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FILED
United States Court of Appeals
Tenth Circuit

August 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHAD E. OSTERHOUT,

Plaintiff - Appellee,

v.

BOARD OF COUNTY COMMISSIONERS OF LEFLORE COUNTY, OKLAHOMA,

Defendant - Appellant,

and

KENDALL MORGAN,

Defendant - Appellant.

Nos. 20-7024 & 20-7025
(D.C. No. 6:17-CV-00099-RAW)
(E.D. Okla.)

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:17-CV-00099-RAW)

Michael Lee Carr (Wellon B. Poe with him on the briefs), Collins, Zorn & Wagner, P.C., Oklahoma City, Oklahoma, on behalf of the Defendant-Appellant Board of County Commissioners of LeFlore County, Oklahoma.

James L. Gibbs (Seth D. Coldiron with him on the briefs), Goolsby, Proctor, Heefner & Gibbs, P.C., Oklahoma City, Oklahoma, on behalf of the Defendant-Appellant Kendall Morgan.

Robert Blakemore (Daniel E. Smolen and Bryon D. Helm with him on the brief), Smolen & Roytman, Tulsa, Oklahoma, on behalf of the Plaintiff-Appellee.

Before **HOLMES**, **BACHARACH**, and **CARSON**, Circuit Judges.

BACHARACH, Circuit Judge.

Mr. Kendall Morgan, a former deputy sheriff for LeFlore County, conducted a traffic stop of Mr. Chad E. Osterhout. During the traffic stop, Mr. Morgan struck Mr. Osterhout in the face[1] and kicked him twice in the ribs. According to Mr. Morgan, Mr. Osterhout was trying to flee; Mr. Osterhout says that he remained still with his hands raised.

Mr. Osterhout sued Mr. Morgan and the Board of County Commissioners of LeFlore County, Oklahoma. Against Mr. Morgan, Mr. Osterhout invoked 42 U.S.C. § 1983 for a claim of excessive force. Against the Board, Mr. Osterhout invoked the Oklahoma Governmental Tort Claims Act, claiming negligent use of excessive force.[2]

The jury attributed liability to Mr. Morgan and the Board, awarding Mr. Osterhout

- $3 million in compensatory damages against both defendants and

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[1] Mr. Morgan said that he had used a closed fist; Mr. Osterhout said that he'd been hit with a flashlight.

[2] Mr. Osterhout also sued Mr. Timms (another former officer who was at the scene) and claimed that the Board had committed an assault and battery. The parties haven't appealed any issues involving the claims against Mr. Timms, and Mr. Osterhout dropped the assault-and-battery claim against the Board.

- $1 million in punitive damages against Mr. Morgan.

Mr. Morgan moved for a new trial or remittitur of damages. The district court remitted the compensatory damages to $2 million, but denied the motion for a new trial. Both defendants appealed.

The Board and Mr. Morgan argue that the district court abused its discretion by using a verdict form with a single total for compensatory damages. And the Board argues that

- the district court erred in denying summary judgment because the notice had been defective and Mr. Morgan's alleged force would have fallen outside the scope of his employment,
- the jury acted inconsistently by assessing punitive damages and finding that Mr. Morgan had acted within the scope of his employment,
- the verdict against the Board conflicted with the clear weight of the evidence, and
- the award of compensatory damages was grossly excessive.

Mr. Morgan argues that

- the district court should have granted a new trial based on opposing counsel's misconduct,
- the compensatory damages were grossly excessive and unsupported by the evidence, and
- the punitive damages were grossly excessive.

We affirm.

I. Mr. Osterhout provided adequate notice of his claim against the Board under the Oklahoma Governmental Tort Claims Act.

On the state-law claim, the Board unsuccessfully sought summary judgment based on the inadequacy of Mr. Osterhout's notice.

A. In his notice, Mr. Osterhout used his attorney's contact information.

Mr. Osterhout sued the Board under the Oklahoma Governmental Tort Claims Act. Under the Act, Mr. Osterhout needed to file a written notice of claim with the Board. Okla. Stat. tit. 51, § 156(B), (D); *see* Okla. Stat. tit. 51, § 157(A) (stating that a claimant cannot sue until the claim is denied). The notice had to state

> . . . the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, the amount of compensation or other relief demanded, *the name*, *address*, *and telephone number of the claimant*, the name, address, and telephone number of any agent authorized to settle the claim, and any and all other information required to meet the reporting requirements of [a specified federal statute].

Okla. Stat. tit. 51, § 156(E) (emphasis added).

Mr. Osterhout submitted a notice, omitting his own contact information but including his attorney's. The Board seized on the omission of Mr. Osterhout's own address and telephone number, urging summary judgment despite the inclusion of the attorney's contact information. The district court declined to grant summary judgment, reasoning that

- the Act does not require strict compliance and

- Mr. Osterhout had substantially complied with the notice requirements.

The Board challenges this reasoning.[3]

For these challenges, we conduct de novo review. *See Gutteridge v. Oklahoma*, 878 F.3d 1233, 1243 (10th Cir. 2018). Summary judgment is appropriate if there are no disputes involving a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

B. Mr. Osterhout complied with the notice requirements.

The Board argues that the notice was incomplete because it omitted Mr. Osterhout's home address and telephone number. We disagree.

The Oklahoma Supreme Court has taken a practical approach to the statutory notice requirements. *See McWilliams v. Bd. of Cnty. Comm'rs*, 268 P.3d 79, 85 (Okla. 2011) (rejecting a "hyper-technical application" of the Act's notice requirements in favor of a "more reasoned approach sounding in equity"). For example, in interpreting the statute, the Oklahoma Supreme Court addressed the requirement that "[a] claim against

[3] As discussed below, the failure to file a motion under Federal Rule of Civil Procedure 50(b) ordinarily waives appellate review of the denial of summary judgment. *See* Part III, below. But the adequacy of notice involves an issue of law that did not go to the jury. So the Board did not waive its challenge involving adequacy of the notice. *See Haberman v. The Hartford Ins. Grp.,* 443 F.3d 1257, 1264 (10th Cir. 2006) (stating that "when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment").

a political subdivision shall be . . . filed with the office of the clerk of the governing body." *I.T.K. v. Mounds Pub. Schs.*, 451 P.3d 125, 134 (Okla. 2019) (quoting Okla. Stat. tit. 51, § 156(D)). There the plaintiff was suing a school district, so the statute required him to file with a clerk for the school district. *Id.* at 129. But the plaintiff filed with the school superintendent rather than a clerk. *Id.*

In *I.T.K. v. Mounds Public Schools*, the Oklahoma Supreme Court recognized the duty to file, but acknowledged the statute's flexibility as to the manner of filing: "[B]ecause the *manner of filing with the clerk's office is not statutorily specified as mandatory*," "a superintendent is a proper recipient for notice when the superintendent's managerial duties require both representing the board and transmitting to a clerk for filing any financial claims against the school district." *Id.* at 136–37, 142 (emphasis in original).

The Oklahoma Supreme Court's reasoning guides us here. The statute requires inclusion of the claimant's address and telephone number, but doesn't spell out which address or telephone number. Do claimants need to use their own residences, or can they use the office of a representative (like an attorney)?

Like a school superintendent in *I.T.K.*, an attorney must communicate information to another person (the claimant), ensuring an opportunity for communication between the claimant and the governing body. *See* Okla.

Stat. tit. 5, ch. 1, app. 3-1, R. 1.4(a)(1). Indeed, a claimant represented by counsel should generally be contacted only through counsel. *Id.* at R. 4.2. So counsel's contact information sufficed for disclosure of the claimant's address and telephone number.

The Board cites *Griffey v. Kibois Area Transit System*, 328 P.3d 687 (Okla. Civ. App. 2013), where the Oklahoma Court of Civil Appeals stated that a letter with only the attorney's contact information "may not have complied with §156(E)." *Id.* at 689. But the *Griffey* court's statement provides little guidance for two reasons.

First, after *Griffey*, the Oklahoma Supreme Court has twice addressed § 156. *I.T.K. v. Mounds Pub. Schs.* 451 P.3d 125 (Okla. 2019); *Grisham v. City of Oklahoma City*, 404 P.3d 843, 849 (Okla. 2018). Both times, the Oklahoma Supreme Court rejected *Griffey*'s reasoning, "declin[ing] to make attributes of notice to be mandatory when the Legislature has not done so." *I.T.K.*, 451 P.3d at 136–37; *Grisham*, 404 P.3d at 848–49.

Second, the *Griffey* statement constitutes only ambiguous dicta because the court ultimately concluded that the claimant's letter had "clearly contained" all of the statutory information. *Griffey*, 328 P.3d at 689–90. So *Griffey* does not require us to reject a notice just because the claimant used the contact information for his attorney's office.

The Board also argues that Mr. Osterhout could not use his counsel's information as his own because § 156(E) separately requires the name,

address, and telephone number of "any agent authorized to settle." Okla. Stat. tit. 51, §156(E). The Board apparently assumes that this requirement would cover the claimant's attorney. But under Oklahoma law, an attorney can ordinarily settle a claim only if authorized by the client. *See Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1096 (Okla. 2005) (stating that an attorney generally lacks "power or authority to . . . settle a case without appropriate authority from the client"). So the notice doesn't require information about the attorney in the absence of a delegation of settlement authority.

* * *

Given the flexibility in the statute, claimants can satisfy the duty to provide an address and telephone number by using their attorneys' contact information.

C. Even if Mr. Osterhout had not strictly complied with the notice provisions, he had substantially complied.

Even in the absence of strict compliance, Mr. Osterhout's substantial compliance would have sufficed.

1. Oklahoma law recognizes substantial compliance.

Oklahoma has "consistently recognized that substantial compliance with the notice provisions of the Act is sufficient when the political subdivision is not prejudiced and the provided information satisfies the

purposes of the statutory notice requirement." *Mansell v. City of Lawton*, 901 P.2d 826, 830 (Okla. 1995).

The Board argues that substantial compliance no longer applies to the statutory notice requirements, pointing to *Shanbour v. Hollingsworth,* 918 P.2d 73 (Okla. 1996). There the court stated that "compliance with the written notice of claim and denial of claim provisions in §§ 156 and 157 are prerequisites to the state's consent to be sued and to the exercise of judicial power to remedy the alleged tortious wrong by the government." *Id.* at 75. But *Shanbour* acknowledged that for requirements other than timeliness, "substantial compliance with the notice of claim provisions in § 156 is sufficient unless the object of the statute has been defeated." *Id.* at 75–76.

The Board argues that the Oklahoma Supreme Court abrogated the doctrine of substantial compliance, relying on *Minie v. Hudson*, 934 P.2d 1082 (Okla. 1997), two Oklahoma appellate court opinions, and two rulings by federal district courts.

The Board misreads *Minie*; it didn't abrogate the doctrine of substantial compliance. There the plaintiff had orally submitted his claim to the city but had not filed a written notice. *Id.* at 1084–85. The city argued that the oral notice was deficient because (1) the Act requires submission of a written claim and (2) the doctrine of substantial

compliance did not apply to that requirement. *Id.* at 1085. The court reiterated that it had

> consistently held that *substantial compliance with the notice provisions of [the Act] is sufficient* when the governmental entity is not prejudiced, and the information provided satisfies the purposes of the statutory notice provisions.

Id. at 1085 (emphasis added); *see also id.* at 1085 n.12 (collecting cases). The court added that under the Act's "clear mandatory language," a claim is sufficient only when written. *Id.* at 1086. As a result, the court continued, a notice substantially complies with the Act only when written. *Id.*

The Board argues that the Oklahoma Court of Civil Appeals has interpreted *Minie* to abrogate substantial compliance. *See Duncan v. City of Stroud*, 346 P.3d 446, 449 (Okla. Civ. App. 2015); *Smith v. White Oak School Dist. ex rel. State Bd. of Educ.*, No. 105,108, 2008 WL 9824868, at *2 (Okla. Civ. App. June 20, 2008). We disagree.

The Board's two cited opinions did not cast doubt on the continued viability of substantial compliance for written notices. In these cases—as in *Minie*—the plaintiffs had failed to file a written notice with the county clerk. In *Duncan*, the plaintiff had sent a letter to an insurance company instead of the county clerk. *Duncan*, 346 P.3d at 448. And in *Smith*, the plaintiff had not sent a written notice. *Smith*, 2008 WL 9824868 at *2. So

these opinions don't say whether a written notice, properly filed with the county clerk, is otherwise substantially compliant under the Act.

The Board also relies on rulings in two federal district court cases; both said that "recent developments in Oklahoma law call the doctrine of substantial compliance into question." *Younger v. City of Muskogee*, No. CIV-16-104-SPS, 2016 WL 6768946, at *2 (E.D. Okla. Nov. 15, 2016) (quoting *Dixon v. Bd. of Cnty. Comm'rs*, No. CIV-15-196-R, 2016 WL 5017332, at *3 (W.D. Okla. Sept. 19, 2016)). But we need not bow to the district courts' interpretation of Oklahoma law, *see Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1280 (10th Cir. 2013), and the Oklahoma Supreme Court has not abrogated substantial compliance for the notice requirements of § 156(E).

Finally, the Board points to *Slawson v. Board of County Commissioners*, 288 P.3d 533 (Okla. 2012), arguing that the Oklahoma Supreme Court abrogated the doctrine of substantial compliance for purposes of the required content in the notice. In *Slawson*, the court stated: "The *limitations* of [the Act] are narrowly structured and a grant of substantial compliance under the general procedural regime is not allowed." *Id.* at 534 (emphasis added) (citing *Carswell v. Oklahoma State Univ.*, 995 P.2d 1118, 1121 (Okla. 1999)). But *Slawson* addressed the Act's limitations period, not the notice requirements.

* * *

We conclude that the doctrine of substantial compliance applies to the notice requirements of the Oklahoma Governmental Tort Claims Act.

2. Mr. Osterhout's notice substantially complied with the Act.

The Board argues that even if the doctrine of substantial compliance applied, Mr. Osterhout's notice would have been defective under *Griffey v. Kibois Area Transit Systems*, 328 P.3d 687 (Okla. Civ. App. 2013). We disagree.

In *Griffey*, the Oklahoma Court of Civil Appeals stated that "the absolute minimum for compliant notice is the identity of the state agency or agencies involved; *the name, address and telephone number of the claimant*; and the name, address, and telephone number of any agent authorized to settle the claim." *Id.* at 689 (emphasis added). The Board argues that omission of this "absolute minimum" information would invalidate the notice. For this argument, the Board relies on the canon that the inclusion of one thing suggests the exclusion of others, pointing out that the Act specifies that the failure to provide other kinds of information "shall not invalidate the notice." Okla. Stat. tit. 51, § 156(E).

This argument ignores part of the statute: "Failure to state [some information] shall not invalidate the notice *unless the claimant declines or refuses to furnish such information after demand by the state or political subdivision*." Okla. Stat. tit. 51, §156(E) (emphasis added). The sentence thus explains only that a notice becomes invalid if the claimant omits some

information and refuses to provide it; the sentence doesn't invalidate a notice based solely on the absence of the claimant's address or telephone number.

Griffey does not undermine the Oklahoma Supreme Court's standard in *Minie*. Under this standard, a plaintiff substantially complies with the Oklahoma Governmental Tort Claims Act's notice requirements if

- "the information provided satisfies the purposes of the statutory notice provisions" and
- "the governmental entity is not prejudiced."

Minie v. Hudson, 934 P.2d 1082, 1085 (Okla. 1997).

To determine whether Mr. Osterhout's attorney's address and phone number suffice, we must "consider the intent of the statute as a whole." *In re Detachment of Mun. Territory from Ada,* 352 P.3d 1196, 1198 (Okla. 2015). The statutory notice requirements were designed to facilitate four purposes: (1) investigation of the claim, (2) repair of any "dangerous conditions," (3) quick settlement, and (4) "fiscal planning to meet possible liability." *I.T.K. v. Mounds Pub. Schs.*, 451 P.3d 125, 137 (Okla. 2019).

The Oklahoma Supreme Court has not addressed substantial compliance when the notice provides counsel's contact information rather than the client's. But the Supreme Court of Kansas has addressed this issue, and its reasoning is persuasive. *See Sleeth v. Sedan City Hosp.*, 317

P.3d 853 (Kan. 2014). There the Kansas court interpreted a similar statute,[4] finding substantial compliance when the notice provided the attorney's address rather than the client's. *Id.* at 864–66.

The court reasoned that "the question of compliance is not based upon a 'mechanical counting' of [the required] information." *Id.* at 865. "Instead, notice is sufficient if it gives the municipality what it needs for a 'full investigation and understanding of the merits of the claims advanced.'" *Id.* (quoting *Cont'l Western Ins. Co. v. Schultz*, 304 P.3d 1239, 1244 (Kan. 2013)). For notice, omission of the claimant's address "was

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[4] The Kansas statute provides:

> Any person having a claim against the municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action. The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested. In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim.

Kan. Stat. Ann. § 12-105b(d).

inconsequential" because the claimant had included the attorney's contact information. *Id.*

The Mississippi Supreme Court also addressed this issue, concluding that omission of the claimant's address was immaterial when the claimant had provided his counsel's address. *Lee v. Memorial Hospital at Gulfport*, 999 So. 2d 1263, 1267 (Miss. 2008). The court reasoned that the state agency could conduct the investigation with counsel's address instead of the claimant's. *Id.*; *see also Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 216–18 (2d Cir. 2010) (concluding that notice of the claim substantially complied with Mississippi law, despite omission of the claimant's residential address, because inclusion of the attorney's address allowed the state agency to conduct an investigation).

The approaches in Kansas and Mississippi make sense. Under that approach, Mr. Osterhout provided (1) the attorney's address and telephone number and (2) all other required information. Corrected Joint App'x vol. 1, at 142; *see* Okla. Stat. tit. 51, § 156(E). This information satisfied the purposes of the notice requirements by allowing the Board to conduct a meaningful investigation, plan for potential liability, and explore settlement. So the notice substantially complied with the statute.[5]

[5] The Board does not argue prejudice from the omission of Mr. Osterhout's personal-contact information.

* * *

The district court did not err in declining to grant summary judgment to the Board because Mr. Osterhout had supplied adequate notice of his claim.

II. The district court did not abuse its discretion in denying Mr. Morgan's motion for a new trial.

The defendants challenge the denial of a new trial. Mr. Morgan argues that Mr. Osterhout's counsel committed misconduct, and both defendants argue that the district court should have asked the jury to separately award damages against the Board and Mr. Morgan.

A. A new trial was not required for the alleged misconduct of Mr. Osterhout's counsel.

For these challenges, we apply the abuse-of-discretion standard. *Burke v. Regalado*, 935 F.3d 960, 1020 (10th Cir. 2019). The district court could not grant a new trial unless the errors had created prejudice and affected a party's substantial rights. Fed. R. Civ. P. 61; *Henning v. Union Pac. R. Co.*, 530 F.3d 1206, 1217 (10th Cir. 2008). Applying this standard of review, we conclude that the denial of a new trial fell within the district court's discretion.

1. Mr. Morgan complains of the trial conduct of Mr. Osterhout's counsel.

Mr. Morgan argues that Mr. Osterhout's counsel violated the district court's in limine rulings and presented improper closing argument. After

the verdict, Mr. Morgan moved for a new trial based on counsel's alleged misconduct.

2. The district court denied Mr. Morgan's motion for a new trial.

The district court denied Mr. Morgan's motion for a new trial, concluding that

- the plaintiff's counsel had not violated the in limine rulings,
- the defendants had not objected to much of the purported misconduct,
- the plaintiff's evidence had been strong, and
- the statements being challenged had not been bad enough or repeated.

Corrected Joint App'x vol. 15, at 1789–97. Mr. Morgan challenges these conclusions.

Mr. Osterhout urges us to disregard this challenge because Mr. Morgan's motion for a new trial does not appear in the appendices. But we have allowed the filing of a new appendix containing this motion, so we will consider Mr. Morgan's challenge to the denial of a new trial.

3. The district court did not abuse its discretion in denying a new trial.

Mr. Morgan argues that Mr. Osterhout's counsel engaged in misconduct through improper questioning and closing argument.

a. Improper Questioning of Witnesses

Mr. Morgan alleges two improper lines of questioning:

1. Some questions violated the in limine rulings and improperly addressed Mr. Morgan's misconduct toward other suspects.

2. Other questions misrepresented Mr. Morgan as a drug kingpin protecting his turf.

i. Consideration of Prejudice

The ultimate question is whether the alleged misconduct would have been prejudicial or harmless. Fed. R. Civ. P. 61; *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1578–79 (10th Cir. 1984). To evaluate prejudice, we consider the pervasiveness of the misconduct, the boundaries of the evidentiary rulings, the action by the district court to sustain an objection, and any curative instructions. *See Mason v. Okla. Tpk. Auth.*, 115 F.3d 1442, 1456 (10th Cir. 1997) (pervasiveness, boundaries, and action sustaining an objection), *overr'd in part on other grounds*, *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 & n.2 (10th Cir. 2011) (en banc footnote); *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1578–80 (10th Cir. 1984) (action sustaining an objection and curative instructions). A new trial is warranted only if the improper questioning is "so pronounced and persistent that it permeates the entire proceeding." *Winter v. Brenner Tank, Inc.*, 926 F.2d 468, 473 (5th Cir. 1991); *accord Innovation Ventures, LLC v. NZG Distrib., Inc.*, 763 F.3d 524, 542 (6th Cir. 2014) (stating that violation of in limine orders can warrant reversal

only if the improper questioning had consistently permeated the trial and created unfair prejudice).

ii. Other Alleged Excessive Force

Before trial, Mr. Morgan moved in limine, urging exclusion of testimony about an OSBI or FBI investigation of Mr. Morgan. Corrected Joint App'x vol. 3, at 510–25. The district court granted the motion.

Mr. Morgan argues that Mr. Osterhout's counsel violated this ruling by asking three times about Mr. Morgan's use of excessive force on other occasions:

1. Counsel asked Mr. Morgan why he had resigned from LeFlore County and if he had been under investigation by the sheriff when he resigned. Appellants' Corrected Joint App'x vol. 8, at 1332–33.

2. Counsel asked Mr. Timms, the other officer at the scene: "Yesterday, I think I asked you, had you ever been present when Mr. Morgan had broken anyone's nose or crushed in their skull or anything. And you said, well, you couldn't really recall that, but you had been around when he'd done some damage. Do you remember that?" Mr. Timms agreed. Counsel then asked Mr. Timms if he had been present in 2016 when Officer Morgan had "head butted" a suspect. *Id.* vol. 11, at 1553.

3. Immediately after a bench conference addressing that question, counsel asked Mr. Timms if he had "an opportunity to observe the injuries that Jeanette Courier [had] sustained [in] November of 2012 at the hands of Mr. Morgan." *Id.* at 1556.

We first consider whether these questions violated the rulings on the motions in limine. Before trial, the court excluded mention of an OSBI or

FBI investigation. But the plaintiff never asked any questions about an OSBI or FBI investigation.

Mr. Morgan argues that Mr. Osterhout's counsel asked about matters already excluded in the in limine rulings, pointing to questions about why Mr. Morgan had resigned from LeFlore County and if his departure had occurred while he was under investigation by the sheriff. Appellants' Corrected Joint App'x vol. 8, at 1332–36. Mr. Morgan objected in part on the basis that the questioning had violated an in limine ruling. But the district court overruled this objection, ruling that the questioning had involved investigation by the sheriff rather than the OSBI or FBI. *Id.* at 1333–34. We agree. Nothing in the record suggested that the sheriff had used the OSBI or FBI to investigate Mr. Osterhout.

We also consider Mr. Morgan's arguments that the questioning was otherwise improper. Mr. Morgan objected to three questions.

The district court overruled Mr. Morgan's objection to the question about resignation. This ruling was correct, for Mr. Morgan had attributed his resignation to other reasons.

The court sustained Mr. Morgan's other two objections, determining that the answers could create much greater unfair prejudice than probative value. *Id.* vol. 11, at 1553–55; *see* Fed. R. Evid. 403. These rulings minimized the impact of any misconduct, and Mr. Osterhout's counsel did not return to this theme until closing argument.

Still, Mr. Morgan argues that the district court erred in overruling his motion for a mistrial because the bell could not be unrung. *See* Appellants' Corrected Joint App'x vol. 13, at 1555. But the district court later instructed the jury that "questions and objections by the lawyers are not evidence." *Id.* vol. 4, at 694. And we assume that the jury followed that instruction. *Gardner By & Through Gardner v. Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996).

Given the brevity of the misconduct and the district court's action in sustaining the objections and providing a curative instruction, we conclude that the questioning did not prejudice Mr. Morgan.

iii. Mr. Morgan's Alleged Drug Connections

Mr. Morgan also points to counsel's questions and Mr. Osterhout's answers, suggesting that six exchanges falsely implied that Mr. Morgan was pursuing some sort of turf battle for drug dealing:

1. Mr. Osterhout testified that Mr. Morgan had said: "Don't ever come back to my town. This is what happens to hippie pieces of [s***] when they come to my town." *Id.* vol. 6, at 1151.

2. Later, Mr. Osterhout also testified that the officers told him, "Don't ever come back to my [f***ing] town." *Id.* vol. 7, at 1166.

3. Counsel questioned Mr. Morgan about his new marijuana-growing supply company, which had "a giant marijuana leaf" on its sign. *Id.* vol. 8, at 1331–32.

4. Counsel asked Mr. Timms, the other officer at the scene, about his new job as an owner of a medical marijuana dispensary and his knowledge of Mr. Morgan's marijuana-growing business.

Id. vol. 10, at 1476–77.

5. Counsel asked Mr. Timms about Mr. Morgan's marijuana business. *Id.* at 1557.

6. Counsel asked another officer if he knew that Mr. Timms was now selling marijuana. *Id.* vol. 13, at 1647–48.

Mr. Morgan didn't object to four of the questions. Appellants' Corrected Joint App'x vol. 4, at 747–76; *id.* vol. 6, at 1151; *id.* vol. 7, at 1166; *id.* vol. 8, at 1331–32; *id.* vol. 11 at 1157; *id.* vol. 15, at 1764–74; *see* Fed. R. Evid. 103(a). The failure to object resulted in forfeiture. *See Burke v. Regalado,* 935 F.3d 960, 1014 (10th Cir. 2019) ("A party forfeits an evidence objection by failing to timely object or move to strike . . . .").

The two remaining exchanges did not prejudice Mr. Morgan:

1. Counsel asked Mr. Timms, the other officer at the scene, about his new job as an owner of a medical marijuana dispensary and his knowledge of Mr. Morgan's marijuana-growing business. *Id.* vol. 10, at 1476–77.

2. Counsel asked another officer whether Mr. Timms's marijuana sales would affect his certifications. *Id.* vol. 13, at 1647–48.

The court sustained Mr. Morgan's objections and gave a curative instruction. *Id.* vol. 10, at 1477; *id.* vol. 13, at 1647–48. In neither exchange did Mr. Morgan object based on prejudice.

These questions accurately reflect Mr. Morgan and Mr. Timms's current professions. And if an implication were unfair, it would have been cured by the district court's action in sustaining the objections and giving

a curative jury instruction. Given this curative action by the court, this line of questioning was not prejudicial.

b. Improper Closing Argument

Mr. Morgan also contends that Mr. Osterhout's counsel made five improper statements in his closing argument:

1. Counsel described his first meeting with Mr. Osterhout: "And I heard [] the pain in his voice and the frustration and the confusion about why this happened to him . . . . I've never had a problem with them [the police] until they crushed my skull in for no reason, and I'm in pain all the time." *Id.* vol. 14, at 1711.

2. Counsel stated: "[Mr. Morgan] had been going around causing damage like this all the time, according to Mr. Timms." *Id.* at 1738.

3. Counsel stated: "[Mr. Morgan and Mr. Timms] got to move on. They both own marijuana dispensaries now." *Id.* at 1741.

4. Counsel stated: "You are the only people in this world who can give [Mr. Osterhout] the justice that he deserves." *Id.*

5. Counsel asked for $2 million in compensatory damages, stating, "We're asking you to do justice for Mr. Osterhout." *Id.* at 1742.

Four factors bear on whether attorney misconduct merited 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. *Whittenburg v. Werner Enterprises, Inc.*, 561 F.3d 1122, 1127 (10th Cir. 2009) (first three factors); *Burke v. Regalado*, 935 F.3d 960, 1027 (10th

Cir. 2019) (balancing the weight of the evidence).[6] When considering pervasiveness, we consider whether the district court sustained an objection, promptly ending the misconduct. *See Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1578–79 (10th Cir. 1984). The ultimate question is whether the attorney misconduct "influenced the verdict." *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1161 (10th Cir. 2017) (quoting *Lambert v. Midwest City Mem'l Hosp. Auth.*, 671 F.2d 372, 375 (10th Cir. 1982)).

Pervasiveness of the misconduct. Any misconduct was not pervasive for two reasons.

First, Mr. Morgan objected to only one of the allegedly improper statements in closing argument (that Mr. Morgan had "caus[ed] damage like this all the time").[7] This single statement was isolated and the Court immediately sustained the objection.

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[6] In briefing, Mr. Morgan relied on opinions from other circuits, including *Dean v. Searcey*, 893 F.3d 504 (8th Cir. 2018) and *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980). At oral argument, however, counsel for Mr. Morgan agreed that *Whittenburg v. Werner Enterprises, Inc.*, 561 F.3d 1122 (10th Cir. 2009), states the proper standard. Oral Argument at 2:32–2:49.

[7] For all other instances, Mr. Morgan forfeited his challenge. *See Burke*, 935 F.3d at 1114 ("A party forfeits an evidence objection by failing to timely object or move to strike . . . ."). Forfeited trial objections are ordinarily reviewable for plain error, but Mr. Morgan did not argue plain error in his motion for new trial. So Mr. Morgan waived an appellate challenge as to the other statements. *See United States v. Leffler*, 942 F.3d

Mr. Morgan argues that counsel improperly tried to prejudice the jury by referring to other instances of excessive force. But the jury had already learned (without objection) that Mr. Timms had seen Mr. Morgan injure others. Corrected Joint App'x vol. 10, at 1511. Mr. Morgan replies that

- Mr. Timms had not said how often he saw Mr. Morgan injure others and
- Mr. Morgan had objected to questions about specific instances and the cause of his resignation.

But the instances drawing objections involved only a few questions and statements.

Curative action. This factor weighs against the grant of a new trial because the district court instructed the jury that lawyers' statements are not evidence. *See id.* vol. 4, at 694 (jury instruction stating that the evidence does not include "[a]rguments and statements by lawyers" and "questions and objections by the lawyers"). We assume that the jury followed this instruction. *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1175 (10th Cir. 2003).

Despite this instruction, Mr. Morgan argues that the district court did not provide curative action. But none was requested.

1192, 1196 (10th Cir. 2019) (stating that the failure to urge plain error creates a waiver on the forfeited issue).

The size of the award of compensatory damages. The jury awarded compensatory damages of $3 million, which the district court remitted to $2 million.

Mr. Morgan argues that an inconsistency existed between the denial of his motion for a new trial and the remittitur. Given recognition that the compensatory damages were excessive, Mr. Morgan argues that Mr. Osterhout's counsel must have inflamed the jury, justifying a new trial.

But Mr. Morgan misreads *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir. 1981). There the Court recognized that a new trial may not be justified even when a remittitur is. *Id.* at 1168, 1178–79. If "there was error only in the excessive damage award, but not one also tainting the finding of liability," a court "may order a remittitur" instead of a new trial. *Id.* at 1168, 1178–79. So no inconsistency exists.

Granted, the damages were sizeable, which supports the grant of a new trial. But this factor alone does not require a new trial. In *Whittenburg v. Werner Enterprises, Inc.*, the existence of a big award contributed to the grant of a new trial. 561 F.3d 1122, 1132–33 (10th Cir. 2009). But there the improper remarks were extensive and the court had declined to take curative action. *Id.* at 1131. We considered all of these factors "as a whole," concluding that they had compelled a new trial. *Id.* at 1132–33. But here, the factors "as a whole" weigh against the grant of a new trial.

The weight of the evidence. Mr. Morgan argues that this was a close case, requiring the jury to choose between his version of the traffic stop and Mr. Osterhout's. But the district court determined that the evidence had strongly supported Mr. Osterhout's version. And Mr. Morgan does not address questions about his credibility stemming from inconsistencies between his incident report and his testimony.

Nor was the evidence of Mr. Osterhout's damages as thin as Mr. Morgan argues. Mr. Osterhout did not rely solely on his testimony, for he supported his version of events with medical bills, photos, and testimony from other witnesses about Mr. Osterhout's depression, anxiety, and lost income. So the weight of the evidence supports the denial of a new trial.

c. Cumulative Error

Mr. Morgan argues that even if these instances were not enough alone, they combined to influence the jury. We consider whether attorney misconduct "in a cumulative perspective, constitute[s] prejudicial trial misconduct." *Rodgers v. Hyatt*, 697 F.2d 899, 902 (10th Cir. 1983). We answer "no." The misconduct was not pervasive, any prejudice was cured, and the evidence was strong.

Mr. Morgan argues that the trial here resembled the trial in *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977). There the Fifth Circuit Court of Appeals granted a mistrial after counsel had disregarded a pretrial

order six times, including in closing argument when no response would have been possible. *Id.* at 1307–08.

But even if we consider the remarks of Mr. Osterhout's counsel throughout the trial, he made fewer improper comments than the attorney had made in *O'Rear*. And the *O'Rear* case involved unique circumstances. There a defendant insinuated that two other third-party defendants had agreed to cooperate with the plaintiff; and the court dismissed the third-party defendants, suggesting support for the defendant's insinuation. *Id.* at 1307–09. No such circumstances exist here.

* * *

We conclude that the district court acted within its discretion by denying Mr. Morgan's motion for a new trial.

B. The district court did not abuse its discretion in using a verdict form with a single line for compensatory damages against both Mr. Morgan and the Board.

Both defendants challenge the form of the verdict.[8]

1. The verdict form included a single line for compensatory damages.

The verdict form contained a single line for total "Compensatory Damages, if any." Second Corrected Joint App'x vol. 4, at 735. Before the

[8] In its opening brief, the Board states that it "adopts and incorporates [Mr. Morgan's] legal and factual argumentation regarding this issue." Board's Opening Br. at 45.

jury deliberated, Mr. Morgan and the Board had objected to the verdict form, suggesting two separate lines for compensatory damages against each defendant. *Id.* vol. 13, at 1669. The district court overruled the objections. *Id.* at 1670.

After the verdict, Mr. Morgan moved for a new trial, arguing that the district court should have used separate verdict forms for each defendant. Second Corrected Joint App'x vol. 4, at 762–65. The court denied the motion, reasoning that "[t]he facts [had] presented a single, indivisible injury." Corrected Joint App'x vol. 15, at 1792–93.

Mr. Morgan and the Board challenge that ruling, which we review for an abuse of discretion. *ClearOne Communications, Inc. v. Bowers*, 643 F.3d 735, 765 (10th Cir. 2011).

2. The district court did not abuse its discretion.

Mr. Morgan and the Board argue that the district court abused its discretion by using a verdict form with only a single line for the compensatory damages,[9] pointing to the existence of two claims (Mr.

[9] The defendants also argue that the verdict form confused the jury on punitive damages, pointing to a question from the jury during deliberations. But the defendants did not object to the district court's answer or assert jury confusion as ground for a new trial. *See* Second Corrected Joint App'x vol. 4, at 762–65; *id.* vol. 14, at 1747–53. The defendants failed not only to raise the issue in district court but also to ask us to request our review for plain error. So we decline to address this issue. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019)

Morgan's constitutional violation and the Board's liability under state law). Given the existence of two claims, Mr. Morgan and the Board theorize that the verdict needed two lines for compensatory damages: one for Mr. Morgan and another for the Board. We disagree.

Damages are to be apportioned between causes of action only if "there are distinct harms" or a "reasonable basis" exists for "determining the contribution of each cause to a single harm." *Jensen v. W. Jordan City*, 968 F.3d 1187, 1197 (10th Cir. 2020) (quoting Restatement (Second) of Torts § 433A (1965)).

No basis exists to tie each cause of action to a separate harm. *See Burke v. Webb Boats, Inc.*, 37 P.3d 811, 814 (Okla. 2001). In fact, Mr. Osterhout did not claim that the Board had directly caused any injury; he argued only that the Board had incurred vicarious liability for Mr. Morgan's conduct. Corrected Joint App'x vol. 4, at 645, 648.[10]

(stating that the failure to argue plain error on forfeited issues creates a waiver).

[10] For vicarious liability, Mr. Osterhout relied on the Oklahoma Governmental Tort Claims Act, which allows *respondeat superior* liability for state employees. *Gowens v. Barstow,* 364 P.3d 644, 650 (Okla. 2015). *Respondeat superior* makes an employer liable for an employee's actions. *Id.*; *see* Okla. Stat. tit. 51, § 152.1 (immunizing state employees against torts for actions within the scope of employment). The doctrine "is grounded in vicarious liability," which occurs "when one person is made answerable for the actionable conduct of another." *Fox v. Mize*, 428 P.3d 314, 319 (Okla. 2018) (quoting *Braden v. Hendricks,* 695 P.2d 1343, 1351 n.24 (Okla. 1985)).

Because Mr. Osterhout's claim against the Board involved vicarious liability, the Board could incur liability only from Mr. Morgan's conduct. And the Board and Mr. Morgan do not explain how the factfinder could separate

- Mr. Morgan's conduct creating vicarious liability for the Board and
- his conduct triggering his own personal liability.

Mr. Morgan argues that the harms are separate because the claims are distinct, distinguishing between the harms from (1) negligently using excessive force and (2) depriving Mr. Osterhout of his constitutional rights. But the violation of a constitutional right is not itself an "actual injury" with a "money value." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986). Instead, such a violation causes the same harms as those resulting from the negligent use of excessive force. *See id.* at 307 (listing injuries cognizable for constitutional violations).[11] So the district court appropriately used only a single line for compensatory damages. *See Jensen v. W. Jordan City,* 968 F.3d 1187, 1197 (10th Cir. 2020) ("Where a single injury gives rise to more than one claim for relief, a plaintiff may

[11] Mr. Morgan argues that the Board incurs liability only if the jury "found . . . that [Mr.] Morgan's conduct was constitutionally justified but still negligent." Morgan's Reply Br. at 14; Morgan's Opening Br. at 33. But he does not support this assertion, so we need not address this argument. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) (stating that "an appellant may waive an issue by inadequately briefing it").

recover his damages under any claim, but he may recover them only once.") (quoting *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1261–62 (10th Cir. 1988), *overruled on other grounds by Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

* * *

For these reasons, we conclude that the district court did not abuse its discretion in using a verdict form with a single line for total compensatory damages.

C. The district court did not abuse its discretion in denying Mr. Morgan's motion for a new trial based on the amount of compensatory damages.

Mr. Morgan also challenges the amount of compensatory damages.

1. The jury awarded $3 million in compensatory damages.

At trial Mr. Osterhout presented evidence of his injuries, and his counsel requested $2 million in compensatory damages. But the jury didn't stop at $2 million; the jury instead awarded $1 million more than Mr. Osterhout's counsel had requested.

Mr. Morgan moved for a new trial based on insufficient proof of the compensatory damages. In the alternative, he moved for a remittitur.

2. The district court denied Mr. Morgan's motion for a new trial, but remitted the damages to $2 million.

The district court denied the motion for a new trial, concluding that the evidence had sufficed for liability. For this conclusion, the court explained that a remittitur would suffice because the error induced excessive damages but didn't taint the finding of liability.

The district court partially granted Mr. Morgan's motion for a remittitur, relying in part on counsel's request for $2 million:

> Here, plaintiff did not present testimony from a medical expert, but it was undisputed from the medical records that he suffered broken nasal bones and a fracturing of an orbital bone, which required surgery. Plaintiff also testified regarding his continuing pain, both physical and mental. He testified as to his requiring medication for depression and anxiety. Additionally, plaintiff's friend Ben Loggains testified as to his observations of plaintiff's depression. Plaintiff also testified as to his inability to work and lost opportunities. ...[T]his court will grant remittitur, but only to the level of $2 million, the amount plaintiff's counsel requested in closing argument.

Corrected Joint App'x vol. 15, at 1800 (citations omitted).

3. The district court did not abuse its discretion.

Mr. Morgan argues that the district court should have granted a new trial because the award of $3 million in compensatory damages had been grossly excessive and unsupported.[12]

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[12] Mr. Morgan focuses on the jury's initial award of damages, not the $2 million damages award as remitted by the district court. Morgan's Opening Br. at 34–41. For the remitted award of damages, Mr. Morgan resorts only to conclusory assertions. *See id.* at 39 (stating that the court

The award of "damages in civil cases is a fact-finder's function." *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985). When the factfinder decides the award, it stands unless it is "so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981). Upon a finding that passion or prejudice tainted the findings on liability and damages, the court must order a new trial. *Id.* But a remittitur may be appropriate if the error affects the amount of damages awarded without affecting the finding of liability. *Id.*

The district court determined that the finding of liability was supported by the evidence and ordered a remittitur. Mr. Morgan argues that the district court should have ordered a new trial for two reasons:

1. Mr. Osterhout did not prove his pain and suffering or a connection to his injuries.

2. The award of $3 million far exceeds the awards in comparable cases.

"reduced the award to the amount [counsel] requested, which was also excessive"); *id.* at 40–41 (stating that "the $2 million that [Mr. Osterhout's counsel] requested was, also, excessive"). We do not separately address these conclusory assertions. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) (stating that "an appellant may waive an issue by inadequately briefing it").

Mr. Morgan bases his first argument in part on the expanse between the award and the amount of Mr. Osterhout's lost profits. We have rejected a similar argument because the award can compensate for pain and suffering:

> We are not persuaded by defendant's reasoning that the overall verdict is excessive because it is 134 times the amount of the "actual financial loss." There is no requirement that the award for mental distress bear any relationship to the financial loss incurred as the result of the tortious acts.

Malandris, 703 F.2d at 1169; *see also Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 307 (1986) (stating that in § 1983 cases, compensable injuries include pain and suffering).

This reasoning is equally applicable here. The jury awarded $3 million, roughly 10 times the lost profits. But the lost profits don't account for Mr. Osterhout's pain and suffering.

Mr. Morgan also urges a failure to prove causation, stating that Mr. Osterhout relied solely on his own testimony and presented no expert testimony. This argument fails because

- expert testimony was unnecessary and
- Mr. Osterhout didn't rely solely on his own testimony.

Lay testimony was permissible. Mr. Morgan appears to acknowledge that a plaintiff's own testimony is ordinarily sufficient under federal law for an award of damages for emotional distress: "The federal authorities that Osterhout cites seem to suggest that damages for mental or emotional

distress may be based solely on the plaintiff's testimony." Morgan's Reply Br. at 19 & n.39 (quoting *S.M. v. Lincoln Cnty.*, 874 F.3d 581, 589 (8th Cir. 2017), and *Chamberlin v. Town of Soughton*, 601 F.3d 25, 35 (1st Cir. 2010)). But Mr. Morgan implies that Oklahoma law differs, requiring expert testimony to link the physical injury to the emotional harm. *Id.* This implication improperly relies on Oklahoma law and misinterprets it.

Mr. Osterhout sued Mr. Morgan in federal court under a federal statute (42 U.S.C. § 1983). So admissibility is governed by federal law, not state law. *See Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1194 (10th Cir. 2002). And the admissibility of lay opinions is governed by Federal Rule of Evidence 701. Given the applicability of this federal rule, there's no conceivable basis to apply Oklahoma law on admissibility. And, as Mr. Morgan appears to acknowledge, federal law allows lay witnesses to testify about their "observations [that] are common enough and require . . . a limited amount of expertise, if any." *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011) (quoting *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995)).[13]

[13] Mr. Morgan cites *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442 (10th Cir. 1997), where we upheld a jury's conclusion that a plaintiff who had not presented expert testimony was not entitled to compensation for his mental illness. *Id.* at 1457, *overruled on other grounds by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011). But there we concluded only that we could not "say the jury's refusal to compensate Mason for his alleged mental anguish shock[ed] the

But the same would have been true even under Oklahoma law. Under Oklahoma law, "an expert is not required if the element of damage lies within the common knowledge of lay persons." *Ellison v. Campbell*, 326 P.3d 68, 73 (Okla. 2014). Laypersons sometimes need expert assistance when confronting complex questions of medical causation. *Godfrey v. Meyer*, 933 P.2d 942, 942–44 (Okla. Ct. App. 1996). But medical expertise isn't required just because a plaintiff seeks damages for a purely subjective injury like past pain and suffering. *Id.* at 944 (citing *Reed v. Scott,* 820 P.2d 445 (Okla. 1991)). "[E]ven subjective injuries may be of a character that expert medical testimony is not necessary to prove the causal connection between the accident, injury, pain and suffering, medical treatment and expense." *Id.*[14]

Mr. Osterhout testified that he had been thrashed in the face with a flashlight and kicked in the ribs. Mr. Osterhout didn't need Sigmund Freud to connect his later depression and anxiety to the beating that he'd experienced. Laypersons could easily see the connection without the aid of expert testimony.

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judicial conscience, or raise[d] an inference of passion or prejudice." *Id*. We did not require expert testimony for an award of damages.

[14] Mr. Morgan cites *Worsham v. Nix*, 145 P.3d 1055 (Okla. 2006). There the trial court excluded expert testimony, and no evidence existed on the cause of the emotional distress. *Id.* at 1069–70.

Mr. Morgan complains not only of the absence of expert testimony but also of Mr. Osterhout's reliance on his own testimony. But Mr. Osterhout didn't rely solely on his own testimony. For example, a friend testified that Mr. Osterhout had

- lost profits from a contract to rehab mobile homes (Corrected Joint App'x vol. 8, at 1281–82, 1296–97) and
- suffered injuries and depression after the incident (*id.* at 1287–1291, 1297–1298).

The friend's testimony was supported by photographs of Mr. Osterhout's face, which showed lacerations to the nose and forehead and under the eye:

Another photograph showed extensive facial bruising, a bleeding laceration on the face, and a deformity and swelling of the nose:

Mr. Osterhout relied not only on photographic proof but also on his medical records. *Id.* vol. 18, at 2198–2292, 2302–86. These records included a CT scan, which showed

- acute displaced fracturing of the nasal bones and
- fracturing of the nasal septum and left orbital roof.[15]

Roughly two weeks after being hit in the face, Mr. Osterhout underwent reconstructive surgery to repair his nasal facture. The surgery left Mr. Osterhout with excruciating facial pain during his recovery.

[15] Orbital roof fractures "are associated with high-impact injuries as well as multiple facial and neurological injuries." Jordyn P. Lucas, M.D., et al., *Orbital Roof Fractures: An Evidence-Based Approach*, 22 *Facial Plastic Surgery & Aesthetic Med.* 471, 472 (2020).

Given the testimony of other witnesses, the photographic evidence of injury, and the medical records, Mr. Osterhout relied on more than his own testimony.

Mr. Morgan also urges us to compare the award of damages to awards in other cases. In general, "comparisons yield no insight into the evidence the jurors heard and saw or how they used it during their deliberations" and "detract from the appropriate inquiry, which is whether the verdict is against the weight of the evidence." *Burke v. Regalado*, 935 F.3d 960, 1036 n.60 (10th Cir. 2019) (quoting *Hill v. J.B. Hunt Transport, Inc.*, 815 F.3d 651, 670–71 (10th Cir. 2016)). Exceptions may exist when "a previous case is similar enough to serve as a meaningful benchmark." *Hill*, 815 F.3d at 671; *see also Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) (reducing an award by at least 80% given comparable cases).

Mr. Morgan cites seventeen opinions, but none are sufficiently similar. *Hill*, 815 F.3d at 671.

For example, 11 of the cited cases are at least 25 years old and do not reflect current public attitudes or spiraling costs for medical care. *See Malloy v. Monahan*, 73 F.3d 1012, 1017 (10th Cir. 1996); *Black v. Hieb's Enters.*, 805 F.2d 360 (10th Cir. 1986); *Hurd v. Am. Hoist and Derrick Co.*, 734 F.2d 495 (10th Cir. 1984); *Herdman v. Smith*, 707 F.2d 839 (5th Cir. 1983); *Ledet v. Burgess*, 632 So. 2d 1185 (La. Ct. App. 1994); *Sullivan v. Quick*, 465 So. 2d 254 (La. Ct. App. 1985); *DiBenedetto v. Stark*, 428 So.

2d 864 (La. Ct. App. 1983); *Dean v. Nunez*, 423 So. 2d 1299 (La. Ct. App. 1982); *Moore v. Aksten*, 459 A.2d 266 (N.H. 1983); *Wilson v. Patel*, No. 14634, 1995 WL 39296 (Ohio Ct. App. Feb. 1, 1995) (unpublished); *Crittendon v. Thompson-Walker Co.*, 341 S.E.2d 385 (S.C. Ct. App. 1986).

Four of the other six cases involve far different injuries. *Azoulay v. Condo. Ass'n of La Mer Estates, Inc.*, 94 So. 3d 686, 686–88 (Fla. Dist. Ct. App. 2012) (the plaintiff "suffered a broken wrist and some face lacerations" after falling); *Murphy v. Smith*, No. 12-CV-0841-SCW, 2015 WL 13236221 (S.D. Ill. 2015) (no claim for long-term mental suffering); *Burton v. Dutiel*, 43 N.E.3d 874, 882–83 (Ohio Ct. App. 2015) (the plaintiff experienced "a sharp pain in her left side, ovary problems, and the need to obtain counseling" after being raped); *Chatman v. Buller*, Case No. 12-CV-192-JHP, 2013 WL 4832811 (E.D. Okla. Sept. 10, 2013) (the plaintiff was forced to the ground without any discussion of injuries). So these cases provide no helpful comparisons.

Finally, Mr. Morgan cites two cases involving weaker evidence: *Rivera v. City of New York*, 836 N.Y.S.2d 108 (N.Y. App. Div. 1st Dept. 2007) and *Smerling v. Dever*, No. 12-CV-50362, 2015 WL 75016 (N.D. Ill. Jan. 6, 2015). In *Rivera*, the jury awarded 7 plaintiffs more than $81 million. *Id.* at 109–111. The trial court remitted the damages to $635,000. *Id.* at 116. On appeal, the court concluded that the damages remained too high, but only after concluding that (1) the force had not been excessive

and (2) the evidence of injury had been insufficient. *Id.* at 115–17. Similarly, in *Smerling*, the trial court limited the damages award because the plaintiff's only injury evidence consisted of his own affidavit and he declined to participate in an evidentiary hearing. 2015 WL 75016, at *4.

The evidence here is stronger than in *Rivera* or *Smerling*. Mr. Morgan does not challenge the sufficiency of the evidence of excessive force, and Mr. Osterhout provided objective evidence of his injuries. *See* pp. 37–42, above.

* * *

Having rejected Mr. Morgan's arguments, we conclude that the district court had discretion to deny the motion for a new trial.

D. Mr. Morgan waived his challenge to the jury instruction on compensatory damages.

Mr. Morgan also challenges the jury instruction on compensatory damages, arguing that it improperly allowed the jury to award Mr. Osterhout for the abstract value of his constitutional right instead of his proven injuries. But Mr. Morgan did not object to the jury instruction, so he has forfeited this argument. *See Black v. M & W Gear Co.*, 269 F.3d 1220, 1232 (10th Cir. 2001) ("[T]his court will not review instructions given to which no objections were lodged before the jury retired for deliberation unless they are patently plainly erroneous and prejudicial.") (quoting *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1054

(10th Cir. 1988)). Because Mr. Morgan does not urge plain error, we would not ordinarily address this argument. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019).

Mr. Morgan replies that he "applied the standard even if he did not use the magic words 'plain error.'" Morgan's Reply Br. at 5; *see also id.* at 3–5. But even if he had argued plain error, he has not shown an error, much less one that is plain and prejudicial. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).

Mr. Morgan argues that the jury instruction "conced[ed]" the lack of "evidence of actual injury or actual damages," which would have forced the jury to improperly compensate Mr. Osterhout for the abstract value of his constitutional rights. Morgan's Opening Br. at 35–36. But the jury instruction did not concede the absence of an injury or actual damages; the instruction said only that "*no evidence of the dollar value* of physical or mental/emotional pain and suffering or loss of a normal life has been or needs to be introduced." Appellants' Second Corrected Joint App'x vol. 4, at 718 (emphasis added). By contrast, Mr. Osterhout presented substantial evidence tying his injuries to Mr. Morgan's conduct. *See* Part II(C), above. And the jury reasonably found Mr. Morgan liable for the conduct. *See* Part II(B), above. So the jury instruction did *not* concede a lack of evidence on injury or actual damages.

E. The assessment of punitive damages was not unconstitutionally excessive.

We also reject Mr. Morgan's challenge to the assessment of punitive damages.

1. The district court upheld the jury's assessment of punitive damages.

This assessment totaled $1 million. Mr. Morgan moved for a remittitur, arguing that the amount was excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The district court denied the motion.

Mr. Morgan argues that the district court misapplied the *Gore* factors.[16] In addressing this argument, we conduct de novo review. *Burke v. Regalado*, 935 F.3d 960, 1037 (10th Cir. 2019).

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[16] In his summary of argument and a heading, Mr. Morgan also challenges

- the assessment of punitive damages based on deviation from the common law and
- the jury instruction on punitive damages.

Morgan's Opening Br. at 20–21, 41. But his argument focuses only on the *Gore* factors. So we will not separately address the jury instruction or the common law. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) (stating that "an appellant may waive an issue by inadequately briefing it").

2. The punitive damages were not excessive.

To determine whether punitive damages are excessive, we consider three factors: (1) "the degree of reprehensibility of defendant's misconduct," (2) "the disparity between the actual or potential harm suffered . . . and [the] punitive damages award," and (3) the difference between the punitive damages and "the civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 574–75.

The reprehensibility of the misconduct. The first factor is the "most important." *Burke*, 935 F.3d at 1039 (quoting *Gore*, 517 U.S. at 575). To evaluate the reprehensibility of the misconduct, we balance five subfactors: (1) whether the harm caused was "physical" or "economic," (2) whether the defendant acted with "indifference or reckless disregard for the health or safety of others," (3) whether the plaintiff was "financially vulnerable," (4) whether the "wrongful conduct" was "repeated" or "isolated," and (5) whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident." *Id.* at 1037.

Mr. Morgan concedes that the first two subfactors—physical harm and indifference or reckless disregard—support heavy punitive damages. Morgan's Opening Br. at 42; *see Burke*, 935 F.3d at 1037 (stating that a jury may award punitive damages when the misconduct "involves reckless or callous indifference to the federally protected rights of others") (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

The third subfactor is neutral because the record does not address Mr. Osterhout's financial vulnerability.

The fourth subfactor weighs against heavy punitive damages because the trial record contained no evidence that Mr. Morgan had repeated his misconduct. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

The fifth subfactor supports heavy punitive damages because the jury found excessive force. Mr. Morgan denies malice, but he "has conceded from the beginning . . . that he intentionally struck [Mr.] Osterhout in the face and kneed him in the ribs." Morgan's Reply Br. at 21. So the physical force was not accidental. *Burke*, 935 F.3d at 1037.

Because three of the five subfactors support heavy punitive damages, we conclude that the reprehensibility of Mr. Morgan's misconduct supports the assessment of substantial punitive damages. *See id.* at 1039 (concluding that a sheriff's conduct was "sufficiently reprehensible" when three subfactors supported punitive damages, including physical harm, indifference or reckless disregard, and repetition of the conduct).

The disparity between the actual harm and the award of punitive damages.[17] The amount of punitive damages "must be based upon the facts

[17] Mr. Morgan argues that we should not consider the second factor because the jury did not apportion compensatory damages between him and

and circumstances of the defendant's conduct and the harm to the plaintiff." *Jones v. United Parcel Serv., Inc*, 674 F.3d 1187, 1207 (10th Cir. 2012) (quoting *Campbell*, 538 U.S. at 425). There are no "concrete constitutional limits on the ratio between" punitive and compensatory damages. *Id.* (quoting *Campbell*, 538 U.S. at 424). Instead, the ultimate issue is whether "the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426.

If compensatory damages are "substantial," the Constitution "perhaps" tolerates punitive damages only if they don't exceed the amount awarded in compensatory damages. *Campbell*, 538 U.S. at 425; *see also Jones*, 674 F.3d at 1207–08 (concluding that punitive damages were grossly excessive when they more than tripled the amount of compensatory damages, which itself exceeded $600,000).

Here the compensatory damages are substantial. But the punitive damages are far less than the amount awarded in compensatory damages (even after the remittitur), so the second factor also supports a heavy assessment of punitive damages.

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the Board. But the Board did not separately cause any injuries. *See* Part II(B)(2), above.

The difference between punitive damages and civil penalties. For the third factor, we compare the assessment of punitive damages to civil penalties in other cases. *Burke v. Regalado*, 935 F.3d 960, 1038 (10th Cir. 2019). The core inquiry is whether the defendant had "reasonable notice" that the misconduct "could result in such a large punitive award." *Id.* (quoting *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996)).

Mr. Morgan urges consideration of criminal penalties for similar conduct, comparing the jury's assessment of punitive damages to Oklahoma's maximum fine of $500 for aggravated assault and battery. *See* Okla. Stat. tit. 21, § 647. But the Supreme Court has discouraged the use of criminal penalties as a comparator for punitive damages in a civil case:

> The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility.

Campbell, 538 U.S. at 428; *see Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1072 n.33 (10th Cir. 2016) (stating that "the Supreme Court has cautioned against the reliance on criminal penalties to support an award of punitive damages"). So even though Mr. Morgan's misconduct might have subjected him to a criminal penalty, that penalty supplies a poor benchmark for punitive damages.

We instead consider other cases with civil awards for excessive force. In many of those cases, juries have awarded punitive damages of $1 million or more for excessive force even when the compensatory damages had been much less. *See, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 91 (1st Cir. 2001) (upholding an award of $1.55 million in punitive damages (compared to $100,000 in compensatory damages) when the defendants had repeatedly punched the plaintiff in the head while trying to physically restrain him); *Casillas-Díaz v. Palau*, 463 F.3d 77, 79–82, 84–86 (1st Cir. 2006) (upholding an award of $1 million in punitive damages (compared to $300,000 in compensatory damages) when the defendants had "savagely beaten" the plaintiffs).

Mr. Morgan cites other opinions that involve far different circumstances. *See Alla v. Verkay*, 979 F. Supp. 2d 349, 354, 375–79 (E.D.N.Y. 2013) (upholding punitive damages of $150,000 for excessive force when the compensatory damages were $1,750,000 and the plaintiff had been punched in the face); *DeYapp v. Tracy*, Nos. Civ. 02-452 JP/RLP, Civ. 02-453 JP/RLP, 2006 WL 8443773, at *2 (D.N.M. Aug. 14, 2006) (jury awarded one plaintiff $133,000 in compensatory damages and $300,000 in punitive damages and the other plaintiff $57,000 in compensatory damages and $200,000 in punitive damages); *Jackson v. Austin*, 241 F. Supp. 2d 1313 (D. Kan. 2003) (ordering each defendant to pay $10,000 in punitive damages to a plaintiff-inmate when the

compensatory damages were $15,000); *Cardoza v. City of New York*, 139 A.D.3d 151, 166–67 (N.Y. App. 2016) (applying a different state-law test to reduce punitive damages from $750,000 to $75,000).

Given the existence of comparable "civil penalties," we conclude that Mr. Morgan had reasonable notice that excessive force could subject him to punitive damages as high as $1 million.

* * *

The three factors support an assessment of $1 million in punitive damages. We thus conclude that the punitive damages were not grossly excessive.

III. The Board waived its other appellate arguments.

The Board also argues that

- the district court should have granted summary judgment because Mr. Morgan's excessive force would not have been within the scope of his employment,
- the jury acted inconsistently by imposing punitive damages and finding that Mr. Morgan had acted within the scope of his employment,
- the verdict conflicted with the great weight of the evidence, and
- the award of compensatory damages was excessive.

These challenges are waived because the Board did not file any post-judgment motions.

For purposes of summary judgment, the scope of employment involved a question of fact. *See Rural Water Dist. No. 4, Douglas Cnty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 975 (10th Cir. 2011). But after the jury decided this factual question, the Board failed to file a Rule 50(b) motion. The failure to file this motion constituted a waiver of the Board's challenge to the denial of summary judgment. *Id.*

The Board argues in its reply brief that it should have obtained summary judgment because Mr. Osterhout couldn't recover for assault and battery given his theory that Mr. Morgan had acted within the scope of employment. But Mr. Osterhout dropped the assault-and-battery claim. *See* p. 2 n.2, above. His prior claim of assault and battery didn't eliminate the Board's need to seek relief under Rule 50(b) on the claim involving negligent use of excessive force.

On the three other challenges, the Board failed not only to file a Rule 50(b) motion but also to move for a new trial, which waived appellate review of the verdict and the award of compensatory damages. *See Morrison Knudsen Corp. v. Fireman's Fund. Ins. Co.*, 175 F.3d 1221, 1256 n.45 (10th Cir. 1999) (explaining that challenges to a verdict and grounds for a new trial must be raised in district court); *Bales v. Uptergrove*, 5 F. App'x 854, 855 (10th Cir. 2001) (unpublished) (concluding that the appellant waived appellate challenges to the verdict or damages based on the failure to move for a new trial or to file a Rule 50(b) motion).

The Board waived its challenge involving inconsistency in the verdict. Because the issue did not involve sufficiency of the evidence, the remedy would involve a new trial rather than judgment as a matter of law. But the Board failed to ask the district court for a new trial. The failure to move for a new trial waives appellate review of an inconsistency in the verdict "unless the verdict is inconsistent on its face so that entry of judgment on the verdict is plain error." *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1421–22, 1424 (10th Cir. 1986).

The Board also waived its argument that the verdict had conflicted with the great weight of the evidence. To appeal on this issue, the Board needed to file a Rule 50(b) motion or a Rule 59(a) motion for a new trial. *See Morrison Knudsen Corp.*, 175 F.3d at 1256 n.45 (explaining that challenges to a verdict and grounds for a new trial must be raised in district court); *see also Aguilar v. Basin Resources, Inc.*, 98 F. App'x 717, 718 (10th Cir. 2004) (unpublished) (concluding that the defendant waived the argument that the verdict was against the great weight of the evidence because the defendant failed to move for a new trial); *Bales v. Uptergrove*, 5 F. App'x 854, 855 (10th Cir. 2001) (unpublished) ("Failure to move for a new trial or to file a Rule 50(b) motion on the ground that the verdict was against the weight of the evidence, waives the issue for purposes of appeal.").

Finally, the Board waived its challenge to the award of compensatory damages by failing to move for a new trial. *See Morrison Knudsen Corp. v. Fireman's Fund. Ins. Co.*, 175 F.3d 1221, 1256 n.45 (10th Cir. 1999) (stating that a challenge to a verdict "by definition arise only after a verdict," so a party must preserve the challenge "by moving for a new trial").

The Board argues that these challenges are otherwise reviewable under the plain-error standard. But the Board hasn't even identified the plain-error standard, much less explained how its challenges would satisfy that standard. We thus consider the Board's plain-error argument inadequately developed. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151–52 (10th Cir. 2012) (declining to consider the appellant's plain-error argument based on inadequate development).

IV. Conclusion

For these reasons, we affirm.