UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ATRA FLEMONS, Personal Representative of the ESTATE OF KAMEL UMAR,

Plaintiff,

v.

Case No. 09-10606
Honorable Julian Abele Cook, Jr.

WAYNE COUNTY, OFFICER MICHAEL NOE, OFFICER CHRISTOPHER PAULSEN, OFFICER JOHN PIETZ, NURSE CAROLYN DAVIS, NURSE SHEVON FOWLER, NURSE LAURA WASHINGTON, NURSE WILMA WILLIS,

Defendants.

ORDER

The controversy in this litigation relates to the health care treatment that was provided to the Plaintiff's now-deceased husband, Kamel Umar, while he was a pretrial detainee at the Wayne County Jail in Detroit, Michigan.[1] The amended complaint, as filed by Atra Flemons, who serves as the personal representative for her husband's estate, advances three claims based on 42 U.S.C. § 1983; namely, (1) the deprivation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution, (2) the violation of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and (3) municipal liability against Wayne County for failure to act with responsibility to prevent these alleged violations of Umar's

[1]The Defendants are the Wayne County government in Michigan and seven individuals who worked as employees within its jail facility; namely, security officers Michael Noe, Christopher Paulsen, and John Pietz; and nurses Carolyn Davis, Shevon Fowler, Laura Washington, and Wilma Willis.

constitutional rights while he was a detainee in their custody. The amended complaint also includes two state-law claims; namely, (1) wrongful death and (2) gross negligence. This Court has subject matter jurisdiction over the § 1983 claims pursuant to 28 U.S.C. § 1331, and over the state law claims pursuant to 28 U.S.C. § 1367.

Currently before the Court is the Defendants' motion for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) and/or for the entry of a summary judgment as authorized by Fed. R. Civ. P. 56.

I.

Umar was booked into the Wayne County Jail as a federal pretrial detainee[2] during the late afternoon hours on July 16, 2008. He was transported by ambulance to the Detroit Receiving Hospital four days later, where he was pronounced dead less than two hours after his arrival. It is Flemons' contention that her husband's death was due to the Defendants' deliberate indifference and gross negligence with regard to his serious medical needs relating to the monitoring and the treatment of his insulin-dependent diabetes.[3] The Defendants dispute these claims, contending that

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[2]On the basis of an intergovernmental agreement, the Wayne County jail houses some federal detainees on behalf of the United States Marshals Service.

[3]The Defendants assert that Umar was a non-insulin-dependent diabetic, but - at a minimum - there is a genuine issue of a material fact as to whether this is an accurate statement. This assertion is directly contradicted by numerous pieces of evidence in the record and by the statements of the Defendants themselves. (*See, e.g.*, Fowler Dep. 25:10-20, 36:9-12, Copy at Ex. 29 to Defs.' Mot. for Summ. J.; Stark Report at 2, Copy at Supp. Exs. to Ex. HH of Pl.'s Resp. to Defs.' Mot. for Summ. J., ECF 59); Request for Off-Site Health Services Form, Copy at Ex. 3, Bates No. 44, to Defs.' Mot. for Summ. J. (noting diagnosis of insulin-dependent diabetes mellitus ("IDDM")). Moreover, once Umar's diabetes was discovered, he was placed on a diabetes protocol which was consistent with the Wayne County Jail's diabetic treatment protocol for insulin-dependent diabetics and inconsistent with its protocol for non-insulin-dependent diabetics. (*Compare* Wayne County Jail Health Services Department Policy Directive: Diabetic Treatment Protocol Insulin and Non-Insulin Dependent ¶¶ II.E, II.F, Copy at Ex. L to Pl.'s Resp., *with* Diabetic Treatment Protocol for Kamel Umar, Copy at Ex. 3, Bates 22, to Defs.' Mot. for Summ. J.). In support of their position, the Defendants proffer (1) the district court

(1) Umar received proper medical care while he was under their care, and (2) his death was attributed to natural causes that were unrelated to their treatment of his diabetic condition.

As an initial matter, the Court notes that the parties dispute the completeness, accuracy, and veracity of the various medical records that were created by the jail staff. The Defendants have acknowledged that some of Umar's medical records are now missing.[4] However, Flemons contends that other pertinent records have been intentionally altered by the Defendants in an effort to misrepresent the quality of the care and medical treatment that was administered to Umar. The Court will address those discrepancies where relevant.

Having found the parties' chronological recitations of the relevant facts to be helpful, the Court will also adopt this format. This summary is based upon the following types of documents in the record: (1) "*post notes*" are notations by officers in a computerized system which records, among other things, the movement of an inmate from one location to another; (2) the "*log book*" is a notebook in which nurses make notes regarding such matters as staffing issues, inmate hospital visits, clinic inventory, and (with apparent inconsistency among nurses) significant inmate medical events; (3) the "*medication flow sheet*" is a document that reflects the dates and times when various

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detention order, where the court noted in passing, under the heading of "history and characteristics of the defendant," that Umar "is a non-insulin dependent diabetic" (*see* Detention Order, Copy at Ex. P to Pl.'s Resp.), and (2) the conclusory affidavit, which was filed on the day prior to the motion hearing, of the medical director of the Wayne County Jail as the only contrary evidence. This evidence does not establish the absence of a genuine issue of a material fact, especially in light of the statements of, and records created by, the nurses who actually provided Umar's medical care. In any event, as will be discussed *infra*, the fact that the Defendants believed that Umar suffered from insulin-dependent diabetes is relevant to determining whether they were subjectively aware that he was suffering from a serious medical problem while in their custody.

[4](*See, e.g.*, Washington Dep. 17:20-18:10, Copy at Ex. 10 to Defs.' Mot. for Summ. J.).

prescribed medications (not including insulin) are administered to inmates; (4) the "*insulin record*" tracks blood sugar levels, insulin administration, diet, and associated notes for diabetic inmates; and (5) the "*progress report*" is a patient log in which nurses record the inmates' subjective description of symptoms, the nurse's objective observations, an assessment of the issue, and a plan for treatment (so-called "SOAP notes"), as well as other miscellaneous notations.

July 16, 2008

- 1627:[5] Umar booked into the Wayne County Jail; intake tuberculosis test administered.
- Unknown: Intake medical questionnaire completed; indicates that Umar stated that he was not diabetic.

July 17, 2008

- Unknown: Umar made a telephone call to his wife during which he repeatedly stated that he was "fine."
- Approx. 0130: Initial health assessment administered by Thomas; Umar disclosed that he was diabetic. This record indicates that Umar stated that he had not taken any pills or insulin in over one year, although this notation appears to be in different handwriting than the rest of the form. Standard diabetes protocol started.[6] Progress report and insulin log reflect that blood sugar was 389 and 10 units of regular insulin were given by Thomas. Progress report indicates that Umar denied taking any medications in the past year. Thomas called Dr. Baruti for orders regarding specialized diabetes protocol.

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[5]In keeping with customary medical reporting and with the parties' own time designations, and to avoid confusion or uncertainty, the Court will record all times in military format.

[6]The standard protocol automatically applies to all diabetic inmates until more specific orders can be prescribed by a physician. The protocol calls for twice daily testing of blood sugar and a specialized 2,200 calorie diabetic diet. If an inmate's blood sugar exceeds 300, the protocol calls for the administration of 10 units of regular insulin and a re-check of blood sugar after 30 minutes. If the second results still exceed 300, the inmate's ketones are checked and the physician is notified of the results of both tests. Ketones are made when the body breaks down fat - rather than carbohydrates - for energy, and their presence can indicate diabetic ketoacidosis, a dangerous and potentially life-threatening condition.

- 0200: Dr. Baruti prescribed Catapres (every 8 hours) for high blood pressure; first dose given.[7] Insulin record reflects that blood sugar was re-checked by Thomas and was 323; no additional insulin given; ketones test negative.

- 0500: Insulin record reflects that blood sugar was checked by Willis and was 73, no insulin was administered, and breakfast was given.[8]

- 1600: Catapres administered by Thomas. The Defendants state that Umar's blood sugar level was checked at this time and was within normal levels, but the insulin log contains no such notation.

- 1820: Insulin record reflects that blood sugar was checked by Nurse Blake (not a Defendant) and was 286, no insulin was given, and the 2,200 calorie diet was given.

July 18, 2008

- 2400: Catapres given.[9]

- 0140: Post notes indicate that Umar's status was changed from "In" to "Registry."

- 0515: Insulin log indicates that Umar's blood sugar count, which was tested by Willis, registered at 482; he was given 10 units of regular insulin and his diet is noted as "BRK." The insulin log does not indicate (and Willis testified that she did not know) the time when this occurred. However, a progress report indicates that Umar was seen by Thomas in the clinic at 0515 for high blood sugar (noting the 482 reading obtained by Willis); ketones were negative. Umar reported that he had eaten a high-sugar cereal and orange juice. This visit is not noted in the log book. Notwithstanding the protocol's requirement to re-check the blood sugar level 30 minutes after a reading higher than 300, Umar's blood sugar was not tested for the next 24 hours.

- Umar was not seen during the balance of this day because he was in the custody of the U.S.

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[7]Flemons argues that the record does not support the Defendants' claim that Catapres was given to her husband at this time. However, she appears to have overlooked the notation at the bottom of the chart which indicates that this first dose was given at 0200, with subsequent doses to be followed on a midnight, 0800, and 1600 schedule.

[8]It is not clear if Umar received the specialized diabetic meal or the standard breakfast. The record simply indicates "BRK," as contrasted from the specific notation made at other times that the 2,200 calorie diet was given. However, the record also indicates that the nursing staff would not necessarily be aware of what food was given to the inmates, as they are uninvolved in that process.

[9]The Defendants state that this occurred at 0200, but the medication flow sheet indicates that this dose was given at 2400.

Marshals for a court appearance. The Defendants acknowledge that there was neither an existing policy nor a procedure in place whereby an inmate's health and medication needs could be communicated to the U.S. Marshals. An attempt to see Umar was made during the nurses' rounds at 1715, but he had not yet returned to the jail. The medication flow sheet appears to show that the 0800 and 1600 doses of Catapres were noted as having been given, and then the notations were crossed out and "CRT" (to indicate court) was written on top. Post notes reflect that his status was changed from "registry" to "in module" at 1730, and that he had been moved to new housing at 2117.

- Approximately 2200: Umar made a telephone call to his uncle, whom he asked for assistance in making arrangements to retain legal counsel. He did not mention any health concerns.

July 19, 2008

- 2400: Catapres given by Willis.

- 0530: Insulin record indicates that Umar's blood sugar reading was 397 and 10 units of regular insulin were administered by Willis. His diet was noted as "BRK." The insulin record also indicates that the charge nurse was notified of his results, and that new orders were subsequently received. The record does not reflect any re-check of his blood sugar after 30 minutes.

- 0800: Catapres given by Thomas.

- 1600: Catapres given by Davis. Insulin log indicates that Umar's blood sugar level was 267; 6 units of Humulin N and 4 units of regular insulin were given by Davis. [Note: Flemons claims that this entry on the insulin log is fraudulent.]

July 20, 2008

- 2400: Catapres given by Willis.

- 0600: Washington received a new diabetes protocol by telephone from Dr. Weekes.[10] This new order, which superceded the standard diabetes protocol, called for (1) 6 units of Humulin N to be given each morning and evening regardless of blood sugar levels; (2) additional regular

[10]There was some confusion as to whether this order was received on the morning of July 19th or July 20th. However, Washington unambiguously testified that she (1) received this order on July 20th at 0600 and (2) wrote July 19th in the records because her shift began at 1100 on July 19th and ran through 0730 on the following day. She stated that it is common practice among the nursing staff to record all events that occur during the overnight shift based upon the date on which the shift began. Washington also noted that she did not work on the July 18th-July 19th overnight shift. Thus, it is her belief that she would not have been on duty at the jail to receive such an order at 0600 on July 19th. The Defendants agree that this order was received on July 20th rather than on July 19th. (*See* Defs.' Reply at 3).

insulin to be given, as needed, based upon the blood sugar level (e.g., 4 units if the level is between 251 and 300, 6 units if it is between 301 and 350, etc.); (3) 2,600 calorie diabetic diet with snack; and (4) blood sugar to be checked twice a day.

- 0614: Post notes indicate that Umar and another inmate, Travis Alford, were taken to the clinic and returned to their ward at 0637. A log book entry at 0600 by Washington indicates that a doctor, who was notified about these two men, issued new orders for treatment. [Note: Flemons alleges that this entry in the log book is fraudulent.] Washington testified that she (1) was "absolutely certain" of having seen him in the clinic at this time, and (2) has a "strong recollection" that a progress report was written by her. However, there is no such report in the record. Moreover, the insulin record contains no notation at this time,[11] and there is no evidence that his blood sugar was tested or insulin was administered.

- 0800: Catapres given.

- 1317: Post notes indicate that Umar was again taken to the medical clinic at this time, and returned to his ward at 1401. The insulin record indicates that his blood sugar level was 344 and that he was given 6 units of regular insulin by Blake - in contravention of the new protocol, which called for 6 units of Humulin N and 6 units of regular insulin.

- 1600: Catapres given by Davis. Insulin record indicates that Umar's blood sugar level was 280, and that Davis administered 6 units of Humulin N and 4 units of regular insulin. [Note: Flemons insists that this insulin log entry is fraudulent.]

- 1616: Post notes indicate Umar was taken to medical at 1616 and returned to his ward at 1645. Progress report by Fowler at 1645 indicates that Umar was seen at the clinic, complaining of feeling weak and having something wrong with his blood sugar level. His blood sugar was not re-tested, but Fowler noted that the diabetic nurse had obtained a reading of 280 on rounds. [Note: No notation of this visit is found in the log book.]

- 1730: Post notes indicate that Umar was taken to medical at 1730, and did not return thereafter to his ward. Peitz indicated that Umar had difficulty walking. [Note: No notation was made in the log book at this time.]

- 1808: Progress report by Nurse McCaa (not a named Defendant) indicates that Umar continued to complain of generalized weakness. His blood sugar was 253 and no insulin was given. He was kept in the clinic for evaluation.

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[11]Washington stated that the absence of any notation on the insulin log was justified because the nurse who was on rounds during this period of time had the log in her possession. Thus, Washington explains that, under this circumstance, she was unable to make any written notation at that time.

- 1820: Umar's vital signs were taken by McCaa.
- 1840: McCaa noted that Umar was sleeping and was easy to rouse. She also noted that Umar stated that he was not in pain or discomfort but was still feeling weak.
- 1900: Progress report by McCaa indicates that Umar suddenly leapt off the examination table and began removing his clothing. He was sweating profusely, seemed confused, and was not responding to verbal stimuli. His blood pressure was 213/110 and blood sugar level was 250. McCaa called Dr. Weekes, who issued an order to transfer Umar to the Detroit Receiving Hospital. These events are noted in the log book, but there is no corresponding blood sugar entry on the insulin log.[12]
- 1920: Ambulance arrived. The run sheet from the ambulance indicates that it left the jail with Umar at 1953 and arrived at the hospital at 1959.
- 2003: Emergency treatment note indicates that, upon arrival, Umar's blood pressure was 198/108 and he appeared acutely agitated. His heartbeat was somewhat irregular.
- 2007: Blood sugar level was 369.
- 2017: Blood sugar level was 445.
- 2026: Blood pressure was 198/108.
- 2032: A preliminary report of an x-ray examination indicated that his heart was not enlarged and noted the likely presence of a pulmonary edema and less likely presence of diffuse pneumonic process.
- Unknown: An electrocardiogram showed a somewhat irregular rhythm that was interpreted as possibly demonstrating atrial fibrillation, but there was no evidence of ST elevation or myocardial infarction. Umar's condition continued to degrade and he became hypoxic and eventually required intubation and was subsequently placed on a ventilator. Marked acidosis was noted. His heart rate decreased. Cardiopulmonary resuscitation was administered for at least 30 minutes. He developed pulseless electrical activity and then became asystolic.
- 2123: Umar was pronounced dead.

The emergency department rendered preliminary diagnoses of (1) cardiopulmonary arrest;

[12]Fowler testified that this entry would not have normally been recorded on the insulin log but instead would have only been recorded on the documentation to be sent with Umar to the hospital.

(2) hyponatremia (decreased sodium concentration in the blood); and (3) lactic acidosis. A Wayne County medical examiner performed an autopsy, and opined that the cause of death was hypertensive and arteriosclerotic cardiovascular disease. He noted an enlarged heart with physical characteristics consistent with high blood pressure, and stated that high blood pressure and a fast heart beat can result in lactic acidosis. The medical examiner, in giving deposition testimony, stated that he did not include diabetes as a contributing factor in Umar's death because he could neither prove nor disprove any causal relationship.

Flemons has proffered the report of Dr. Werner Spitz, who also performed an autopsy and rendered starkly different conclusions than those of the medical examiner. Spitz opined that (1) Umar's heart was of regular dimensions; (2) there was no evidence of pulmonary embolism or infarction; (3) only minimal arteriosclerosis was present; (4) there was no evidence of recent heart muscle damage; (5) the microscopic findings were consistent with long-standing diabetes mellitus, hypertensive cardiovascular disease, and coronary artery disease. It was his conclusion that Umar's medical condition, while housed at the jail,[13] pointed to complications arising from diabetes as the cause of death - a conclusion that was reinforced by a finding that his bladder contained a large volume of urine which reflected the consumption of large amounts of liquids prior to death.

Flemons has also submitted the report of a causation expert, Dr. Robert Stark, who - based

[13]The Defendants have consistently misrepresented Dr. Spitz's conclusion by claiming that the report only pointed to "vague conditions at the jail" as having contributed to Umar's death. (Defs.' Br. in Supp. of Summ. J. at 20; *see also* Defs.' Reply Br. at 5). However, it is quite clear that Spitz refers here to Umar's condition - and not to some unspecified condition of the jail facility. (*See* Spitz Rep. at 4 ("Mr. Umar's condition at the jail suggests complications of diabetes as the cause of death")). Notwithstanding the troubling and incomplete state of the jail's medical records, there is no question that Umar's condition in the days which preceded his death (most notably the date of his death) included, among other things, wildly vacillating blood sugar levels; subjective complaints of weakness, thirst, and blurred vision; and mental status changes.

upon his review of the record - concluded that "Umar died of respiratory failure, pulmonary edema and acidosis from uncontrolled diabetes which led to cardiac arrest. This was not a sudden coronary event (heart attack) or stroke. Rather, it was uncontrolled diabetes progressing to acidosis and electrolyte imbalance which affected the heart rhythm." (Stark Report at 1, Copy at Supp. Exs. to Ex. HH of Pl.'s Resp., ECF 59). He states that, "[t]o a reasonable degree of medical certainty, earlier intervention would have prevented Mr. Umar's sudden death." (*Id.*)

Finally, Flemons proffers the report of a nursing expert, Jacqueline Moore, who opined, to a reasonable degree of nursing certainty, that the care delivered by the jail nursing staff was grossly inadequate in, *inter alia*, the following respects: (1) they knew of Umar's serious medical needs, yet failed to obtain prior medical records or ensure that he was being provided diabetic meals in accordance with the jail protocol; (2) Washington and Davis may have (a) failed to maintain the medical records and (b) deliberately altered the content of the insulin orders and insulin log; and (3) Fowler, McCaa, and Washington failed to respond to Umar's clearly deteriorating condition for several hours and, in so doing, allowed him to languish in his cell when urgent care was needed. (Moore Report at 4-5, Copy at Supp. Exs. to Ex. HH of Pl.'s Resp., ECF 59).

The record also contains the statements and deposition testimony of several inmates who were housed with Umar on July 20th. The general themes therein are that (1) Umar was not provided the diabetic meals that were needed by him; (2) he had been seen eating food from other inmates' trays; (3) he was exhibiting symptoms of thirst, difficulty moving and breathing, dizziness, being excessively hot, and having vision problems; (4) he (and other inmates, on his behalf) pressed

the "dukane" button[14] to alert the officers to his symptoms and to request medical attention on multiple occasions; (5) the officers at one point refused to respond to this request and instead made statements to the effect of, "Shut the f**k up and sit the f**k down unless [you're] dying," "Don't push the f**king button again. If you do, I'm going to come up there and beat you're a**. Stay off the f**cking button," and the like;[15] (6) Umar was begging for assistance, saying "please" and "nurse" repeatedly, and at one point slid down the wall; and (7) some significant period of time elapsed after Umar began requesting medical assistance and when he was taken to the clinic.[16] The depositions of the officers establish that (1) Pietz and Paulsen were in the control room during this time, and (2) Noe was not in the control room because he was on his lunch break. (Pietz Dep. 13:1-6, 19:22-20:10; Paulsen Dep. 31:22-35:1; Noe Dep. 21:13-22:1, 49:10-50:12, 52:4-53:3).

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[14]The dukane button activates an intercom system by which inmates can communicate with officers in the control room.

[15]The Defendants state that there was only one witness (Michael Whitfield) who claimed that an officer had used words of obscenity toward Umar. Moreover, they maintain that Whitfield subsequently recanted this allegation. It is true that Whitfield later stated that an unknown officer had said to Umar, "If you're not going to pass out, sit down and shut up" (Defs.' Reply at Ex. 2) - a comment that in and of itself is problematic. However, the Defendants' contention that Whitfield was the only inmate to have made this allegation is not true. (*See, e.g.*, Baker Dep. 13:19-14:5, 50:14-51:11; Wright Dep. 23:3-8, 24:13-24, 54:23-55:18; Carothers Dep. 10:24-12:16, Exs. T, U, FF to Pl.'s Resp.). The Defendants also suggest that it is "[o]f significance" that Flemons did not cite any designation in the record for these threats and obscenities, but this too is patently false. Although Flemons did not provide any citation for this or any other assertion in the "Introduction" section of her brief, she did provide no fewer than five citations for these assertions in the "Plaintiff's Counter Statement of Facts" and "Argument" sections. (Pl.'s Resp. at 11, 20).

[16]Although the estimates of the duration of time vary substantially, the statements of those inmates who were interviewed are consistent insofar as they state that (1) the officers ignored or refused to act upon some of their requests, and (2) these officers had allowed too much time to elapse without attending to Umar's seemingly rapidly deteriorating condition. It appears that the bulk of these requests were made during the time period between Umar's return from the clinic at 1645 and his subsequent trip there at 1730.

At all times that are relevant to this action, the Wayne County government was subject to a consent order and settlement agreement ("consent order") that arose from an unrelated civil action in the Wayne County Circuit Court of Michigan, *Wayne County Jail Inmates v. Lucas*, Case No. 71-173217CZ.[17] This consent order, *inter alia*, required this governmental authority to adopt and enforce certain policies that are related to the medical care provided to its inmates.

II.

The parties have submitted voluminous matters outside the pleadings and, as will be seen, the Court has relied upon this material in rendering its decision. Therefore, although the pending dispositive motion was brought pursuant to Fed. R. Civ. P. 12(b)(6) and 56(c), it will be decided exclusively under the standards that are applicable to a motion for summary judgment.[18] Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

The purpose of the summary judgment rule "is to isolate and dispose of factually unsupportable claims or defenses . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The

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[17]Flemons has consistently made reference to the consent order as the "federal consent decree" in her response brief. However, the allegations in the complaint, as well as those portions of the consent order that were attached as an exhibit to her response, make clear that it was entered by a state court.

[18]The Defendants filed their motion after having submitted their answer to the amended complaint. Therefore, their request for a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) was untimely filed, although it could have been treated as a motion for judgment on the pleadings under Rule 12(c). *See* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004) ("[A] post-answer Rule 12(b)(6) motion is untimely and . . . some other vehicle, such as a motion for judgment on the pleadings . . . must be used"); *Satkowiak v. Bay Cnty. Sheriff's Dep't.*, 47 F. App'x 376, 377 n.1 (6th Cir. 2002).

entry of a summary judgment is proper "if the movant shows 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). "A fact is 'material' for purposes of summary judgment if proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties." *Aqua Grp., LLC v. Fed. Ins. Co.*, 620 F. Supp. 2d 816, 819 (E.D. Mich. 2009) (citing *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984)). In order for a dispute to be genuine, it must contain evidence upon which a trier of the facts could find in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 560 (6th Cir. 2004). When assessing a request for the entry of a summary judgment, a court "must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party." *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). The entry of a summary judgment is appropriate if the nonmoving party fails to present evidence which is "sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Thus, the moving party has the initial obligation of identifying those portions of the record that demonstrate the absence of any genuine issue of a material fact. *Id.* at 323. Thereafter, the nonmoving party must "come forward with some probative evidence to support its claim and make it necessary to resolve the differences at trial." *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991); *see also Anderson*, 477 U.S. at 256. The presence or the absence of a genuinely disputed material fact must be established by (1) a specific reference to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions,

interrogatory answers, or other materials," or (2) a "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

III.

A. Constitutional Claims

1. Individual Defendants[19]

The individual Defendants submit that they are entitled to qualified immunity on the claims raised by Flemons pursuant to 42 U.S.C. § 1983. To establish a claim under this federal statute, a plaintiff must set forth facts that, when construed favorably, establish "(1) the deprivation of a right secured by the Constitution or laws of the United States (2) [that was] caused by a person acting under the color of state law."[20] *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

The doctrine of qualified immunity generally protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Its purpose is "to shield the official from

[19]The following analysis applies only to those claims brought against these Defendants in their individual capacities. Because claims against a person in his or her official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), the official-capacity allegations against these individuals will be subsumed within the analysis of the municipal liability claim against Wayne County.

[20]The parties agree that all of the individual Defendants were acting under the color of state law at all times that are relevant to this lawsuit. Therefore, the consideration by this Court will be confined to a determination as to whether Umar's constitutional rights were violated.

suit altogether, saving him or her from the burdens of discovery and costs of trial." *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This doctrine has also been described as a broad standard which is designed to protect "'all but the plainly incompetent or those who knowingly violate the law.'" *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "If *no* reasonably competent [official] would have taken the same action, then qualified immunity should be denied; however, 'if [officials] of reasonable competence could disagree on [the legality of the action], immunity should be recognized.'" *Id.* (quoting *Malley*, 475 U.S. at 341).

"Once [this doctrine has been] raised, the plaintiff bears the burden of showing that a defendant is not entitled to qualified immunity." *O'Malley v. Flint*, 652 F.3d 662, 667 (6th Cir. 2011); *see also Moldowan v. City of Warren*, 578 F.3d 351, 375 (6th Cir. 2009) (quoting *Silberstein v. City of Dayton*, 440 F.2d 306, 311 (6th Cir. 2006)). The Sixth Circuit has declared that a two-factor test should be applied to determine if a plaintiff can overcome a defendant's assertion of qualified immunity.[21] A defendant is entitled to qualified immunity unless a court determines that (1) the facts - when viewed in a light that is most favorable to the plaintiff - show that a constitutional violation has occurred;[22] and (2) the violation involved a clearly established

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[21]The Sixth Circuit has applied a two-factor test, as well as a three-factor test. *Compare Polk v. Hopkins*, 129 F. App'x 285, 288 (6th Cir. 2005) (applying three-factor test), *with Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009) (applying two-factor test). While neither test has been explicitly adopted in this Circuit, the more recent line of cases seems to suggest that it has preferred an adoption of the two-factor test.

[22]Thus, a finding of a constitutional violation will simultaneously establish the first prong of Flemons' § 1983 claims and the first prong of her effort to overcome the Defendants' assertion of qualified immunity.

constitutional right of which a reasonable person would have known.[23] *E.g.*, *Dominguez*, 555 F.3d at 549; *Phillips v. Roane Cnty.*, 534 F.3d 531, 538-39 (6th Cir. 2008). However, if the "'the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability,' and thus summary judgment should not be granted." *Griffith v. Coburn*, 473 F.3d 650, 657 (6th Cir. 2007) (quoting *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998)).

Flemons claims that her husband was subjected to cruel and unusual punishment, as defined by the Eight Amendment to the U.S. Constitution,[24] which forbids prison officials from 'unnecessarily and wantonly inflicting pain' on an inmate by acting with 'deliberate indifference' toward [his] serious medical needs." *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6th Cir.

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[23]The Defendants make no argument with respect to the second prong of this analysis. Instead, they assert that the Court need not reach this question because Flemons cannot establish the existence of any constitutional violation in this case. Notwithstanding, the Court recognizes that the right of an inmate to be free from deliberate indifference to his serious medical needs has long been clearly established. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005) ("[A] pretrial detainee's right to [receive] medical treatment for a serious medical need has been established since at least 1987."); *Johnson v. Carnes*, 398 F.3d 868, 874 (6th Cir. 2005) ("[T]his court has long held that prison officials who have been alerted to a prisoner's serious medical needs are under an obligation to offer medical care to such prisoner."); *see also Garretson v. City of Madison Heights*, 407 F.3d 789, 799 (6th Cir. 2005) (violation of clearly established law established where defendants "knew that [plaintiff] was an insulin-dependent diabetic who was past due for treatment. And, they arguably denied her insulin by either not seeking medical help for her or failing to transfer her to a location where she could receive treatment after she notified them of her immediate health needs").

[24]Although the right of a pretrial detainee to receive medical treatment is based upon the terms of the Fourteenth Amendment, it is analogous to the Eighth Amendment right of prisoners to be free from deliberate indifference to their serious medical needs. *Barber v. City of Salem*, 953 F.3d 232, 235 (6th Cir. 1992).

2004) (quoting *Estelle*, 429 U.S. at 104).[25]

A § 1983 claim that asserts "[a] constitutional [violation] for denial of medical care has objective and subjective components." *Id.* The objective component requires the existence of a "sufficiently serious" medical need; namely, one that has been diagnosed by a doctor as mandating treatment, or one so obvious that even a lay person would recognize the need for medical treatment. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008). On the other hand, the subjective element "requires an inmate to show that prison officials have a sufficiently culpable state of mind in denying medical care." *Blackmore*, 390 F.3d at 895 (citation and internal quotation marks omitted); *see also Mingus v. Butler*, 591 F.3d 474, 480 (6th Cir. 2010). This latter element requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Blackmore*, 390 F.3d at 896; *see also Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001) ("To satisfy the subjective component, the plaintiff must allege 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.").

There can be no question that Umar's diabetes was a sufficiently serious medical need. The jail medical staff cannot claim otherwise, insofar as a treatment protocol was ordered immediately upon recognition of his diabetic condition and subsequently amended and tailored to his particular

[25]In her complaint, Flemons recites separate counts against the Defendants for their alleged violations of the Fourth and Fifth Amendments. However, it should be noted that both of these alleged violations are premised on the prohibition within the Eight Amendment which addresses the imposition of cruel and unusual punishment, as incorporated against the states under the Fourteenth Amendment. Therefore, the Court will consider these two counts simultaneously.

situation. Moreover, his medical needs were also readily apparent to his fellow inmates - who have consistently testified about his deteriorating physical condition as well as their repeated, and, for some amount of time, unheeded, requests for immediate medical assistance for Umar - and were repeatedly communicated to some, if not all, of the Defendant-officers.

However, the Defendants attempt to negate the significance of this argument by pointing to *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001) (citation and internal quotation marks omitted), in which the Sixth Circuit held that an "inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed." This argument misses the mark for two reasons. First, this holding has been expressly limited to "those claims involving minor maladies or non-obvious complaints of a serious need for medical care . . . , [and not] to medical care claims where facts show an obvious need for medical care that laymen would readily discern as requiring prompt medical attention by competent health care providers." *Blackmore*, 390 F.3d at 898; *cf. Estate of Carter*, 408 F.3d at 312 (no verifying medical evidence needed to establish objective prong where detainee showed classic signs of heart attack because "even laypersons can be expected to know that a person showing the warning signs of a heart attack needs treatment immediately in order to avoid death"). Second, even if *Napier* was applicable to the situation now pending, the Court concludes that Flemons has presented sufficient verifying evidence, for the purpose of the summary judgment analysis, in the form of the expert opinions from Spitz, Stark, and Moore.

With respect to the subjective prong, the Court cannot find any evidence that Noe had any involvement in or awareness of the conduct about which Flemons complains. On the contrary, it

appears that (1) he was away from the control room when the other officers allegedly refused - in obscene and threatening language - the repeated entreaties for medical assistance, and (2) shortly after his return, he ordered Umar to be taken to the clinic. Because Flemons has been unable to establish the second prong of this constitutional claim as it applies to Noe, this Defendant is entitled to qualified immunity. Thus, the now-pending § 1983 claims against Noe must be, and are, dismissed.

However, the same conclusion cannot be reached with respect to Pietz and Paulsen. Although Flemons is unable to state - with any reasonable degree of certainty - which of these two individuals made the alleged statements, the record establishes that the control room was set up in such a manner that any person therein would have heard the requests for medical assistance and the other officer's responses thereto. For the purposes of this summary judgment motion, the Court is satisfied that Flemons has proffered a sufficiency of evidence that both of these officers (1) were aware of these requests by Umar or those made on his behalf by fellow inmates, and (2) either responded to these medical overtures with obscenities and threats or failed to intervene when the other officer did so.[26] *See Estelle*, 429 U.S. at 104–05 (deliberate indifference may be manifested

[26]The Defendants argue that, even if these statements were made, verbal abuse or threats alone do not rise to the level of a constitutional violation. While this may well be a true statement of the law in this Circuit, *see Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989), it is also irrelevant to the case at bar. This action does not arise pursuant to a purported constitutional right to be free from verbal abuse. On the contrary, this action is based on claims of deliberate indifference by jail staff persons (i.e., guards and nurses) to the serious medical needs of a detainee, and the officers' responses to these requests for medical assistance are probative of their respective states of mind - a necessary element of the deliberate indifference claim. The Defendants contend that Flemons "blames [her husband's] injuries on negligent conduct and cursing" by the guards. This argument is, at minimum, seriously flawed. Flemons has contended throughout this litigation that Umar died because he had been denied requisite medical care by the guards and nurses - not because of the vile language that was allegedly aimed at him. *See Flores v. Lenawee Cnty.*, No. 07-11288, 2008 WL 4601404, at *14 (E.D.

by "prison guards in intentionally denying or delaying access to medical care"); *Garretson*, 407 F.3d at 798 (evidence that officers were aware of plaintiff's diabetic condition and need for treatment sufficient to establish subjective prong); *see also Dominguez*, 555 F.3d at 550 ("Because government officials do not readily admit the subjective component of this test, it may be demonstrat[ed] in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (citations and internal quotation marks omitted)). The Defendants also make much of their claim that Umar was transported to the medical clinic within twenty minutes after he and other inmates began to request help due to his deteriorating medical condition. Even assuming the truth of their representation of the time that elapsed,[27] the Court fails to see how their

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Mich. Oct. 15, 2008) (allegations that guard was informed of inmate's medical needs and responded to her cries for help - which he attributed to heroin withdrawal - with "shut the f**k up . . . I am sick of you bothering me" sufficient to state a claim of deliberate indifference to survive motion to dismiss; evidence that he ignored her requests for medical help sufficient to survive summary judgment).

[27]In support of this assertion, the Defendants cite to several pieces of evidence, none of which actually makes this claim. In their opening brief, they cite generally - without page designations - to their Exhibit 3, which is an accumulation of approximately thirty pages of medical records, and to their Exhibit 10, which is Washington's deposition, neither of which appears to make any representation as to the amount of time that had elapsed. In their reply brief, they cite to the deposition of Michael Whitfield, who stated that Umar had been taken to the medical clinic within twenty minutes of the time when he was allegedly verbally abused by one of the officers. However, the Defendants fail to acknowledge that Whitfield also stated that Umar had pressed the dukane button prior to the "yelling incident" with the guards. (Whitfield Dep. 94:18-95:1, Copy at Ex 1 to Defs.' Reply (Whitfield: "[T]he first time he actually pressed the button, you know, nobody answered. And I don't know how many times exactly it was, but . . . after he was told to shut up and sit down, that's when . . . he didn't press the button any more after he spoke to the officer. . . ."; Question: "Okay, so after he was told to sit down and shut up, about 20 minutes went by and then the door opened?"; Whitfield: "Right.")). Thus, although this deposition supports the claim that Umar was transported to the clinic within twenty minutes of when the officer yelled at him, it says nothing about how much time had elapsed after Umar initiated his requests for medical assistance until he was taken to the clinic.

purported refusal or declination to provide medical care for *only* twenty minutes to a detainee in serious and plainly evident medical distress helps their defense.[28] This is enough evidence upon which to create a genuine issue of a material fact as to whether they had sufficiently culpable states of mind, which "entails something more than mere negligence, but can be satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Blackmore*, 390 F.3d at 895-96 (citations and internal quotation marks omitted); *see also Estate of Carter*, 408 F.3d at 313 (if plaintiff can make strong showing on objective component, it is often not necessary to offer explicit evidence that defendant actually drew inference of substantial risk of serious harm). Thus, the Court concludes that Flemons has established both prongs of the deliberate indifference standard based upon the denial of medical care as it applies to Pietz and Paulsen - and thus she has established the first prong of the qualified immunity analysis.[29]

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[28]Again, it is worth noting that these individuals do not allege that, after ignoring Umar's requests for help for twenty minutes, they decided to transport him to the clinic. It was Noe who, upon his return from his lunch break, made this decision.

[29]The Defendants note that an investigation by the internal affairs section within the Sheriff's Office in Wayne County resulted in a recommendation of no discipline. Flemons objects to the consideration of this report by the Court because, in her judgment, it is inadmissible hearsay under Fed. R. Evid. 801 and 802. Where, as here, a party "object[s] 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 determine whether - regardless of the admissibility of the evidence in its present form - the party offering the challenged evidence would be able to present the content or substance of the evidence in an admissible form for trial, 11 James William Moore et al., Moore's Federal Practice § 56.91 (Matthew Bender 3d ed.1997). Once such an objection is raised, "the burden is on the proponent of the material to show either that the material is admissible as presented or to explain the admissible form that is anticipated in the event of trial." *Id.* Here, the Defendants have not (1) made any effort to respond to Flemons' objection regarding the admissibility of the report, or (2) presented the Court with any basis for concluding that they could present this evidence in an admissible form for trial. Thus, the report must be excluded.

The Defendants do not deny - and the Court has concluded - that the rights asserted here were clearly established. Thus, Pietz and Paulsen are not entitled to qualified immunity on the § 1983 claims, which, having survived summary judgment, will be permitted to go forward.

The Court also concludes that Flemons has presented sufficient evidence to satisfy the subjective prong with respect to three of the individual Defendant-nurses. The medical records, such as they are, consistently indicate that the medical staff understood Umar to be suffering from insulin-dependent diabetes.[30] However, these records are seriously deficient, with many purported medical interventions going entirely unrecorded, thus raising questions about whether they ever occurred. Moreover, the evidence strongly suggests that several nurses intentionally altered or directed the alteration of medical and other records after-the-fact. For example, Davis entered three

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In any event, even if the Court did consider this report, it is clear that it is not probative of these Defendants' lack of liability for several reasons. First, the investigator elected not to interview Paulsen at all, or to ask Pietz or Noe about the alleged abusive comments - although, bizarrely, she did submit that question to two other officers who had no recollection of having worked on July 20th or of any of the events of that day. This blatant omission severely undermines the credibility and purported thoroughness of this investigation, and arguably raises a suspicion that it was conducted so as to deliberately avoid obtaining the most important and relevant information from those individuals who were best suited to provide it. (*See* Carter-Steele Report at 3-4, 6-7, Copy at Ex. 15 to Defs.' Mot. for Summ. J.; *see also* Carter-Steele Dep. 107:9-110:3, Copy at Ex. JJ to Pl.'s Resp.). Second, the inquiry encompassed within the report is distinct from the present analysis. Third, the report is devoid of any conclusions as to whether any policies, procedures, or laws were violated. Thus, this report is insufficient to establish the absence of a genuine issue of a material fact. The Defendants have also submitted the request for a warrant that had been submitted to the Wayne County Prosecutor. (Copy at Ex. 16 to Defs.' Mot. for Summ. J.). This request was ultimately denied, purportedly because Umar died of natural causes. It is worth noting, however, that this request contained information about Umar's purported statements to Officer Nathaniel Vitale that was later determined to be untrue. Moreover, the warrant request makes no mention whatsoever of the allegations that certain officers had responded to Umar's requests for assistance with verbal abuse and threats. Therefore, this evidence, too, merits little, if any, weight.

[30]*See supra* note 3.

recordings on the insulin log that Flemons has credibly challenged. She recorded blood sugar readings and insulin administration at 1600 on July 18th, 19th, and 20th. The July 18th reading is crossed off and the same content is entered for July 19th. If this entry had actually been entered contemporaneously with the events it records on July 19th, it would be an unlikely mistake to accidentally place the notation above the already-existing notation at 0530 on July 19th. The July 19th notation is even more troubling because it records a treatment which is consistent with the modified Humulin-based insulin protocol - but, significantly, the evidence establishes that this new protocol was not ordered until the morning of July 20th. This strongly suggests that this notation records an event that never occurred, and was belatedly added - at a time when Davis was under the impression that the new order had been given at 0600 on July 19th rather than the following day - to give the appearance of following the diabetic protocol. Flemons has also produced a report from a forensic handwriting expert, Erich Speckin,[31] who opined that these three entries were not made on their purported dates, but were made contemporaneously with each other at some later time.

Speckin also concluded that the entry by Washington at 0600 on July 20th was also most likely not made contemporaneously with the surrounding entries. The Defendants have offered the affidavit of Travis Alford, who states that he was in the clinic with Umar at that time. (Alford Aff., Copy at Ex. 20 to Defs.' Mot. for Summ. J.). The affidavit originally stated that Alford "saw [Umar] get his DIASCAN (finger prick) to test for his sugar and then saw him get a shot on insulin

[31]The Defendants state that this expert "most certainly will be disqualified by this court" (Defs.' Reply at 4), but note that the parties have agreed to depose their opponent's experts and to raise objections thereto after the present motion has been decided. Thus, they have not, at this stage, raised an objection to the consideration of this report by this Court.

in his arm." However it is interesting to note that the latter half of this sentence was apparently crossed out by Alford. Moreover, the insulin log does not contain any entry at this time as it relates to Umar - although this failing could be due to the fact that the insulin log was in the possession of a nurse while on rounds. Moreover, the progress notes by Washington, who has a "strong recollection" of having made appropriate timely entries relating to Umar's medical treatment - have since gone missing. There is thus no evidence that Umar received any insulin that morning.[32]

The evidence also suggests that Fowler instructed or encouraged a prison officer, Nathaniel Vitale, to make a false report regarding his interaction with Umar. Specifically, Vitale authored a report on July 20th (the date of Umar's death) in which he wrote about his "conversation" with Umar who allegedly told him that his illness/injury did not have any connection to his incarceration in the Wayne County Jail. However, when interviewed by the internal affairs department, Vitale denied having ever spoken with Umar, and, disturbingly, indicated that he had only inserted the challenged language into his report at the direction of Fowler. (*See* Carter-Steele Report at 1-2, Copy at Ex. 15 to Defs.' Mot. for Summ. J.). Equally as disturbing, there is no indication that Fowler's apparent instruction to file a false report was ever investigated or addressed.

While the record at this stage of the litigation does not reveal the intent with which these

[32]As noted above, the insulin log records that a dose of insulin was administered at 1317 that day, although not in compliance with the new diabetes protocol that had been ordered that morning, and the notation for the 1600 insulin administration must be viewed with significant skepticism. It is thus not clear whether Umar received any insulin on the day of his death aside, perhaps, from the non-protocol dose given at 1317. Moreover, in light of the fact that the 1600 notation for July 19th appears to represent an administration of insulin that did not occur, it appears that Umar received only one dose of insulin on the day which preceded his death, at 0530.

apparent alterations and falsifications were done,[33] it is important to remember that it is not Flemons' burden to prove her case in order to defeat the pending dispositive motion. For present purposes, there is surely enough evidence to permit a reasonable trier of the facts to determine that, notwithstanding their belief that Umar suffered from insulin-dependent diabetes, these three nurses had (1) knowingly failed to provide him with proper or adequate medical treatment and, (2) based upon that knowledge, engaged in after-the-fact alterations to cover their tracks.[34] *See Estate of Carter*, 408 F.3d at 312-13 (officer's belief - even though mistaken - that detainee had not had required heart medication for three days relevant to subjective prong inquiry). Regardless of

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[33]The Defendants note that the Wayne County Prosecutor, after investigating allegations that the nursing staff had fraudulently altered Umar's medical records, concluded that "errors were made in recording times and dates, however, corrections were made in keeping with their standard operating procedures. Further, the questioned areas of the document were satisfactorily answered and no criminal or nefarious intent was discerned on the part of the nurses making entries in the log book relative to Mr. Umar." (Memo. from James Bivens, Jr., to Donn Fresard, Oct. 7, 2010, Copy at Ex. 4 to Defs.' Reply). As with the internal affairs report, Flemons complains that this evidence constitutes inadmissible hearsay and should not be considered. Fed. R. Civ. P. 56(c)(2). Although the Defendants fault Flemons for not moving to exclude this report at an earlier stage in this litigation, they have once again failed to respond to the merits of her hearsay objection. Thus, this evidence, too, must be excluded.

Again, the Court notes that - even if this evidence was considered - it is seriously deficient in probative value. This document has been submitted to the Court in the form of a memorandum in which the chief of the investigations division (1) opines that the report of the individual who conducted the investigation was complete, and (2) adopts the conclusions therein. Absent the base of the investigation (to wit, the actual report), the Court is left only with conclusions that are devoid of reasons, which severely weakens, almost to a state of non-existence, the persuasive force of this report. Moreover, the Court is especially concerned about the entry on the insulin log at 1600 on July 19th, which, as detailed above, appears to represent a treatment that never occurred. The Court fails to see how recording an event that did not occur is "in keeping with . . . standard operating procedures." As an aside, the Court notes that, even if it accepted the claim that these errors were made without any nefarious intent, such deficient record-keeping is, in itself, of great concern.

[34]The Court also notes that these concerns strongly suggest that the remaining records should be viewed with some skepticism.

whether these apparent after-the-fact alterations themselves constituted any violation (of jail policy or of law), they do suggest that these individuals "subjectively perceived facts from which to infer substantial risk to [Umar and] did in fact draw the inference, and . . . then disregarded that risk." *Comstock*, 273 F.3d at 703. As a result, the Court determines that Flemons has met her burden of demonstrating the existence of a material factual issue as to whether these individuals had a sufficiently culpable state of mind in depriving Umar of adequate medical care. *Blackmore*, 390 F.3d at 895-96. By establishing both prongs of the deliberate indifference analysis with respect to Davis, Washington, and Fowler, Flemons has satisfied the first prong of the qualified immunity analysis. Again, the Defendants do not deny - and the Court has concluded - that the rights asserted here were clearly established. Thus, Davis, Washington, and Fowler are not entitled to qualified immunity on the § 1983 claims, which, having survived summary judgment, will be permitted to go forward.

However, the Court also concludes that there is an insufficient amount of evidence to establish the subjective prong as it pertains to Willis. There is no evidence that she provided constitutionally inadequate medical care to Umar or any allegation that the records which document the care that was provided by her had been altered or falsified. The evidence reflects that her administration of Catapres was done in accordance with the relevant order. At most, the evidence indicates that, after obtaining a blood sugar reading above 300 on July 19th, she failed to do a follow-up blood test thirty minutes later, as required by the order that was then in place.[35] This one

[35]No follow-up blood test was performed on July 18th after Willis obtained a blood sugar reading above 300, but the progress report shows that Umar was in Nurse Thomas' care in the clinic after this reading was obtained, and then was out of the facility in court the remainder of the day. Therefore, this failure cannot be attributed to Willis.

failure is insufficient to establish that Willis was subjectively aware of, but disregarded, the existence a substantial risk to the health of Umar. *See Blackmore*, 390 F.3d at 896; *Comstock*, 273 F.3d at 703. Because Flemons has not provided sufficient evidence to create a genuine issue of a material fact with respect to the subjective prong of her deliberate indifference claim against Willis, this Defendant is entitled to qualified immunity and the § 1983 claims against her must be, and are, dismissed.

2. Wayne County

To establish municipal liability against Wayne County, Flemons must show that the alleged constitutional violations were inflicted pursuant to a governmental custom, policy, or practice. *Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). Because a municipality cannot be held liable on the basis of vicarious liability or respondeat superior, a complainant must show that "deliberate action attributable to the municipality directly caused a deprivation of federal rights." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997).

It appears that Flemons' municipal liability claim proceeds under two related legal theories, to wit: Wayne County's failure to (1) properly and adequately train and supervise the individual Defendants (*see* Compl. ¶¶ 233-236; 237(c)-(j), (l); and 238(a), (b); Pl.'s Resp. at 24, 25-26); and (2) enact certain policies and procedures that would have prevented Umar's constitutional rights from being violated (*see* Compl. ¶¶ 237(a), (b), (k); 238(c); Pl.'s Resp. at 24-25, 26-27). Under either theory, Flemons maintains that Wayne County's *inaction* caused the violation of Umar's

rights. "Though the Supreme Court has only addressed municipal inaction under § 1983 in the failure to train context, courts apply the same analysis to failure to establish and enforce policy claims as well." *Gailor v. Armstrong*, 187 F. Supp. 2d 729 (W.D. Ky. 2001) (listing cases) (citation omitted); *see also Kahlich v. City of Grosse Pointe Farms*, 120 F. App'x 580, 584-85 (6th Cir. 2005) (analyzing municipal liability under failure to enact policy theory using same rubric as failure to train).

The Supreme Court has determined that (1) a municipality will be liable for inaction only in "limited circumstances," and (2) a "municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (citing *Okla. City v. Tuttle*, 471 U.S. 808, 822-23 (1985) (plurality op.)). To establish liability, Flemons must show that Wayne County's "failure to train its employees in a relevant respect [amounts] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)); *see also Fleming ex rel. Fleming v. Fields*, No. 04-74354, 2006 WL 2571953, at *5 (E.D. Mich. Sept. 5, 2006) (adopting report and recommendation which noted that "inaction only becomes a policy or custom when the failure to enact policy 'amounts to deliberate indifference to the rights of persons with whom [the corrections guards] come into contact.'" (quoting *City of Canton*, 489 U.S. at 388)). A finding of deliberate indifference "requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410.

The Sixth Circuit has incorporated these requirements into a three-pronged test, which requires a plaintiff to prove that "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3)

the inadequacy was closely related to or actually caused the injury." *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006). In light of the authorities cited above, the Court will apply this test to both the failure to train and failure to enact policies analyses.

In arguing that Wayne County should be held liable under § 1983, Flemons points to its failure to (1) ensure compliance with the jail's policies and procedures regarding the treatment of diabetic inmates;[36] (2) train its jail officers regarding the housing of diabetic inmates and the ailments or problems that they may exhibit or experience; (3) enact and comply with policies consistent with the consent order regarding (a) the housing of diabetic inmates and (b) the maintenance of a current, accurate system of medical records; and (4) enact a policy to (a) advise court personnel of diabetic inmates' medical needs when they leave the jail in the temporary custody of the U.S. Marshal for court appearances and (b) ensure that such inmates receive proper medical care upon their return to the jail. The Court will assume, except where otherwise noted, that these alleged failures are sufficient to meet Flemons' burden with respect to the first prong of the *Ellis* analysis, and will confine its analysis to the second and third prongs.

A plaintiff can establish the second prong of this analysis by showing that the municipality (1) "fail[ed] to provide adequate training in light of foreseeable consequences that could result from a lack of instruction," *id.* at 700-01 (citation and internal quotation marks omitted); or (2) "fail[ed] to act in response to repeated complaints of constitutional violations by its officers," *id.* at 701.

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[36]The Court has generously construed Flemons' argument that "Defendants never complied with their own [policies] and procedures related to the treatment of diabetic inmates" (Pl.'s Resp. at 24) - which speaks only to the conduct of the individual Defendants and thus would require an otherwise forbidden respondeat superior theory of liability - as an argument in which Wayne County is accused of failing to adequately train or supervise the Defendant-nurses so as to ensure compliance.

Here, Flemons relies primarily on the first type of showing,[37] arguing that, in light of the foreseeable consequence of inadequate or delayed treatment or emergency medical care for diabetic inmates, Wayne County's failure to ensure compliance with diabetes protocols, train its officers on how to recognize symptoms associated with diabetes, and enact the specified policies constitutes deliberate indifference.

With respect to the first basis, and even though Flemons has demonstrated the existence of a material factual issue with respect to whether the nurses adhered to the diabetes protocols in rendering treatment to Umar, she has not made any showing that Wayne County was deliberately indifferent in providing its nurses with purportedly inadequate supervision or training in the treatment of diabetic inmates. To find that all three prongs of the *Ellis* test were satisfied here, the Court would have to accept a chain of inferences that is lacking in evidentiary support at every step of the way. First, that the failure of the nurses to abide by the diabetes protocols facially demonstrates that Wayne County's training or supervision was inadequate - which, as noted above, the Court has assumed. Second, that the violation of Umar's constitutional rights was a foreseeable consequence of this inadequate training or supervision, and thus the County was deliberately indifferent to his rights. And third, that the inadequate training or supervision caused or was closely related to the violation of Umar's constitutional rights. Even though Flemons has provided

[37]Flemons briefly argues that Wayne County can be made accountable to her on the theory that its failure to remedy a pattern of constitutional violations constitutes a custom or policy for purposes of § 1983 liability. *See* Pl.'s Resp. at 26 n.54. However, in the absence of any evidence of a history or a pattern of repeated violations, this argument must fail. *See, e.g., Thomas v. City of Chattanooga*, 398 F.3d 426, 431 (6th Cir. 2005) (evidence of forty-five excessive force lawsuits against police department did not establish that it had custom of condoning such conduct because this evidence was "conclusory," insofar as plaintiff "did not produce any data showing what a 'normal' number of excessive force complaints would be").

sufficient evidence upon which to create a genuine and material factual issue with respect to the first link in this inferential chain - to wit, that the nurses failed to comply with the diabetes protocol and provided constitutionally inadequate medical care - the evidentiary support ends there. Indeed, in light of their formal medical training and the fact that these nurses were plainly aware of the relevant treatment protocols, it could hardly be deemed - and Flemons has provided no evidence or argument that it was - a foreseeable consequence that they would not abide by them and would thus cause Umar to suffer a constitutional injury. Thus, the Court is asked to find municipal liability from nothing more than prima facie evidence of its employees' constitutional violations. But this is exactly the sort of respondeat superior theory that *Monell* and *Brown* forbid. *See City of Canton*, 489 U.S. at 392 ("In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities - a result we rejected in *Monell*." (citations omitted)). Because Flemons cannot satisfy the second and third prongs of the *Ellis* analysis, the Court will grant Wayne County's motion for summary judgment with respect to Flemons' § 1983 claim based upon any purported failure to train or supervise its nurses.

With respect to the second basis, the officers have admitted in their deposition testimony that they did not receive training specifically relating to diabetes. However, Flemons has not proffered any authority for the proposition that deliberate indifference can be shown by evidence of the failure of a municipality to train its officers - as opposed to its health care providers - in the symptoms and risks of any and all specific ailments and diseases that, if left untreated, may result

in injury or death. *See City of Canton*, 489 U.S. at 391 ("Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct."). Flemons does not challenge the Defendants' contention that the officers were trained to summon medical care if an inmate makes such a request or otherwise requires it.[38] The Defendants have also presented evidence which demonstrates that these officers received substantial training in first aid and other medical topics. *See Miller v. Calhoun Cnty.*, 408 F.3d 803, 816 (6th Cir. 2005) (in case involving death of detainee from brain tumor, rejecting argument that county could be liable for failure to provide emergency medical training to officers and commanders where evidence showed they had received at least some medical training, including first aid and cardiopulmonary respiration). Thus, and taking these facts in a light that is most favorable to Flemons, the Court cannot conclude that it could have been foreseeable to Wayne County that the lack of diabetes-specific training would have caused Pietz and Paulsen to refuse the request of an inmate who seeks medical care to relieve him from obvious great physical distress. Furthermore, Flemons not presented any evidence of a causal link between this lack of training and the officers' alleged misconduct. Noting that Flemons is unable to make out the second and third prongs of the *Ellis* analysis, the Court concludes that Wayne County cannot be held liable under § 1983 for its failure to provide diabetes-specific training to its officers.

Similarly, with respect to the third and fourth bases, Flemons' claims fail to establish the causal connection between the absence of the specified policies and the violation of Umar's constitutional rights, as required by *Monell*, *Brown*, and *Ellis*. There is no evidence which suggests

[38]The facts that (1) Umar had already been taken to the medical clinic twice on the day of his death and (2) Noe, shortly after returning from his lunch break, ordered Umar to be taken to the clinic also support this assertion.

that any deficiencies in the medical treatment Umar received had any connection to his not being housed in a specific diabetes unit. While it is clear to the Court that there were significant problems with the maintenance of the medical records in this case, Flemons' claim that there was no policy in place regarding medical record-keeping is unsupported by the evidence. In her pursuit of this claim, Flemons cites to a portion of McCaa's deposition testimony wherein she, when questioned whether there was "a policy in place for nurses to document kind of like a patient chart to document their observations, their treatment, their care of the inmate during their shift," responded, "No. We only mostly document on inmates when they have a problem." (McCaa Dep. 17:4-9, Copy at Ex. NN to Pl.'s Resp.). McCaa's statement fails to demonstrate that Wayne County did not maintain a policy or a practice for some other method of record-keeping besides the maintenance of a patient chart. Indeed, the next several questions relate to the specific record-keeping systems that were in place with regard to the general administration of medication and the specific administration of insulin for diabetic inmates. Moreover, as the Court has discussed in some detail, all of the nurses testified at length about the record-keeping methods that were employed by them during Umar's custodial stay at the Wayne County Jail. In any event, Flemons has not presented any evidence which suggests that the incomplete, faulty, or even altered records caused the alleged constitutional violations. The Court has already noted that the apparent after-the-fact alterations of the records may demonstrate that the nurses were subjectively aware that they were providing Umar with constitutionally inadequate medical care. That being said, there is no basis upon which to conclude that the faulty record-keeping was the source or the cause of his injury. Thus, even assuming that the first two *Ellis* prongs have been satisfied, the third required showing clearly has not been made.

Finally, a similar shortcoming arises with respect to Flemons' claim based on the lack of

a policy which addresses (1) communication to non-jail officials of diabetic inmates' medical needs when they leave the jail for court appearances, and (2) assurances that these inmates receive proper medical care upon their return to the jail. While the Court finds the lack of such a policy to be troubling and potentially dangerous, this failing does not appear to have caused the constitutional violations that Flemons has alleged. Flemons acknowledges that Umar had not complained of any health concerns until he "began his diabetic downward spiral" on July 19th - the day after he had been in court. (*See* Pls.' Resp. at 5). In the absence of any other basis for municipal liability related to the treatment - or lack of treatment - provided to Umar on July 19th and 20th, there is no reason to conclude that one skipped blood sugar test on July 18th constitutes, or was causally related to, a constitutionally-cognizable injury.

Because Flemons cannot satisfy the *Ellis* test, the Court concludes that Wayne County cannot be held liable on a failure-to-train or a failure-to-enact-policies theory of municipal liability. Therefore, a summary judgment is entered in favor of Wayne County on Flemons' municipal liability claim.

B. State Tort Claims

The Defendants next assert that Flemons is barred from pursuing her state law claims on the ground that governmental immunity shields them from liability.[39]

[39]"A federal court exercising supplemental jurisdiction is bound to apply the law of the forum state, including its choice of law rules." *Menuskin v. Williams*, 145 F.3d 755, 761 (6th Cir. 1998). Neither party has presented - nor does the Court perceive - any justification for displacing the presumption that Michigan law should apply in tort actions filed in this state. *See Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 425 (6th Cir. 2009) ("Generally speaking, a tort claim filed in a Michigan court will be governed by Michigan law unless a rational reason exists to displace it." (citations and internal quotation marks omitted)).

Wayne County is immune from Flemons' gross negligence and wrongful death claims.[40] Michigan's governmental immunity statute provides, in relevant part, as follows:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

Mich. Comp. Laws § 691.1407(1). Wayne County is a governmental agency within the meaning of the statute, *see* Mich. Comp. Laws § 691.1407(1) ("'Governmental agency' means this state or a political subdivision."), and the "operation of a jail has been consistently regarded as a uniquely governmental function," *North v. Macomb Cnty*, No. 10-11377, 2011 WL 4576848, at *6 (E.D. Mich. Sept. 30, 2011) (citing cases). The complaint does not specifically plead any statutory exception to the application of the governmental immunity statute, and Flemons has not responded to the Defendants' assertion that Wayne County is entitled to its protection. Therefore, a summary judgment is entered in favor of Wayne County with respect to her wrongful death and gross negligence claims.[41]

The individual Defendants also submit that they satisfy the requirements of Michigan's governmental immunity for tort liability statute, which provides, in relevant part, as follows:

> Except as otherwise provided in this section, and without regard to the discretionary

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[40]The complaint does not identify the Defendants to whom these counts refer, and, in her response brief, Flemons refers only to the individual Defendants. Thus, it is not clear whether these two counts were intended to run against Wayne County.

[41]In light of this conclusion, the Court need not address the Defendants' argument that Flemons "improperly proceeds under a theory of respondeat superior." (Defs.' Br. in Supp. of Mot. for Summ. J. at 20). The Court notes, however, that - regardless of whether Flemons intended these counts to run against Wayne County, *see supra* note 40 - she plainly did intend for them to run against the individual Defendants.

> or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the officer [or] employee . . . while in the course of employment or service . . . if all of the following are met:
>
> > (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury . . . .

Mich. Comp. Laws § 691.1407(2). "Gross negligence," in turn, is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.* § 1407(7)(a). The showing required to meet the recklessness standard has often been treated as equivalent to the showing required to meet the deliberate indifference standard. *See Farmer*, 511 U.S. at 839 ("With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness. It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." (citations omitted)); *Phillips*, 534 F.3d at 540. However, the Sixth Circuit has also opined that a plaintiff may face a lower burden in showing gross negligence than in showing deliberate indifference. *See Kellerman v. Simpson*, 258 F. App'x 720, 727-28 (6th Cir. 2007) ("Because Mich. Comp. Laws § 691.1407(7)(a) lacks a requirement that the defendant be subjectively aware that the plaintiff faces a serious risk of injury, the threshold for showing gross negligence is less onerous than for establishing deliberate indifference."). Finally, under the law in Michigan, "[a]n employee's conduct is 'the proximate cause' of an injury if it is 'the one most immediate, efficient, and direct

cause preceding an injury.'" *Bennett v. Krakowski*, 671 F.3d 553, 560 (6th Cir. 2011) (quoting *Robinson v. City of Detroit*, 613 N.W.2d 307, 317 (Mich. 2000)).

There is no dispute with respect to the first two elements of immunity. However, the parties disagree as to whether Flemons has provided sufficient evidence of gross negligence and causation. It is clear, for the reasons discussed in the analysis of the § 1983 claims above, that there is insufficient evidence of any negligence - much less gross negligence - by Noe and Willis. Therefore, these two Defendants are entitled to governmental immunity with respect to Flemons' tort claims. It is equally clear that, inasmuch as she has presented sufficient evidence to survive the entry of a summary judgment on her deliberate indifference claim with respect to the remaining individual Defendants,[42] a sufficient quantum of evidence, for summary judgment purposes, of their gross negligence exists. *Cf. Kellerman*, 258 F. App'x at 728 (affirming denial of governmental immunity, notwithstanding plaintiff's failure to satisfy objective or subjective prong of deliberate indifference analysis, where defendant nurse allegedly "refus[ed] to inspect [plaintiff's] open blister, despite [his] complaints of pain and the possibilities of infection given the jail conditions"). Thus, all that remains to be determined is the causation element.

The Defendants argue that causation cannot be shown because the proximate cause of Umar's injuries was a heart attack which does not have any relationship to their own alleged misconduct. This argument fails for at least two reasons. First, with respect to the gross negligence

[42]The Court need not tarry long over the Defendants' claim that Flemons "complete[ly] disregard[s]" federal law relating to privacy of medical information when she alleges that Pietz and Paulsen were grossly negligent, in part, because they "should have known" about Umar's diabetic condition. (*See* Defs.' Br. in Supp. of Mot. for Summ. J. at 8). The evidence, taken in the light most favorable to Flemons, shows that these two individuals did in fact know of Umar's deteriorating medical condition because they were repeatedly so informed by him, as well as by other inmates.

claim, Flemons does not contend that Umar's death was his only injury. (*See* Compl. ¶ 171 ("By the conduct described above, Defendants breached the duty of care owed to Mr. Umar and proximately caused him to suffer economic and non-economic damages, including but not limited to, conscious pain and suffering, loss of freedom, mental and emotional distress, humiliation, embarrassment, anxiety, fright, discomfort, pain, and physical injuries, which ultimately resulted in his wrongful death.")). Thus, even if Flemons could not establish that the Defendants' conduct proximately caused Umar's death, she has plainly proffered sufficient evidence to create a genuine issue of a material fact as to whether their conduct proximately caused any of the cited injuries. Second, the Court concludes that Flemons has presented sufficient evidence, in the form of the expert opinions by Doctors Spitz and Stark, to create a genuine issue of a material fact as to the cause of Umar's death. As noted above, *supra* note 13, the Defendants have attempted to minimize the import of Spitz's analysis by claiming that he asserted only that "vague conditions at the jail contributed to his death." The Court has already rejected this claim as being a plainly inaccurate representation of the conclusions by this expert. Furthermore, the Defendants have completely ignored the Stark report.

Although it may seem odd for the Court to have concluded that multiple individuals could be the "*one* most immediate, efficient, and direct cause preceding an injury," *Robinson*, 613 N.W.2d at 317 (emphasis added), there are at least two responses to this seeming incongruity. First, even if only one individual's actions could ultimately be deemed to be the proximate cause of an injury, so long as Flemons presents evidence which is sufficient to create a genuine issue of a material fact with regard to each Defendant, it will be the responsibility of the jury - not the Court - to determine

which one was most proximately involved. As another judge in this District held in a different inmate death case:

> If there is evidence that tends to show that more than one defendant's gross negligence may have been "the" proximate cause of [plaintiff's decedent's] death, the plaintiff may present that case to a jury. Involvement of other possible agencies of injury is not fatal to a claim that a prison official was grossly negligent in failing to furnish adequate medical care when there is evidence that the defendants "had multiple opportunities to provide adequate medical care and to, in all likelihood, prevent [the decedent's] injuries." *Dominguez*, 555 F.3d at 553. . . . [T]here is evidence that each of the defendants had the ability to intervene to help [the decedent] in the last hours of her life. That evidence is sufficient to create a jury question on the causation element of the plaintiff's gross negligence claim.

Smith v. Cnty. of Lenawee, No. 09-10648, 2011 WL 1150799, at *27 (E.D. Mich. Mar. 28, 2011) (quoting *Dominguez*, 555 F.3d at 553).

Second, it is not at all clear that a plaintiff is required to show that the conduct of only one individual - as opposed to a group of individuals - was the proximate cause of the identified injury. This conclusion is supported by several unpublished, but persuasive, opinions of the Michigan Court of Appeals. For example, in *Thompson v. Rochester Community Schs.*, No. 269738, 2006 WL 3040137 (Mich. Ct. App. Oct. 26, 2006), a student had collapsed at her school and was in an unresponsive and unconscious state. The defendants, nine employees of the school, apparently operating under the mistaken belief that she was suffering from an epileptic seizure, failed to perform cardiopulmonary respiration or use the school's automated external defibrillator, and rejected suggestions to call 911 until approximately fifteen minutes had elapsed. *Id.* at *1-4. Upon the arrival of the 911 paramedics, the stricken student had no pulse, and she was later pronounced dead shortly after her arrival at the hospital. *Id.* at 6. After concluding that genuine issues of material fact existed as to whether the defendants had been grossly negligent, the court thereafter rejected the defendants' argument that proximate causation had not been established because the autopsy report

and death certificate had attributed the student's death to a preexisting medical condition. *Id.* at 11-15. The court noted that the medical experts disagreed as to (1) the exact cause of her death, and (2) whether the preexisting condition would have caused her death absent the grossly negligent conduct of the defendants. *Id.* Further, the court opined that, "[i]n light of the disputed medical evidence, and drawing all reasonable inferences in favor of plaintiff, we conclude that rational jurors could have honestly concluded that defendants' alleged gross negligence was [t]he one most immediate, efficient, and direct cause of [the decedent's] death." *Id.* (citation and internal quotation marks omitted).

Other unpublished opinions from the Michigan Court of Appeals support the same conclusion. *See Estate of Sherrill Turner v. Nichols*, Nos. 288375, 291287, 296198, 2010 WL 4968073, at *3 (Mich. Ct. App. Dec. 7, 2010) ("[A] question of fact clearly exists regarding whether the underlying medical event or defendants' failure to provide the requested medical assistance was 'the proximate cause,' i.e., the one most immediate, efficient, and direct cause of decedent's death. In other words, there is no evidence that the underlying medical event would have certainly killed decedent, i.e., there was no chance of survival, or that the decedent would not have survived even with proper and timely medical assistance. Accordingly, there appears to be evidence from which a reasonable jury could conclude that defendants' gross negligence was the one most immediate, efficient, and direct cause of death."); *Hartzell v. City of Warren*, No. 252458, 2005 WL 1106360, at *16 (Mich. Ct. App. May 10, 2005) (governmental immunity warranted for officer because, where "the breach of the standard of care by [*two* health care providers] was the proximate cause of decedent's death," officer's conduct could not also be *the* proximate cause).

Because Flemons has offered sufficient evidence to create a genuine issue of a material fact with respect to all elements of the governmental immunity analysis as to Pietz, Paulsen, Davis, Washington, and Fowler, the Court denies these Defendants' requests for the entries of a summary judgment in their favor regarding the wrongful death and gross negligence claims.

IV.

For the reasons that have been set forth above, the Defendants' motion for summary judgment (ECF 52) is granted in part and denied in part. Specifically, a summary judgment is granted in favor of (1) Noe and Willis, in their individual and official capacities, on all of Flemons' claims; (2) Pietz, Paulsen, Washington, Davis, and Fowler - in their official capacities only - on all of Flemons' claims and (3) Wayne County on Flemons' municipal liability and state tort claims. Noe, Willis, and Wayne County are dismissed as parties to this litigation. Summary judgment is denied to Pietz, Paulsen, Washington, Davis, and Fowler - in their individual capacities - on Flemons' § 1983 and state tort claims.

IT IS SO ORDERED.

Date: May 31, 2012

s/Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on May 31, 2012.

s/ Kay Doaks

Case Manager