IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUSTIN P. BOND, as Personal Representative of the Estate of Terral Ellis, II, deceased, Plaintiff, v. THE SHERIFF OF OTTAWA COUNTY, in his official capacity, Defendant.	)	Case No. 17-cv-00325-CRK-CDL

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND BRIEF IN SUPPORT

Wellon B. Poe, OBA No. 12440
Jamison C. Whitson, OBA No. 18490
Alison B. Levine, OBA No. 33021
Justin P. Ashlock, OBA No. 33459
COLLINS ZORN & WAGNER, PLLC
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078
E-mail: wbp@czwlaw.com
jcw@czwlaw.com
abl@czwlaw.com
jpa@czwlaw.com

ATTORNEYS FOR DEFENDANT SHERIFF OF OTTAWA COUNTY, IN HIS OFFICIAL CAPACITY

October 5, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL RULES

LIST OF EXHIBITS

DEFENDANT'S MOTION FOR JUDGMENT
AS A MATTER OF LAW AND BRIEF IN SUPPORT

Defendant Sheriff of Ottawa County, in his official capacity ("Defendant"), respectfully moves this Court, pursuant to Fed. R. Civ. P. 50(b), to grant his Renewed Motion for Judgment as a Matter of Law.[1] Plaintiff failed to present evidence at trial which was sufficient to support the verdict. Defendant therefore requests this Court grant judgment in his favor or order a new trial. Additionally, Defendant requests, pursuant to Fed. R. Civ. P. 50(c)(1), that if the present Motion is granted that the Court conditionally rule on Defendant's related Motion for New Trial [Dkt. 411]. In support thereof, Defendant respectfully submits the following Brief:

BRIEF IN SUPPORT

STATEMENT OF THE CASE

Decedent Terral Ellis ("Ellis") was detained in the Ottawa County Jail from October 10-22, 2015. On October 10, 2015, Ellis was booked into the Ottawa County Jail ("the jail") as a pre-trial detainee on an outstanding arrest warrant. A medical history was taken at book-in in which Ellis reported that he had asthma but did not disclose any other current medical conditions, medical treatments, or injuries at that time. Defendant employed Theresa Horn, LPN ("Nurse Horn") as a full-time nurse to provide day-to-day medical care to jail inmates. Defendant also contracted with Certified Physician Assistant Aleta Fox ("Phys. Asst. Fox"), who came to the jail as requested to conduct inmate medical exams and to remain on-call at all times for consultation regarding routine inmate care and medical emergencies. Additionally, Defendant contracted with an on-call physician to assist with any medical issues which could not be addressed by either Nurse Horn or Phys. Asst. Fox.

[1] Defendant moved for Judgment in his favor pursuant to Fed. R. Civ. P. 50(a) at the close of Plaintiff's case. (Ex. 1, Vol. X, 1028:1-1035:8).

On Saturday, October 17, 2015, Nurse Horn received a call from jail staff advising her that Ellis was complaining that he thought he had broken his back, which Ellis attributed to sleeping on a hard bunk. Despite his complaint of a broken back, Ellis was mobile at that time and denied having fallen or receiving any other injuries. Nurse Horn advised the jailer to give Ellis ibuprofen and advised that she would check on him the following Monday. On Monday, October 19, 2015, Ellis was brought to the nurse's office where he advised Nurse Horn that he had pain in the middle of his back and thought it might be kidney stones. She examined him and advised Ellis that it appeared to be a dislocated rib. She then allowed Ellis to call his grandfather to see if he would pay for a chiropractor appointment. Apparently there was no response from Ellis's grandfather, so Nurse Horn gave Ellis ibuprofen and advised him that she would make an appointment for him to see Phys. Asst. Fox.

On October 21, 2015, at approximately 4:30 p.m., jail staff responded to a call from housing unit D of an inmate experiencing a medical condition. Upon their arrival, they found Ellis, who appeared to be having a seizure. Jail staff called Nurse Horn, who told them to call EMS, which they immediately did. EMS personnel arrived shortly thereafter and found Ellis alert and able to advise EMS that he had experienced two seizures. Ellis also advised EMS that he was having some pain from possible broken ribs, but he was advised by EMS that there was really nothing which could be done for broken ribs besides wrapping them. EMS took Ellis's vital signs, noted they found no apparent acute medical concerns, and advised the jailers that Ellis was in stable condition. Ellis asked EMS personnel to use their cell phones to call his grandfather. When he was not permitted to call his grandfather, Ellis became visibly agitated and demanded the jailer take him to the holding cell, though he did not sign the EMS refusal paperwork. Jail staff advised EMS that Ellis would be placed in a holding cell in view of the booking desk and that if his condition worsened, they would call for an ambulance again.

That evening at approximately 8:18 p.m., Ellis walked to and from the bathroom under his own power. Surveillance video shows he did not appear to have any difficulty walking and did not appear to be in any distress. Later, at approximately 10:00 p.m., Ellis told jail staff that he was having a hard time moving, that he was still in pain, and that he felt he was going numb from the waist down. Jailers called Nurse Horn, told her about Ellis's complaints, and mentioned that EMS had already been in to see him. Horn advised jailers to tell Ellis he needed to get up and move around and to utilize the bathroom himself. She further advised staff that if Ellis needed anything for pain, Jailers could give him some over-the-counter pain relief and that she would be in to see Ellis the following morning (October 22, 2015).

Video evidence demonstrates that early the next morning, on October 22, 2015, at approximately 1:37 a.m., Ellis was let out of his cell to use the bathroom, which he again accomplished under his own power without any appearance of difficulty walking or other physical distress. This was repeated at approximately 3:23 a.m., again without any apparent difficulty walking or distress, despite Ellis having told jailers that his legs were numb and he could not walk beginning at 1:30 a.m. Jail surveillance video plainly shows that between 4:00 a.m. and 8:00 a.m., Ellis made no complaints to jail staff and that he talked with a fellow inmate while exhibiting no signs of respiratory distress. A mere half hour later, between 8:30 a.m. and 8:43 a.m., Ellis repeatedly called out for help and requested jailers to call the E.R., which they did not do.

At approximately 10:45 a.m., Nurse Horn got into a heated verbal exchange with Ellis at Ellis's cell, which included Nurse Horn cursing at him. Ellis claimed he could not move his legs and asked Horn to look at his legs, complaining that they were turning black. She refused to look at his legs, yelled that they were not black, that there was nothing wrong with him, and that she was sick and tired of dealing with him. Nurse Horn also threatened to punish Ellis by chaining him to the D-ring in the floor of the cell if he continued complaining about his medical condition.

Approximately three hours later, jailer Shoemaker conducted a check on Ellis and observed that his feet and hands were slightly discolored and that his arm was cold to the touch. Shoemaker immediately requested that Nurse Horn come to the cell. She directed Shoemaker to call EMS. When EMS arrived, Ellis was in respiratory distress, but awake and talking. At approximately 2:14 p.m., Ellis suddenly became nonresponsive. EMS administered epinephrine, intubated him, started chest compressions, and transported him to the hospital where he was pronounced dead. The manner of Ellis's death was determined to be natural and caused by sepsis/septic shock due to acute bronchopneumonia.

Plaintiff, as the personal representative of Ellis's estate, filed suit against Defendant, in his official capacity, under 42 U.S.C. § 1983 alleging violations of Ellis's right to medical care as a pre-trial detainee under the Fourteenth Amendment. As part of that claim, Plaintiff advanced a theory of liability based on a failure to train jail employees. Because the claim which proceeded to trial was brought against Defendant in his official capacity as Sheriff of Ottawa County, liability of Defendant turned not merely on whether Ellis's Fourteenth Amendment rights were violated, but on whether the policies, procedures, or customs of Defendant authorized such a violation, per *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978). Likewise, Defendant could be found liable under the failure to train theory only if Plaintiff proved a failure to train amounting to deliberate indifference to the rights of Ellis such that the failure to train could be considered as a policy or custom of Defendant. *See City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

At trial, evidence and witness testimony established that during the time Ellis was detained in the jail, the jail had policies in place which required that inmates receive both emergency and non-emergency care comparable to that received by the surrounding community. Jail policy did not require jailers to contact Nurse Horn before calling for an ambulance. Jail policy further

required all jailers to be trained in first aid and CPR with updated training annually and permitted the jail administrator to place an inmate in a holding cell if they suspected the inmate was in need of medical observation. If jail staff believed that an inmate had become paralyzed, jail policy required staff to contact an ambulance for immediate emergency medical assistance.

New jail staff were provided training on the jail's policies and procedures, including training on jail medical policies and procedures and on the Oklahoma Jail Standards. Then they shadowed a supervisor performing jail duties for a period of time until they were familiar with jail functions. Jail staff were also required to complete 20 hours of annual jail training on the Oklahoma Jail Standards, including training on supervision of prisoners, rights and responsibilities of inmates, emergency procedures, and First Aid & CPR. The Sheriff had personally witnessed the Undersheriff and Jail Administrator provide this training to jail staff.

Prior to this incident, the Sheriff had never heard of any jail staff interacting with any jail inmates in a manner similar to which staff members interacted with Ellis. Indeed, prior to this incident, there were no indications that the procedures and practices in place for delivering medical care to jail inmates were inadequate or that jail inmates were not receiving adequate medical attention.

At the close of Plaintiff's case, Defendant orally moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), but the motion was denied and the case was submitted to the jury. (Ex. 1, Vol. X, 1028:1-1035:8). Despite the substantial amount of evidence demonstrating that Defendant could not be held liable for a constitutional violation, the jury returned a verdict in favor of Plaintiff for $33,000,000.00 in compensatory damages. Defendant now seeks to renew the challenges to the sufficiency of the evidence raised in his Rule 50(a) motion pursuant to Rule 50(b) and has contemporaneously filed a Motion for a New Trial and a Motion for Remittitur pursuant to Rule 59. [Dkts. 411 and 412].

STANDARD OF REVIEW

Federal Rule of Civil Procedure 50(a) permits a court to grant judgment as a matter of law to a party when the nonmoving party has been fully heard on an issue at trial and the court finds that there is no legally sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party on that issue. Fed. R. Civ. P. 50(a)(1)-(2). Rule 50(b) permits a party whose Rule 50(a) motion was not granted at trial to file a renewed motion for judgment as a matter of law after judgment has been entered in favor of the nonmoving party. When presented with such a motion the court may allow judgment on the verdict, order a new trial, or direct entry of judgment as a matter of law. Fed. R. Civ. P. 50(b)(1)-(3). "'Judgment as a matter of law under Rule 50 'is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position.'" *Mountain Dudes v. Split Rock Holdings, Inc.*, 946 F.3d 1122, 1129 (10th Cir. 2019) (quoting *In re: Cox Enters., Inc.*, 871 F.3d 1093, 1096 (10th Cir. 2017)). In other words, judgment as a matter of law is granted when "'the evidence conclusively favors one party such that reasonable [people] could not arrive at a contrary verdict.'" *Id.* (quoting *Bill Barrett Corp. v. YMC Royalty Co.*, 918 F.3d 760, 766 (10th Cir. 2019) (per curiam)). When a court determines the evidence presented at trial was legally insufficient to support the jury verdict, the verdict cannot stand. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009); *see also Ryder v. Topeka*, 814 F.2d 1412, 1418 (10th Cir. 1987).

If the motion for judgment as a matter of law is granted, the court "must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed" and must "state the grounds for conditionally granting or denying the motion for a new trial." Fed. R. Civ. P. 50(c)(1).

ARGUMENT AND AUTHORITY

I. THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS TO SUPPORT THE VERDICT

Plaintiff brought a claim against Defendant in his official capacity as Sheriff of Ottawa County alleging that Ellis's constitutional right to receive adequate healthcare as a pre-trial detainee under the Fourteenth Amendment was violated. As part of that claim, Plaintiff also alleged that the purported constitutional violation was a result of Defendant's failure to train jail staff. At trial, Plaintiff failed to demonstrate through the evidence presented that Ellis's Fourteenth Amendment rights were violated or that any alleged violation was the result of Defendant's own policies and procedures or a failure to train jail staff. As a result, Defendant is entitled to judgment as a matter of law in his favor or is entitled to a new trial.

A. THE EVIDENCE DID NOT SUPPORT THE JURY'S FINDING THAT ELLIS'S CONSTITUTIONAL RIGHTS WERE VIOLATED

The right of an inmate to receive medical care in a custodial setting is well-established. *Paugh v. Uintah County*, 47 F.4th 1139, 1153 (10th Cir. 2022). The Eighth Amendment is violated when a jail official is deliberately indifferent to the serious needs of a prison inmate. *Id.* (citing *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000); *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)). The same constitutional protections afforded to prison inmates by the Eighth Amendment are afforded to pretrial detainees through the due process clause of the Fourteenth Amendment. *Id.* at 1153-1154 (citing *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019)). The United States Supreme Court has made clear that proof of deliberate indifference to an inmate's serious medical needs is required to succeed on a 42 U.S.C. § 1983 claim for denial of medical care under the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The same standard is used to evaluate denial of medical care claims brought by pre-trial detainees for alleged violations of the Fourteenth Amendment. *Strain v. Regalado*, 977 F.3d 984, 989-990 (10th Cir.

2020). However, mere negligence – even gross negligence – is insufficient to support a claim of deliberate indifference under § 1983. *Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489, 1495 (10th Cir. 1990) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 and n. 7, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)).

"[D]eliberate indifference is a stringent standard of fault, requiring proof that [an] actor disregarded a known or obvious consequence of his action." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 410 (1997). A § 1983 claim alleging inadequate or delayed medical care involves "both an objective and subjective component, such that [the Court] must determine both whether the deprivation is sufficiently serious and whether the government official acted with a sufficiently culpable state of mind." *Oxendine v. R.G. Kaplan, M.D.*, 241 F.3d 1272, 1276 (10th Cir. 2001). As for the objective component, 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 lay person would easily recognize the medical necessity for a doctor's attention. *Oxendine,* 241 F.3d at 1276. A plaintiff must further demonstrate that the defendant's failure to timely meet that objective medical need caused him to suffer substantial harm. *Id*. at 1276-77.

As for the subjective component, a plaintiff alleging deliberate indifference to medical needs occurred must establish that the defendant knew of a substantial risk of harm and failed to take reasonable measures to abate that risk. *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999) (quoting *Farmer*, 511 U.S. at 847). In that regard, a plaintiff must prove that the defendant was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and that the defendant actually drew that inference. *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (quoting *Farmer*, 511 U.S. at 837). The Tenth Circuit has held that a prison official acts "solely…as a gatekeeper to other medical personnel capable of treating the condition" and "may

be held liable under the deliberate indifference standard if she delays or refuses to fulfill that gatekeeper role." *Mata*, 427 F.3d at 751 (internal quotations and citation omitted).

In this case, it is the subjective prong of the deliberate indifference case which was at issue at trial. The issue the jury was required to decide was whether any of Defendant's employees were deliberately indifferent to Ellis's medical needs. To satisfy the subjective portion of the deliberate indifference test, Plaintiff was required to establish that jail staff both knew of a substantial risk of harm to Ellis *and* failed to take reasonable measures to abate that risk of harm. *Hunt, supra,* 199 F.3d at 1224 (10th Cir. 1999) (quoting *Farmer, supra,* 511 U.S. at 847). Plaintiff had to prove by a preponderance of the evidence that jail staff were both aware of facts from which the inference could be drawn that Ellis was at a substantial risk of serious harm *and* that they actually drew that inference. *Mata, supra,* 427 F.3d at 752 (10th Cir. 2005) (quoting *Farmer*, 511 U.S. at 837). It is crucial to note that "[a]n official's failure to alleviate a significant risk of which he was unaware, **no matter how obvious the risk or how gross his negligence in failing to perceive it**, is not an infliction of punishment and therefore not a constitutional violation." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008) (emphasis added).

Testimony from witnesses at trial overwhelmingly established that jail staff failed to perceive that there was a substantial risk of harm to Ellis from the morning of October 22, 2015 until they called EMS that afternoon just before his death. The strongest evidence of this is the fact that on October 21, less than 24 hours prior, Ellis had experienced a seizure. (Ex. 2, Vol. IV, 341:22-342:15). When jail staff became aware of this, they quickly contacted EMS. (Ex. 2, Vol. IV, 341:22-342:15, 366:24-367:24). When EMS arrived at the jail, they examined Ellis and determined that he had no acute medical concerns. (Ex. 2, Vol. IV, 341:22-342:15, 366:24-367:24; Ex. 6, Vol. XI, 1157:1-5). In other words, the evidence plainly showed that when jail staff were actually aware of facts from which the inference could be drawn that Ellis was at risk of substantial

harm and they actually *did* draw that inference, they obtained emergency medical care for Ellis by contacting Nurse Horn and by calling EMS.

The evidence also plainly shows that on October 22, they did *not* draw any such inference until early that afternoon. Nurse Horn testified that on the morning of October 22, she did not believe that Ellis was faking his illness but that she believed Ellis was being untruthful about what was actually wrong with him because what he was telling her did not match what she was seeing. (Ex. 3, Vol. VII, 726:16-727:10). Nurse Horn and other jail staff clearly failed to perceive the significant risk of harm to Ellis. (Ex. 4, Vol. II, 135:6-16; Ex. 5, Vol. III, 263:15-270:25). Even Plaintiff's own expert witness testified that he believed jail staff did not really think Ellis was actually ill. (Ex. 1, Vol. X, 1022:10-2). Plaintiff's expert further testified that if jail staff had seen Ellis walking around just hours earlier that they could reasonably presume that Ellis was not actually as ill or injured as he said he was and that no ambulance needed to be called. (Ex. 1, Vol. X, 1015:5-1016:20). He additionally testified that symptoms of sepsis can mimic other things and that it can be difficult to diagnose. (Ex. 1, Vol. X, 994:17-997:21). And again, once jail staff *did* draw the inference that Ellis's condition was an emergency, they *did* call EMS.

Defendant anticipates Plaintiff will argue that signs of Ellis's illness were obvious and that jail staff should have realized his condition was sufficiently serious, but any argument to that effect is unpersuasive and irrelevant to this analysis. The fact is, even if the risk was obvious and even if Nurse Horn or other jail staff were grossly negligent in failing to perceive and appreciate obvious signs of illness, they were not deliberately indifferent to Ellis's medical needs if Ellis did not receive medical attention due to their failure to perceive Ellis was at a substantial risk of serious harm. *Tafoya, supra,* 516 F.3d at 916. Not only did testimony at trial show that jail staff simply did not perceive that risk, but Plaintiff's own expert testified that based on what jail staff knew and had witnessed regarding Ellis's physical symptoms, the failure to perceive the severity of his

illness was reasonable under the circumstances. Combined with the fact that jail staff were aware that less than twenty-four hours earlier EMS had examined Ellis and found no acute illness, the evidence in this case does not at all support that any of Defendant's employees actually drew the inference that Ellis was at a substantial risk of serious harm or were deliberately indifferent to Ellis's medical needs.

Because the evidence at trial does not support that Plaintiff satisfied the second prong of the deliberate indifference test, Defendant is entitled to judgment as a matter of law or a new trial.

B. THE EVIDENCE DID NOT SUPPORT THAT A POLICY OR CUSTOM OF DEFENDANT RESULTED IN THE ALLEGED VIOLATION

As Defendant was sued in his official capacity as the Sheriff of Ottawa County under 42 U.S.C. § 1983, he could only be found liable for violating Ellis's Fourteenth Amendment rights if Plaintiff proved at trial that the constitutional injury alleged was caused by Defendant's own policies or customs. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). A governmental entity can only be liable for a constitutional violation when the entity "makes a deliberate choice to follow a course of action from among various alternatives." *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 406-07 (1997). Rather, *Monell* requires plaintiffs to establish that a policy or custom of the defendant existed and was in force and that the policy or custom directly caused the alleged constitutional violations. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821-22 (1985); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). Assuming, without conceding, that Ellis's Fourteenth Amendment rights were violated by one or more of Defendant's employees, the evidence *still* does not support a finding of liability against Defendant because there was no evidence that Defendant's policies, practices, or customs caused any such violation.

1. Policies required that inmates receive adequate medical care.

Both Plaintiff and Defendant introduced evidence at trial of the policies which were in place regarding inmate medical care during Ellis's detention at the jail. In fact, the parties made numerous stipulations regarding Defendant's policies prior to trial and the jury was advised of those stipulations in the jury instructions. [Dkt. 388, pp. 3-6]. The jury was instructed that the following facts regarding Defendant's policies were not in dispute and required no proof: jail policy required medical care to be delivered under the direction of a licensed physician; jail policy required a schedule for sick call; jail policy permitted detention officers to call emergency services if the jail nurse was not available; jail policy required the jail administrator to review statistics on inmate medical care and required the administrator and nurse to review the medical care's effectiveness and efficiency quarterly. [Dkt. 388, pp. 3-6]. While the parties also stipulated those policies largely were not followed, a violation of internal policy does not equate to or establish a constitutional violation. *See Tanberg v. Sholtis*, 401 F.3d 1151, 1163-65 (10th Cir. 2005). The jury was also instructed on that fact. [Dkt. 388, Inst. 21, p. 29]. Jail Policy also required that

> [a]ll county jail inmates shall be entitled to health care comparable to that available to citizens in the surrounding community. Medical care at the facility shall be delivered under the direction of a licensed physician and through the use of trained health care personnel. No jailer or other employee will ever summarily or arbitrarily deny an inmate's request for medical service.

(Plf. Trial Ex. 33; Dft. Trial Ex. 10F). The jail clearly had policies in place which required that inmates have access to both emergency and non-emergency medical care. (Plf. Trial Ex. 32-36).

Plaintiff argued at trial that language from the job description for the jail nurse constituted a policy of deliberate indifference to inmates' medical needs. The job duty description states that

> [b]asically a correctional facility nurse does almost everything a trauma nurse does. It's just the type of patients we deal with are different. Never let your guard down, never turn your back to them, and don't ever let them gain your trust.

(Plf. Trial Ex. 29, pp. 11-12). However, testimony demonstrated that was neither the intent nor the effect of the policy. Former Jail Administrator Harding testified that the policy meant "trust but verify." (Ex. 5, Vol. III, 292:4-293:5). He specifically testified that jail staff should verify anything inmates tell them because sometimes inmates are not truthful and from time to time fake illnesses for one reason or another. (Ex. 5, Vol. III, 263:15-25, 292:4-293:5). Phys. Asst. Fox testified that this is the standard policy and practice in correctional medicine and that she was trained on that practice at another correctional facility. (Ex. 6, Vol. XI, 1223:18-1224:25). Even Plaintiff's own expert witness, Dr. Todd Wilcox ("Wilcox"), testified that it is important for jail staff to observe and consider what they are actually seeing and not to rely solely on what the inmate is telling them regarding medical complaints to determine whether or not the inmate is malingering. (Ex. 1, Vol. X, 1015:5-13).

The evidence at trial clearly demonstrated that the policies and procedures of the jail required that inmates receive emergency and routine medical care when needed. Consequently, under *Monell, supra,* even if Ellis's constitutional rights *were* violated, any such violation cannot have been proximately caused by any policy or procedure of the jail. The evidence at trial thus did not support the jury verdict and Defendant is entitled to judgment as a matter of law or a new trial.

2. No evidence of a custom of deliberate indifference to medical needs.

Municipal liability can potentially also be established by an informal custom so widespread and permanent that it is equivalent to an official policy. *Waller v. City and County of Denver*, 932 F.3d 1277, 1283 (10th Cir. 2019) (citing *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010)). Evidence of a single incident is insufficient to establish a widespread custom and impose liability under *Monell. See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Even evidence of one prior incident sufficiently similar in nature to put a defendant on notice that a problem exists is insufficient to establish a pattern of violations, even when the incident is

egregious. *Waller, supra,* 932 F.3d at 1287 (citing *Coffey v. McKinley Cty.*, 504 F. App'x 715, 719 (10th Cir. 2012); *Martin v. Malhoyt*, 830 F.2d 237, 255 (D.C. Cir. 1987). Deliberate indifference cases in particular require proof of a pre-existing *pattern* of constitutional violations. *Id.* at 1287.

Here, assuming that Ellis's constitutional rights were actually violated, *no* evidence was presented of any pattern of deliberate indifference to medical care occurring prior to Ellis's death. Harding testified that while he was the jail administrator, there were no other deaths in the jail. (Ex. 5, Vol. III, 263:2-5). Durburow testified that he wanted to improve the quality of healthcare for inmates at the jail so he contracted with Phys. Asst. Fox to provide an additional level of healthcare over and above that provided by Nurse Horn. (Ex. 7, Durburow Video Depo. Clip Report, 44:17-45:18, 46:01-47:1). Prior to Ellis's death, Durburow had no reason to believe that the healthcare being provided to inmates may possibly violate inmates' constitutional rights. He testified that prior to Ellis's death, he had no knowledge of Nurse Horn or jail staff treating any inmate in the manner Ellis was unfortunately treated. (Ex. 7, Durburow Video Depo. Clip Report, 175:02-05, 175:8-11).

Because there was no evidence to support that an informal custom of deliberate indifference to healthcare existed either, the evidence is insufficient to support the verdict and Defendant is entitled to judgment as a matter of law or a new trial.

3. *Crowson* is not applicable to this analysis.

Defendant anticipates that Plaintiff will argue that he stablished municipal liability through proving there was a "systemic failure" of policies and procedures under *Crowson v. Wash. Cty. State of Utah*, 983 F.3d 1166, 1191-92 (10th Cir. 2020). In *Crowson*, the Tenth Circuit recognized an extremely limited exception to well-established § 1983 law wherein a plaintiff may establish municipal liability in situations where there is no one individual employee who has committed a constitutional violation but where the cumulative effect of multiple employees' actions taken as

the result of a systemic lack or failure of policies and procedures results in a constitutional violation. *Id.* at 1191. This limited exception simply is not applicable here.

In *Crowson*, the plaintiff sued the defendant county under § 1983 for deliberate indifference to medical needs on the theory that the complete absence of medical care policies by the county resulted in his constitutional rights being violated. The county moved for summary judgment on the grounds that there was no constitutional violation by its employees and that no policy or procedure led to any alleged violation. *Id.* at 1177. The district court denied summary judgment, finding that a jury could find that the jail nurse and jail doctor were deliberately indifferent to the plaintiff's medical needs. *Id.* Citing to *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985), the Tenth Circuit held that "[d]eliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care" and that even when "the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Crowson*, 983 F.3d at 1186 (citing *Garcia,* 768 F.2d at 310). The court clarified, though, that failure-to-train claims may *not* be maintained without a showing of a constitutional violation by a *particular* improperly-trained officer. *Id.* at 1187. The court noted that in *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009), it had expressly rejected the idea that a county could be held liable for a "systemic injury caused by the interactive behavior of several government officials, each of whom may be acting in good faith." *Id.* (citing *Martinez, supra,* 563 F.3d at 1092). After stating that the ruling in *Garcia* governs over *Martinez*, the court further clarified that the general rule is:

> **there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable**. In most cases, this makes the question of whether a municipality is liable dependent on whether a specific municipal officer violated

> an individual's constitutional rights. But *Garcia* remains a **limited exception** where the alleged violation occurred as a result of multiple officials' actions or inactions.

Id. at 1191 (citing *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001)) (emphasis added).

Again, context is key to understanding the limited holding of *Crowson. Crowson* involved a complete "lack of written protocols for monitoring, diagnosing, and treating inmates." *Id.* at 1173. In discussing *Garcia*, the *Crowson* court explained that the type of claim for which *Garcia* (and thus *Crowson*) is applicable in a claim where the evidence shows a "systemic **lack** of policies and procedures." *Id.* at 1188 (emphasis added). However, here there was simply no lack of policies and procedures at the jail. Here, the jail not only had written policies and procedures in place as was demonstrated in subsection 1 above, but jail employees were actually trained on those written policies and procedures, as will be demonstrated in subsection 4 below. It is therefore obvious that the evidence does not support that Plaintiff established (or even could establish) municipal liability via the ruling in *Crowson.*

4. The evidence does not support there was a failure to train.

There are limited circumstances where inadequacy in training can be a basis for § 1983 liability. *City of Canton v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Inadequacy in training may serve as the basis for municipal liability under § 1983 "only where the failure to train amounts to deliberate indifference." *Id.* at 388. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality...can a city be liable for such a failure under § 1983." *Id*. at 389. To establish deliberate indifference to a need for training, Plaintiff was required to prove Defendant both knew of and disregarded the substantial risk of inadequate training of his employees. *Id.* at 388. Plaintiff was required to prove there was a policy or custom of the jail involving deficient training, that the policy or custom caused an injury, and that the policy or custom was adopted with the knowledge it could put citizens at a substantial risk of serious harm. *Lance v. Morris*, 985 F.3d 787, 800 (10th Cir. 2021) (citing *Waller, supra,* 932 F.3d at 1283-84).

The evidence at trial did not prove any of these elements. In fact, former Jail Administrator Harding testified that jailers are required to complete annual training, that they review policies and procedures when hired, and that they receive on-the-job training via shadowing, (Ex. 5, Vol. III, 248:5-19). The jail had a policy in place requiring that staff be trained and Harding followed that policy when training jail staff. (Ex. 5, Vol. III, 248:20-250:17). Former Sheriff Durburow also testified that new jail staff received 24 hours of training and all jail staff, including the jail nurse, received annual training on the jail's policies and procedures and Oklahoma Jail Standards. (Ex. 7, Durburow Video Depo. Clip Report, 175:12-176:2, 176:5-177:4, 177:7). Durburow was personally aware the training had occurred because he watched the Undersheriff and the Jail Administrator conduct the training. (Ex. 7, 177:8-15). Because the evidence overwhelmingly shows jail staff were trained and that Defendant did not have a policy of deliberate indifference to the need for additional training, the evidence is not sufficient to support the verdict and Defendant is entitled to judgment as a matter of law.

CONCLUSION

The evidence which was presented at trial simply does not support the verdict that the jury returned in favor of Plaintiff. Plaintiff failed to demonstrate through the evidence that Ellis's constitutional rights were violated. A constitutional violation was certainly required to establish liability, as the limited exception to § 1983 municipal liability law found in *Crowson, supra,* was wholly inapplicable here and certainly not supported by the evidence of this case. The failure to prove that Ellis's constitutional rights were actually violated by one or more of Defendant's employees, on its own, demonstrates the jury verdict is not supported by the evidence. The amount of evidence establishing that Defendant had policies and procedures in place requiring that inmates receive medical care and that jail staff were actually trained on those policies and procedures also, on its own, demonstrates the jury verdict is not supported by the evidence. It is undeniable that the

evidence did not support the jury verdict given that the evidence fails to support *both* required aspects of an official capacity municipal liability claim.

WHEREFORE, premises considered, Defendant respectfully requests that judgment be entered in his favor pursuant to Fed. R. Civ. P. 50(b), as Plaintiff failed to present evidence at trial which was sufficient to support the required elements of his § 1983 deliberate indifference claim.

Respectfully submitted,

s/ Alison B. Levine
Wellon B. Poe, OBA No. 12440
Jamison C. Whitson, OBA No. 18490
Alison B. Levine, OBA No. 33021
Justin P. Ashlock, OBA No. 33459
COLLINS, ZORN, & WAGNER, PLLC
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105
(405) 524-2070/Fax: (405) 524-2078
E-mail: wbp@czwlaw.com
jcw@czwlaw.com
abl@czwlaw.com
jpa@czwlaw.com

ATTORNEYS FOR DEFENDANT SHERIFF OF OTTAWA COUNTY, IN HIS OFFICIAL CAPACITY

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, I electronically transmitted this filing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Daniel E. Smolen
Robert M. Blakemore
Bryon D. Helm
SMOLEN & ROYTMAN, PLLC
701 South Cincinnati Avenue
Tulsa, OK 74119

Attorneys for Plaintiff

s/ Alison B. Levine
Alison B. Levine