

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS **April 21, 2026**

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

AUSTIN P. BOND, as Personal
Representative of the Estate of Terral
Ellis, II, deceased,

Plaintiff - Appellee,

v.

Nos. 24-5035 & 24-5080

SHERIFF OF OTTAWA COUNTY, in
his official capacity,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:17-CV-00325-CRK-CDL)

Alison B. Levine (Wellon B. Poe, Jamison C. Whitson, and Justin P. Ashlock with her on the briefs), of Collins Zorn & Wagner, PLLC, Oklahoma City, Oklahoma, for Defendant-Appellant.

Robert M. Blakemore (Daniel Smolen with him on the briefs), of Smolen & Roytman, Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **McHUGH**, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

This appeal arises after the tragic death of Terral B. Ellis, II in pretrial custody at the Ottawa County Jail in Miami, Oklahoma. On October 10, 2015, Mr. Ellis—twenty-six years old—voluntarily surrendered to the Jail under an outstanding arrest warrant. On October 21, he reportedly suffered a seizure and was moved to an administrative segregation cell for medical observation. The next day, Mr. Ellis died in custody from septic shock due to acute bronchopneumonia.

Austin Bond, the personal representative of Mr. Ellis’s estate (the Estate), sued the Sheriff of Ottawa County (Ottawa) in his official capacity and others under 42 U.S.C. § 1983 in federal court. He claimed Ottawa violated Mr. Ellis’s constitutional right to adequate medical care under the Fourteenth Amendment. After an eight-day trial, the jury found in favor of the Estate and awarded \$33 million in compensatory damages. Ottawa filed several post-judgment motions, which the district court denied. Ottawa now appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court in full.

I¹

A

On June 9, 2017, the Estate sued in the United States District Court for the Northern District of Oklahoma alleging Ottawa violated Mr. Ellis’s constitutional rights while he was in pretrial confinement at the Jail. The Estate named a number of defendants and alleged federal constitutional claims under 42 U.S.C. § 1983 and state law claims.² The only claim that proceeded to trial was the Estate’s Fourteenth Amendment claim against the Sheriff of Ottawa County in his official capacity. RI.55, 58. The Estate alleged Ottawa

¹ We recite the facts based on the evidence presented to the jury at trial. *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1214–15 (10th Cir. 2008) (discussing the denial of a Rule 50 motion for judgment as a matter of law); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1156 (10th Cir. 2006) (discussing the denial of a Rule 59 motion for a new trial).

² The complaint named Terry Durborow, the Sheriff of Ottawa County during Mr. Ellis’s custody, in his individual capacity; Jeremy Floyd, the Sheriff of Ottawa County at the time of the complaint, in his official capacity; the Board of County Commissioners of Ottawa County; Theresa Horn, the Jail’s nurse, in her individual capacity; Jeffrey Harding, a Jail employee, in his individual capacity; Charles Shoemaker, a Jail employee, in his individual capacity; “Defendant Bray,” a Jail employee, in his individual capacity; Jennifer Grimes (now Jennifer Dillinger), an Integris paramedic, in her individual capacity; Kent D. Williams, an Integris paramedic, in his individual capacity; and Baptist Healthcare of Oklahoma, LLC, otherwise known as Integris Miami EMS or Integris. The district court granted Mr. Floyd’s unopposed motion to substitute him as the named-party defendant with the Sheriff of Ottawa County, in his official capacity. The district court dismissed the Ottawa County Board of County Commissioners, and the parties stipulated to the dismissal of the other defendants, leaving the Sheriff of Ottawa County, in his official capacity, as the sole remaining defendant.

“disregarded the known and obvious risks to Mr. Ellis’ health and safety” and failed to provide “timely or adequate medical treatment and proper monitoring and supervision for Mr. Ellis while he was placed under their care, in deliberate indifference to Mr. Ellis’ serious medical needs, health and safety.” RI.56. According to the Estate, these allegedly “unconstitutional acts” were “affirmatively linked” to unlawful policies and practices maintained by Ottawa. RI.58. The Estate sought compensatory damages and attorneys’ fees. Although the complaint initially asserted a claim for punitive damages, the Estate later disclaimed it.

For several years, the parties engaged in discovery and pretrial litigation. The jury trial began on August 15, 2023 and lasted just over a week.³ We now describe the trial in some detail, focusing on the evidence relevant to the issues on appeal.

On the first day of trial, before any witness testified, the district court advised the jury of thirty-four facts “to which the parties have stipulated” and that the jury “can accept” as “the truth.” RV.1031. Though “these facts may come up and be mentioned during testimony,” the district court explained, they

³ The Honorable Claire R. Kelly of the United States Court of International Trade sat by designation as the trial judge.

are “not in dispute.” RV.1032. The district court then recited the following “stipulated facts” in full:

[One]: On October 10th, 2015, Mr. Ellis voluntarily turned himself in to Ottawa County.

Two: Decedent Terral Ellis was booked into the Ottawa County Jail on October 10th, 2015.

Three: At the time of Mr. Ellis’s incarceration, the Ottawa County Sheriff was Terry Durborow, who had served as sheriff since 2006.

Four: At the time of Ellis’s incarceration, the Ottawa County Sheriff’s Office employed Theresa Horn, a licensed practical nurse, who had been employed as the jail nurse since 2005.

Five: Mr. Ellis was housed at the jail from October 10th, 2015, through the time of his death on October 22nd, 2015.

Six: Mr. Ellis was a pretrial detainee.

Seven: On October 17th, 2015, Ellis complained of back pain, reporting he believed his back was broken.

Eight: Nurse Horn, the jail’s nurse, was not present at the jail and did not physically examine Mr. Ellis on October 17th, 2015.

Nine: Nurse Horn saw Mr. Ellis on October 19th, 2015.

Ten: Nurse Horn did not take Mr. Ellis’s vital signs when she saw him on October 19th, 2015.

Eleven: On October 21st, 2015, Mr. Ellis reported having a seizure to jail staff.

Twelve: INTEGRIS EMS paramedics were called to the jail on October 21st, 2015.

Thirteen: Paramedics Grimes and Williams saw Mr. Ellis at the jail on October 21st, 2015.

Fourteen: Mr. Ellis was not taken to the hospital on October 21st, 2015.

Fifteen: On October 21st, 2015, at approximately 8:18 p.m., Ellis was let out of his cell to use the bathroom.

Sixteen: Ellis walked to the bathroom and then back to the cell with a cup in his hand.

Seventeen: Around 10:23 p.m. on October 21st, 2015, Ellis reported to Officers Bray and Lawson that his legs were numb.

Eighteen: Bray did not call emergency medical services for Ellis the evening of October 21st, 2015.

Nineteen: On October 22nd, 2015, at approximately 1:37 a.m., Ellis was let out of his cell and walked to the bathroom and then back to the cell with a cup in his hand.

Twenty: Later that same morning at approximately 3:23 a.m., Ellis was again let out of his cell, walked to the bathroom, and then returned to the cell with a cup in his hand.

Twenty-one: On October 22nd, 2015, around 8:28 a.m., Ellis was moaning in distress, and the jail staff told him that they were not going to call emergency services.

Twenty-two: Around 8:59 a.m. on October 22nd, 2015, Ellis asked for water, but a member of the jail staff refused, saying “Don’t let him fool you,” and that Ellis could get his own water. . . .

Twenty-three: Around 10:45 a.m. on October 22nd, 2015, Ellis complained of being unable to walk, that his legs were black and blue, and that he was in pain.

Twenty-four: Shoemaker was near the cell Ellis was in when Horn arrived to examine him on the morning of October 22nd.

Twenty-five: Instead of referring Ellis for medical treatment, Horn mocked and threatened him for reporting his symptoms, implied he was faking his illness, and told him she was tired of dealing with him[.]

Twenty-six: Other than summoning Horn, Shoemaker did nothing to assist Ellis.

Twenty-seven: Around 1:45 p.m. on October 22nd, 2015, Horn contacted emergency services.

Twenty-eight: Ellis died at the hospital at 2:51 p.m. from sepsis/septic shock resulting from acute bronchopneumonia.

Twenty-nine: There was no physician directly providing care at the jail, even though the jail's medical services policy required medical care to be delivered under the direction of a licensed physician.

Thirty: The medical services policy also required a schedule for sick call, but the jail did not maintain scheduled sick call or a sick call list.

Thirty-one: Although the sheriff's office contracted with a physician's assistant to visit the jail once a week for inmate medical exams, visits were not regularly scheduled, and the physician's assistant only visited the jail when and if Horn called her.

Thirty-two: The jail's medical care policy permitted detention officers to call emergency services if the nurse was unavailable.

[Thirty-three]: The jail's medical services policy required the jail administrator to review annually statistics on inmate medical care and also required the jail administrator and nurse to review at least quarterly the medical care's effectiveness and efficiency. However, formal audits were never done.

Thirty-four: The manner of Ellis's death was determined by the medical examiner to be natural and caused by sepsis/septic shock due to acute bronchopneumonia.

RV.1032-36.⁴

⁴ These same "stipulated" facts, RIV.981, were identified in the pretrial order and were included in the "statement of the case" section of the final jury instructions.

The jury then heard from thirteen witnesses. The Estate called six witnesses and presented the video deposition testimony of three others:

- Jeffrey Harding, the Jail administrator (JA) for Ottawa;
- Michael Harrington, an inmate at the Jail during Mr. Ellis’s detention (by deposition video);
- Kent Williams, a paramedic;
- Johnny Bray, a detention officer at the Jail (by deposition video);
- Cartis Lawson, a detention officer at the Jail;
- Charles Shoemaker, the assistant JA;
- Theresa Horn, the Jail nurse;
- Terry Durborow, the Ottawa County sheriff (by deposition video); and
- Dr. Todd Randall Wilcox, a physician, testifying as the Estate’s expert witness.

Ottawa called four witnesses:

- Shannon Biggs, a firefighter;
- Jennifer Dillinger, a paramedic;
- Aleta Fox, the physician assistant that contracted with the Jail; and
- Derek Derwin, a former Ottawa JA.

Video footage from the Jail was also shown to the jury without objection.⁵

⁵ The surveillance videos are included in the appellate record, and we have reviewed them. The videos have subtitles, but there is no transcript. We reference the video evidence in our discussion. *See, e.g., Kapinski v. City of Albuquerque*, 964 F.3d 900, 902 n.1 (10th Cir. 2020) (“Footage from both surveillance cameras is in the appendix on appeal and has been viewed by the

B

We now describe the trial evidence, which we organize and discuss in the following categories:

- Evidence about Mr. Ellis’s time at the Jail, beginning on October 10, 2015, and ending on October 22, 2015, when he died;
- Evidence about the Jail’s policy of providing medical services to inmates and training staff to respond to inmate requests for medical services; and
- Evidence about state and national jail standards.

1

On October 10, 2015, Mr. Ellis voluntarily surrendered to the Jail on an outstanding arrest warrant charging him with driving under the influence. Jeffrey Harding—Ottawa’s then-jail administrator—testified about Mr. Ellis’s booking process. Mr. Ellis’s “Book-In Sheet” identified “Asthma” under “Previous/Current Medical Conditions[.]” RXV.3293–94. Under the “Prescriptions/Medical Treatments/Medical Programs” category, the form

court.”); *United States v. Wagner*, 951 F.3d 1232, 1248 n.15 (10th Cir. 2020) (“We rely . . . on the recording introduced at trial when . . . discussing the sufficiency of the evidence.”).

We cite these videos as “R.Supp.#.X:XX:XX,” where # corresponds to the appellate appendix number and XX corresponds to the time on the video. For the video deposition of former Sheriff Terry Durborow, we use the form R.Supp.TB.X:XX:XX.

listed “Albutorol.”⁶ RXV.3294 (capitalization omitted). After booking, Mr. Ellis was housed in the Jail’s general-population unit—the “D Pod.” RV.1090.

The trial evidence does not meaningfully describe any events until October 17, when, as stipulated, Mr. Ellis “complained of back pain, reporting he believed his back was broken.” RV.1033. Theresa Horn, the Jail’s licensed practical nurse (LPN), was not present at the Jail that day. She examined Mr. Ellis on October 19. According to Nurse Horn’s progress reports from that examination, she told Mr. Ellis “he had what appeared to be a dislocated rib.” RXV.3338. Nurse Horn also said that, when the Jail’s physician assistant made rounds, she would see him. RXV.3338. Nurse Horn later testified that, as an LPN, she was not qualified to make medical diagnoses.

Michael Harrington, an inmate housed with Mr. Ellis in the D-Pod, described what happened in the days after Mr. Ellis saw Nurse Horn on October 19. Mr. Harrington thought “something was extremely wrong with” Mr. Ellis. R.Supp.272.0:04:55–:58. Mr. Ellis was “not acting [like] himself” and was not eating. R.Supp.272.0:05:45, 0:06:10–:25, 0:07:16–:24. At one point, when Mr. Ellis could not get out of his bed, he urinated in a cup, and Mr. Harrington had to throw it away for him in the bathroom. “I placed my hand

⁶ The book-in sheet does not list an inhaler among Mr. Ellis’s “Personal Property Items,” and nothing in the record suggests Mr. Ellis had an inhaler while at the Jail. RXV.3295.

on [Mr. Ellis’s] heart,” he recalled, “and I fe[lt] his heart just pounding, I mean, 100 miles an hour.” R.Supp.272.0:10:51–:59. Mr. Ellis “literally looked like he was going to drown in his own sweat.” R.Supp.272.0:19:23–:27; R.Supp.272.0:19:13–:17 (testifying he believed “something was critically wrong” with Mr. Ellis). According to Mr. Harrington, Mr. Ellis said, “I feel like I’m going to die,” and “I’m in the worst pain in my life.” R.Supp.272.0:10:38–:45.

Mr. Harrington became so concerned about Mr. Ellis that he filled out a medical slip and gave it to jail staff on Mr. Ellis’s behalf. R.Supp.272.0:06:23–:41. He wrote Mr. Ellis “was sick,” “needed medical treatment,” and “had something wrong with his back.” R.Supp.272.0:06:45–:55. Mr. Harrington said the Jail “just ignored it.” R.Supp.272.0:06:34. Mr. Harrington also described how he came across Officer Bray while helping Mr. Ellis walk to the recreation yard. “[A]ren’t you going to help [Mr. Ellis],” he asked Officer Bray. “He needs help. There’s something wrong with him—he needs help.” R.Supp.272.0:09:01–:07. Mr. Harrington testified that, in response, Officer Bray asked, “What did the nurse say?” R.Supp.272.0:09:13. In Mr. Harrington’s view, Officer Bray was “just irritated,” and told Mr. Ellis, “look, you’re not going to get O.R.

bonded, . . . so basically you can forget about that.”⁷ R.Supp.272.0:09:24–:33. Mr. Ellis responded, “I’m not lying,” and “what are you going to tell my two-year-old son whenever I die?” R.Supp.272.0:09:42–:47.

On October 21, Mr. Ellis informed jail staff that he had suffered a seizure. The Jail reported Mr. Ellis’s seizure to emergency medical services (EMS). While waiting for EMS to arrive, Officers Lawson and Bray spoke outside of Mr. Ellis’s cell.⁸

Officer Bray: Yeah, it’s awesome how a guy [referring to Mr. Ellis] with no history of seizures is suddenly having a seizure.

Officer Lawson: Yes, it is. I’m feeling one coming on, too, Bray. . . . I hear the medical around here is excellent.

Both: [laughter].

R.Supp.250.0:02:54–3:14.

EMS arrived at 4:38 p.m. on October 21 to assess Mr. Ellis for a possible seizure. Three EMS responders—Kent Williams, Jennifer Dillinger, and Shannon Biggs—testified at trial. They documented their assessment in various EMS records. Mr. Williams told jail staff Mr. Ellis “was stable and

⁷ “O.R.,” short for “own recognizance,” refers to release from the Jail. Nurse Horn confirmed that an inmate “would be released” if “O.R. bond got granted.” RVI.1439.

⁸ The conversation was captured on video and shown to the jury.

nothing acute appeared to be happening.” RXV.3345. Ms. Dillinger checked “No Treatment Required” and “P[atient] Refused Care” on her report. RXV.3341–43. Mr. Biggs reported Mr. Ellis was “alert” and “oriented” but was “sweating profusely” and complaining about “[p]ain in his lower back from falling two days prior.” RVIII.1677.

Mr. Ellis told EMS he “was not sure if he wanted to go to the hospital” and ultimately decided against transport. RXV.3348. EMS did not take Mr. Ellis to the hospital. Mr. Williams testified that, as EMS were leaving the Jail, staff confirmed Mr. Ellis “would be put in a cell and checked on every 15 minutes” and a doctor would visit him in the morning. RV.1160. EMS were told “if anything changed” they “would be called back immediately[.]” RV.1160.

Around 5:00 p.m., at the recommendation of Nurse Horn, the Jail transferred Mr. Ellis to an administrative segregation cell for “medical observation.” RV.1099, 1123. JA Harding confirmed “Nurse Horn made that recommendation without ever coming to the jail to do her own assessment on Mr. Ellis[.]” RV.1102. JA Harding testified on direct examination about Mr. Ellis’s placement into the administrative segregation cell:

Q: There were two separate cells, H1 and H2, that were solitary confinement cells; agreed?

A: Yes.

Q: Cell 1, where Terry Ellis was placed, had no sink or toilet, correct?

A: Correct. . . .

Q: So anytime Mr. Ellis wanted water, he'd have to rely on jail staff bringing it to him, correct?

A: Yes.

Q: It had no intercom for him to call out, correct?

A: Correct.

Q: It didn't have a window, correct?

A: An outside window. . . .

Q: Cell H1 did have a D-ring, correct?⁹

A: Yes. . . .

Q: There's no camera within the cell, is there?

A: No. . . .

Q: If they needed help, they'd have to yell for it?

A: Yes. . . .

Q: And despite Mr. Ellis having . . . back pain, he's being moved from a bunk now to a cement floor to lay on this pad, correct?

A: Yes.

RV.1104-23.

Officer Lawson helped move Mr. Ellis into the administrative segregation cell. He remembered "having to get [Mr. Ellis's] shoe out from

⁹ The D-ring was a restraining device that grounded an inmate's hands to the floor behind them and prevented the inmate from standing up. The Jail used the D-ring "to control inmates who were causing a problem or being destructive at the jail." RV.1105.

under the bunk . . . because he couldn't bend over and pick it up himself." RVI.1278. As Officer Lawson and Mr. Ellis walked to the new cell, Officer Lawson observed Mr. Ellis had "a noticeable limp or gait" and was "struggling to move." RVI.1280. Officer Lawson also remembered "having to carry [Mr. Ellis's] mat" to his new cell. RVI.1278. Officer Lawson said carrying an inmate's mat was "against [Jail] policy" because it leaves staff "susceptible . . . with an inmate behind you." RVI.1279. But because Mr. Ellis "was in pain," Officer Lawson did not consider him "an immediate threat." RVI.1279.

At 8:20 p.m. that evening, Mr. Ellis appeared to request an inhaler. Video footage showed Officer Lawson telling Mr. Ellis, "No. That's a nurse thing." R.Supp.267.0:01:29–:33. Officer Lawson explained on direct examination what he and Mr. Ellis were discussing:

A: I think he's asking for an inhaler.

Q: Okay. And – and your response was, . . . "I can't do that. It's up to the nurse"?

A: Yeah. The inhaler's on the [medical] cart. The only inhalers we had were personal inhalers. We didn't have, like, a community inhaler for people with asthma or anything. I mean, it's not a real thing. But, yeah, there was no option to give somebody an inhaler if they didn't have it on the cart.

RVI.1303. At 9:55 p.m., Officer Bray asked Officer Lawson, "what time did . . . we go to D Pod to check on the zombie?"—referring to Mr. Ellis. RV.1128.

At 10:23 p.m., Mr. Ellis “reported to Officers Bray and Lawson that his legs were numb.” RIII.617. In video footage shown to the jury, Mr. Ellis can be heard saying, “Can you call the ambulance?” RIII.720. Officer Lawson then repeated Mr. Ellis’s complaint to Officer Bray, stating, “he can’t get up to piss. He can’t get up for nothing.” R.Supp.253.0:00:25–:30. Officer Bray laughed and asked Mr. Ellis, “You’re paralyzed now? Uh huh. Okay. I’m not laughing. I ain’t laughing at you. I’m going to call [the nurse] right now.” R.Supp.254.0:00:32–:46.

Officer Bray called Nurse Horn to tell her about Mr. Ellis’s complaint. Nurse Horn said EMS had examined Mr. Ellis earlier that day, and she would see him in the morning. Nurse Horn also told Officer Bray that Mr. Ellis needed to use the bathroom by himself. On direct examination, Officer Bray testified about Mr. Ellis’s complaint that his legs were numb:

Q: Did you believe Mr. Ellis that he could not feel his legs and that he was going numb from the waist down?

A: I was – I was uncertain.

Q: Okay. But you were concerned enough to call [Nurse Horn]?

A: Yes.

R.Supp.271.0:42:55–43:16.

The jury also viewed footage showing Officer Lawson placing a call to Nurse Horn that night. Officer Lawson told Nurse Horn that Mr. Ellis

complained of numb legs, “internal bleeding, and just all his other symptoms.” RVI.1290. In response, Nurse Horn made a “joke,” saying Mr. Ellis “wouldn’t know if he was bleeding internally or not.” RVI.1290–91. Officer Lawson testified that “joke” is why he is laughing in the footage.

At midnight, the Jail had a shift change, and Officer Mike Wiford clocked in. In video, Officer Wiford can be heard asking Mr. Ellis, “you can’t get up? They said there’s nothing wrong with you. What do you want? . . . I’m not getting you anything. You’re going to get it yourself, man.” RIII.724. Officer Wiford also told Mr. Ellis, “So if you want to get a drink of water, get up.” R.Supp.256.0:02:19.

Officer Lawson was also on duty that night and recalled Mr. Ellis “was complaining . . . all night.” RVI.1333. “He was crying for his child and wanted to see his child.” RVI.1333; *see* RVI.1296 (testifying “[t]here were tears” and it was “very clear no one was taking it seriously”). As the parties stipulated, Mr. Ellis “was let out of his cell to use the bathroom” and “walked to the bathroom and then back to his cell” three times that night. RIII.617. All three times he returned to his cell with a cup in his hand.

The parties stipulated that, around 8:30 a.m. the next morning, Mr. Ellis was “moaning in distress,” but “the jail staff told him that they were not going to call emergency services.” RII.617. In footage played to the jury, Mr. Ellis can

be heard yelling, “Oh, my God! Help! My legs! It’s my legs! Please. Hey. Don’t go anywhere!” R.Supp.257.0:10:23–47.

At this point in the trial, the Estate’s counsel appeared to display some emotion. The district court called counsel up for a brief bench conference. Trial then resumed.

Charles Shoemaker, the assistant JA, then took the witness stand. During his testimony, the jury saw video of Assistant JA Shoemaker telling Mr. Ellis, “Hey, hey, we did this yesterday. You’re not selling me.” R.Supp.257.0:11:13–21. In response, Mr. Ellis said, “Don’t leave me here! Don’t leave. . . . I just fell.” R.Supp.257.0:11:22–29. Assistant JA Shoemaker responded, “We’re not calling the ER.” R.Supp.257.0:11:31–37. Mr. Ellis then said, “Please, dude, wait. Dude, I can’t believe y’all are doing this!” R.Supp.257.0:11:37–42. He then yelled “help!” or “somebody help me!” more than twenty-five times over the next four minutes. R.Supp.257.0:11:44–15:44.

On direct examination, Assistant JA Shoemaker testified about this exchange:

Q. You would agree with me that Mr. Ellis was pleading for help?

A. Yes. You can hear it in the video.

Q. You also would agree with me that you didn’t think Terry Ellis was faking; correct?

A. Correct.

Q. But despite not thinking he was faking and despite hearing him pleading for help, it's your testimony that you had to get ahold of the nurse? That was the next step you needed to do?

A. Yes.

RIX.1964. Assistant JA Shoemaker then called Nurse Horn to “tell her that we have Terral Ellis in H1 and he is screaming for help” and “stat[ing] that he cannot get up or walk.” RIX.1970. According to Assistant JA Shoemaker, Nurse Horn responded she would “look at him . . . [w]hen [she] get[s] there[,]” RIX.1970, and “instructed [Assistant JA Shoemaker] to make [Mr. Ellis] walk,” RIX.1973.

A few minutes later, at 8:36 a.m., while Mr. Ellis continued to yell for help, video footage shows the following exchange between Mr. Ellis and two members of the jail staff—Officer Travis Eads and Brenda Pierce, a jail kitchen worker:

Ms. Pierce: That poor guy needs help.

Officer Eads: In more ways than one.

Mr. Ellis: I can't breathe, help.

Ms. Pierce: If you can't breathe, how can you talk?

Officer Eads: It's a miracle.

R.Supp.257.0:18:05–18:19. At 8:47 a.m., Officer Eads can be heard talking on the phone, saying, “this guy has been yelling help for about 30 minutes I guess he hurt his back or something and he got up, tried to stand up and fell

down[.]” RIII.749. Officer Eads also spoke with another inmate who thought Mr. Ellis may have died:

Inmate: I think he died, dude.

Officer Eads: You think he died?

Inmate: That’d be pretty bad.

Officer Eads: What? Yeah, that would be.

Inmate: He sounded so bad.

R.Supp.259.0:00:00–:23.

At 8:59 a.m., Mr. Ellis requested water. Officer Eads told Mr. Ellis he would get him water, but Assistant JA Shoemaker said, “[Mr. Ellis] can get up and he can go get it. He did last night. Don’t let him try to fool you.”

R.Supp.260.0:00:00–:14. Officer Eads left the door open and told Mr. Ellis, “I guess you’ve got to get up and go get it if you want it[.]” RIII.758. Mr. Ellis did not leave his cell.

About an hour later, at 10:00 a.m., footage showed Mr. Ellis screaming “asthma, asthma attack! . . . My asthma! I’m having an asthma attack! Help! Help!” R.Supp.261.0:00:00–:59. Officer Eads asked Mr. Ellis if he had an inhaler. Mr. Ellis said no, and Officer Eads did not respond. Mr. Ellis continued to yell. Assistant JA Shoemaker told Mr. Ellis to “shut up!” R.Supp.261.0:04:14–:17. Mr. Ellis said, “Please, sir can I get Albuterol or not?”

I think I'm dying." R.Supp.262.0:00:03--:11. JA Harding testified on direct examination about this exchange:

Q: When Mr. Ellis was begging for his asthma inhaler and Albuterol and was reporting that he couldn't breathe and that he was -- he thought he was dying, your jail staff should have immediately responded; correct?

A: Yes, they should have -- they should have responded.

Q: But no one did anything, did they?

A: No.

RIII.762.

At 10:25 a.m., Nurse Horn arrived at the Jail. Assistant JA Shoemaker testified he "had to convince [Nurse Horn] to get down there to check on [Mr. Ellis] even after she had arrived[.]" RIX.1985. At 10:42 a.m., footage shows Mr. Ellis asking Assistant JA Shoemaker to look at his legs. Assistant JA Shoemaker responded, "No, I'm not looking at your legs. Why would I look at your legs, man? I'm not medical?" R.Supp.264.0:01:14--:18. Nurse Horn then arrived in the cell. Mr. Ellis said, "My legs are black and purple." R.Supp.264.0:01:22. Nurse Horn responded, "They don't look black to me[.]" R.Supp.264.0:01:30. The jury then saw video of the following exchange between Mr. Ellis and Nurse Horn:

Nurse Horn:	Listen to me and shut up! We've had EMS come over and check you out. Ain't a damn thing fucking wrong with you.
-------------	---

Mr. Ellis: Look at my legs.

Nurse Horn: Your legs are fine! They are not black. They are pink. They are red.

Mr. Ellis: Call them again. . . .

Nurse Horn: No. No.

Mr. Ellis: Look at my legs, damn it.

Nurse Horn: I looked at your fucking legs, and they are not black! If you call that black, you're fucking colorblind.

Mr. Ellis: Oh, oh, I can't move my legs, sir. . . .

Nurse Horn: I just seen you move your legs. You moved your feet like that.

Mr. Ellis: Just a little bit. I don't know if it's broken or not.

Nurse Horn: I'm tired of dealing with your dumb ass, you hear me? . . .

If we put you back in the pod and you start pissing in a cup again, you're gonna go on the fucking D-Ring because there ain't a damn thing wrong with you. You understand me? . . .

You can get out of here if it's – if it's okay with him [indicating Shoemaker], but the very – the very first time you say, “oh, I can't get up, I need help – I can't – oh, I'm having seizures [inaudible], you're going to go on that D-Ring and that's where you're going to stay the whole time that you are here because I'm sick and tired of

fucking dealing with your ass. Ain't a damn thing wrong with you.

R.Supp.264.0:01:48–3:08. Nurse Horn was asked on direct examination about how she treated Mr. Ellis:

Q: Ma'am, you hadn't done anything for him, had you?

A: It doesn't show that I did.

Q: Well, this is your chance to tell the jury the long list of things that you've done to help him prior to being just tired of his dumb ass.

A: I can't recall that, sir.

Q: Okay. Well, we know you didn't take any of his vitals; correct?

A: Correct. . . .

Q: You would agree with me that instead of berating Mr. Ellis, screaming at him, shouting profanities at him, you could have taken 10 to 20 minutes and actually done an assessment; correct?

A: Yes.

Q: But you chose not to; correct?

A: Apparently.

RX.2097–98. According to Nurse Horn, Mr. Ellis's "symptoms that he was describing wasn't what I was seeing." RX.2101.

Around 1:00 p.m., an inmate looked into Mr. Ellis's cell and told staff it "looks like he's dying[.]" RIII.778–79. At 1:39 p.m., Assistant JA Shoemaker told Mr. Ellis, "nurse wants to talk to ya." R.Supp.266.0:00:06. When Mr. Ellis did not respond, Assistant JA Shoemaker testified that he went to Nurse

Horn's office and told her that "it appears that he needs some medical attention, come down here." RIX.2002. Footage showed Assistant JA Shoemaker returning to Mr. Ellis's cell trailed by Nurse Horn. Nurse Horn testified that when she went into the cell, Mr. Ellis's skin was "cool to touch," and he responded "in pain when touched on any part of the body." RVI.1350. She observed his extremities were "mottled," meaning his skin was "kind of a bluish color." RVI.1351. Another report described Mr. Ellis's face as "purple" with a "blank stare[.]" RIII.789.

Around 1:45 p.m., the Jail called EMS. While waiting for EMS to arrive, another inmate cleaned Mr. Ellis's cell and asked jail staff what to do with his mat because it had "pee all over it[.]" RIV.900. Upon arrival at the Jail, EMS unsuccessfully performed CPR on Mr. Ellis. He was then transported to the hospital, where he died at 2:51 p.m.

Mr. Ellis's cause of death was septic shock resulting from acute bronchopneumonia. The Estate's medical expert, Dr. Todd Randall Wilcox, described bronchopneumonia as "a significant infection of the lung organ in the body," RVII.1502, and sepsis as "when bacteria or an infectious agent is circulating in the bloodstream and going throughout the body" causing "organ systems [to] start shutting down." RVII.1512. Dr. Wilcox opined that septic shock can include intense, full-body pain. He also discussed "mottling," which

is the term Nurse Horn used to describe how Mr. Ellis’s legs looked on the afternoon of October 22, before she called EMS. According to Dr. Wilcox, mottling refers to skin becoming discolored because vital organs are “shutting down.” RVII.1535–36.

On cross-examination, Ottawa asked Dr. Wilcox whether Mr. Ellis could have been “malingering” or faking illness. RVII.1596. Dr. Wilcox confirmed that, based on his review of the jail footage, he “believe[d] that [jail staff] thought [Mr. Ellis] was faking” illness. RVII.1603.

2

Next, we detail the evidence about the Jail’s policies and custom of administering medical services to inmates. The jury heard about written policies maintained by the Ottawa Sheriff’s Department, which are derived from the “Ottawa County Policy and Procedure—Medical Services book.”¹⁰ RXIV.3098 n.3. Most relevant to the issues on appeal are the “Medical Services Policy,” the “Jail Nurse Policy,” the “Emergency Medical Care Policy,” and the “Staff Orientation Policy.”

¹⁰ The district court referred to Ottawa’s Policy and Procedures as “The Ottawa County Policy and Procedure—Medical Services book.” RXIV.3098 n.3. Neither party challenges the existence of the policy book or the district court’s terminology in describing it.

Ottawa's Medical Services Policy states, "All county jail inmates shall be entitled to health care comparable to that available to citizens in the surrounding community." RXV.3285; RX.2092 (referring to the health care provided to the surrounding community as "the community standards"). Under the policy, "Medical care at the [Jail] shall be delivered under the direction of a licensed physician and through the use of trained health care personnel." RXV.3285. This policy is to be fulfilled through several corresponding "procedures," including a "quarterly" review of the medical services by "the jail administrator and nurse." RXV.3285. The policy also requires the "schedule for sick call shall be established and published to the inmates." RXV.3285.

The parties stipulated, "There was no physician directly providing care at the jail even though the jail's Medical Services Policy required medical care to be delivered under the direction of a licensed physician." RIII.618. JA Harding testified, the "nurse was our medical professional, and she answered to" a physician assistant, Aleta Fox (PA Fox). RV.1113. PA Fox did not regularly visit the Jail, and Nurse Horn "would call [PA Fox] when [she] needed her." RVI.1410-11. On the days PA Fox worked at the Jail, Nurse Horn "would go through and triage the [requests for medical care] that were important and bring the ones in that were most important and then we would

review the remainders.”¹¹ RVIII.1747. As the parties stipulated, this practice contravened the Medical Services Policy’s requirement of a “scheduled sick call” day at the Jail. RIII.618; *see* RVIII.1789.

The Jail Nurse Policy details the role and responsibilities of the on-site nurse. The nurse is to “work under the supervision of an MD or PA., who in smaller county jails is not usually on the premises at all times, but [is] usually accessible by phone.” RXV.3362. Under the policy, “It is the nurse’s responsibility to notify the facility MD or PA of any serious medical or mental conditions, and to provide what care is ordered by said MD or PA.” RXV.3362. The policy also describes the “intake screening” process and mandated jail staff are to “notify the nurse” of “any medical issues, or . . . medication” needs “before placing the inmate in a pod[.]” RXV.3362.

¹¹ Nurse Horn testified “the sheriff, undersheriff, and jail administrator were all aware that” she “always triaged the sick calls[.]” RVI.1408–09. Nurse Horn also confirmed she “served as a gatekeeper at the jail for inmates to seek not only outside medical care, but also medical care with Ms. Fox[.]” RVI.1407–08. Several witnesses agreed. *E.g.*, R.Supp.TB.0:24:55–25:11 (Sheriff Durborow describing Nurse Horn as a “kind of the gatekeeper” and confirming she “would identify to Aleta Fox” the inmates that Nurse Horn felt PA Fox needed to see during a medical visit); R.Supp.271.0:13:55–14:07 (Officer Bray testifying “it was common knowledge with everybody” that “the nurse was the one who made all the choices on the inmate’s medical,” including sending an inmate to the hospital); RIX.2013 (Assistant JA Shoemaker confirming “Theresa Horn was the one in charge of making all of the medical delivery system decisions at the jail, not some PA or some physician that was on contract”).

Nurse Horn testified she did not have a set work schedule at the Jail. Her typical arrival time was “sometime in the morning.” RVI.1437. Officer Bray explained Nurse Horn was typically gone by the time his shift started at 3 p.m. Nurse Horn acknowledged she took inmates’ vitals “sometimes.” RVI.1446. And Officer Bray explained, “If the nurse wasn’t there to take vitals, their vitals weren’t being taken.” RVI.1248. Nurse Horn also relied on EMTs to make medical decisions at the Jail when she “thought it was necessary.” RVI.1418. According to the Jail’s records, Nurse Horn often addressed inmate’s health concerns over the phone. Officer Bray testified, “more often than not,” Nurse Horn would evaluate inmates over the phone. R.Supp.271.0:32:39–:52. Officer Lawson said, “it was common for [Nurse Horn] to diagnose . . . stuff over the phone[.]” RVI.1247.

Several witnesses described the care Nurse Horn provided the inmates at the Jail. On direct examination, Officer Lawson was asked if he “observe[d] Nurse Horn refuse to provide any kind of care to inmates[.]” RVI.1245. He answered, “Yes, sir.” RVI.1245. And when asked if that refusal was “on a frequent basis,” he testified, “yeah, absolutely frequent. More common than not, I would say.” RVI.1245. Derek Derwin, a former Ottawa JA, explained during his tenure, inmates had complained Nurse Horn was not providing requested medical care. Assistant JA Shoemaker confirmed “sick call slips”—

the mechanism used by inmates to request medical care—were “piling up in [Nurse Horn’s] inbox[.]” RIX.2012.

Nurse Horn admitted she did not believe Mr. Ellis received care consistent with the community standards. *See* RX.2092. JA Harding agreed. *See* RIII.784. Assistant JA Shoemaker thought the Jail’s inmates generally—not just Mr. Ellis—were not receiving medical care in accordance with community standards. RIX.2013. And, on direct examination, Officer Bray agreed the Jail’s medical care was “subpar,” testifying:

Q: You knew . . . the medical around the Ottawa County Jail was subpar, correct?

A: I would agree.

Q: And what led you to believe that the medical delivery system at the Ottawa County Jail was subpar?

A: I felt that the medical program being led by what I believe was a person who was an LPN was insufficient.

Q: Did you voice those concerns to your superiors?

A: I made that comment to . . . Shoemaker, as well as other jailers. . . .

Q: What was Mr. Shoemaker’s response?

A: I – I can’t remember his exact response, but I believe at the time he agreed.

Q: Okay. What were the other jailers’ responses?

A: Overall, they agreed.

R.Supp.271.0:08:21–9:16.

Ottawa’s Emergency Medical Care Policy states, “Emergency medical services are available 24 hours a day to inmates[.]” RXV.3283. In the case of an emergency, the policy permits “[t]he facility administrator, facility nurse or shift supervisor on duty” to “[c]ontact an ambulance” or “[h]ave a deputy dispatched to the facility to transport the inmate to [the] Health Center.” RXV.3283–84. Notwithstanding the written policy, Officers Lawson and Bray testified they were trained to call emergency services only with Nurse Horn’s permission. On cross-examination, Defendants pressed Officer Lawson on his ability, under the policy’s terms, to call an ambulance for Mr. Ellis. In response, he answered, “That wasn’t the directive by my supervisor.” RIX.1918. Officer Lawson explained, when inmates needed medical attention, he “would have to call the nurse back to back to back to back until she finally answered.” RVI.1245–46. This made him feel “helpless” on the night of October 21, 2015, because he could not “call the EMTs without [Nurse Horn], and it’s very clear no one was taking [Mr. Ellis] seriously.” RVI.1296.

Ottawa’s Staff Orientation Policy mandates, “All new or part-time jail personnel shall participate in a general orientation to familiarize themselves with the Ottawa County Jail prior to their assignment to duty.” RI.Supp.68. Under the policy, “Jail officers shall receive at a minimum of twenty (20) hours of orientation prior to be[ing] independently assigned to a particular post and

shall be tested on the same.” RI.Supp.68. New jailers had to complete training, review the Jail’s policies and procedures, and receive additional on-the-job training through shadowing.

The Jail trained staff on Ottawa’s policies by having them read the Jail’s “policies and procedures.” Officer Bray testified to reading the policies one time. And when asked whether he remembered “anybody . . . ever taking any steps whatsoever to assess whether or not you were trained to handle medical emergencies,” R.Supp.271.1:20:25–:39, Officer Bray answered, “not that I can recall,” R.Supp.271.1:20:39. He agreed “the training at Ottawa County was insufficient for what [he] w[as] being required to do.” R.Supp.271.1:11:35–:42.

Officer Lawson reported a similar experience with his own training. He testified he had never seen the policy book and was not trained on it. RVI.1220. He recalled that on his “first day of training, . . . [the Jail] ha[d] [him] read . . . a little paper pamphlet.”¹² RVI.1219. After reviewing the pamphlet, Officer Lawson asked Assistant JA Shoemaker to clarify the Jail’s policy on self-defense, to which he responded, “fuck that policy book[.]” RVI.1220. Officer Lawson’s first day of training included no shadow period and concluded with

¹² Officer Lawson did not testify about which policies were included in the pamphlet he saw.

the Jail “releas[ing] [him] in plain clothes to go collect trays from inmates[.]” RVI.1222–25.

Finally, the Jail Nurse Policy states, “the type of patients that we deal with are different. [N]ever let your guard down. [N]ever turn your back to them. [D]on’t ever let them gain your trust.” RXV.3363. On cross-examination, Nurse Horn said she “wouldn’t trust an inmate” because of “what they could do” to threaten her “own safety.” RVI.1447. Officer Lawson and JA Harding described their understanding of the Jail’s policy on trusting inmates. Officer Lawson testified the Jail trained officers not to trust inmates and described the approach as “a general lack of trust [in] every situation.” RVI.1317. JA Harding said the Jail trained officers to “trust but verify.” RXI.2330.

3

The jury heard witness testimony about the health and safety standards for jails set by the Oklahoma Department of Health (referred to as the “Oklahoma jail standards”) and those used by the National Commission on Correctional Health Care (NCCHC). Ottawa objected to the introduction of this evidence, and the district court gave the jury a limiting instruction during JA Harding’s testimony:

Jurors, you’re going to start hearing about some jail standards, some national and state standards, throughout the trial. You are

allowed to consider these, but you should not consider these standards as solely dispositive of whether the sheriff's office acted with deliberate indifference. So you should consider them, but you should not consider them solely dispositive.

RV.1072.

On direct examination, JA Harding confirmed the Oklahoma jail standards were “rules that [the Jail] had to follow” and “were set in place as a guide to tell [staff] how [they] were supposed to run the jail[.]” RV.1072–73. He agreed the Oklahoma jail standards made the Jail “a safer environment, for inmates if they were followed,” and the Jail’s treatment of Mr. Ellis violated several of those standards. RV.1073, 1085–89, 1113–14. According to testimony from former Ottawa JA Derwin, “The Oklahoma Department of Health is the regulator of county jails as far as health and safety” and is responsible for approving the Jail’s written policies, as described above. RX.2143. The Oklahoma jail standards set the minimum for what Oklahoma jails must follow.

Dr. Wilcox briefly testified about the jail standards set by NCCHC, a “not-for-profit organization that advocates for healthcare in correctional facilities.” RVII.1572. Dr. Wilcox explained that NCCHC’s standards were “not mandatory,” meaning Oklahoma jails were not required to follow them, but they served as “good guidelines.” RVII.1488.

C

After the Estate rested, Ottawa moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court denied Ottawa’s motion from the bench. “I believe that the plaintiffs have met their burden,” the district court ruled, “and that there is sufficient evidence for the matter to go to the jury [on the Estate’s Fourteenth Amendment claim].” RVII.1616. The trial continued. Ottawa called four witnesses—Paramedics Biggs and Dillinger, PA Fox, and former Ottawa JA Derwin—whose pertinent testimony is described above.

Before the case was submitted to the jury, Ottawa challenged several aspects of the jury instructions, which we will address in our discussion. The jury then heard closing arguments. As relevant here, the Estate’s counsel appeared to become emotional during his closing argument. And, in the Estate’s rebuttal closing argument, counsel urged the jury that a large verdict was necessary to deter Ottawa from future wrongdoing. After deliberating for less than one day, the jury returned a verdict for the Estate worth \$33 million in compensatory damages, plus post-judgment interest.

Ottawa then moved for judgment as a matter of law under Rule 50(b), challenging the sufficiency of the evidence. Ottawa also moved for a new trial and for remittitur under Rule 59(a). It argued a new trial was warranted

because the evidence was insufficient, the Estate's counsel engaged in improper conduct, the jury instructions were erroneous, and the court admitted evidence about state and national jail standards that should have been excluded. As to remittitur, Ottawa argued the compensatory damages award was excessive and resulted from misconduct by the Estate's counsel during closing argument. The district court denied all three motions in a written order (Omnibus Order) on February 29, 2024. The district court also granted in part the Estate's motion for attorneys' fees, awarding \$970,402 in fees and \$19,480.54 in costs. Almost a month later, Ottawa filed a motion under Rule 60(b)(6), seeking reconsideration of the district court's rulings on the motions for new trial and remittitur. The district court denied reconsideration.

This timely appeal followed.¹³

II

Ottawa seeks reversal, focusing its appellate challenge on five alleged errors. Ottawa argues the district court erred, *first*, by denying Ottawa's renewed motion for judgment as a matter of law under Rule 50(b); *second*, by denying Ottawa's motion for a new trial under Rule 59(a); *third*, by denying

¹³ We procedurally consolidated Ottawa's appeals of the district court's Omnibus Order and reconsideration order.

Ottawa’s motion for remittitur under Rule 59(a); *fourth*, by granting the Estate’s motion for attorneys’ fees; and *fifth*, by denying Ottawa’s motion for reconsideration under Rule 60(b)(6). We consider, and reject, each challenge.¹⁴

III

Ottawa challenges the denial of its motion for judgment as a matter of law (JMOL) under Rule 50(a)(1). The rule states:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: [] resolve the issue against the party; and [] grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

¹⁴ The Estate says we “should summarily affirm due to [Ottawa]’s deficient Appendix,” which “does not include vital video surveillance evidence” presented at trial. Resp. Br. at 2. We decline the invitation. To be sure, it is the responsibility of the appellant to “compl[y] with the requirements set out by the Federal Rule of Appellate Procedure and our Local Rules[.]” *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1189 (10th Cir. 2018) (first citing Fed. R. App. P. 30(a)(1); then citing 10th Cir. R. 30.1(b)(1)). Ottawa did not meet these requirements. But the Estate filed a supplemental appendix, including the videos it faults Ottawa for omitting. *See* 10th Cir. R. 30.2(A)(1) (permitting an “appellee who believes that the appellant’s appendix omits items that should be included” to “file a supplemental appendix”). Under these circumstances, we have the record needed to resolve this appeal and decline the invitation to summarily dismiss it. *See Lincoln*, 900 F.3d at 1190 (explaining the appellee “provid[ed] an appendix that contains most of the evidence necessary to review the district court’s decision” and “we are permitted to look at the record as a whole, including the supplemental appendix submitted by [appellee]”).

Fed. R. Civ. P. 50(a)(1)(A)–(B). Ottawa insists the Estate failed to show by a preponderance of the evidence that Ottawa violated the Fourteenth Amendment. We disagree. The evidence presented to the jury justifies the district court’s decision to deny relief under Rule 50. To explain why, we first describe the applicable legal standards of review and the substantive law attendant to the Estate’s Fourteenth Amendment claim. Applying these standards, we then analyze, and reject, Ottawa’s arguments for reversal.

A

1

“We review a district court’s denial of a Rule 50 motion *de novo*, applying the same standards as the district court.” *Bill Barrett Corp. v. YMC Royalty Co., LP*, 918 F.3d 760, 766 (10th Cir. 2019) (per curiam) (internal quotation marks omitted). “A party is entitled to [JMOL] only if the court concludes that all of the evidence in the record reveals no legally sufficient evidentiary basis for a claim under the controlling law.” *Id.* (internal quotation marks omitted). “The quantum of evidence necessary to defeat a JMOL motion is slight, such that justifying the grant of a JMOL motion is difficult in practice.” *Stroup v. United Airlines, Inc.*, 26 F.4th 1147, 1156–57 (10th Cir. 2022).

“[O]ur caselaw contemplates that we apply a light touch in reviewing denials of JMOL motions.” *Id.* at 1158. “A district court’s refusal to grant

judgment as a matter of law may be reversed only if the evidence is such that without weighing the credibility of the witnesses the only reasonable conclusion is in [the moving party]’s favor.” *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2013) (alteration in original) (internal quotation marks omitted); *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1302 (10th Cir. 2003) (explaining “a directed verdict is only appropriate if the evidence . . . points but one way and is susceptible to no reasonable inferences supporting the non-moving party” (internal quotation marks omitted)). Our task is to “determine only whether the jury verdict is supported by substantial evidence,” and substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence.” *Stroup*, 26 F.4th at 1157 (quoting *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002)). In making this determination, we “draw[] all reasonable inferences in favor of the nonmoving party and do[] not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.” *Bill Barrett Corp.*, 918 F.3d at 766 (internal quotation marks omitted).

2

“The Fourteenth Amendment’s Due Process Clause entitles pretrial detainees to the same standard of medical care that the Eighth Amendment

requires for convicted inmates.” *Lance v. Morris*, 985 F.3d 787, 793 (10th Cir. 2021); *Est. of Beauford v. Mesa County*, 35 F.4th 1248, 1262 (10th Cir. 2022) (“The right to custodial medical care is well settled.”). This constitutional standard means “prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates[.]’” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)).

“Prison officials violate the Constitution when they act with ‘deliberate indifference to an inmate’s serious medical needs.’” *Est. of Beauford*, 35 F.4th at 1262 (quoting *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). “The deliberate indifference standard lies ‘somewhere between the poles of negligence at one end and purpose or knowledge at the other.’” *Mata*, 427 F.3d at 752 (quoting *Farmer*, 511 U.S. at 836). “To establish deliberate indifference based on prison officials failing to attend to an inmate’s serious medical needs, a plaintiff must satisfy an objective and subjective component.” *Smith v. Allbaugh*, 987 F.3d 905, 910 (10th Cir. 2021). “[T]he focus of the objective component is the seriousness of the plaintiff’s alleged harm, while the focus of the subjective component is the mental state of the defendant with respect to the risk of that harm.” *Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1044 (10th Cir. 2022).

Only the subjective component is at issue in the appeal before us.¹⁵ To satisfy the subjective component—knowledge of a risk—the plaintiff must show the “official had a sufficiently culpable state of mind.” *Est. of Beauford*, 35 F.4th at 1262 (internal quotation marks omitted). “In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety.” *Id.* (quoting *Farmer*, 511 U.S. at 834). Deliberate indifference means “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 1262–63 (quoting *Farmer*, 511 U.S. at 837).

Whether a prison official had the requisite state of mind “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence,” *id.* at 1263 (internal quotation marks omitted), “[b]ecause it is difficult, if not impossible, to prove another person’s actual state of mind,” *DeSpain v. Uphoff*, 264 F.3d 965, 975 (10th Cir. 2001). A “factfinder may [also] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019) (quoting *Farmer*, 511 U.S. at 842).

¹⁵ Ottawa does not challenge the objective component. Nor could it. *See Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019) (“We have held that death, [is], without doubt, sufficiently serious to meet the objective component.” (alteration in original) (internal quotations marks omitted)).

To establish a deliberate-indifference claim against a municipality, the plaintiff must establish the municipality was responsible for the constitutional violation.¹⁶ *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 691 (1978). In *Monell*, the Supreme Court explained “Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.” *Id.* “[I]n other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Waller v. City & County of Denver*, 932 F.3d 1277, 1283 (10th Cir. 2019) (alteration in original) (quoting *Monell*, 436 U.S. at 691).

To hold a municipality liable under § 1983, a plaintiff must prove: (1) the existence of a “municipal policy or custom,” (2) “a direct causal link between the policy or custom and the injury alleged[,]” and (3) “that the municipal action was taken with ‘deliberate indifference’ as to its known or obvious consequences.” *Id.* at 1283–84 (first quoting *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010); and then quoting *Bd. of Cnty. Comm'rs of*

¹⁶ Recall, the Estate sued the Sheriff of Ottawa County in his official capacity. “Suing individual defendants in their official capacities under § 1983, we’ve recognized, is essentially another way of pleading an action against the county or municipality they represent.” *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010); *Huff v. Reeves*, 996 F.3d 1082, 1092 (10th Cir. 2021) (“[C]laims against a municipal official acting in his or her official capacity . . . are the same as claims against a municipality itself.” (internal quotation marks omitted)).

Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 407 (1997)); *see also Schneider v. City of Grand Junction Police Dep’t*, 717 F.3d 760, 769 (10th Cir. 2013) (summarizing that municipal-liability claims have “three elements: (1) official policy or custom, (2) causation, and (3) state of mind”).¹⁷

A municipal policy or custom may take these forms: “[1] a formal regulation or policy statement, [2] an informal custom that amounts to a widespread practice, [3] decisions of municipal employees with final policymaking authority, [4] ratification by final policymakers of the decisions of subordinates to whom authority was delegated, and [5] the deliberately indifferent failure to adequately train or supervise employees.” *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm’rs*, 962 F.3d 1204, 1239–40 (10th Cir. 2020) (internal quotation marks omitted). At issue here is the fifth form of “municipal policy or custom,” a “failure to adequately train or supervise employees.” *Id.*

As to state of mind, deliberate indifference “is defined differently for [individual liability purposes] and municipal liability purposes.” *Barney v. Pulsipher*, 143 F.3d 1299, 1307 n.5 (10th Cir. 1998); *see also Schneider*, 717 F.3d at 771 n.5 (noting deliberate indifference of an employee and of the municipality are related, but separate, inquires). “In the municipal liability context, deliberate indifference is an *objective* standard which is satisfied if the

¹⁷ Causation is not at issue in this appeal.

risk is *so obvious that the official should have known of it.*” *Barney*, 143 F.3d at 1307 n.5. (emphasis added). Therefore, “[t]he deliberate indifference standard may be satisfied when the municipality has actual *or constructive notice* that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm.” *Schneider*, 717 F.3d at 771 (emphasis added) (quoting *Barney*, 143 F.3d at 1307). This “[n]otice can be established through a pattern of tortious conduct or if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality’s action or inaction.” *Finch v. Rapp*, 38 F.4th 1234, 1244 (10th Cir. 2022) (internal quotation marks omitted).

B

On appeal, Ottawa challenges the district court’s refusal to grant a JMOL, making two arguments contesting the sufficiency of the evidence on deliberate indifference. Ottawa contends, *first*, the evidence does not show the Jail knew of a risk to Mr. Ellis, and *second*, the evidence shows the jail staff was trained and Ottawa was not deliberately indifferent to the need for additional training. We discern no reversible error.

1

Ottawa first insists jail staff “failed to perceive there was a substantial risk of harm to Ellis from the time he was seen by EMS on October 21 until

they called EMS again the next afternoon.” Op. Br. at 18. In response, the Estate asserts “there was abundant testimony at trial, from multiple witnesses, showing Jail staff did in fact perceive the risks to Ellis’s health and safety.” Resp. Br. at 32. We agree with the Estate.

Recall, the Estate needed to show jail staff had “a sufficiently culpable state of mind,” meaning the staff “kn[e]w[] of and disregard[ed] an excessive risk to [Mr. Ellis’s] health or safety[.]” *Est. of Beauford*, 35 F.4th at 1262–63 (internal quotation marks omitted). On the first day of trial, the jury heard dozens of stipulated facts about Mr. Ellis’s time at the Jail between October 10 (when he self-reported to the Jail on an outstanding arrest warrant for DUI) and October 22 (when he died at the hospital while still in pretrial custody). The parties agreed Mr. Ellis told jail staff he had severe back pain, leg numbness and discoloration, and difficulty walking. Jail staff knew Mr. Ellis reported having a seizure, repeatedly cried out, and asked for an ambulance.

During the eight-day trial, the jury heard testimony from thirteen witnesses, reviewed dozens of exhibits, and watched over twenty excerpts of video footage from the Jail. The evidence showed Mr. Ellis become increasingly ill during his pretrial detention. In video footage, Mr. Ellis asked for medication and medical attention, moaned in distress, cried, screamed for help, claimed he could not breathe, and yelled that he was experiencing an asthma

attack. Other inmates expressed concern to jail staff about Mr. Ellis's condition. Mr. Harrington, a fellow detainee, testified he repeatedly asked jail staff for help on Mr. Ellis's behalf. Another inmate told staff that he thought Mr. Ellis had died. As the days went on, jail staff called Mr. Ellis a "zombie," RV.1128, and an inmate said he "looks like he's dying," RIII.779.

Jail staff mocked Mr. Ellis. Nurse Horn "threatened him for reporting his symptoms, implied he was faking his illness, and told him she was tired of dealing with him." RIII.617. Officer Lawson and Assistant JA Shoemaker, who interacted directly with Mr. Ellis during his detention observed his physical condition and did not think he was malingering. Jail staff called EMS when Mr. Ellis reported having a seizure, and ultimately moved him to an administrative segregation cell for medical observation.

On this record, we readily conclude "substantial evidence"—both direct and circumstantial—shows Ottawa knew of a substantial risk of harm to Mr. Ellis and failed to take reasonable measures to abate that risk. *Stroup*, 26 F.4th at 1157 (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)); *Farmer*, 511 U.S. at 842 (explaining that "knowledge of a substantial risk" can be inferred "from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that

the risk was obvious” (internal citation omitted)); *Worden v. Tri-State Ins. Co.*, 347 F.2d 336, 343 (10th Cir. 1965) (“The office of a stipulation of facts is to permit the jury to be advised that certain agreed facts are true and that the jury may consider them as the evidence in the case[.]”).

Ottawa resists this conclusion, contending the evidence did not show Ottawa knew of a risk to Mr. Ellis’s health and safety.¹⁸ Ottawa emphasizes that, less than 24 hours before Mr. Ellis died, EMS responded to a call from jail staff reporting Mr. Ellis’s seizure; EMS determined Mr. Ellis had no acute medical concerns; and Mr. Ellis chose not to go to the hospital. Ottawa also says jail staff witnessed Mr. Ellis walking just hours before his death. We are not persuaded.

Though we review *de novo*, “[w]e do not retry issues, second guess the jury’s decision-making, or assess the credibility of witnesses and determine the weight to be given their testimony.” *Webco*, 278 F.3d at 1128. Importantly, “the mere existence of contrary evidence does not itself undermine the jury’s findings as long as sufficient other evidence supports the findings.” *Id.*

¹⁸ Ottawa does not address whether jail staff “*disregard[ed]* an excessive risk to inmate health or safety.” *Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1045 (10th Cir. 2022) (emphasis added) (internal quotation marks omitted). We deem any contrary argument waived. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (“[A]ppellant failed to raise this issue in his opening brief and, hence, has waived the point.”).

(internal quotation marks omitted). Here, at best, Ottawa has shown an alternative inference that was available to the jury, but it has not undermined the substantial evidence and reasonable inferences amply supporting the verdict.

2

Ottawa next argues “the evidence is insufficient to support the verdict” on a theory of inadequate training “[b]ecause the evidence overwhelmingly shows staff was trained and [Ottawa] did not have a policy of deliberate indifference to the need for additional training[.]” Op. Br. at 28. Again, we disagree.

To prove a failure-to-train claim under *Monell*, the Estate must demonstrate Ottawa maintained a policy or custom of inadequate training, that the policy or custom caused injury, and that the municipality adopted the policy or custom with deliberate indifference. *See Lance*, 985 F.3d at 800 (citing *Waller*, 932 F.3d at 1283–84). Ottawa claims there is insufficient evidence to show it had a policy or custom of inadequate training. For instance, it points out “[JA] Harding testified jailers were required to complete annual training, that they review policies and procedures when hired, and that they received on-the-job training via shadowing[.]” Op. Br. at 27 (citing RIV.823). The district court acknowledged the testimony Ottawa now emphasizes but concluded it

did not warrant granting a JMOL. As the district court correctly observed, “the jury *also* heard one officer testify that he had never seen the policy book and had received no training on it.” RXIV.3101 (emphasis added). Officer Lawson testified that his training did not include a shadow day, he was not debriefed specifically on the Jail’s medical practices, and he immediately began working after reading the policy pamphlet. And as the district court pointed out, “the jury heard evidence that the correction officers were instructed that they were not to call an ambulance” during medical emergencies, despite written policies directing otherwise.¹⁹ RXIV.3101.

Even assuming Ottawa has identified an alternative inference from the evidence, it has not disturbed the reasonable inference—that we must draw in the Estate’s favor—that the Jail maintained a policy or custom of inadequately training jail staff. *See Bill Barrett Corp.*, 918 F.3d at 766. “It is the province of the jury, and not this court, to resolve conflicts in the evidence.” *Webco*, 278 F.3d at 1128. Ottawa has thus failed to establish “a reasonable jury would not

¹⁹ The jury also heard that Assistant JA Shoemaker said, “fuck that policy book” during training. RXIII.3014. Although this statement was made in response to a question about self-defense policies and not medical policies, we agree with the district court that this statement reasonably supports a general “disregard[]” for the Jail’s “written policies,” including the “written policies for medical treatment of inmates[.]” RXIV.3104.

have a legally sufficient evidentiary basis to find for” the Estate. Fed. R. Civ. P. 50(a)(1).²⁰

We thus affirm the district court’s denial of Ottawa’s renewed motion for judgment as a matter of law.

IV

Ottawa next seeks reversal of the district court’s denial of its motion for new trial under Rule 59. The rule provides, “[t]he court may, on motion, grant a new trial on all or some of the issues . . . 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). “A motion for a new trial is not regarded with favor and should only be granted with great caution.” *Franklin v. Thompson*, 981 F.2d 1168, 1171 (10th Cir. 1992) (internal quotation marks omitted). “We review the denial of a Rule 59(a) motion for abuse of discretion.” *Burke*, 935 F.3d at 1026; *Thiringer v. Barlow*, 205 F.2d 476, 478 (10th Cir.

²⁰ Ottawa also appears to argue the *Monell* “policy or custom” element could not be supported on a theory of an informal custom of providing inadequate medical care. Op. Br. at 20–23. The district court concluded Ottawa maintained “a prevalent custom of denying adequate medical care[.]” RXIV.3098. We need not consider this issue, however, given our conclusion that the evidence supports the jury’s verdict on the instructed failure-to-train theory. See *Kirkbride v. Terex USA, LLC*, 798 F.3d 1343, 1349 (10th Cir. 2015) (“So long as the jury’s verdict was supported by sufficient evidence under at least one valid theory of liability presented to the jury, we must affirm.” (internal quotation marks omitted)).

1953) (“A motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of such discretion.”). “A district court abuses its discretion if it made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.” *Burke*, 935 F.3d at 1026 (internal quotation marks omitted).

On appeal, Ottawa reprises several arguments made in the district court to support its request for a new trial under Rule 59. Ottawa, *first*, objects to how the jury was instructed; *second*, insists the district court erroneously admitted evidence about state and national jail standards; and *third*, claims the Estate’s lawyer engaged in prejudicial misconduct by displaying emotion at several points during the trial and making improper remarks during closing argument.²¹ We consider each argument summarizing additional pertinent

²¹ Ottawa also continues to argue “the jury verdict was clearly and decidedly against the weight of the evidence[.]” Op. Br. at 29–30. “When a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence.” *Burke*, 935 F.3d at 991 (internal quotation marks omitted). Here, as in the JMOL context, this court must “draw all inferences from the evidence in favor of the non-moving party, and do[es] not weigh the evidence or judge witness credibility.” *Id.* (internal quotation marks omitted). As discussed, we already concluded the jury heard evidence sufficient to support its verdict. We discern no abuse of discretion in denying Ottawa’s new trial motion on this ground.

facts and legal principles as needed. For the reasons explained, we discern no abuse of discretion by the district court.

A

Ottawa argues the jury instructions “did not provide the jury a clear understanding of the issues and the applicable legal standards[.]” Op. Br. at 30. Ottawa objects to Instruction 17, which concerned the deliberate-indifference standard, and challenges the district court’s refusal to give Ottawa’s proffered instruction stating abusive language alone would not show a constitutional violation. We review *de novo* whether jury instructions correctly state the governing law. *Pratt v. Petelin*, 733 F.3d 1006, 1009 (10th Cir. 2013). “We review for abuse of discretion a district court’s decision not to give a tendered jury instruction.” *Sherouse v. Ratchner*, 573 F.3d 1055, 1060 (10th Cir. 2009). “We read and evaluate the jury instructions in light of the entire record to determine if they fairly, adequately and correctly state the governing law and provide the jury with an ample understanding of the applicable principles of law and factual issues confronting them.” *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1154–55 (10th Cir. 2012) (internal quotation marks omitted). Our inquiry is not whether the instructions “are flawless, but whether the jury was misled in any way and whether it had a[n] understanding of the issues and its duty to decide those issues.” *Brodie v. Gen.*

Chem. Corp., 112 F.3d 440, 442 (10th Cir. 1997) (internal quotation marks omitted).

1

Instruction 17 is titled “42 U.S.C. § 1983 – Deliberate Indifference Denial of Medical Care,” and states, in full:

To prevail on his §1983 claims against the Sheriff of Ottawa County, in his official capacity, Plaintiff must first establish, by a preponderance of the evidence, that an agent or employee of the Sheriff of Ottawa County, in his official capacity, or multiple agents and employees together, as a result of gross deficiencies in policies or staffing, violated Mr. Ellis’ federal constitutional right to medical care by acting with deliberate indifference to Mr. Ellis’ serious medical needs. A mistake or inadvertent failure is not deliberate indifference. An official’s actions or inactions falling below the standard of care, as well as a violation of state statute or jail policy may be evidence of deliberate indifference, but alone are not sufficient to find liability.

To recover damages on Plaintiff’s claim that the Ottawa County Jail failed to obtain medical care for Mr. Ellis, Plaintiff must first prove by a preponderance of the evidence that:

1. Mr. Ellis suffered from a serious medical need;
2. An agent, employee, officer of the Sheriff was aware of Mr. Ellis’ serious medical need; and
3. One or more agents or employees’ deliberate indifference, or the deliberate indifference of multiple agents and employees together, as a result of gross deficiencies in policies or staffing, proximately caused injury to Mr. Ellis.

With regard to the first element, a medical need is considered sufficiently serious if a physician has diagnosed the condition and mandated treatment, or the condition is so obvious

that even a layperson would easily recognize the medical necessity for a doctor's attention.

With regard to the claim that the Ottawa County Jail staff failed to obtain medical care for Mr. Ellis, Plaintiff must likewise prove that an agent, employee, or multiple agents and employees together, as a result of gross deficiencies in policies or staffing, acted with deliberate indifference in failing to obtain medical care for Mr. Ellis.

Deliberate indifference occurs when an agent or employee of the Sheriff of Ottawa County, in his official capacity, had actual knowledge of a substantial risk of harm to Mr. Ellis and failed to take reasonable measures to abate that risk. In other words, Plaintiff must prove that one or more agents or employees of the Sheriff of Ottawa County, in his official capacity: (1) was aware of facts from which the inference could be drawn that a substantial risk of harm to Mr. Ellis existed; and (2) actually drew that inference. Again, you may infer actual knowledge of such a risk on the part of an agent or employee if you find that such a risk would have been obvious to that agent or employee.

The third element requires Plaintiff to demonstrate that the failure to timely meet Mr. Ellis' serious medical need proximately caused Mr. Ellis to suffer substantial harm.

RIV.1001–02.

Ottawa objected to this instruction at trial and again in its motion for new trial, claiming it “contained an inaccurate statement of law[.]” RXI.2362–65. In Ottawa's view, Instruction 17 created the misimpression that the jury “could find [Ottawa] liable even without a definite constitutional violation as long as [the jury] found that there were gross deficiencies in policies or staffing.” RXI.2364. Ottawa also argued Instruction 17 improperly relieved the jury of finding a constitutional violation as a predicate to *Monell* liability. The

district court rejected this argument. It reasoned that “[t]he plain language of Instruction 17 does not lend itself to an interpretation that liability can be found without a constitutional violation” because it “expressly states that a constitutional violation is necessary to find Defendant liable.” RXIV.3119. Ottawa now reprises this argument on appeal. We are not persuaded.

Instruction 17 correctly states the law on a deliberate-indifference claim against a municipality. Ottawa does not dispute Instruction 17 properly defines “deliberate indifference” as “actual knowledge of a substantial risk of harm to Mr. Ellis and fail[ure] to take reasonable measures to abate that risk.” RIV.1001. And, consistent with *Monell* liability, the instruction requires the Estate to establish “an agent or employee of [Ottawa] . . . violated Mr. Ellis’ federal constitutional right to medical care by acting with deliberate indifference to Mr. Ellis’ serious medical needs.” RIV.1001; *see Monell*, 436 U.S. at 691 (stating a prerequisite to municipal liability is a constitutional violation).

If there is any doubt about what the law requires, Instruction 19 settles the matter. Instruction 19 is titled “42 U.S.C. § 1983 – Municipal Liability Training & Supervision,” and states, in relevant part:

In this case, Plaintiff contends that the Sheriff of Ottawa County, in his official capacity can be held liable for the alleged violations of Plaintiff’s constitutional rights by the individual Jail employees because those employees were not adequately trained

and/or supervised. . . . For Plaintiff to recover on this claim, you must find that all of the following elements have been proved by a preponderance of the evidence:

1. An agent or employee of the Sheriff of Ottawa County, in his official capacity violated Mr. Ellis’ constitutional rights as discussed previously;
2. The agent or employee who violated Mr. Ellis’ constitutional rights was not adequately trained and/or supervised on a specific issue that was closely related to the alleged violation of Mr. Ellis’ federal constitutional rights;
3. The deficient training and/or supervision practices caused Mr. Ellis’ injury; and
4. The deficient training and/or supervision practices were adopted with deliberate indifference.

. . .

If Plaintiff fails to prove any of the above-listed elements by a preponderance of the evidence, you must find for the Sheriff of Ottawa County, in his official capacity on this claim.

RIV.1004–05. As Ottawa acknowledges, we must read “the jury instructions as a whole[.]” Op. Br. at 32; see *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (stating jury instructions “may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record” (internal quotation marks omitted)). Most instructive to our inquiry is the part of Instruction 19 that states, “[i]f Plaintiff fails to prove any of the above-listed elements by a preponderance of the evidence, [the jury] must find for the Sheriff of Ottawa County, in his official capacity on this claim.” RIV.1005. This

further shows the jury was correctly instructed that an underlying constitutional violation is a predicate to Ottawa’s liability.²²

2

Ottawa next challenges the district court’s refusal to give the jury the following instruction:

You are advised that mere words alone – no matter how insensitive or reprehensible – are insufficient to establish a constitutional violation. Verbally abusive language, taunts, threats, and deplorable, offensive, or unprofessional language toward an inmate do not amount to a constitutional violation.

RIV.941. Ottawa requested the instruction because the Estate “repeatedly” displayed video of Nurse Horn “using abusive language and [making] threats against” Mr. Ellis. RIV.940. Ottawa believed, without its proffered instruction,

²² Ottawa’s contrary position is difficult to follow and relies on a misreading of *Crowson v. Washington County*, 983 F.3d 1166 (10th Cir. 2020). There, we reiterated that “a claim under § 1983 against either an individual actor or a municipality cannot survive a determination that there has been no constitutional violation.” *Id.* at 1186. But we recognized a “systemic” theory of *Monell* liability, where “the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual’s constitutional rights.” *Id.* (quoting *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985)). We observed *Monell* liability based on a systemic theory was a “limited exception” to the usual requirement for unconstitutional action by a specific individual and existed to ensure that a municipality does “not escape liability by acting through twenty hands rather than two.” *Id.* at 1191. Contrary to Ottawa’s view, *Crowson* did not relieve a plaintiff of the fundamental burden of showing a constitutional violation as a predicate to *Monell* liability. And nothing in Instruction 17 suggests the jury can find liability without finding a constitutional violation or instructs on the systemic theory recognized in *Crowson*.

the jury could improperly find a constitutional violation based on mere words alone. In its motion for a new trial, Ottawa contended “the jury was left to deliberate liability without any instruction on whether abusive language is a constitutional violation or not.” RXI.2367. The district court rejected this argument. Ottawa’s requested instruction “was unnecessary,” the district court ruled, because Instruction 17 already correctly told the jury “[a]n official’s actions or inactions falling below the standard of care, as well as a violation of state statute or jail policy may be evidence of deliberate indifference, but alone are not sufficient to find liability.” RXIV.3120 (quoting RIV.1001).

On appeal, Ottawa again insists it was reversible error to deny its proffered instruction on abusive language. We disagree.

A “trial judge is given substantial latitude and discretion in tailoring and formulating the instructions so long as they are correct statements of law and fairly and adequately cover the issues presented.” *United States v. Woodmore*, 127 F.4th 193, 210 (10th Cir. 2025) (internal quotation marks omitted). Where “the material issues in the case have been comprehensively and correctly covered in the general instructions, it is not error to refuse requested instructions even though they be correct statements of law.” *Sherouse*, 573 F.3d at 1060–61 (quoting *Walker v. Dean*, 333 F.2d 753, 755 (10th Cir. 1964)). That

is the situation here. The jury instructions comprehensively set the parameters for liability on the Estate's deliberate-indifference claim. Instruction 17 said conduct "falling below the standard of care" or in "violation of state statute or jail policy . . . *alone* are not sufficient to find liability." RXIV.3120 (emphasis added). Even assuming for argument's sake that Ottawa's proffered instruction correctly stated the law, the district court did not abuse its discretion by refusing to give it under the circumstances.

B

Ottawa also contends a new trial is warranted because the district court erroneously admitted evidence about state and national jail standards. "[W]hen the issue of whether to grant a new trial hinges on the admissibility of evidence, this court reviews the admission of the evidence for abuse of discretion." *Stroup*, 26 F.4th at 1168 (internal quotation marks omitted). "Because evidentiary rulings are within the sound discretion of the district court, this court will reverse only upon a 'definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States v. Chavez*, 976 F.3d 1178, 1193 (10th Cir. 2020) (quoting *United States v. Samaniego*, 187 F.3d 1222, 1223 (10th Cir. 1999)). To prevail on an evidentiary challenge to a district court's denial of a new trial motion, appellants must also establish prejudice.

Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 1283 (10th Cir. 2003). “[E]vidence admitted in error can only be prejudicial if it can be reasonably concluded that . . . without such evidence, there would have been a contrary result.” *Id.* (second alteration in original) (internal quotation marks omitted).

1

The Estate elicited testimony from several witnesses about the Oklahoma jail standards and those used by the NCCHC. Ottawa consistently objected to this evidence at trial. In Ottawa’s view, the jury could erroneously conclude that any conduct inconsistent with those standards amounted to deliberate indifference. The district court overruled Ottawa’s objections. Ottawa requested and received two limiting instructions about the jail-standards evidence. Recall, during trial, the district court explained that the jail standards evidence is not “solely dispositive of whether the sheriff’s office acted with deliberate indifference.” RV.1072. And the jury instructions—in Instruction 21, titled “State Law or Policy Violation”—also contained a relevant limiting instruction, which stated in full: “A violation of State law, regulation or policy may be evidence of, but by itself, would be insufficient, to show deliberate indifference or liability under § 1983.”²³ RIV.1007.

²³ Instruction 21 was nearly identical to the limiting instruction Ottawa requested. *See* RIV.940 (“You are instructed that a violation of a state law or an internal policy or procedure is not necessarily evidence of a violation of

In its motion for new trial, Ottawa argued the jail-standards evidence should have been excluded under Federal Rule of Evidence 403 “due to the resulting confusion and prejudice to Defendant.” RXI.2370. The district court rejected the argument. “The state and national jail standards were relevant to issues in the case[,]” the district court ruled. RXIV.3121. The court then explained “the risks of prejudice and confusion do not substantially outweigh the relevance of the state and federal standards.” RXIV.3122. And, “[a]ny possible prejudicial effect of the standards evidence [wa]s greatly diminished by” the limiting instruction. RXIV.3122.

2

On appeal, Ottawa maintains the jail-standards evidence “should have been excluded under Rule 403[.]”²⁴ Op. Br. at 39. Rule 403 provides, “The court

federal constitutional rights. If you find that anyone in this case violated any state law or regulation or any internal policy or procedure of the Ottawa County Jail with regard to the treatment of Plaintiff, the operation of the Ottawa County Jail, the operation of the Ottawa County Jail, or the training or supervision of the Jail’s staff, such a finding would be insufficient in itself to support liability under 42 U.S.C. § 1983. Rather, Plaintiff must prove that his federal, constitutional rights were violated as addressed in the preceding instructions.”).

²⁴ Ottawa does not appear to advance a relevance argument under Rule 401 on appeal. *Mhoon*, 31 F.3d at 984 n.7 (“[A]ppellant failed to raise this issue in his opening brief and, hence, has waived the point.”). To the extent Ottawa insists the jail standards are not relevant, we see no reason to disturb the district court’s conclusion that the evidence is “probative of whether [Ottawa] was deliberately indifferent to Mr. Ellis’ medical needs.” RXIV.3122.

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.” Under Rule 403’s balancing test, the court “must give the evidence its maximum reasonable probative force and the minimum reasonable risk of unfair prejudice or confusion.” *Boardwalk Apartments, L.C. v. State Auto Prop. & Cas. Ins. Co.*, 816 F.3d 1284, 1289 (10th Cir. 2016). To exclude otherwise admissible evidence under Rule 403 is “an extraordinary remedy and should be used sparingly.” *World Wide Ass’n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1139 (10th Cir. 2006) (quoting *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001)). Indeed, “absent a clear abuse of discretion, we defer to the trial judge on the issue of Rule 403 balancing because of [her] familiarity with the full array of evidence in the case.” *Id.*

The district court did not abuse its discretion in admitting the jail-standards evidence after conducting the requisite balancing under Rule 403. While jail standards “do not establish constitutional parameters for the reasonable measures necessary to insure inmate safety,” we have recognized “they do provide persuasive authority concerning what is required.” *Lopez v. LeMaster*, 172 F.3d 756, 761 (10th Cir. 1999), *abrogated in part on other*

grounds, Brown v. Flowers, 974 F.3d 1178, 1182 (10th Cir. 2020); *see also Mata*, 427 F.3d at 757 (“While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm.”). That is precisely what the district court observed in finding the jail-standards evidence probative. The district court explained, “Circumstantial evidence of deliberate indifference can be extracted from both a defendant’s awareness and disregard of state and national standards.” RXIV.3122. And, in the district court’s view, “established state and national standards may be persuasive in determining proper actions required to ensure inmate safety.” RXIV.3122. We see no error in these well-reasoned determinations. Even so, whatever risk of prejudice existed was cured by the oral and written limiting instructions the district court provided at Ottawa’s request. *See Fed. R. Evid.* 403 advisory committee’s notes to proposed rules (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”).

Ottawa fails to develop an argument that it sustained prejudice from the admission of the jail-standards evidence. *See Minshall*, 323 F.3d at 1283 (concluding an error in admitting evidence is “prejudicial if it can be reasonably

concluded that . . . without such evidence, there would have been a contrary result” (alteration in original) (internal quotation marks omitted)). Ottawa asserts “there is grave doubt as to whether the error [in admitting the jail-standards evidence] had a substantial influence on the verdict.” Op. Br. at 39–40 (internal quotation marks omitted). But such conclusory assertions are no proxy for argument. Ottawa nowhere attempts to articulate why “a trial without [the jail-standards] evidence would have had a contrary result.” *Racher v. Westlake Nursing Home Ltd. P’ship*, 871 F.3d 1152, 1161 (10th Cir. 2017). Under these circumstances, Ottawa has failed to show the district court erred in refusing to exclude the jail standards evidence under Rule 403 or to grant a new trial on that basis.

C

Finally, Ottawa seeks a new trial based on alleged misconduct by the Estate’s counsel. Ottawa points to, *first*, emotion displayed by the Estate’s counsel during trial, and *second*, remarks about deterrence made by the Estate’s counsel during rebuttal closing argument. As we will discuss, the district court appears to have assumed, for purposes of assessing whether to

grant a new trial, the words and actions of the Estate’s counsel, as identified by Ottawa, amounted to misconduct. We take the same approach.²⁵

With this understanding, we review the denial of Ottawa’s motion for new trial on attorney-misconduct grounds for an abuse of discretion. *Burke*, 935 F.3d at 1026. Four factors bear on whether attorney misconduct justifies a new trial: “(1) the pervasiveness of the misconduct, (2) the taking of curative action, (3) the size of the verdict, and (4) the weight of the evidence.” *Osterhout v. Bd. of Cnty. Commr’s of LeFlore Cnty.*, 10 F.4th 978, 992 (10th Cir. 2021).

Applying these standards, we discern no error. We first describe the alleged misconduct and then consider and reject Ottawa’s arguments for reversal.

1

On the first day of trial, the Estate played jail footage showing Mr. Ellis moaning in distress and yelling, “Oh, my God! Help! My legs! It’s my legs! . . . Don’t go anywhere!” R.Supp.257.0:10:23–:46. When this video was played,

²⁵ The district court assumed an attorney’s display of emotion can be improper. In support, it relied on *Carey v. Lovett*, 622 A.2d 1279, 1288–90 (N.J. 1993)—a case cited by Ottawa. In *Carey*, the court found counsel acted improperly by, among other things, crying during direct examination of a witness. *Id.* at 1289–90. Neither the parties nor the district court cites a case from this circuit recognizing that emotional displays by counsel are necessarily treated as misconduct, and we are aware of none. For purposes of this appeal, we proceed on the assumption without deciding the matter.

counsel for the Estate appeared to cry.²⁶ The district court immediately called the lawyers to a bench conference.

District court: I understand it's very emotional. Do you need [a] minute?

Estate's counsel: No, I'm okay.

District court: We'll take a minute.

Estate's counsel: I'm fine.

District court: Are you sure?

Estate's counsel: Yeah, yeah.

Ottawa's counsel: Your Honor, [counsel], this was an issue at the last trial, the same thing, crying and tearing up there.

Estate's counsel: At the last trial --

District court: Listen, I wasn't at the last trial but if someone is going to get emotional here, we're going to stop the trial and control ourselves. So if you need a minute, maybe we should take a minute.

²⁶ The parties dispute on appeal whether the Estate's counsel was actually crying, just starting to cry, sniffing, or something else. The district court found the Estate's counsel "displayed emotion" and "began to cry." RXIV.3111–14. The record supports the court's finding, and no party argues it was clearly erroneous.

As explained, we have not yet passed on whether emotional displays by counsel constitute misconduct. We assume without deciding that such actions can constitute misconduct for purposes of determining whether a new trial was warranted.

Estate’s counsel: I’m good. I’ll look at you and I’ll say, Judge, I need a minute. I’ll let you know. I promise.

District court: Why don’t you take a minute right here. . . . We won’t have to stop it if you’re able to control yourself. So I don’t want you to lose control.

. . .

Estate’s counsel: I’m ready.

RIII.739–40. Counsel then took a minute to collect himself, and trial resumed without interruption.

Before closing arguments, the district court held a bench conference outside the presence of the jury and cautioned the lawyers, “if we have to have sidebars about things that we shouldn’t be arguing or things that shouldn’t be being said, then that’s coming out of” the offending party’s closing argument time. RIX.1846. The district court then read the jury instructions, which explained compensatory damages:

[I]f you find that Plaintiff has proven his claim, then you must award damages that you think will justly and fairly compensate for any injury you find was caused by Defendant’s violation of Mr. Ellis’ constitutional right to adequate medical care. These damages are called compensatory damages. . . .

An award of compensatory damages must be based on evidence and not on sympathy, speculation, or guesswork. No evidence of the dollar value of physical pain, mental or emotional pain and suffering, or loss of life needs to be introduced.

RIV.1009.

Closing arguments followed. In his closing, Ottawa’s counsel told the jury, “we’re talking about compensatory damages, not damages to punish Ottawa County.” RIX.1892. Ottawa suggested that, “if you decide to award” compensatory damages, an appropriate verdict would be between \$1.5 million and \$3 million. RIX.1893. “[Y]ou cannot award damages that would punish this county,” counsel for Ottawa emphasized, but “can award damages to compensate the estate of Mr. Ellis.” RIX.1894.

During the Estate’s rebuttal closing argument, counsel again appeared to become emotional. The district court held another bench conference:

District court:	Take a minute and collect yourself. Take a minute and collect yourself.
Estate’s counsel:	I don’t have a tear coming out of my eyes.
District court:	I heard you sniffing.
Estate’s counsel:	I wasn’t sniffing.
District court:	I heard you.
Estate’s counsel:	I was stopping so that I didn’t cry.
District court:	Okay. So then let’s take a minute. We’ll take a minute. We’ll breathe. Let’s breathe. Are you okay? . . . [I]f you get emotional, let’s take a minute, and we’ll just do something. This way, the jury doesn’t know you’re getting emotional.

RIX.1902. The Estate’s counsel then continued with his rebuttal. Referring to remarks by Ottawa, the Estate’s counsel said, “They talk about this idea of ‘you

can't punish us,' but the point of constitutional law, the point of a [§] 1983 case, which is the area that we practice, is the idea of a deterrent effect. It's to deter[.]” RIX.1903. At this point, Ottawa objected, and the district court held another bench conference.

“I don't think that he can say deter,” Ottawa's counsel told the district court, insisting the Estate's counsel “tries to use [the word deter] in [terms] of deterring to punish. You can't use it that way.” RIX.1903–04. The district court observed the Estate's counsel “hasn't done that yet. . . . He said deter, and he hasn't gone to punish.” RIX.1904. Ottawa raised what it described as a “running objection” to any reference to deterrence, and the district court “overruled” the objection “with respect to deterrence.” RIX.1904. “I understand [the objection] with respect to punishment[.]” the court said, “and if that comes up, I will stop again.” RIX.1904.

The Estate continued its rebuttal closing argument:

The idea of deterrence, the idea that you eight people are getting to make this decision, and you can deter this from happening in our community through your verdict. You can deter this from happening in the state of Oklahoma based on awarding an historically significant amount.

Again, you're the last kind of line. . . . I think that the case is worth 50 million dollars or more based on the pain and suffering that Terry went through.

I think that when you really sit down, and you look at the jury instruction on compensatory damage, and you think about what he was suffering, what his suffering was like both from a physical

standpoint and from a mental standpoint and the idea that even in those moments of suffering, he just wants, “Like, what are you going to tell my kid?[]”

...

[T]his has to be an incredibly significant verdict; otherwise, these gentlemen are going to walk out of here, and they’re going to high-five because they’ll say, “We can -- we can run a cheap medical system. We don’t have to even have a doctor. We can go 18 years with an LPN and no one following the policies, no one even knowing what the medical policies were, no one following the contracts. We can run a very, very cheap medical system because that jury just came back with a very small verdict. They listened to us. They just awarded the family 3 million dollars. Business as usual. That worked out from a financial standpoint.”

...

And you are the eight people who can . . . award a verdict that actually compensates, truly compensates, for what Terry went through, and also has the ability to deter it from happening in the future.

RIX.1904–07.

2

Ottawa moved for a new trial based on the emotional displays by the Estate’s counsel and the reference to deterrence made during his rebuttal closing argument. The district court denied Ottawa’s motion, concluding the *Osterhout* factors did “not tip in the favor of Defendant.” RXIV.3111. On appeal, Ottawa raises the same arguments the district court rejected. We consider the *Osterhout* factors and discern no abuse of discretion in the district court’s ruling.

Pervasiveness of the misconduct. The district court found the emotional displays and reference to deterrence in closing argument did “not rise to the level of pervasive [misconduct].” RXIV.3114. We agree. At most, Ottawa has alleged three instances of misconduct, amounting to just one transcript page of the Estate’s thirty-page closing argument. This is not pervasive. *Compare Burke*, 935 F.3d at 1032–33 (finding conduct not pervasive because, among other reasons, “the comments at issue here appeared sporadically during the argument, which consumes more than 40 pages of the Joint Appendix.”), *and Osterhout*, 10 F.4th at 992 (concluding “[a]ny misconduct was not pervasive” because only “a few questions and statements” were at issue (emphasis added)), *with Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1124, 1131 (10th Cir. 2009) (finding misconduct “pervasive” because it “occupied more than half of closing argument” and was “the heart and soul of the argument”).

Curative action by the district court. The district court found that it adequately cured counsel’s improper conduct by “immediately call[ing] for a sidebar” and “properly instruct[ing] the jury to award compensatory damages[.]” RXIV.3114–15. Ottawa contends the district court’s curative action was “unsuccessful in preventing” emotional displays. Op. Br. at 47. Ottawa now insists the district court should have done more, like making remarks to the jury about the emotional displays or provided limiting

instructions each time the Estate’s counsel got emotional. Ottawa, however, never asked the district court to take these additional steps. *See Rios v. Bigler*, 67 F.3d 1543, 1550 (10th Cir. 1995) (concluding “the district court did not abuse its discretion in denying Plaintiff’s motion[] for . . . new trial” where “Plaintiff did not request” a “limiting instruction”).

Ottawa claims the district court’s instruction on compensatory damages was not sufficiently curative. We cannot agree. For one, we have recognized a court’s “instructions help[] dispel any prejudicial effect of improper comments.” *Burke*, 935 F.3d at 1033 (citing *Racher*, 871 F.3d at 1171 (holding a new trial was not warranted where the judge overruled an objection to improper argument but “adequately instructed” the jury on the difference between compensatory and punitive damages)). Here, the jury instructions clarified that only compensatory damages were available and must be awarded “based on evidence and not on sympathy, speculation, or guesswork.” RIV.1009. We “presume that jurors follow their instructions.” *Penry v. Johnson*, 532 U.S. 782, 799 (2001). Ottawa has not explained why that presumption is overcome here.

Verdict size and weight of the evidence. Focusing on the Estate’s closing argument mentioning deterrence, Ottawa contends the \$33 million verdict is excessive and against the weight of the evidence. The district court rejected this argument, and so do we.

Juries have “wide discretion” to “fix the amount of noneconomic compensatory damages,” *Racher*, 871 F.3d at 1172, and “[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context,” *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 438 (1996) (internal quotation marks omitted). When determining whether attorney misconduct requires a new trial, courts “compare the propriety of the challenged remarks against the weight of the evidence adduced at trial.” *Burke*, 935 F.3d at 1026. Therefore, “[e]ven if some statements exceeded the bounds of permissible argument, a judgment will not be disturbed unless it clearly appears that the challenged remarks influenced the verdict.” *Id.* (quoting *Racher*, 871 F.3d at 1168). Applying these principles, we cannot say the reference to deterrence during the Estate’s rebuttal influenced the verdict given the evidence presented to the jury. *See, e.g.*, RV.1032–36 (stipulating that Mr. Ellis complained of severe back pain, reported having a seizure, was denied water, could not walk, said he had discolored legs, and was “mocked and threatened” for reporting his medical concerns); R.Supp.264.0:01:48–3:08 (video showing Nurse Horn called Mr. Ellis a “dumb ass” and threatened to use the D-ring to restrain him for asking for medical care); RIII.760–62 (discussing Mr. Ellis being denied requests for medication, yelling about an asthma attack, moaning in distress, and crying); R.Supp.257.0:11:44–15:44 (video showing Mr. Ellis

yelled “help!” more than twenty-five times over four minutes to no avail); RVI.1295 (discussing Mr. Ellis begging to see his child); R.Supp.261.0:04:14–:17; R.Supp.264.0:01:48–3:08 (videos displaying jail staff telling Mr. Ellis to “Shut up!” in response to his complaints).

Thus, even assuming the Estate’s counsel committed misconduct by displaying emotion and making an improper remark, the district court did not abuse its discretion by denying Ottawa’s motion for a new trial on that basis.

V

Ottawa next challenges the district court’s denial of its motion for a remittitur, which sought to reduce the \$33 million award or obtain a new trial under Rule 59. In the district court, Ottawa made two arguments for reducing the compensatory damages award. First, Ottawa argued “the award drastically exceeds awards in comparable cases.” RXII.2567 (header formatting omitted). Second, Ottawa insisted the verdict resulted from passion and prejudice because counsel, in its closing argument, had “blatantly asked the jury to punish” Ottawa. RXII.2565. The district court denied Ottawa’s motion. On appeal, Ottawa repeats the arguments it advanced in district court.

In the remittitur context, we will reverse the district court’s ruling “only if we can discern a manifest abuse of discretion.” *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 766 (10th Cir. 2009) (internal quotation marks

omitted); see *United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1229 (10th Cir. 2000) (observing a denial of remittitur motion “on grounds of excessiveness will not be disturbed on appeal absent a *gross abuse of discretion*” (emphasis added)). This highly deferential standard of review is appropriate because “[t]he jury ha[s] wide latitude to choose an award based on the evidence.” *Hill v. J.B. Hunt Transp., Inc.*, 815 F.3d 651, 670 (10th Cir. 2016); see also *Prager v. Campbell Cnty. Mem’l Hosp.*, 731 F.3d 1046, 1063 (10th Cir. 2013) (“The jury, who has the first-handed opportunity to hear the testimony and to observe the demeanor of the witnesses, is clothed with a wide latitude and discretion in fixing damages[.]” (internal quotation marks omitted)). The moving party bears “the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence.” *Hynes v. Energy W., Inc.*, 211 F.3d 1193, 1206 (10th Cir. 2000). And “the trial court is in the unique position to observe the witnesses and their demeanor as well as the jurors’ attitude during the trial[.]” *Bielicki v. Terminix Int’l Co., LP*, 225 F.3d 1159, 1165 (10th Cir. 2000).

The task for the appellate court is therefore limited: We “must evaluate whether the evidence supports the verdict,” *Burke*, 935 F.3d at 1035, “view[ing] the evidence in the light most favorable to the prevailing party,” *Hill*, 815 F.3d at 668 (quoting *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983)).

Ultimately, we ask whether “the jury award is so excessive . . . as to shock the judicial conscience and to raise an *irresistible inference* that passion, prejudice, corruption or another improper cause invaded the trial.” *Murphy Oil USA, Inc. v. Wood*, 438 F.3d 1008, 1021 (10th Cir. 2006) (emphasis added) (internal quotation marks omitted).

Guided by these standards, we consider Ottawa’s appellate arguments and discern no error.

A

Ottawa contends the district court “ignored timely, relevant jury verdicts” in “comparable cases” demonstrating “the excessiveness of the award” here, thus requiring remittitur. Op. Br. at 51–56. In particular, Ottawa identifies verdicts in other “§1983 cases concerning the denial of medical care in Oklahoma jails.”²⁷ Op. Br. at 51. Even assuming for argument’s sake that Ottawa’s referenced cases are comparable, we have repeatedly disapproved of

²⁷ Ottawa focuses on *Burke*, 935 F.3d 960 (10th Cir. 2019) and *Young v. Correctional Healthcare Cos., Inc.*, 721 F. Supp. 3d 1209 (N.D. Okla. 2024). Both cases involve deliberate-indifference claims under *Monell* for the death of an inmate in Oklahoma county jail. *See Burke*, 935 F.3d at 985, 991, 997–98; *Young*, 721 F. Supp. 3d at 1217–18. In *Burke*, the jury returned a verdict for the plaintiff for \$10 million in compensatory damages and \$250,000 in punitive damages. 935 F.3d at 989. In *Young*, the jury returned a verdict for the plaintiff for \$14 million in compensatory damages and \$68 million in punitive damages. 721 F. Supp. 3d at 1218–19.

the comparative analysis Ottawa urges. *Hill*, 815 F.3d at 670 (explaining we “discourage comparisons to awards from other cases” as part of the remittitur analysis); *Hoskie v. United States*, 666 F.2d 1353, 1358 n.4 (10th Cir. 1981) (discussing how “we do not generally countenance such comparisons[,]” because “[i]t is a difficult and often fruitless task to compare damages in one case with those in another”); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1252 (10th Cir. 2000) (reasoning “such comparisons yield no insight into the evidence the jurors heard and saw or how they used it during their deliberations”); *Dolenz v. United States*, 443 F.3d 1320, 1322 (10th Cir. 2006) (rejecting the invitation to “engage in a comparison of the challenged awards to awards . . . in similar cases”). We cannot say the district court abused its discretion by declining to engage in an inquiry we have discouraged.

B

Ottawa next insists that repeated references to deterrence made by the Estate’s counsel during the rebuttal closing argument requires remittitur. Recall, the complaint initially asserted a claim for punitive damages, but the Estate later disclaimed it and sought only compensatory damages.²⁸ In

²⁸ Only compensatory damages, not punitive damages, are recoverable against Ottawa. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding that “a municipality is immune from punitive damages under [] § 1983”).

Ottawa’s view, the size of the damages award suggests that it was intended not to compensate the Estate but to punish Ottawa and deter it from committing unlawful conduct again. The compensatory award stemmed from an impermissible punitive purpose, Ottawa insisted, so it must be reduced. The district court rejected this argument.

The district court first acknowledged the Estate’s counsel “invoked the deterrent purposes of Section 1983,” but concluded “it is not clear those remarks went too far.” RXIV.3129. In the district court’s view, counsel merely responded to Ottawa’s own comments about punishment during its closing remarks. But even if the statements were improper, they did not influence the verdict. Ottawa “fails to show that the jury’s \$33-million-dollar award was clearly influenced by counsel for Plaintiff’s closing remarks,” the district court reasoned, “rather than its own independent assessment of the evidence presented.” RXIV.3131. Again, we discern no error.

1

“[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights[.]” *Carey v. Piphus*, 435 U.S. 247, 254 (1978). In addition to “provid[ing] compensation to the victims of past abuses,” § 1983 was intended “to serve as a deterrent against future constitutional deprivations[.]” *Owen v. City of Independence*,

445 U.S. 622, 651 (1980); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (“[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983.”). “[T]he threat that [compensatory] damages might be levied against the [municipality] may encourage those in a policymaking position to institute internal rules and programs . . . to minimize the . . . infringements on constitutional rights.” *Owen*, 445 U.S. at 652. Accordingly, “[§] 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (citing *Carey*, 435 U.S. at 256–57); *see id.* at 307 (explaining, in the § 1983 context, “compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . , personal humiliation, and mental anguish and suffering.” (internal quotation marks and citations omitted)). “Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs’ actual losses.” *Id.*

Of course, unlike compensatory damages, “[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and

to deter him and others from similar extreme conduct.” *City of Newport*, 453 U.S. at 266–67. The Supreme Court “never has suggested that punishment is as prominent a purpose under [§ 1983] as are compensation and deterrence.” *Id.* at 268. Indeed, “[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of *compensatory damages*.” *Carey*, 435 U.S. at 256–57 (emphasis added).

Against this backdrop, we have “recognize[d] the potential prejudice posed by arguments that invite the jury to award damages based on punishment or deterrence when only compensatory damages are at issue.” *Burke*, 935 F.3d at 1028 (quoting *Racher*, 871 F.3d at 1169). Still, arguments “explicitly link[ing] deterrence to compensatory damages rather than punitive damages” will not always require reversal of a jury verdict. *Id.* at 1029; *see id.* at 1035–36 (concluding the district court did not abuse its discretion in denying motion for remittitur because the jury was presented with “evidence [that] supported” the verdict). “Even if some statements exceeded the bounds of permissible argument, ‘a judgment will not be disturbed unless it clearly appears that the challenged remarks influenced the verdict.’” *Racher*, 871 F.3d at 1168 (quoting *Lambert v. Midwest City Mem’l Hosp. Auth.*, 671 F.2d 372,

375 (10th Cir. 1982)); *see also Hill*, 815 F.3d at 670 (finding no abuse of discretion where the jury was presented with “ample evidence” to support the jury’s verdict).

Resolving a motion for remittitur, therefore, is a fact-intensive inquiry, requiring courts to focus specifically on the evidence presented to the jury at trial. In the remittitur context, our precedent has described the requisite evidence as “support[ing] the verdict,” “ample,” “sufficient,” and “substantial.” *See Burke*, 935 F.3d at 1035–36 (concluding “the evidence supports the verdict”); *Hill*, 815 F.3d at 670 (describing the evidence as “ample” to support the jury’s verdict); *Hynes*, 211 F.3d at 1206 (finding the evidence “was sufficient”); *O’Gilvie v. Int’l Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987) (discussing “the usual remittitur situation” requires “a trial judge [to] review[] the jury’s verdict in order to determine if substantial evidence at trial supported the amount awarded”). We need not dwell on what term is most appropriate because, as we explain, the standard is satisfied here.

2

On the record before us, and given the “considerable deference on appeal” owed to the trial court, *Burke*, 935 F.3d at 1035 (internal quotation marks omitted), we discern no abuse of discretion in the district court’s conclusion that remittitur was unwarranted.

Like the district court, we assume the Estate made improper remarks in its rebuttal closing argument and ask only whether the trial evidence supports the compensatory damages award.²⁹ There can be no serious question that it does. For over a week of trial, the jury heard ample proof of the actual harm sustained by Mr. Ellis during his pretrial confinement. Ottawa does not meaningfully argue otherwise. Ottawa simply points to conflicting evidence, which is not our duty to resolve. *See Webco*, 278 F.3d at 1128 (“It is the province of the jury, and not this court, to resolve conflicts in the evidence.”).

²⁹ In *Burke*, “counsel appeared to ask the jury twice to base its award of *compensatory* damages on deterrence.” 935 F.3d at 1029. There, in considering whether to set aside the jury’s verdict because of an improper argument, we assumed without deciding that counsel’s remarks were improper and also observed that “[w]e have not previously addressed the limits of permissible comments in this circumstance.” *Id.* We take the same approach today.

The extent to which deterrence can inform a jury’s decision in a § 1983 case involving only compensatory damages and what lawyers can tell juries about deterrence in such cases present difficult questions. In her thoughtful concurrence, Judge McHugh “would hold that the Estate’s counsel’s comments in closing argument, which encouraged the jury to base its [compensatory damages] award on deterring future misconduct, were improper.” Concurrence at 1. Though we need not draw bright lines to resolve this appeal, some guideposts emerge from the applicable law. For instance, it would be inconsistent with § 1983’s deterrent purpose for counsel to urge the jury to rely on general concepts of punishment, without more, as a freestanding reason to impose a compensatory damages award. But it would be consistent with § 1983’s deterrent purpose to seek redress for compensable injuries and argue to the jury that a generous award for those injuries will have *the effect* of deterring future tortious conduct.

We fully endorse the district court’s description of why the verdict against Ottawa was not against the weight of the evidence or so excessive as to shock the judicial conscience:

It is unclear how one might monetize the pain of a slow septic death, or how that process and prospect of dying felt to a young man who must have questioned why he turned himself in; who begged for others to help him; who cried for his child; and who was then forced to weigh the risk of being chained to the floor against the hope of asking for help. It is difficult to calculate the cost of the anguish Mr. Ellis felt when he considered whether to continue to plead for help for the sake of himself and his child, as he sat next to the D-ring cemented in the floor of his cell, possibly wondering if, as threatened, he might be chained to it if he spoke again. Perhaps, he hoped he would get better if he stayed quiet. We do not know. We cannot know the pain of that choice. It is unclear the precise monetary values the jury assigned to the variables of pain, despair, disbelief, and helplessness endured by Mr. Ellis.

RXIV.3128. We will defer to the jury’s award of damages when it is “supported by any competent evidence tending to sustain it[.]” as is plainly the case here.³⁰

Prager, 731 F.3d at 1063 (internal quotation marks omitted).

VI

We next turn to Ottawa’s challenge to the award of attorneys’ fees to the Estate. “We review a district court’s attorneys’ fees award for abuse of

³⁰ We note the jury’s award of \$33 million in compensatory damages shows it necessarily rejected awarding the “50 million dollars or more” that the Estate had requested. RIX.1905.

discretion[.]” *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1177 (10th Cir. 2023).

Ottawa contended the Estate unreasonably sought fees for duplicative tasks and work on claims dismissed by the district court. The district court sustained some of Ottawa’s objections, reducing the fee award in part. On appeal, Ottawa contends the district court should have made even more deductions to account for “an unreasonable number of hours spent on straightforward, unnecessary, and duplicative tasks,” such as “reviewing video surveillance footage” and the Estate’s work on “dismissed claims and claims made against other former co-defendants.” Op. Br. at 64. We are not persuaded.

“An award of attorneys’ fees is a matter uniquely within the discretion of the trial judge who ‘has intimate knowledge of the efforts expended and the value of the services rendered.’” *In re Syngenta*, 61 F.4th at 1178 (quoting *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988)). The district court’s “experience with and knowledge about the course of the litigation compels appellate court deference to [its] determination in the absence of an abuse of discretion.” *Id.* (alteration in original) (quoting *Brown*, 838 F.2d at 453); *see also Anchondo v. Anderson, Crenshaw & Assocs., LLC*, 616 F.3d 1098, 1104 (10th Cir. 2010) (noting we “owe[] much deference” to a

district court’s “uniquely informed on-the-spot judgment” about attorneys’ fees).

Here, the district court disagreed with Ottawa that the Estate’s attorneys spent an unreasonable amount of time reviewing jail footage. According to the district court, the fees sought were not attributable to “an aggressive litigation strategy rather than simple due diligence[,]” and “[i]t is unclear how Plaintiff would know what footage would be relevant before reviewing the footage in its entirety.” RXIV.3143–44. The hours spent working on issues related to then-dismissed defendants and claims, the district court found, also was reasonable since those issues were “interrelated with the claim against the Defendant.” RXIV.3146. Ottawa simply disagrees with the fee award but offers no basis to conclude the district court abused its discretion. The challenged determinations are inherently discretionary, and we see no reason to disturb them on the record before us. We thus affirm the district court’s attorneys’ fees award to the Estate.

VII

Ottawa also appeals the denial of its motion for reconsideration under Rule 60(b)(6).³¹ Rule 60(b) allows a district court to “relieve a party . . . from a

³¹ The Estate contends the district court lost jurisdiction to rule on Ottawa’s motion for reconsideration after Ottawa filed its notice of appeal. The Estate is wrong. *See Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965) (“In

final judgment, order, or proceeding for” six reasons.³² Fed. R. Civ. P. 60(b). Ottawa moved for reconsideration of the district court’s denial of its motions for remittitur and a new trial under Rules 60(b)(6) and 59(e), stating that “Defendant seeks reconsideration of this Court’s determination that the \$33 million compensatory damages verdict was not excessive and was not the product of passion or prejudice[.]”³³ RXIV.3165.

We review a district court’s denial of a Rule 60(b) motion for abuse of discretion. *Choice Hospice, Inc. v. Axxess Tech. Sols., Inc.*, 125 F.4th 1000, 1011

ordinary civil cases the rule is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion[.]”).

³² These reasons are:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)–(6).

³³ Although Ottawa’s motion for reconsideration mentioned Rule 59, the district court denied the Rule 59 argument as untimely, and Ottawa does not challenge that ruling on appeal.

(10th Cir. 2025). “Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances.” *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005) (internal quotation marks omitted). “Given the lower court’s discretion, the district court’s ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below.” *Id.* (internal quotation marks omitted). “A reviewing court may reverse only if it finds a complete absence of a reasonable basis and [is] certain that the . . . decision is wrong.” *Id.* (alterations in original) (internal quotation marks omitted). A Rule 60(b) “motion is not a substitute for an appeal.” *Id.* (internal quotation marks omitted).

We conclude the district court did not abuse its discretion. “[A] motion for reconsideration . . . is not appropriate to revisit issues already addressed[.]” *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). But that is what Ottawa’s motion sought to do. Ottawa moved for reconsideration under Rule 60, renewing the same arguments it already made—the “amount of the award is excessive and shocks the conscience” as evidenced by damages awards in similar cases; the verdict was “excessive” given the “evidence that an ambulance was called for Mr. Ellis and that he refused to let EMS take him to the hospital for further evaluation the day before his death”; and the reference by the Estate’s counsel to deterrence demonstrates “the excessive award was

the result of jury passion, prejudice, or improper motive[.]” RXIV.3167, 3174–75 (heading formatting omitted).

The district court rejected Ottawa’s arguments, concluding they were raised in the motions for remittitur and new trial and already ruled upon.³⁴ To the extent Ottawa raises a new argument regarding the subsequently filed remittitur order in *Young v. Correctional Healthcare Cos., Inc.*, 721 F. Supp. 3d 1209 (N.D. Okla. 2024), it does not change our conclusion. In all three motions—the motion for new trial, for remittitur, and for reconsideration—Ottawa’s argument remained the same: “*Young* is persuasive authority which demonstrates the \$33 million award in the present case is shocking to the judicial conscience[.]” Supp. Op. Br. at 6–7. As discussed, however, the district court had already correctly rejected the invitation to “compare awards” between cases. RXIV.3132 (citing *Stokes v. United States*, 967 F.3d 1034, 1044 (10th Cir. 2020)).

VIII

We affirm the district court in full.

³⁴ To the extent the Omnibus Order did not discuss the evidence about Mr. Ellis’s refusal of transport, we discern no abuse of discretion in the district court’s denial of reconsideration. At bottom, Ottawa’s argument targets the sufficiency of the evidence, which the district court fully considered.

Nos. 24-5035 & 24-5080, *Bond v. Sheriff of Ottawa County*

McHUGH, Circuit Judge, joined by **HOLMES**, Chief Judge, concurring:

I concur with the excellent majority opinion in full. Specifically, I agree with the panel’s conclusion that under the *Osterhout* factors, any impropriety in the Estate’s counsel’s conduct did not warrant a new trial. And I agree that Ottawa’s motion for remittitur of the \$33 million compensatory damages award should be rejected. I write separately, however, because I would hold that the Estate’s counsel’s comments in closing argument, which encouraged the jury to base its award on deterring future misconduct, were improper.

I. CASE LAW

In *Burke v. Regalado*, 935 F.3d 960, 1029 (10th Cir. 2019), as in this case, counsel asked the jury to use its award to “not only compensate for [the plaintiff’s] injuries but also to deter future constitutional violations.” In *Burke*, punitive damages were also available, and we noted that “references to deterrence and systemic correction are not necessarily improper when, as here, the jury was instructed to consider whether to award punitive damages.” *Id.* But we clarified that some of counsel’s remarks asking the jury to “base its award of *compensatory* damages on deterrence” “may have crossed the line.” *Id.* We noted that municipal entities are immune from punitive damages and assumed without deciding that statements which had “explicitly linked deterrence to compensatory damages rather than punitive damages” were improper. *Id.* The majority takes the same approach as *Burke* and assumes, without deciding, that the argument about deterrence was improper in a case where only compensatory damages were permitted.

Building on *Burke*, I would squarely hold that encouraging a jury in a § 1983 case to base an award of compensatory damages on deterrence—rather than compensating the plaintiff for pain, suffering, and loss of familial relationships—is improper. The Supreme Court has acknowledged multiple times that § 1983 has a broad deterrent purpose, and that compensatory damages can further that deterrent purpose. But as discussed *infra*, the Court has also been clear that deterrence in the § 1983 context is primarily served by levying punitive damages against individual wrongdoers, that municipalities cannot be held liable under § 1983 for punitive damages, and that considerations informing a compensatory damages award are limited to compensating a plaintiff for the harm caused by the defendant. Against that background, encouraging a jury assessing an award of compensatory damages to consider the deterrent purpose of the award is improper because it urges the jury to base the award on something more than the amount necessary to compensate the plaintiff.

In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court explained that “[t]he central aim of the Civil Rights Act [the forerunner of § 1983] was to provide protection to those persons wronged by the ‘[m]isuse of power, possessed by virtue of state law.’” *Id.* at 650 (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961)). This protection is effectuated, the Court explained, by allowing plaintiffs to hold state officials liable for violations of their constitutional rights. *See id.* Beyond compensating plaintiffs for past deprivations, § 1983 was also “intended . . . to serve as a deterrent against future constitutional deprivations.” *Id.* at 651. As such, holding municipalities liable for “all . . . injurious conduct, whether committed in good faith or not, should create an incentive for

officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651–52.

But the next year, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), the Supreme Court held that punitive damages are not recoverable against a municipality in a § 1983 suit. In so holding, the Court explained that § 1983's general deterrent purpose was not a sufficient reason to override existing immunities at common law such that punitive damages against a municipality could be justified.

First, examining history and policy, the Court explained that “the tort liability created by § 1983 cannot be understood in a historical vacuum.” *Id.* at 258. The Court noted that when Congress enacted the forerunner to § 1983, “the immunity of a municipal corporation from punitive damages at common law was not open to serious question.” *Id.* at 259. Rather, it was “generally understood” that a municipality “was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages.” *Id.* at 259–60. This “[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day.” *Id.* at 260. Namely, “courts view[] punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.” *Id.* at 263. As such, “[c]ompensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers.” *Id.* Similarly, the legislative history of the Civil Rights Act and its amendments contained no suggestion Congress would have contemplated punitive damages against municipalities, but rather suggested

opposition “to punishing innocent taxpayers and bankrupting local governments.” *Id.* at 266.

Having concluded the common law prohibition against imposing punitive damages against municipalities was not disturbed by anything in the text or legislative history of § 1983, the Court further held that “considerations of public policy” did not “dictate a contrary result.” *Id.* First, the Court explained that the retributive purposes of punitive damages would not be served by imposing punitive damages against a municipality when the taxpayers would shoulder the burden. *Id.* at 266–67.

Next, the Court turned to “[t]he other major objective of punitive damages”—deterrence. *Id.* at 267. The Court noted the plaintiff had “argue[d] vigorously that deterrence is a primary purpose of § 1983, and that because punitive awards against municipalities for the malicious conduct of their policymaking officials will induce voters to condemn future misconduct through the electoral process, the threat of such awards will deter future constitutional violations.” *Id.* at 268. The Court acknowledged that “the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983,” and that “[i]t is in this context that the Court’s prior statements contemplating punitive damages ‘in a proper § 1983 action’ should be understood.” *Id.* (emphasis added) (quoting *Carlson v. Green*, 446 U.S. 14, 22 (1980)). Nonetheless, the Court held that “the deterrence rationale of § 1983 does not justify making punitive damages available against municipalities.” *Id.* This was because “it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed

based on the wealth of their municipality.” *Id.* at 268. Corrective action such as voting out or discharging the “offending officials” could take place whether or not punitive damages were awarded, and in fact, compensatory damages alone may be enough inducement for the public to vote out offending officials. *Id.* at 269. Instead, the “*more effective means of deterrence*” is “allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official,” rather than “the citizen-taxpayer.” *Id.* at 269–70. The Court concluded that given a jury’s wide latitude in assessing punitive damages, and the fact that evidence of a tortfeasor’s wealth is admissible as a measure of punitive damages that should be awarded, the “unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.” *Id.* at 270. And such a “windfall recovery” would put a “strain on local treasuries and therefore on services available to the public at large.” *Id.* at 270–71.

Following *City of Independence* and *City of Newport*, the Supreme Court has continued to recognize § 1983’s broad deterrent purpose but has tended to emphasize deterrence in the context of discussing punitive damages. For example, in upholding a punitive damages award against an individual officer, the Supreme Court stated more succinctly that “deterrence of future egregious conduct is a primary purpose of *both* § 1983, *and* of punitive damages.” *Smith v. Wade*, 461 U.S. 30, 49 (1983) (internal citations omitted). And in *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n.9 (1986), the Court stated that, in contrast to compensatory damages, the purpose of punitive damages in § 1983 cases is “to punish the defendant . . . and to deter others from similar behavior.” *See also Keenan v. City of Philadelphia*, 983 F.2d 459, 478

(3d Cir. 1992) (Higginbotham, J., dissenting) (noting “purposes of punishment and deterrence are those frequently cited by the Supreme Court” in discussing punitive damages awards).

Moreover, the Supreme Court has been clear about the proper considerations for assessing compensatory damages in § 1983 cases, drawing from common law tort principles. *See, e.g., Stachura*, 477 U.S. at 305–06. In *Stachura*, the Court stated that “[p]unitive damages aside, damages in tort cases are designed to provide ‘compensation for the injury caused to plaintiff by defendant’s breach of duty.’” *Id.* at 306 (quoting 2 F. Harper, F. James, & O. Gray, *Law of Torts* § 25.1, p. 490 (2d ed. 1986) (second emphasis in original)). Compensatory damages “include not only out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering.’” *Id.* at 307 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). “Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*,” *i.e.*, “damages grounded in determinations of plaintiffs’ actual losses.” *Id.* (first emphasis in original). Firmly grounding damage awards in the plaintiff’s losses is important so that juries are not “free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants.” *Id.* at 310.

Drawing on *Stachura*, the Tenth Circuit has described the “appropriate compensatory damages” in a § 1983 case brought by the estate of a deceased victim to “include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim’s life had not the injury occurred, the

victim’s loss of consortium, and other damages recognized in common law tort actions.” *Berry v. City of Muskogee*, 900 F.2d 1489, 1507 (10th Cir. 1990). This is meant to be a “relatively generous standard”: “compensation in cases involving constitutional rights should not be approached in a miserly fashion,” because “[i]t is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right.” *Evans v. Fogarty*, 241 F. App’x 542, 562 (10th Cir. 2007) (unpublished) (quoting *Foster v. MCI Telecomms. Corp.*, 773 F.2d 1116, 1121 (10th Cir. 1985)). However, the compensatory award must be linked to “the facts and circumstances of the case.” *Id.*

II. ANALYSIS

To recap, I read the governing Supreme Court case law to (1) recognize § 1983’s deterrent purpose in the assessment of both compensatory and punitive damages awards; (2) to emphasize that the considerations informing an award of compensatory damages must be grounded in the plaintiff’s actual harm, not in a desire to punish the wrongdoer; and (3) to firmly prohibit the consideration of punitive damages when the defendant is a municipality. Putting these pieces together, I would hold that it is improper for a § 1983 plaintiff’s closing argument seeking only compensatory damages to suggest to the jury that deterrence—one of the two considerations principally underlying punitive damages—can and should enter the compensatory damages calculus. While deterrence is an effect of compensatory damages awarded for § 1983 claims, it is improper for counsel to suggest that deterrence is a component of such an award.

Here, I would conclude that the Estate’s closing argument improperly encouraged the jury to consider deterrence as a basis for its damages award. The Estate’s closing argument did properly emphasize compensating Mr. Ellis for his pain and suffering. However, it also pointed to deterrence as a basis for the jury to impose a significant compensatory damages award:

MR. SMOLEN: They told you, “Hey, we didn’t do anything wrong. But if we did, give – give his family 3 million bucks. Look at the interest rate. 5 percent. Think about all the things that they can do with that. These poor people. Think about all the things that they can do with that. That should be enough, right?”

They talk about this idea of “you can’t punish us,” but the point of constitutional law, the point of a 1983 case, which is the area that we practice, is the idea of a deterrent effect. . . .

The idea of deterrence, the idea that you eight people are getting to make this decision, and you can deter this from happening in our community through your verdict. You can deter this from happening in the state of Oklahoma based on awarding an historically significant amount.

Again, you’re the last kind of line. We’ve worked on this case for eight years, and it’s hard for me, but the most important thing is that I’m handing, like, this off to you to make that decision.

I think that the case is worth 50 million dollars or more based on the pain and suffering that Terry went through. I think that when you really sit down, and you look at the jury instruction on compensatory damage, and you think about what he was suffering, what his suffering was like both from a physical standpoint and from a mental standpoint and the idea that even in those moments of suffering, he just wants, “Like, what are you going to tell my kid? Like, I came in here. I did the right thing. I did what I thought was the right move, and here I am in a cement cell while people scream at me and mock me, and my legs are turning black, and I can’t breathe.” But even in those moments, he is thinking about his child, so you know that that was important to him. Those were some of the last things that we know that he was saying, other than screaming for help or crying out in pain.

And so I think when you look at how young he was, the idea that he had checked himself in, that the pain from an emotional standpoint and from a physical standpoint was so great, that this has to be an incredibly significant verdict; *otherwise, these gentlemen are going to walk out of here, and they're going to high-five because they'll say, "We can – we can run a cheap medical system. We don't have to even have a doctor. We can go 18 years with an LPN and no one following the policies, no one even knowing what the medical policies were, no one following the contracts. We can run a very, very cheap medical system because that jury just came back with a very small verdict. They listened to us. They just awarded the family 3 million dollars. Business as usual. That worked out from a financial standpoint."*

That's what it's about to them. That's why we're here, is because they think, like them, who devalue a human life for a person who is in a jail setting, that you will as well. That you won't put value on Terry Ellis's life just because he happened to be in the Ottawa County Jail.

That's why we're here. That's – that's why we're having to present this case to you, is because really what you've seen throughout the last week is their own indifference, and it's an indifference to the concept of human life, the value of constitutional rights, the value that we all live in a country – we've had people die for our country to make sure that we have these rights. And you are the eight people who can uphold those rights, and you can award a verdict that actually compensates, truly compensates, for what Terry went through, and *also has the ability to deter it from happening in the future.*

App. Vol. IX at 1902–07 (emphases added).¹

In particular, the remarks stating “the point” of § 1983 is deterrence, asking the jury to see themselves as the “last . . . line” to prevent future constitutional rights violations in the state, to picture the jail staff and administrators “walk[ing] out of here

¹ Notably, in a sidebar after Ottawa's counsel lodged an objection when the Estate began to discuss deterrence, Ottawa asserted that the Estate “tries to use [deterrence] in [] term[s] of deterring to punish,” which counsel asserted was improper. App. Vol. IX at 1904. The district court stated “[h]e said deter, and he hasn't gone to punish,” and so allowed the remarks. *Id.* As discussed *infra*, I would hold that encouraging a jury to base its award on deterrence in the context of compensatory damages is itself problematic, even without a direct reference to punishment.

. . . high-fiv[ing]” if the jury acceded to the request for a lower verdict all went far past an acknowledgment of § 1983’s deterrent purpose. *See id.* at 1903, 1905–06. Instead, these remarks encouraged the jury to base its award not just on compensation for Mr. Ellis’s pain and suffering, but also on the need to award a “historically significant amount” to deter future violations from occurring. *See id.* at 1905. These remarks, notably, are far afield of the jury instructions, which properly directed the jury to award compensatory damages for “Mr. Ellis’[s] physical and mental pain before death, loss of life, and loss of familial relationships,” and to base such an award “on evidence and not on sympathy, speculation, or guesswork.” App. Vol. IV at 1009. Instead, the Estate’s remarks encouraged the jury to consider deterrence, and specifically the need to award a “historically significant amount” to deter future violations. *See App. Vol. IX* at 1905. This is a consideration that should be reserved for a punitive damages award, which was not available against the municipal defendant in this case. I would hold these remarks were improper.

The Estate cites two out-of-circuit cases to argue that the remarks were not improper, but neither changes my analysis. In the first, *Chalmers v. City of Los Angeles*, 762 F.2d 753, 756 (9th Cir. 1985), a municipality appealed a jury verdict of \$12,500 in compensatory damages in a § 1983 case. The municipality argued, *inter alia*, that counsel’s discussion in closing arguments of “the deterrent effects of damages under section 1983” was “effectively requesting an award of punitive damages.” *Id.* at 761. The Ninth Circuit acknowledged that *City of Newport* held a municipality may not be held liable for punitive damages under § 1983, but it also emphasized that case’s

acknowledgement that deterrence is a general goal of § 1983. *Id.* (citing *City of Newport*, 453 U.S. at 268). The court concluded that “an argument which emphasizes deterrence is not necessarily equivalent to an argument for punitive damages” and noted that, in the face of an objection during closing arguments, counsel “explicitly outlined the compensatory nature of the requested damages.” *Id.*

Similarly, in *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 39–40 (2d Cir. 1997), a municipal defendant challenged a jury verdict in a § 1983 case. The Second Circuit rejected an argument that counsel’s plea to the jury to ““send a message’ with its damage award” was essentially a plea for punitive damages, holding that “counsel’s comments merely suggested that the jury should send a message that this country’s civil rights laws are vigorously enforced and that plaintiff should be fully compensated despite the fact that the defendant is a government agency, concepts that are totally appropriate.” *Id.* at 40. Notably, the court did not cite *City of Newport* or any Supreme Court precedent concerning the interplay between § 1983’s deterrent purpose and punitive damages. *See id.*; *see also Lee v. City of Syracuse*, 446 F. App’x 319, 324 (2d Cir. 2011) (unpublished) (similar).

I do not see these cases as incompatible with a conclusion that counsel’s comments here went beyond noting § 1983’s deterrent effect and improperly suggested that deterrence should form the basis of the jury’s calculation of a compensatory damages award. Both cases recognize that an argument for deterrence is not problematic where counsel makes clear that compensation is the basis of the award, rather than punishment. *See Chalmers*, 762 F.2d at 761; *Ramirez*, 112 F.3d at 40. But here, as discussed *supra*, the

closing arguments did not properly focus the jury on the need to provide compensation alone, as the *Chalmers* and *Ramirez* comments ultimately did. Instead, the Estate’s counsel asked the jury to use deterrence as a *primary reason* to assess a “historically significant” damages award. *See* App. Vol. IX at 1905. These comments were improper, even considering these out-of-circuit cases.

Again, I agree with the majority that the Estate’s counsel’s comments here ultimately did not constitute misconduct under the *Osterhout* factors, and that a remittitur of the \$33 million compensatory damages award is unwarranted considering the compelling evidence of Mr. Ellis’s prolonged suffering. But I would clarify for future litigants that Supreme Court and Tenth Circuit precedent prohibits asking the jury to calculate damages based on deterrence in § 1983 cases in which only compensatory damages are available. While a compensatory damage award properly tailored to the actual injury suffered will likely also have a deterrent effect on the future conduct of a municipality, it is improper to ask the jury to calculate a compensatory award in excess of the actual injury with a goal toward deterrence. Thus, I would hold that the Estate’s closing argument remarks highlighted above were improper.