FILED
United States Court of Appeals
Tenth Circuit

October 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUSTIN BOND, as Special Administrator of the Estate of Mitchell Lee Godsey,

Plaintiff - Appellant,

v.

VIC REGALADO, in his official capacity; BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY; ARMOR CORRECTIONAL HEALTH SERVICES, INC.; ANGELA MCCOY, LPN; CURTIS MCELROY; SETH WHITMAN,

Defendants - Appellees.

No. 22-5065
(D.C. No. 4:18-CV-00231-GKF-CDL)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Mitchell Lee Godsey died while being detained in the medical unit at the David L. Moss Criminal Justice Center (DLM) in Tulsa, Oklahoma. Alleging that Mr. Godsey's death resulted from the improper administration of insulin by a

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

licensed practical nurse (LPN) employed by Armor Correctional Health Services, Inc. (Armor), the administrator of Mr. Godsey's estate (the Estate) unsuccessfully sued the Tulsa County Sheriff, Armor, and three of Armor's employees under 42 U.S.C. § 1983 and Oklahoma law. The Estate now appeals from the judgment against it. Exercising jurisdiction under 28 U.S.C. § 1291, we vacate the district court's dismissal of the Estate's state-law negligence claims, but we affirm the remainder of the judgment.

BACKGROUND

I. Factual Background

Mr. Godsey, age 59, had insulin-resistant diabetes that was not well-controlled. He arrived at DLM in the late afternoon of Saturday, July 30, 2016. He exhibited concerning behaviors, including unsteadiness and seizure-like activity.

The Sheriff contracted with Armor to provide healthcare services at DLM. Armor employee Angela McCoy, LPN, was the booking nurse on duty. Observing Mr. Godsey's difficulties, she assessed him as having an acute medical condition. His blood-sugar level was low (67 mg/dL).[1] She administered glucagon and took him in a wheelchair to the medical unit, and emergency services responded to DLM.

[1] The parties did not contest that Nurse McCoy considered the reading of 67 mg/dL to be low. *See* Aplt. App. Vol. XIII at 3544. The record indicates that "[a] normal blood sugar level is less than 100 mg/dL after not eating (fasting) for at least 8 hours; it is less than 140 mg/dL 2 hours after eating." *Id.* Vol. IV at 1422 n.1; *see also id.* Vol. XIII at 3416 (testimony of the Estate's medical expert, using "a blood sugar level of 100" for "a normal individual").

After being administered an IV, Mr. Godsey was taken to the hospital, a measure authorized in a phone call with DLM's nurse practitioner.

Mr. Godsey returned to DLM later that night. Just after midnight, in the early hours of Sunday, July 31, Nurse McCoy observed that he was still in a state of some confusion and recorded his blood-sugar level as 79 mg/dL. Although she initially thought to place him in general population, she later placed him in the medical unit for observation because his blood-sugar levels remained unstable.

Armor employee Seth Whitman, LPN, was on duty in the medical unit during the 7:00 a.m. to 7:00 p.m. shift on July 31. It was Nurse Whitman's first day working alone at DLM, after a period of training and shadowing. When he first checked Mr. Godsey's blood-sugar level that morning, it again was low (50 mg/dL). He provided Mr. Godsey with two glucose tabs and a sack lunch.

Mr. Godsey was served lunch at 11:37 a.m. When Nurse Whitman next checked his blood sugar, about two hours later, the reading was 248 mg/dL.[2] He administered Mr. Godsey four units of insulin, purportedly as authorized by Mr. Godsey's records and according to a sliding scale. But Mr. Godsey's records did not contain any physician order for insulin. And Nurse Whitman never contacted DLM's medical director (Dr. Curtis McElroy), DLM's nurse practitioner, or any other higher-level practitioner about treating Mr. Godsey. Moreover, the Estate's

[2] The record indicates that a blood-sugar level of 248 mg/dL is elevated. *See* Aplt. App. Vol. IV at 1422 n.1; *see also id.* Vol. XI at 3954 (testimony of defendants' medical expert that "[i]n a patient who doesn't have diabetes the sugar doesn't go above 140").

expert, Dr. John Daniels, testified that a sliding scale is only for preprandial (or pre-meal) use of insulin. Viewed in the light most favorable to the Estate, the record thus indicates Nurse Whitman erred both by administering insulin that was not authorized by a physician and by administering the insulin after Mr. Godsey ate his lunch, rather than before.

Mr. Godsey had dinner just before 5:00 p.m., and Nurse Whitman checked his blood-sugar levels at 6:14 p.m. With the reading showing 306 mg/dL, Nurse Whitman administered eight units of insulin. Again, the record viewed in the light most favorable to the Estate indicates this was error, both as to lack of authorization and as to timing. Dr. Daniels opined this administration of insulin, about 90 minutes after a meal, caused prolonged hypoglycemia (low blood sugar).

From approximately 6:30 p.m. to 11:00 p.m., officers performed security checks on Mr. Godsey's cell every half-hour. At the security check at 11:33 p.m., an officer discovered Mr. Godsey unresponsive in his cell. He was not breathing and had no pulse. His blood-sugar level was 24 mg/dL. Nurse McCoy and other personnel responded, and emergency services were summoned. CPR was ineffective, however, and Mr. Godsey was pronounced dead at 12:13 a.m. on August 1, 2016. Drug tests showed the presence of methamphetamine, and the medical examiner declared the cause of death to be "[a]cute intoxication by methamphetamine," Aplt. App. Vol. V at 1148, but Dr. Daniels opined that Mr. Godsey's death was caused by a "fatal hypoglycemic episode that resulted from inappropriate administration of insulin," *id.* Vol. VIII at 1971 (internal quotation marks omitted).

II. Administrative Proceeding

The Oklahoma Board of Nursing entered a Stipulated Order of discipline against Nurse Whitman. Nurse Whitman stipulated that he administered two glucose tabs without a provider order; failed to notify a provider of the blood-sugar result of 50 mg/dL; and administered four units of insulin and eight units of insulin "utilizing a sliding scale without a Healthcare Provider order." *Id.* Vol. VI at 1422. The Board declared that Nurse Whitman's conduct violated the Oklahoma Nursing Practice Act and the Board's rules. The Board severely reprimanded Nurse Whitman and ordered him to pay an administrative penalty and complete additional training, but it did not revoke his license.

III. Legal Proceedings

The Estate brought suit against the Sheriff in his official capacity, Armor, Dr. McElroy, Nurse McCoy, and Nurse Whitman. As relevant to this appeal, the amended complaint alleged an individual § 1983 claim against Nurse Whitman; municipal § 1983 claims against the Sheriff and Armor; and state-law negligence claims against Armor, Dr. McElroy, Nurse McCoy, and Nurse Whitman (collectively, the Armor defendants).[3] The district court disposed of those claims at different stages of the litigation.

[3] The Estate does not appeal from the judgment in favor of an additional defendant, the Board of County Commissioners of Tulsa County. It also does not appeal from the dismissal of state-constitution claims against the Sheriff, Armor, and Nurse Whitman or the dismissal of § 1983 individual claims against Dr. McElroy and Nurse McCoy.

First, the district court dismissed the negligence claims against the Armor defendants. Next, the district court granted summary judgment to Nurse Whitman on the individual § 1983 claim against him and to the Sheriff and Armor on a failure-to-train § 1983 municipal-liability claim. That left three § 1983 municipal-liability claims against the Sheriff and Armor to go to trial: that they (1) inadequately staffed DLM with qualified professionals; (2) failed to supervise LPNs; and (3) maintained a practice of providing inadequate access to a physician.

During trial, the Sheriff and Armor moved for judgment as a matter of law on all three remaining claims. The district court denied the motion as to the claims of inadequate staffing and inadequate access to a physician, but granted it as to the failure-to-supervise claim. The jury decided in favor of the Sheriff and Armor on both the inadequate-staffing and the inadequate-access claims. The district court then entered a final judgment against the Estate and in favor of the defendants.

DISCUSSION

I. Claims Dismissed Under Rule 12(b)(6)

The district court dismissed the Estate's negligence claims against the Armor defendants under Federal Rule of Civil Procedure 12(b)(6). Our review is de novo. *See Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023).

"An employee of the state or its political subdivision who operates or maintains a jail or correctional facility is exempt from state tort liability under the [Oklahoma Governmental Tort Claims Act (OGTCA)]," and "[t]he OGTCA defines 'employee' as including licensed medical professionals under contract with the

county who provide medical care to inmates or detainees." *Id.* at 1147. In a footnote in *Barrios v. Haskell County Public Facilities Authority*, 432 P.3d 233, 236 n.5 (Okla. 2018), the Oklahoma Supreme Court stated, "Generally speaking, the staff of a healthcare contractor at a jail are 'employees' who are entitled to tort immunity under the [O]GTCA." Relying on *Barrios*, the district court held the OGTCA immunized the defendants from liability on the Estate's negligence claims.

After the district court's final judgment in this case, however, this court held that a district court erred in awarding immunity under *Barrios* at the Rule 12(b)(6) stage. *See Lucas*, 58 F.4th at 1148. *Lucas* recognized "that Barrios did not find that a healthcare contractor at a jail was an employee entitled to tort immunity under the OGTCA but simply assumed the healthcare contractor was an employee for purposes of answering the certified questions before it." 58 F.4th at 1147-48 (internal quotation marks omitted). Accordingly, "[o]n a motion to dismiss, it was premature for the district court to determine that [the healthcare contractor and the prison doctor] were entitled to immunity based on Barrios's non-binding legal assumption, which was decidedly not an express statement of law." *Id.* at 1148.

Similarly, here it was premature for the district court to rely on *Barrios* to determine without further analysis that Armor, Dr. McElroy, Nurse McCoy, and Nurse Whitman were immune from state-law claims of negligence. But as discussed below, we affirm the judgment in favor of the defendants on the Estate's § 1983 claims, and therefore, as the defendants argue, there are no longer any federal claims for the district court to adjudicate. When no federal claims remain pending, it is

appropriate for the district court to decline to exercise supplemental jurisdiction over state-law claims. *See Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1314 (10th Cir. 2021) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." (internal quotation marks omitted)); *VR Acquisitions, LLC v. Wasatch Cnty.*, 853 F.3d 1142, 1149 (10th Cir. 2017) ("[T]he district court should have simply declined to exercise supplemental jurisdiction over [the] state-law claims after it dismissed [the] federal claims."). We therefore vacate the judgment in favor of the defendants on the state-law negligence claims and remand for the district court to conduct further proceedings, which in its discretion may include declining to exercise supplemental jurisdiction over those claims.

II. Claims Decided on Summary Judgment

The district court granted summary judgment to Nurse Whitman, Armor, and the Sheriff on certain § 1983 claims. We review the grant of summary judgment de novo. *See Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. Medical-Treatment § 1983 Claim Against Nurse Whitman

The district court granted summary judgment to Nurse Whitman on the Estate's § 1983 medical-treatment claim, concluding the Estate had not created a

genuine issue of material fact as to whether Nurse Whitman violated Mr. Godsey's constitutional rights.

It is well-established that prison officials' "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation and internal quotation marks omitted). Because Mr. Godsey was a pretrial detainee, his constitutional protection "springs from the Fourteenth Amendment's Due Process Clause" rather than the Eighth Amendment, but the standards are the same under both amendments. *Burke v. Regalado*, 935 F.3d 960, 991 (10th Cir. 2019).

A deliberate-indifference inquiry has two prongs, one objective and one subjective. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the objective prong, the deprivation must be "sufficiently serious." *Id.* (internal quotation marks omitted). And under the subjective prong, the official must have a "sufficiently culpable state of mind." *Id.* (internal quotation marks omitted).

The Sheriff concedes that the objective prong is not at issue in this appeal, but the Armor defendants do not. We agree with the district court that the Estate easily satisfies the objective prong. The Estate presented evidence connecting Nurse Whitman's conduct to Mr. Godsey's death, and we have "consistently held that death qualifies as a substantial harm that satisfies the objective component." *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1155 (10th Cir. 2022) (internal quotation marks omitted), *cert. denied sub nom. Anderson v. Calder*, 143 S. Ct. 2658 (2023).

We thus turn to the subjective prong. For the subjective prong, the required "state of mind is one of deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (internal quotation marks omitted). In this context, a prison official cannot be liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. As relevant here, medical professionals may be found to act with deliberate indifference when they "'fail to treat a serious medical condition properly.'" *Paugh*, 47 F.4th at 1154 (quoting *Sealock*, 218 F.3d at 1211). "This may occur, for example, when a medical professional . . . 'responds to an obvious risk with treatment that is patently unreasonable.'" *Id.* (quoting *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006)). "But, at the same time, a medical professional has not acted with deliberate indifference if he or she merely negligently treats or diagnoses an inmate—even if that provided care would constitute medical malpractice." *Id.*

The district court held that the Estate failed to present sufficient evidence for a factfinder to conclude that Nurse Whitman drew the inference that there was a substantial risk of harm. The court rested its conclusion on three points: (1) "there is no dispute that Nurse Whitman believed there to be a physician's order for insulin," Aplt. App'x Vol. VIII at 2061; (2) "Mr. Godsey's medical records reflect that he was previously administered insulin according to a sliding scale at DLM," *id.* at 2062;

and (3) "plaintiff's expert, Dr. Daniels, testified that he has no medical criticisms of the physician order for a sliding scale Whitman believed was in place," *id.*

Pointing out that on summary judgment the court must view the evidence and all reasonable inferences therefore in the light most favorable to the non-moving party, *see, e.g.*, *Valdez v. Macdonald*, 66 F.4th 796, 831 (10th Cir. 2023), the Estate argues that the district court inappropriately accepted Nurse Whitman's testimony and viewed the evidence in the light most favorable to him, rather than to the Estate. Analogizing to *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001), the Estate also asserts it produced significant evidence that the treatment provided by Nurse Whitman was patently unreasonable, including that the nurse knew he could not provide insulin without a doctor's order and that he admitted before the Oklahoma Board of Nursing that he jeopardized a patient's life or safety.

Nurse Whitman testified in his deposition that he reviewed Mr. Godsey's chart and believed there was a current order for insulin. But of course, there was no such order in Mr. Godsey's records. The Estate asserts that the district court erred in relying on Nurse Whitman's testimony because a jury need not believe it. The problem, however, is that the Estate produced no evidence that might cause a jury to infer that Nurse Whitman administered the insulin despite knowing that there was no order in place. "Inferences supported by conjecture or speculation will not defeat a motion for summary judgment." *Self*, 439 F.3d at 1236.

In *Self*, we recognized that "[s]o long as a medical professional provides a level of care consistent with the symptoms presented by the inmate, *absent evidence*

of actual knowledge or recklessness, the requisite state of mind cannot be met." 439 F.3d at 1233 (emphasis added). There we concluded "it would amount to mere speculation to conclude [the doctor] had a culpable state of mind. Summary judgment requires more than mere speculation. It requires some *evidence*, either direct or circumstantial, that [the doctor] knew about and consciously disregarded the risk." *Id.* at 1235. Similarly, we have affirmed the grant of summary judgment in other cases in which the plaintiff failed to produce evidence to undermine a defendant's asserted belief or perception with regard to the subjective prong. *See Est. of Beauford v. Mesa Cnty.*, 35 F.4th 1248, 1264 (10th Cir. 2022) ("[T]he Estate has pointed to no evidence showing [the deputy] believed [the detainee] was seizing or otherwise drew the inference [the detainee] faced a substantial risk of serious harm to his health or safety."); *Mata v. Saiz*, 427 F.3d 745, 760 (10th Cir. 2005) ("Nothing in the record suggests, however, [the nurse] believed [the plaintiff] was suffering severe chest pain, when she released her, thereby *consciously* disregarding a *known* medical risk to [the plaintiff]." (internal quotation marks omitted)).

The Estate also criticizes the district court for relying on the facts that Mr. Godsey had previously received insulin on a sliding scale at DLM and that Dr. Daniels had no criticisms of the purported sliding-scale order. The Estate urges that nurse notes in Mr. Godsey's records cannot be read as an order for insulin and the records contained no sliding scale, so considering these assertions as undisputed facts construes the evidence in the light most favorable to Nurse Whitman instead of

the Estate. Again, however, the Estate fails to produce evidence that would create a genuine issue of material fact as to whether Nurse Whitman honestly believed there was a sliding-scale order in place.

The circumstances of this case do not rise to the level of *Oxendine*. There, a general practitioner surgically reattached a prisoner's finger rather than consult a specialist, and then delayed in referring the prisoner for specialist care even though the prisoner's fingertip started turning black and decaying. *See* 241 F.3d at 1277-78. We found that the prisoner stated a claim for deliberate indifference because (1) the doctor knew of the "delicate nature of the operation and follow-up care"; (2) the prisoner had informed the doctor his finger had turned black, the reattached portion was falling off, and he was in considerable pain; (3) the doctor did not seek specialized assistance for at least a week after he recorded the presence of gangrenous tissue; and (4) the prisoner alleged that the doctor was not qualified to perform the operation. *Id.* at 1279.

Here, however, insulin is not an uncommon treatment for diabetes. Indeed, one of our sister circuits has held that "a jury is capable of understanding, unaided, the risks of failing to provide insulin to a diabetic and of a trained doctor's denial of a diabetic's known need for insulin." *Scinto v. Stansberry*, 841 F.3d 219, 230 (4th Cir. 2016). And the task itself was not one an LPN was unqualified to undertake; nothing in the record indicates that administering insulin is outside the scope of an LPN's practice, when done under proper supervision. The Estate's own expert, Dr. Daniels, did not question Mr. Godsey's need for insulin or even the amounts administered. He

simply opined that Nurse Whitman erred in administering the insulin after Mr. Godsey ate (postprandial administration). *See* Aplt. App. Vol. III at 792 ("Really, I'm here today simply to say that the insulin that was given, the timing of it was inappropriate; that he died of complications of hypoglycemia. That's really it."); *id.* at 802 ("Q So for both of the administrations of insulin, it's the timing of administration close to a meal that you have a problem with? A That is correct."); *id.* at 805 ("[T]he sliding scale, although reasonable standing by itself, it's not reasonable when it's given in a postprandial state."). This error, while certainly grave, is more akin to medical malpractice than to deliberate indifference.

For these reasons, we affirm the district court's grant of summary judgment to Nurse Whitman on the medical-treatment § 1983 claim.

B. Failure-to-Train § 1983 Claims Against Sheriff and Armor

After concluding that the evidence did not show that Nurse Whitman committed a constitutional violation, the district court also granted summary judgment to the Sheriff and Armor on the § 1983 claims that they failed to train Nurse Whitman. It held those claims could not proceed without showing that the nurse had committed a constitutional violation. *See Burke*, 935 F.3d at 1010 ("We have held that neither a supervisor nor a municipality may be held liable based on an unconstitutional policy where there is no evidence of a constitutional violation by any individual subordinate.").

The Estate argues that because it was improper to grant summary judgment to Nurse Whitman, we should reverse the judgment on the failure-to-train claims as

well. That argument necessarily fails in light of our affirmance of the grant of summary judgment to Nurse Whitman. Therefore, we also affirm the judgment in favor of the Sheriff and Armor on the failure-to-train claims.

III. Claims That Went to Trial

Finally, the Estate asserts that the district court erred by granting judgment as a matter of law to the Sheriff and Armor on the Estate's failure-to-supervise § 1983 claim. It also asserts the district court erred at trial by (1) excluding evidence and declining to instruct the jury on differences in the scope of practice of LPNs versus registered nurses (RNs), and (2) commenting to the jury regarding the grant of summary judgment to Nurse Whitman and the Estate's difficult task in establishing deliberate indifference.

A. Judgment as a Matter of Law

The Estate complains that the district court granted judgment as a matter of law under Federal Rule of Civil Procedure 50(a) to the Sheriff and Armor on the Estate's failure-to-supervise § 1983 claim. We review the grant of a Rule 50(a) motion de novo. *See Bay v. Anadarko F&P Onshore LLC*, 73 F.4th 1207, 1215 (10th Cir. 2023).

The district court granted the motion based on *Estate of Burgaz by & through Zommer v. Board of County Commissioners for Jefferson County*, 30 F.4th 1181, 1189 (10th Cir. 2022), which issued after the district court decided the summary judgment motions. In *Burgaz*, we stated, "[f]or a municipality (or sheriff, in this case) to be held liable for *either a failure-to-train or failure-to-supervise claim*, an

individual officer (or deputy) must have committed a constitutional violation." *Id.* at 1189 (emphasis added). The district court thus granted judgment to the Sheriff and Armor on the failure-to-supervise § 1983 claim for the same reason it had granted summary judgment on the failure-to-train § 1983 claim: once it granted summary judgment on the medical-treatment claim against Nurse Whitman, there was no underlying constitutional violation to support a failure-to-supervise claim.

As with the failure-to-train claims, the Estate asserts that because it was improper to grant summary judgment to Nurse Whitman, we should also reverse the judgment on the failure-to-supervise claims. And as with the failure-to-train claims, this argument necessarily fails in light of our affirmance of the grant of summary judgment to Nurse Whitman. Therefore, we also affirm the judgment in favor of the Sheriff and Armor on the failure-to-supervise claims.

B. Scope-of-Practice Issues

During trial, the Estate sought to introduce evidence regarding the differences in an RN's and an LPN's scope of practice. The Estate's counsel began questioning sheriff's office employee Angela Mariani, RN, about a memorandum she wrote about healthcare staffing at DLM (the Mariani Memorandum). The Mariani Memorandum discussed Oklahoma law regarding the differences in the scope of practice between an RN and an LPN. Counsel had Ms. Mariani read from the document and testify about what it said about LPNs. Counsel also quoted the memorandum. Eventually, however, the district court told counsel he could not read from a document that was not in evidence. Counsel moved for admission of the Mariani Memorandum, but one

of defendants' counsel objected on the ground of foundation. The district court sustained the objection. The Estate's counsel then pivoted to using the Mariani Memorandum to refresh Ms. Mariani's recollection.

After counsel continued addressing nurses' scope of practice with Ms. Mariani, the district court informed counsel:

> [I]t strikes me that to the extent that it would be helpful to the jury to understand the legal distinction between an RN's role and an LPN's role, to the extent that you're suggesting that state law would help to do that, it would be the judge's role to instruct them as to the applicable law and I would be pleased to do that.
>
> It's not . . . proper to read from a document that's not in evidence. So to the extent that this Oklahoma Nursing Practice Act, as it distinguishes between scope of practice of a registered nurse and an LPN, I'd be happy to include that in the jury instructions, if that would be helpful.

Aplt. App. Vol. XII at 3164. Counsel stated that would be helpful and moved on.

The district court's initial proposed instructions included an instruction on Oklahoma law as to the scope of practice of an RN and an LPN. But then the district court removed the instruction in light of its grant of judgment as a matter of law to the Sheriff and Armor on the Estate's failure-to-supervise § 1983 claim. At the jury-instruction conference, the Estate objected to the instruction's removal. The court explained that when it stated it would be willing to instruct the jury, "it was proceeding on the presumption that the second theory of failure to supervise would proceed and it is not now. So [it] believe[d] the court's statement that [it] would give those Oklahoma rules and laws to the jury is no longer necessary." *Id.* Vol. XIII at 3583. The court further indicated that the description of Oklahoma law in the

proposed instruction "goes far beyond the facts of this case and . . . would only serve to confuse" the jury. *Id.* at 3584. And it determined that "the record here is replete with admissions and testimony that an RN receives greater training and has more medical knowledge and . . . that an RN is to be present to supervise LPNs." *Id.*

1. Excluding the Mariani Memorandum

The Estate first challenges the district court's exclusion of the Mariani memorandum. Generally "[w]e review evidentiary decisions for abuse of discretion." *Burke*, 935 F.3d at 1011 (internal quotation marks omitted). Here, however, after the court sustained the defendants' foundation objection, the Estate's counsel did not inform the district court why it should conclude there was an adequate foundation or attempt to lay any additional foundation for the document. Because the Estate did not address the grounds for denying admission or make an effort to remedy those grounds, including directing the district court's attention to any of the Federal Rules of Evidence it cites in its opening brief, our review is only for plain error. *See id.* at 1014. But the Estate does not argue for plain error, "mark[ing] the end of the road" for its argument about the exclusion of the memorandum. *Id.* (internal quotation marks omitted).

2. Jury Instruction

The Estate next argues that the district court erred in declining to give the proposed instruction on the nurses' scopes of practice. "[W]e review the district court's refusal to give requested instructions for abuse of discretion." *Valdez*,

66 F.4th at 828 (internal quotation marks omitted).[4] "So long as the charge as a whole adequately states the law, the refusal to give a particular requested instruction is not grounds for reversal." *Harte v. Bd. of Comm'rs of Cnty. of Johnson*, 940 F.3d 498, 525 (10th Cir. 2019) (brackets and internal quotation marks omitted). "If we determine that the trial court erred, we must then determine whether the error was prejudicial to the moving party." *Id.* (internal quotation marks omitted).

The Estate contends that the instruction was necessary to its claim that DLM was insufficiently staffed with qualified professionals. Noting that it sought to prove its case "through evidence of a chronic failure to staff the medical unit with RNs," Aplt. Corrected Opening Br. at 43, the Estate asserts, "Without sufficient evidence or instruction concerning the difference in the licensure and what an RN versus an LPN is medically capable and legally permitted to do, [the Estate's] first theory of liability is toothless," *id.* at 48. It continues, "Because the jury did not have sufficient information regarding the dangers of leaving unsupervised LPNs in charge of an infirmary, [the Estate] was deprived the ability to show how Defendants' staffing policies and practices were 'deficient.'" *Id.*

The court instructed the jury that the Estate claimed the defendants inadequately staffed DLM with qualified professionals and maintained a practice of

[4] The defendants assert the Estate failed to preserve its objection by failing to tender a proposed jury instruction. But in the unusual circumstances of this case, where the district court indicated during trial it would include a jury instruction, then tendered an initial jury instruction that apparently satisfied the Estate, but ultimately declined (over the Estate's objection) to issue that instruction, we are not convinced the Estate had to supply its own instruction to preserve its objection for appeal.

inadequate or non-existent access to a physician. It also instructed that "[d]eliberate indifference to serious medical needs may be shown by proving, by a preponderance of the evidence, that there are such gross deficiencies in staffing or procedures that the detainee was effectively denied access to adequate medical care." Aplt. App. Vol. XIII at 3559. Any error in omitting the more specific scope-of-practice instruction was not prejudicial to the Estate. Even assuming the instruction was relevant beyond the failure-to-supervise claim, the Estate fails to undermine the court's second and third reasons for declining the instruction. The court was concerned that the instruction would confuse the jury, which is a proper reason for declining to give it, *see Valdez*, 66 F.4th at 830 n.40. The court also reasonably determined that the jury was adequately informed by the evidence regarding RNs' greater training and the need for LPNs to be supervised by higher-level medical practitioners. Our review confirms the existence of such evidence.

For these reasons, the district court did not abuse its discretion in declining to instruct the jury on Oklahoma law defining the scopes of practice of RNs and LPNs.

C. Comments to Jury

Finally, the Estate complains about remarks the court made during the trial, informing the jury it previously had found there was no evidence to conclude Nurse Whitman acted with deliberate indifference and noting the deliberate-indifference standard was "a much more difficult standard than negligent," Aplt. App. Vol. XII at 3343. The Estate argues that these remarks impeded its ability to prove its municipal-liability claims. "Because [it] was not required to, and was

prevented from, proving that Whitman was individually liable at trial, and the jury would not be instructed on individual liability, the Court's remarks could only serve to confuse the jury to [the Estate's] detriment." Aplt. Corrected Opening Br. at 49-50.

We review this issue for plain error because Estate did not object at trial. *See Hynes v. Energy W., Inc.*, 211 F.3d 1193, 1201-02 (10th Cir. 2000). "To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).

The Estate has failed to establish error, much less error that is plain. "The trial court has wide discretion in stating facts and commenting on the evidence. It is within the trial court's power to direct the trial in a manner reasonably thought to bring about a just result and in pursuit of that goal nonprejudicial comments may be made from time to time." *Hynes*, 211 F.3d at 1201 (internal quotation marks omitted); *see also Bill Barrett Corp. v. YMC Royalty Co.*, 918 F.3d 760, 773 (10th Cir. 2019) (per curiam) ("[A] federal district court judge has the unquestioned right to comment reasonably upon the evidence, and to express his opinion of it, provided it is made clear to the jury that it is not bound by his views and that they are the sole judges of the facts." (internal quotation marks omitted)). In making the comments about Nurse Whitman's deliberate indifference, in one instance the district court was following up Nurse Whitman's testimony by explaining to the jury what

issues it would and would not be tasked with deciding, and in another, it was trying to clarify and direct the cross-examination of the defendants' expert witness. Its statement about the high standard for establishing deliberate indifference was also made in the context of summarizing the issues for the jury, and it was an accurate summation of the law. The Estate therefore has not shown that the district court strayed outside the boundaries of proper commentary.[5]

CONCLUSION

We vacate the judgment in favor of the Armor defendants on the state-law negligence claims and remand for the district court to conduct further proceedings on those claims. We affirm the remainder of the district court's judgment.

Entered for the Court

Jerome A. Holmes
Chief Judge

[5] Moreover, the court's remarks were reflected in the jury instructions. One instruction explained that the claims against the Sheriff and Armor were based upon the theory that multiple officers' actions or inactions caused a constitutional violation, and it directed jurors "not to consider whether any one individual—including nurses Seth Whitman and/or Angela McCoy, or Dr. Curtis McElroy—acted with deliberate indifference." Aplt. App. Vol. XIII at 3554. Another instruction informed the jury, "[d]eliberate indifference is a stringent standard of fault," and [n]egligence does not constitute deliberate indifference." *Id.* at 3559.