Case No. 25-1271

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GRISWOLD,
as Personal Representative of
the Estate of **JOHN E. GRISWOLD**,
Plaintiff-Appellee,

v.

TRINITY HEALTH MICHIGAN,
dba St. Joseph Mercy Livingston

Defendant

and

TERRY DAVIS, Sergeant; **TRAVIS LINDEN**, Deputy; **PATRICK TURCHI**, Deputy; **ALLISON SCHULTE**, Deputy; **ERIC VANVLEET**, Deputy; **KURT HEIOB**, Deputy; **VINCENT JOHN**, Deputy

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

No. 2:22-cv-10980 (Honorable Robert J. White, *presiding*)

DEFENDANTS–APPELLANTS' REPLY BRIEF

Oral Argument Requested

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INTRODUCTION

Plaintiff's arguments in response to this appeal are wild—wildly inaccurate in both law and fact. Plaintiff seeks to turn this appeal into an entirely different case than it was in the District Court. From changing the applicable standard, to making up facts, Plaintiff's entire brief should be rejected wholesale by this Court.

First, Plaintiff urges this Court to apply a lower standard for imposing liability than Defendants, the District Court, and even he applied below. To support this, he cites cases decided after this incident, which do not retroactively apply that standard.

Second, Plaintiff asks this Court to accept 'facts' which are at best made up from whole cloth, and at worst blatantly contradicted by the record. Plaintiff also misrepresents Defendants' testimony at depositions to suggest they all knew of the condition that led to Mr. Griswold's death.

Because the record unambiguously establishes that Defendants lacked ***actual*** knowledge of Mr. Griswold's condition, this Court should reverse the District Court's denial of summary judgment and find that the Defendants were not deliberately indifferent and should be dismissed from this lawsuit.

ARGUMENT

I. LEGAL ERRORS IN PLAINTIFF'S BRIEF

A. Legal Error No. 1: Plaintiff improperly applies *Brawner* to this pre-2021 case

Perhaps recognizing Defendants are entitled to qualified immunity under the actual-knowledge standard of *Farmer v. Brennan*, 511 U.S. 825 (1994), Plaintiff now asks this Court to discard *Farmer* and apply the lower reckless-indifference standard later adopted by *Brawner v. Scott County, Tennessee*, 14 F.4th 585 (6th Cir. 2021). [Doc. 31, p. 49] There are three problems with his argument. First, Plaintiff should be estopped from taking the opposite position he did below, which was to accept the *Farmer* standard. Second, the cases he cites in support of applying *Brawner* retroactively, do not apply *Brawner* to the clearly-established prong. Third, Defendants are entitled to immunity under either standard. Each is addressed below.

1. Plaintiff cannot rely on the Brawner standard in this Court after embracing the Farmer standard in the District Court

i. The rules of judicial estoppel and invited error

Judicial estoppel prevents parties from "gain[ing] an advantage by litigation on one theory, and then seek[ing] an inconsistent advantage by pursuing an incompatible theory." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981)). The *New Hampshire* case centered around a dispute between New

Hampshire and Maine over how to define the border between those states where that border was defined by the Piscataqua River. *Id.* at 745. New Hampshire had agreed in a 1977 case to a particular definition of "middle of the river," which a 1740 boundary determination used to define the border, but now argued that the border should be placed at one shore of the river. *Id.* The Supreme Court found that New Hampshire should be "equitably barred from asserting—contrary to its position in the 1970's litigation—that the inland Piscataqua River boundary runs along the Maine shore." *Id.* at 749.

The *New Hampshire* court identified three factors useful to the judicial estoppel analysis, though they are not "inflexible prerequisites or an exhaustive formula." *Id.* at 751. Those are 1) "a party's later position must be 'clearly inconsistent' with its earlier position;" 2) "whether the party has succeeded in persuading a court to accept that party's earlier position" which "would create the perception that either the first or the second court was misled;" and 3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51 (cleaned up and internal citations omitted).

Similar to judicial estoppel, the doctrine of invited error holds that a party should be prevented from "inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." *Harvis v. Roadway Exp.*

Inc., 923 F.2d 59, 61 (6th Cir. 1991). Put another way, "when a party has himself provoked the court to commit an error, that party may not complain of the error on appeal unless that error would result in manifest injustice." *U.S. v. Demmler*, 655 F.3d 451, 458 (6th Cir. 2011) (citing *Harvis*). In *Harvis*, the plaintiff brought a lawsuit including a discriminatory contract claim and lost at a jury trial, shortly before the Supreme Court narrowed the scope of such claims and eliminated claims like the plaintiff's. *Harvis*, 923 F.2 at 60. The plaintiff's argument on appeal was that the verdict against him on his other claims, based on the same facts, should be vacated, because under the new standard, the contract claim should never have been heard at all. *Id.* The Sixth Circuit held that the plaintiff could not benefit from the new standard where his case below was based on the old standard. *Id.* at 61.

ii. Plaintiff's inconsistent position is barred under both doctrines

Applying both doctrines, Plaintiff should not be allowed to argue for a different standard now. Below, all parties and the District Court agreed that the correct legal standard to apply to Plaintiff's deliberate-indifference claim was that of *Farmer v. Brennan*, 511 U.S. 825 (1994). [*MSJ*, R. 53, PageID.823; *MSJ Response*, R. 77, PageID.3258, PageID.3272; *Opinion*, R. 109, PageID.4810; *Transcript*, R. 104, PageID.4602-03] Under *Farmer*, to be liable for deliberate indifference, "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." *Id.* at 837. The actual-knowledge requirement is especially important, because three years after Mr. Griswold's death, this Court adopted a different, lower standard in *Brawner v. Scott County, Tennessee*, 14 F.4th 585 (6th Cir. 2021). Under *Brawner*, an officer can be held liable if the plaintiff demonstrates "reckless indifference," where the officer reasonably should have known of the condition, even if the plaintiff cannot prove actual knowledge. *Id.* at 596. Plaintiff now seeks to have this Court consider this case under the lower *Brawner* standard, even as all parties and the District Court agreed below that *Farmer* controls.

Because *Brawner* changed the standard from actual knowledge to reckless indifference, this Court has considered the question whether it retroactively applies to deliberate-indifference claims in *Lawler ex rel Lawler v. Hardeman County*, 93 F.4th 919, 927 (6th Cir. 2024). It concluded that *Brawner* is not retroactive, because a 2021 decision cannot "clearly establish" the law prior to 2021; therefore, the *Farmer* standard still applies to pre-2018 claims. *Id.* at 927-28. Defendants raised the *Lawler* opinion in their Motion for Summary Judgment. [*MSJ*, R. 53, PageID.823] Plaintiff agreed, writing:

> Plaintiff does not dispute that the pre-*Kingsley/Brawner* standard applies to pretrial detainees whose constitutional rights were violated prior to 2021 to 2023 because these cases postdate John's preventable death in this case; accordingly, the more stringent post-*Brawner* standard was not "clearly established" prior to the Sixth Circuit's 2021 decision in *Brawner. Lawler ex rel. Lawler v. Hardeman Cnty*., 93 F.4th 919, 928 (6th Cir. 2024) ("Given the date [2018] of the conduct at issue, we instead must apply *Farmer's* standards.")

[*MSJ Response*, R. 77, PageID.3273]

Plaintiff blames the District Court for this error in applying *Farmer*, arguing it erred by not applying *Brawner*. [Doc. 31, p. 50] Plaintiff's argument is "clearly inconsistent" with his prior argument that persuaded the District Court to apply *Farmer*. It would prejudice Defendants to allow such an about face, as they must now address it for the first time in their reply brief on appeal. *New Hampshire*, 532 U.S. at 750-51. This is the essence of "seek[ing] an inconsistent advantage by pursuing an incompatible theory" with that advanced below. *Id*. at 749. Therefore, judicial estoppel is appropriate. Put another way, the 'error' Plaintiff accuses the District Court of is one he "has himself provoked the court to commit," *Demmler*, 655 F. 3d at 458, so the invited-error doctrine should bar this argument.

2. Plaintiff's cited cases do not support applying Brawner's standard

Plaintiff cites several cases to argue that this Circuit applies *Brawner* to pre-*Brawner* incidents, thus it must be retroactive, but this reflects a fundamental misunderstanding of qualified immunity. Defendants argued that they are entitled to qualified immunity under both prongs of the analysis. [Doc. 21, pp. 28-35] Plaintiff responds that *Brawner* should apply at both prongs, pointing to four cases where he says this Court applied *Brawner* at the second prong to pre-2021 incidents, and one case from 2009 which he claims applied a *Brawner*-like standard. [Doc. 31, p. 51, 53] Those cases are: *Helphenstine v. Lewis County*, 60 F.4th 305 (6th Cir. 2023);

Greene v. Crawford County, 22 F.4th 593 (6th Cir. 2022); *Howell v. NaphCare, Inc.*, 67 F.4th 302 (6th Cir. 2023); *Mercer v. Athens County*, 72 F.4th 152 (6th Cir. 2023); and *Dominguez v. Correctional Medical Services*, 555 F.3d 543 (6th Cir. 2009). There are three problems with Plaintiff's approach: 1) the Sixth Circuit explicitly rejected it in *Lawler*, which all parties agreed upon below; 2) Plaintiff's cases do not apply the pre-*Brawner* analysis at the second prong; and 3) Plaintiff's pre-*Brawner* caselaw does not apply *Brawner*, a case which did not yet exist.

i. *Lawler, and later Hehrer, reject Plaintiff's approach*

The first problem with Plaintiff's approach is that *Lawler*, which was decided in 2024, rejects the application of *Brawner* to pre-*Brawner* incidents. Each of the four cases Plaintiff cites was decided in 2022 or 2023; in 2024, the *Lawler* Court set out to settle this Court's "evolving caselaw" in light of *Brawner*'s departure from *Farmer*. *Lawler*, 93 F.4th at 926-28. It held that "older decisions applying *Farmer* to the claims of pretrial detainees provide the only clearly established law in 2018." *Id.* at 927-28. And it went out of its way to highlight the district court's mistake where it "invoked *Brawner*'s more lenient test in all but name…[in finding] that a jury could find that the officers had '*recklessly* disregarded' a significant risk." *Id.* at 928. *Lawler* made these findings with good reason: it avoids the all-too-common pitfall of "premis[ing] liability on what an officer *should* have known rather than

what she *did* know." *Wiertella v. Lake County*, 141 F.4th 775, 785 (2025) (Readler, J., dissenting).

Plaintiff also ignores the most recent decision of this Court reaffirming that before 2021, the *Brawner* standard was not clearly established. *Hehrer v. Clinton County*, 161 F.4th 955, 963 (6th Cir. 2025). The *Hehrer* Court noted that, had the defendants argued that *Brawner*'s reckless-indifference test was not clearly established, they "would have raised a valid point…that they did not violate clearly established law." *Id.* at 963.[1]

The *Hehrer* Court cautioned litigants against the very mistake Plaintiff has made: blending the constitutional-violation and clearly-established prongs to argue for the more favorable standard. *Id.* at 963. That is, the *Brawner* standard applies retroactively only in analyzing the first prong, whether a constitutional violation can be proven under the given facts. It cannot apply retroactively to the second prong, whether the right at issue was clearly established at the time of the conduct at issue.

ii. *Plaintiff's own cases do not support applying Brawner*

The second problem with Plaintiff's approach is that his cases do not support applying *Brawner*, because they rely upon pre-*Brawner* caselaw for the second

[1] The *Hehrer* defendants "forfeited such a claim" because they failed to brief it before the magistrate judge in the trial court. *Hehrer*, 161 F.4th at 963. Here, Defendants raised the clearly-established issue below. [*MSJ*, R. 53, PageID.822-830] The trial-court briefing on the *Farmer*/*Brawner* distinction is sparse only because Plaintiff waited until the case came to this Court to raise it for the first time.

prong, such as *Burwell v. City of Lansing, Michigan*, 7 F.4th 456, 477 (6th Cir. 2021). Each lands on the *Farmer* standard that "a prisoner has a right not to have his *known*, serious medical needs disregarded by a medical provider or an officer" (emphasis added). *Helphenstine*, 60 F.4th at 327; *Greene*, 22 F.4th at 615; *Howell*, 67 F.4th at 318; *Mercer*, 72 F.4th at 164. Plaintiff's suggestion that this Court apply *Brawner* retroactively is wrong under his own cases, and it is wrong under *Lawler* and *Hehrer*.

The legal principle Plaintiff misunderstands is that the two prongs are analyzed separately; in the first prong, courts analyze whether there was any violation at all, while in the second, courts analyze whether the officer committing the claimed violation would have understood *at the time* that it was a violation. *Hehrer*, 161 F.4th at 962 (6th Cir. 2025). So even if the court considers post-incident law at the first prong, it is limited to pre-incident law at the second prong. *Id.* at 963 (finding a constitutional violation under the first prong while noting that had the defendants raised the second prong as an issue, they "would have a valid point" they were entitled to qualified immunity). This analysis makes sense because it allows the Court to provide guidance to officers about how they must conduct themselves moving forward, while also not holding officers liable for changes in the law. *See Lawler*, 93 F.4th at 926 ("officers will obviously lack notice of future rules that a court has yet to adopt."). Thus, the post-*Brawner* analysis can be undertaken for the

first prong should a court wish, but the second prong must be confined to *Farmer* for pre-2021 incidents.

In sum, Plaintiff's argument that *Brawner* retroactively applies in the qualified immunity context is not supported by the cases he offers or this Court's precedent. None applied *Brawner* to pre-*Brawner* conduct, and this Court explicitly disavowed doing so in *Lawler* and again in *Hehrer*. *Farmer* is the correct standard to apply.

iii. The pre-Brawner caselaw does not support applying Brawner

The third problem with Plaintiff's approach is that he cites *Dominguez v. Correctional Medical Services*, 555 F.3d 543, 549 (6th Cir. 2009) to wrongly suggest that the *Brawner* "should have known" standard has been in place as far back as 2009. *Dominguez* did not apply that standard; it applied *Farmer*. In analyzing the deliberate indifference landscape, the *Dominguez* Court cited *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001), for the position that "deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk," a quote that comes from *Farmer*, 511 U.S. at 836. *Farmer* goes on to establish the very standard Plaintiff now seeks to discard: that liability will only attach where "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.*" *Farmer*, 511 U.S. at 837 (emphasis added). Thus, a full

reading of *Dominguez* demonstrates that it actually relies on *Farmer*, not some proto-*Brawner* standard from 12 years before *Brawner* was decided.

Moreover, *Dominguez* and *Comstock* both cite the "reckless disregard" language of *Farmer* in discussion of the intent requirement, not the knowledge requirement. *Dominguez*, 555 F.3d at 550; *Comstock*, 273 F.3d at 703. Plaintiff's insistence on applying the *Brawner* standard to a claim arising long before that case was decided is misguided and disingenuous.

Because *Brawner* was decided after Mr. Griswold's death in 2018, it cannot be considered to clearly establish the law as it applies to this case. *Farmer* is the case which controls and it requires actual knowledge to support a constitutional violation.

3. Defendants are entitled to qualified immunity even under Brawner

Even if this Court agreed with Plaintiff that *Brawner* should now be applied instead of *Farmer*, it should still find that Defendants are entitled to immunity because the record does not support that they recklessly disregarded "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Brawner*, 14 F.4th at 596. As more fully discussed in section II below, and in Defendants' principal brief, the record does not support a finding that Mr. Griswold's condition was "so obvious that it should be known" he would die without medical intervention.

B. Legal Error No. 2: The rights Plaintiff characterizes as "clearly established" are too general to provide guidance

In addressing qualified immunity's second prong, instead of alleging particularized violations of specific rights, Plaintiff identifies the right at issue as "the right to medical treatment for a serious medical need." [Doc. 31, p. 59] This is not specific enough to overcome qualified immunity. *Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000) To overcome qualified immunity, Plaintiff "cannot simply assert a constitutional violation and rely on broadly stated general rights…" *Cooper*, 203 F.3d at 951. Instead, there must be "pre-existing Supreme Court or Sixth Circuit precedent that would have put a reasonable officer on notice that *her specific conduct* was unlawful." *Campbell v. Riahi*, 109 F.4th 854, 860 (6th Cir. 2024) (emphasis added). See also *Bell v. City of Southfield*, 37 F.4th 362, 367-68 (6th Cir. 2022) ("For a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.")

The cases on which Plaintiff relies provide some guidance, but do not support his position. For instance, *Burwell v. City of Lansing, Michigan*, 7 F.4th 456, 477 (6th Cir. 2022) noted that "[i]t is clearly established that a prisoner has a right not to have his *known*, serious medical needs disregarded" and that there was a clearly established right "to have medical assistance summoned upon police officers *becoming aware* that he was in need of immediate medical care." *Burwell*, 7 F.4th at 477 (internal quotations omitted and emphasis added). This holding supports that,

as argued above and in Defendants' principal brief, at the time of Mr. Griswold's incarceration, the *Farmer* actual-knowledge standard was the clearly established law.

Plaintiff also argues, and the District Court agreed, that under *Grote v. Kenton County*, 85 F.4th 397 (6th Cir. 2023) and *Greene v. Crawford County*, 22 F.4th 593 (6th Cir. 2022), it was clearly established prior to 2018 that reliance on a medical provider's evaluation is unreasonable if that evaluation happened "prior to changed circumstances." [Doc. 31, p. 64; *Order*, R. 109, PageID.4830-31] This is incorrect; the "changed circumstances" doctrine was advanced for the first time in *Grote*, in 2023, referencing *Greene*, a 2022 case. 85 F.4th at 412; 22 F.4th at 608-09. It cannot be said to have been clearly established four years before its invention. *Bell*, 37 F.4th at 367-68. Moreover, *Greene* and *Grote* provide no guidance as to what "changed circumstances" means, because neither even analyzes a situation involving changed circumstances. They are not signposts which could have guided Defendants' actions, and do not clearly establish the law.

Greene was decided in 2022. That case dealt with an inmate who was experiencing delirium tremens while detoxing from alcohol, which led to hallucinations and an inability to sleep. 22 F.4th at 601. He was seen by a mental health professional but not a physician. *Id.* at 603-04. He "continued to suffer from delirium tremens following [the] mental health evaluation" and eventually died. *Id.*

at 608-09. Although *Grote* cites *Greene* for the "changed circumstances doctrine," the Court in *Greene* instead denied summary judgment for the jail staff because the 'medical professional' on whom they were relying was actually just a mental health counselor, who they knew was not qualified to treat delirium tremens or other medical problems. *Id.* at 608. *Greene* cannot be said to clearly establish that after an inmate has been seen at a hospital and discharged with clearance to stay, his condition not improving is cause to send him back to the same medical provider.

Grote also does not involve a scenario with changing medical circumstances, despite its use of the "changed circumstances" language upon which Plaintiff relies. 85 F.4th at 412. In that case, an inmate who was uncontrollably shaking and sweating told the jail nurse he took half a gram of methamphetamine prior to booking, and the nurse believed he was detoxing, rather than overdosing. *Id.* at 402. After the nurse left, deputies checked on him 5 minutes later, then 17 minutes later, then left him alone for 24 minutes, whereupon he had a seizure which eventually led to his death. *Id.* Though the *Grote* Court opined that deference to a medical professional is unreasonable when "the medical professional rendered their opinion prior to changed circumstances," it went on to note that Plaintiff had not argued the officers should have disregarded the nurse's assessment, and so did not analyze whether the officers' conduct was reasonable. *Id.* at 412. Therefore, *Grote* does not provide any guidance for jail deputies' conduct.

In summary, though Plaintiff and the District Court relied on *Greene* and *Grote* for the proposition that Defendants could not reasonably rely on the hospital's assessment because of Mr. Griswold's "changed circumstances," nothing in those cases actually clearly establishes such a doctrine. In the situation Defendants confronted, where an arrestee is cleared by a hospital to stay in the jail and his condition does not dramatically change from moment to moment, no case even suggested they should override the doctors, much less clearly established it.

C. Legal Error No. 3: Plaintiff draws incorrect legal conclusions from the testimony

1. Policy violations do not establish deliberate indifference

Plaintiff claims that Defendants violated Livingston County Jail policies and thus must have been deliberately indifferent; he is wrong. Specifically, he accuses Defendants of breaching Jail policy by not re-conducting the intake process upon Mr. Griswold's return from the hospital, and not declaring Mr. Griswold unfit for confinement because of his presentation. [Doc. 31, pp. 21, 24] Even accepting for purposes of argument that the policies were violated, "failure to follow internal policies, without more," is not sufficient to establish deliberate indifference. *Hyman v. Lewis*, 27 F.4th 1233, 1238 (6th Cir. 2022) (quoting *Winkler v. Madison County*, 893 F.3d 877, 891 (6th Cir. 2018)).

In *Hyman*, a decedent died of an accidental drug overdose from drugs hidden in his rectum; over the course of his jail stay, the officer responsible for checking on

him violated jail policy by only visually checking on him from outside his cell instead of entering the cell to ensure he was breathing. *Id.* at 1236. He did not enter because it was late at night, the decedent appeared to be sleeping, and officers often disregarded that policy, to avoid irritating sleeping inmates. *Id.* at 1236. The Sixth Circuit held that such violation was at most negligent, which was not sufficient to meet the standard for deliberate indifference. *Id.* at 1237-38.

Here, like in *Hyman*, the alleged policy violations by Defendants do not rise to the level of deliberate indifference. If they did violate the policies by not insisting the hospital perform further checks after it already cleared Mr. Griswold to stay, then such a decision was not more than negligent. Plaintiff has not produced any evidence that the alleged policy violations occurred as a result of "intentionally ignor[ing Plaintiff's] needs" instead of mere negligence. *Hyman*, 27 F.4th at 1237. The Court should not lend any weight to Plaintiff's allegations that the jail policies were violated, because even if they were, that would not prove deliberate indifference.

2. The Court should not credit legal conclusions in lay or expert testimony

Plaintiff also seeks to use witnesses' legal conclusions to prove his claims, but doing so is impermissible. He elicited testimony from Sheriff Murphy that "any failure to bring the medical problem to the attention of a medical provider 'would be deliberate indifference to a medical need.'" [Doc. 31, p. 23] He also elicited testimony from Deputy Linden where Linden agreed that "the failure to obtain a

medical assessment of the inmate is deliberate indifference." [Doc. 31, p. 26] And he states that Defendants' expert, Timothy McGuckin, opined that failing to seek medical attention for an individual in Mr. Griswold's position would be deliberate indifference. [Doc. 31, p. 32] None of the three can usurp the Court's role in defining the legal terms on which this case turns.

Witnesses, whether lay or expert, cannot testify as to legal conclusions such as deliberate indifference. *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (experts); *In re Dickson*, 655 F.3d 585, 592 n. 4 (6th Cir. 2011) (lay witnesses). Although Fed. R. Evid. 704(a) does not automatically exclude opinion testimony "just because it embraces an ultimate issue," the issue that is 'embraced' must be a question of fact, not of law. *Berry*, 25 F.3d at 1353. For instance, in *Berry*, a law enforcement expert testified that it was deliberately indifferent for the Detroit Police Department to only lightly discipline officers for shooting incidents; the Sixth Circuit found that opinion impermissibly invaded the Court's responsibility "to define legal terms." *Id*.

This Court should reach the same conclusion as the *Berry* Court did. Just because witnesses in this case agreed that some action or inaction would be 'deliberately indifferent,' whatever meaning that phrase carries for them, does not mean that action or inaction satisfies the legal standard to impose liability for

deliberate indifference. This Court should give that testimony no weight as to the ultimate legal conclusions in this case.

II. FACTUAL ERRORS IN PLAINTIFF'S BRIEF

A. Plaintiff invented facts wholesale which the District Court improperly credited

Defendants take issue in this appeal with the District Courts reliance on unsupported "facts" and/or inferences. Plaintiff characterizes this issue as Defendants of not accepting his version of the facts on appeal which he believes is fatal to the appeal. [Doc. 31, p. 48] In doing so, Plaintiff fails to appreciate that what Defendants are actually arguing is that these supposed facts are not in the record, i.e., they are "blatantly contradicted by the record" and therefore Defendants and this Court need not accept. *Gillispie v. Miami Township, Ohio*, 18 F.4th 909, 916 (6th Cir. 2021) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

This Court has also clarified that the collateral-order doctrine only requires acceptance of "the plaintiff's *record-supported* facts." *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024). There is no requirement that Defendants adopt Plaintiff's precise, verbatim characterization of the facts. *See generally Gillispie*, 18 F.4th at 917 (6th Cir. 2021). Plaintiff's and the District Court's versions are so riddled with such blatant contradictions and unsupported leaps of logic that Defendants and this Court need not accept them.

Specifically, Plaintiff takes issue with Defendants' characterization of Mr. Griswold's condition as two symptoms, lethargy and vomiting. [Doc. 31, p. 48] He identifies four other symptoms: unsteady gait, apparently-diminished cognitive and motor function, inability to communicate, and inability to alter his position. [Doc. 31, p. 48] He believes Defendant must accept these without exception. Defendant's argument is that there is an exception to allow consideration of these because the record does not support them.

For example, Plaintiff and the District Court concluded that Mr. Griswold "appeared unable to clean himself, to elevate his head and torso to clear away the remaining vomit, or to shift the position of his body away from the pool of vomit collecting on the cell floor. And he did not appear capable of verbalizing a request for assistance." [Doc. 31, p. 35] But the record contains no evidence that Mr. Griswold could not clean himself, could not elevate his head and torso, could not shift the position of his body, or could not speak. Plaintiff points to no expert testimony, no statements of a doctor or Mr. Griswold. To the contrary, the cell video contains instances where he ***does*** several of those things.

The Claim	**The Truth**
Mr. Griswold could not clean himself.	Mr. Griswold cleans his face off after he vomits. [*MSJ*, R. 53-22, 1:54:13]
Mr. Griswold could not elevate his head.	Mr. Griswold moves his head around. [*MSJ*, R. 53-22, 1:39:14]

Mr. Griswold could not elevate his torso.	Mr. Griswold shifts his body around. [*MSJ*, R. 53-22, 3:55:20]

Because these contentions are blatantly contradicted by the video evidence, the Court need not accept them. *Scott*, 550 U.S. at 380.

The Court also does not need to credit Plaintiff and the District Court's inference that Mr. Griswold was not "capable of verbalizing a request for assistance." There is no evidence, direct or circumstantial, that he tried to speak, wanted to speak, or would speak but for his condition. While the Court can credit Plaintiff's *reasonable* inferences, it is not required "to draw every possible inference, no matter how stretched, in the nonmovant's favor." *Walden v. General Electric International, Inc.*, 119 F.4th 1049, 1061 (6th Cir. 2024) (citing *Kinlin v. Kline*, 749 F.3d 573, 576 (6th Cir. 2014)). *See also Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) ("In order to survive summary judgment, Plaintiff cannot rely on conjecture or conclusory allegations.").

In *Walden*, an employment discrimination action, the plaintiff asked this Court to infer that because some answers on a competing applicant's aptitude test appeared to be written lighter in color, then that test must have been falsified after the fact as a pretense to deny the plaintiff employment. *Id.* at 1059-60. This Court declined to credit that unsupported inference, finding it too speculative and unlikely to constitute a 'reasonable' inference. *Id.* at 1061. Therefore, it held that where the

plaintiff's contention "rest[ed] not on significant probative evidence, but on conjecture and speculation," the plaintiff did not "create a triable factual matter." *Id.* at 1061 (internal quotations and citations omitted).

In the same way as in *Walden*, Plaintiff's stretched inference about Mr. Griswold's ability to speak is unreasonable. It is too speculative to infer that Mr. Griswold must have wanted or tried to speak but could not, based only on video footage where he does not speak. The video does not contain any indication that he is trying to or wants to speak, such as gesturing to communicate nonverbally or even just communicate that he is struggling. And the surrounding context matters: Mr. Griswold is sitting in jail in the middle of the night, after his family called the police on him during a domestic dispute, *after* being medically cleared at a hospital by a doctor. In that context, the inference that he could not speak is a far greater (and unsupported) leap away from the objective facts of this circumstance. Without more, this Court need not credit Plaintiff's speculation that Mr. Griswold was rendered incapable of speaking.

B. Plaintiff's conclusions based on the depositions of the Defendants are unsupported

Plaintiff argues that each deputy had personal knowledge of Mr. Griswold having vomited, but he is wrong. His contention relies on misrepresented deposition testimony. In the misrepresented testimony, the deputies answered questions based on the surveillance video being played for them *at the deposition*, rather than stating

they were aware *on the night of the incident* that Mr. Griswold had vomited. This can be seen throughout their deposition transcripts, where Plaintiff's counsel asks the deputies questions in the present tense; when reduced to a transcript, the answers become ambiguous as to whether they are testifying about their present observation of the video, or recollection of what was happening at the time.

> Q: …have you ever had reason to look at footage from within that area?
>
> **A: Not that I recall, sir, no.**
>
> Q: Any reason to think it's a different camera system than *what we're looking at on the shared screen*?
>
> **A: No, sir.**
>
> Q: Okay, are you *watching the video*?
>
> **A: Yes, sir.**
>
> * * *
>
> Q: On October 14, 2018, do you have a memory of being in the intake control pod as part of keeping observation of John and observing him vomiting?
>
> **A: Not that I'm aware of, sir, no. I don't recall.**
>
> Q: Just by looking at John, it's readily apparent to you that he has vomited; is that correct?
>
> **A: Yes.**

[*MSJ Response*, R. 77-9, PageID.3416] (italics added for emphasis). In the above example, it is obvious that Deputy Turchi is testifying that he 1) did not observe Mr. Griswold vomiting on the night of the incident and 2) it is "readily apparent" in the

video he is now watching that Mr. Griswold has vomited. Plaintiff leveraged these answers to argue the deputies had knowledge on the night of the incident; in reality, the deputies only gained that knowledge after the filing of the lawsuit. The above example is just one instance; as shown below, Plaintiff makes this same argument as to nearly every deputy.

1. Linden and Turchi

Plaintiff alleges that Deputies Linden and Turchi "acknowledged the fact that Mr. Griswold had vomited was apparent" and then parlays that acknowledgment into "a serious risk of harm to Mr. Griswold that they directly observed." [Doc. 31, p. 55] This is legerdemain; Linden and Turchi acknowledged at deposition that the video they were then watching made it apparent Griswold had vomited. [*MSJ Response*, R. 77-9, PageID.3416, 3471-72] It was not an acknowledgment that they were subjectively aware of the vomit at the time of Mr. Griswold's incarceration.

2. Davis

Just as with Deputies Linden and Turchi, Sgt. Davis agreed at his deposition that the surveillance video "clearly depicts" Mr. Griswold vomiting. [*MSJ Response*, R. 77-9, PageID.3591] In the same line of questioning, he clarified that "I don't remember when I—if I was told. I know I've seen it on the video after." [*MSJ Response*, R. 77-9, PageID.3591] This is the only factual allegation about Sgt. Davis which Plaintiff supports with a citation to the record. [Doc. 31, p. 56] Plaintiff goes

on to state that "at the time of the 4:30 AM check, Mr. Griswold was not moving and was laying on the floor next to a puddle of vomit," but Sgt. Davis did not have this knowledge; he testified that he did not have "any recollection of seeing vomit." [*MSJ Response*, R. 77-9, PageID.3592] Sgt. Davis's testimony does not establish the requisite knowledge to meet the subjective prong.

3. Schulte

Deputy Schulte's testimony is similar to that of Deputies Linden and Turchi and Sgt. Davis; she also testified that, as she watched the video at deposition, it was apparent that Mr. Griswold had vomited. [*MSJ Response*, R. 77-9, PageID.3618] She did not testify that on the date of the incident, she observed the vomit on video. Instead, she testified that she was aware of the vomit from watching the video while sitting in on Deputy Turchi's deposition. [*MSJ Response*, R. 77-9, PageID.3612] This cannot impute knowledge of the vomiting on the day of the incident to Deputy Schulte.

4. VanVleet, John, and Heiob

Plaintiff claims that "Deputy VanVleet admitted at his deposition that it was readily apparent that Mr. Griswold vomited on himself," but omits VanVleet's subsequent testimony that he was not sure at the time whether he even knew the substance was vomit as opposed to urine or something else. [*MSJ Response*, R. 77-14, PageID.3644] And Plaintiff does not even attempt to show that Deputies John

and Heiob had the requisite knowledge. [Doc. 31, p. 57] Instead, he falls back on the subsequent investigator's report and EMS records, which were generated after Mr. Griswold's death and cannot establish what anyone observed prior to his death. [Doc. 31, p. 57-58] The record does not establish knowledge on the part of Deputies VanVleet, John, or Heiob.

CONCLUSION

Plaintiff's last-ditch effort to move the goalposts and argue for a lower standard is unallowable. The record, when Plaintiff's misrepresentations and inventions are removed, unambiguously establishes that Defendants lacked actual knowledge of Mr. Griswold's condition. Since actual knowledge is required under the *Farmer* standard, which is the correct one, this Court should reverse the District Court's denial of summary judgment.

Respectfully submitted,

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Dated: February 25, 2026

CERTIFICATE OF COMPLIANCE

I certify that Appellant's reply brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 5,932 words, excluding the contents exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

I further certify that Appellant's brief complies with the typeface requirement in Rule 32(a)(5) of the Federal Rules of Appellate Procedure. I prepared the brief in Microsoft® Word 365 and used Times New Roman, a proportionally spaced font, at size 14 point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **Wednesday, February 25, 2025,** I electronically filed the foregoing document with the Clerk of the Court using the Court's ECF system which will send notification to all counsel of record.

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