FILED
United States Court of Appeals
Tenth Circuit

May 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUSTIN P. BOND, as Special Administrator of the Estate of Billy Woods, deceased,

Plaintiff - Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA,

Defendant - Appellee.

No. 20-7067
(D.C. No. 6:18-CV-00108-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **BALDOCK**, and **BACHARACH**, Circuit Judges.

Special Administrator Austin Bond ("Plaintiff") appeals from the district court's decision to admit evidence concerning a settlement agreement (as well as to permit the jury to hear related statements from counsel for the defense) and the court's subsequent decision to deny his motion for a new trial. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I

This appeal stems from the death of Billy Woods ("Decedent"), a sixteen-year-old teenager who committed suicide while incarcerated at the Muskogee County Regional Juvenile Detention Center ("RJDC"). Decedent's then-Special Administratrix, Robbie Burke,[1] brought, among other claims, a lawsuit pursuant to 42 U.S.C. § 1983 against eight Defendants: the Board of County Commissioners of Muskogee County ("Board"), which owned the RJDC; the Muskogee County Council of Youth Services ("MCCOYS"), which operated and maintained the RJDC; the State of Oklahoma, *ex rel.*, Office of Juvenile Affairs ("OJA") which generally oversaw judicial detentions statewide and inspected the RJDC annually; Steven Buck, then-OJA director; and Jerrod Lang, Angela Miller ("A. Miller"), Brandon Miller ("B. Miller"), and Marietta Winkle (collectively the "MCCOYS Officers," and, when grouped with the MCCOYS, the "MCCOYS Defendants"), the detention officers working when Decedent died.

Plaintiff voluntarily dismissed his claims against the OJA on February 7, 2019. Then, Plaintiff settled with the MCCOYS Defendants and Mr. Buck—who were subsequently dismissed. That left the Board as the sole defendant. To possibly facilitate a settlement, Plaintiff and the Board participated in a summary jury trial before a magistrate judge, a dress rehearsal of sorts before the real trial, to find out

[1] Ms. Burke passed away while the action was ongoing, and Mr. Bond replaced her as Plaintiff.

how a theoretical jury would rule. As the record reflects, "[t]he summary jury trial provides a low risk method by which counsel may obtain the perception of six jurors of the merits of their case in the course of a half-day proceeding so as to give parties a reliable basis upon which to build a just and acceptable settlement." Aplt.'s App., Vol. 21, at 5837 (Handbook and Rules of the Ct. for Summ. Jury Trial Proceedings, filed May 22, 2019). "This proceeding in no way affects the parties' right to a full trial *de novo* on the merits." *Id.*

The summary jury trial was held before two six-member juries, an "Individual Jury" and a "Group Jury." *Id.*, Vol. 9, at 2343, 2345 (Order Setting Summ. Jury Trial, filed May 22, 2019). The parties were given the opportunity to present "evidence that would be admissible at trial upon the merits." *Id.* at 2344. At the conclusion of the presentations, the six-member Group Jury was tasked to return a consensus verdict, if possible, while each of the six jurors composing the Individual Jury was tasked to return a separate verdict "on liability and/or damages."[2] *Id.* at

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[2] The summary jury trial handbook provides:

> At the conclusion of the presentations, the jury will be given an abbreviated charge and allowed to retire for its deliberations. The Group Jury will return a consensus verdict, if possible, as to both liability and damages. Each member of the Individual Jury will be given separate verdict forms to list their opinions on the issues of liability and damages. By providing multiple perspectives on the juries' verdicts, the parties are afforded some insight as to lay perceptions of the case and the results may suggest an equitable basis for settlement.

Aplt.'s App., Vol. 21, at 5842.

2345. The Group Jury rendered a verdict in Plaintiff's favor and determined that it would have awarded $20 million in damages. However, three members of the Individual Jury found for the Board, while the other three individual jurors found for Plaintiff and awarded less than $20 million in damages. After that exercise, no settlement was reached.

Plaintiff and the Board then went to trial to dispose of Plaintiff's § 1983 municipal liability claim against the Board. Before the trial, the Board asked the district court if it could mention the fact that Plaintiff settled with the Board's former codefendants. Specifically, the Board wanted to introduce Plaintiff's pre-trial settlement with the MCCOYS Defendants. In making this request, the Board reasoned that the settlement agreement would be needed to avoid jury confusion and speculation, and to possibly counter any bias that the codefendants—who were scheduled to be witnesses at trial—may have against the Board. The district court granted that request over Plaintiff's objection, ruling that the evidence was permissible for limited purposes pursuant to Rule 408 and Rule 403 of the Federal Rules of Evidence; but it prohibited the Board from mentioning or discussing the terms or amount of the settlement agreement.

At trial, Defense counsel mentioned the settlement agreement several times. To start, in the opening statement, Defense counsel noted that:

> The surveillance video in this case is going to be hard to watch. It shows two hours with no one checking on Billy Woods. It will show all of the other residents are out in the program but Billy Woods is the only resident in his room. The video will show MCCOYS' employee Brandon Miller

> and MCCOYS' employee Jerrod Lang right there in the hallway supervising showers of the other residents. There is no reason they should not have checked on him.
>
> The evidence will show that ***both [B. Miller and Lang] have been sued in this case by the plaintiff in this lawsuit and both have settled***.
>
> ***
>
> [T]he county agrees that these four MCCOYS' employees should have tried first aid and CPR and they should have immediately called 911. It's common sense.
>
> The evidence will show all ***four MCCOYS employees were sued by the plaintiff in this case, and all four have settled***. The evidence will show that MCCOYS ran the juvenile detention center. The evidence will show though that Jerrod Lang, Brandon Miller, Jackie Winkle, and Angela Miller were MCCOYS' employees, and not county employees. The evidence will show that MCCOYS hired, trained, and supervised the daily activities of these four MCCOYS employees, the count[y] did not.
>
> The evidence will show that ***plaintiff sued MCCOYS in the lawsuit and the evidence will show that MCCOYS has settled with the plaintiff***.

Aplt.'s Opening Br. at 13 (first and second alteration in original) (quoting Aplt.'s App., Vol. 10, at 2860–63 (Trial Tr. Vol. I, dated July 7, 2020)).

Defense counsel also specifically asked the testifying MCCOYS administrative staff and some of the MCCOYS Officers whether they had been sued and subsequently settled. *See* Aplee.'s Resp. Br. at 6–7; Aplt.'s App., Vol. 11, at 3141–42 (Trial Tr. Vol. II, dated July 8, 2020); *id.*, Vol. 15, at 4119 (Trial Tr. Vol. III, dated July 9, 2020); *id.*, Vol. 16, at 4604 (Trial Tr. Vol. V, dated July 15, 2020); *id.*, Vol. 17, at 4640; Aplee.'s Supp. App., Vol. 5, 1049–50 (Trial Excerpt of Cross-

Examination of Patty Reece, dated July 8, 2020); Aplt.'s Opening Br. at 16. And in the closing argument, Defense counsel told the jury:

> Everything Mr. Smolen [i.e., Plaintiff's attorney] is talking about has to do with Jerrod Lang, Marietta Winkle—or Jackie Winkle, Brandon Miller, and Angela Miller, those four people, and then MCCOYS, ***those are the people who did wrong in this case***. Those are the people who didn't do what they were supposed to do ***and those people have settled with the plaintiffs***. Now, plaintiffs are going to come and ask you for 20 million dollars. That's what they're going to want. That's not right. That's not right for what these people did.

Aplt.'s Opening Br. at 17 (quoting Aplt.'s App., Vol. 12, at 3262 (Def.'s Closing Argument Tr., dated July 17, 2020)).

Aside from one instance on the second day of trial, however, Plaintiff did not raise any concerns regarding Defense counsel's questions or his opening statement and closing argument. *See id.* at 15–16; Aplee.'s Resp. Br. at 7. In that sole instance, Plaintiff suggested that Defense counsel's references to the settlement agreement "were improper and appeared to be contrary" to the district court's pretrial order. Aplt.'s Opening Br. at 15. Specifically, the following exchange ensued:

> MR. SMOLEN: Just two things[3] I would like to address with the Court, Your Honor, [to] make a record on it. The situation with [Defense counsel] discussing settlement. It was my understanding at pretrial that he was allowed to ask a witness, "Were you named in this case?" They were supposed to say "yes." And then he was allowed to say,

[3] The other "thing" involved COVID-19 concerns as to one of the testifying witnesses, which is not at issue in this trial. *See* Aplt.'s App., Vol. 12, at 3251–52.

"And were you"—"did you settle?" And say, "Yes." I've heard in his opening monologs [sic] about how MCCOYS has settled and everybody has settled. He's done it over and over repeatedly with the witnesses.

THE COURT: I'm sorry. Go ahead.

MR. SMOLEN: That's okay. He's asking [a MCCOYS officer], "And MCCOYS settled; didn't they?" And that's not a—I don't feel like that's consistent with the order.

THE COURT: I saw nothing that was inconsistent with the order.

MR. SMOLEN: Okay.

THE COURT: I mean, I figured that [Defense counsel] was going to mention [the settlement evidence] in opening. He mentioned it. I figured that he was going to mention it with each MCCOYS' witness and he has, at least the ones that were individually sued.

MR. SMOLEN: That was my understanding, was the individuals could say that; but when he's got a program coordinator testifying that MCCOYS has settled, that's where I feel like at least my understanding of your order, that it wasn't that. It was that [the MCCOYS Officers] could say I was sued or I wasn't sued and I settled out, but not the entities.

THE COURT: Well, that's—I could go either way on that; okay?

MR. SMOLEN: I just wanted to make a record.

THE COURT: That's fine. I don't find it to be egregious. If it was a violation of my order, as I mentioned to my staff before this trial started when you have to rule on 13,000 motions in limine if your orders are actually somewhat nuanced, I have the rulings right in front of me. I haven't had to refer to them yet but I'm not going to be perfect; okay?

MR. SMOLEN: Your Honor.

THE COURT: So forgive me but I thought what they did was okay.

MR. SMOLEN: *And all I'm asking is I think that it's been done enough. I just don't want it to continue to happen in*

> *the future. If the Court doesn't think that they violated it, that's fine*. I totally respect you. But you made the order. I just think the jury *has heard it enough at this point*. For him to sit up there and ask every witness, ["]and MCCOYS has settled out; haven't they?["]
>
> THE COURT: Well, he can do it with each, with the individual defendants that have settled.
>
> MR. SMOLEN: But not with respect to every administrator, every county commissioner asking them about whether MCCOYS, the entity—
>
> THE COURT: And I think I admonished at the pretrial that it's going to be a limited inquiry.
>
> MR. SMOLEN: Right. That's why I'm raising it.
>
> THE COURT: And that's—I'm glad that you did. I will keep that in mind. I'll tell [Defense counsel] that I agree with you. I think it can only go so far and it's not going to be with every witness, so.

Aplt.'s App., Vol. 12, at 3248–51 (emphases added).

Importantly, though Plaintiff's counsel indicated that he "just wanted to make a record," *id.* at 3249, he did not seem to be making an objection to Defense counsel's *prior* settlement references, *see id.* at 3249–51. Specifically, Plaintiff's counsel indicated that "all [he was] asking" is that Defense counsel's settlement references be stopped because "it's been done enough" and he "just [did not] want it to continue to happen in the future." *Id.* at 3250. In Plaintiff's counsel's view, "the jury ha[d] heard [about the settlement] enough at this point." *Id.*

In other words, Plaintiff's objection appeared to focus only on Defense counsel's possible, *future* settlement references—not references that had occurred

previously.[4] And, even if Plaintiff's counsel's comments could be interpreted as encompassing an objection to Defense counsel's prior settlement references, he effectively withdrew any objection that he could conceivably be understood to have made by saying, "If the Court doesn't think that they violated [the pretrial order], that's fine." *Id.* As a consequence of all of this, it appears that the only settlement references to which Plaintiff's counsel could properly make objections to were future references. Yet when Defense counsel subsequently brought up the settlement (i.e., made such future references)—as part of both his witness examinations and closing argument—Plaintiff's counsel did *not* object.

After the trial, the jury ruled in favor of the Board. Plaintiff subsequently filed a motion for a new trial, arguing (1) that the district court should not have admitted the settlement agreement evidence pursuant to Rules 408 and 403 of the Federal Rules of Evidence and (2) that Defense counsel strayed from the district court's pretrial order. The district court found Plaintiff's first argument—*viz.*, that the district court should not have admitted the settlement evidence—unavailing because evidence of the settlement was admissible pursuant to Rule 408 and Rule 403, and Plaintiff nevertheless did not suffer prejudice if error was committed. With respect to Plaintiff's second argument, the district court found that Plaintiff waived his

[4] Indeed, Plaintiff appears to admit as much in his Opening Brief. *See* Aplt.'s Opening Br. at 15 ("Counsel for Plaintiff specifically asserted that the repeated references to settlement were excessive and prejudicial and *asked the Court to disallow any further settlement evidence or argument*." (emphasis added)).

challenges to Defense counsel's actions during the trial because he did not contemporaneously object. This appeal followed.

II

Plaintiff appeals from the district court's judgment, claiming that the court erred (1) in admitting the settlement evidence in violation of Federal Rules of Evidence 408 and 403, and (2) in allowing Defense counsel to improperly stray from the court's pretrial order. Plaintiff further contends that these errors "substantially and adversely affected his rights." Aplt.'s Opening Br. at 47. Specifically, he points to the "$20 million summary jury verdict in [his] favor," and claims that the "most notable difference between [the summary jury trial and the actual trial], in terms of the facts presented, is the settlement evidence." *Id.* at 47–48.

The Board argues that Plaintiff forfeited both of his evidentiary challenges by failing to contemporaneously object during the Board's opening statement, closing argument, and questioning of various witnesses. And the Board alleges that, by failing to argue for plain error, Plaintiff has waived his arguments on appeal. Alternatively, the Board contends that "the district court did not err in admitting the fact-of-settlement evidence as [its pretrial order] did not violate [Rule] 408 or 403." Aplee.'s Resp. Br. at 20.

After carefully reviewing the record, we conclude that Plaintiff forfeited his claim challenging Defense counsel's use of the settlement evidence at trial. More specifically, by failing to contemporaneously object to Defense counsel's allegedly unpermitted actions, Plaintiff forfeited his claim that Defense counsel strayed from

the boundaries of the pretrial order. Accordingly, given that Plaintiff did not request plain-error review on appeal, we conclude that he effectively waived this claim.

However, we conclude that Plaintiff's challenge to the district court's pretrial order is properly preserved for our review. Nonetheless, we determine that the district court did not abuse its discretion in admitting the settlement evidence, as its pretrial order did not violate Rule 408 or Rule 403 of the Federal Rules of Evidence. Furthermore, even assuming *arguendo* that the district court erred in admitting the settlement evidence, we conclude that any such error was harmless.

III

Pursuant to Federal Rule of Civil Procedure 59(a), "[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59(a)(1)(A). The decision to grant or deny a Rule 59(a) motion is committed to the trial court's "sound discretion." *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993) (quoting *Canady v. J.B. Hunt Transp., Inc.*, 970 F.2d 710, 716 (10th Cir. 1992)).

On appeal, "[w]e review the denial of a motion for a new trial under the abuse of discretion standard." *United States v. Gwathney*, 465 F.3d 1133, 1144 (10th Cir. 2006). Likewise, "[a] trial court's evidentiary rulings will not be disturbed absent an abuse of discretion." *Hinds*, 988 F.2d at 1047; *see also Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1131 (10th Cir. 2011) ("Evidentiary rulings 'generally are committed to the very broad discretion of the trial judge, and they may constitute

an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment.'" (quoting *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998))). Where, as here, "a motion for a new trial asserts that the district court erred in determining the admissibility of evidence, the verdict must stand unless the district court 'made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Weaver v. Blake*, 454 F.3d 1087, 1091 (10th Cir. 2006) (quoting *Hinds*, 988 F.2d at 1046).

"An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1223 (10th Cir. 2018) (quoting *N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1245 (10th Cir. 2017)). Stated another way, "[a]n abuse of discretion will be found only where the trial court makes 'an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.'" *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez–Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

Furthermore, even if the district court abused its discretion in admitting certain evidence, "[a] new trial cannot be granted unless the error was prejudicial and affects the party's substantial rights." *Henning v. Union Pac. R. Co.*, 530 F.3d 1206, 1217 (10th Cir. 2008) (citing FED. R. CIV. P. 61); *see also Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1161 (10th Cir. 2017) ("To obtain a reversal for the allegedly erroneous admission of evidence or closing argument, an appellant also

must make a showing of prejudice."). Accordingly, "the court may set aside a jury verdict due to erroneously admitted evidence only if it reasonably concludes that a trial without that evidence would have had a contrary result." *Racher*, 871 F.3d at 1161. If the district court's error is harmless, then an appellate court should not overturn the district court's ruling. *See Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995).

IV

On appeal, Plaintiff raises two evidentiary challenges. First, he argues that the district court's pretrial order—which admitted the settlement evidence for the "limited purposes of preventing jury confusion about and speculation as to the former co-defendants' absence and to show possible bias of the witnesses"—was erroneous. Aplt.'s App., Vol. 18, at 5003–04 (District Ct. Order Denying Pl.'s Mot. for New Trial, filed Nov. 10, 2020). Specifically, Plaintiff asserts that the admission of the settlement evidence was contrary to Rules 408 and 403 of the Federal Rules of Evidence. *See* Aplt.'s Opening Br. at 32. Second, Plaintiff claims that the district court erred in allowing Defense counsel to use the settlement evidence at trial in a manner that was not in accordance with the pretrial order. In particular, Plaintiff states that, at trial, the Board "improperly used the settlement evidence to establish the liability of the settling defendants," which "was a direct affront to Rule 408." *Id.*

The Board argues that Plaintiff forfeited both of these challenges by failing to object during the Board's opening statement, closing argument, and cross-examination of various witnesses. *See* Aplee.'s Resp. Br. at 22. Specifically, the

Board notes that "[a]s Plaintiff admits in his Brief, aside from once on day two, Plaintiff did not object to the fact-of-settlement evidence at trial." *Id.* at 7. As such, the Board claims "the plain error standard applies here, but since Plaintiff did not argue that the trial court committed plain error, . . . he has waived that argument on appeal." *Id.* at 27–28.

We partially agree with the Board. We first conclude that Plaintiff forfeited his claim challenging Defense counsel's use of the settlement evidence at trial—*viz.*, his claim that Defense counsel strayed beyond the boundaries of the pretrial order. Given that Plaintiff has not requested plain-error review on appeal, we conclude that he has effectively waived this claim. However, we hold that Plaintiff's challenge to the district court's pretrial order is properly preserved for our review.

A

"A party forfeits an evidence objection by failing to timely object or move to strike or by failing to 'state[] the specific ground, unless it was apparent from the context.'" *Burke v. Regalado,* 935 F.3d 960, 1014 (10th Cir. 2019) (alteration in original) (quoting FED. R. EVID. 103(a)(1)(B)). Indeed, in most instances, "[t]o preserve an issue for review, a party must make a contemporaneous objection or otherwise give the trial court the opportunity to remedy the claimed error." *Spahr v. Ferber Resorts, LLC*, 419 F. App'x 796, 806 (10th Cir. 2011) (unpublished) (first citing *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1011 (10th Cir. 1999); and then citing *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962 (10th Cir. 1993)).

"Generally, a pretrial motion in limine will not preserve an objection if the objection is not renewed at the time the evidence is introduced." *United States v. Nichols,* 169 F.3d 1255, 1264 (10th Cir. 1999). "A three-part test determines whether a party must renew a motion in limine by a contemporaneous objection at trial to preserve an issue for appeal." *Pandit v. Am. Honda Motor Co.*, 82 F.3d 376, 380 (10th Cir. 1996). Specifically, "[t]o overcome the claim of [forfeiture] for failure to contemporaneously object," we review whether "(1) the matter was adequately presented to the district court; (2) the issue was of a type that can be finally decided prior to trial; and (3) the court's ruling was definitive." *Id.*

To urge reversal of a forfeited issue, a party must argue plain error.[5] *See United States v. Ramirez*, 348 F.3d 1175, 1181 (10th Cir. 2003). "[F]ailure to argue for plain error and its application on appeal[] surely marks the end of the road for an argument for reversal not first presented to the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011); *see In re Rumsey Land Co., LLC,* 944 F.3d 1259, 1271 (10th Cir. 2019) ("If an appellant does not explain how its forfeited arguments survive the plain error standard, it *effectively waives* those arguments on appeal." (emphasis added)).

B

[5] Under the plain error standard, a plaintiff must establish that (1) the district court erred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Munoz*, 812 F.3d 809, 813 (10th Cir. 2016).

Plaintiff provides a bevy of arguments challenging Defense counsel's actions at trial. Overall, Plaintiff complains that "[a]t trial, . . . [Defense] counsel . . . left no doubt that he was utilizing the settlement evidence to establish the liability of MCCOYS and its employees." Aplt.'s Opening Br. at 37. Plaintiff believes that such use of the settlement evidence was prohibited under Federal Rule of Evidence 408 and the district court's pretrial order. *See id.* at 35.

The Board responds by noting that—with the possible exception of one exchange on the second day of trial—Plaintiff did not "complain or otherwise object to the settlement evidence/statements, based on purported inconsistencies with the court's pretrial ruling or for any other reason." Aplee.'s Resp. Br. at 26. Thus, "[c]onsidering Plaintiff's lack of contemporaneous objection (based on FRE 403 and 408) at trial to the at-issue testimony and argument, he has forfeited those objections." *Id.* The district court agreed with the Board, reasoning that "Plaintiff did not contemporaneously object" to the Board's use of the settlement evidence at trial; "thus, he waived any objection." Aplt.'s App., Vol. 18, at 5005 n.3. We conclude that the Board has the better of this argument.

It is undisputed that Plaintiff did not contemporaneously object when Defense counsel used the settlement evidence at trial—*viz.*, during the Board's opening statement, closing argument, and cross-examination of certain witnesses. Indeed, with the exception of one instance, Plaintiff did not raise any concerns with the district court *at any point* regarding the Defense counsel's use at trial of the settlement evidence. Thus, by failing to contemporaneously object to Defense

counsel's actions at trial, Plaintiff forfeited his appellate arguments challenging those specific actions. *See, e.g.*, *Burke*, 935 F.3d at 1014 ("A party forfeits an evidence objection by failing to timely object or move to strike or by failing to 'state[] the specific ground, unless it was apparent from the context.'" (alteration in original) (quoting FED. R. EVID. 103(a)(1)(B))); *see also Spahr*, 419 F. App'x at 806 ("To preserve an issue for review, a party must make a contemporaneous objection or otherwise give the trial court the opportunity to remedy the claimed error."); *cf. United States v. Santiago*, 977 F.2d 517, 521 n.5 (10th Cir. 1992) ("Absent a contemporaneous objection, . . . we reverse only if the record demonstrates clear prejudice constituting plain error.").

Plaintiff attempts to avoid the consequences of our forfeiture doctrine by claiming that his exchange with the district court on the second day of trial constituted an objection to the Defense counsel's use of the settlement evidence. *See* Aplt.'s Opening Br. at 15–16. Plaintiff further claims that "[a]fter raising the objection . . ., counsel for Plaintiff was resigned to the fact that any further objection would be futile." *Id.* at 16. Plaintiff's reliance on this single exchange is unavailing.

First, that exchange was not contemporaneous—as required by our precedent. *See Burke*, 935 F.3d at 1014; *Santiago*, 977 F.2d at 521 n.5. Instead, this exchange occurred outside of the jury's presence after testimony ended and before the district court adjourned on the second day of trial. That fact alone is dispositive of the inquiry. Second, looking at the substance of the exchange, even if we assume that Plaintiff made a proper and specific objection to Defense counsel's *prior* references

to the settlement evidence, *see Burke*, 935 F.3d at 104—rather than merely expressing general concerns—he appears to have withdrawn any such objection when he said, "If the Court doesn't think that [the Board] violated [the pretrial order], that's fine." Aplt.'s App., Vol. 12, at 3250. Further, when Defense counsel *subsequently* brought up the settlement (i.e., made additional, new references to the settlement)—as part of both his witness examinations and closing argument—Plaintiff's counsel did *not* object.

And Plaintiff's failure to now argue for plain-error review effectively waives the issue; in other words, Plaintiff has no entitlement to be heard on this line of argument. *See, e.g.*, *In re Rumsey*, 944 F.3d at 1271 ("If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal."); *Richison*, 634 F.3d at 1131 ("[F]ailure to argue for plain error and its application on appeal[] surely marks the end of the road for an argument for reversal not first presented to the district court."). Thus, we consider Plaintiff's line of argument concerning Defendant's actions at trial waived, and we decline to consider it further.

C

Plaintiff also challenges the admission of the settlement evidence for the limited purposes authorized by the district court's pretrial order. Specifically, Plaintiff contends that the admission of the evidence—as authorized by the court's pretrial order—violated Rules 408 and 403 of the Federal Rules of Evidence. *See* Aplt.'s Opening Br. at 35–43 (arguing that admission of the settlement evidence

violates Rule 408); *id.* at 43–46 (arguing that admission of the settlement evidence violates Rule 403). The parties had briefed this issue, and the district court overruled Plaintiff's objection at a pretrial conference. Before considering the merits of Plaintiff's claim, we determine whether it is properly preserved for our review.

The district court found that Plaintiff's pretrial objection to its pretrial order "preserved the ruling because it was adequately presented to the court, was the type of issue that can be finally decided in a pretrial hearing, and was ruled upon definitively." Aplt.'s App., Vol. 18, at 5005 n.3 (citing *Pandit*, 82 F.3d at 380). Unsurprisingly, the Board disagrees with the district court's conclusion. The Board argues that Plaintiff's pretrial objection did not preserve his challenges to evidence admitted at trial pursuant to the court's pretrial order because Plaintiff did not renew his objections contemporaneously at trial. *See* Aplee.'s Resp. Br. at 23–24. Specifically, the Board claims that Plaintiff's pretrial objection to the pretrial order was "not of the type that could be 'finally decided prior to trial[']" (i.e., failed to satisfy *Pandit*'s second prong). *Id.* at 24 (quoting *Gardetto v. Mason*, 201 F.3d 447, 1999 WL 118838, *4–5 (10th Cir. 1999) (unpublished table case)). We disagree with the Board.

We do not see why Plaintiff's failure to object *at trial* would lead to the forfeiture of its challenge to the district court's *pretrial* order. Specifically, following our test enunciated in *Pandit*, we agree with the district court that the matter was presented to the court, the issue could be decided prior to trial, and the ruling was definitive. *See* 82 F.3d at 380.

First, the parties had opportunities to file briefs regarding the admission of the settlement evidence. *See United States v. Bedford*, 536 F.3d 1148, 1158 (10th Cir. 2008) ("Defendant's motion adequately informed the court of the basis for his objections, and the court's ruling came after it received the Government's detailed pretrial summary of the opinions it intended to elicit from [the witness]."). Thus, both parties were able to present their respective positions on the matter to the court.

Second, the question of whether evidence could be admitted for certain, specific limited purposes without violating Federal Rules of Evidence 408 and 403 is the type of issue that—at least under the circumstances here—could be decided prior to trial. *See Richardson v. Mo. Pac. R. Co.*, 186 F.3d 1273, 1276–77 (10th Cir. 1999) (concluding that the district court "could and did make a definitive ruling on the evidence" under Rule 403 before trial because "[t]he issues in the case were straightforward, and both the proffered evidence and the facts upon which admissibility depended were fairly certain and unlikely to change given the character of the evidence admitted at trial"); *see also United States v. Tenorio*, 312 F. App'x 122, 126 (10th Cir. 2009) (unpublished) (holding the Rule 403 issue that was disposed of pretrial "could be decided fairly prior to trial, as the content of the proposed testimony was straightforward and was fully and accurately described").

More specifically, the questions implicated by the Board's request were "straightforward" and "the facts upon which admissibility depended were fairly certain and unlikely to change" during the course of the trial. *Richardson*, 186 F.3d at 1276–77. In its brief to the district court, the Board first requested the settlement

evidence be admitted under Rule 408's exception to be used "for the limited, relevant, and proper purpose of preventing jury confusion and speculation as to the codefendants' absence and to assist the jury in understanding . . . this case." Aplt.'s App., Vol. 9, at 2560 (Def. Board's Br. Regarding Admitting the Fact of Former Codefendants' Settlement with Pl. at Trial, filed June 10, 2020). The Board also stated that it "only wish[ed] to introduce the fact that [the] Plaintiff[] came to a settlement agreement with [the MCCOYS Defendants]; it does not seek to introduce the terms or amounts of any settlement agreements." *Id.* at 2561. And finally, the Board requested that it be allowed to use the settlement evidence against the former codefendants if they exhibited bias or uncooperativeness at trial. *See id.* at 2561–62. Guided in part by our precedent in *Richardson*, we conclude that the type of issue before the district court—at least under the circumstances of this case—could be decided prior to trial.

Finally, the district court's ruling on the matter was definitive—*viz.*, it granted the Board's request to admit the settlement evidence for the aforementioned purposes, without equivocation or qualification. *See* Aplt.'s App., Vol. 10, at 2741 (District Ct. Pretrial Order, filed July 6, 2020). Thus, having satisfied *Pandit*'s three-part test, Plaintiff's challenge to the district court's pretrial order was preserved. Accordingly, we address the merits of Plaintiff's claim.

V

A

Plaintiff acknowledges that "the District Court ruled that the settlement evidence was properly admitted for the 'limited purposes of preventing jury confusion about and speculation as to the former co-defendants' absence and to show possible bias of the witnesses.'" Aplt.'s Opening Br. at 39 (quoting Aplt.'s App., Vol. 18, at 5003–04). Nonetheless, despite these limitations, Plaintiff claims that the district court's decision "was in error." *Id.* First, he argues that the admission of the settlement evidence "was a direct affront to Rule 408," as, at the pretrial proceedings, the Board "made clear its intent to use the settlement evidence in its effort to establish 'the fault of its former codefendants.'" *Id.* at 35, 36–37 (emphasis omitted). Second, Plaintiff contends the district court "did not identify how the evidence was used to show any bias." *Id.* at 41. Specifically, Plaintiff claims that a "more specific assertion of bias was required to invoke the Rule 408(b) exception." *Id.*

The Board disagrees, arguing that "the district court correctly determined the fact-of-settlement evidence's intended and actual use at trial did not violate [Rule] 408." Aplee.'s Resp. Br. at 29. Indeed, the Board points to its own briefing in the district court to show that it only "sought admission of the . . . settlement [evidence] . . . to prevent jury confusion and speculation as to [the former] codefendants' absence as parties at trial, show bias, and assist in the jury's understanding of the case since references to and significant discussions of the former codefendants at trial would be inevitable." *Id.* at 30. Furthermore, the Board claims that, contrary to Plaintiff's

assertions, it "articulated the potential bias of its former codefendants in its [pretrial] Brief Regarding Settlement." *Id.* at 36. Thus, the Board concludes that the district court's pretrial order was consistent with Rule 408. We agree.

Rule 408 of the Federal Rules of Evidence provides:

> (a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; . . . .
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. Rule 408 bars settlement evidence in both criminal and civil proceedings. *See United States v. Bailey*, 327 F.3d 1131, 1146 (10th Cir. 2003). But, as Rule 408(b) clearly provides, a district court may admit settlement evidence for certain limited purposes. FED. R. EVID. 408(b). Specifically, "[t]he plain text of Rule 408 permits evidence of a settlement to be admitted for purposes other than to prove the validity or amount of a claim." *O'Hearon v. Castleview Hosp.*, 156 F.3d 1244, 1998 WL 480161, at *2 (10th Cir. 1998) (unpublished table decision); *see Hamilton v. Water Whole Int'l Corp.*, 302 F. App'x 789, 795 (10th Cir. 2008) (unpublished) ("While settlements may not be introduced to prove liability, evidence of such settlements is admissible under Rule 408 for other purposes."); *cf. Kennon v.*

Slipstreamer, Inc., 794 F.2d 1067, 1070 (5th Cir. 1986) (holding that it is not an abuse of discretion to reveal the fact of settlement in order to avoid jury confusion and explain the absence of settling defendants).

Here, the district court made the following pretrial ruling with respect to the settlement evidence:

> The Court GRANTED Defendant Board's Brief regarding admitting into evidence the fact of former codefendants' settlement with plaintiff at trial, (Court Doc. 275), ruling Defendant Board could introduce the fact of its former codefendants' (MCCOYS, Steven Buck, Jerrod Lang, Angela Miller, Brandon Miller, and Marietta Winkle) had been sued by Plaintiff in this lawsuit and have settled with Plaintiff. *However, the terms of the settlement agreement(s) and settlement amount(s) are not to be mentioned or discussed.*

Aplt.'s App., Vol. 10, at 2741 (emphasis added).

The terms of the court's pretrial order clearly show that it was following Rule 408's limitations. Specifically, the district court's pretrial order made clear that the admission of the settlement evidence was not being authorized to prove the liability of the MCCOYS Defendants—especially insofar as that liability might exclude any liability of the Board. Nor, relatedly, did the court's order contemplate any discussion of the terms or amount of the settlement. Instead, consistent with Rule 408(b), the evidence was admitted for two other purposes—*viz.*, "for the limited purposes of preventing jury confusion about and speculation as to the former co-defendants' absence and to show possible bias of the witnesses." Aplt.'s App., Vol. 18, at 5003–04.

Relatedly, the court's prescribed limitations for the admission of the fact-of-settlement evidence are entirely consonant with the underlying purposes of Rule 408. *See Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir. 1997) ("Rule 408 only bars admission of evidence relating to settlement discussions if that evidence is offered to prove 'liability for or invalidity of the claim or its amount,' and the evidence at issue here was not offered for that forbidden purpose. Rather, [plaintiff] offered the evidence to show it was not at fault for any delay and to show [defendant] acted in bad faith. Accordingly, the district court did not abuse its discretion in allowing the testimony at issue, nor did it abuse its discretion in refusing [defendant's] request for a mistrial."); *Haynes v. Manning (Haynes I)*, 717 F. Supp. 730, 733 (D. Kan. 1989) ("Without evidence of why the [former defendants] were not litigants, the jury would be confused and left to speculate."), *aff'd in part, rev'd in part on other grounds*, 917 F.2d 450 (10th Cir. 1990); *see also Haynes v. Manning (Haynes II)*, 917 F.2d 450, 454 (10th Cir. 1990) (holding plaintiff's argument that "the district court erred in permitting introduction of evidence of their settlement with . . . former defendants . . . [is] without merit").

Furthermore, Plaintiff's claim that the Board was required to provide a more specific assertion of bias is unavailing. As an initial matter, the Board provided such a rationale in its pretrial brief, stating that the codefendants "settled with Plaintiff and . . . the Board intends to argue that their conduct caused . . . constitutional violations, [which] may make them biased towards Plaintiff and/or uncooperative on the stand." Aplt.'s App., Vol. 9, at 2561–62; *cf. BNSF Ry. Co. v. Lafarge Sw., Inc.*, 2009 WL

9144599, at *3 (D.N.M. Jan. 26, 2009) ("Evidence relating to a settlement is admissible to show that the parties are in a non-adverse relationship to the extent it tends to make their respective positions less credible."). In other words, the Board requested that the court admit the settlement evidence for *possible* use against the codefendants *if* they proved to be uncooperative or biased. Of course, as Plaintiff states, bias could not have been demonstrated at the time of the pretrial proceedings because the trial had not yet begun. However, that does not mean that the district court abused its broad discretion by issuing a pretrial order admitting the settlement evidence—with the aforementioned limitations—in the event that bias arose. *See Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) ("The purpose of an in limine motion is 'to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.'" (quoting *Banque Hypothecaire Du Canton De Geneve v. Union Mines*, 652 F. Supp. 1400, 1401 (D. Md. 1987))).

Accordingly, for the foregoing reasons, we discern no abuse of discretion in the district court's admission of the fact-of-settlement evidence for the limited purposes of preventing jury confusion and showing possible bias of the witnesses. Stated otherwise, we do not find the district court made "an arbitrary, capricious, whimsical, or manifestly unreasonable judgement" when it issued its pretrial order.

See Oldenburg, 34 F.3d at 1555 (quoting *Hernandez-Herrera*, 952 F.2d at 343).[6]

B

Next, Plaintiff contends that "[e]ven assuming that an exception to Rule 408(a) applies, the proposed settlement evidence should have *still* been excluded under Rule 403." Aplt.'s Opening Br. at 43. Plaintiff claims that "the settlement evidence had virtually zero probative value, while the danger of unfair prejudice was substantial." *Id.* at 45. Specifically, Plaintiff asserts that "[i]t is highly likely that the settlement evidence caused the jury to decrease, and in this case, eliminate, [the Board's] responsibility for the [relevant constitutional] violation." *Id.* at 46.

The Board disagrees, claiming that the settlement evidence was highly relevant to the matter. Specifically, "admitting the fact of settlement was necessary to assist the jury in understanding the case, show bias, and to prevent jury confusion and speculation by explaining the (former) codefendants' absence from trial." Aplee.'s Resp. Br. at 42. Furthermore, the Board asserts that any prejudicial effect was diminished by the district court's limitations on the admissibility of the evidence and its subsequent instructions to the jury. *See id.* at 41. Taken together, the Board

[6] Plaintiff also asserts that the district court's "admission of the settlement evidence . . . is contrary to the intended purpose of Rule 408" and creates a "chilling effect on settling cases with less than all defendants." Aplt.'s Opening Br. at 42–43. "We recognize that Rule 408 is designed to encourage settlement of disputes." *O'Hearon*, 1998 WL 480161, at *3. "But the initial determination as to whether this settlement information" is admissible "must be made by the trial judge, to whom we defer absent an abuse of discretion. On the record before us, we conclude there is no reversible error." *Id.*

contends that "the danger of unfair prejudice to Plaintiff was not outweighed by the probative value of the evidence." *Id.* at 42. We agree.

Under Rule 403 of the Federal Rules of Evidence, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. "The Rule is meant to relax the iron rule of relevance by permitting the trial judge to preserve the fairness of the proceedings by excluding evidence despite its relevance." 12 Tracey Bateman, et al., FEDERAL PROCEDURE, L. ED. § 33:105, Westlaw (database updated Mar. 2023) (citing *United States v. McRae*, 593 F.2d 700 (5th Cir. 1979)). "The district court has considerable discretion in performing the Rule 403 balancing test, but exclusion of evidence under Rule 403 that is otherwise admissible under the other rules is an extraordinary remedy and should be used sparingly." *United States v. Durham*, 902 F.3d 1180, 1224 (10th Cir. 2018) (quoting *United States v. Silva*, 889 F.3d 704, 712 (10th Cir. 2018)).

Here, the settlement evidence was highly relevant to the present action. There were seven former codefendants—most of whom participated as witnesses at trial—whose absence as named defendants could have confused the jury. Specifically, the fact that the MCCOYS Defendants were no longer part of the case is relevant information the jury may have needed to know. What is more, the MCCOYS Defendants were critical to both parties' theories of the case. Accordingly, many of the MCCOYS Defendants were called to testify, and the parties constantly referenced

their actions, which would have only served to increase the jury's speculation regarding their absence as named defendants had the settlement evidence not been introduced. As such, the district court correctly determined that it was important to inform the jury that the MCCOYS Defendants had settled in order to ensure there would be no jury confusion or speculation regarding their status in the litigation. In other words, the value of the evidence was significant. *See Kennon*, 794 F.2d at 1070 ("[R]evealing the fact of settlement explains the absence of the settling defendants and thus tends to reduce jury confusion."); *Haynes I*, 717 F. Supp. at 733 ("Without evidence of why the [former defendants] were not litigants, the jury would be confused and left to speculate.").

Furthermore, contrary to Plaintiff's assertions, the prejudicial effect of the settlement evidence was insubstantial. As an initial matter, the district court appropriately limited the admissibility of the settlement evidence for the "purposes of preventing jury confusion about and speculation as to the former co-defendants' absence and to show possible bias of the witnesses." Aplt.'s App., Vol. 18, at 5003–04. Thus, the district court's pretrial order ensured that the settlement evidence could not be used to prove the liability of the MCCOYS Defendants or—perhaps more importantly—to eliminate the Board's liability for the alleged constitutional violation.

Moreover, even if the jury would have been inclined to improperly use the settlement evidence to infer the MCCOYS Defendants' liability, the district court properly instructed the jury in a manner that would have minimized any prejudicial

effect of such an inference. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 540 (1993) ("[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'" (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))); *United States v. Davis*, 780 F.2d 838, 847 (10th Cir. 1985) (holding that in light of the instructions given to the jury, the "probative value [of the evidence] outweighed the danger of prejudice; therefore, the district court did not abuse its discretion in admitting the evidence" under Rule 403).

Specifically, at issue in the trial was the liability of the Board—and only the Board. And the district court made clear through its instructions to the jury that, irrespective of any wrongdoing by the MCCOYS Defendants, the Board could still be held independently liable on Plaintiff's claims. Specifically, the district court instructed the jury that "contracting out juvenile facility services to a private entity does not relieve the county of its constitutional duty to provide adequate medical care and protection to those juveniles in custody at the juvenile detention center." Aplt.'s App., Vol. 18, at 4954 (Trial Tr. Vol. VII, dated July 17, 2020). Accordingly, consistent with the district court's instructions, the MCCOYS Defendants' liability would have had no bearing on the jury's determination regarding the Board's independent liability.[7]

[7] Indeed, insofar as the former codefendants acknowledged any wrongdoing at trial, it would hurt—not help—the Board's defense, because it would help the Plaintiff to shoulder his burden of establishing the requisite constitutional violation by persons acting at the Board's behest. *See, e.g.*, *Schneider v. City of*

Thus, given the probative value of the settlement evidence and the limited prejudicial effect posed by its admission, we conclude that the district court did not abuse its discretion in declining to use the "extraordinary remedy" of excluding the otherwise admissible settlement evidence under Rule 403. *Durham*, 902 F.3d at 1224 (quoting *Silva*, 889 F.3d at 712); *see also Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) ("[C]ourt of appeals uphold Rule 403 rulings unless the district court has abused its discretion."); *United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) ("[W]e are required to give 'substantial deference . . . to a trial court's Rule 403 ruling.'" (omission in original) (quoting *United States v. Easter*, 981 F.2d 1549, 1554 (10th Cir. 1992))).

C

In any event, even assuming *arguendo* that the district court erred in admitting the settlement evidence, we conclude that Plaintiff has not demonstrated that any such error was prejudicial (i.e., not harmless). As discussed *supra*, "[t]o obtain a reversal for the allegedly erroneous admission of evidence . . ., an appellant also must make a showing of prejudice." *Racher*, 871 F.3d at 1161. "Erroneously admitted evidence is prejudicial 'if [the court] can reasonably conclude that without the evidence, there would have been a contrary result.'" *Sundance Energy Okla., LLC v.*

Grand Junction Police Dep't, 717 F.3d 760, 769 (10th Cir. 2013) (explaining, in establishing a *Monell* claim, the plaintiff must demonstrate that the municipality's policy or custom caused a constitutional violation); *Quintana v. Santa Fe Cnty. Bd. of Commr's*, 973 F.3d 1022, 1034 (10th Cir. 2020) (same).

Dan D. Drilling Corp., 836 F.3d 1271, 1279 (10th Cir. 2016) (quoting *Seeley v. Chase*, 443 F.3d 1290, 1293 (10th Cir. 2006)). New trials based on evidentiary errors should only be granted "if the error 'had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect.'" *Abraham v. BP Am. Prod. Co.*, 685 F.3d 1196, 1202 (10th Cir. 2012) (quoting *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1212 (10th Cir. 2011)).

To demonstrate prejudice, Plaintiff points to the summary jury trial where he was "rendered" a $20 million award and asks, "[h]ow then, can one explain a second jury awarding Plaintiff $0 and issuing a verdict in favor of [the Board] a year later?" Aplt.'s Opening Br. at 47–48. Plaintiff answers that "[t]he most notable difference between the two proceedings, in terms of the facts presented, is the settlement evidence." *Id.* at 48.

Plaintiff's reliance on the summary jury trial is unavailing. As the district court noted, there were too many significant procedural and legal differences between the summary jury trial and the actual trial which could explain the Group Jury's award of $20 million to Plaintiff. *See* Aplt.'s App., Vol. 18, at 5005 n.2. And even given those significant differences, the members of the Individual Jury *still* provided outcomes that either favored the Board or gave substantially less than $20 million for damages. *See id.*

In particular, the summary jury trial is described as a proceeding that "in no way affects the parties' right to a full trial *de novo* on the merits." *Id.*, Vol. 21, at 5837. Specifically, the summary jury trial is a "predictive tool," conducted ordinarily

in "one-half day and will rarely extend beyond a full day." *Id.* at 5837–38. Furthermore, it is "non-binding," and the "evidentiary and procedural rules are few and flexible and tactical maneuvering is kept to a minimum." *Id.* at 5838. The record does not reflect any disagreement concerning that description from either party—meaning that both parties presumably knew what a summary jury trial was, its purposes and limitations, and why parties enter such a trial as a tool for settlement. *Cf. Strandell v. Jackson Cnty., Ill.*, 838 F.2d 884, 884 (7th Cir. 1987) ("In a nonbinding summary jury trial, attorneys summarize their case before a jury, which then renders a nonbinding verdict. The purpose of this device is to motivate litigants toward settlement by allowing them to estimate how an actual jury may respond to their evidence."); *In re Cincinnati Enquirer, a Div. of Gannett Satellite Info., Inc.*, 94 F.3d 198, 199 (6th Cir. 1996) ("A summary jury trial proceeding is not in the nature of a court hearing or a jury trial, but is essentially a settlement proceeding. . . . The summary jury trial does not present any matter for adjudication by the court, but functions to facilitate settlement." (citation omitted)). Thus, given the unique nature and purpose of the summary jury trial, it is of no moment that the Group Jury found in favor of Plaintiff.

Accordingly, we conclude that Plaintiff has failed to demonstrate prejudice arising from the district court's decision to admit the settlement evidence.

VI

For the foregoing reasons, we uphold the district court's decision to admit the settlement evidence and to deny Plaintiff's motion for a new trial. Accordingly, we **AFFIRM** the district court's judgment.

Entered for the Court

Jerome A. Holmes
Chief Circuit Judge