

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ANGELA LOWE,	:	
Plaintiff,	:	Case No. 1:08-cv-01339
	:	
v.	:	JUDGE: DONALD C. NUGENT
	:	
CUYAHOGA COUNTY/ BOARD OF	:	
COMMISSIONERS, et al.	:	<u>PLAINTIFF'S MOTION TO</u>
	:	<u>COMPEL DISCOVERY OF</u>
Defendants.	:	<u>CUYAHOGA COUNTY AND</u>
	:	<u>MIDWEST MEDICAL STAFFING</u>
	:	<u>DEATH INVESTIGATION AND</u>
	:	<u>CONTINUOUS QUALITY</u>
	:	<u>IMPROVEMENT RECORDS</u>
	:	

Plaintiff moves this Court for an order compelling Defendants to produce the following records:

1. Mortality reviews (including those done pursuant to policy J-A-10, 'Procedure in the Event of an Inmate's Death' (Doc. 75-8, Spisak Dep. Ex. 100)) of Sean Levert and each inmate listed on Effinger Depo. Ex. 66 (Doc.73-9);
2. All minutes and documentation related to the Continuous Quality Improvement (QI) program from 1/1/00 – 12/31/09 as described in policy J-A-06 'Continuous Quality Improvement Program' (Doc.75-9, Spisak Dep. Ex. 101).

The parties have satisfied the local rule for addressing discovery disputes and this motion is filed at the direction of the Court. *See* minutes of status conference from February 3, 2010, R. 60.

## **MEMORANDUM**

### **I. INTRODUCTION**

In this civil rights action the widow of Sean Levert challenges the jail policies that caused the suffering and death of her husband. R & B singer Sean Levert was a nonviolent prisoner sentenced to serve 11 months in prison for failure to pay child support. He entered the Cuyahoga County Correction Center (“Jail”) on March 24, 2008. From that moment until his death on March 30, 2008, Mr. Levert was entirely dependent on Jail staff and jail medical policies for his medical care.<sup>1</sup> Pursuant to County policy, Mr. Levert was deprived of his prescription drugs and then he predictably experienced withdrawal from that medication. The withdrawal was severe and traumatic for Mr. Levert causing him terrible suffering and death. Defendants routinely study deaths in custody and other critical incidents. They do not perform factual investigations of medical staff conduct outside their mortality and quality improvement review. Plaintiff seeks, pursuant to established federal law, the minutes and reports from these investigations for several years before Mr. Levert’s death. Defendants have refused. This motion was requested by the Court.

### **II. FACTS RELEVANT TO THIS MOTION**<sup>2</sup>

The policies at issue in this case were established by Defendants McFaul, Kochevar, Dubber, Commissioners and County (“County”) and by Defendants Tuffuor, Kellon and Midwest Medical Staffing (“Midwest”).<sup>3</sup> Pursuant to those policies, Mr. Levert was not

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<sup>1</sup>Dr. Tuffuor Dep. at 35:15 – 36:5 (Doc.62).

<sup>2</sup> Plaintiff has uncovered a dramatic failure to treat Mr. Levert involving many defendants. This motion does not set out all of the facts relevant to a full understanding of this tragic and needless death. The focus is only on the facts necessary to show the need for the discovery at issue.

<sup>3</sup> Dr. Tuffuor stated that he was the “ultimate decision maker about clinical policies at the jail.” Tuffuor Dep. at 21:18-20 (Doc.62). See also, Dubber Dep. at 14:15-19 (Doc.63). Defendant Dubber stated that it is

allowed to take his prescription Xanax into the jail.<sup>4</sup> His valid, current prescription was locked in the jail property room.<sup>5</sup> Xanax is an anti-anxiety medication which can be habit forming. Mr. Levert was taking a high dose (6 mg per day).<sup>6</sup> Terminating the Xanax foreseeably placed him at risk for withdrawal and those symptoms would be expected to start within one to three days.<sup>7</sup> Defendant treating Psychiatrist Dr. Kellon explained what happened next:

16 My understanding and my impression from this is  
17 that what happened is his medication was never  
18 verified.

19 Q. Okay.

20 A. And somehow the lack of verification of the  
21 medicine led to him not getting his medication.

22 Q. Which led to?

23 A. Which led to his having withdrawal, severe, very  
24 severe withdrawal and the consequences subsequently led  
25 to his death.

Kellon Dep. at 98:16–25 (Doc.66).

Mr. Levert experienced withdrawal symptoms from at least March 27 through his death on the night of March 30. These included sweating, talking to himself, laughing and sitting up while sleeping.<sup>8</sup> As early as 8:30 a.m. on March 27, Mr. Levert was asking the correction staff to help him get his Xanax.<sup>9</sup> By March 29 Mr. Levert was extremely delusional, hearing voices and allegedly seeing a “female running around the jail ...trying to stab a C.O.”<sup>10</sup> By the early morning hours of March 30, Mr. Levert was completely

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her duty to ensure that the medical policies and procedures are followed. Dubber Dep. at 62:14-19 (Doc.63).

<sup>4</sup> Nurse Jane Lawrence Dep. Ex. AS (Policy J-D-02, Property Meds).

<sup>5</sup> McClelland Depo. Ex. 28 (Property Receipt); Dubber Dep. Exs. 44, 45 (Prescription bottles)(Docs. 63-6, 63-7), and Dubber Dep. Ex. 48, p.10 (Booking Documents)(Doc.63-10).

<sup>6</sup>Tuffuor Dep. at 102:5 (Doc.62).

<sup>7</sup>Tuffuor Dep. at 102: 9-11 (Doc.62); Main Dep. at 13-16 (Doc.64).

<sup>8</sup> Price Dep. Ex. 33, p.2 (Inmate Roland interview)(Doc.71-2).

<sup>9</sup> Price Dep. Ex. 32 (3/27/08 Report Narrative)(Doc.71-1).

<sup>10</sup> Price Dep. Ex. 33, p.2 (Doc.71-2).

delusional. Correctional staff logged that Levert, “Started to talk about his son fell into the pool out side of his cell window.”<sup>11</sup> The correction staff referred him to the mental health unit “due to tearfulness and making bizarre statements.”<sup>12</sup>

At the mental health unit Mr. Levert was admitted but his vitals were not taken.<sup>13</sup> As the day progressed Mr. Levert was tearful and his behavior eventually was so disruptive to the other inmates in the mental health unit that he was locked in his cell.<sup>14</sup> The continued tearfulness and disruptive behavior did not cause Mr. Levert to be assessed; did not cause his medical chart to be reviewed; and did not cause any referral to a psychiatrist.<sup>15</sup> The hallucinations continued in the evening and Mr. Levert, still locked down, believed his mother was being killed and he began yelling and banging on the floor and walls of his cell.<sup>16</sup> Mr. Levert, still screaming and delusional, was then strapped to a “restraint chair.”<sup>17</sup> The placement of Mr. Levert into the restraint chair was videotaped.<sup>18</sup>

At various time Mr. Levert visualized his son being murdered, his mother being murdered, his wife having sex with other men, and people injured in car accidents.<sup>19</sup> Treating psychiatrist, Defendant Dr. Kellon, explained that these delusions for someone in withdrawal are “frightening” and “terrifying.”<sup>20</sup>

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<sup>11</sup> Effinger Dep. Ex. 63 (3/30/08 Report Narrative. See entry at 3:25 a.m.)(Doc.73-6).

<sup>12</sup> Effinger Dep. Ex. 64 (3/29-3/30/08 Report Narrative)(Doc.73-7)

<sup>13</sup> Dubber Dep. at 175:7-9 (Doc.63). Nurse Lawrence noted that the hallucinations at 3:50 a.m. included “hearing his child through the speaker, drowning in water...” Lawrence Dep. Ex. AY (Progress Note).

<sup>14</sup> See Deposition of Nurse Cooper, taken February 4, 2010, to be filed when transcribed.

<sup>15</sup> *Id.* (Nurse Cooper explained her failure to pursue and assessment by stating that “If I had a nickel for every inmate who cried on psyche unit I would be a rich lady.”); See also deposition of Nurse Janosko, taken February 5, 2010, to be filed when transcribed.

<sup>16</sup> Hairston Dep. Ex. 34 (3/30/08 Report Narrative)(Doc.72-1).

<sup>17</sup> McClelland Dep. at 111-114 (Doc.65).

<sup>18</sup> McClelland Dep. Ex 23 (DVD).

<sup>19</sup> See, e.g., McClelland Dep. at 66, 69, and 105 (Doc.65).

<sup>20</sup> Kellon Dep. at 15:8-10 (Doc.66).

Plaintiff Lowe claims that her husband Sean suffered this terrifying withdrawal because of County and Midwest policies that include:

1. Inadequate medication verification;<sup>21</sup>
2. Psychiatric appointment system that caused undue delays;<sup>22</sup>
3. Failure to train corrections staff and patients regarding the signs and symptoms of Xanax withdrawal;<sup>23</sup>
4. Failure to resolve conflict between inmate confidentiality policy and the need for continuity of care;<sup>24</sup>
5. Improper use of the restraint chair in response to symptoms of withdrawal from Xanax;<sup>25</sup>
6. Inadequate mental health staffing;<sup>26</sup> and
7. Failure to diagnose, monitor and treat Xanax withdrawal.<sup>27</sup>

Xanax is in a class of drugs known as benzodiazepines.<sup>28</sup> This class of drugs was available in the jail pharmacy. Many inmates have been prescribed benzodiazepines while incarcerated in the jail.<sup>29</sup> Defendants have a system for reviewing the care

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<sup>21</sup> A fax for information regarding medications was received from South Pointe Hospital but never read by the jail staff. Kurtycz Dep. at 18:23-15 (Doc.67). Nor was there any effort to verify the medication through the pharmacy noted on the prescription bottle brought to the jail by Mr. Levert. Dr. Tuffuor stated that pharmacies are very cooperative. Tuffuor Dep. at 40 (Doc.62).

<sup>22</sup> Defendant Dr. Alvarado agreed that patients terminated from Xanax should have an appointment with a psychiatrist within three days from termination of the medication. Alvarado Dep. at 60:22 -61:10 (Doc.68). Mr. Levert was scheduled for a psychiatric appointment 14 days after he was terminated from the medication. Dep. Ex. 103.

<sup>23</sup> Patient education about withdrawal is important. Tuffuor Dep. at 58:19 – 59:24 (Doc.62). Defendant Main did the medical review at intake and released Mr. Levert to the cellblock but did not chart any education of Mr. Levert about the signs and symptoms of withdrawal from Xanax. Spisak Dep. Ex. 102, Levert Medical File (Doc.10).

<sup>24</sup> Tuffuor Dep. at 149-151 (Doc.62).

<sup>25</sup> McClelland Dep. Ex. 23 (Doc.65-13).

<sup>26</sup> Nurse Cooper Deposition taken February 4, 2010, to be filed when transcribed.

<sup>27</sup> Medical Director Defendant Tuffuor stated that vital signs were “an area of deficiency.” Tuffuor Dep. at 104:13-105:9 (Doc.62); Dubber Dep. at 61: 2- 62:9 (Doc.63).

<sup>28</sup> Main Dep. at 11-13 (Doc.64).

<sup>29</sup> Dubber Dep. Exs. 46, 47 (Docs.63-8, 63-9).

provided to inmates that have died in the jail.<sup>30</sup> They also have a broader system for learning about other problems in the delivery of care through a “continual quality improvement” program.<sup>31</sup> As set out above, evidence so far indicates that the medical policies— by design and/or implementation - caused Mr. Levert to suffer withdrawal and die. The top county jail health care official, Health Care Manager Christine Dubber, stated that all county policies were followed with respect to the care provided Sean Levert.<sup>32</sup>

Jail Administrator Ken Kochevar stated that he did no independent investigation of the events leading up to the death of Sean Levert.<sup>33</sup> Rather, he relied on the medical staff to reassure him that all policies were followed and that no one needed to be disciplined because everyone did their job properly:

25 Q. After you had these conversations and you

1 reviewed the events that led to Sean Levert's death,  
2 did you, as the jail administrator, conclude that the  
3 County policies with respect to the delivery of medical  
4 care had been followed appropriately in the treatment  
5 of Sean Levert?

6 A. It did appear after discussing the matter with  
7 Chris Dubber at some length that policies were followed  
8 as they existed.

Kochevar Dep. at 33:25-34:8 (Doc.69).

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<sup>30</sup> Dubber Dep. at 135:20-21; 135:22-136:15 (Doc.63).

<sup>31</sup> Tuffuor Dep. at 26 (Doc.62); Kurtycz Dep. at 32:4 – 35:13 (Doc.67); Spisak Dep. at 18:20-19:6 (Doc.75); McGonegal Dep. at 82:21-83:14 (Doc.70). See also testimony of Nurses Deavers and Mosher taken the week of February 1, 2010 and not yet transcribed.

<sup>32</sup> Dubber Dep. at 65:23-66:14 (Doc.63). Ms. Dubber does note that vitals were not taken by Defendant nurse Lawrence when Mr. Levert was placed in the restraint chair. Dubber Dep. at 66:3-11 (Doc.63). She also notes that Lawrence may be in error when Lawrence testified that information regarding Xanax was not present in the Levert medical chart when Lawrence treated M. Levert on March 30, 2008. See e.g., Dubber Dep. at 70: 1-10 (Doc.63). This motion to compel, however, is directed to issues regarding County and Midwest liability. In a civil rights case, of course, there is no comparative fault and all the defendants are jointly and severally liable. *Hays v. Jefferson County, Ky.*, 668 F.2d 869 (6th Cir. 1982); *Weeks v. Chaboudy*, 984 F.2d 185 (6th Cir. 1993).

<sup>33</sup> Kochevar Dep. at 113:20-115:11(Doc.69).

But when counsel pressed to find out just what investigation had been conducted regarding the Levert death the Defendants objected based on a state law “peer review privilege.”<sup>34</sup> Health Care Manager Defendant Dubber conceded that mortality reviews are done and that the Sheriff is responsible for staff discipline but she testified that she does not share the results of the mortality reviews with the sheriff.<sup>35</sup> Dr. Tuffuor receives mortality and QI materials<sup>36</sup> but Midwest CEO Earlene McGonegal does not seek access to this information.<sup>37</sup>

At the deposition of Dr. Tuffuor he was asked to explain the results of the Mortality review done with respect to Sean Levert’s death. Defense counsel instructed him not to answer.<sup>38</sup> Similarly Defense counsel stated that Defendant Dubber would not be permitted to answer questions and only described the process and records related to mortality reviews.<sup>39</sup>

No privilege shields the mortality reviews and quality improvement materials in this case. To grant such a privilege would allow Defendants to cover up the systemic deficiencies that are identified through mortality and critical incident reviews at the jail and would unfairly prejudice Plaintiff’s ability to prove her civil rights claim against the County Defendants and the Midwest Defendants.

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<sup>34</sup> Tuffuor Dep. at 107-109 (Doc.62). See also Spisak Dep. at 41:15-25, 46:13-22 (Doc.75); Dubber Dep. at 62:10-64:24 (Doc.63).

<sup>35</sup> Dubber Dep. at 138:22-23 (Doc.63).

<sup>36</sup> Tuffuor Dep. at 26 (Doc.62); Dubber Dep. at 138 (Doc.63).

<sup>37</sup> McGonegal Dep. at 10:15-18 (Doc.70).

<sup>38</sup> Tuffuor Dep. at 107-109; 153-154 (Doc.62).

<sup>39</sup> See Dubber Dep. at 137-140 (Doc.63).

### **III ARGUMENT**

#### **A. Entity Liability under §1983 Can be Established by Reviewing the Response of A Defendant to Similar Problems Identified Before the Incident Involved in the Litigation.**

Plaintiff claims that the County and Midwest and the policymakers were deliberately indifferent to the serious medical needs of Sean Levert. Prisoners have a well-established constitutional right to medical care, and denial of such care falls under the Eighth Amendment prohibition on cruel and unusual treatment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prisoner's right to medical care is violated when government officials act deliberately indifferent towards a prisoner's serious medical needs. *Id.* at 104. The need for medical care to treat withdrawal symptoms has been held to be sufficiently serious to meet the requirements of the Eighth Amendment. *Clutters v. Sexton*, No. 1:05cv223, 2007 WL 3244437 (S.D. Ohio 2007)(finding obvious signs of Oxycontin withdrawal to be sufficiently serious); *Thomas v. City of Shaker Heights*, No. 1:04CV2150, 2006 WL 160303 (N.D. Ohio 2006)(Alcohol Withdrawal Syndrome); *Kenney v. Paderes*, 217 F. Supp. 2d 1095, 1098 (D. Haw. 2002)(Lorazepam, benzodiazepine withdrawal); *Gonzales v. Cecil Cty. Maryland*, 221 F. Supp. 2d 611, 616 (D. Md. 2001)(heroin withdrawal). Furthermore, it is well-established in the Sixth Circuit that a prisoner's "psychological needs may constitute serious medical needs." *Comstock*, 273 F.3d 693, 703 (quoting *Horn v. Madison Cty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994)); *Perez v. Oakland*, 466 F.3d 416, 428 (6th Cir. 2006)(prisoner right to treatment of serious medical needs including psychiatric and psychological counseling was clearly well established by binding case law); *see also Thomas v. Webb*, 39 Fed. App'x 255, 256 (6th Cir. 2002)(stress disorder is a serious medical need).

In *Clutters*, the plaintiff was prescribed Oxycontin and Oxycodone to manage pain after surgery. *Clutters*, 2007 WL 3244437, at \*1. After the jail physician took the plaintiff off of the medication, the plaintiff began acting “irrationally,” yelling, hallucinating that bugs were crawling on him and making bizarre comments and lewd gestures. *Id.* at \*2. The plaintiff later died from head injuries sustained while he was going through withdrawal. *Id.* at \*3. The court held that the need for the prescription drug was a serious medical need. The Court denied summary judgment to the County regarding claims that staff was inadequately trained to treat withdrawal and that the restraint chair was used inappropriately on the inmate. *Id.*

Local governments can generally be liable under 42 U.S.C. § 1983 based on one of three theories: (1) the action was taken pursuant to a formal policy; (2) the action was taken pursuant to a longstanding practice or custom; and (3) the action was taken by a person serving as a “final policymaker.” *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Plaintiff cannot seek to hold the County or Midwest liable under the doctrine of respondeat superior in a civil rights case. *Id.* However, these Defendants are liable if their official policies, practices and customs are the moving force of the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197 (1989); *Abdie v. Karnes*, 556 F.Supp.2d 804 (S.D. OH. 2008). The response by a local government to prior instances of abuse can therefore be placed into evidence as part of the proof of a policy or custom as well as proof of training that may be so deficient as to constitute deliberate indifference to the rights of the plaintiff. *Abdie v. Karnes, supra* (challenged training provided to deputies to execute arrest warrants issued by the probate court). It is clear then that how an entity sueable under §1983,

responds to prior incidents can be very important to the proof of liability for a constitutional violation.

**B. There is No Federal Peer Review Privilege so the Mortality and QI Material are Discoverable under Federal Law**

There is no federal peer review privilege. The Sixth Circuit has generally held that claims of privilege are governed by federal statutory and common law, where the case is brought in federal court under federal question jurisdiction. *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 2002). District courts in the sixth circuit have generally declined to apply a peer review privilege, even if the information it protects would be relevant to pendent state law claims. *See, e.g., Keen v. Hancock Cty. Job & Fam. Services*, 581 F. Supp. 2d 893 (N.D. Ohio 2008). Furthermore, there appears to be no case from the Supreme Court or Sixth Circuit Court of Appeals that recognizes a peer review privilege under federal common law, and Congress has not codified such a privilege. *Gen. Motors Corp. v. Director of Nat'l Institute for Occupational Safety and Health*, 636 F.2d 163, 165 (6th Cir. 1980). *See also, Zamorano v. Wayne State Univ.*, No. 07-12943, 2008 WL 2067005 (E.D. Mich. 2008)(§1983 with pendent state law claims); *Ott v. St. Luke Hosp.*, 522 F. Supp. 706 (E.D. Ky. 1981)(§1983); *Rdzanek v. Hosp. Serv. Dist. #3*, No. Civ.A. 03-2585, 2004 WL 74312 (E.D. La. 2004)(§1983 with pendent state law claims); *Jenkins v. DeKalb Cty., Ga.*, 242 F.R.D. 652 (N.D. Ga. 2007)(federal common law, not state privilege law, applied and Defendants were ordered to produce morbidity and mortality report of mental health director of county jail in §1983 suit that had pendent state law claims); *see also, Thayer v. Chiczewski*, 257 F.R.D. 466 (N.D. Ill. 2009)(state law statutory reporter's privilege does not apply to prevent discovery in federal § 1983 case). The reason for failing to recognize a peer review privilege is simple. As set out above

plaintiffs in civil rights cases need discovery of prior incidents in order to determine the custom or practice; to determine the knowledge necessary to prove deliberate indifference; and to determine the history relevant to failure to train claims.

District courts from this Circuit do not recognize a medical the peer review privilege under federal law, *regardless of the underlying subject matter of the case*, whether it be antitrust or discrimination. *Nilavar v. Mercy Health System*, 210 F.R.D. 597, 604-07 (S.D. Ohio 2002)(antitrust)(citing *Virmani v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001); *LeMasters v. Christ Hosp.*, 791 F. Supp. 188, 191 (S.D. Ohio 1991)(discrimination)(“plaintiff’s right to be free from discrimination and her need for information sufficient to prove her allegations outweigh the defendant [hospital’s] desire for confidentiality”); *Ott v. St. Luke Hosp. of Campbell County, Inc.*, 522 F. Supp. 706 (E.D. Ky. 1981); *Dorsten v. Lapeer County Gen. Hosp.*, 88 F.R.D. 583, 586 (E.D. Mich. 1980)(finding that the “balance weighs in favor of discovery” of hospital peer review materials by plaintiff in discrimination case); *Alba v. Marietta Memorial Hosp.*, 184 F.R.D. 280, 290 (S.D. Ohio 1980)(rejecting plaintiff’s argument against application of statute of limitation on grounds that peer review materials were obtainable through due diligence because no such privilege applies in federal cases).

The result from other circuits similarly rejects peer review privileges. *Memorial Hosp. for McHenry County v. Shadur*, 644 F.2d 1058 (7th Cir. 1981); *Johnson v. United Parcel Serv., Inc.*, 206 F.R.D. 686 (N.D. Fla. 2002); *Mattice v. Memorial Hosp. of South Bend*, 203 F.R.D. 381 (N.D. Ind. 2001); *Leon v. County of San Diego*, 202 F.R.D. 631 (S.D. Cal. 2001); *Krolikowski v. Univ. of Mass.*, 150 F. Supp. 2d 246 (D. Mass. 2001); *Tucker v. U.S.*, 143 F. Supp. 2d 619 (S.D. W.Va. 2001); *Marshall v. Spectrum Medical Group*, 198 F.R.D. 1 (D. Me. 2000); *Syposs v. U.S.*, 179 F.R.D. 406 (W.D.N.Y. 1998); *Holland v. Muscatine Gen. Hosp.*, 971 F. Supp. 385 (S.D. Iowa 1997); *Price v. Howard County Gen. Hosp.*, 950 F. Supp. 141 (D.Md. 1996); *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80 (M.D. La. 1996); *Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993); *Quinn v. Kent Gen. Hosp., Inc.*, 617 F. Supp. 1226 (D. Del. 1985); *Wei v. Bodner*, 127 F.R.D. 91 (D.N.J. 1989); *Robinson v. Magovern*, 83 F.R.D. 79 W.D.Pa. 1979)).

Plaintiff has set out numerous issues that may lead to entity liability in this case. Every one of those issues can best be developed by accessing the deliberate effort to study the delivery of medical care at the jail in previous instances. Nineteen inmates died at the jail between March, 2000 and April 2009.<sup>40</sup> Every one of those deaths was subject to a mortality review. Further, the QI system regularly generates reports as to the problems experienced in the delivery of medical care to the inmates at the jail. Not to access that history will deny plaintiff crucial facts relevant to the knowledge defendants had of deficiencies and hamper proof of deliberate indifference. Indeed, in one landmark case regarding medical care in prison the court held that the absence of a functioning quality assurance program was actually evidence of deliberate indifference, clearly setting QI into the middle of the proof needed to measure compliance with the constitutional standard. *Madrid v. Gomez*, 912 F. Supp. 1282 (N.D. Cal. 1995).

Note also that in *Thomas v. City of Shaker Heights, supra*, Judge Adams denied summary judgment to the City based on its alleged failure to train jail staff to treat alcohol withdrawal syndrome. Summary judgment was granted, however, regarding an alleged custom or practice of deliberate indifference to inmates suffering from alcohol withdrawal because the plaintiff failed to present “pattern” evidence. *Id* at \*6. These types of entity liability determinations simply cannot be made without access to peer review and QI materials since those are the materials that reveal the “pattern” evidence deemed necessary in *Thomas*.

### **III CONCLUSION**

The motion to compel should be granted.

Respectfully submitted,

/s/Alphonse A. Gerhardstein

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<sup>40</sup> Effinger Dep. Ex. 66 (Doc.73-9).

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2010, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Alphonse A. Gerhardstein  
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