

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**ANGELA LOWE  
Plaintiff,**

**v.**

**CUYAHOGA COUNTY/ BOARD OF  
COMMISIONERS, et al.**

**Defendants.**

**: Case No. 1:08-cv-01339**  
**:**  
**:**  
**: JUDGE: DONALD C. NUGENT**  
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**MOTION TO AMEND COMPLAINT AND TO FILE FOURTH AMENDED  
COMPLAINT AND MEMORANDUM IN SUPPORT**

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## **MOTION**

Pursuant to Fed. R. Civ. P. 15, plaintiff moves this Court for leave to file the Fourth Amended Complaint. The purpose of the amendment is to substitute as Defendants Joe –Anna Cooper and John Richard Janosko for two of the Jane and John Doe Defendants. These two nurses were deliberately indifferent to the serious medical needs of Sean Levert from 6:45 a.m. until 7:15 p.m. on March 30, 2008. A copy of the proposed amended complaint is attached to this motion.

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

This case challenges the denial of medical care to Sean Levert at the Cuyahoga County Jail between March 24, 2008 and his death on March 30, 2008. Plaintiff has identified a number of individuals and two entities who denied Mr. Levert needed medical care in violation of the Eighth Amendment. Doc. 20. Specifically, these defendants seized his valid prescription for Xanax and placed it in the property room on March 24, 2008. At all times after that act, Defendants had a duty to evaluate Mr. Levert for Xanax and resume his prescription in order to avoid foreseeable severe withdrawal symptoms. Defendants failed to resume the Xanax prescription; failed to verify his prescription; failed to assess his need for continued medication; failed to identify his withdrawal symptoms and failed to treat his withdrawal symptoms. These acts caused Mr. Levert severe suffering and injury and ultimately caused his death.<sup>1</sup>

During the last day of his life, March 30, 2008, Mr. Levert was housed in the Mental Health Unit at the jail. Nurses Cooper and Janosko were responsible for Levert's care between

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<sup>1</sup> As a human being, the suffering endured by Mr. Levert was unbearable. See e.g., *Gibson v. Moskowitz*, 523 F.3d 657 (6th Cir. 2008) (\$4.5 million in damages for an inmate who died following several days of distress). As an R & B performer, Mr. Levert's family lost substantial earnings. See report of Harvey Rosen, PhD, attached as Exhibit A-4 to the Declaration of Alphonse A. Gerhardstein.

6:45 a.m. and 7:15 p.m. that day. They were deliberately indifferent to his serious medical needs and negligent in the delivery of care to Mr. Levert. Specifically, they:

- Failed to review his chart even though he was a new patient and the chart was readily available;<sup>2</sup>
- Failed to provide a mental health assessment when he was singled out by the custody staff at approximately 4:30 p.m. as needing evaluation and treatment;<sup>3</sup>
- Failed to measure his vital signs;<sup>4</sup>
- Failed to identify the signs and symptoms of Xanax withdrawal or treat him for the symptoms of Xanax withdrawal;<sup>5</sup>
- Failed to chart the fact that he was decompensating so much that he had to be removed from the pod area and locked in his cell after dinner;<sup>6</sup>
- Failed to report any of these problems to Jane Lawrence when she relieved them at 7:15 p.m. on March 30, 2008.<sup>7</sup>

These two defendants caused Mr. Levert to suffer from Xanax withdrawal without treatment all day on March 30, 2008. They acted negligently and with deliberate indifference to the serious medical needs of Sean Levert. All of these facts are set out in the attached Fourth

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<sup>2</sup> Cooper Depo. at 38:11-15, 48:2-5, 63:7-16 (Doc.80)(Levert was new and she didn't check his chart); Cooper Depo. at 48:2-5; Janosko Depo. at 26:25-28:4.

<sup>3</sup> Cooper Depo. at 35:24-36:4 (officer told us he was crying and requested they investigate); 57:4-18, 38:18-40:1 (did partial mental exam – asked Levert if he was okay, and Levert said yes) (Doc.80).

<sup>4</sup> Depo. Ex. 102, Levert medical chart indicates that vital signs were not checked at all while Cooper and Janosko were on duty (Doc.75-10). See also Dubber Depo. at 61:2-10.

<sup>5</sup> Both nurses concede that Levert was crying. Cooper Depo. 56:13-15 (Doc.80); Janosko Depo. at 42:21-43:18 (Doc.85). Janosko testified that not only did he never see Levert (48:11-14), but also that he was not aware of what the withdrawal symptoms for Xanax were until after Levert passed away. Janosko Depo. at 48:3-10 (Doc.85). Supervisor Ruzicka testified that he expected his nurses to know the signs and symptoms of Xanax withdrawal. Ruzicka Depo. at 9:9-16 (Doc.84). See also Cooper Depo. 27:3-25 for a description of Xanax withdrawal symptoms and treatment (Doc.80).

<sup>6</sup> Nurse Cooper testified that CO Rodriguez told her Levert had been moved to his cell because of this crying but she did not perform a mental health assessment even though his crying was prolonged; was one of the triggers that caused his admission and had been associated with hallucinations. Cooper Depo. at 40:19-25, 57:4-18; (Doc.80). Depo. Ex.64 (Doc.73-7).

<sup>7</sup> Cooper Depo. 43:7-12 (Doc.80); Lawrence Depo. at 108:4-11 (Doc.74); Janosko Depo. at 104:14-106:2 (Doc.85).

Amended Complaint. As set out below, Cooper and Janosko have been named as defendants as soon as their conduct was discovered. The amendment will not prejudice any of the other defendants and it should be allowed.

## II. ARGUMENT

### A. Standard for Determining a Motion to Amend.

Rule 15 of the Federal Rules of Civil Procedure provides that leave of the Court to amend a pleading “shall be freely given when justice so requires.” Reasonable requests to amend should be viewed with favor by the Court. *See* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §1484 (2d ed.) and cases cited therein. Leave to amend should normally be granted unless the moving party is guilty of undue delay, bad faith, dilatory motive, or the proposed amendment will be futile or cause undue prejudice to the opposing party. *Forman v. Davis*, 371 U.S. 178, 182 (1962). For the reasons described below, Plaintiff requests that the Complaint be amended.

### B. The Amendment adding as Defendants Nurses Cooper and Janosko is not the result of undue delay, bad faith, or dilatory motive.

The proposed amendment does not reflect any undue delay or dilatory motive. In her initial Complaint, Plaintiff Angela Lowe sued several Doe defendants.<sup>8</sup> The first round of discovery revealed that several of those Defendants were Midwest Medical Staffing, Inc., Donald Kellon, M.D., L. Alvarado, M.D., Jane Lawrence, Christine Main, and Cynnamon Ali. They were added as defendants in the Third Amended Complaint (Doc. 20). Doe Defendants were maintained in the Third Amended Complaint because discovery had not yet been completed.

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<sup>8</sup> In Plaintiff’s original Complaint, the Defendants were Cuyahoga County, Gerald T. McFaul, and John and Jane Does 1-15 (Doc.1).

At no time in the initial disclosures by Defendants were nurses Cooper and Janosko identified as persons with knowledge about the treatment of Sean Levert in the Cuyahoga County Jail. Nor were these nurses identified in the interrogatory responses. For example, Defendant Dubber answered the interrogatories propounded to Defendant Cuyahoga County.<sup>9</sup> The interrogatories, propounded on November 25, 2008, included three separate inquiries that should have generated responses identifying nurses Cooper and Janosko.<sup>10</sup> Instead, the answers simply referred Plaintiff back to the medical record that did not include any reference to these two nurses:

6. Other than Nurse Jane Lawrence, name each individual and entity responsible for insuring that Sean Levert received Xanax or its equivalent during the period of his incarceration.

**ANSWER TO INTERROGATORY NO.6:**

See Cuyahoga County Corrections Center medical records of Plaintiffs decedent previously produced.

7. Identify each individual responsible for reporting and documenting Sean Levert was on medication and needed alprazolam when he was at the Cuyahoga County Correctional Facility in March 2008.

**ANSWER TO INTERROGATORY NO.7:**

See Cuyahoga County Corrections Center medical records of Plaintiffs decedent previously produced.

8. Identify each individual and entity responsible for maintaining the continuity of care<sup>1</sup> for Sean Levert and the individuals and entities responsible to continue to administer his alprazolam medication inside the Cuyahoga County Correctional Facility.

**ANSWER TO INTERROGATORY NO.8:**

See Cuyahoga County Corrections Center medical records of Plaintiffs decedent and contract between Midwest Medical Staffing, Inc. and Cuyahoga County previously produced.

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<sup>9</sup> See Ex. A-1, Gerhardstein Declaration (attached). Interrogatories were propounded November 25, 2008. Responses were mailed May 8, 2009. See also Depo. Ex.112, Defendants' Initial Disclosures (Doc.85-1).

<sup>10</sup> Ex.A-1, pp.4-5.

See Gerhardstein Declaration, Ex. A-1, County Responses to Interrogatories. Plaintiff's counsel learned about these two nurses through their own ongoing investigation. As soon as they learned about the nurses, both of the nurses were noticed for deposition. Cooper was deposed on February 4, 2010 and Janosko was deposed on February 5, 2010. Transcripts of those depositions and the related exhibits have been filed with the court.<sup>11</sup> Thus the plaintiff engaged in no undue delay in adding these Defendants to the case.

**C. The Amendment Adding as Defendants Nurses Cooper and Janosko is not Futile; Nor will it cause Undue Prejudice to the Other Defendants**

The Amendment adding Nurses Cooper and Janosko as Defendants is not futile. There is ample evidence to support liability against them.<sup>12</sup> Defendant Dr. Kellon framed all the errors by defendants succinctly:

A. My understanding and my impression from this is that what happened is his [Sean Levert's] medication was never verified.

Q. Okay.

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

Q. Which led to?

A. Which led to his having withdrawal, severe, very severe withdrawal and the consequences subsequently led to his death.<sup>13</sup>

Defendants Cooper and Janosko were responsible along with Defendants Lawrence and Kellon for providing medical care during Mr. Levert's last day of life.<sup>14</sup>

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<sup>11</sup> See Cooper Depo. (Doc.80) and Janosko Depo. (Doc.85).

<sup>12</sup> See Dr. Knoll Affidavit supporting the medical malpractice claim (attached to the draft fourth amended complaint).

<sup>13</sup> Kellon Dep. at 98:16-25 (Doc.66).

<sup>14</sup> Plaintiff will show deliberate indifference from the moment all of the defendants seized Mr. Levert's medication without giving him education regarding withdrawal; through their failure to verify his Xanax prescription; their failure to schedule him in a timely manner for an evaluation of his need for Xanax; their failure to follow up his request for Xanax on March 27 (see Doc.71-1, p.2); and their failure to monitor withdrawal symptoms before March 30. These two new defendants did not interact with Mr. Levert until March 30.

## 1. Facts Supporting Deliberate Indifference and Malpractice

### a. Deliberate Indifference early on March 30, 2008

- In the early morning hours of March 30, 2008, Defendant Lawrence received a call that Mr. Levert “was confused” and needed to be seen.<sup>15</sup> Levert was admitted to the mental health unit on the seventh floor of the Jail at or around 3:50 a.m.<sup>16</sup>
- At this time, Lawrence noticed that Levert was experiencing hallucinations and seemed to be confused.<sup>17</sup> Lawrence’s progress note stated “[a]dmit to mental health on observation until evaluated by psychiatrist. Has + auditory hallucinations of hearing his child drowning in water, and his wife’s voice over the speaker.”<sup>18</sup>
- Defendant Jane Lawrence was aware that Levert was on prescription medication, as she had completed a mental health screening form on March 25 and scheduled him to see the psychiatrist.<sup>19</sup>
- At approximately 3:50 a.m. on March 30, Defendant Lawrence conducted a mental health assessment of Levert. However, she failed to consult his chart or other records. She did not question him about prescription medications.<sup>20</sup>
- Defendant Lawrence, while conducting this assessment, partially filled out a Mental Health Assessment Form.<sup>21</sup> However, Defendant Lawrence failed to fill out a portion of drug and alcohol assessment section specifically discussing withdrawal symptoms.<sup>22</sup>

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<sup>15</sup> Depo. Ex. 64, jail log (Doc.73-7); Lawrence Depo. at 39:13-15 (Doc.74).

<sup>16</sup> Lawrence Depo. at 39:18-19, 40:12 (Doc.74); Depo. Ex. 53 (Doc.74-17).

<sup>17</sup> Lawrence Depo. at 39:20-21.

<sup>18</sup> Depo. Ex.53 (Doc.63-15); Lawrence Depo. at 88:4-8.

<sup>19</sup> Depo. Ex.41 (Doc.63-3); Lawrence Depo. at 84:10-12.

<sup>20</sup> Depo. Ex.50 (Doc.63-12); *Id.* at 84:8-17.

<sup>21</sup> Depo. Ex.50 (Doc.63-12).

<sup>22</sup> Depo. Ex.50 (Doc.63-12).

During this assessment, Defendant Lawrence was aware that Levert was suffering from hallucinations.<sup>23</sup>

- Defendants John Richard Janosko and Joe-Anna Cooper relieved Defendant Lawrence at 6:45 a.m. Defendant Lawrence did not inform Defendants Cooper and Janosko of Levert's status, nor that he brought his Xanax prescription with him when he was admitted and that he had not received his medication since then.<sup>24</sup>

**b. Deliberate Indifference 6:45 a.m. – 7:15 p.m., March 30, 2008**

- Defendant Janosko is a Registered Nurse (RN) working in the Mental Health Unit of the Cuyahoga County Correctional Facility.<sup>25</sup> His job title requires that he delegate responsibilities to Licensed Practical Nurses (LPN).<sup>26</sup> Additionally, Defendant Janosko is responsible for interviewing the newly admitted inmates, checking with security officers, and making rounds of the patient cells.<sup>27</sup>
- Defendant Cooper is an LPN in the Mental Health Unit.<sup>28</sup>
- Neither Defendant Cooper, nor Defendant Janosko reviewed Levert's chart or file, despite the fact that he was a newly admitted patient who was experiencing hallucinations,<sup>29</sup> and had been admitted to the Mental Health Unit for "bizarre" behavior.<sup>30</sup>
- At approximately 4:00 p.m., Defendant Cooper was summoned by a correctional officer to Levert's pod. Levert was standing by himself in the middle of the day area crying.

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<sup>23</sup> Lawrence Depo. 94:4-6. (Doc.74)

<sup>24</sup> Janosko Depo. 31:16-32:17.

<sup>25</sup> *Id.* at 6:8-12.

<sup>26</sup> *Id.* at 13:1-4.

<sup>27</sup> *Id.* at 6:8-12, 11:20-13:3.

<sup>28</sup> Cooper Depo. 6:2-13 (Doc.80).

<sup>29</sup> Cooper Depo. 38:11-15, 63:13-16; Janosko Depo. 47:11-19, 61:21-62:6, 87:16-24.

<sup>30</sup> Janosko Depo. 22:11-14. See also Depo. Ex.33 (Doc.71-2, p.5).

Defendant Cooper asked Levert a few questions regarding the potential for harm to self or others, however Defendant Cooper never consulted Levert's chart or medical screening and history information.<sup>31</sup>

- Defendant Cooper conceded that she did not do a full mental status exam.<sup>32</sup> Even though weeping was one of the symptoms that caused Mr. Levert to be admitted to the Mental Health Unit, Defendant Cooper did not read his chart or question Mr. Levert fully about his state of mind.<sup>33</sup> She conceded that her only focus was 'the current situation' of Mr. Levert's uncontrolled crying.<sup>34</sup> She obviously had no concern when patients in her unit would weep. She callously stated in deposition that, "I work in a jail, and if I had a nickel for every man who cried I would be a very rich lady."<sup>35</sup>
- Defendant Cooper did not "chart" this encounter with Levert.<sup>36</sup> Defendant Janosko did not chart or otherwise record any information about Levert.<sup>37</sup>
- Approximately one hour later, Defendant Cooper had another conversation with the correctional officer because Levert was still crying and was visibly upset and distraught.<sup>38</sup>
- Neither Defendant Cooper, nor Defendant Janosko, conducted a proper mental and physical health evaluation of Levert.<sup>39</sup> Instead, Levert was left weeping in his cell because he was "bumming out" the other inmates.<sup>40</sup>

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<sup>31</sup> Cooper Depo. 36:11-37:4, 38:11-40:1, 63:13-16 (Doc.80).

<sup>32</sup> Cooper Dep. 57:4-18. She also conceded that had she read the chart she would have done a more complete exam.  
*Id.*

<sup>33</sup> Cooper 60:19-21, 63:13-16.

<sup>34</sup> *Id.* at 57:9-14.

<sup>35</sup> *Id.* at 63:1-2.

<sup>36</sup> *Id.* 41:10-13.

<sup>37</sup> Janosko Depo. 40:3-9 (Doc.85).

<sup>38</sup> Cooper Depo. 86:24-87:5.

<sup>39</sup> Cooper Depo. 57:4-18 (Doc.80); Janosko Dep. at 27:16-28:4 (Doc.85).

<sup>40</sup> Cooper Depo. 87:3-5.

- Because no proper evaluation of Levert was conducted, and because Defendant Cooper never recorded her interactions with him, none of this information was passed on to Jane Lawrence when she returned for the next shift.<sup>41</sup>

**c. Deliberate Indifference 7:15 p.m. – 11:30 p.m. March 30, 2008**

- On the evening of March 30, when Defendant Lawrence returned to begin her shift, Levert was still exhibiting obvious signs of withdrawal, including auditory and visual hallucinations.<sup>42</sup>
- At approximately 10:52 p.m., Levert was placed in a restraint chair.<sup>43</sup>
- Defendant Lawrence failed to take Levert's vitals at any time prior to or after he was placed in the restraint chair.<sup>44</sup>
- Defendant Lawrence called Defendant Dr. Kellon. Defendant Kellon ordered that an injection of Haldol, Ativan, and Benadryl be given to Levert. Defendant Lawrence failed to administer this injection.<sup>45</sup>
- Levert was placed in an observation room, still strapped into the restraint chair, facing away from the door. Consequently, no one was able to properly observe Levert.<sup>46</sup>
- Levert died in the restraint chair. Alprazolam (Xanax) withdrawal was a cause of death.<sup>47</sup>

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<sup>41</sup> See sources cited *Supra* notes 3,7.

<sup>42</sup> Mr. Levert believed he could see his mother and son were being killed. Depo. Ex.36 (Doc.72-3). See also Depo. Ex.34 at time markers 8:15 p.m. and 8:51 p.m. (Doc.72-1, p.4). Mr. Levert's condition continued to worsen. Just prior to being placed in the restraint chair, the post officer's log noted that at 10:43 p.m. Levert was yelling and punching /stomping on the floor. See Depo. Ex. 34 (Doc.72-1, p.5). See also Depo. Ex.26, Incident Response Report (Doc.65-16).

<sup>43</sup> Depo. Ex.57, Restraint Chair Order (Doc.63-19); Depo. Ex. 38, Restraint Chair Log (Doc.72-5).

<sup>44</sup> Dubber Depo. at 61:2-10 (Doc.63); a review of Mr. Levert's medical chart indicates that vital signs were not checked at all while Cooper and Janosko were on duty (Doc.75-10).

<sup>45</sup> Lawrence Depo. at 112:7-13; 161:3-162:21 (Doc.74). See also Depo. Ex. 102 (Doc.75-10, p.18).

<sup>46</sup> Effinger Depo. at 51:14-52:7; 94:6-23 (Doc.73)

<sup>47</sup> Depo. Ex.77, Inventory (Doc.62-11, p.3); Gerhardstein Declaration, Ex. A- 2, Wecht expert report.

## **2. Cooper and Janosko Were Deliberately Indifferent to the Serious Medical Need 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. A claim of deliberate indifference under the Eighth Amendment has both objective and subjective components. *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001). The objective component is satisfied where a prisoner shows that "the medical need at issue is 'sufficiently serious.'" *Id.* at 702-03 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The subjective component is satisfied when the plaintiff alleges facts "which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Id.* at 703.

### **a. The evidence establishes that Levert had a serious medical need, and that his medical need was obvious even to a layperson.**

The Sixth Circuit has held that a medical need is sufficiently serious where the inmate is "incarcerated under conditions posing a substantial risk of serious harm," such that the denial of treatment would result in the "unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 896 (6th Cir. 2004) (emphasis omitted) (quoting *Farmer*, 511 U.S. at 834). A medical need is sufficiently serious where it involves a life-threatening condition, or in situations where "it is apparent that delay would detrimentally exacerbate the medical problem." *Blackmore*, 390 F.3d at 897 (finding "classic" signs of appendicitis made seriousness of arrestee's medical need sufficiently obvious). Further, a medical need meets the objective component where it has been "diagnosed by a

physician as mandating treatment,” or where it is obvious that the individual requires a doctor’s attention. *Id.* at 897 (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990)).

Where the seriousness of the need for medical care is "obvious even to a lay person, the constitutional violation may arise.” *Blackmore*, 390 F.3d at 900. “This violation is not premised upon the ‘detrimental effect’ of the delay, but rather that the delay alone in providing medical care creates a substantial risk of serious harm.” *Id.* Where this “obviousness” standard for determining serious medical need applies, “it is sufficient to show that [the Plaintiff] actually experienced the need for medical treatment, and that need was not addressed within a reasonable time frame.” *Id.*

The need for properly prescribed medication is a serious medical need, particularly where the failure to administer the medication may result in serious injury, illness or death. *Hill v. Marshall*, 962 F.2d 1209, 1214 (6th Cir. 1992). In *Hill*, the plaintiff filed an action under 42 U.S.C. § 1983 claiming Eighth Amendment violations stemming from defendants’ failure to provide him with his medication, which was prescribed to prevent him from contracting tuberculosis. *Id.* at 1210-11. While incarcerated at the Hamilton County Jail, Plaintiff tested positive for the tuberculin bacteria. This meant that he did not actually have tuberculosis, but that he was at risk of contracting it because the bacteria was already in his system. Expert testimony presented at trial indicated that, though the medication could prevent contraction of the disease, when the medication had been started and then was stopped, or administered irregularly, the plaintiff’s risk of contracting the disease was actually increased. *Id.* at 1211. The Sixth Circuit upheld a jury finding that the prison official-defendant’s failure to provide the plaintiff’s medication was “so likely to result in the violation of the inmates’ constitutional rights that we

find that he was deliberately indifferent to their serious medical needs.” *Id.* at 1214. The Sixth Circuit upheld awards of \$95,000 in compensatory damages, and \$900,000 in punitive damages for the mental anguish experienced from failing to receive this prescribed medication. *Id.* at 1215-17.

In *Hill*, the prescribed medication was intended to prevent a disease from developing. It is not surprising, therefore, that other cases hold that terminating medication or drugs and then failing to treat the withdrawal symptoms is also a serious medical need under the Eighth Amendment. *Bertl v. City of Westland*, No. 07-2547, 2009 WL 247907 (6th Cir. 2009) (obvious signs of alcohol withdrawal (delirium tremens) constitutes a serious medical need) (citing *Speers v. County of Berrien*, 196 F. App’x 390 (6th Cir. 2006) (alcohol withdrawal)); *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); *Gonzalez v. Cecil Cty. Maryland*, 221 F. Supp. 2d 611, 616 (D. Md. 2001) (heroin withdrawal)

It logically follows that, in cases where withdrawal symptoms occur *as a result* of failure to provide properly prescribed medication, courts have found that the medical need in question was sufficiently serious. In *Clutters v. Sexton*, the plaintiff was prescribed Oxycontin and Oxycodone to manage pain after a serious surgery. 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 noted that a serious medical need is one “that has been

diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* at \*7 (citing *Blackmore*, 390 F.3d at 891). In that case since the plaintiff had been prescribed the Oxycontin by his physician, he had a serious medical need for that medication. *Id.*

Similarly, in *Bertl*, the decedent, Larry Bertl, was arrested for driving while intoxicated. *Bertl*, 2009 WL 247907, at \*1. At his arraignment, Bertl informed the court of that he had not taken his prescription for Phenobarbitol, and court observed that Bertl appeared to be suffering from delirium tremens, or alcohol withdrawal symptoms. *Id.* While being transferred to another police department the next day, Bertl became increasingly delusional. *Id.* Other prisoners stated that Bertl appeared unconscious and nonresponsive and that he shook uncontrollably. *Id.* The police officers noticed Bertl's condition, and called for medical assistance. *Id.* The Sixth Circuit affirmed the district court's denial of summary judgment, concluding that Bertl's medical condition had satisfied the objective component of the deliberate indifference standard, reasoning that lay people had recognized his need for medical assistance. *Id.* at \*5.

In the case at bar, Sean Levert was diagnosed with and suffered from anxiety disorder, a serious psychological condition. To manage his anxiety disorder, Levert was prescribed six milligrams of Xanax per day. Like the plaintiff in *Hill*, Levert brought his prescription with him to the facility. But Levert was denied his validly prescribed Xanax for six days, ultimately resulting in his death on March 30, 2008. Like the plaintiff in *Clutters*, and the decedents in *Blackmore* and *Bertl*, Levert suffered from "classic" benzodiazepine withdrawal symptoms during the six days he was denied Xanax by the Jail, including hallucinations, anxiety, agitation and yelling.<sup>48</sup> The severity of Levert's withdrawal symptoms made it obvious to lay persons that

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<sup>48</sup> Lawrence Depo 38:7-11; Cooper 27:3-22. A layperson, his cellmate, Bart Roland, noticed withdrawal symptoms as early as March 28<sup>th</sup>. Two other lay persons also notice the symptoms. Depo. Ex.33, Sheriff's Investigation

he had a serious medical need requiring the attention of a doctor, as evidenced by the observations of the officers that led Levert to be admitted to the mental health unit.<sup>49</sup>

**b. Nurses Cooper and Janosko knew of the substantial risk to Levert and then disregarded that risk**

While negligence or simple misdiagnosis does not suffice to show deliberate indifference, the plaintiff is not required to show that the official acted with the purpose of causing the harm in question. *Farmer*, 511 U.S. at 835. Deliberate indifference does not require the plaintiff “to demonstrate that the officials had a conscious intent to inflict pain upon the Plaintiff.” *Owensby v. City of Cincinnati*, 385 F. Supp. 2d 626 (S.D. Ohio 2004), *aff’d Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005) (delay of medical care immediately after arrest). Rather, deliberate indifference merely requires that the official or medical professional have knowledge of the plaintiff’s serious needs, or knowledge of circumstances “clearly indicating the existence of such needs.” *Horn v. Madison Cty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994) (holding that psychological needs are serious medical needs and deliberate indifference to those needs may be established without evidence of conscious effort to inflict pain). Deliberate indifference to a serious risk is the equivalent of recklessly disregarding that risk. *Farmer*, 511 U.S. at 838 (holding that the “subjective recklessness” standard of criminal law is appropriate for determining whether officials acted with deliberate indifference). “[I]t is enough that the official acted or failed to act despite his knowledge of substantial risk of serious harm.” *Id.* at 842.

A fact-finder may conclude that a state actor knew of a substantial risk from “the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842. The Supreme Court noted in *Farmer*

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(Doc.71-2, p.2); Gerhardstein Declaration Exs.A-6 and A-7, Roland Affidavit, Cottingham Affidavit. Defendant Cynnamon Ali also became aware on March 27<sup>th</sup> that Mr. Levert was in need of his blood pressure Medication. See Depo. Ex. 32, Pod Officer Log (Doc.71-1, p.2), Price Depo. at 17:3-18:16 (Doc.71).

<sup>49</sup> The pod officers on March 30 eventually requested that Sean Levert be transferred from the general population to the mental health unit. Depo. Ex.63 (Doc.73-6). They noted that he started to talk about his son falling into the pool outside of his cell window.

that, where the risk in question was “expressly noted by prison officials in the past” and where the circumstances “suggest that the defendant-official being sued had been exposed to information concerning the risk and thus ‘must have known’ about it,” a fact-finder could properly conclude that the defendant had actual knowledge of the risk. *Id.*; *see also Comstock*, 273 F.3d at 703 (noting permissibility for courts to infer from circumstantial evidence that the official had knowledge of the risk). “Officials, of course, do not readily admit this subjective component, so ‘it [is] permissible for reviewing courts to infer from circumstantial evidence that a prison official had the requisite knowledge’” *Phillips v. Roane Cty., Tenn.*, 534 F.3d 531, 540 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 836).

Courts have also held that “grossly incompetent or inadequate care,” failure to respond to a known medical problem, and a doctor’s decision to take an “easier and less efficacious course of treatment” can constitute deliberate indifference. *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989) (affirming denial of summary judgment to defendant on qualified immunity grounds where defendants, a psychiatrist and a physician, took and kept plaintiff off of his psychiatric medications despite fact that plaintiff harmed himself on several occasions). For instance, where a medical professional’s review of an inmate’s status is “grossly inadequate,” and where such professional wholly fails to refer to the patient’s medical history and the results of prior evaluations, deliberate indifference may be found. *Comstock*, 273 F.3d at 710-11 (finding that prison psychiatrist was deliberately indifferent where he failed to review inmate’s medical and psychological records before determining that inmate was no longer suicidal and where inmate subsequently killed himself).

In *Gonzalez v. Cecil County, Maryland*, the district court found that, where the plaintiff suffered from acute heroin withdrawal symptoms, the administration of simple remedies by

nurses while failing to treat the pulmonary distress and pneumonia caused by the withdrawal, was inappropriate and may well constitute deliberate indifference. *Gonzalez v. Cecil County, Maryland*, 221 F.Supp.2d 611, 616 (D.Md. 2002). This is also so where the state actor provides no treatment whatsoever. *Id.* The court went on to deny qualified immunity to the nurses both because the right to adequate medical treatment was clearly established and because an assertion that they were “just following orders” was insufficient. *Id.* at 617.

The Seventh Circuit has noted that an official whose responsibility it is to record incidents regarding inmates, and to personally assess an inmate’s illness, may be deliberately indifferent where she fails to do so. *Davis v. Carter*, 452 F.3d 686, 696 (7th Cir. 2006). In *Davis*, the plaintiff was incarcerated and was suffering from heroin withdrawal. The court noted that an officer who was charged by policy to contact paramedics when an emergency situation arose may have been deliberately indifferent to the plaintiff’s rights when he delegated that responsibility to someone else and the paramedics never arrived. *Id.* Further, the court held that a sergeant who was responsible for documenting such incidents may have been deliberately indifferent where he failed to do so. *Id.*

The conduct of the two nurses in this case is similar to that of the psychologist in *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001). In *Comstock*, the decedent was transferred from the county jail to a reception and guidance center. After arriving at the center, the decedent was observed to be “acting despondently” in his cell and was referred to Defendant McCrary for a psychological evaluation. *Comstock*, 273 F.3d at 698. The notes McCrary took during the evaluation indicated that the decedent was feeling suicidal, but that “lethality appear[ed] to be moderate.” *Id.* McCrary then put the decedent on suicide watch. *Id.* The next day, a physician conducted a physical examination, noting that the decedent was concerned, and

had thoughts of dying because other inmates had threatened to kill him. *Id.* Later that morning, Defendant McCrary interviewed the decedent again and concluded that he was no longer suicidal. The decedent was taken off suicide watch and returned to his cell. He committed suicide that afternoon. *Id.*

Defendant McCrary failed to examine the decedent's prior history, the results of the examination with the physician, and failed to consult others who had interviewed the decedent or the guards who looked over him on a daily basis. *Id.* at 706. Several experts testified that such practices were "routine," and that McCrary's interview was "grossly inadequate" because he failed to take such steps. *Id.* at 708. The Sixth Circuit concluded that the plaintiff had produced sufficient evidence to show that defendant McCrary's actions constituted deliberate indifference to the risk that the decedent would harm himself when presented with the opportunity. *Id.* at 711.<sup>50</sup>

In the case at bar, Plaintiff alleges that nurses Cooper and Janosko were aware of Sean Levert's serious medical condition, and deliberately ignored that risk. They failed to review Levert's chart even though he was a new patient,<sup>51</sup> failed to provide a mental health assessment when he was singled out by the custody staff as needing evaluation and treatment,<sup>52</sup> failed to measure his vital signs, failed to identify the signs and symptoms of Xanax withdrawal or treat him for the symptoms of Xanax withdrawal, and failed to chart the fact that he was

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<sup>50</sup> *But see Comstock v. McCrary II*, 142 Fed. App'x. 242 (6th Cir. 2005), *abrogated on other grounds by Allison v. City of E. Lansing*, 484 F.3d 874 (6th Cir. 2007). On remand, the jury returned a verdict in favor of the defendant, The district court denied plaintiff's motion for judgment as a matter of law. The Sixth Circuit affirmed, holding that the issue was one for the jury. *Id.* at 243. However, the jury verdict, and the district court's decision upholding it, were based in large part on the fact that McCrary performed a mental assessment test after speaking with the decedent, and only after that assessment concluded that he was no longer at risk of suicide. *Id.* In contrast, Defendant Cooper admitted that her assessment of Levert was incomplete. Cooper Depo. at 57:4-18 (Doc.80). Further, neither Cooper nor Janosko ever read Levert's file and they admit that had they known of his history with Xanax they would have called the physician immediately and started Mr. Levert on a Benzodiazepene taper. Cooper Depo. at 59:24-60:15; Janosko Depo. at. 32:13-33:13. See also, Dubber Depo. at 124:21-125:8.

<sup>51</sup> See sources cited *Supra* note 2

<sup>52</sup> See sources cited *Supra* note 3

decompensating so much that he had to be removed from the pod area and locked in his cell after dinner,<sup>53</sup> and failed to report any of these problems to Jane Lawrence when she relieved them at 7:15 p.m. on March 30, 2008.<sup>54</sup>

Defendant Janosko is responsible for interviewing inmates in the Mental Health Unit,<sup>55</sup> however, despite the fact that Levert had just been admitted to the ward for “bizarre” behavior, including hallucinations and physical outbursts, mere hours before the beginning of Defendant Janosko’s shift, Defendant Janosko never once talked to Levert.<sup>56</sup> He never conducted any interview nor any physical or psychological assessment.<sup>57</sup> Likewise, Defendant Cooper did not initiate any kind of assessment of Levert until she was summoned by another prison employee because Levert was crying and was clearly in distress. Despite these signs of trouble, neither Defendant Janosko nor Defendant Cooper so much as opened Levert’s file.<sup>58</sup> Further, despite seeing Levert in distress, and despite the knowledge that Levert was eventually locked in his cell because he would not stop crying, neither defendant took any steps to record this behavior. Defendant Cooper did not “chart” the incident,<sup>59</sup> nor did she report it to Defendant Lawrence that evening when she returned for her shift.<sup>60</sup> Defendant Janosko was aware of the incident and likewise did nothing to take note of it. As a direct and proximate result, Sean Levert suffered for hours and died of withdrawal from Xanax later that evening. These actions by defendants constitute deliberate indifference to an obvious and serious medical need and therefore were violative of Sean Levert’s Eighth Amendment rights.

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<sup>53</sup> See sources cited *Supra* notes 5-6

<sup>54</sup> See sources cited *Supra* note 7

<sup>55</sup> Janosko Depo. at 13:1-4.

<sup>56</sup> *Id.* at 27:16-25 (Doc.85).

<sup>57</sup> *Id.*

<sup>58</sup> Cooper Depo. 38:11-15; Janosko Depo. 47:11-19, 61:21-62:1.

<sup>59</sup> Cooper Depo. 41:10-13.

<sup>60</sup> *Id.* at 41:10-13.

Consequently, because Defendants Janosko and Cooper's actions constituted deliberate indifference to Sean Levert's serious medical needs, their actions, along with the actions of the other defendants to this action, violated Levert's rights under the Eighth Amendment. Therefore, the claims against them are not futile. The motion to amend the complaint should be granted and the Fourth Amended complaint should be accepted for filing.

### **3. Claims Against Cooper and Janosko are Timely Filed.**

The amended complaint is filed before the two year statute of limitations for Eighth Amendment has expired. Thus the civil rights claim is timely. The medical malpractice claim has a one year statute. The amendment is not futile with respect to the one year statute as plaintiff contends that it relates back to timely filing of the third amended complaint. Fed. R. Civ. P. 15(c)(1)(C) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when ... the amendment changes the party or the naming of a party against whom a claim is asserted, if [the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading] and if, within [120 days], the party to brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Factors that a Court considers when determining whether a defendant has received constructive notice "include whether: 1) the new defendant allegedly committed the unconstitutional acts; 2) the new defendant worked for the original defendants; 3) the new and original defendants are represented by the same counsel; 4) the plaintiff is incarcerated; and 5) the plaintiff is proceeding pro se." *See Berndt v. State of Tenn.* 796 F.2d 879 (6th Cir. 1986) (allegations of denial of medical care and excessive force reveal sufficient notice to institutional staff to permit amendment to name

Defendants). In this case, these nurses had constructive notice of the suit.<sup>61</sup> They fit nearly all of the factors set out above. First, as previously reviewed, nurses Cooper and Janosko committed the unconstitutional acts alleged against them. Second, they work for Christine Dubber and the County,<sup>62</sup> Defendants that were earlier named in this case.<sup>63</sup> Third, the new and original county defendants are represented by the same counsel.<sup>64</sup> Fourth, Mr. Levert was incarcerated and, more importantly, was killed as a result of the Defendants' conduct and has been unavailable to help with discovery. All facts are controlled by the Defendants.

In any event, on the facts of this case the statute should be tolled.<sup>65</sup> In a similar situation, the Sixth Circuit vacated a district court order refusing to permit an amendment to the pleadings. *Friedmann v. Campbell*, 202 F.3d 268, 1999 WL 1045281 (6th Cir. 1999) (unpublished table decision). In *Friedman*, the plaintiff inmate filed a civil rights claim *pro se*. He named "John Doe" defendants. *Id.* at \*1. He filed timely discovery requests seeking the names of the Doe defendants but defendants delayed their response until after the statute of limitations had run. The Court noted that the "doctrine of equitable tolling permits a plaintiff to sue after the statute of limitations has expired if, through no fault or lack of diligence on his part, he was unable to sue before, even though the defendant took no active steps to prevent him from suing." *Id.* at \*2 (citing *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548) (7th Cir. 1996)). In this case Cooper and Janosko were never identified in response to discovery requests and they certainly should have been identified. Plaintiff's own investigation generated these candidates for deposition. This motion has been filed as soon as practicable after Cooper and Janosko were

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<sup>61</sup> Cooper Depo 58:11-59:4 (spoke to Defendant Lawrence about Lawrence's deposition).

<sup>62</sup> Cooper Depo 5:22-6:7, 7:18-20; Janosko Depo. at 6:8-12, 10:19-25.

<sup>63</sup> Defendant Cuyahoga County was an originally named defendant, Doc. 1, and Defendant Dubber was named a defendant in the Third Amended Complaint, Doc. 20.

<sup>64</sup> Janosko also retained an additional attorney to defend his deposition.

<sup>65</sup> Tolling is a factual issue that should be determined by a jury.

deposed. The statute of limitations should be tolled and relate back to the third amended complaint.

### **III. Conclusion**

The Motion to Amend should be granted and the Fourth Amended Complaint accepted for filing.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 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.

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