



treatment deficiencies but failed to correct these problems and/or train the staff to overcome these problems. Those policies and practices and the failure to train were the moving force behind the constitutional violation in this case.

If Defendants will concede liability, discovery of this evidence is not necessary. Otherwise the pattern evidence that will emerge from discovery of the mortality and CQI materials simply must be accessed in order for plaintiff to meet her burden. See, *Thomas v. City of Shaker Heights*, No. 1:04CV2150, 2006 WL 160303 (N.D. Ohio 2006) (lack of pattern evidence regarding Alcohol Withdrawal Syndrome in civil rights case). Pattern evidence showing prior notice of similar problems has been determinative in other civil rights contexts. See, *Cherrington v. Skeeter*, 344 F.3d 631, 646, 647 (6th Cir. 2003) (“Plaintiffs have failed to identify any similar incidents or prior complaints that might have alerted the Defendant City to the need to cover this topic in its officer training.”); *Beard v. Whitmore Lake School Dist.*, 244 Fed. Appx. 607, 2007 WL 1748139, at \*6 (6th Cir. June 19, 2007.) (no pattern of unconstitutional searches established); *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1999) (“A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers”).

The Defendants first cite to *Talwar v. Catholic Healthcare Partners*, 258 Fed. App’x. 800 (6th Cir. 2007), for the proposition that the Sixth Circuit has recognized and applied the peer review privilege found in O.R.C. § 2305.252 to federal question cases.<sup>2</sup> But the defendants have misrepresented the holding of *Talwar* two key areas. First, the Defendants assert that summary judgment was granted to defendants “based on peer

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<sup>2</sup> R. 78, p. 7. Plaintiff is referring to the number at the bottom of the page.

review immunities found in R.C. § 2305.252.”<sup>3</sup> However, in affirming summary judgment for the defendants on the state law claims, the Sixth Circuit held that the defendants were immune from liability for the state law claims under O.R.C. § 2305.251, Ohio’s immunity shield for health care entities. *Id.* 808-809. This decision had nothing to do with Ohio’s peer review privilege statute (O.R.C. § 2305.252) as the Defendants assert in their brief.<sup>4</sup>

Second, the defendants also inaccurately assert that the denial of discovery for minutes from an investigative committee in *Talwar* was upheld on the basis of “the peer review privilege in [O.R.C. § 2305.252].”<sup>5</sup> This is false. The Sixth Circuit affirmed the district court’s decision to summarily deny such discovery after a review for abuse of discretion on the basis that any error, if any, was harmless. *Id.* at 809-810. The plaintiff simply could not show any prejudice or that the presence of the records would have established a disputed fact. *Id.* This was not premised upon Ohio’s peer review privilege statute, O.R.C. § 2305.252, as the defendants contend. In fact, in the entirety of *Talwar*, the only mention of the peer review privilege statute that defendants assert as a major basis for the Court’s decision is a brief summary of the *Talwar* defendants’ arguments as to why discovery was properly denied by the district court.

The only other case that the Defendants rely on for the proposition that a peer review privilege exists in the Sixth Circuit is *Haddix v. Caruso*, No. 4:92-cv-110 (W.D. Mich. Oct. 6, 2006), an unpublished decision from another district court within this Circuit.<sup>6</sup> *Haddix* is a prisoner rights class action that has been pending under various

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> R. 78, pp. 7-9. Plaintiff is referring to the number at the bottom of the page.

names for more than twenty years. It is not a damage action. The case has been at the remedy stage for many years. The reported three page decision states simply that the court appointed class action monitor already has access to all of the inmate medical files so the monitor can investigate inadequate care without accessing peer review materials. *Id* at \*2. The Court was NOT reviewing a request for peer review materials in order to prove liability against an entity. In fact liability was not at issue. Decree compliance was the issue. Moreover, there was no question of *local government* liability as there is in this case since the defendants in *Hadix* are state prison officials. The County and Midwest Defendants cannot avoid the overwhelming authority cited by Plaintiffs by relying on this brief unreported decision from a class action regarding discovery during consent decree implementation.

Similarly, *United States v. Michigan*, 940 F.2d 143, 161-166 at footnote 12 is also not helpful to defendants. This case is a civil rights action brought by the U.S. Department of Justice against the State of Michigan. The consent decree in that case incorporated compliance with the Michigan peer review statute. The District Court unilaterally modified the consent decree during the remedial stage of the case to order access to that material. The Sixth Circuit reversed saying that such a consent decree modification was not warranted by the record. These unique facts do not involve a damage action. Nor do they involve a local jail and local government liability. Nor do they involve proof of liability in the first instance. Rather, at issue was consent decree modification during compliance proceedings under the CRIPA statute which applies only to the United States Department of Justice. The case is simply not relevant to the issues

before this court and the burden on Ms. Lowe to secure proof that that will support entity liability.

It is interesting to note that *Hadix* distinguished *Agster v. Maricopa County*, 422 F.3d 284 (4th Cir. 2001). But in *Agster*, the issue was much closer to the one facing this court. In that case, a family of a deceased inmate alleged inadequate medical care at a county jail. The Court rejected the claim of privilege and ordered that mortality review materials be produced. The Ninth Circuit was keen to point out the different objectives served by those involved in civilian health care and those that provide health care to prisoners, ultimately concluding that the much higher level of public accountability for the correctional system was consistent with discovery of peer review materials. *Id.* at 840. The same result should apply here.

Plaintiff reminds the Court that it is quite willing to abide by any reasonable protective order for the requested materials and will also agree that the materials first be produced in camera if that will help the Court in its ultimate determination of the issue. The motion to compel should be granted.

Respectfully submitted,

David B. Malik (0023763)  
8437 Mayfield Road, Suite 103  
Chesterland, OH 44026  
(440) 729-8260  
[Dbm50@earthlink.net](mailto:Dbm50@earthlink.net)

/s/Alphonse A. Gerhardstein  
Alphonse A. Gerhardstein (0032053)  
GERHARDSTEIN & BRANCH CO. LPA  
432 Walnut Street, Suite 400  
Cincinnati, Ohio 45202  
(513) 621-9100  
(513) 345-5543 (Fax)  
[agerhardstein@gbfirm.com](mailto:agerhardstein@gbfirm.com)

Daryl T. Dennie (0067609)  
75 Public Square, Suite 1414  
Cleveland, OH 44114  
(216) 622-2700

Dennis Niermann (007988)  
4070 Mayfield Rd  
Cleveland, OH 44121  
(440) 729-8260

[dryldennie@aol.com](mailto:dryldennie@aol.com)

[niermann@en.com](mailto:niermann@en.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 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  
Attorney for Plaintiff