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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ESTATE OF BARTON GRUBBS; TANYA SMITH, individually and as the personal representative of the Estate of Barton Grubbs,

Plaintiffs - Appellants,

v.

CHRISTIN HERNANDEZ, in her individual capacity,

Defendant - Appellee.

No. 18-1358
(D.C. No. 1:16-CV-00714-PAB-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ** and **EID**, Circuit Judges.**

Barton Grubbs was a pretrial detainee at the Weld County Jail when he ingested a significant number of prescribed Valium and Percocet pills. Found unresponsive in his cell the following morning, Grubbs was declared dead due to complications from

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** The late Honorable Monroe G. McKay, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of this appeal, but passed away before its final resolution. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. *See United States v. Wiles*, 106 F.3d 1516, 1516 n* (10th Cir. 1997) (citing *United States v. Wiles*, 102 F.3d 1043, 1043 n** (10th Cir. 1996)); 28 U.S.C. § 46(d).

overdose toxicity. Grubbs's daughter, Tanya Smith, brought this action individually and on behalf of his estate (collectively "Estate") under 42 U.S.C. § 1983 and state law alleging that a variety of defendants were negligent and deliberately indifferent to Grubbs's medical needs. A jury returned a verdict in favor of Nurse Christin Hernandez, the only remaining defendant, on the only remaining claim, § 1983 deliberate indifference. On appeal, the Estate challenges the district court's actions on two grounds: (1) that it provided an erroneous jury instruction that confused negligence and deliberate indifference, and (2) that it abused its discretion in limiting expert testimony. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

I. FACTUAL BACKGROUND

On an evening in March 2014, Colorado State Patrol Trooper Travis Tyndall arrested Grubbs for driving while under the influence of alcohol or drugs. At Grubbs's request, Tyndall retrieved Grubbs's prescriptions—a bottle of Valium and a bottle of Percocet—from Grubbs's vehicle. Tyndall then transported Grubbs to a police substation for a blood-draw prior to his transfer to the Weld County Jail.

At the substation, Tyndall allowed Grubbs to take his prescribed dosage of pills after Grubbs complained of pain, and to place his prescriptions into his coat pocket. Later, upon arrival to the Weld County Jail, Tyndall escorted Grubbs from the sally port into the booking vestibule. Although a door sign between the sally port and the booking vestibule directed for arrestees to be "restrained behind their back or belly-belted," Tyndall exercised his discretion under "state patrol policy" to remove Grubbs's handcuffs once inside and instructed him to sit on the bench.

Soon after, at around 2:44 a.m., when Tyndall's back was turned, Grubbs removed his prescriptions from his coat and "ingested all of the Valium and all but 1½ pills" of his remaining Percocet. ROA Vol. II at 325; *see also* ROA Vol. VI at 1314–16. Before long, Deputy Eric Sutherland of the Weld County Sheriff's Department arrived. Tyndall subsequently advised Sutherland that Grubbs had prescriptions in his coat that needed to be logged. Sutherland called the licensed practical nurse ("LPN") on duty, Christin Hernandez, an employee of Correct Care Solutions ("CCS"), to process Grubbs's prescriptions.

While awaiting Hernandez's arrival, Sutherland searched Grubbs and secured the prescription bottles. Seeing the now-empty bottles, Tyndall advised Sutherland and Hernandez that "it was a possibility that an unknown number of pills were missing." ROA Vol. II at 326 n.5. Both Tyndall and Sutherland then asked Grubbs if he had taken any more pills. Grubbs responded "no." *Id.* at 326. Sutherland further asked Grubbs if he had ever attempted or contemplated suicide. Grubbs answered "no." *Id.* at 794. Sutherland reported he did not see any signs during the questioning that Grubbs overdosed.

Still, Sutherland requested a suicide staffing for Grubbs. After taking Grubbs's vitals, Hernandez and Weld County Sheriff's Deputy Jennifer Lenderink questioned Grubbs to determine his suicide risk. Although Grubbs first denied having any suicidal thoughts, he later began to cry and told them that his son recently overdosed. Grubbs then admitted to taking nearly 70 Valium pills earlier in the booking vestibule.

Unsure how Grubbs accessed his prescriptions, Hernandez requested for Lenderink to obtain surveillance footage to confirm Grubbs's admission. Instead, Lenderink suggested they check Grubbs's vitals once again. When Grubbs's vitals returned to normal at 4:45 a.m., roughly two hours after Grubbs ingested the pills, Lenderink refrained from obtaining the video.

Hernandez then called her supervisor to seek advice. The supervisor concluded no "red flags" were present to justify calling the doctor. ROA Vol. IV at 835. In time, Hernandez cleared Grubbs for intake but assigned him to the highest level of suicide staffing at Level 1 and notified all relevant staff. At Level 1, Grubbs was monitored at least 50 times by deputies walking past his cell. But at approximately 8:52 a.m., deputies found Grubbs unresponsive in his cell and sent him to the hospital. Grubbs was declared dead due to complications of overdose toxicity.

On July 26, 2016, the Estate filed the operative complaint against the Colorado State Patrol, Weld County Sheriff's Office, the Board of County Commissioners of the County of Weld, CCS, and Nurse Hernandez (individually). It asserted claims, inter alia, of deliberate indifference to a serious medical need under 42 U.S.C. § 1983 and wrongful death negligence claims under Colorado state law.[1] The Estate voluntarily dismissed the Colorado State Patrol as a party and settled its claims against the Weld County

[1] The Estate asserted six claims for relief: (1) wrongful death (all defendants); (2) claim for expenses related to Grubbs's death (all defendants); (3) deliberate indifference to medical needs under 42 U.S.C. § 1983 (all defendants); (4) adoption of an official policy under § 1983 (Weld County defendants); (5) failure to adequately train or supervise under § 1983 (Weld County defendants); and (6) common law negligence (Hernandez).

defendants, but proceeded to trial on its § 1983 deliberate indifference, wrongful death negligence, and common law negligence claims against Hernandez, and its wrongful death negligence claim against CCS.[2]

On January 17, 2018, after the Estate retained Dr. Jeffrey Metzner as a trial expert on correctional mental health care standards, the defendants filed a Rule 702 motion.[3] The Estate intended for Dr. Metzner to "testify regarding the appropriate protocols in correctional health care and specifically, the propriety of Nurse Hernandez's response to Mr. Grubbs's statement that he had ingested Valium." ROA Vol. II at 332. Dr. Metzner also planned to speak about "the preventability of Mr. Grubbs's death." *Id.* He was to conclude "that Mr. Grubb[s's] death would have been preventable had he received adequate mental health and/or medical treatment." *Id.*

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[2] On March 8, 2017, the district court dismissed the Estate's § 1983 deliberate indifference claim as to CCS and the Weld County defendants, leaving Hernandez as the sole defendant under this claim, and dismissed the fourth and fifth claims in their entirety. On July 20, 2018, the Estate settled its claims against the Board of County Commissioners of the County of Weld and the Weld County Sheriff's Office, leaving two remaining defendants: CCS and Hernandez. The claims that remained were (1) wrongful death negligence (CCS and Hernandez), (2) wrongful death damages (CCS and Hernandez), (3) § 1983 deliberate indifference (Hernandez), and (6) common law negligence (Hernandez).

[3] Federal Rule of Evidence 702 governs the admissibility of expert testimony. It states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

On June 26, 2018, the district court issued a pre-trial order, finding that Dr. Metzner could not testify on whether Hernandez breached the nursing standard of care or on the preventability of Grubbs's death, but that he was qualified to opine on whether one trained in suicide assessments should have believed Grubbs when he said he ingested the pills.

The court cabined its analysis of Dr. Metzner's proposed testimony into two categories: "standard of care" and "causation." ROA Vol. II at 333, 339. First, under the standard of care testimony, the court confined its Rule 702 analysis to "the opinion, expressed during Dr. Metzner's deposition, that Nurse Hernandez should have believed Mr. Grubbs when Mr. Grubbs said during the suicide staffing that he took the pills." *Id.* at 335. The court specifically found that Dr. Metzner was "not qualified to opine as to whether Nurse Hernandez breached the nursing standard of care" because "there [was] no evidence that he [had] directly supervised LPNs, received formal training in nursing standards of care, or worked in such close proximity to nursing staff as to become familiar with the applicable standards." *Id.* at 336–37. But Dr. Metzner's "psychiatric background and his many years of experience developing policies and practices for correctional health care" did qualify him "to express an opinion as to whether an individual trained in conducting suicide assessments should have believed Mr. Grubbs when he said he had ingested the pills." *Id.* at 337. Thus, Dr. Metzner was permitted to declare that "an individual adequately trained in conducting suicide assessments should have believed Mr. Grubbs." *Id.*

The court also analyzed the relevance of Dr. Metzner's intended testimony that "any such lack of awareness on the part of Nurse Hernandez [about the warning indicators Grubbs provided] would demonstrate that she was not qualified to conduct a suicide risk assessment." *Id.* at 338. The court found that "this testimony, while not subject to exclusion under Rule 702, appear[ed] to be irrelevant." *Id.* The court explained that "[b]ecause Dr. Metzner [was] not qualified to testify about an LPN's standard of care, his opinions could not support [the Estate's] negligence claim against Nurse Hernandez." *Id.* The court also noted that, up until this order, the Estate had "provide[d] no explanation" of how this testimony would be relevant as to whether Hernandez was deliberately indifferent. *Id.* But, despite these misgivings, the court did not, at that moment, preclude the Estate from offering this particular testimony.

Second, under the causation aspects of Dr. Metzner's proposed testimony, the court ruled that he was unqualified "to opine regarding the preventability of Mr. Grubbs's death at any point in time." *Id.* at 339. Citing to Dr. Metzner's deposition testimony "that he could not remember the last time he had prescribed either Valium or oxycodone,"[4] and to his lack of knowledge about the effects of those drugs, the court found that the Estate had "not demonstrated that Dr. Metzner [was] qualified" to discuss the preventability of Grubbs's death. *Id.* at 339–40. "Nor [had] [the Estate] shown that Dr. Metzner's opinions on preventability [were] reliable under Rule 702." *Id.* at 339, 341. It was for these reasons that the court determined Dr. Metzner could not testify on

[4] Percocet consists of both oxycodone and acetaminophen. *See* ROA Vol. II at 324.

whether Hernandez breached the nursing standard of care or on the preventability of Grubbs's death.

The jury trial began on July 23, 2018. "At the time of Dr. Metzner's testimony at trial, [the Estate] had a wrongful death negligence claim against CCS and Nurse Hernandez, a deliberate indifference claim against Nurse Hernandez, and a [common law] negligence claim against Nurse Hernandez."[5] Reply Br. at 11.

On July 30, 2018, during trial but before Dr. Metzner's testimony, the court sought to clarify the scope of Dr. Metzner's testimony. Once it became apparent that Dr. Metzner planned to discuss topics that would have contravened its order, such as testimony that had an "adequate suicide risk assessment . . . been done, [t]he outcome for Mr. Grubbs may [have] be[en] different," the court asked whether counsel had read the June 26 order "because . . . he can't testify about [the] outcome being different." *Id.* The Estate responded that it "[u]nderstood." *Id.* Next, after the court reminded the Estate that Dr. Metzner could not testify about an LPN's standard of care, the Estate clarified that Dr. Metzner was to testify about "protocols in correctional healthcare," and "protocols in the decision of whether or not someone should be sent to the hospital based on the information they have at the time." *Id.* at 1436–38. However, it was unclear to which claim this testimony would be relevant. *See id.* at 1437. This prompted a lengthy discussion about the nature and purpose of Dr. Metzner's intended testimony.

[5] This lies in contrast to later in the trial—prior to deliberation—when the Estate dropped all of its claims except a single deliberate indifference claim against Hernandez.

Because the Estate's description of Dr. Metzner's testimony sounded similar to setting the parameters of an LPN's standard of care—which the court had previously precluded Dr. Metzner from discussing—the court inquired further: "But I already ruled he can't testify about the standard of care in regard to an LPN. And wouldn't that all just go to whether or not she was negligent? And that would be the standard of care." *Id.* at 1438. The Estate responded, "No. It would go to . . . deliberate indifference and whether or not the information she had at that time . . . rise[s] to that level." *Id.* The Estate added that Dr. Metzner would testify that it was not "even a close call" for Hernandez to understand that Grubbs was at risk, and this observation would inform the jury about "whether or not Nurse Hernandez truly appreciated the risk and drew the inference." *Id.* at 1440.

The Estate further emphasized that "one of the critical issues of the several issues that are still in play is the non-parties at fault." *Id.* at 1445. Although the Estate had settled all claims against the Weld County defendants, it noted that the remaining defendants "place[d] a lot of weight" on what the County policies required them to do (or not do). *Id.* The district court responded, "what exactly are you going to elicit from Dr. Metzner about the negligence of Weld County?" *Id.* at 1448. The Estate said Dr. Metzner would discuss, among other things, that "Hernandez establish[ed] that vital signs were normal and relay[ed] that to security." *Id.* He would also talk about various dynamics between Hernandez and the Weld County correctional officers, such as whether or not "Weld County should have told Ms. Hernandez" to take Grubbs's vitals every 30 minutes or whether "she should have done" that on her own. *Id.* at 1449. In the Estate's

mind, describing the proper interplay between Weld County officials and Hernandez was crucial because it affected whether the "liability on Weld County . . . dramatically increase[d] or decrease[d]" as opposed to Hernandez's liability. *Id.*

The defendants were immediately critical of this proposed testimony.[6] The defendants told the court that "everything [the Estate] has indicated to you [that it] wants to do is . . . to try to have this witness comment on what the reasonable expectation of an LPN is." *Id.* at 1450.

After this extensive discussion, the district court returned to its June 26 order, and repeated that Dr. Metzner was not qualified to testify about an LPN's standard of care. The court noted that Dr. Metzner could testify to the general standards for properly conducting a suicide assessment and to Weld County's negligence. But the court remained concerned the Estate would capitalize on this opportunity by directly implicating Hernandez for failing to meet an LPN's standard of care. Thus, seeking to avoid this "real threat," the court expressly limited the Estate's ability to veer off into this foreclosed subject area:

> [Dr. Metzner] can only testify about the negligence or somehow a violation of some protocol or something of Weld County. In doing so, he cannot refer to Nurse Hernandez at all. There can be some indirect reference, but the reason I am going to preclude him from actually using her name is because I don't want the jury to confuse testimony about Weld County with any implied testimony that Nurse Hernandez was negligent or deliberately indifferent. He needs to focus his testimony on Weld County employees.

Id. at 1456.

[6] At this point in the trial, the Estate had not yet dropped its claims against CCS.

Separately, the district court undertook a series of discussions concerning the appropriate jury instructions. On June 14, 2018, the parties first submitted their proposed instructions, which contained separate definitions for "negligence" and "deliberate indifference." On July 26, 2018, the district court notified the parties of its revisions and allowed the parties to review them. The next day, the district court highlighted one additional change, which revised the deliberate indifference instruction to include the phrase "serious medical need." ROA Vol. VII at 1420–21. The Estate did not object to the proposed revision.

On July 30, 2018, after the close of evidence, the Estate moved to dismiss the wrongful death negligence claims against both CCS and Hernandez, and the common law negligence claim against Hernandez, leaving a single § 1983 deliberate indifference claim against Hernandez. On July 31, 2018, the district court granted the Estate's motion.

On the following morning, the district court provided revised jury instructions that no longer contained any references to the negligence claims. Defense counsel raised that it might be helpful to define negligence because the deliberate indifference instruction is defined in part as more than "mere negligence." *Id.* at 1637–38. The district court asked the Estate if it had any objections to this suggestion, and the Estate informed the district court that the definition of negligence was unnecessary. However, the district court decided the change would be helpful and explained:

> Here is what I am going to do, and that is include right after—so in Instruction No. 11 after it says "mere negligence or inadvertence does not constitute deliberate indifference," I am going to incorporate the definition of negligence . . . I do think that we need to instruct the jury on what negligence is given . . . that would be something that they cannot base a verdict of deliberate indifference on.

Id. at 1640.

After a recess to amend the instructions, the court asked if both sides had reviewed the instructions and inquired if there were any issues. The Estate responded that it had no problems. Neither did defense counsel. As such, the court proceeded to instruct the jury and allow for closing arguments.

During deliberation, the jury sent a note to the court requesting "clarity on the difference between dilberate [sic] indifference, + negligence with regards to the 'failure' to do an act." ROA Vol. VIII at 1834–35. This prompted the district court to inquire of each party as to how it should respond. Among other things, the Estate told the district court that the instructions were "adequate," and that the court should direct the jury back to the instructions without additional comment. ROA Vol. VII at 1692–93. After an extended dialogue, the district court decided to direct the jury back to the text of Instruction No. 11, concluding that "nowhere do you get any better explanation of what the difference is between deliberate indifference and negligence than the jury instruction that we've already given." *Id.* at 1698–99. Neither party objected.

A little over an hour and a half later, the jury returned its verdict in favor of Hernandez.

II. ANALYSIS

The Estate raises two arguments on appeal. First, it asserts that "the [d]istrict [c]ourt submitted erroneous instructions to the jury that, overall, when construed together, misled and confused the jury on the applicable law" regarding negligence and deliberate

indifference. Aplt. Br. at 18. Second, the Estate contends the district court erred by limiting the testimony of Dr. Metzner. [7] We address each issue in turn.

A. Jury Instructions

Concerning Instruction No. 11, the Estate asserts one major problem: "[t]he jury should have been instructed only as to the definition under the deliberate indifference standard, and not given all applicable forms of failure for other standards." Aplt. Br. at 22. However, we conclude that the Estate's claim is without merit because Instruction No. 11 correctly explained the applicable law of deliberate indifference.

A jury instruction is properly given if it "state[s] the applicable law and focus[es] the jury on the relevant inquiry." *See United States v. Lee*, 54 F.3d 1534, 1536 (10th Cir. 1995).

As a preliminary matter, the parties dispute the standard of review that this court should apply to examine the decision to instruct the jury regarding negligence. "A district court's decision to give or not give a particular jury instruction is reviewed for abuse of discretion; however, we review the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." *United States v. Jereb*,

[7] In a single paragraph, the Estate argues that the "district court was also mistaken to exclude Dr. Jacqueline Moore, Dr. Campbell, Dr. Knierim, Dr. Geppert, Christin Hernandez and Deborah Weatherwax from testifying about the elements of deliberate indifference." Aplt. Br. at 30. The sole support for this claim is that "it was an abuse of discretion to prevent the testimony because of the importance in proving deliberate indifference." *Id.* We find this briefing insufficient to challenge the district court's ruling on these witnesses. *See United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) (holding that "[a]rguments inadequately briefed in the opening brief are waived") (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998)).

882 F.3d 1325, 1335 (10th Cir. 2018) (internal quotation marks and citation omitted). But if the Estate failed to object to the challenged jury instruction, "we review only for plain error." *See id.* Hernandez contends the Estate "waived [its] initial and current objections to the instruction" under the invited error doctrine. Aple. Br. at 26. We need not decide whether invited or plain error applies, however, because we find no error in giving the instruction in the first instance.

The Estate argues that the district court erred by incorrectly informing the jury in Instruction No. 11 when it included the definition of negligence while explaining deliberate indifference, thereby conflating deliberate indifference with negligence. After undergoing multiple revisions, the language at issue in the final instruction states:

> Deliberate indifference is established only if there is actual knowledge of a substantial risk of medication overdose to Mr. Grubbs and if defendant Hernandez disregarded that risk by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference. Negligence means failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect oneself or others from bodily injury or death. A[n] [LPN] is negligent when the [LPN] does an act that reasonably careful [LPNs] would not do or fails to do an act that reasonably careful [LPNs] would do.

ROA Vol. VII at 1637–38. We conclude that the language of Instruction No. 11 aligns with the precedent of the Supreme Court and this court.

The Supreme Court has explained that the test for deliberate indifference under the Eighth Amendment is a "stringent standard of fault," *Brd. of Cty. Comm'ns of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997), and one more akin to criminal recklessness than an objective civil standard. *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994). Deliberate

indifference has been routinely defined by the Supreme Court to be more than negligence. *See Farmer*, 511 U.S. at 835 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."); *Bryan Cty.*, 520 U.S. at 407 ("A showing of simple or even heightened negligence will not suffice."); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (explaining physician's negligence did not rise to the level of "unnecessary and wanton infliction of pain" required to show "deliberate indifference"). Across its caselaw on these instructions, the Court has often defined the concept of deliberate indifference by comparison to negligence.

Although the Estate argues that "because the instruction added the definition of negligence, Instruction 11 incorrectly informed the jury," Aplt. Br. at 23, this court has previously reached the opposite conclusion. In *Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990), the issue was whether the municipality acted with deliberate indifference, but the original jury instructions were "grounded in negligence and clearly [did] not meet the deliberate indifference standard." *Id.* Thus, we remanded for a new trial with proper instructions that "caution the jury that mere negligence is not sufficient to impose liability on the City." *Id.*

Now, looking to Instruction No. 11 as a whole, we find that it does just that: it cautions the jury that mere negligence does not constitute deliberate indifference. The instruction therefore does not contain a misstatement of the governing law of deliberate indifference. First, the instruction explains the elements of deliberate indifference,

including the objective and subjective components of the test. ROA Vol. II at 498. It further explains the subjective component requires "actual knowledge of a substantial risk of medication overdose to Mr. Grubbs and if defendant Hernandez disregarded that risk." *Id.* The district court explained the concept of negligence, clarifying that negligence "does not constitute deliberate indifference." ROA Vol. VII at 1637–38. Accordingly, Instruction No. 11 firmly reflects an accurate statement of the applicable law for deliberate indifference.[8]

Given that this court does "not decide whether the instructions 'are flawless, but whether the jury was misled in any way and whether it had a[n] understanding of the issues and its duty to decide those issues,'" our analysis turns on whether the jury was misled by the inclusion of the definition of negligence in Instruction No. 11. *Lederman*, 685 F.3d at 1155 (quoting *Brodie v. Gen. Chem. Corp.*, 112 F.3d 440, 442 (10th Cir. 1997)) (alteration in original). Here, the instruction was not misleading to the jury. The case law is clear that deliberate indifference *is* more than mere negligence, as the instruction so explains. *Id.*; *see also Byanooni v. City of Los Angeles*, 317 F. App'x 647, 648 (9th Cir. 2009) (holding that it did not mislead the jury to include the statement, "defendant cannot be held liable if he was merely negligent," in a deliberate indifference instruction). The district court did not err when it provided Instruction No. 11.[9]

[8] The delineation between these concepts was made all the more necessary when, on the eve of closing arguments, the Estate dismissed its wrongful death negligence claims (after presenting multiple days' worth of evidence alleging both negligence and deliberate indifference).

[9] We note that the language of Instruction No. 11 is similar to language approved by our sister circuits. For example, the Seventh Circuit has found it reversible error *not* to define

B. Expert Testimony

The Estate's second argument is that the district court erred in limiting testimony from Dr. Metzner. As the proponent of this contested expert testimony, the Estate "bears the burden of showing that [its] proffered experts' testimony is admissible." *United States v. Orr*, 692 F.3d 1079, 1091 (10th Cir. 2012) (citation omitted). We review de novo "whether the district court employed the proper legal standard and performed its gatekeeper role" in determining whether to admit or exclude expert testimony. *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006). However, we evaluate "the manner in which the district court performs this gatekeeping role" for an abuse of discretion. *Id.* (citing *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir. 2003); *Orr*, 692 F.3d at 1091.

To determine whether an expert's opinion is admissible, the district court must undertake a two-step analysis. *See Conroy v. Vilsack*, 707 F.3d 1163, 1168 (10th Cir. 2013). "First, the district court must determine whether the expert is qualified by knowledge, skill, experience, training, or education to render an opinion." *Id.* (internal

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"recklessly" in a deliberate indifference jury instruction. *See Miller v. Neathery*, 52 F.3d 634, 638–39 (7th Cir. 1995). The Fourth Circuit has affirmed a jury instruction on deliberate indifference that included the definition of "recklessly" because it "informed the jury of the essential principles of the deliberate indifference standard." *Hoy ex rel. Brown v. Simpson*, 182 F.3d 908, *4 (4th Cir. 1999) (unpublished). The Sixth Circuit has affirmed a deliberate indifference jury instruction because it "correctly defined 'deliberate indifference' by precluding the jury from finding an [E]ighth [A]mendment violation predicated upon gross negligence." *Walker v. Norris*, 917 F.2d 1449, 1454 (6th Cir. 1990) (citation omitted). The Ninth Circuit has concluded a jury instruction on deliberate indifference did not mislead the jury where it included that, "defendant cannot be held liable if he was merely negligent." *Byanooni*, 317 F. App'x at 648.

quotation marks and citation omitted). Next, "the court must satisfy itself that the proposed expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony." *Id.* (internal quotation marks and citations omitted).

The Estate argues that the district court's limitations on Dr. Metzner's testimony left it without expert testimony as to what would constitute deliberate indifference, and consequently whether that deliberate indifference caused the death of Grubbs. During oral argument, the Estate stated it was challenging the district court's refusal to allow any of its witnesses "to set the standard for what deliberate indifference is." Oral Arg. at 6:24–6:27. Seeking more specifics, this court asked, "Can you help [us] understand what the expert would have testified to that was in your view erroneously excluded?" *Id.* at 6:42–7:53. The Estate responded:

> [F]irst of all, in the correctional care setting, [Dr. Metzner] defined the standard of care: what an LPN could do, what a RN should be doing, what a doctor does. And he was going to talk about all of that and how this didn't work in this situation. You had an LPN that shouldn't have been doing this in the first place. And when the [district court] says you can't even mention her name, how is he supposed to describe and opine on the standard of care regarding negligence and deliberate indifference if he can't even talk about the person who is making the call at that time. He said when Christin Hernandez was told certain facts by Barton Grubbs—that he was having a crisis, that he didn't want to die, that he had ingested these pills—she should have known right there that it was time to send him, at least call the doctor and at least to call an ambulance if the doctor wasn't available. And [Dr. Metzner] wasn't allowed to testify to any of that.

Id. at 6:42–7:53. The Estate further argued that as "the foremost expert in the sequencing of this type of care," *id.* at 9:00–9:06, Dr. Metzner should have been able to speak to "Hernandez's role in correctional health care," Aplt. Br. at 32, and how her lack of

qualifications to conduct a suicide risk assessment helped cause Grubbs's death, which should have been preventable, Reply Br. at 15.

At bottom, the Estate criticizes the district court's refusal to allow Dr. Metzner or any of its experts from "testify[ing] about Nurse Hernandez'[s] role in the correctional health care system," Reply Br. at 15, as a means to establish how she was deliberately indifferent to the risks of Grubbs overdosing, *see* Aplt. Br. at 25. But the Estate misses the essence of what the district court explained in its June 26 order, and what it continued to emphasize throughout its rulings at trial. The district court never issued a blanket rule stating that *no expert* could testify about whether or not Hernandez should have known to call a doctor after assessing Grubbs, or was deliberately indifferent to such a need. Rather, it was that Dr. Metzner's specific experiences and training did not render him qualified under Fed. R. Evid. 702 to voice an opinion as to whether Hernandez breached the nursing standard of care, was deliberately indifferent to Grubbs's needs, or caused his death. *See* ROA Vol. II at 336–37.

The question, then, is whether the district court abused its discretion in not permitting Dr. Metzner to testify to these matters. The Estate pushes back on this framing of the question, emphasizing that Dr. Metzner "was not endorsed to testify about the standard of care for a licensed practical nurse." Reply Br. at 14. Instead, he "was endorsed to testify about the standard of care in correctional health care," Aplt. Br. at 32–33, and how Hernandez's role fit into the overall system, Reply Br. at 15.

But this is largely a distinction without a difference. The Estate's own statements reveal that Dr. Metzner's testimony intended to stray into what constitutes an LPN's

standard of care and the fact that Hernandez deviated from this standard. At oral argument, the Estate informed this court that Dr. Metzner would have testified to "what an LPN could do" in a correctional care setting. Oral Arg. at 6:59–7:01. Not only would Dr. Metzner discuss the responsibilities of an LPN in this environment, but he was to testify that based on her qualifications, Hernandez "shouldn't have been doing [a suicide risk assessment] in the first place." *Id.* at 7:09–7:12. Dr. Metzner was to also venture into a topic specifically declared off-limits by the district court: that Hernandez breached her duty of care by failing to call a doctor or request an ambulance after speaking to Grubbs. *See id.* at 7:30–7:51. All of these statements align with what the Estate previously informed the district court.[10]

In sum, labeling Dr. Metzner's proposed testimony as merely a discussion on the "appropriate protocols in correctional health" does not change the fact that he was also planning to testify to the standards of care for an LPN and how Hernandez breached this duty, was deliberately indifferent, and played a causal role in his death. ROA Vol. II at 332.

We conclude that the district court did not abuse its discretion when it limited Dr. Metzner's testimony. Admittedly, Dr. Metzner's "entire professional career has been

[10] Among other topics, Dr. Metzner was to analyze the specific dynamics between Hernandez and the Weld County correctional officers. For example, Dr. Metzner would discuss: "Hernandez establishing that vital signs were normal and relaying that to security." ROA Vol. VII at 1448. He would scrutinize whether or not Hernandez should have told security officials that "we don't know where some pills are and you need to be more concerned." *Id.* And he would explore whether Hernandez should have taken the initiative to assess Grubbs's vitals every 30 minutes or if this was something that Weld County needed to instruct her to do. *See id.* at 1449.

devoted to the improvement of the mental health in correctional facilities." Aplt. Br. at 26–27. He has developed generalized mental health curriculum for health care staff in the context of correctional health care systems. But to quote the district court, "there is no evidence that he has directly supervised LPNs, received formal training in nursing standards of care, or worked in such close proximity to nursing staff as to become familiar with the applicable standards." *Id.* at 336–37. In Dr. Metzner's own words, the closest he has come to training LPNs is only "indirectly." Reply Br. at 14. And this entailed establishing mental health training for all staff—nothing tailored for LPNs. Indeed, Dr. Metzner's proposed testimony that Hernandez should have believed Grubbs derived from his experience as a forensic and correctional psychiatrist, not from any specific knowledge regarding nursing.

Similarly, the district court did not err in declining the Estate's request for Dr. Metzner to testify as to the preventability of Grubbs's death. On appeal, the Estate broadly contends that Dr. Metzner was qualified to offer an opinion that Grubbs's death could have been prevented based on his knowledge, experience, and training. But several facts discredit this assertion. In his deposition, Dr. Metzner admitted he could not remember the last time he prescribed either Valium or oxycodone—the two drugs that caused Grubbs's death. This much was evidenced when he displayed a lack of accurate knowledge about the effects of these drugs. *See* ROA Vol. I at 110 (citing an average peak absorption time for Valium of 1.5 to 3 hours following ingestion, which contradicted Dr. Metzner's own document which stated the average peak absorption time was actually 1 to 1.5 hours). When questioned further about this discrepancy, Dr.

Metzner admitted, "I haven't extensively explored that." *Id.*[11] Dr. Metzner was unable to identify the peak absorption time for oxycodone and stated he "would have to re-look that up." ROA Vol. II at 340. Additionally, by his own admission, Dr. Metzner was not an expert "in resuscitative measures for overdose." *Id.* Accordingly, the district court did not abuse its discretion in concluding that the Estate failed to show that Dr. Metzner's proposed testimony on the preventability of Grubbs's death "falls within the reasonable confines of his subject area." *Id.* at n.16 (internal quotation marks omitted).

Although the Estate argues that "[n]o courts have found [Dr. Metzner] to be unqualified or have rejected his testimony as unreliable or irrelevant except this District Court," Aplt. Br. at 26, Dr. Metzner's track record of testifying in other cases holds no weight as to his qualifications concerning the specifics of this case. In light of Dr. Metzner's background and experience, we find that the district court's decision was not "whimsical or manifestly unreasonable." *Dodge*, 328 F.3d at 1223; *see also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1163–64 (10th Cir. 2000) (finding that a trial court's decision to exclude testimony "abuses discretion" where "it renders 'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'") (quoting *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998)).[12]

[11] Accuracy with these figures was important, because Hernandez finished her suicide assessment of Grubbs at approximately 1 hour and 26 minutes after Grubbs took the pills—at which point Grubbs had already likely reached peak absorption according to Dr. Metzner's document. *Id.* at 112.

[12] The Estate also argues the district court misunderstood and misapplied *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 (7th Cir. 1996), in making its ruling. *See* Aplt. Br. at 29. Because the Estate merely recites the facts of *Pardue* rather than making a legal

III. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

Entered for the Court

Allison H. Eid
Circuit Judge

argument, we find that it has not sufficiently raised this issue and do not further consider it.