IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No: 16-cv-00629 WJM-STV

THE ESTATE OF JOHN PATRICK WALTER,
by and through its personal representative, DESIREE' Y. KLODNICKI,

Plaintiff,

v.

CORRECTIONAL HEALTHCARE COMPANIES, INC., et al.

Defendants.

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS AGAINST THE ESTATE OF ROY D. HAVENS

I. INTRODUCTION

The Estate of Roy Havens has already tried to dismiss the case once on statute of limitations grounds. It was a pure question of law when the Havens Estate first moved under Rule 12(b)(6), and it is precisely the same pure question of law now under Rule 56. The Court correctly denied the Estate's motion on the first go-round. Nothing has changed. There is no new legal authority or evidence relating to the statute of limitations. Rather, the Estate seeks reconsideration by raising an argument that it previously *conceded*—despite this Court's prior appraisal that it would "not examine this question further." Accordingly, the Court should deny the Estate's motion based on fairness and judicial economy alone.[1]

[1] The Havens Estate has filed a separate and distinct motion from that of Defendants Allen and Repshire. The Estate files separately solely because it devotes much of its motion to re-arguing an issue this Court previously advised it would not consider. But for the Estate's attempt to re-argue this issue, it would have been much more efficient, given the substantial factual overlap, for these defendants to combine their motions into one—in which case, Plaintiff would have filed a single combined response. As a consequence of filing separately, plaintiff must respond separately to each

Even if the Court were to reconsider the statute of limitations question, the Havens Estate's interpretation of the Colorado tolling statute is illogical. When the Estate first moved on statute of limitations grounds, it took the position that Mr. Walter's death was *not* the triggering event that started the statute of limitations running. Instead, the Estate correctly asserted that it was the continuing violation of Mr. Walter's constitutional rights *during* his 17-day confinement and the pain and suffering he experienced *leading up to his death* by which the statute of limitations must be measured. We agree. The date of Mr. Walter's death was merely the last possible date from which the statute of limitations could be measured—not the triggering event. Reversing course, the Estate now claims that *only* Mr. Walter's death could trigger the statute of limitations. This about-face is part of a strained effort to put a round peg in a square hole—to support a claim that Colorado's tolling law does not apply to any case in which the tortfeasor's wrongful conduct causes the victim's death. This makes no logical sense and would lead to absurd results. As shown below, the Second Amended Complaint was filed well-within the applicable limitations period.

Finally, the Estate seeks summary judgment on the merits, arguing that a reasonable jury could not find deliberate indifference on the part of P.A. Havens. In fact, there is ample evidence of his deliberate indifference—more than enough to overcome summary judgment.

II. RESPONSE TO MOVANT'S STATEMENT OF MATERIAL FACTS[2]

SMF ¶ 1: Admitted, but object to relevance. Only the Second Amended Complaint, filed on June 16, 2016, against The Estate of Roy D. Havens matters for purposes of the instant motion.

SMF ¶ 2: Admitted, but object to relevance. *See* Response to SMF ¶ 1.

motion (despite substantial overlap in the facts) without knowing if the Court will even consider the Estate's re-argument at all. Each response is within the 40-page limitation of WJM Revised Practice Standards II.E.7.b which does not address the question of when different defendants file separate summary judgment motions.

[2] Plaintiff's admissions and denials are for purposes of this motion only.

SMF ¶ 3: Admitted, but object to relevance. *See* Response to SMF ¶ 1.

SMF ¶ 4: Admitted, but object to relevance. *See* Response to SMF ¶ 1.

SMF ¶ 5: Admitted, but object to relevance. *See* Response to SMF ¶ 1.

SMF ¶ 6: Admitted.

SMF ¶ 7: Admitted, but object to relevance. *See* Response to SMF ¶ 1.

SMF ¶ 8: Admitted.

SMF ¶ 9: Admit that Mr. Walter was booked as a pretrial detainee at the Fremont County Detention Center, but deny that this occurred on April 2, 2014. The Estate conflates the "arrest date" with the "booking date," which was April 3rd—not April 2nd. *See* Def. Ex. 4 (red box placed around arrest date; booking date below that). However, the Estate's mistake is not material here.

SMF ¶ 10: Admitted.

SMF ¶ 11: Admitted.

SMF ¶ 12: Admitted.

SMF ¶ 13: Admitted.

SMF ¶ 14: Admit the first sentence. Deny the characterization that Repshire "referred Mr. Walter to the provider." Admit only that she put a small sticky note on Mr. Walter's chart to flag it for P.A. Havens to see. *See* Repshire Dep. (Ex. 1) at 170:9-171:7.

SMF ¶ 15: Admitted.

SMF ¶ 16: Admit in part. P.A. Havens wrote "Weaning off methadone – he may go through some withdrawal. I have no suggestions. May call Dr. Herr for more advice." Def. Ex. 10.

SMF ¶ 17: Denied. Dr. Herr recalls no phone call relating to Mr. Walter. *See* Herr Dep. (Ex. 2) at 180:3-181:21. He did not document the alleged call. *Id.* at 180:13-15. It was a basic practice of telephonic medicine to document phone calls. *Id.* at 176:22-25. Dr. Herr was not even the on-call

provider on April 19th. *See* Ex. 54. If Repshire called Dr. Herr, she gave him no pertinent information. *See* Repshire Dep. (Ex. 1) at 187:22-194:13.

SMF ¶ 18: Admitted.

III. STATEMENT OF ADDITIONAL DISPUTED FACTS

A. Facts Relating to the Deliberate Indifference of P.A. Havens

1. Fremont County contracted with Correctional Healthcare Companies, Inc. (CHC) to provide healthcare services at the Fremont County Jail. *See* Jail Services Contract (Ex. 3).

2. Under the contract with CHC, P.A. Roy Havens provided medical services at the Fremont County Jail. *See* Movant's Answer to Second Amended Complaint (ECF 135) ¶ 25.

3. P.A. Havens worked at the jail one hour per week. *See* Dep. of K. Maestas (Ex. 5) at 62:14-19; Dep. of S. Repshire (Ex. 1) at 19:19-23. He usually came in the evening after getting off his day job. *See* Dep. of M. Doughty (Ex. 6) at 33:7-10; Maestas Dep. (Ex. 5) at 286:15-22.

4. Many people come to jail on prescription medications. Herr Dep. (Ex. 2) at 47:20-48:12. These include benzodiazepines (or "benzos"). *Id*. at 47:16-48:12. "Commonly prescribed benzos include Xanax, Klonopin, Valium and Ativan." Moore Rept. (Ex. 7) at 2.

5. People on benzos—particularly high doses over a long time—can develop a physical dependence. *See* Roy-Byrne Rept. (Ex. 8) at 3-5; Gendel Rept. (Ex. 9) at 4-5; Moore Rept. (Ex. 7) at 2-3. The sudden cessation of a person's benzo can lead to dangerous withdrawal. *See* Ex. 8 at 3-5; Ex. 9 at 4-5; Ex. 7 at 2-3; Ex. 10 at 23. Consequences of benzo withdrawal include anxiety, insomnia, loss of appetite, cognitive impairment, tremors, mood swings, hallucinations, bizarre behavior, abnormal vital signs, seizures, and death. *See* Ex. 8 at 4; Ex. 9 at 5; Ex. 7 at 2-3.

6. Benzo withdrawal is a significant risk in jails because a percentage of incoming jail inmates will have been using benzos in the community, and the sudden discontinuance of the benzo in jail can result in life-threatening withdrawal symptoms. Moore Rept. (Ex. 7) at 2.

7. Benzos should never be abruptly stopped—any discontinuance must occur by slow tapering with careful monitoring. *See* Moore Rept. (Ex. 7) at 2; Roy-Byrne Rept. (Ex. 8) at 5; Stern Rept. (Ex. 10) at 20, 23. Severe benzo withdrawal requires hospitalization for intensive care. *See* Ex. 8 at 5. All reasonable jail medical personnel are well-aware of the foregoing. *See* Ex. 7 at 2-4, 16; Ex. 8 at 4-5, 12; Ex. 10 at 20.

8. CHC's Chief Medical Officer, Dr. Herr, agrees that benzo withdrawal "can be life-threatening." Herr Dep. (Ex. 2) at 62:15-25. He agrees that "[p]atient's showing signs of late, severe withdrawal should be hospitalized" and that the standard of care requires hospitalization. *Id.* at 73:19-74:1. He agrees that "[d]iscontinuing someone's benzo use without adequate monitoring and treatment may have catastrophic results" for those who are dependent. *Id.* at 60:13-17. He agrees that "[p]atients should be tapered off benzodiazepines" since "abrupt discontinuance can lead to dangerous physical effects" *Id.* at 70:1-6. He agrees that with untreated withdrawal "a delirium may develop with hallucinations, changes in consciousness, profound agitation, autonomic instability, seizures and death." *Id.* at 73:13-18. He agrees that "all medical providers who work in the field of correctional medicine have an obligation to know about the symptoms, risks, and dangers associated with benzo withdrawal." *Id*. at 55:16-20. He agrees that all reasonable medical professionals working in jails must know that benzo-dependent individuals will be among those admitted and confined in jail. *Id.* at 48:21-49:6.

9. Dr. Herr testified that it would be inappropriate and outside the standard of care for any jail to have a blanket practice of suddenly discontinuing inmates' benzos. *Id*. at 166:21-167:17. He testified that such a practice would be unsafe and should be stopped. *Id*. at 183:8-184:22.

10. As of April 2014, Mr. Walter was under a long-standing prescription for Klonopin—a well-known benzo known generically as "Clonazepam." Pursuant to his providers' prescriptions, Mr.

Walter had been taking this benzo daily, in high doses, for years. *See* Gendel Rept. (Ex. 9) at 5-6; Roy-Byrne Rept. (Ex. 8) at 6, 12; Stern Rept. (Ex. 10) at 20, 23; Moore Rept. (Ex. 7) at 6.

11. Given the dose and duration of Mr. Walter's benzo prescription, an abrupt discontinuation "would certainly evoke a withdrawal syndrome" which would be "serious, at a minimum." Gendel Rept. (Ex. 9) at 6. Cutting him off cold turkey would predictably result in a "potentially life-threatening withdrawal syndrome." Stern Rept. (Ex. 10) at 20, 23. *See also* Ex. 8 at 7.

12. Mr. Walter had his container of prescribed Klonopin when he was booked at the jail on April 3, 2014. It was properly labeled and had the correct number of tablets remaining in the bottle. *See* Stern Rept. (Ex. 10) at 5 fn. 1; Roy-Byrne Rept. (Ex. 8) at 6; Moore Rept. (Ex. 7) at 6. The bottle was released to his family after his death. *See* Ex. 11. He also filled out a form at booking stating that he was taking Klonopin and provided the name and location of his prescribing provider. *See* Ex. 12. Though he misspelled the medication, Havens "assumed he meant Klonopin" on the form. *See* Movant's Answer to Second Amended Complaint (ECF 135) at ¶ 68.

13. Mr. Walter's Klonopin (and other prescription bottles) were sealed in a bag and delivered to the jail's medical staff with the accompanying form. *See* Maestas Dep. (Ex. 5) at 142:14-144:14; Repshire Dep. (Ex. 1) at 68:15-71:15. The form became the first page of Mr. Walter's chart, which was available for all medical providers at the jail to see. *Id.* at 134:9-135:19.

14. When Mr. Walter entered the jail on April 3rd, the booking officer spent 45 minutes with him; this included watching him shower and change into jail clothes. Dep. of J. Wheaton (Ex. 14) at 15:11-18:21. Mr. Walter was "calm" and uninjured except for some scratches. *See* Booking Rept. (Ex. 15). He was not confused or mentally abnormal in any way. *See* Ex. 14 at 19:4-22:14. He gave his weight as "200 pounds." *See* Ex. 16. Others who saw him near the time of his booking described him as "calm," "lucid and coherent," uninjured, healthy looking, and weighing "about 200 pounds." *See* Decl. of Quinn Smith (Ex. 18) at ¶ 5; Decl. of Jason Vercillo (Ex. 19) at ¶ 3.

15. Although P.A. Havens was at the jail on the evening of April 3rd, there is no evidence to suggest he examined Mr. Walter or sought any information from his medical records or his medical providers. *See* Maestas Dep. (Ex. 5) at 95:2-11; Stern Rept. (Ex. 10) at 6.

16. Without making any individualized medical assessment, P.A. Havens ordered an abrupt discontinuance of Mr. Walter's Klonopin prescription. Ex. 7 at 7. The Health Services Administrator (HSA) of the jail, Ms. Maestas, confirmed that the order to cold-turkey Mr. Walter from his Klonopin prescription came from P.A. Havens. Maestas Dep. (Ex. 5) at 152:18-153:2. The Chief Medical Officer for CHC, Dr. Raymond Herr, also testified that Havens gave the order to stop Mr. Walter's benzodiazepines without any tapering. Herr Dep. (Ex. 2) at 192:2-194:15.

17. P.A. Havens's order to cold-turkey Mr. Walter from his Klonopin was "medically inappropriate and dangerous." Gendel Rept. (Ex. 9) at 17. The decision would "predictably cause a significant withdrawal syndrome." *Id*. Had there been any plan to discontinue Mr. Walter from his Klonopin, it should have been tapered very slowly over a long time. *Id*. Stopping it altogether, without any tapering at all was "far beneath the standard of care." *Id*. *See also* Ex. 7 at 8.

18. "[D]ue to the well-recognized and profound risks associated with cold-turkey discontinuance, no competent health care provider would ever recommend such a procedure." Roy-Byrne Rept. (Ex. 8) at 5. The decision to stop Mr. Walter from his benzo "cold-turkey" was "a gross deviation of the standard of care and highly dangerous." *Id*. at 7. Benzodiazepines "should never be abruptly withdrawn," and the decision to cold-turkey Mr. Walter was "an outrageously careless, irresponsible, and as it turned out, fatal decision." *Id*. at 12.

19. P.A. Havens's decision to "abruptly discontinue Mr. Walter's clonazepam [Klonopin] was patently dangerous and likely to lead to life-threatening withdrawal given the high dose he was on and prolonged time he had been on it." Stern Rept. (Ex. 10) at 8. "Abrupt stoppage, especially

when a patient has been on such a high dose for such a long time, is known to result in a withdrawal syndrome which is quite serious, and sometimes lethal." *Id*. at 36.

20. P.A. Havens's cold-turkey discontinuance of Mr. Walter's benzodiazepine was much more than just negligent. It specifically violated CHC's written medication bridging requirements, which prohibited such an order in the circumstances of this case. CHC Policy D-02 mandates that "[p]atients entering the facility on prescription medication *continue to receive the medication in a timely fashion as prescribed*, or acceptable alternate medications are provided as *clinically indicated* . . . ." Ex. 20 at 2-4 (emphases added). No medication discontinuance is allowed unless information is gathered indicating why it was prescribed, the dosages and times of administration, when it was last taken, and the prescribing clinician and pharmacy. *Id*. Under the policy, a patient who enters the jail on an established and verified regimen of medications "shall be continued on this regimen until seen by the responsible physician." *Id.* None of this was done in Mr. Walter's case, yet P.A. Havens abruptly discontinued his Klonopin anyway. *See* Moore Rept. (Ex. 7) at 7-8; Stern Rept. (Ex. 10) at 6-8; Gendel Rept. (Ex. 9) at 8; Maestas Dep. (Ex. 5) at 177:7-179:5. "The decision to discontinue the clonazepam in an information vacuum was reckless." Ex. 10 at 7.

21. From the point of his confinement on April 3rd until his death on the evening of April 20th, Mr. Walter was never provided with even a single dose of any benzodiazepine medication of any kind. Maestas Dep. (Ex. 5) at 11:14-20.

22. P.A. Havens's order blatantly violated another of CHC's policies—specifically, Clinical Protocol L-06. (Ex. 53). This protocol, which specifically applied to Klonopin and other benzos, required specific and detailed inquiries of any patient who had been taking Klonopin or other specified benzos for more than two weeks before entering the jail. *Id*. It required that the patient have a full vital sign workup as part of the clinical inquiry. *Id*. And it required that if the medications were current (as was the case for Mr. Walter), a "psychiatrist or medical provider on

call" must be contacted "for a taper off of these mediations." *Id*. There is no evidence that any of these steps were undertaken by P.A. Havens. Rather than arrange for a taper, he completely cut off Mr. Walter's medication—cold turkey. *See* Maestas Dep. (Ex. 5) at 11:14-20, 152:18-153:2. His decision to abruptly discontinue Mr. Walter's medication was not the product of an informed medical judgment or an individualized clinical assessment relating to Mr. Walter; instead, it was pursuant to an across-the-board practice at the jail. *See id.* at 43:2-44:10.

23. P.A. Havens also breached his duty by not formulating a plan for Mr. Walter's high blood pressure and by failing to ensure the LPNs understood their duty to monitor Mr. Walter for signs of withdrawal. *See* Stern Rept. (Ex. 10) at 6-9, 35-37. CHC's Chief Medical Officer believes P.A. Havens gave a "poor order" that put the LPNs "in a bad place." Herr Dep. (Ex. 2) at 198:17-199:1.

24. As of April 5th, Mr. Walter was in a group of cells known as the "T-Pod" where he was housed with other inmates. *See generally* Vercillo Decl. (Ex. 19); Smith Decl. (Ex. 18); Ex. 21.

25. In the T-Pod, other inmates recall Mr. Walter being "very concerned" that he was not getting his Klonopin. Smith Decl. (Ex. 18) ¶ 6. Twice a day, a nurse would come to the pod with a deputy. When they came to the T-Pod, Mr. Walter "would tell them that he was not getting his Klonopin and that he desperately needed it." *Id*. Inmate Smith recalls Mr. Walter "begging them for the Klonopin" *Id*. Mr. Walter told the nurses "that he needed his Klonopin and that he would die if he didn't get it" and "said this repeatedly to them over the course of several days." *Id*. Inmate Vercillo also recalls Mr. Walter telling the nurses that he was "going to die" without his medication. Vercillo Decl. (Ex. 19) ¶ 4. "Whenever one of the nurses would come by for med pass, Mr. Walter would tell [her] he was not getting his required medication." *Id.* He was "quite vociferous," and his "concerns grew and grew." *Id*. Mr. Walter told the nurses words to the effect of, "I'm going to die without it!" *Id.* Mr. Walter made these requests regularly and daily. *Id*.

26. In response to Mr. Walter's "urgently-expressed pleas," Maestas told him, "I'm not taking

your shit. If you have a problem, kite it" and walked away. Vercillo Decl. (Ex. 19) ¶ 5.

27. Another inmate submitted two kites on behalf of Mr. Walter requesting his medication. Vercillo Decl. (Ex. 19) ¶ 6. *See also* Smith Decl. (Ex. 18) ¶ 7. Maestas told the inmate he could not fill out kites for others, so he assisted Mr. Walter and saw him submit additional kites to the nurses on duty. *See* Ex. 19 ¶ 6. These kites were never produced in discovery and have presumably been destroyed; however, a reasonable jury could infer that P.A. Havens was aware of them.

28. After several days in the T-Pod, Mr. Walter's behavior changed. *See* Smith Decl. (Ex. 18) ¶ 8. He "went from being totally normal to acting extremely strange." *Id.* He stopped sleeping, began "speaking gibberish," and stopped eating. *Id*. "He started to shake a lot." *Id*. This was all "very different from the way he had been behaving when he first came in." *Id*. Mr. Walter "kept getting weirder and weirder" with "loud nonsensical talking and jabbering" at night. *Id*. Inmate Smith told the CHC nursing staff that Mr. Walter "needed to be in a hospital and not in jail." *Id*. Inmate Vercillo recalls Mr. Walter "behaving in a very bizarre way that was totally different than when he first came in." Vercillo Decl. (Ex. 19) ¶ 7. He was "up at all hours of the night," "barely sleeping," "not eating," "pacing and sweating profusely," "mumbling and talking incoherently," "kick[ing] the door," removing his clothes, and "getting visibly weaker and more frail compared to when he first came in." *Id*.

29. On April 13th, Detention Deputy Combs interacted with Mr. Walter. She was concerned that he was "mentally confused" and "shaky" and that his eyes were "involuntarily pulsating or twitching." Dep. of C. Combs (Ex. 22) at 33:10-34:16.

30. Mr. Walter received no medical evaluation at all until April 13th. On April 13th, LPN Doughty checked his blood pressure and pulse "due to possible [withdrawal]." *See* Ex. 23. This was one of only two times during his confinement that his vital signs were checked. His blood pressure was abnormally high. *See* Doughty Dep. (Ex. 24) at 98:2-6. She ordered daily blood

pressure checks for the next five days. *Id*. at 98:23-99:4. However, his blood pressure was checked only one other time (on April 14th when it was still high) and never again, in violation of the standard of care. *See* Moore Rept. (Ex. 7) at 8-9; Roy-Byrne Rept. (Ex. 8) at 8.

31. On April 14th another detention officer, Corporal Mass, interacted with Mr. Walter and found that he was "confused and shaking the entire time [he] was speaking with him." *See* Ex. 25. On this same date, detention records show a complaint from Mr. Walter's cellmate that he "kept him up all night by talking to the wall" and that he was speaking nonsensically. *Id.*

32. On April 15th, officers removed Mr. Walter from the T-Pod and used force against him in the form of tasering him, pepper-spraying him, and using other types of painful force. *See* Cathcart Rept. (Ex. 26) at 5-6; Brasfield Rept. (Ex. 27) at 18-19. Mr. Walter was delusional and not in his right mind when they were using this force on him. *See* Wheaton Dep. (Ex. 14) at 125:12-23, 137:23-138:12; Owen Dep. (Ex. 33) at 80:3-13, 81:2-16.

33. On the morning of April 15th, Mr. Walter was moved into a small holding cell in the jail's booking area known as "Holding Cell 2" and for the next *118 and ½ hours* (from 7:00 a.m. on April 15th until his death at approximately 5:30 p.m. on April 20th), he was held nearly-continuously in this cell. J. Green Dep. (Ex. 28) at 87:19-88:1.

34. The holding cell has large windows through which anyone could easily observe Mr. Walter from the booking area. *See* Rankin Dep. (Ex. 29) at 74:8-75:19; Martin Dep. (Ex. 30) at 24:9-25:3; Beicker Dep. (Ex. 4) at 36:19-38:13. *See also* photographs (Ex. 31). One could also communicate with him without opening the door. J. Green Dep. (Ex. 28) at 32:4-13.

35. Detention officers posted an "Inmate Welfare Checklist" on the door of the holding cell to document Mr. Walter's condition every half-hour. *See* Ex. 34. It was visible for anyone to see. Lightcap Dep. (Ex. 35) at 85:6-13; Rankin Dep. (Ex. 29) at 119:22-25.

36. The holding cell was an approximately 30-second walk from the medical office where P.A.

Havens was stationed when he worked. *See* K. Maestas Dep. (Ex. 5) at 147:12-17.

37. By the time Mr. Walter was moved to the holding cell on April 15th, his withdrawal symptoms were severe: "The standard of care required that Mr. Walter be transferred to a hospital for treatment by at least April 15th. The need for hospital treatment grew more urgent with each passing day and hour." *See* Gendel Rept. (Ex. 9) at 19. The failure to transport Mr. Walter to the hospital was particularly urgent because the Fremont County Jail "was totally ill-suited to address his serious medical needs." *Id*.

38. Repshire was the only LPN on duty at the jail on April 16, 17, 18 and 19—from 7:00 a.m. to 7:00 p.m. Repshire Dep. (Ex. 1) at 223:8-224:2. She was there alone, unsupervised, even though she was newly-hired, inexperienced, and did not know how to care for an inmate who, like Mr. Walter, was suffering from substance withdrawal. *Id.* at 39:20-40:2, 40:14-41:17, 47:16-19, 54:7-55:19, 63:1-5, 75:21-76:2, 76:23-77:2, 99:17-100:8, 104:9-106:9.

39. No medical person was at the jail *at all* to care for Mr. Walter for the 12-hour period of 7:00 p.m. to 7:00 a.m. during each day of his confinement. *See* Wheaton Dep. (Ex. 14) 122:5-8.

40. The seriousness of Mr. Walter's condition was obvious to the detention staff. By April 16 or 17, Deputy Wheaton was "growing very concerned about [his] deteriorating health." Wheaton Dep. (Ex. 14) at 110:14-21. He felt that Mr. Walter "needed attention for both his mental condition and his physical condition." *Id*. at 107:17-20. He went to LPN Repshire to tell her that Mr. Walter was "deteriorating rapidly." *Id.* at 107:21-108:25. He made this report to Repshire in front of Mr. Walter's holding cell where she could see for herself. *Id*. at 108:18-25.

41. Similarly, it was obvious to Deputy Combs that Mr. Walter was deteriorating during his time in the holding cell—she observed him confused, behaving bizarrely, losing a lot of weight, shaking uncontrollably, not sleeping, refusing meals, naked for hours in full view, not making sense, not being responsive, having urinated in his surroundings, and really going downhill. Combs

Dep. (Ex. 22) at 63:1-65:3.

42. Mr. Walter's serious medical needs were also clear to Deputy Lightcap.[3] She, too, believed he was unfit for confinement and belonged in a hospital. Lightcap Dep. (Ex. 35) at 134:9-25. On April 16-17, she observed him hitting the door with a closed fist hard enough to hurt himself, staring vacantly for minutes on end, shaking from head to toe almost as if he was freezing cold, laying on the mat while shaking, pacing in his cell with no apparent purpose, and telling non-existing people in his cell to get out. *Id*. at 85:1-108:4. She was concerned he was not being provided with adequate medical care and testified that the whole detention staff shared her concerns. *Id*. at 140:25-141:17, 136:17-18. Lightcap testified that detention deputies and supervisors were upset that the medical staff was not attending to Mr. Walter's needs and were not providing him with the care he obviously required. *Id.* at 142:11-143:13.

43. Deputy Wilson worked swing shift daily from April 16-19. Decl. of Christopher Wilson (Ex. 17) at ¶¶ 2-6. He saw Mr. Walter repeatedly during this four-day period. *Id*. ¶ 6. Mr. Walter's appearance was "shocking" and "grew worse and worse with each passing day." *Id*. ¶ 7. He was "almost unrecognizable" from when he had been brought into the jail two weeks earlier. *Id*. "It was obvious that Mr. Walter had lost a massive amount of weight." *Id*. ¶ 8. Mr. Walter was naked and his bones were jutting out beneath his skin; he was "pale and gaunt" and "looked very sick." *Id*. He was "weak and frail," "lying down on the floor of the cell," and "shaking." *Id*. "Mentally, he seemed to be in another world. Mr. Walter was obviously in need of medical attention." *Id*.

44. The detention deputies were not alone in their concern for Mr. Walter: "the entire staff who worked in the booking area" were deeply worried about his medical condition. Rankin Dep. (Ex. 29) at 89:12-20, 91:16-19, 93:12-94:1, 96:21-97:1. One sergeant received reports from about 18

[3] Deputy Lightcap has since married and changed her last name to "Gonzales." Her deposition transcript uses her current name, Gonzales, but we refer to her here by her name at the time of the events in question—Lightcap.

members of the detention staff expressing concerns about Mr. Walter. *See* R. Miller Dep. (Ex. 32) at 51:17-52:3, 58:18-60:6. Sergeants and corporals reported to Commander Rankin that Mr. Walter's medical condition was serious, including that he needed to be in a hospital. Rankin Dep. (Ex. 29) at 89:24-91:11. Rankin saw Mr. Walter for himself inside the holding cell on at least two occasions and confirmed the reports he had been getting. *Id.* at 81:22-25, 92:16-19. The reports to commander Rankin likely occurred on both April 16 and 18. *Id*. at 100:23-101:3, 97:21-98:1. His own observations also occurred on those dates. *Id*. at 101:9-11.

45. Like everyone else, Rankin saw a host of highly concerning symptoms. He saw Mr. Walter in the holding cell confused, behaving bizarrely, and shaking uncontrollably. *Id*. at 82:17-83:3. He saw that Mr. Walter was pale and thin, naked, and looked pretty awful. *Id*. at 83:8-23. He noticed that Mr. Walter was talking to people who were not there and talking nonsensically. *Id*. at 83:24-84:11. He saw that Mr. Walter was yelling and screaming, unaware of his surroundings, disoriented, confused, and unable to fill out a medical request form or kite. *Id*. at 85:4-18, 86:24-87:4. He could see that Mr. Walter appeared to be very ill. *Id*. at 85:19-21. He was aware that Mr. Walter had not been regularly sleeping or eating. *Id*. at 86:19-23. He knew that Mr. Walter's condition was deteriorating rapidly and getting worse and worse. *Id*. at 93:12-94:1. He knew that Mr. Walter was getting weaker and weaker and losing a lot of weight. *Id*. at 95:5-8. It was apparent to him that Mr. Walter was "in a medical crisis" and "in need of hospitalization." *Id*. at 87:5-12. *See also id*. at 102:2-9.

46. Mr. Walter's medical issues were so dire that Commander Rankin addressed it with his bosses, Undersheriff Martin and Sheriff Beicker. He went to Martin because staff members were concerned that Mr. Walter's serious medical needs were not being addressed and fully conveyed to Martin that his staff members were frustrated by the lack of medical response for Mr. Walter. *Id*. at 109:22-25, 110:4-13. *See also* Martin Dep. (Ex. 30) at 43:2-12, 45:3-6, 46:3-11. Martin

received at least three reports from Rankin, which included descriptions about Mr. Walter's condition and the medical staff's apparent lack of treatment. *See id*. at 48:18-49:8, 50:18-51:2.

47. Likewise, Rankin informed Sheriff Beicker that Mr. Walter was deteriorating or going downhill, mentally confused, talking nonsensically, not sleeping, shaking, losing unusual amounts of weight, and thin or emaciated. Beicker Dep. (Ex. 4) at 57:20-58:24, 59:18-20, 62:11-63:12. Beicker knew from reports that the staff were concerned and felt that Mr. Walter was clearly in need of medical attention that he was not getting. *Id*. at 60:11-18, 61:10-14, 63:13-18, 90:9-21. These reports were likely made to Sheriff Beicker by at least April 16th. *Id.* at 74:2-13.

48. According to Sheriff Beicker, the staff felt helpless because they felt thought Mr. Walter was clearly in need of medical attention that he wasn't getting. *Id*. at 61:10-14. The "general consensus" was that "the medical staff was not providing him with all necessary care." *Id*. at 63:13-18. Rankin came to Beicker with these reports at least two to three times and repeatedly told him that Mr. Walter was not improving and seemed to be deteriorating. *Id*. at 115:4-116:13.

49. Sheriff Beicker received another report from a corporal. The corporal came to him seeming "extremely upset," "concerned," and "disturbed." *Id*. at 74:14-75:13. The corporal was bothered by Mr. Walter's "continued deterioration." *Id*. at 76:2-10. The corporal said that "what Medical's doing is not working." *Id*. at 76:17-18. Beicker learned that Mr. Walter "remained mentally confused," remained "weak appearing," was "still pale and unwell looking," "still shaking, shuddering," and "[s]till acting in a way that he appeared to be hallucinating." *Id*. at 82:13-83:11.

50. Following these reports, Beicker claims to have clearly and unambiguously communicated to "*the PA, the physician's assistant*" that he expected appropriate care be provided to Mr. Walter. *Id*. at 82:1-6 (emphasis added).

51. On April 16th, LPN Repshire flagged Mr. Walter's chart for P.A. Havens to see when he came in. Repshire Dep. (Ex. 1) at 170:3-171:7.

52. P.A. Havens came to the jail on April 17th, likely in the evening. *See* Ex. 37; Doughty Dep. (Ex. 6) 33:7-10. Repshire's note from the morning before (about 34 hours earlier) alerted P.A. Havens that Mr. Walter was now in the holding cell and "acting very very strange." *See* Ex. 37.

53. The same note alerted P.A. Havens that Mr. Walter was "talking to himself & 'others'" and trying to unlock his cell. *Id.* It also alerted P.A. Havens that Mr. Walter's "holding cell smelled" and that his blood pressure had not been checked "due to his strange behavior." *Id*.

54. The note further alerted P.A. Havens that Commander Rankin had come to Repshire with concerns. These included that Mr. Walter had been on his meds "for years," that he "has been combative the last couple days," and that he had been pepper sprayed. *Id.* The note also stated that Commander Rankin "noticed [Mr. Walter] was fine before we started weaning him off and wondered if there was anything we could do." *Id*.

55. By the evening of April 17th, a review of Mr. Walter's chart by P.A. Havens would have readily shown that his April 3rd order to initiate the benzo withdrawal protocol had been ignored by the nurses and never even initiated. Stern Rept. (Ex. 10) at 37; Gendel Rept. (Ex. 9) at 17.

56. P.A. Havens took no action to remediate the fact that his order to initiate the benzo withdrawal protocol had been ignored. *See* Stern Rept. (Ex. 10) at 14.

57. P.A. Havens ignored the evidence that Mr. Walter was withdrawing from his Klonopin. *Id.* at 37. A "personal evaluation was absolutely required of him at this point," but P.A. Havens did not question Mr. Walter, conduct an evaluation of him, or even visit him. *Id*. He "had a solemn duty to Mr. Walter to protect his health and provide care for his serious medical needs," but by failing to see Mr. Walter, who was clearly observable just steps away from the medical office, he "failed to demonstrate even a modicum of effort to address those risks." *Id*.

58. No later than the 14th day of Mr. Walter's confinement (which was April 17th), CHC policy required that he receive a comprehensive health assessment. Moore Rept. (Ex. 7) at 11. This

required assessment, as set out in CHC's "Essential" Policy E-04, would have included, at a minimum, taking of vital signs and a full documented physical exam. *See* Ex. 38. Mr. Walter never received this required assessment. Maestas Dep. (Ex. 5) at 94:4-15; Moore Rept. (Ex. 7) at 11.

59. A glance at Mr. Walter's chart by P.A. Havens on April 17th would have revealed that Mr. Walter never received the comprehensive health assessment required by CHC policy. *See* Gendel Rept. (Ex. 9) at 10. Yet P.A. Havens took no action to correct this problem, and Mr. Walter never received the required assessment. *Id*. Vital signs alone are "an essential guidepost in monitoring withdrawal" (Ex. 9 at 10), and the full health assessment "would have identified myriad serious medical concerns that had emerged and were continuing to emerge." Moore Rept. (Ex. 7) at 11.

60. If P.A. Havens had reviewed Mr. Walter's chart, he would have seen that his blood pressure had been checked only twice during his confinement (once on April 13th and once on 14th) and that both times it was abnormally high. *See* Exs. 23 & 39; Roy-Byrne Rept. (Ex. 8) at 8.

61. If P.A. Havens had reviewed Mr. Walter's chart, he would have noticed that despite the abnormally high blood pressure on April 13 and 14 and an order by Nurse Doughty to check it again every day for the next five days, no vital signs at all had been taken on April 15, 16 or 17. *See* Doughty Dep. (Ex. 6) at 112:6-24.

62. If P.A. Havens had looked at the Inmate Welfare Checklist posted on Mr. Walter's cell, just steps away from the medical office, he would have seen that in the two days Mr. Walter had been in the holding cell, he had slept, *at most*, for only one-and-a-half hours. *See* Ex. 34. He would have also seen that Mr. Walter was talking to himself and yelling inside his cell. *Id*.

63. P.A. Havens knew that after he left the jail on the evening of the 17th, there would be no nurse or other medical provider at the jail for approximately the next 12 hours—and that Mr. Walter would have no nurse or other medical provider at the jail for 12 hours out of every ensuing day. *See* Movant's Answer to Second Amended Complaint (ECF 135) at ¶ 64. P.A. Havens "should

have recognized that Mr. Walter was seriously ill and acted urgently to transfer him to hospital care, rather than permitting him to remain in a jail setting where it was virtually impossible for his condition to be adequately addressed." Gendel Rept. (Ex. 9) at 19.

64. The sum total of P.A. Havens's note on April 17th was: "Weaning off methadone – he may go through some withdrawal. I have no suggestions. May call Dr. Herr for more advice." Ex. 37. This was grossly inadequate: "Havens was Mr. Walter's attending clinician. He was responsible for his health and life. If he had doubts, questions, or was out of 'suggestions' it was his responsibility, his duty, to contact Dr. Herr himself." Stern Rept. (Ex. 10) at 37. Among other things, his note represents "his lack of sense of responsibility for Mr. Walter's medical well-being and his indifference." Gendel Rept. (Ex. 9) at 17. "If Mr. Havens didn't know what was wrong with Mr. Walter, and had concern about him, he should have promptly called Dr. Herr or immediately transferred Mr. Walter to a hospital, or both." *Id*. at 18. P.A. Havens "did not act to emergently transfer Mr. Walter to a hospital, even when it was clear from his note on 4/17/14 that he did not know what to do for Mr. Walter." *Id.* at 10.

65. P.A. Havens acted far below the standard of care. *See* Stern Rept. (Ex. 10) at 35-37; Roy-Byrne Rept. (Ex. 8) at 15; Gendel Rept. (Ex. 9) at 17-18, 20. He left the jail on the evening of the 17th, knowing that it would be staffed, only half of the time, by a newly-hired, unsupervised, untrained, LPN who had no knowledge or experience with benzo withdrawal or any kind of withdrawal. *See* ¶ 38, *supra*. He left even though it was obvious to the detention staff that Mr. Walter was not getting the medical aid he needed and belonged in a hospital. *See* ¶¶ 40-49, *supra*.

66. From the point that P.A. Havens left the jail on April 17 until Mr. Walter's death on Easter Sunday, April 20, Mr. Walter's condition continued to deteriorate. Throughout this time, he remained in the holding cell. Deputy Wilson describes Mr. Walter's condition on April 19th:

> By April 19th, Mr. Walter's condition was quite obviously dire – any person could see that. He was, by this time, covered with bruises. I could see bruises on his hands, feet, shins and torso. He was lying on the cell floor, simply shaking. He was emaciated and seemed to have no sense of his surroundings or the condition he was in.
>
> By the end of my shift on Saturday, April 19th, Mr. Walter was in such dire condition that I remarked to one of my fellow deputies, Charlene Combs, "I would not be surprised if he dies tonight." She agreed with me and told me that her superiors and pretty much everyone else working in the booking area were aware of Mr. Walter's situation. She also told me that the jail's nurse was aware of MR. Walter's situation. Based on what I observed, and in light of the deterioration in Mr. Walter's condition with each passing day, he looked to me to be a dying man. Any person who saw Mr. Walter between April 16-19 (and particularly on April 19th) would have seen the same things I saw.

Wilson Decl. (Ex. 17) ¶¶ 9-10.

67. An inmate being held across from Mr. Walter on April 19th describes him looking "like a living corpse," "malnourished," "violently shuddering," covered with injuries, and "talking and mumbling almost nonstop." Decl. of J. Weber (Ex. 40) ¶ 3. "He was obviously physically and mentally ill, and anyone who looked at him for more than a minute would be able to see that." *Id.*

68. Deputy Lightcap was so disturbed by Mr. Walter's condition on April 19th that she contemporaneously documented her observations. *See* Ex. 41. She described him as being covered with "excessive bruises" "all over his body," his toe appeared to be broken, "[t]here seemed to be more bruises *showing up each day*," and she saw his obvious "diminishing size." Ex. 41 (emphasis added). His whole body was violently and involuntarily shaking, and she could see fresh blood among *many other* detailed and disturbing observations. *See* Lightcap Dep. (Ex. 35) at 110:18-129:6. His mental and physical condition was so dire that as of April 19, it was apparent to her that Mr. Walter was in a "medical crisis" and needed to be in a hospital. *Id.* at 123:10-24, 134:9-25.

69. The Court need not guess what Mr. Walter's body looked like on April 19th because, following his death, photographs were taken of his body to show the excessive external injuries

that were now covering him from head to toe. These photos were shown to Deputy Lightcap during her deposition, and she confirmed that they accurately depict the condition of his body on the night of April 19th—18 and ½ hours before he died. *See* Ex. 42; Lightcap Dep. (Ex. 35) at 140:7-17.

70. In the days and hours leading up to his death, "Mr. Walter suffered extreme mental, physical and emotional pain, suffering and anguish for days on end as the result of the gross deviations from the standard of care . . . . Mr. Walter's benzodiazepine withdrawal was a serious medical need and caused him to needlessly suffer extreme mental, physical and emotional pain and suffering and anguish . . . ." Roy-Byrne Rept. (Ex. 8) at 15.

71. Mr. Walter died in his cell at approximately 5:30 p.m. on Sunday, April 20th. Ex. 9 at 7. He weighed 168 pounds at autopsy—a loss of more than 30 pounds during his 17 days in jail. *See* Ex. 44; Rept. of Frank Sheridan, M.D. (Ex. 43) at 4. He had multiple external injuries—extensive bruises and abrasions—covering nearly his whole body. *See* Ex. 44; *see also* photographs (Ex. 42).

72. Mr. Walter also had extensive *internal* injuries—most notably, *multiple broken ribs* on the back side of his body. *See* Sheridan Rept. (Ex. 43) at 6. These fractures occurred "at the strongest point in the rib-cage," and a "great deal of externally-applied force" would have been necessary to cause them. *Id.* They were not pre-existing or caused by resuscitative efforts. *Id.* The jury can infer that but for Mr. Walter's withdrawal psychosis, he would not have suffered his many injuries.

73. Mr. Walter died from "Acute Benzodiazepine Withdrawal." Ex. 45; *see also* Sheridan Rept. (Ex. 43) at 4. His death was "entirely preventable" and had he been treated appropriately during his confinement or "transported to the hospital and provided emergency medical care for his severe benzodiazepine withdrawal prior to his death," he would not have died and would have been spared from the pain and suffering he experienced. Ex. 43 at 5.

B. The Death of Roy B. Havens, the Formation of His Estate, and the Lawsuit

74. P.A. Havens died on February 4, 2016. *See* Havens's SMF ¶ 6.

75. On June 16, 2016, Plaintiff formed the Estate of Roy B. Havens. *See* Order (Ex. 46).

76. On June 16, 2016 (the same day the Havens Estate was formed), plaintiff promptly filed her Second Amended Complaint, adding as a defendant "The Estate of Roy D. Havens, by and through its personal representative, Linda Havens." [ECF 84]; Def. Ex. 3. The Second Amended Complaint was filed within two-years-and-four months of *all* events occurring during Mr. Walter's April 2014 confinement, including all facts alleged against P.A. Havens.

77. In the Second Amended Complaint, plaintiff alleged against the Havens Estate:

> Defendant the Estate of Roy D. Havens was duly formed under the laws of the State of Colorado. Its personal representative, Linda Havens, is a United States Citizen and a Colorado resident. Roy D. Havens, P.A., now deceased, was an agent, employee, and/or subcontractor of one or more of the corporate defendants and was responsible for providing medical care to John Patrick Walter during his pretrial detention. At all material times, he was acting under color of state law. Mr. Havens died on or about February 4, 2016. All claims that would have been available to assert against Mr. Havens individually, had he survived, are now properly asserted against the Estate of Roy D. Havens by and through its personal representative, Linda Havens.

Second Amended Complaint (ECF 84) ¶ 25.

78. Plaintiff detailed the allegations involving P.A. Havens that occurred during Mr. Walter's pretrial detention between his jail admission and death. *See* Second Amended Complaint (ECF 84) at ¶¶ 64-107, 174, 179, 210. Plaintiff alleged as follows at paragraph 179:

> Defendant the Estate of Roy D. Havens, by and through its personal representative, Linda Havens, is liable for the actions of Roy D. Havens (now deceased) who violated Mr. Walter's Fourteenth Amendment rights by acting with deliberate indifference to his serious medical needs and otherwise subjecting him to inhumane conditions of confinement that amounted to punishment. As a direct and proximate result of the unconstitutional acts and omissions of Roy D. Havens, Mr. Walter experienced extreme physical pain and suffering, severe mental anguish, and death.

79. On June 22, 2016, plaintiff caused a formal "Claim" to be filed and served against the Havens Estate in the District Court for Fremont County, Colorado. This claim referenced the instant action, incorporated and asserted the allegations in the instant action, and specified that the tortious conduct occurred from "April 2, 2014 through April 20, 2014." *See* ECF 116-2 (Ex. 47).

80. On July 20, 2016, the Havens Estate waived service of this suit. *See* ECF 95 (Ex. 48).

C. The Haven Estate's First Motion to Dismiss Based on the Statute of Limitations

81. On September 12, 2016, The Havens Estate filed a motion to dismiss the claims against it under Fed. R. Civ. P. 12(b)(6) "as barred by the statute of limitations." *See* ECF 114 (Ex. 49).

82. In its motion, the Havens Estate asserted the following:

a) "Mr. Walter had notice of his constitutionally inadequate care from the time he was booked into the facility, through the discontinuation of his Klonopin medication, while suffering withdrawal symptoms and right up until his death." *Id.* at 6-7.

b) "[I]t is Mr. Walter's and not Ms. Klodnicki's [the PR's] notice that matters in deciding whether the cause of action accrued." *Id.* at 7.

c) "Ms. Klodnicki [the personal representative] is bringing Mr. Walter's constitutional claim as a survival action." *Id.*

d) "This action is exclusively aimed at vindicating Mr. Walter's constitutional rights." *Id.*

e) "Mr. Walter's cause of action (and by extension, Ms. Klodnicki's) accrued whenever Defendants deprived Mr. Walter of a constitutional right." *Id.*

f) "Plaintiff's allegations, if taken as true, show that Mr. Walter's claims . . . accrued daily." *Id.*

g) "Because it is Mr. Walter's notice that matters, Mr. Walter's claims could not accrue later than the date of Mr. Walter's death on April 20, 2014." *Id.*

D. The Court's Ruling: Plaintiff's Suit Against the Havens Estate Was Timely

83. Plaintiff opposed the Estate's motion because it had ignored Colorado's tolling statute, CRS 15-12-802(2), which automatically suspends the statute of limitations for four months when a tortfeasor dies—tacking an additional four months onto the otherwise-applicable statute of limitations for claims against the estate of a deceased tortfeasor. ECF 115 (Ex. 50).

84. On February 3, 2017, the Court denied the Havens Estate's motion to dismiss. *See* ECF 132 (Ex. 51). The Court agreed that CRS 15-12-802(2) "is unambiguous: '[t]he running of *any statute of limitations*, other than exceptions not relevant here, 'is suspended during the four months

following the decedent's death but resumes thereafter.'" *Id*. at 20. The Court found that because the statute of limitations was tolled upon the death of P.A. Havens, the complaint against his estate could be filed up until August 19, 2016. *Id*.

85. Regarding the precise argument the Havens Estate now makes in its Rule 56 motion—that the tolling statute should not apply to claims where the statute of limitations is measured from the death of the tort victim—the Court noted that this interpretation was not advanced by the Havens Estate, was deemed to be conceded, and that "the Court will not examine this question further." ECF 132 (Ex. 51) at 19 fn. 8.

IV. ARGUMENT

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Adler v. Wal-Mart Stores*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986)). The Havens Estate seeks summary judgment on two grounds. First, it attempts to reargue statute of limitations issue. The Court already ruled in favor of the plaintiff on this issue and should do so again. Second, it argues that the evidence is insufficient to support plaintiff's constitutional claim against the Havens Estate. Given the ample evidence, the Court should reject this argument as well.

A. The Havens Estate's Statute of Limitations Re-Argument Should be Rejected

The Havens Estate urges the Court to adopt a strained interpretation of Colorado's tolling statute, C.R.S. 15-12-802(2), which would render it inapplicable to wrongful death claims. There are three fundamental problems with this argument. First, fairness and judicial economy should preclude the Havens Estate from rearguing this issue. Second, the Estate's proposed interpretation of the statute is illogical. The statute (which is admittedly not an example of model drafting by the

Colorado Legislature) can *only* be referring to the death of the person whose estate is being administered—not the death of the tort victim; otherwise it would lead to absurd results. Third, even if the Court accepted the Havens Estate's interpretation of the tolling statute, the running of the statute of limitations here is not "measured from the event of [Mr. Walter's] death." Instead, it is the events occurring in the jail *up to the moment of his death* from which the statute of limitations is measured. As discussed below, this is a survival action to vindicate Mr. Walter's constitutional deprivations *during* his life. His death was not the moment the statute of limitations *began*; rather, it was the point at which harm against him *ended*. The statute of limitations is measured from April 3, his first day of confinement, up until his death.

1. Fairness and Judicial Economy Should Preclude Defendant's Re-Argument

Although the Court clearly has discretion to re-examine its earlier orders, this Court has noted that this discretion does not invite the parties to re-assert old arguments that were made or could have been made in prior dispositive briefing. *JTS Choice Enters. v. E.I. Dupont De Nemours & Co.*, No. 11-cv-03143-WJM-KMT, 2014 U.S. Dist. LEXIS 99360, at *17-19 (D. Colo. July 22, 2014). "[I]n consideration of both judicial economy and fairness to the parties, judges in this district have imposed limits on their broad discretion to revisit interlocutory orders and consider whether new evidence or new legal authority has emerged, or whether the prior ruling was clearly in error when deciding motions to reconsider interlocutory orders." *Id*. at *17. When a party "has failed to cite an intervening change in the law, any evidence that was unavailable at the time of the original briefing, or any need to correct clear error or prevent manifest injustice," an attempt to seek reconsideration of a dispositive issue should be rejected on grounds of fairness and judicial economy. *Id*. at *18. It is not appropriate for a party to lose a dispositive motion and then "rehash

old arguments, reframe pre-existing evidence, [or] attempt to raise new arguments that could have been brought forth in its initial briefs." *Id*.

In this case, there is no new evidence or legal authority relevant to the statute of limitations. And whether the statute of limitations argument is advanced by the Havens Estate via Rule 12(b)(6) or Rule 56 makes no difference—it is still the same, purely legal argument. The arguments the Havens Estate makes now could clearly have been made when it filed its 12(b)(6) motion more than one year ago. While the Haven's Estate might have been unfamiliar with this Court's position on litigants attempting to take second bites at the dispositive motion apple, it is difficult to understand why it believes it can advance its argument when the Court admonished the parties that it would "not examine this question further." *See* ECF 132 (Ex. 51) at 19 fn. 8. The Havens Estate's statute of limitations argument should be denied for this reason alone.

2. The Havens Estate's Interpretation of Colorado's Tolling Statute is Flawed

Plaintiff filed claims against the Havens Estate under 42 U.S.C. § 1983 based on repeated violations of Mr. Walter's Fourteenth Amendment rights as a pretrial detainee. *See* ECF 84. Section 1983 does not contain its own statute of limitations. In Section 1983 actions, "state law determines the appropriate statute of limitations and accompanying tolling provisions." *Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir. 1995). *See also Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir. 2004) ("[S]tate law governs the application of tolling in a civil rights action."); *Onyx Props., LLC v. Bd. of County Comm'rs of Elbert County*, 868 F. Supp. 2d. 1171, 1176 (D. Colo. 2012) (holding that in Section 1983 cases, the statute of limitations and related questions of tolling are governed by state law) (internal quotations omitted).

Colorado's general two-year statute of limitations governs § 1983 claims against living defendants. In addition, when a tortfeasor dies, Colorado law provides a four-month tolling

provision that automatically provides an additional four months from the date of the tortious conduct to file claims against the tortfeasor's estate. The applicable statutory scheme is set out in C.R.S. 15-12-802. Under this scheme, the Colorado Legislature permits personal representatives of *defendant*-estates to assert statute of limitations defenses that the decedent would otherwise have been entitled to assert—but with one critical caveat: the statute of limitations is ***suspended*** for four months after the tortfeasor's death. The statute reads as follows:

> 15-12-802. Statutes of limitations.
>
> (1) Unless an estate is insolvent, or would otherwise be rendered insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.
>
> (2) The running of any statute of limitations measured from some event other than death [of the decedent whose estate is being administered][4] or the giving of notice to creditors for claims against a decedent ***is suspended during the four months following the decedent's death but resumes thereafter*** as to claims not barred by the provisions of this part 8.
>
> (3) For purposes of any statute of limitations other than those time periods specified in [other inapplicable sections], the proper presentment of a claim under [the probate claim presentment statutes] is equivalent to commencement of a proceeding on the claim.

C.R.S. 15-12-802 (emphasis and brackets added).

The intent of the foregoing provision is clear. A tort victim would ordinarily be required to sue his or her tortfeasor within two years from the date of the tort. But when the tortfeasor dies before the action can be filed (whether that occurs one day, one week, or at any time before the two-year period expires), the victim cannot sue without first ensuring that the tortfeasor's estate is set up and a personal representative appointed to become the real party in interest. This necessarily

[4] This bracketed language, which represents Plaintiff's interpretation of the statute and the one adopted by the Court in its original order, is discussed in more detail below.

takes time. Accordingly, the Colorado Legislature chose to remedy the potential for injustice by giving the tort victim an additional four months to take the necessary steps to cause the formation of decedent's estate and commence suit against it. This makes perfect sense.

The Colorado Court of Appeals has interpreted C.R.S. 15-12-802(2) to be exactly what it is—a tolling statute that automatically tacks four months onto the end of any otherwise-applicable limitations period. *See Hoffman v. Estate of Donald Chandler and Julie Fisher*, Colorado Court of Appeals, No. 14-CA-1742 (Sept. 17, 2015) (unpublished and attached as Exhibit 52). *Hoffman* involved claims by a victim of a motor-vehicle tort committed on May 28, 2010. Because the case involved a motor vehicle tort, Colorado's three-year statute of limitations applied. This meant that the tort victim was required to commence suit no later than May 28, 2013. Unbeknownst to the tort victim, the tortfeasor had died between the tort and the filing of the complaint. The Colorado Court of Appeals held that the tortfeasor's death automatically extended the limitations period for claims against the tortfeasor's estate by four months past the original limitations period:

> Section 15-12-802(2), C.R.S. 2015, states, in relevant part, '[t]he running of any statute of limitations measured by some event other than [the tortfeasor's] death . . . is suspended during the four months following the decedent's death but resumes thereafter . . . .' This section covers the specific circumstances presented in this case: (1) the applicable statute began running the day the accident occurred; (2) it was tolled for four months beginning on the day the decedent died; and (3) it resumed after that four month period expired.

Id. at 11. Applying the statute to the facts of that case, which involved an incident on May 28, 2010, the court held as follows:

> [T]he legislature, via the probate code, provided plaintiff with additional time to correct the problem [caused by the inability to name a deceased person as a defendant]. As we set forth above, section 15-12-802(2) tolled the statute of limitations for four months following the decedent's death. So plaintiff had until September 28, 2013 [three years and four months following the tort] to amend her complaint and open an estate to effectuate service of process.

Id. at 16.[5] The court's reasoning in *Hoffman* is directly applicable here. Plaintiff had two years plus four months to file her claims against the Havens Estate.

As this Court previously ruled, the statute of limitations against the Havens Estate stopped running on the date of P.A. Havens's death—February 4, 2016. At that time, the two-year statute of limitations had not expired. The limitations period was suspended for four months after P.A. Havens's death and did not start to run again until June 4, 2016, finally expiring on August 19, 2016. Plaintiff filed the Second Amended Complaint against the Estate on June 16, 2016—well-within this period—without any need to relate back to the original pleadings. Indeed, even if the limitations period commenced on the date P.A. Havens stopped Mr. Walter's Klonopin (April 3, 2014), ignoring the continuing violation, plaintiff had until at least August 3, 2016 to file any claims against the Estate. It is undisputed that plaintiff filed suit against the Estate by way of a Second Amended Complaint on June 16, 2016. No matter how one calculates the accrual date, the claims here were properly asserted against the Estate well-within the period before the statute of limitations would have expired as this Court originally found. *See* ECF 132 at 19.

The Havens Estate now focuses on the language of C.R.S. 15-12-802(2) referring to "the running of any statute of limitations measured from **some event <u>other than death</u> or the giving of notice to creditors for claims against a decedent**" to argue that tolling does not apply in cases against a tortfeasor's estate if the tort caused the victim's death. In other words, the Estate suggests that this language refers to the death of Mr. Walter (the tort victim) rather than the death of Mr. Havens (the tortfeasor). Put another way, the Estate would argue that the statute of limitations would be tolled for every tort claim of any kind against a tortfeasor's estate *except* a claim arising

[5] Ultimately, the court held that the plaintiff did not do so in time because she waited until October 4, 2013 to file an amended complaint, thereby missing the three-year-and-four-month deadline by one week.

from the death of the victim. The Estate points to no legislative history or other source that interprets the statute this way. And it is illogical to suggest that the Legislature intended "death" to refer to anyone's death but the death of the person against whose estate the claim is being asserted. If, for some bizarre reason, the statute meant to carve out a narrow exception for wrongful death claims (being the only claims not tolled), it would have explicitly said so.

Take the *Hoffman* case, for example. The Havens Estate suggests that the claims of the car accident victims were tolled only because they survived the crash. Under the Estate's theory, the statute would not have been tolled if the victims of the crash died. But what sense does that make? Particularly when it is a basic principle of tort law that it is the commission of the tort and the knowledge of the commission of the tort that starts the statute of limitations running—not the damage suffered. *Palisades Nat'l Bank v. Williams*, 816 P.2d 961 (Colo. App. 1991). Indeed, it has long been the law in Colorado that even when the tortious act causes death, it is the commission of the tort itself rather than the death that later results from it by which the statute of limitations must be measured. *Crownover v. Cleichman*, 38 Colo. App. 96, *aff'd*. 194 Colo. 48 (1977).

The "death" in C.R.S. 15-12-802(2) refers to claims that are measured from the death of the person whose estate is being administered. This is evident from examining other provisions of Colorado's probate law. For example, a will contest against the decedent's estate is generally subject to a three-year statute of limitations *measured from the date of the decedent's death*. C.R.S. 15-12-108(1). Obviously, it makes sense that will contest claims would not tolled from the decedent's death since it is the decedent's death itself that is the trigger for the running of the statute for such claims. Moreover, the use of the language "death" in the same sentence as "giving of notice to creditors for claims against a decedent" evidences the Legislature's intent that the "death" is the death of the person whose estate is being administered.

3. Even Accepting Defendant's Statutory Interpretation, Mr. Walter's Death is Not the "Event" From Which the Statute of Limitations is Measured

Moreover, the Court need not resolve the question of whose "death" the tolling statute refers to because, even if the Estate's interpretation were accepted, Mr. Walter's death is not itself the "event" from which the statute of limitations is "measured." Mr. Walter's death *stopped* the tortious action against him; it did not *start* it or even continue it. The date of his death is the last possible date by which the statute of limitations could be measured, but it was not the triggering event. This was conceded by the Havens Estate and affirmatively advanced in its 12(b)(6) motion.

The Estate's inconsistency on this point is remarkable. In its 12(b)(6) motion, the Estate asserted that Mr. Walter "had notice of his constitutionally inadequate care from the time he was booked into the facility, through the discontinuation of his Klonopin medication, while suffering withdrawal symptoms and right up until his death." ECF 114 (Ex. 49) at 6-7. The Estate urged that "it is Mr. Walter's and not [the personal representative's] notice that matters in deciding whether the cause of action accrues." *Id*. at 7. The Estate said that "[t]his action is exclusively aimed at vindicating Mr. Walter's constitutional rights" and that "Mr. Walter's cause of action (and by extension, Ms. Klodnicki's) accrued whenever Defendants deprived Mr. Walter of a constitutional right." *Id.* The Estate asserted that "Plaintiff's allegations, if taken as true, show that Mr. Walter's claims that the conditions of his constitutionally inadequate confinement [sic] accrued daily." *Id.* And the Estate stated that "[b]ecause it is Mr. Walter's notice that matters, Mr. Walter's claims could not accrue later than the date of Mr. Walter's death on April 20, 2014." *Id.*

Now, the Havens Estate tacks 180 degrees. It argues that *only* Mr. Walter's *death* gave rise to a claim. It says that "the statutory period for which Plaintiff could file her claim for against [sic] the Estate of P.A. Havens *started to accrue upon Mr. Walter's death* on April 20, 2014." Def. Mot. (ECF 172) at 6 (emphasis added). It states: "The Plaintiff in this case, Mr. Walter's Estate, could

not become aware of its cause of action until Mr. Walter died." *Id*. at 7. It urges that "Mr. Walter's death triggered the Plaintiff's cause of action" and "[t]he plaintiff in this case, Mr. Walter's Estate, could not become aware of its cause of action until Mr. Walter died." *Id*.

The Estate's original position (that the statute is measured from the violations of Mr. Walter's personal rights during his confinement) is correct. Its current position (that the statute is measured only from Mr. Walter's death and his personal representative's knowledge of his death) is wrong. For nearly 30 years, it has been the law in the Tenth Circuit that a § 1983 action based on deliberate indifference—even, as here, deliberate indifference that causes death—is *not* a wrongful death action as such. Rather, it is a "survival action, brought by the estate of the deceased victim in accord with § 1983's express statement that liability is 'to the party injured.'" *Berry v. Muskogee*, 900 F.2d 1489, 1506-07 (10th Cir. 1990). Unlike a common law wrongful death claim, the death of the decedent does not give rise to an independent cause of action by his surviving beneficiaries personally. Rather, suit is brought by the decedent's estate through his or her personal representative to recover compensatory damages personal to the decedent such as "pain and suffering before death" and other damages personal to the victim. *Id*. at 1507. Relatives and beneficiaries do not have their own cause of action; rather, the personal representative of the decedent's estate can only bring those claims that are personal to the decedent. *Kelly v. Rockefeller*, 69 Fed. Appx. 414, 416 (10th Cir. 2003); *Bruner-McMahon v. Hinshaw*, 846 F. Supp. 2d. 1177, 1198 (D. Kan. 2012); *Scothorn v. Kansas*, 772 F. Supp. 556 (D. Kan. 1991). Simply put, "a wrongful death action . . . is not recognized as a federal remedy under § 1983 in the Tenth circuit." *Sudac v. Hoang*, No. 03-2520-GTV, 2004 U.S. Dist. LEXIS 9067, at *8 (D. Kan. May 13, 2004).

Because this is the law in the Tenth Circuit, the Second Amended Complaint against the Havens Estate and the other defendants was brought by the personal representative of Mr. Walter's estate to recover damages personal to him occurring between the date of his confinement and

continuing for 17 days up through the moment of his demise. No relative has asserted a personal cause of action arising from Mr. Walter's death, nor could they. Wrongful death cases are not allowed under Section 1983 in this circuit; only survival actions are.

For this reason, the statute of limitations is not measured from the moment of Mr. Walter's death, but rather from the unconstitutional conduct of the defendants (including P.A. Havens) leading up to his death. While his death is a convenient marker for the *last* moment in time when the statute of limitations *could* be measured, it was not the triggering event (as it would be in a wrongful death action, when beneficiaries' claims necessarily arise). Rather, as the Havens Estate originally urged, the statute of limitations "*accrued daily*" during Mr. Walter's confinement. In short, even if one were to accept the Havens Estate's argument that CRS 15-12-802(2) does not apply to cases in which the limitations period is measured from the tort-*victim's* death, Mr. Walter's death was not the triggering event in this case.

The Havens Estate's case citations do not support its position. *Kripp v. Luton*, 466 F.3d 1171 (10th Cir. 2006) is a property forfeiture case standing for the basic proposition that the statute of limitations runs from the time plaintiff received notice his property had been taken. The Estate then cites *Rowell v. Clifford*, 979 P.2d 363, 364 (Colo. App. 1998), which involves a state-law "wrongful death [action] separate and distinct from the action that the decedent would have had for personal injuries had he or she survived." *Id.* But our case is not a wrongful death action; it is a survival action and, as is evident from its original motion, the Havens Estate is well aware of the distinction. *See* ECF 114 (Ex. 49) at 7. The Havens Estate compounds the irony by citing *Coffey v. United States*, No. 08-0588, 2011 U.S. Dist. LEXIS 138822, at *102 (D.N.M. Nov. 28, 2011) in which the court dismissed unnamed defendants well after the statute of limitations expired under New Mexico's wrongful death statute. Finally, in *Dorrough v. GEO Group, Inc*., No. 14-1389-D,

2016 U.S. Dist. LEXIS 90026, (W.D. Okla. July 12, 2016) the court simply used the date of the decedent's death as the last moment in time by which the statute of limitations could start running.

In sum, the second effort by the Havens Estate to dismiss the case against it on statute of limitations grounds should be denied.

B. <u>The Evidence is Ample to Support Plaintiff's Fourteenth Amendment Claim</u>

1. Legal Standard

The Havens Estate begins by noting that the Eighth Amendment protects inmates from cruel and unusual punishment and that the subjective "deliberate indifference" standard applies to inadequate medical care claims brought under the Eighth Amendment. *See* ECF 172 at 12. The Havens Estate then devotes the rest of its motion to arguing that P.A. Havens was not deliberately indifferent to Mr. Walter's admittedly serious medical needs. Before considering this argument, the Court should keep in mind that this is *not* an Eighth Amendment case. The Eighth Amendment applies only to convicted prisoners, and Mr. Walter was not a convicted prisoner. As a pretrial detainee, his constitutional rights are governed by the Fourteenth Amendment.

The distinction between Fourteenth Amendment claims (due process—for pretrial detainees) and Eighth Amendment claims (cruel and unusual punishment—for convicted prisoners) has long been an academic one with no practical difference. But the distinction is no longer academic—even in cases, like this one, involving allegations of inadequate medical care. In 2015, the Supreme Court determined that an *objective* standard governs excessive force claims brought by pretrial detainees under the Fourteenth Amendment as distinct from the subjective standard that applies to such claims brought by convicted prisoners under the Eighth Amendment. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Since then, at least two circuit courts have decided that the *Kingsley* holding extends beyond excessive force claims and applies to other

claims involving the Fourteenth Amendment rights of pretrial detainees, such as failure-to-protect claims and claims for overcrowding, lack of sanitation, and similar unconstitutional conditions of confinement. These courts have interpreted *Kingsley* as replacing the subjective "deliberate indifference" standard for pretrial detainees with a less-stringent, objective standard. *See Darnell v. Pineiro*, 849 F.3d 17 (2nd Cir. 2017); *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc), cert. den., 137 S. Ct. 831 (U.S. Jan 23, 2017).

As of 2017, several district courts have relied on the Supreme Court's holding in *Kingsley,* as well as circuit court authority, to rule that a subjective showing of deliberate indifference is no longer required in inadequate medical care cases brought by pretrial detainees under the Fourteenth Amendment. *See, e.g.*, *Portillo v. Webb*, No. 16-cv-4731, 2017 U.S. Dist. LEXIS 168854, at *10-12 (S.D.N.Y., Oct. 11, 2017) (with regard to claim alleging denial of medical care, "*Kingsley* altered the subjective prong where a claim is made by a pretrial detainee"); *Murray v. McKay*, No. 1:17-cv-00564-MJS (PC), 2017 U.S. Dist. LEXIS 133566, at *10-11 (E.D. Cal. Aug. 18, 2017) (after *Kingsley*, "the Court sees no reason why the same rationale should not apply to other Fourteenth Amendment conditions of confinement and medical care claims"); *Borges v. Cty. of Humboldt*, No. 15-cv-00846 YGR, 2017 U.S. Dist. LEXIS 116387, at *8-10 (N.D. Cal. July 25, 2017) (after *Kingsley*, subjective element no longer applicable to medical care claim under Fourteenth Amendment); *Sadler v. Dutton*, No. CV 16-00083-H-DLC-JTJ, 2017 U.S. Dist. LEXIS 119031, at *9-10 (D. Mont. June 1, 2017) (dispensing with subjective inquiry in Fourteenth Amendment medical care claim after *Kingsley*); *Lloyd v. City of New York*, No. 14-cv-9969, 2017 U.S. Dist. LEXIS 49526, at *25-29 (S.D.N.Y. March 31, 2017) (circuit authority interpreting *Kingsley* means that "'*mens rea* prong' of deliberate indifference to serious medical needs claims under the Fourteenth Amendment [will now] be analyzed objectively.").

This Court has relied on *Kingsley* to eliminate the subjective inquiry in conditions of confinement cases brought by pretrial detainees. *See Eaves v. El Paso Cnty. Bd. of Cnty. Comm'rs*, No. 16-cv-01065, 2017 U.S. Dist. LEXIS 43307, at *16-17 (D. Colo. March 24, 2017). So too has at least one other district court in this circuit. *See Abila v. Funk*, 220 F. Supp. 3d 1121 (D. N.M. 2016). Given that the source of this change in the law is the Supreme Court, and given that the Tenth Circuit has not spoken on whether *Kingsley* extends to medical care claims for pretrial detainees, this Court could properly decide that a subjective state-of-mind requirement is no longer applicable to Fourteenth Amendment denial of medical care claims. However, the Court need not address this issue unless it chooses to do so, because plaintiff has ample evidence to satisfy the deliberate indifference standard under the pre-*Kingsley* state of the law.

2. There is Ample Evidence that P.A. Havens was Deliberately Indifferent

The Havens Estate does not challenge the fact that Mr. Walter had an objectively serious medical need throughout his 17-day confinement—both for his Klonopin medication initially, and for the subsequent withdrawal that developed. And because P.A. Havens was an employee of a private healthcare company rather than county employee, the defense recognizes that he cannot assert any qualified immunity defense.[6] The Havens Estate's only argument is that the evidence is insufficient to show deliberate indifference on the part of P.A. Havens. This is incorrect. Viewing the evidence in the light most favorable to Mr. Walter, a reasonably jury could easily find that P.A. Havens was deliberately indifferent to his admittedly serious medical needs.

Deliberate indifference under the subjective standard asks whether the defendant was "aware of facts from which the inference could be drawn that a substantial risk of serious harm

[6] *See Estate of Grubbs v. Weld Cnty. Sheriff's Office*, No. 16-cv-00714-PAB-STV, 2017 U.S. Dist. LEXIS 33009, at *17-19 (D. Colo. Mar. 8, 2017) (holding that qualified immunity is unavailable to employees of a private company providing medical services to jail inmates).

exits" and whether there is evidence that the defendant actually drew the inference. *Vasquez v. Davis*, 226 F. Supp. 3d 1189, 1209 (D. Colo. 2016) (citing *Farmer v. Brenan*, 511 U.S. 825, 837 (1994)). Whether a jail official had the requisite knowledge of a substantial risk of serious harm is "subject to demonstration 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." *Id*. (quoting *Farmer*, 511 U.S. at 842). "In medical cases particularly, objective standards of proper care may be introduced as circumstantial evidence about what a medical provider knew." *Id*. This includes expert testimony about what a medically educated individual would have realized. *Id*. (citing *LeMarbe v. Wisneski*, 266 F.3d 429, 436-38 & n. 6 (6th Cir. 2001)). "[C]ontemporary standards and opinions of the medical profession . . . are highly relevant in determining what constitutes deliberate indifference to medical care." *Mata v. Saiz*, 427 F.3d 745, 757-58 (10th Cir. 2005) (internal citations omitted). In addition, circumstantial evidence of deliberate indifference includes references to a facility's written regulations and internal procedures. "[S]uch protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm." *Id*. at 757.

As the Supreme Court has held, the plaintiff need not prove "that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite knowing of a substantial *risk* of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (emphasis added). Moreover, the risked "harm" need not be death; unnecessary pain or a worsening of the inmate's condition is sufficient even if the delay in medical treatment is a short one. *Mata*, 427 F.3d at 755. Deliberate indifference is shown when a medical defendant completely "fails to follow the required protocols, contact the appropriate medical personnel, and/or attempt to assist [the inmate] in any fashion." *Id*. at 758. Deliberate indifference

can include not only the failure to treat a medical condition, but also delaying or refusing to fulfill the role of "gatekeeper" for other medical personnel capable of treating the condition. *Sealock v. Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000).

There is no question that the arbitrary "cold-turkey" denial of an inmate's medication with no tapering or substitute medication and no individualized assessment of the inmate can constitute deliberate indifference. *See Strain v. Sandham*, No. S-05-0474, 2009 U.S. Dist. LEXIS 4760, at *17 (E.D. Cal. Jan. 23, 2009). This is because deliberate indifference occurs when a jail's medical personnel "deliberately ignore the express orders of a prisoner's prior physician for reasons unrelated to the medical needs of the prisoner." *Id*.

In this case, there is ample evidence that P.A. Havens's arbitrary and abrupt discontinuance Mr. Walter's longtime Klonopin prescription (with no tapering) was deliberately indifferent. Doing so "would predictably cause a significant withdrawal syndrome." Gendel Rept. (Ex. 9) at 17. "[N]o competent health care provider would ever recommend such a procedure." Roy-Byrne Rept. (Ex. 8) at 5. Discontinuing Mr. Walter's prescription with no tapering "was patently dangerous and likely to lead to life-threatening withdrawal." Stern Rept. (Ex. 10) at 8. For P.A. Havens to cold-turkey Mr. Walter was a "gross deviation of the standard of care and highly dangerous." Roy-Byrne Rept. (Ex. 8) at 7. It was "medically inappropriate and dangerous." Gendel Rept. (Ex. 9) at 17. P.A. Havens not only knew Mr. Walter was on Klonopin, he could also see that Mr. Walter was on high daily doses as indicated on the bottles he brought with him to the jail. He could see the name of the prescribing provider and the pharmacy, and he could tell that Mr. Walter was medication-compliant as indicated by the fact that the correct number of tablets remained and that the prescription had been refilled just days earlier. To suddenly discontinue Mr.

Walter with no tapering or substitute benzo of any kind "would certainly evoke a withdrawal syndrome" which would be "serious, at a minimum." Gendel Rept. (Ex. 9) at 5.

It might be one thing if P.A. Havens made a reasoned decision—even a negligent one—to discontinue Mr. Walter based on some sort of individualized medical rationale. But this is not what he did. He cold-turkeyed Mr. Walter simply because that was the way things were done at the Fremont County Jail—everyone on a benzo was cold-turkeyed with no individualized assessment of appropriateness. *See* Maestas Dep. (Ex. 5) at 43:2-44:10. Moreover, in suddenly discontinuing Mr. Walter from his prescribed benzo, P.A. Havens knowingly disregarded his company's written policies on the subject. For example, he ignored Policy D-02, which mandates that every inmate continue to receive their outside medication as prescribed until clinically determined otherwise pursuant to set procedures. *See* Ex. 20. Nor did he pay heed to the benzo protocol, L-06, which mandated clinical inquiry into facts pertaining to Mr. Walter's prescription and required a tailored tapering schedule for any discontinuance. The record shows that he did not inquire of Mr. Walter, his pharmacy, or his outside clinician in utter disregard of his company's written requirements and the standard of care. His order was reckless, irresponsible, and devoid of considered judgment. His decision was deliberately indifferent and highly dangerous.

So too was his complete lack of action when he became aware of Mr. Walter's withdrawal symptoms on the evening of April 17th. By then, Mr. Walter's chart had been flagged for him to review. P.A. Havens knew from the chart that Mr. Walter was "acting very very strange." Mr. Walter was "talking to himself & 'others.'" His blood pressure had not been checked "due to his strange behavior." His "holding cell smelled." The chart showed that the jail commander had come to an LPN with concerns, noting that Mr. Walter was "fine" upon his entry into the jail but had recently become "combative" and had been "sprayed" and "fought." P.A. Havens could also see

from the chart that his order for the LPNs to start the "benzo protocol" had been *totally disregarded by them*—not implemented in any way, shape or form. The chart readily showed that Mr. Walter's blood pressure was high on the only two occasions it had been checked and that orders to take his vitals on subsequent days had not been followed—leaving P.A. Havens with no vital signs upon which to make any judgment about Mr. Walter's well-being for the three days before he came in.

He could also see from the chart that CHC's "essential" policy E-04, which mandated a comprehensive health assessment of Mr. Walter within 14 days of his admission to the jail had been disregarded. Mr. Walter was in a fully-observable location—a mere 30-second walk from the medical office where P.A. Havens would have been on the evening of April 17th. A simple glance at the "Inmate Welfare Checklist" on Mr. Walter's door would have shown him that Mr. Walter had slept, *at most*, for one-and-a-half hours in the previous two days. It would have also showed him that Mr. Walter was regularly talking to himself and yelling, among other things. And a brief observation *of* Mr. Walter in the windowed holding cell would have revealed what, by now, was obvious to the entire lay detention and command staff who were observing him regularly: Mr. Walter was gravely ill and getting worse.

Yet, although he was then acting in the role of gatekeeper for Mr. Walter's continuing care, P.A. Havens did nothing. The record shows that he did not evaluate Mr. Walter, talk to Mr. Walter, or even see Mr. Walter. He did not discuss Mr. Walter's condition with anyone, call anyone, take any action to remediate the numerous breaches in his care to that point, or take any action whatsoever. He knew Mr. Walter would be without *any* on-site care for 12 hours out of every ensuing day (including the 12 hours after he left that evening) and that only a single, newly-hired LPN (who had been failing to monitor Mr. Walter or assess him as required up to that point) would be on staff during daytime hours. Whereas P.A. Havens "should have recognized that Mr. Walter

was seriously ill and acted urgently to transfer him to hospital care, rather than permitting him to remain in a jail setting where it was virtually impossible for his condition to be adequately addressed," Gendel Rept. (Ex. 9) at 19, he took no action. All he did was write a short, dismissive note about how Mr. Walter "may go through some withdrawal." He had "no suggestions" for the LPNs other than that they "[m]ay call Dr. Herr for more advice." This was deliberately indifferent. "PA Havens was Mr. Walter's attending clinician. He was responsible for his health and life. If he had doubts, questions, or was out of 'suggestions' it was his responsibility, his duty, to contact Dr. Herr himself." Stern Rept. (Ex. 10) at 37. The note represents "his lack of sense of responsibility for Mr. Walter's medical well-being and his indifference." Gendel Rept. (Ex. 9) at 17. "If Mr. Havens didn't know what was wrong with Mr. Walter, and had concern about him, he should have promptly called Dr. Herr or immediately transferred Mr. Walter to a hospital, or both." *Id*. at 18. Instead, P.A. Havens took no action whatsoever and left the jail at about the same time LPN Repshire did on the evening of April 17th—never to follow up again.

The deliberate indifference standard does not require P.A. Havens to have known that his acts or omissions would result in Mr. Walter's death. He need only have known that his actions or inactions had a substantial risk of causing unnecessary suffering or a worsening of Mr. Walter's admittedly serious medical condition. In this case, the risk of arbitrarily discontinuing Mr. Walter's prescription benzo—and forcing him into "cold turkey" withdrawal—was obvious. The risk of failing to act in the face of Mr. Walter's ensuing benzo withdrawal symptoms was equally obvious. Especially when viewed in the light most favorable to the plaintiff, the evidence and inferences drawn therefrom are more than sufficient for a reasonable jury to find deliberate indifference.

V. CONCLUSION

The Court should deny the Havens Estate's Motion for Summary Judgment.

Dated this 6th day of November, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date stated below this document was filed with the Clerk of the Court for the United States District Court for the District of Colorado, via the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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Dated this 6th day of November, 2017.

/s/ Sally Hartmann