 U.S. 253, 288-89 (1968) (holding that a party is only entitled to proceed to trial if it presents sufficient, probative evidence supporting the claimed factual dispute, rather than resting on mere allegations). In ruling upon a summary judgment motion, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving party, *Scott v. Harris*, 550 U.S. 372, 378 (2007), and only evidence which would be admissible at trial may be considered, *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

A. <u>Section 1983 Claims Against Individual Defendants</u>

Defendants assert that summary judgment is warranted with respect to LPN Aldrich because she behaved objectively reasonably and provided adequate medical treatment of Ms. Nelson. ECF No. 15 at 14. Further, they argue that both

LPN Aldrich and Director Sharp should be entitled to qualified immunity. *Id*. at 13.

To make a claim under § 1983 a plaintiff must show that (1) a person acting under color of state law (2) committed an act that deprived the plaintiff of some right, privilege, or immunity protected by the Constitution or laws of the United States. *Leer v. Murphy*, 844 F.2d 628, 632–33 (9th Cir. 1988). Pretrial detainees have a constitutional right to adequate medical care while in the custody of the government and awaiting trial. *Russell v. Lumitap*, 31 F.4th 729, 738 (9th Cir. 2022). When a violation implicates a pretrial detainee's Fourteenth Amendment right to adequate medical care, the Ninth Circuit requires the claim to be evaluated under an objective deliberate indifference standard. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1068 (9th Cir. 2016). In the context of the Fourteenth Amendment, a plaintiff making a claim for inadequate medical treatment via failure to protect must show "more than negligence but less than subjective intent—something akin to reckless disregard." *Id*. at 1071 (citing *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)). The elements required to show violation of a pretrial detainee's Fourteenth Amendment Due Process rights by failure-to-protect against individual officers include:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
>
> (2) Those conditions put the plaintiff at substantial risk of suffering

> serious harm;
>
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
>
> (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Id.

The third element regarding whether the defendant's actions were objectively unreasonable is an inquiry that will "turn on the 'facts and circumstances of each particular case.'" *Kingsley*, 576 U.S. at 397 (internal citation omitted).

However, qualified immunity shields government actors from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). On summary judgment, a court examines whether a state official is entitled to qualified immunity by determining (1) whether the evidence viewed in the light most favorable to the plaintiff is sufficient to show a violation of a constitutional right and (2) whether that right was "clearly established at the time of the violation." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 599 (9th Cir. 2019).

1. LPN Aldrich

With respect to the § 1983 claim against LPN Aldrich, Defendants assert that all the care Ms. Nelson received was objectively reasonable, especially in light of her discharge from the Central Washington Hospital and subsequent appearance at CCRJC without apparent withdrawal symptoms. ECF No. 15 at 5–6. Further, according to Defendants, LPN Aldrich followed proper CIWA protocol and administered an appropriate standard of care, including providing a "loading dose" of Librium, and simply made a mistake diagnosing the tremors experienced by Ms. Nelson as "severe." The reasonableness of LPN Aldrich was assessed by Defendants' expert witnesses, Dr. Jared Strote and Nurse Billye Tollackson, in their review of the surveillance footage and related material. *Id*. at 7–8.

Plaintiff asserts that LPN Aldrich's failure to assess Ms. Nelson until her tremors were "severe," general failure to follow CCRJC's withdrawal protocol, and failure to provide medical monitoring after administering medication, all amount to inadequate medical treatment. ECF No. 25 at 6–7. When viewed in the light most favorable to Plaintiff, reasonable minds could differ as to whether or not LPN Aldrich acted with reckless disregard in her treatment of Ms. Nelson.

As to the four factor tests detailed in *Castro v. County of Los Angeles* for determining a violation of the Fourteenth Amendment, LPN Aldrich made several decisions with respect to Ms. Nelson's care while confined, including choosing to

see her six hours after beginning her shift or while performing "med pass" at 9:30 a.m., dosing 100-milligrams of Librium, and then failing to provide medical monitoring. ECF No. 26 at 11, 13, 14.

Second, reasonable minds could differ, evidenced by dueling expert witnesses, as to whether this conduct put Ms. Nelson at risk of medical complications. Nurse Roscoe, expert witness for Plaintiff, maintains that LPN Aldrich fell below the requisite standard of care at several points, including failing to visit Ms. Nelson's cell after reviewing her intake paperwork, failing to accurately document her treatment of Ms. Nelson, and failing to provide appropriate medical monitoring given the CIWA policy. ECF No. 28 at 8–11. In contrast, Nurse Billye Tollackson, expert witness for Defendants, provided testimony that based on Ms. Nelson's presentation without withdrawal symptoms at the time of her intake after discharge from the hospital, LPN Aldrich saw her at an appropriate time. ECF No. 21 at 4, 6. LPN Aldrich administered the appropriate medication per jail protocol, and Ms. Nelson did not appear on video surveillance to be in distress after care was given. *Id*. at 7–8.

As to the third element, whether LPN Aldrich's actions were reasonable with respect to the care provided, critical facts are still in dispute because it is not readily apparent that she followed internal CCRJC's protocol. Such facts, discussed at length *supra*, include: whether LPN Aldrich was required to evaluate

Ms. Nelson when she arrived for her shift, whether she should have and did not call a provider to discuss her withdrawal symptoms, and whether Ms. Nelson was appropriately monitored after withdrawal protocol was initiated. This is weighed in light of the additional circumstances, including Ms. Nelson's discharge from the Central Washington Hospital as fit for jail, the missing footage of her demeanor in the holding cell between the hours of 3 a.m. and 6:30 a.m. on November 21, 2021, Ms. Nelson's general state before, during, and after being treated for withdrawal, and LPN Aldrich's decision not to place Ms. Nelson on a heightened level of medical monitoring. ECF Nos. 16 at 6, 26 at 4; *compare* ECF Nos. 27 at 20, 28 at 7, and 20-5 at 2 ("I placed a BP (Blood Pressure) wrist cuff around her wrist but due to the tremors it was unable to get [a] reading") *with* 17-1 at 4 and 21 at 6.

And the fourth factor, whether Defendant caused her injuries, is highly contested by both parties and is made no clearer by the autopsy report which listed the cause of death as "chronic ethanolsim with steatohepatitis, dilated cardiomyopathy, and probable withdrawal." ECF No. 20-5 at 1. The medical examiner who performed the autopsy stated each symptom of chronic alcoholism could have independently or jointly have caused Ms. Nelson's death. ECF Nos. 20-4 at 31–32 and 30-8 at 13–14. Plaintiff's medical expert, Dr Cummins, has testified that on a more probable than not basis, that Ms. Nelson's death was caused by the onset of alcohol withdrawal, and seems to suggest this could have

been further complicated by respiratory distress due to a negative interaction with the dose of Librium.[3] ECF No. 27 at 10, 18. Defendants' two expert witness reach separate conclusions from each other, and from Dr. Cummins. Dr. Jared Strote found on a more probable than not basis that Ms. Nelson's death was caused by cardiac arrest. ECF No. 17 at 8. And Dr. Carl Wigren found that Ms. Nelson's death was caused by hypoxia (a lack of oxygen to the brain) caused by heart contraction due to cardia arrhythmia which in turn was caused by either fatty liver disease or dilated cardiomyopathy. ECF Nos. 18 at 5, 18-1 at 7, and 38-8 at 10.

Nevertheless, Defendants assert that summary judgment is still proper because qualified immunity applies. At step one, the Court assesses whether or not there is a triable issue of fact as to whether a constitutional violation has been committed. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). As discussed above, the Court determines that a jury may find that LPN Aldrich's medical care was inadequately performed with reckless disregard, because many of the key facts are still in dispute.

The second prong of the qualified immunity test is whether every reasonable

[3] The Court once again notes that the autopsy did not reveal that Ms. Nelson died from a Librium overdose but did reveal a diseased liver as a side effect from overuse of alcohol. ECF No. 20-4 at 29.

official in the same position as the defendant would understand that the conduct was unlawful in the situation she was confronted with. *Taylor v. Barkes*, 575 U.S. 822, 824 (2015) (per curiam) (holding that for qualified immunity purposes, law is "clearly established" if "every reasonable official would have understood that what he is doing violates th[e] right"); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 678 (9th Cir. 2021). Stated another way, a right is clearly established for qualified immunity purposes if "it would be clear to a reasonable [prison official] that [her] conduct was unlawful in the situation he confronted' ... or whether the state of the law [at the time of the alleged violation] gave 'fair warning' to [her] that [her] conduct was unconstitutional." *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir.2002) (internal citation omitted). Here, Plaintiff must show that a reasonable nurse would have understood that failing to assess Ms. Nelson for potential withdrawal in a timely manner when medical shifts begin at 6 a.m., failing to properly assess and document her interaction with Ms. Nelson, failing to contact a provider based on withdrawal symptoms, and failing to provide substantive medical monitoring after providing withdrawal medication, "presented such a substantial risk of harm to [Ms. Nelson] that the failure to act was unconstitutional." *Horton*, 915 F.3d at 600.

As a preliminary matter, pretrial detainees have a constitutional right to adequate medical care while in the custody of the government and awaiting trial.

Russell v. Lumitap, 31 F.4th 729, 738 (9th Cir. 2022); *Sandoval*, 985 F.3d at 667. The Ninth Circuit has held that prison officials violate the Constitution when they "deny, delay, or intentionally interfere" with medical treatment, *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006), or when the official's chosen treatment is "medically unacceptable under the circumstances," *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012) (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)). A lack of exact factual similarity is no bar to the establish that notice of a constitutional right exists in a given situation. *Wilk v. Neven*, 956 F.3d 1143, 1148 (9th Cir. 2020) (internal citations omitted). However, "for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal citation omitted). Precedent in this area casts a wide net and includes instances of subpar medical attention which resulted in death, as well as instances involving treatment of less than life threatening ailments, as constitutionally deficient medical care. *See Gordon v. Cnty. of Orange*, 6 F.4th 961, 970, 72 (9th Cir. 2021) (finding a pre-trial detainee has a right to medical screening and direct view safety checks); *Clement*, 298 F.3d at 905 (finding that denying inmates a shower and medical attention for four hours after being exposed to pepper spray while in confinement was clearly established as unconstitutional).

In viewing the facts in the light most favorable to Plaintiff, LPN Aldrich's

care of Ms. Nelson could be described as both delayed and medically unacceptable, given the internal withdrawal policy of CCRJC that she purportedly did not follow. Plaintiff points to *Norman v. Wellpath, LLC*, No. 3:19-CV-02095-MO, 2022 WL 1516262, at *13 (D. Or. May 13, 2022), a recently decided case from the District of Oregon, which is instructive but not binding. *Norman* involved a pre-trial detainee who died in custody from "complications of chronic beverage alcohol use." *Id*. at *2. Notable for the matter at hand, the deceased, who was discharged from a hospital, refused treatment after a medical evaluation from the nurse on duty. The nurse then contacted a doctor per jail protocol and received the instruction to "wait until morning" to assess her vital signs due to the amount of medication she had received at the hospital. The deceased was then placed on medical monitoring and received check-ins roughly every 45 minutes and was constantly monitored through a security camera. During the night, the deceased rolled off her bed, landing face down on the floor, and was found dead 20 minutes later. *Id*.

While not entirely analogous because the nurses involved did not assert qualified immunity, *Norman* is helpful in its discussion of the right to direct-view safety check-ins recognized in *Gordon v. County of Orange,* 6 F.4th at 973. As applied to this case, the Court in *Gordon* stated:

> Thus, at the time of the incident, Gordon had a clearly established constitutional right to have a proper medical screen conducted to ensure

> the medically appropriate protocol was initiated. As applied here, [a nurse] acted as gatekeeper by serving as the screening nurse and was therefore responsible for identifying an inmate's urgent medical needs. Whether she failed to do so is properly considered under the first prong of the qualified immunity analysis.

Id. at 971–72.

Additionally, *Gordon* instructed that pre-trial detainees have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment, and further held "law enforcement and prison personnel should heed this warning because the recognition of this constitutional right will protect future detainees." 6 F.4th at 973. Further, the court in *Norman* found that "a reasonable jury could find that that [the nurse in question] violated [the deceased's] rights by failing to put her on a closer watch." No. 3:19-CV-02095-MO, 2022 WL 1516262, at *17. While not exactly on point, the Court is satisfied based on the information as presented, that Ms. Nelson was entitled to be properly screened and watched while experiencing withdrawal and notice of this right was indicated on her intake form. ECF No. 20-3 at 1 ("Stated that she will withdrawal from alcohol"). A nurse in LPN Aldrich's place would be on notice and understand that failure to administer proper care, akin to what is described in the internal CCRJC's policy of monitoring, would result in the violation of a pre-trial detainee's Fourteenth Amendment right, and ultimately lead to injury or death. Thus, she is not entitled to qualified immunity for summary

judgment purposes.

In sum, as to Plaintiff's § 1983 claim against LPN Aldrich, material facts are still in dispute and thus the Court cannot grant summary judgment. Nor does qualified immunity entitle her to summary judgment.

2. Chelan County Jail Director Christopher Sharp

Next, Defendants allege that Director Sharp either cannot be found liable under § 1983 or is entitled to qualified immunity because he had no interaction with Ms. Nelson while she was in the custody of CCRJC. ECF No. 15 at 13. In addition to a lack of direct involvement, Defendants also assert Plaintiff has failed to show that Director Sharp was deliberately indifferent via a failure to train theory, which provides that under § 1983, a supervisor can be held liable for a subordinate's violation if: " '[his] own culpable action or inaction in the training, supervision, or control of his subordinates,' 'his acquiescence in the constitutional deprivations of which the complaint is made,' or 'conduct that showed a reckless or callous indifference to the rights of others.'" *Starr v. Baca*, 633 F.3d 1191, 1195 (9th Cir.), *withdrawn and superseded on denial of reh'g en banc*, 652 F.3d 1202 (9th Cir. 2011) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991). Defendants assert that Director Sharp took meaningful steps after the death of Mr. Verville to provide an updated policy surrounding fentanyl withdrawal, including "jail checks," and that LPN Aldrich behaved appropriately

in response to Ms. Nelson's symptoms. ECF No. 35 at 8. Plaintiff asserts that Director Sharp did not provide proper training and failed to meaningfully reprimand LPN Aldrich after the death of Mr. Verville. ECF No. 25 at 10.

Under § 1983, a supervisor cannot be held liable under *respondeat superior*. *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1166 (9th Cir. 2020). Instead, a plaintiff's claim must show that a supervisor exercised deliberate indifference in the training or supervision of an employee, amounting to a constitutional violation. *Flores v. Cnty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)). As part of this demonstration, a plaintiff must show that the supervisor disregarded known gaps in a training program that would cause employees to violate constitutional rights, or the gaps must obviously lead to constitutional violations. *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (internal citation omitted). Or, a supervisor may be held liable for the actions of an employee under § 1983 if he or she knew of the employee's violations and failed to act to prevent them. *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013) (internal citation omitted). A plaintiff must show that the supervisor was deliberately indifferent to the need of employee training, and that the inaction of the supervisor was the moving force behind the constitutional violation. *See Flores*, 758 F.3d at 1159; *Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992).

The Court cannot determine that summary judgment is proper as to Director Sharp's failure to train LPN Aldrich. A supervisor may be held liable in an individual capacity for his "own culpable action or inaction in the training, supervision, or control of his subordinates." *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998). Defendants first argue that Director Sharp did not approve of any delay in medical care because LPN Aldrich responded appropriately to Ms. Nelson's symptoms. ECF No. 35 at 7. However, the internal policy states that inmates at risk of experiencing withdrawal shall be seen "promptly," and Ms. Nelson was not seen until almost six hours after LPN Aldrich began her shift, and then never reassessed again. ECF No. 30-10 at 3. And Plaintiff's contention that LPN Aldrich did not respond appropriately to Mr. Verville's detox but was still not instructed on internal CCRJC policies after his death, lends to argument that Director Sharp was aware of training flaws and chose inaction regarding inmates Fourteenth Amendment right to adequate medical treatment. ECF No. 25 at 10. And, though new policies were put in place, Plaintiff asserts that LPN Aldrich and the rest of the medical staff should have been retrained after the death of Mr. Verville, and LPN Aldrich stated she was not. ECF Nos. 25 at 19 and 30-15 at 17. There is no suggestion that members of medical staff were aware of the expectations under the new policies at the time of Ms. Nelson's death, or if the new policies addressed the cause of Mr. Verille's

death in custody. The Court agrees that reasonable minds could differ as to Director Sharp's knowledge of the need for retraining, and therefore declines to grant summary judgment.

Defendants contend that even if Director Sharp can be held liable under § 1983, he is nevertheless shielded by qualified immunity. ECF No. 33 at 7. Having already established that a triable issue of fact remains as to Director Sharp's supervisor liability under § 1983, the Court next considers the second prong of the qualified immunity test, whether the right "was clearly established at the time of the violation." *Sandoval*, 985 F.3d at 671. The Court concludes that, pursuant to the discussion surrounding LPN Aldrich *supra*, should a trier of fact determine that Director Sharp failed to provide adequate training and supervision to CCRJC medical staff, the right to adequate medical care via monitoring was established at the time of violation. *Gordon*, 6 F.4th at 970, 73. Therefore, Director Sharp is not entitled to qualified immunity at this time.

B. *Monell* Liability Against Chelan County

Finally, Plaintiff seeks to hold Chelan County liable under § 1983 for its ratification of a policy of failure to train staff to treat and monitor inmates for detox or withdrawal. ECF No. 25 at 17. Defendants argue that Chelan County had in place appropriate policies for addressing withdrawal and detox, and they were followed. ECF No. 15 at 15. Further, it asserts that the death of Mr. Verville

cannot be used to establish a pattern or practice for the purpose of *Monell* liability. *Id*. at 16; ECF No. 35 at 8.

A municipality cannot be held liable under § 1983, except if a plaintiff can prove that it has a policy or custom which led to a constitutional violation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Under a *Monell* framework, a plaintiff must demonstrate: (1) he or she had a constitutional right of which he was deprived; (2) the municipality had a policy; (3) the policy amounts to deliberate indifference to his constitutional right; and (4) "the policy is the moving force behind the constitutional violation." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). There are three ways a plaintiff may satisfy the *Monell* policy requirement: first, a government may act pursuant to an expressly adopted policy, second a government may act pursuant to a "longstanding practice or custom," *Thomas v. County of Riverside*, 763 F.3d 1167, 1170 (9th Cir. 2014), and third, the person who commits the constitutional violation acts as a final governmental policymaker or such an official "ratified a subordinate's unconstitutional decision or action and the basis for it." *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010). Here, Plaintiff is arguing that Chelan County either has a practice of failing to train staff, or that it ratified constitutional violations of medical staff by failing to retrain and reprimand. ECF No. 25 at 16.

As to a standing policy or custom, Plaintiff argues that Chelan County offered no training to ensure that staff follow the internal policies of alcohol withdrawal and detox, including training regarding medical monitoring. *Id*. at 18–19. A failure to train may be the basis for *Monell* liability if it amounts to deliberate indifference. *City of Canton*, 489 U.S. at 388. To demonstrate a deliberate indifference, a plaintiff must show that the choice was a conscious one in the decision not to train as it relates to the relevant constitutional violation, which can be satisfied by an obvious need for training that is lacking. *Price v. Sery*, 513 F.3d 962, 973 (9th Cir. 2008) ("[The failure to train standard is] objective in that it does permit a fact finder to infer 'constructive' notice of the risk where it was 'obvious'—but this is another way of saying that there needs to be some evidence that tends to show a conscious choice."). In general, a failure to train claim must contain; (1) the deprivation of a constitutional right, (2) a showing that the municipality had a training policy that amounts to deliberate indifference to the constitutional rights of those with whom officials are likely to come into contact; and (3) a showing that the constitutional injury would have been avoided had the municipality properly trained those officers. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007) (internal citations and quotation marks omitted). However, the practice or custom must be founded upon sufficient frequency and consistency, isolated or sporadic incidents of violation are

insufficient. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (internal citations omitted).

Plaintiff posits that the County did not provide proper training to CCRJC staff on internal policies regarding withdrawal and detox, based on the failure of staff to respond appropriately to Ms. Nelson and Mr. Verville per those policies. ECF No. 25 at 18–19. This is further supported, according to Plaintiff, by a lack of proper protocol regarding video monitoring, evidenced by the fact that the only official policy describes video monitoring for the purpose of security and communication, but does not explicitly mention medical monitoring. *Id.*; ECF No. 30-21 at 2. Defendants argue that Chelan County had in place proper Lexipol policies on withdrawal and detox, and that Plaintiff cannot show deliberate indifference based on a failure to train. ECF Nos. 15 at 12 and 35 at 9.

Having decided that the prior incident involving the death of Mr. Verville is admissible for purposes of demonstrating a practice or custom, the Court cannot determine that summary judgment is proper as to the *Monell* claim against Chelan County. For one, Defendants have produced no internal training or policy regarding video medical monitoring, despite stating that inmates with medical concerns are monitored this way. ECF No. 15 at 13. Further, there is no indication that there is a requirement that an CCRJC official in charge of the monitoring be medically trained, nor does it appear, based on Chelan County's 30(b)(6)

deposition, that the monitoring is consistently done by the same person or particularly conducive for proactive monitoring. ECF No. 30-6 at 4–5 ("Basically I could be [in the control room] for five minutes while the individual goes to the bathroom. I could try to give them a 15-minute break occasionally.") ("I can see movement, but if somebody is covered up, I cannot tell . . . if they're just sleeping. I cannot tell how they're doing specifically. The cameras are not that good as I cannot tell you . . . if she is breathing right now, I could not tell because she's about right here."). This is also set against the backdrop of Plaintiff's contention that Mr. Verville vomited at least ten times while in custody, six of those times occurred after he was provided medication, yet was provided no additional assessment by medical staff. ECF No. 26 at 17. Further, Plaintiff and Defendants disagree about the effectiveness of video monitoring and the type of cell checks Ms. Nelson received after the administration of her withdrawal medication. ECF Nos. 15 at 6, 25 at 16, 19-1 at 7, and 30-13 at 4.

Defendants' expert on correctional practices discussed that an internal investigation after the death of Ms. Nelson revealed that staff was confused about the internal policy regarding proper cell checks. ECF No. 19-1 at 27. And it appears that, even if the jail staff understood part of the internal cell check policy, that both deputies were to enter the cell, and perform a check at least every 60 minutes, staff did not perform this function for either Mr. Verville or Ms. Nelson.

ECF Nos. 20-18 at 9–12 (describing how deputies "briefly looked" into Ms. Nelson's cell, and LPN Aldrich did not visit during a 2:29 p.m. "Medical Pass") and 30-20 at 6–9.

LPN Aldrich also failed to follow internal protocol with regard to Mr. Verville and Ms. Nelson. Plaintiff contends that internal jail protocol would have required both Mr. Verville and Ms. Nelson to be seen by medical staff "promptly" based on their respective reports that withdraw or detox may be a possibility but were not seen until their symptoms had become severe. Additionally, Plaintiff contends that both individuals should have been placed on heightened monitoring based on their condition, which was not done in either case. ECF No. 25 at 8.

The above-described conditions within CCRJC leave triable issues of fact for a jury to consider. Reasonable minds could differ as to whether Chelan County was deliberately indifferent to obvious gaps in training, as first demonstrated by the death of Mr. Verville, and ultimately led to violations of Ms. Nelson's Fourteenth Amendment right to adequate medical care. As such, summary judgment is not proper with respect to the *Monell* liability of Chelan County.

C. <u>Negligence Claim Against All Defendants</u>

Plaintiff argues that the same foundation that supports the constitutional claim brought against each defendant may also support a claim of negligence. ECF No. 25 at 20. Defendants argue that there was no breach of duty, in that Ms.

Nelson at all times had access to adequate medical care, and that nothing CCRJC did or failed to do caused Ms. Nelson's death. ECF No. 15 at 16–17.

As is well known, the elements of negligence are duty, breach, causation, and damage or injury. *Hartley v. State*, 103 Wash. 2d 768, 777 (1985). Washington law requires that the breach be the proximate cause of the injury, meaning that it is both the cause in fact and the legal cause. *Id*. (internal citation omitted). "Breach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law." *Hertog, ex rel. S.A.H. v. City of Seattle,* 138 Wash. 2d 265, 275 (1999) (internal citation omitted).

Washington State law has long recognized the special relationship that exists between a jail exercising custodial control and a prisoner without liberty, and thus has imposed upon correctional facilities the requirement to keep a prisoner, "in health and free from harm." *Gregoire v. City of Oak Harbor*, 170 Wash. 2d 628, 635 (2010) (quoting *Kusah v. McCorkle*, 100 Wash. 318, 325 (1918)). Defendants do not contest that a duty exists to keep inmates safe while in custody but argue that there has been no breach of the duty, and that no action from the correctional facility caused Ms. Nelson's death. ECF No. 15 at 17–18.

The question of whether or not Defendants fell below the standard of care required of the duty imposed is at the heart of this matter, and greatly contested by

both sides. Plaintiff's expert witnesses are adamant that Defendants provided substandard care to Ms. Nelson while in custody. ECF Nos. 27 at 7, 28 at 12, and 29 at 29. Defendants' witnesses are equally insistent she was given proper medical care. ECF No. 17-1 at 7, 19-1 at 6–7, 21 at 8. As such, reasonable minds could differ as the issue of breach.

Likewise, causation is fiercely debated by either side, and the crux of the ultimate question of liability. Cause in fact is the "but for" cause of the injury, meaning that the event would not have occurred without action from the defendant. *Taggart v. State*, 118 Wash. 2d 195, 226 (1992). Stated another way, cause in fact cannot be established if the plaintiff's injury would have occurred without a breach of duty. *Walker v. Transamerica Title Ins*. Co., 65 Wash. App. 399, 403 (1992). However, there may be multiple "but for" causes or independent actors may breach separate duties which together produce an injury. *Meyers v. Ferndale Sch. Dist*., 12 Wash. App. 2d 254, 264–65 (2020), *aff'd but criticized*, 197 Wash. 2d 281, 481 P.3d 1084 (2021). Legal causation, on the other hand, is a policy consideration intertwined with the question of duty and decides how far to extend defendant's responsibility for its actions. *Taggart,* 118 Wash. 2d at 226.

As was previously discussed, the medical examiner provided three separate symptoms of chronic alcoholism which could have independently or in some combination caused the death of Ms. Nelson, and is laid out *supra*, parties disagree

as to what specifically caused her death. ECF No. 20-5 at 1. Because reasonable minds could disagree as to the proximate cause of Ms. Nelson's death, whether it be a spontaneous medical episode or caused by some mistreatment of alcohol withdrawal, is ultimately a question for the jury.

Therefore, summary judgment as to the claim of negligence against all three defendants is denied.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendants' Motion to Strike (ECF No. 32) is **GRANTED in part.**
2. Defendants' Motion for Summary Judgment (ECF No. 15) is **DENIED.**

The District Court Executive is directed to enter this Order and furnish copies to counsel.

DATED April 19, 2024.

THOMAS O. RICE
United States District Judge