No. 20-30739

IN THE

United States Court of Appeals for the Fifth Circuit

ERIE MOORE, JR.; TAMARA GREEN;
TIFFANY ROBINSON,
Plaintiffs-Appellants,

v.

LASALLE MANAGEMENT COMPANY, L.L.C., INCORRECTLY NAMED AS LASALLE CORRECTIONS L.L.C.; RAY HANSON; GERALD HARDWELL; ROY BROWN; REGINALD WILLIAMS; KENNETH HART; DANIELLE WALKER; DUAN ROSENTHAL; JEREMY RUNNER; REGINALD CURLEY, INCORRECTLY NAMED AS REGINALD CURLY; CITY OF MONROE; SHERIFF OF OUACHITA PARISH; DONALD MURPHY; CHASE WELLS; TOMMY CROWSON, INCORRECTLY NAMED AS OFFICER CROWSON; WILLIAM MITCHELL, INCORRECTLY NAMED AS NURSE MITCHELL; ALTON HALE; RICHWOOD CORRECTIONAL CENTER, L.L.C.; ARCHIE AULTMAN, INCORRECTLY NAMED AS AULTMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana, USDC No. 3:16-CV-1007

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the number and style of the case are as follows: Moore v. LaSalle Management Company, L.L.C., 5th Cir. No. 20-30739.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

Defendants participated in and presided over the violent death of Erie Moore, Sr., a detainee in their custody, in violation of his constitutional rights. And they punished and abused him in the same manner that other detainees in their custody were punished and abused. Afterwards, nothing changed. No one was reprimanded, no policies were revised, and the abuses continued.

Now, asked to reckon with those constitutional violations, Defendants offer no coherent theory in response. Instead, they deflect, and they ask this Court to do the same.

Faced with gruesome videos showing Defendant guards striking Mr. Moore's head and slamming it into the ground—as well as medical evidence that he died from blunt force trauma to the head—Defendants expect this Court to believe that, actually, he died from some other, undocumented head injury, caused by some unknown source, days earlier. What's more, they expect this Court to rule that a jury would be compelled to believe that story, too.

Their other contentions are similarly far-fetched. Defendants assert that Plaintiffs waived an argument about vicarious liability that

the parties—Defendants included—briefed in the district court. They hide behind purported immunities that have no basis in legal or historical authorities. And with respect to several key claims, Defendants present no argument and no record evidence at all, yet they still expect this Court to rule in their favor on those claims.

Much of Defendants' briefing reads like a closing argument, crediting only the evidence in their favor, pointing out where Plaintiffs' evidence is contradicted by their own, and attacking the credibility of supposedly disgruntled employee witnesses. Defendants will have the opportunity to make their closing arguments. But in light of these genuine and profound disputes of material fact, they must make them to a jury.

ARGUMENT

I. The Pending And Appealed Claims.

Defendants seek to make hay of claims that they contend Plaintiffs abandoned. They are right in some respects; as with virtually all appeals heard by this Court, Plaintiffs have sought to narrow the issues on appeal. For example, as the Sheriff Defendants note, Plaintiffs are not raising claims against them at this stage. In other

respects, however, Defendants misrepresent the arguments on appeal. For clarity, Plaintiffs herein describe the claims and issues still in this case, both in the district court and in this appeal.

First, the following claims remain pending in the district court and are not at issue in this appeal:

1. Federal and state excessive force claims for non-lethal force against Defendants Runner, Hardwell, Rosenthal, and Foster. ROA.27167, 27359.
2. Federal conspiracy, federal failure to intervene, and federal and state failure to provide medical care claims against Defendant Foster. ROA.27167.
3. Respondeat superior liability for Defendants LaSalle and Richwood, to the extent any individual Defendants are held liable on state law claims. ROA.27305.
4. All federal and state claims for non-lethal injuries against Defendants Loring and Douglas, who only moved for summary judgment on the question of causation of Mr. Moore's death. ROA.27392.

Second, the following claims were dismissed in the district court and are raised in this appeal:

1. Deliberate indifference claims against Defendants Runner, Hardwell, Curley, Williams, and Mitchell. Opening Brief ("OB") 53-67.
2. Individual punitive damages claims against Defendants Runner, Hardwell, Curley, and Williams. OB67-73.
3. Respondeat superior liability for Defendants LaSalle and Richwood, to the extent any individual Defendants are held liable on federal law claims. OB74-84.
4. *Monell* claims against Defendants LaSalle, Richwood, and the City of Monroe. OB84-96, 116-18.
5. Corporate punitive damages claims against Defendants LaSalle and Richwood. OB102-116.

Third, Plaintiffs have challenged the district court's entry of partial summary judgment on the causation of Mr. Moore's death. OB35-53. Finding insufficient evidence of causation, the district court's judgment curtailed many of Plaintiffs' claims to the extent they arose from his death, as opposed to non-lethal injuries. ROA.27392

("Plaintiffs' claims against Defendants for any injuries to Moore that were less than lethal remain pending."). If this Court agrees that summary judgment on causation was unwarranted, it should reverse that judgment.

The effect of that reversal would be to permit Plaintiffs to seek recovery for Mr. Moore's death, not just his non-lethal injuries. That would expand the potential scope of liability on the excessive force claims against Defendants Runner, Hardwell, Foster, Loring, and Douglas, as well as respondeat superior liability for Defendants LaSalle and Richwood based on their employees' use of excessive force.[1]

This would be true with respect to both the federal and state law claims relating to lethal excessive force. As the district court ruled, ROA.27390, and Plaintiffs' brief explained, OB53, the causation arguments are identical. The district court resolved them in tandem, ROA.27390, and this Court should do the same.

[1] As to Plaintiffs' deliberate indifference claims (e.g., failure to provide medical care and lost chance of survival), Defendants "did not seek summary judgment on" the question whether these failures also contributed to Mr. Moore's death, so that issue remains pending for trial. ROA.27390.

Fourth and finally, Defendants' briefs contain arguments on issues that Plaintiffs have not raised in this appeal. The Court may disregard Defendants' arguments on the following issues:

1. Bystander liability: Although the LaSalle Defendants contend that "Plaintiffs attempt to resurrect the failure to intervene (bystander liability) claims[] on appeal," LaSalle Brief ("LSB") 95, Plaintiffs did not.
2. Delegation to the warden: Although the LaSalle Defendants present argument about whether "allowing a warden to run a prison is somehow a violation of the Constitution," LSB115, Plaintiffs did not raise that issue.

II. The District Court Erred In Granting Summary Judgment To The Individual Defendants.

A. Richwood guards, including Defendant Foster, beat Mr. Moore in the Four-Way.

As an initial factual matter, the parties dispute whether Richwood guards, including Defendant Foster, beat Mr. Moore in the camera-free area of the facility known as the Four-Way. Several of Defendants' arguments on the merits rely on their disputed contention that there

was no such beating. The district court correctly denied summary judgment on this issue. ROA.27157-27158.

As Plaintiffs explained, Foster later described the incident in detail to another guard, John Badger. OB21-22. Foster told Badger that he and other guards were "beating" Mr. Moore—that "they beat him [to] death"—and that "they laughed and talked about it," planning how "to protect one another in court." ROA.24487.

Defendants contend that (1) Foster's statements are inadmissible hearsay and (2) there is insufficient evidence in the record to raise a genuine dispute about whether Foster and other guards beat Mr. Moore in the Four-Way. They are wrong on both counts.

1. Defendant Foster's statements are admissible.

Through Badger's testimony, Plaintiffs seek to offer Foster's statements as evidence of the Four-Way beating. On appeal, Defendants contend for the first time that Foster's statements are inadmissible hearsay. *See* LSB147-50. Because Defendants failed to raise a hearsay objection in the district court, that argument is waived, and this Court should decline to consider it. *BGHA, LLC v. City of Universal City*, 340 F.3d 295, 299 (5th Cir. 2003).

In fact, Defendants conceded below that Foster's statements to Badger were "statements made by a party opponent." ROA.26630. Defendants got it right the first time. Foster's statements to Badger—that he and other guards beat Mr. Moore to death and then planned to cover it up—are "statement[s] … offered against an opposing party" that were "made by the party in an individual or representative capacity." Fed. R. Evid. 801(d)(2)(A). That is classic admissible non-hearsay, and the district court was correct to consider it for the truth of the matter asserted: that the beating took place. *See* ROA.27155-27157.[2]

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[2] Defendants assert in passing that Foster's statements "would only come in if Foster testified at trial," LSB147-48, but they misstate the law. The exclusion for party admissions is categorical. *See* Fed. R. Evid. 801(d)(2).

The case Defendants cite, *Bellard v. Gautreaux*, lays out the correct rule. 675 F.3d 454, 460-61 (5th Cir. 2012). There, the party-opponent (the sheriff) made a statement to a non-party (LeDuff). *Id.* Because the sheriff's statement was a party admission, it "would be admissible," so long as LeDuff were to testify. *Id.* at 461. The same is true here, where a party-opponent (Foster) made the statement to a non-party (Badger), who will testify to it. The problem in *Bellard*—not present here—was that LeDuff denied hearing the statement, *id.* at 459, and the plaintiff could not introduce the statement through his own testimony because of a *different* hearsay problem, *id.* at 461. Defendants appear to be conflating the two levels of potential hearsay addressed in the *Bellard* opinion.

Defendants then pivot, arguing more narrowly that Foster's statements are inadmissible as to other Defendants. LSB148. That's also wrong. Foster's statements are admissible against at least Defendants LaSalle, Richwood, and the City, because Foster made the statement as their "agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(a)(2)(D). Foster was their agent or employee, he was speaking about his on-the-job use of force against a detainee in their custody, and he was speaking while still a Richwood guard. *See* ROA.24487, 24494.

As to the remaining Defendants, the hearsay objection is waived, as explained above. In fact, in the district court, instead of attacking Foster's statements as hearsay, Defendants attacked Badger's credibility, suggesting that he should not be believed because Richwood fired Badger and his mother. ROA.26629 & n.2. That is obviously an improper credibility argument at summary judgment. The Court should reject Defendants' waived, baseless hearsay objection.

2. A reasonable jury could conclude that the Four-Way beating took place.

A reasonable jury could credit Badger's testimony about Foster's statements and, relying on those statements, infer that the Four-Way

beating took place just as Foster said it did. Defendants protest that Badger's testimony conflicts with other evidence in the record, LSB150-52, but that argument backfires: All Defendants show is that there is a genuine dispute. The district court correctly rejected their arguments for this reason, ROA.27157, and this Court should do the same.

Defendants catalog the evidence in their favor, in defiance of the summary-judgment standard. They argue that there could not have been a beating, because sheriff's deputies were sometimes present with the guards in the Four-Way and Mr. Moore's injuries were not sufficiently severe.[3] LSB150-52. But Defendants' arguments are self-defeating, because they concede that there *were* periods when the guards were left alone with Mr. Moore and that Mr. Moore *did* have numerous injuries afterward.

Plaintiffs' evidence confirms this genuine dispute. The deputies observed cuts and bleeding on Mr. Moore, ROA.23177, 23179, and some of these injuries are corroborated by the photographs in the record,

[3] Defendants also cite evidence of a positive drug screen in support of their argument that no beating took place. LSB152. That evidence is patently irrelevant to the question whether the guards beat Mr. Moore, and the Court should see this underhanded tactic for what it is.

ROA.12261-12263. Mr. Moore's family also testified about the injuries, including cuts and swelling. ROA.14982. According to Defendant Mitchell, Mr. Moore was not bleeding when Mitchell saw him in the Four-Way, ROA.23455-23456, so a jury could infer that these injuries were inflicted in the Four-Way between Mitchell's visit and the deputies' arrival.

In sum, there was admissible evidence from which a jury could reasonably conclude that Richwood guards, including Foster, beat Mr. Moore in the Four-Way.[4] Several of Defendants' arguments—including with respect to causation and *Monell*—rely on their belief that no such beating occurred. Because a jury could disagree, those arguments should be rejected.

B. A reasonable jury could find that Defendants caused Mr. Moore's death.

Plaintiffs laid out robust and common-sense evidence showing the causes of Mr. Moore's death. OB36-50. Plaintiffs further established how the district court erred as a matter of law in requiring a heightened

[4] At trial, Plaintiffs may also seek to prove that Defendants Loring and Douglas participated in the Four-Way beating. Neither moved for summary judgment on that issue, which remains disputed below.

showing of conclusive proof of causation, rather than causation "by a preponderance of the evidence," *Lasha v. Olin Corp.*, 625 So. 2d 1002, 1005 (La. 1993), and by drawing inferences against Plaintiffs, OB45-46, 50-53.

In response, Defendants ask this Court to repeat the error—to draw its inferences against Plaintiffs and to weigh the evidence in Defendants' favor. That is not the standard in district court or before this Court on review, and this Court should recognize the genuine dispute on causation.

1. The district court erred by improperly construing the evidence on the timing of the fatal injury in Defendants' favor.

As Plaintiffs explained, testimony by all of Mr. Moore's treating physicians supports the conclusion that Mr. Moore suffered a fatal subdural hematoma within a narrow window of time prior to his hospitalization. The district court erred in selectively crediting the evidence that cut against that testimony. OB36-41.

Defendants complain that Plaintiffs' evidence was not sufficiently conclusive. *See* LSB60-64. Although it is true that some of the testifying physicians described the evidence as merely consistent with a

fatal injury in that narrow window, Dr. Nelson affirmed that Mr. Moore's fatal injury *did occur* between 7:00 p.m. and Mr. Moore's 9:30 p.m. arrival at the hospital. *See* ROA.24187 ("Q: If the facts show that Mr. Moore was standing, … moving about in a normal fashion at seven p.m., would it be your opinion that the trauma would have occurred between that seven p.m. mark and the time of presentation to the hospital? A: If that were the case, yes."). Moreover, he ruled out a slowly progressing hematoma caused before that period. ROA.24186-24187 ("If it were a chronic subdural hematoma slowly progressing, [Mr. Moore] would have had signs and symptoms long before [4:30 p.m.]."). Dr. Owings likewise testified that Mr. Moore's fatal subdural hematoma "was not present" until at or just before 7:00 p.m. ROA.24584. A reasonable jury could credit that testimony and, on that basis, conclude that the fatal injury occurred within that window of time.

The district court's error, repeated in Defendants' briefing, is in relying on other testimony and supposing that the jury would have to credit that other evidence, too. When the district court ruled that "the medical evidence *allows* for a 48-hour window," ROA.27385 (emphasis

added), it was saying that it *could* infer that the injury occurred within that longer period. But the possibility of an inference in Defendants' favor is no basis for summary judgment. Because a reasonable jury could *also* infer a narrower window in Plaintiffs' favor, the district court was required to make that latter inference. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 257 (1986).

Viewed in this light, the rest of Defendants' arguments on timing are immaterial. Each of those arguments requires crediting less favorable evidence and drawing inferences other than the one most favorable to Plaintiffs—that the fatal injury occurred in the 2.5-hour window.

For instance, Defendants argue that the 2.5-hour inference is unreasonable because Mr. Moore was acting erratically before arriving at Richwood. LSB64-65. But that is wrong twice over. First, it assumes that the jury would credit evidence favorable to Defendants about Mr. Moore's behavior, despite Defendants' failure to take action on their supposed concerns about his state. Second, even assuming Mr. Moore was acting unusually, the physicians' testimony turned not on his demeanor but on his ability to function at the most basic level—i.e.,

standing and moving about normally—which Defendants have not disputed. *See* ROA.24187.

Similarly, Defendants simply ignore Dr. Nelson's unequivocal testimony establishing that the injury occurred in the 2.5 hours prior to Mr. Moore's arrival at the hospital. LSB62-63. And while Defendants acknowledge Dr. Nelson's earlier testimony that the fatal injury "*more likely than not*" occurred in the hours just prior to admission at the hospital, ROA.24185 (emphasis added), they complain that Dr. Nelson's statement depended upon the accuracy of the history he received, LSB63. Defendants identify no inaccuracy in the history that Dr. Nelson was provided, LSB63, and so effectively concede this point.

The reasonableness of the inference that Plaintiffs seek is further underscored by the testimony of Dr. Gonzalez-Toledo. He analyzed the blood in Mr. Moore's skull and testified that the fatal head trauma occurred in a 0-to-24 hour window before his presentation at the hospital. OB38-39. That is consistent with Dr. Nelson's 2.5-hour window, but inconsistent with the district court's crediting of a 48-hour window. And Dr. Owings (a third treating physician) testified that the fatal subdural hematoma "was not present during the time of that

video" taken in the cell—i.e., before roughly 7:00 p.m.—providing further support for Dr. Nelson's 2.5-hour window. OB39. Finally, the video evidence bolsters Dr. Nelson's conclusion: Mr. Moore was conscious and speaking before Defendants violently extracted him from his cell and beat him in the Four-Way. Afterward, he never regained consciousness or spoke again. OB40.

In response, Defendants selectively quote from other parts of the medical witnesses' deposition testimony, in order to cherry-pick less conclusive statements by those witnesses. LSB60-63. At best, Defendants identify potential cross-examination topics for these witnesses, but they provide no reason the physicians' testimony should be disregarded at summary judgment.

2. A reasonable jury could find that Defendants inflicted the fatal injuries on Mr. Moore during the relevant time period.

If the district court had correctly drawn the appropriate favorable inferences for Plaintiffs regarding timing, it would have substantially narrowed the list of reasonably probable causes of Mr. Moore's death. Within the roughly 2.5-hour window described by Drs. Nelson and

Owings, there were four reasonably probable causes of a subdural hematoma, each attributable to individual Defendants.

Video evidence shows three instances of force, in which Defendant Runner punches Mr. Moore, Hardwell body-slams him, and Runner drops him, resulting in his head hitting the floor each time. OB42-43, 57. The first of those uses of force occurred at 6:08 p.m., with the latter two occurring approximately an hour later. OB42. Finally, Mr. Moore was next taken to the Four-Way, a room with no cameras, where Defendant Foster bragged that he and three other guards[5] "beat him [to] death," and "finished him," while disclosing that they planned to "protect one another in court." OB43 (citing ROA.24485, 24487, 24491).

Beyond the videos and Foster's statements, the medical testimony supports that each of these four instances was a reasonably probable cause of Mr. Moore's subdural hematoma. The medical examiner and coroner explained that Mr. Moore's death was a "homicide," "consistent" with the "head injuries received while in jail," like coming into "contact

[5] As noted above, the question whether Defendants Loring and Douglas joined with Foster in the beating was not raised at summary judgment and is a live issue for trial. Plaintiffs ask this Court to reverse on causation as to these guards, as well.

with a hard floor." OB43 (citing ROA.23258, 24936-24937). Dr. Nelson similarly testified that a subdural hematoma like the one Mr. Moore suffered would require "significant force," which could include a body being slammed headfirst into a hard floor or a strike to the back of the head. OB44 (citing ROA.24182).

Defendants take issue with these opinions, but on perplexing grounds. They call the testimony "speculation" without ever identifying what was speculative about it. LSB64. They complain that the homicide finding was "based only upon the information available to [the coroner] at the time," *id.*, but that is an essential feature of all admissible testimony. The coroner could not have testified to information of which she was not aware. Fed. R. Evid. 602, 703. Nor do Defendants ever say what information she was missing. Defendants also point out that the medical and legal definitions of homicide are different, without explaining how that is conceivably relevant. As Dr. Peretti explained, the medical definition of homicide is the killing of one person by another, ROA.29847, which is just what Plaintiffs would be asking the jury to find.

Defendants toss in one more glaring red herring, arguing:

> [T]he list of causes provided by the Plaintiffs could not possibly capture all named Defendants. And yet still the Plaintiffs refer to the Defendants collectively, even where all named Defendants could not have been involved in the four alleged incidences of harmful conduct.

LSB70. This grossly mischaracterizes Plaintiffs' argument, which identified specific uses of deadly force and identified the relevant Defendants by name. *See, e.g.*, OB42-43, 57. Plaintiffs' causation argument on appeal is limited to these instances and individuals; Plaintiffs have not argued, as Defendants misleadingly suggest, that "all named Defendants" were personally involved in those uses of force.

3. Plaintiffs offered sufficient medical evidence to establish causation.

Finally, Defendants attempt to wave away all that evidence by insisting that causation can be established only by direct medical testimony identifying one particular use of force as the cause. *See* City of Monroe Brief ("CMB") 62-63.

That is not the law. The Louisiana Supreme Court has held that "[w]hile expert medical evidence is sometimes essential" to prove causation, "it is self-evident that, as a general rule, whether the defendant's fault[] was a cause in fact of a plaintiff's personal injury or damage may be proved by other direct or circumstantial evidence."

Lasha, 625 So. 2d at 1005. Direct medical evidence is required only "[w]here the conclusion is not one within common knowledge." *Id.* (quoting Prosser, *Torts*, § 41 (5th ed. 1984)).

A lay juror likely could not conclude on her own that, for instance, an airborne particle caused a plaintiff's cancer. But that is a far cry from the situation here. Direct expert medical testimony is not "essential" to the common-sense conclusion that multiple severe head injuries were the cause of the fatal swelling in Mr. Moore's brain that followed. The general rule therefore applies, and no direct medical evidence was necessary.

In any event, even according to Defendants, Plaintiffs need not rely exclusively on medical evidence; they must simply produce *some* "medical evidence that, when combined with other direct and circumstantial evidence, allows a jury to rationally infer" causation. LSB59 (quoting *Perry v. City of Bossier City*, No. 17-0583, 2019 WL 1782482, at *4 (W.D. La. Apr. 23, 2019)). And here, Plaintiffs provided testimony from five physicians that, combined with the other evidence,

was more than sufficient to show that Defendants caused Mr. Moore's death. *See* OB43-44; *supra* pp. 12-16.[6]

4. The district court erred by granting summary judgment on the basis of its own speculation about hypothetical causes.

Finally, causation is also demonstrated in this case by the circumstantial evidence. The parties agree on the framework: A plaintiff relying on circumstantial evidence to prove causation need only rule out other "reasonably *probable* alternative causes." LSB67-68 (citing *Crews v. Broussard Plumbing & Heating*, 38 So. 3d 1097 (La. Ct. App. 2010)). As the Louisiana Supreme Court explained in *Naquin v. Marquette Casualty Co.*, a case Defendants cite, that "does not mean … that [a plaintiff] must negate all other *possible* causes." 153 So. 2d 395, 397 (La. 1963) (emphasis added).

[6] Defendants dismiss all the medical testimony as irrelevant because it was, in Defendants' view, "perfectly equivocal." CMB63-64 (quoting *Pepitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002)); LSB67 (same). Far from it. To take just one example, Dr. Nelson testified that Mr. Moore's fatal injury "more likely than not" occurred within the five hours prior to his hospital admission, the same window in which Defendants repeatedly slammed Mr. Moore's head to the ground and beat him in the Four-Way. OB37, 42-43.

The district court's error was the one described in *Naquin*: It expected Plaintiffs to rule out all hypothetically possible causes, rather than just the reasonably probable ones. As Plaintiffs explained, the district court incorrectly relied on two remotely possible causes that were not reasonably probable: First, an in-custody injury inflicted by Mr. White. Second, an injury predating Mr. Moore's arrest, from a source never identified by the district court or Defendants. There was zero evidence of either of these injuries. Instead, the record indicates they were both exceedingly unlikely to have occurred at all, much less to have caused Mr. Moore's death. OB46-48. The district court's own speculation is not enough to push these hypothetical causes into the realm of reasonable probability.

In response, Defendants argue that "Plaintiffs themselves have alluded to or provided support for" these two potential "sources of Moore's injury" because the operative complaint "alleges that an altercation occurred between Moore and White" and because Mr. Moore was "acting erratically." LSB64-65. Plaintiffs agree that there was an altercation between Mr. Moore and Mr. White, but the undisputed evidence is that White inflicted no injury on Moore. OB47-48.

According to Defendants, the fact that Mr. Moore was "acting erratically" during his arrest and booking "undermin[es] Dr. Owings' testimony that … Moore [was] acting normally prior to" being assaulted by Runner, Hardwell, and Foster. LSB65. But "acting normally" for Dr. Owings' purposes meant merely that Mr. Moore was "in control of his body faculties," was "able to form words," and "was moving both sides of his body symmetrically." ROA.24583. There is no dispute that Mr. Moore met this description before the guards' assault.[7]

As an additional possible cause, Defendants point to the instance in the hallway when Runner dropped Mr. Moore's head to the ground. Although Plaintiffs contend this was a cause for which Defendants should be held liable, Defendants seek to avoid liability by arguing that the video "shows that the drop was unintentional." LSB71. According to Defendants, the district court was not required to draw "any

[7] Similarly, the LaSalle Defendants contend that there is a "reasonable possibility that Moore was injured when dropped by [sheriff's] officers while carrying him to their car, again as previously asserted by the Plaintiffs in their pleadings." LSB68. Although Plaintiffs initially alleged and believed that to be the case, they have not continued to press the issue. And Defendants point to no evidence that such an injury, if it occurred, was a reasonably probable cause of death. *See* Sheriff's Br. 7; LSB46.

inference" in favor of Plaintiffs because the video "directly contradicts" any assertion that Runner intended to harm Mr. Moore. LSB72 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). But *Scott v. Harris* is inapposite. The Supreme Court held that a plaintiff could not survive summary judgment where he contended his driving posed no threat to others but where a video showed his car "racing down narrow, two-lane roads in the dead of night," "swerv[ing] around more than a dozen other cars, cross[ing] the double-yellow line, and forc[ing] cars traveling in both directions to their respective shoulders to avoid being hit," while "run[ning] multiple red lights." *Scott*, 550 U.S at 378-80. In other words, the plaintiff's account was so "blatantly contradicted" and "utterly discredited" by the video "that no reasonable jury could believe it." *Id.* at 380. Here, by contrast, the video and Plaintiffs' account are not in utter contradiction. A jury could watch the series of traumatic blows to Mr. Moore's head, each one causing contact with the floor, and infer that the third in the series was worse than negligent, and at the very least, reckless.[8] That inference is rendered all the more reasonable

[8] A jury finding that the third drop was reckless would support a finding of deliberate indifference. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419-20 (5th Cir. 2017).

by the fact that Runner concealed this third impact in his report and that after the drop he failed to seek medical assistance, a wheelchair, or a stretcher. OB20. Plaintiffs do not ask the Court to ignore any video evidence but rather to recognize that a reasonable jury could view it and draw inferences in either direction.[9]

Even if a reasonable jury would be compelled to find that the drop described above was unintentional, summary judgment on this basis was still improper. A jury could conclude that the three other intentional uses of force were (at a minimum) substantial factors in causing Mr. Moore's fatal subdural hematoma. OB49-50.

5. Defendants' actions were at least substantial factors in causing Mr. Moore's death.

Plaintiffs explained that "where there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a

[9] The City Defendants separately assert that the district court properly found the drop was unintentional because "the record contains [Defendant] Runner's unrebutted testimony that he slipped and fell." CMB69. But a reasonable jury would not be compelled to credit the self-serving testimony of a defendant who was caught on video punching Mr. Moore's head to the ground less than an hour before, especially where there is evidence he and other Defendants coordinated to downplay their actions. OB20, 52, 57.

substantial factor in bringing about the accident." *Bonin v. Ferrellgas Inc.*, 877 So. 2d 89, 94 (La. 2004); *see also* OB49-50.

Defendants fail to rebut Plaintiffs' substantial-factor analysis. They rely on the supposed "require[ment]" of "expert medical testimony" debunked above. LSB73; *see supra* pp. 19-21. Defendants then rely on a case that is not even about concurrent causes; it merely establishes the uncontroversial proposition that courts must consider each actor's individual actions. *Stewart v. Murphy*, 174 F.3d 530, 537 (5th Cir. 1999). Plaintiffs do not dispute that each individual actor must have been a substantial factor causing the harm. Apart from these quibbles, Defendants do not even attempt to show that their actions were not substantial factors. That should be the end of the matter.

This Court has held that concurrent causation can alternatively be established if Defendants "functioned as a unit." *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990). As Plaintiffs explained, that is exactly how Defendants proceeded. OB50-52.

Defendants urge that *Simpson* is "distinguishable," CMB72; LSB76, but their attempts to explain away *Simpson* only underscore its application here. Defendants stress that Mr. Moore's injuries arose not

just due to "one discrete act but four separate acts." CMB72; *see also* LSB77. But Defendants together bludgeoned Mr. Moore in his cell and dragged him down the hallway, dropping him along the way, before taking him into the Four-Way to "finish him." Afterward, Defendants used conspicuously identical language to downplay Mr. Moore's injuries and their own misconduct, and they agreed to have each other's backs in court. OB52. A reasonable jury could conclude that these guards "functioned as a unit," to cause injury each time.

For all the foregoing reasons, the district court erred in concluding that no reasonable jury could find that Defendants caused Mr. Moore's death.

C. A reasonable jury could hold Defendants liable for their deliberate indifference.

On appeal, Plaintiffs raised deliberate-indifference claims against four Defendant guards (Runner, Hardwell, Curley, and Williams), OB55-62, as well as Richwood's nurse (Mitchell), OB62-65. In their briefs, Defendants waived any argument as to the guards. As to Mitchell, they demonstrate they can prevail only by misrepresenting his testimony and drawing inferences in their favor. Because Plaintiffs have shown that all five of these Defendants knew of and disregarded

an excessive risk to Mr. Moore's health and safety, this Court should reverse.

1. A reasonable jury could hold the Defendant guards liable for deliberate indifference, an issue Defendants have now waived.

In response to Plaintiffs' extensive evidence showing knowledge of and disregard for the harms to Mr. Moore, Defendants make a curious move: First, they recite the legal standard, which is not in dispute. LSB87-89. Then, they provide a single sentence of purported argument: "But there is no evidence to support these claims." LSB89.

Plaintiffs' brief advanced six pages of facts, inferences, and legal conclusions to support these claims. OB56-62. In response, Defendants have not tried to show that any of those facts were disputed, that any of those inferences were unreasonable, or that any of those conclusions were unfounded. They offer no citations to or discussion of the record—just those nine words, claiming "no evidence."

Defendants therefore waived any argument in defense of the judgment in their favor on these claims.[10] *Matthews v. Remington Arms*

[10] This Court's case law at times describes this "failure to brief" concept as forfeiture, waiver, and abandonment. Plaintiffs use the term

Co., 641 F.3d 635, 641 (5th Cir. 2011); *United States v. Stalnaker*, 571 F.3d 428, 439-40 (5th Cir. 2009) ("matters are waived for inadequate briefing" when party "does not fully explain them and … does not cite the record or relevant law"); Fed. R. App. P. 28(b) (requiring by cross-reference to Rule 28(a)(8) an "argument, which must contain … appell[ee]'s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appell[ee] relies").

To briefly review, based on the video evidence and testimony, a reasonable jury could conclude that all four of these Defendants were aware that Mr. Moore's head was repeatedly slammed into the concrete floor. OB56-57. The jury would learn that Runner and Williams concealed one of these impacts in their reports and that Runner, Williams, and Hardwell coordinated to use the same euphemism in downplaying the injuries to Mr. Moore. OB57. All four later observed Mr. Moore unconscious in the Four-Way—again, aware of the severe injuries they had inflicted. OB58. None of them sought out medical attention or called an ambulance. They just left Mr. Moore on the floor.

"waiver," but the legal analysis in the context of deficient briefing is the same regardless of terminology.

Plaintiffs explained at length why this amounts to a conscious disregard for Mr. Moore's health—and why the district court's conclusions to the contrary contravened this Court's precedent. OB56-61. Defendants ignore it all. This Court should reverse.

2. A reasonable jury could find that Defendant Mitchell was deliberately indifferent.

As to Mitchell, Defendants' argument is premised on misrepresentations of the record that this Court should see right through. Viewed accurately—not to mention in the light most favorable to Plaintiffs—the record provides all a reasonable jury would need to hold Mitchell liable.

As Plaintiffs explained, while Mr. Moore was unconscious in the Four-Way, he was nonresponsive to Mitchell's questions. OB63. In his deposition, Mitchell claimed to have medically "assess[ed]" Mr. Moore only once, but Mitchell "[j]ust, you know, spoke with him." OB63 (citing ROA.26166). Mitchell observed a knot growing on Mr. Moore's forehead, and he used the technique known as a "sternum rub" to establish the obvious—that Mr. Moore was unconscious. OB63-64. He made no medical diagnosis and provided no medical treatment.

Defendants counter with an unreasonably favorable and selective view of Mitchell's testimony. Without a single citation to the record, they assert that Mitchell "assessed Moore several times," that Mr. Moore "responded to a sternal rub both physically and verbally," and that Mitchell believed he was asleep. LSB89-90. This Court should disregard unsupported attorney assertions. Fed. R. App. P. 28(a)(8)(A), (b).

When the record is taken into account, these assertions are plainly disputed. Mitchell conducted no genuine assessment; he did not even check basic vital signs. OB64 (citing ROA.25803). Mr. Moore responded to Mitchell's rub with a grimace and a grunt, not verbally as Defendants misrepresent. OB64 (citing ROA.26181). Mitchell also knew that the rub would awaken a healthy person—and that a brain bleed can present as sleeping—but he did nothing when that rub revealed that something was wrong. OB64 (citing ROA.26182-26183).

These facts distinguish *Cleveland v. Bell*, on which Defendants rely. 938 F.3d 672 (5th Cir. 2019). The nurse in *Cleveland* conducted a genuine examination of the detainee and provided actual treatment in response to her findings: She "checked his vital signs, treated him for a

cut on the back of his head," determined "that he did not exhibit any signs of acute distress," and "put him on a list to see the next available doctor." *Id.* at 674. Although the detainee's condition later deteriorated, the nurse did not personally observe that. *Id.* On those facts, this Court concluded that the nurse had insufficient knowledge of the risk to the detainee's health and that she was acting on "her sincere opinion at the time." *Id.* at 676.

Mitchell's actions fell far short of that bar. As just noted, he did not conduct even a basic medical assessment, and he personally observed Mr. Moore deteriorate until he was unconscious and non-responsive. To the extent he conducted any assessment at all, it indicated that something was wrong. Mitchell's failure to act was, therefore, not grounded in any sincere examination or opinion. To the extent he purports to have believed Mr. Moore was healthy and sleeping, that was incompatible with his subjective knowledge of the head injury and that the sternum rub would have roused a healthy person. ROA.26182. A jury would not have to credit Mitchell's self-serving testimony, and it certainly would not have to accept Defendants' misleading spin on it.

Defendants also contend that Plaintiffs somehow changed their story on appeal, but they quote selectively from one of Plaintiffs' district-court filings to suit their purposes. LSB91. That filing asserts that "Mr. Moore appeared to *officers* to be sleeping and snoring," ROA.5474 (emphasis added), a contention that is irrelevant to Mitchell's knowledge, because Mitchell knew that the sternum rub did not wake him. The filing asserts that deputies later injured Mr. Moore while transferring him to their car, ROA.5475, but the possibility that Mr. Moore may have suffered an additional injury later on says nothing about Mitchell's earlier actions or inactions. Last, it says that Moore "displayed no outward physical sign of injury," ROA.5475, but that was a reference to the observations by the deputies, not Mitchell, who himself testified about the visible injury to Mr. Moore's head, *see* ROA.5475, 26168. And in the portion of the quotation elided by Defendants, Plaintiffs reiterated that Mr. Moore "showed no signs of consciousness," ROA.5474, which Mitchell knew.

Finally, Defendants rely on *Dyer v. Houston*, a case where paramedics conducted a genuine examination, where the detainee walked away apparently healthy, and where the question was whether

the paramedics should have provided additional treatment. 964 F.3d 374, 377-78 (5th Cir. 2020). As Plaintiffs explained, OB62-65, none of that was the case here: This was not a case about whether Mitchell arrived at the wrong diagnosis, because he made no genuine diagnosis. To the extent Mitchell performed any assessment at all, it revealed that something was wrong, yet Mitchell provided *no* treatment. And Mr. Moore did not just walk away.

Because a reasonable jury could conclude that Mitchell knew of the risks to Mr. Moore's health and disregarded them, this Court should reverse.

D. Defendant Mitchell concedes that the district court erred in granting him qualified immunity.

Defendants now concede, LSB94, that as medical staff for a private facility, Mitchell was "categorically ineligible for qualified immunity," *Sanchez v. Oliver*, 995 F.3d 461, 467 (5th Cir. 2021); *see also* Br. of Amicus Rights Behind Bars, at 14-18. The district court's judgment in Mitchell's favor should be reversed. *See* ROA.27187-27198, 27203.

Defendants then pivot to argue that Plaintiffs have not appealed "the district court's Judgments, to the extent that they granted

qualified immunity to other Defendants." LSB94. The Court can make quick work of that argument, because qualified immunity was not the basis for the district court's dismissal of any other claims on appeal. And the district court denied qualified immunity when it was asserted with respect to the claims still pending in the district court. *See, e.g.*, ROA.27352-27355. There is nothing for this Court to do on qualified immunity but reverse as to Mitchell.

E. A reasonable jury could find that Defendants' actions warrant punitive damages, an issue Defendants have now waived.

Plaintiffs' brief explained that a reasonable jury could conclude that Defendants Runner, Curley, Williams, and Hardwell demonstrated "reckless or callous indifference" to Mr. Moore's constitutional rights, such that punitive damages are warranted. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999); OB68.

Defendants have no response. Their brief lays out their agreement on the legal standard and then summarily states: "based upon the record there is no facts or evidence to warrant the imposition

of punitive damages upon any Defendant." LSB96. That is the entirety of their briefing on the matter.

Plaintiffs explained above that under the Federal Rules and this Court's precedent, the failure to brief an issue constitutes waiver. *Supra* pp. 28-29; Fed. R. App. P. 28(a)(8)(A), (b). The same applies here. Defendants have waived any argument on individual punitive damages.

Even if Defendants' argument were not waived, Defendants do not rebut the facts or law presented in Plaintiffs' brief. They do not explain how any of the facts proffered by Plaintiffs are genuinely disputed—much less undisputed and in their favor, as is their burden at this stage. And they cite no evidence in the record.

As Plaintiffs explained in detail, there is abundant evidence to establish that Runner, Hardwell, Williams, and Curley recklessly disregarded multiple severe head injuries inflicted upon Mr. Moore. OB67-73. That includes evidence that these Defendants took turns inflicting and/or observing each other inflict excessive force on Mr. Moore, particularly to his head—all without ever taking steps to intervene, to check on his condition, or to seek medical attention. OB69-72. Instead, as a reasonable jury could conclude, they left him

lying on the floor, shackled and unconscious, in a camera-free corridor for nearly two hours, and then agreed to conceal what happened. *See id.* Given this evidence of reckless indifference, which Defendants do not dispute on appeal, this Court should reverse on punitive damages as to all four of these Defendants.[11]

III. The District Court Erred In Granting Summary Judgment To The Corporate Defendants.

A. This Court should reverse on respondeat superior liability, which Defendants do not dispute on its merits.

As Plaintiffs explained, OB75-84, Supreme Court precedent confirms that private, for-profit companies like LaSalle and Richwood are legally distinct from municipalities—and thus are not entitled to governmental immunity from tort liability. This is true even when those companies contract to perform government functions. *Richardson v. McKnight*, 521 U.S. 399, 405-06, 412 (1997).

Rather than directly responding, the corporate Defendants try to avoid the issue by offering hollow defenses. First, they argue that

[11] Even if this Court rejects Plaintiffs' arguments as to Curley's and/or Williams's liability for deliberate indifference, it should still reverse on punitive damages as to Runner and Hardwell, whose excessive-force claims are still pending for trial.

Monell must govern because district courts and a previous unpublished decision have applied *Monell* immunity to corporations. Second, they insist this Court cannot decide the issue because Plaintiffs failed to preserve it. Neither argument is persuasive. This Court should reverse.

1. LaSalle and Richwood do not refute the substance of Plaintiffs' vicarious-liability argument.

As a threshold matter, LaSalle and Richwood do not even attempt to refute the substance of Plaintiffs' argument that Supreme Court precedent actually *requires* the application of respondeat superior to private companies sued under § 1983. *See* OB74-84. That silence speaks volumes.

To recap, the Supreme Court has expressly held that (1) § 1983 should be read to incorporate common-law principles, OB75-76, and (2) at the time § 1983 was enacted, the common-law principle of respondeat superior applied to private prisons, OB76-77. Because common-law principles govern "absent specific provisions to the contrary," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981), and nothing in the text of § 1983 precludes the doctrine of

respondeat superior, private companies should be susceptible to vicarious liability under § 1983. Indeed, in the only Supreme Court decision addressing this issue, the Court held that, yes, vicarious liability was available against a private restaurant under § 1983. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

LaSalle and Richwood do not cite any Supreme Court or Fifth Circuit precedent to the contrary, because there is none. Instead, they cite a series of district court decisions that, in turn, rely exclusively on an unpublished decision from this Court: *Olivas v. Correctional Corp. of America*, 215 F. App'x 332 (5th Cir. 2007). LSB138-140. But *Olivas* is not binding and simply assumes that the corporate defendant "may not be held liable on a theory of respondeat superior." 215 F. App'x at 333. The pro se plaintiff in *Olivas* never disputed *Monell*'s applicability to a corporate defendant. Appellant's Br., *Olivas*, No. 06-10208 (5th Cir. Apr. 17, 2006). The issue was simply not raised, and the panel conducted no analysis. Defendants here do not attempt to fill in the gap, providing no rationale why *Monell*—a decision governing municipal liability—should apply to private corporations. While many courts have assumed *Monell* applies without examining the question on

its merits, the Seventh Circuit and numerous district courts have called that assumption into doubt, especially given more recent Supreme Court jurisprudence. OB83 & n.10.[12]

In short, this issue is not resolved by any binding case law, and this Court should address it on its merits.

On the merits, the corporate Defendants do not attempt to respond to Plaintiffs' extensive textual and common-law analysis explaining why *Monell* does not govern § 1983 actions against private corporations. *See* OB79-84. They ignore that *Monell* looked to the text of § 1983, found it silent on the matter, and concluded based on background common-law principles applicable to *municipalities* that there was no basis to impose respondeat superior liability *on*

[12] There is no published Fifth Circuit decision on point. Defendants cite in passing to *Auster Oil & Gas, Inc. v. Stream*, but there was no argument in that case that private parties could be held vicariously liable under § 1983—the Court simply assumed that *Monell* applied. 835 F.2d 597, 602 n.3 (5th Cir. 1988). Nor was the argument raised in *Abate v. S. Pac. Transp. Co.*, which did not even involve a § 1983 action and certainly did not analyze the availability of vicarious liability against private parties under that statute. 993 F.2d 107, 111 (5th Cir. 1993). Finally, both cases pre-date *Richardson*, where the Supreme Court recognized that common-law tort principles at the time § 1983 was enacted distinguished between private corporations and municipalities.

municipalities. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692-93 (1978).

Applying that same analysis for private contractors, OB75-77, the result is the opposite, because the common law was different for them. Whereas *Monell* arose from "certain rather complicated municipal tort immunities [that] existed at the time § 1983 was enacted," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 n.5 (1985), private prison contractors enjoyed no common-law immunities, *Richardson*, 521 U.S. at 405-07. Moreover, the historical and legislative record demonstrates that Congress in fact intended to apply respondeat superior to private companies. Br. of Amici Promise of Justice Initiative et al., at 11-16. Thus, the Supreme Court's common-law justification for immunizing municipalities in *Monell* simply does not exist for private contractors.

The corporate Defendants have no response to these arguments. Instead, they rely on empty procedural defenses, as discussed below, none of which holds water. Moreover, LaSalle and Richwood do not contest, as a factual matter, that the individual Defendants were acting within the scope of their employment when they violated Mr. Moore's constitutional rights. *See* OB84 & n.11. Accordingly, LaSalle and

Richwood can and should be held vicariously liable for their employees' conduct under § 1983, and the district court erred in concluding otherwise.

2. Plaintiffs preserved the respondeat superior argument.

Instead of responding to the substance of Plaintiffs' argument, LaSalle and Richwood try to avoid the issue by claiming it was never raised below. LSB137-143. In so doing, they misunderstand the modern pleading standard and misrepresent the record.

As to the former, Defendants argue that the operative complaint did not expressly invoke respondeat superior as a theory of liability. LSB137-38. But this outdated argument is known as the "theory of the pleadings" doctrine, and as the Supreme Court has explained, it has been "abolished." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (citation omitted) (reversing Fifth Circuit application of the doctrine where complaint failed to cite § 1983). Under the modern approach, "the complaint need only allege facts" that support liability; it need not "state the proper legal theory for the requested relief." *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016). Plaintiffs' complaint alleges in detail how the individual Defendants violated Mr. Moore's

constitutional rights and that each was a guard "for Richwood and LaSalle, and at all times herein mentioned, was acting in such capacity as the agent, servant and employee under the color of state law." ROA.1379-1383. These allegations comply with *Johnson*.

Second, LaSalle and Richwood claim that this issue was never raised before the district court. LSB138. That is boldly inaccurate. Plaintiffs raised the issue, and the district court ruled on it. It is therefore preserved, because this Court "will consider an issue if the argument on the issue before the district court was sufficient to permit the district court to rule on it." *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 376 (5th Cir. 2017) (internal quotation marks omitted).

To be specific: Plaintiffs argued that "LMC and RCC are vicariously liable for [individual Defendants'] acts," ROA.22643, and that *Monell* does not apply to private corporations, ROA.2063-2065. They explained that they "disagree that rejection of vicarious liability for a private entity sued under Section 1983 is a correct application of law," citing four district court cases and a law-review article in support. ROA.2064-2065 & n.7; *accord* ROA.1767-1768, 1992. Notably, Plaintiffs

raised the issue enough that Defendants responded to it at length—even though they now tell this Court that the issue is new. *See* ROA.1809, 2145-2148, 2153, 2472, 6077.

Not only did Plaintiffs raise the argument below, but the district court considered and ruled on it. ROA.27295 ("LaSalle and Richwood may not be held liable for the acts of employees under a theory of respondeat superior" or be "vicariously liable for the actions of their employees under § 1983."); ROA.2347-2348 ("[J]ust as a municipal corporation is not vicariously liable for the constitutional torts of its employees, a private corporation is not vicariously liable under § 1983 …."). Because "[t]he district court here had the opportunity to rule on this issue, and it did," Plaintiffs' argument "was sufficient to preserve the issue for appeal." *Vavra*, 848 F.3d at 376.

In short: Supreme Court precedent requires that private jail contractors, unlike municipalities, be held vicariously liable under § 1983, because such private contractors, unlike municipalities, were held vicariously liable for their employees' conduct at common law. This argument is uncontested on its substance and was preserved

below, so this Court should reverse the district court's grant of summary judgment on the matter.

B. A reasonable jury could hold Defendants liable under *Monell*.

Defendants cannot explain away the story that emerges from the record: The harms they inflicted on Mr. Moore were part and parcel of ongoing customs of abuse at Richwood and an unmistakable failure to train on an essential skill. Instead, Defendants deflect, making unfounded evidentiary objections and raising irrelevant evidence.

1. Plaintiffs offered admissible evidence of two abusive customs at Richwood.

Plaintiffs explained that the district court erred by failing to address the merits of Plaintiffs' arguments regarding the existence of two abusive customs at Richwood—the improper use of the Four-Way and of chemical spray to punish people in their custody. OB84. In opposition, Defendants argue that Plaintiffs' evidence does not raise a factual issue regarding the existence of either practice. They are incorrect. Through the testimony of Richwood employees, as well as subsequent guilty pleas regarding the same practices, Plaintiffs raised more than enough factual issues to defeat summary judgment. In

response, Defendants take a scattershot approach, hoping to distract the court with waived issues and meritless objections.

In the district court, as on appeal, Plaintiffs relied on the declaration of Yolanda Jackson, a former Richwood booking officer. ROA.22671-22675, 20785. Ms. Jackson testified that "there was a wide[]spread practice at [Richwood] of taking prisoners … into an area called the … fourway," where there were no cameras, "to question the prisoners and to 'teach them a lesson' off camera." ROA.21084-21085. In their briefs, Defendants attempt to discount Ms. Jackson's testimony regarding use of the Four-Way by raising hearsay objections and by arguing that her statement lacks sufficient detail. *See* CMB27-28; LSB143-47.

Defendants raised neither of these arguments in the district court. *See* ROA.26646-26661, 26295. These arguments are therefore waived and should not be considered on appeal. *See BGHA*, 340 F.3d at 299 (Appellant waived hearsay objection to affidavits introduced in support

of summary judgment "by failing to object below to the admission of the affidavits.").[13]

The Four-Way. Even if the Court were to consider Defendants' arguments, Ms. Jackson's declaration presents admissible evidence regarding the customary use of the Four-Way at Richwood. As an initial matter, her statements regarding use of the Four-Way were not hearsay. Ms. Jackson explained that "many officers … told her of this practice" of using the Four-Way to question inmates. ROA.21085. These statements were offered by Plaintiffs "against an opposing party" (LaSalle, Richwood, and the City) and were "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). They therefore are "not

[13] Defendants quote a portion of *Bellard* concerning the role of unobjected-to hearsay at summary judgment, although they make no argument based on that portion of the quotation. LSB145 (quoting *Bellard*, 675 F.3d at 461). To be clear, even if the Jackson declaration were hearsay, it was not error for the district court to consider it in the absence of an objection. That rule is expressly stated in the portion of the *Bellard* quotation that Defendants elided in their brief. 675 F.3d at 461. And on review, the only exception is for plain error that "would affect the fairness, integrity, or public reputation o[f] judicial proceedings," which Defendants do not mention, much less show. *Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 694 (5th Cir. 1995).

hearsay." *Moss v. Ole S. Real Est., Inc.,* 933 F.2d 1300, 1312 (5th Cir. 1991).

Defendants cite and quote at length from some hearsay cases, but they do not conduct any actual hearsay analysis. And for good reason: The cases do not support their bald assertion of hearsay. Take *Bellard*, which actually supports the admission of the Jackson declaration. 675 F.3d at 460-62. *Bellard* examined an instance of double hearsay: The defendant sheriff made a statement to a chief of police, and the chief repeated that statement to the plaintiff, who sought to testify about the statement in court. *Id.* This Court found that the first level—the defendant sheriff's out-of-court statement—was a non-hearsay party admission, just like the statements made by the officers to Jackson here. *See id.* at 460-61. But it was the second level of hearsay, not present here—the out-of-court repeating of the initial statement by the nonparty chief to the plaintiff—that rendered the plaintiff's testimony inadmissible, because no hearsay exclusion or exception applied. *Id.* at 461. There is no such problem here: The only out-of-court statement at issue is a party admission made directly to the testifying witness, Jackson. Under *Bellard*, Ms. Jackson's declaration is admissible.

Nor was her declaration too conclusory to create a factual issue. *See* CMB28. Ms. Jackson was a booking officer at Richwood for three years, and she submitted a sworn declaration based on her understanding of the practices at that facility. *See* ROA.21083. She learned of the practice of using the Four-Way to question detainees and "teach them a lesson," ROA.21084-21085, and she stated that "[t]he practice was continuing through her separation from RCC in September or October of 2015, just weeks before the Moore incident," ROA.21085. Her declaration therefore raises genuine disputes regarding the use of the Four-Way for punishment. *See, e.g.*, *Daniel v. Cook County*, 833 F.3d 728, 735 (7th Cir. 2016) (reversing summary judgment concerning jailhouse custom on the basis of staff testimony about widespread problem); *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995) (reversing summary judgment where plaintiff was "not the only City inmate who has complained of a lack of adequate treatment" across several months and employees).

Although Defendants argue the declaration lacks sufficient details, "specific examples are not required to meet the 'condition or practice' element." *Montano v. Orange County*, 842 F.3d 865, 876 (5th

Cir. 2016). In *Montano*, the defendant argued (after an adverse jury verdict) that plaintiffs had not provided "specific examples of other instances of detainees who suffered Mr. Montano's fate as a result of the de facto policy." *Id.* The Court held that such specificity was not required because given the consistent testimony of jail employees, "the evidence was sufficient for a reasonable juror to infer a de facto policy." *Id.* Likewise, based on the consistent testimony of Richwood employees, a reasonable juror could infer that the Four-Way was used to punish detainees.

As just noted, Ms. Jackson's declaration was not the only evidence. Assistant Warden Turner conceded that the Four-Way was used to interrogate detainees. ROA.13996. And two Defendants here pleaded guilty to conspiracy charges, testifying under oath about their use of the camera-free Four-Way to interrogate and abuse five handcuffed detainees. OB27 (citing Douglas & Loring Pleas[14]). This evidence raised genuine disputes of material fact, and the district court erred in holding otherwise. *See Sanchez v. Young County* (*Young*), 956

[14] This evidence is offered to prove a custom, not (as Defendants posit) to show Defendants' character or propensities. LSB153-56.

F.3d 785, 794 (5th Cir.), *cert. denied*, 141 S. Ct. 901 (2020) (explaining that "seemingly consistent testimony creates a fact issue over whether the County has a policy"); *Montano*, 842 F.3d at 875.

Chemical spray. Ms. Jackson also testified about the routine and abusive use of chemical spray on handcuffed detainees. ROA.21084. Defendants have little response to this evidence, other than to point out that Ms. Jackson did not witness the events that took place in this case and did not make allegations about individual Defendants. LSB143-44. But as Plaintiffs explained, Ms. Jackson's declaration was offered to establish the existence of the practice, which she herself witnessed "[o]n many occasions." ROA.21084. Her declaration was admissible for that purpose; that she did not also testify about other facts in this case is irrelevant. And given her personal knowledge, there is no hearsay concern.

Again, Ms. Jackson's declaration was not the only evidence. With respect to Mr. Moore, Foster described the guards as having gone into "pepper spraying mode" against their detainee in the Four-Way. ROA.24491. And the two convicted Defendants admitted under oath that they used chemical spray on five restrained detainees in the Four-

Way, too. OB27 & n.4 (citing Douglas & Loring Pleas). A jury could credit Ms. Jackson's description of the practice, bolstered by evidence of these other instances, and reasonably infer that the practice existed. *Young*, 956 F.3d at 794 ("To the extent the County disputes that this is the jail's … protocol or that jailer testimony is consistent, resolving those disputes is the province of the jury."). And that practice was unquestionably unconstitutional. *McCoy v. Alamu*, 950 F.3d 226, 231 (5th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1364 (2021).

2. Defendants' ratification of these customs is further evidence of their existence.

There was yet more evidence that these customs existed, evidence which the district court did not even address. As Plaintiffs explained, if supervisors failed to investigate an incident or take remedial action, those failures are evidence that the incident was part of a prevailing custom. OB92; *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). In the absence of any action, a jury could reasonably infer the existence of the custom.

As Plaintiffs explained, the district court improperly disregarded evidence that LaSalle and Richmond ratified these customs by failing to investigate Mr. Moore's death and taking no remedial action. OB92-96.

In response, Defendants point to several cases stating that "the mere failure to investigate" and "to discipline an employee" does not establish liability. *See* CMB43, 46. But Plaintiffs are not seeking liability based solely on Warden Hanson's failure to investigate or to discipline staff. Rather, Plaintiffs point to these failures *as evidence* of the customs at issue. *Grandstaff*, 767 F.2d at 171 ("If what the officers did … was not acceptable to the police chief, changes would have been made.").

Defendants also argue that Plaintiffs failed to raise a factual issue regarding ratification because the conduct here was neither "extreme" enough nor "knowingly approved" of by the policymaker. These arguments miss the mark. The conduct here was both egregious and ratified by the policymaker's subsequent inaction.

Defendants argue that ratification is limited to extreme facts, but they cite cases that do not even come close to the violence and abuse in this case. *See Davidson v. City of Stafford*, 848 F.3d 384 (5th Cir. 2017) (protestor arrested and jailed; no excessive force); *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747 (5th Cir. 2009) (protesters threatened with arrest; no excessive force); *Peterson v. City of Fort Worth*, 588 F.3d 838 (5th Cir. 2009) (officer "delivered a hard

knee strike to [plaintiff]'s thigh"); *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998) (suspect shot while fleeing); *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986) (suspect wounded when police returned gunfire).

Rather, this case is akin to the extreme scenario in *Young*, where this Court held that fact issues remained as to whether the policymaker ratified jail employees' failure to monitor a highly intoxicated and suicidal pretrial detainee who died in jail. 956 F.3d at 793. Likewise, in *Grandstaff*, this Court concluded that a policymaker ratified the officers' conduct, which consisted of "repeated acts of abuse … by several officers in several episodes" and resulted in the death of a man they mistook for a fugitive. 767 F.2d at 171.

Defendants also argue that ratification does not apply because Warden Hanson did not "knowingly approve" of the use of force or chemical spray in the Four-Way. CMB40. He did. Defendants concede that Hanson failed to investigate fully what transpired with Mr. Moore, but they argue that Hanson's cursory investigation was sufficient in light of what he knew on the night of the incident at Richwood. A reasonable jury could disagree.

First, there was extensive evidence that would have alerted Hanson to the beating in the Four-Way and the use of chemical spray against Mr. Moore while he was restrained. Mr. Moore was forcibly removed from his cell (on video) and taken to the Four-Way, where he was left handcuffed and unresponsive for nearly two hours. OB23-25. Mr. Moore never woke up, and he died one month later. OB26-27. After he was taken to the hospital, the Four-Way was coated in fresh pepper spray. ROA.14708.

If Hanson failed to register this evidence, it was because he stuck his head in the sand. Neither he nor anyone else at Richwood conducted any genuine investigation into the events that led to Mr. Moore's death. ROA.10235-10236, 10235-10236. Hanson never asked any questions about what happened to Mr. Moore in the Four-Way. ROA.10234. Nor did he change any of Richwood's policies or discipline any employees. *See* ROA.10234, 10276, 13994, 27266-27267.

A policymaker cannot skirt liability by remaining willfully blind and then claiming a lack of knowledge. *E.g.*, *Santibanes v. City of Tomball*, 654 F. Supp. 2d 593, 613-14 (S.D. Tex. 2009) (denying summary judgment where police chief did not adequately investigate

and discipline officer despite apparent violations of policies and procedures).

Second, Defendants again invoke the unfounded notion that Hanson's failure to investigate was excused because he could not "compel witnesses" or "learn any details of ongoing investigations" by local law enforcement. LSB120. If these were genuine obstacles to Hanson's investigation, Defendants never explain how. Did Hanson's subordinates refuse to answer their boss's questions without a subpoena? Any juror who has had a boss would see why that suggestion is dubious. This section of Defendants' argument is devoid of record citations for a reason. *See* LSB119-20.

Third, Defendants take a bizarrely shortsighted view of Hanson's obligations. For example, they somehow contend that Hanson's investigation was justifiably slight because he "knew nothing of the severity of Moore's injuries until he learned that Moore had died" about a month later. LSB120. (That is hard to imagine, given the video evidence, which Hanson viewed that night, depicting gruesome trauma to Mr. Moore's head.) But even assuming an initial lack of knowledge, then what? What did Hanson do to investigate *after* he learned about

Mr. Moore's death? The fact that Hanson's knowledge may have been limited on October 15 does not excuse an ongoing refusal to investigate once that knowledge was expanded. A reasonable jury could see all these excuses for what they are: pretext.

The failure to investigate the events leading up to Mr. Moore's death showed the "disposition of the policymaker" and further supported triable issues of fact regarding whether Richwood had a custom of using the Four-Way and chemical spray to punish detainees. *Grandstaff*, 767 F.2d at 171-72; *Young*, 956 F.3d at 793. The district court erred by failing to acknowledge genuine issues regarding LaSalle and Richwood's abusive customs, failing to address evidence that they ratified these customs, and failing to draw inferences in Plaintiffs' favor.

3. A reasonable jury could hold Defendants liable for failure to train.

Plaintiffs' witness Kenny Sanders outlined the ways in which LaSalle and Richwood failed to adequately train their guards to protect the rights of detainees like Mr. Moore. OB99-102. To highlight just a few of his conclusions, he found that "training was not being reasonably conducted or as it was recorded"; that guards could not accurately

describe when certain uses of force were appropriate; and that LaSalle and Richwood's lack of training on defensive tactics can lead to unnecessary and unreasonable uses of force. ROA.23134-23136.

Defendants' primary tactic is to brush aside Sanders' detailed report and focus instead on a three-page affidavit by Richwood's competing witness, George Armbruster. Of course, a competing witness's testimony is no basis for summary judgment. *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014). At most, there is a genuine dispute.

For instance, while Armbruster opined that LaSalle and Richwood's written policies met state requirements, ROA.10576, Sanders opined that guards did not in fact receive the training mandated by those policies because, among other things, they "receive[d] more credit than was actually spent training," ROA.23134. While Armbruster opined that Defendants who used force on Mr. Moore received proper training, ROA.10576, Sanders pointed out that at least one of those Defendants admitted that he had never received any refresher training on the use of force, ROA.23134. And while Armbruster opined that Defendants' training policies were not "in any

way inadequate," ROA.10577, Sanders opined that his review revealed the training policies to be "grossly insufficient," ROA.23134. These are matters for a jury to resolve.

Defendants also attempt to paper over the lack of relevant training in defensive tactics by reciting a laundry list of irrelevant trainings—like CPR and suicide prevention. *E.g.*, LSB97-109. But when it comes to training to prevent excessive force and street-fighting tactics, Defendants come up short. They are forced to admit bluntly that "[t]here is no training done at [Richwood] on defensive tactics." LSB101. The only instruction on defensive tactics they identify is training that guards receive through POST before their employment—which in the case of several Defendants, occurred years before Mr. Moore's death. *See* CMB51-52; ROA.9375, 10228. Defendants do not deny that guards are not retrained or recertified, no matter how many years have passed. OB100. Nor do they deny that "without proper refresher training in defensive tactics, … it is predictable and foreseeable" that guards will resort to tactics like "street-fighting" that "result in the use of unnecessary force." ROA.23136; OB101.

Defendants point to training on the use of force generally and repeatedly claim that Richwood conducts an annual training on its general policies, including a component on use of force. *E.g.*, LSB99-101, CMB51-52. But they acknowledge that this so-called training "does not [include] a hands-on demonstration as far as the use of force" or defensive tactics, but rather the mere "read[ing of] the use of force policy out loud." LSB101. And per Sanders, class sign-in rosters, deposition testimony, and training records revealed that any alleged training was "grossly insufficient." ROA.23134. Defendants do not engage head-on with the evidence Sanders highlights or explain why that evidence, especially when construed in the light most favorable to Plaintiffs, fails to create a genuine dispute as to the inadequacy of training in defensive tactics. Instead, they fall back on blanket assertions about general training and the disputed opinions of their expert.

As for whether LaSalle and Richwood were deliberately indifferent to the inadequacy, Plaintiffs explained that the district court erred in refusing to recognize this Court's "single-incident exception," under which deliberate indifference may be inferred from a single

incident if the risk of constitutional violation was an obvious or highly predictable consequence of a failure to train. OB99; *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000). Defendants implicitly concede the error by repeatedly acknowledging the single-incident exception. *E.g.*, CMB12, 48-50, 53. But they insist that it does not apply here. CMB50. As the evidence discussed above establishes, a reasonable jury could find that LaSalle and Richwood provided *no* training on defensive tactics and at best a lip-service training on use of force. And it could conclude that the use of excessive force and street-fighting tactics here was the highly predictable result of grossly inadequate training.

Defendants' remaining objections to the failure-to-train claim all fail to pass muster. They attempt to wave away the Sanders testimony by asserting that Plaintiffs "generally cannot show deliberate indifference through the opinion of only a single expert." LSB114 (citing *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988)). But Defendants omit the crucial qualification to that principle: "[A]n expert's opinion should not be alone sufficient to establish constitutional 'fault' … *where no facts support the inference*" of the defendant's reckless

disregard. *Stokes*, 844 F.2d at 275 (emphasis added); *accord Conner v. Travis County*, 209 F.3d 794, 798 (5th Cir. 2000) (faulting expert for providing "little more than his opinion" on a failure to train, "without citing underlying data"). In other words, an expert may not offer wholly unsubstantiated opinions. Here, of course, Sanders did not rely merely on his say-so to opine that the training at Richwood was grossly insufficient; his opinion was grounded in his review of the record evidence, including Richwood's own documents and Defendants' deposition testimony. OB99-101.

Defendants next assert that the single-incident method of proving deliberate indifference applies only when there is a complete failure to train with respect to the alleged injury, as opposed to "training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury." CMB50 (quoting *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 625 n.5 (5th Cir. 2018)). But the particular conduct here was, for instance, punching and slamming detainees in the head. *See Littell*, 894 F.3d at 625 n.5 (particular conduct of "knee strikes"). Plaintiffs do not assail Richwood's training in punching specifically but rather its utter failure to train on defensive tactics generally.

Defendants also point to a brief statement by Armbruster that the training Defendants received "met or exceeded" the requirements of state law. *E.g.*, CMB50, LSB109. But while "compliance with state requirements" may be "consider[ed] … a factor counseling against a 'failure to train' finding," *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 171 (5th Cir. 2010), it cannot be a shield against federal constitutional violations. And here, Armbruster's statement that Defendants' training complied with state law is countered by considerable evidence that Richwood's training was constitutionally inadequate and that Defendants did not actually receive the training that Richwood's policies required, even if the policies complied with state law in theory. OB98-102.

Finally, Defendants argue that any failure to train was not a moving force behind Mr. Moore's constitutional injuries. CMB58-60. According to Defendants, that is because Runner received training on defensive tactics—through POST, not Richwood—a few months before Mr. Moore's death, while Hardwell received training on use of force seven months before. CMB59-60. But there was sufficient evidence to create a genuine dispute whether the inadequacies in these trainings

were a moving force in Mr. Moore's injuries. As Sanders pointed out, "Runner admitted that he had never received any refresher training on Use of Force" and no training on the matter at all at Richwood. ROA.23134. And Hardwell—the supervisor responsible for all the uses of force against Mr. Moore—lacked the "knowledge, skills, and abilities to make" "critical decisions concerning using force on [detainees]." ROA.23135. Hardwell's own egregious takedown of Mr. Moore likewise controverts Defendants' assertion of adequate training on defensive tactics. Hardwell further "admitted that he never received any training in Defensive Tactics from 2009 to 2015," ROA.23135, training that Sanders opined is vital to ensuring that guards do not "revert to gross motor skills or street-fighting skills," as they did here, ROA.23136; *see also* ROA.23144, 23136-23137. Given all this evidence, a reasonable jury could credit Sanders and find that the training failures at Richwood were a moving force behind the constitutional violations.

C. A reasonable jury could impose punitive damages on LaSalle and Richwood.

1. Private companies can be liable for punitive damages under § 1983.

The corporate Defendants offer no reason for this Court to depart from nearly every other court to address the question and create a never-before-recognized immunity from punitive damages for private corporations.[15] There is none.

LaSalle concedes that punitive damages were available in suits against private companies in 1871, just as they are today. LSB125. LaSalle instead argues that, as an entity "engaged in the performance of acts for the public benefit," it should be exempt from this rule because *City of Newport*'s immunity from punitive damages "concerns itself with protecting the *function* of public institutions, not the exact actors who may[ ]be performing those functions." LSB126 (emphasis changed).

[15] As Plaintiffs' brief explained, every other district court that had addressed the issue held that private corporations can be subject to punitive damages under § 1983. OB102-03 & n.14. Since the filing of that brief, one court has agreed with the decision below. *See Carter v. Gautreaux*, No. CV 19-105, 2021 WL 2785332, at *6 & n.81 (M.D. La. July 2, 2021). Notably, that court deemed the argument conceded, and it failed to recognize the mountain of decisions cutting the other way.

Because its facilities *function* like public jails, LaSalle says it should have the same immunity that governmental actors enjoy.

LaSalle is wrong. This Court has explicitly rejected that exact approach: "[T]he question is *not* whether a modern public counterpart would be entitled to immunity, but, rather, whether general principles of tort immunities and defenses under 'the common law as it existed when Congress passed § 1983 in 1871' support the availability of immunity to a private party." *Sanchez*, 995 F.3d at 467-68 (quoting *Filarsky v. Delia*, 566 U.S. 377, 384 (2012)).

Under *Sanchez*, what matters is the historical question whether the private entity would have been entitled to immunity at common law. *Id.* On that point, LaSalle has come up with nothing. LaSalle fails to cite any authority—based on 1871 common law or otherwise—for recognizing an exception from punitive damages for private actors performing public functions, despite bearing the burden of establishing entitlement to an immunity under § 1983. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

That's no surprise, because no such authority exists. The common-law immunity recognized in *City of Newport* was, as the

Supreme Court recognized, limited to municipalities and did not extend to private corporations. *See* 453 U.S. at 261-62. Instead, late-nineteenth-century sources show that the historical antecedent to modern-day private jails like LaSalle's would have been liable for punitive damages. As the Supreme Court explained, during that era, "some States … leased their entire prison systems to private individuals or companies which frequently took complete control over prison management, including inmate labor and discipline," and "the common law provided mistreated prisoners in prison leasing States with remedies against mistreatment by those private lessors." *Richardson*, 521 U.S. at 405. And case law related to those lawsuits demonstrates that punitive damages were available against the private entities that leased prisoners into their own custody. *E.g.*, *Buckalew v. Tenn. Coal, Iron & R.R.*, 20 So. 606, 611 (Ala. 1896) (permitting punitive damages against lessor coal mine for death of leased prisoner).

What's more, LaSalle acknowledges that "cases involving railroads from the 19th century" establish that "if [LaSalle] operated a railroad … a litigant could be awarded punitive damages against them if the applicable law allowed." LSB125. LaSalle contrasts its public

function, purportedly deserving of immunity, with the supposedly private functions of a railroad, which would not be immune. What LaSalle fails to acknowledge, however, is that nineteenth-century railroads performed public functions, just like LaSalle does. When § 1983 was adopted, common carriers like railroads were considered to "exercise a sort of public office, and have duties to perform in which the public is interested." *Munn v. Illinois*, 94 U.S. 113, 130 (1876). Despite fulfilling these public functions, common carriers—including railroads—were regularly held eligible for punitive damages, as LaSalle concedes. *See, e.g.*, *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101, 111 (1893); *Silver v. Kent*, 60 Miss. 124, 129-30 (1882); *Carmichael v. Bell Tel. Co.*, 72 S.E. 619, 621-22 (N.C. 1911).

The upshot is that available common-law sources all point in one direction: Punitive damages *were* available against private actors performing public functions, just like LaSalle.

Despite this consistent historical record, LaSalle contends that "the historical analysis is not dispositive nor preclusive of a policy analysis," and then insists that the district court's policy rationales support recognizing a brand-new immunity here. LSB125. A court's

role, however, is "to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). But the latter is what the district court did here: It relied on its own policy preferences rather than examining the intent of Congress.

That was error. Courts turn to public policy in interpreting § 1983 only after determining whether a preexisting common-law immunity was available. *See, e.g.*, *City of Newport*, 453 U.S. at 266 ("Finding no evidence that Congress intended to disturb the settled common-law immunity, we now must determine whether considerations of public policy dictate a contrary result."); *Filarsky*, 566 U.S. at 384, 389 (noting that "the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871" and turning to policy only to address whether "the reasons we have given for recognizing immunity under § 1983 counsel[] against carrying forward the common-law rule"); *Sanchez*, 995 F.3d at 468-69.

Even taken at face value, LaSalle's policy rationales fail to weigh in favor of immunity. Contrary to what LaSalle argues, *City of Newport* did not seek "to protect the public fisc" at all costs. LSB130. To the

contrary, the Supreme Court reasoned that municipalities would be especially vulnerable to *direct* liability for punitive damages, given their involvement in "a large range of activity in everyday life" and the "prejudicial impact on the jury" stemming from "the unlimited taxing power of a municipality." 453 U.S. at 270. These concerns dwarf the potential harms that might *indirectly* affect municipalities if punitive damages are allowed against private contractors. *City of Newport* does not shield private actors whenever an award against them might tenuously affect a municipality.

This makes sense. Any damages award, compensatory or punitive, against any § 1983 defendant—municipality, government official, or private entity—has *some* downstream effect on municipal finances. After all, every proper § 1983 defendant is acting under color of law. But that does not mean all such defendants are immune from punitive damages. Consider municipal officials, who are routinely held liable for punitive damages. *See Smith*, 461 U.S. at 35. When this happens, the same market forces described by LaSalle are at play: Municipalities may need to indemnify them or pay higher salaries to retain them, just like they may need to pay more to contract with

private jails. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 952 (2014). And even if LaSalle is right that "the risk of punitive damages will necessarily be written into the contract terms" when municipalities contract in the future, LSB128, the same can be said for *compensatory* damages against private contractors, which all agree are available. There is nothing unique about punitive-damages awards against private companies that warrants a special exception here.

LaSalle further errs when it reiterates the district court's conclusion that private corporations cannot form the requisite intent for punitive damages. LSB130. For over a century, the common law has recognized that corporations can face punitive damages in tort based on the intent of their employees. *See Jeffersonville R.R. v. Rogers*, 28 Ind. 1, 7 (1867); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999). There is no reason "for adopting a different rule under § 1983." *Smith*, 461 U.S. at 49.

Equally unconvincing is LaSalle's argument that imposing punitive damages against a private company would "allow[] a plaintiff double recovery on punitive damages." LSB131. Punitive damages are

fundamentally not "recovery" damages. Rather, they are "private fines levied by civil juries to punish reprehensible conduct and to deter." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). For that reason, juries regularly impose differing amounts of punitive damages based on the degree of each defendant's wrongdoing. *See, e.g.*, *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 304 (5th Cir. 1998).

Finally, LaSalle argues that punitive damages will create a backdoor to vicarious liability because employers will always be liable when their employees engage in punitives-worthy conduct. But this reasoning is at most an argument against vicarious liability. LaSalle does not explain how this concern is relevant to direct (rather than imputed) liability for punitive damages, which Plaintiffs seek here.

In sum, both law and policy compel the conclusion that the district court erred in expanding *City of Newport* to create a newfound immunity. This Court should join virtually every other court to address the question and hold that punitive damages remain available against private companies sued under § 1983.

2. A reasonable jury could find that LaSalle and Richwood violated Mr. Moore's constitutional rights with reckless or callous indifference.

The district court also erred in granting summary judgment to LaSalle and Richwood on whether they acted with the requisite intent to warrant punitive damages. The parties agree punitive damages are appropriate if a defendant's conduct "demonstrates 'reckless or callous indifference' to a person's constitutional rights." *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994) (quoting *Smith*, 461 U.S. at 56). Plaintiffs established this indifference with evidence including, for example, a "wide spread practice"—discussed by "many officers" at Richwood—of taking detainees into the Four-Way, where "there [are] no cameras," for the "express[] purpose" of "us[ing] force and punish[ing]" them. ROA.21084-21085.

In response, Defendants contend that LaSalle and Richwood lacked the requisite intent because they did not ratify or acquiesce in the misconduct. Invoking *Young*, 956 F.3d 785, they argue that ratification or acquiescence "requires more than the *suggestion* that someone *should have known* of a *potential* abuse," LSB133-34 (emphases added). Even accepting Defendants' premise, Plaintiffs

argued and demonstrated far more than what Defendants claim: Plaintiffs showed the abuses were both rampant and openly discussed, such that a reasonable jury could find that there was simply no denying their widespread occurrence or LaSalle and Richwood's awareness of them. OB114-16.

In any event, *Young* only reinforces the opposite of what Defendants urge. A reasonable jury could conclude punitive damages are warranted. By Defendants' own telling, *Young* concluded that "[w]hen the official policymaker knows about misconduct yet allegedly fails to take *remedial action*, this inaction arguably shows acquiescence to the misconduct such that a jury could conclude it represents official policy." LSB134 (emphasis added) (quoting *Young*, 956 F.3d at 793). That is precisely what the evidence shows here: Given the testimony of widespread abuses at Richwood, and the knowledge of supervisors, a reasonable jury could infer that LaSalle and Richwood knew about the misconduct. *Supra* pp. 45-57; OB114-16. Yet they failed to remedy it or take any action to curb its frequency.

Defendants resist this conclusion by pointing to Defendant Hanson's "review of th[e] incident" involving Mr. Moore, which

Defendants claim "simply came to a conclusion that the Plaintiffs do not support." LSB134. But Defendants do not deny that, whatever cursory internal review might have taken place, LaSalle and Richwood made no policy changes and imposed no discipline. OB27. And an administrative review that produces no remedy is not "remedial action." Quite the contrary, papering over extensive abuses with a sham investigation that preserves the status quo can only be described as "reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. At the very least, a reasonable jury could so conclude based on the evidence in the record, and the district court erred in holding otherwise.

IV. The District Court Erred In Granting Summary Judgment To The City Of Monroe.

Much of the City's briefing has already been addressed throughout this reply. The critical remaining question is whether the district court properly granted summary judgment on the *Monell* claims against the City.

As the City concedes, CMB20, the district court's sole ground for dismissing the City *Monell* claims was its accompanying dismissal of the *Monell* claims against LaSalle and Richwood, ROA.27420. For the

reasons already explained, this Court should reverse as to LaSalle and Richwood. If it does, the rationale for judgment in the City's favor falls away.

On appeal, the City advances two alternative arguments. First, it argues that "Richwood's written policies complied with the Basic Jail Guidelines." CMB22. Plaintiffs raised no issues concerning Richwood's written policies in this appeal, so this argument gets the City nowhere.

Second, the City acknowledges that Plaintiffs do challenge two unwritten customs of abuse at Richwood, but it contends that it should be shielded from liability by its contract. CMB22-23. According to the City, to the extent those customs were prevalent at Richwood, "they were not within any policymaking authority granted to Richwood." CMB22. The thinking goes that because the contract required Richwood's policies to be in accordance with applicable law and forbade punishment, any unlawful policy was outside the scope of authority delegated to Richwood by the City.

The Court should not abide this shell game. It is virtually always the case that, when an unwritten custom is challenged under *Monell*, that custom conflicts with some governing written policy or law. If a

municipality condones an unlawful custom, it cannot avoid liability by claiming that it did not authorize its agents in writing to break the law in the course of their duties.

The City cites one case in support of its argument, *Bennett v. Pippin*, a case that starkly demonstrates why the City is wrong. 74 F.3d 578 (5th Cir. 1996). The City borrows an innocuous legal standard from *Bennett*: that a policymaker's actions cannot be attributed to a municipality if those actions were outside "the sphere of the policy maker's final authority." *Id.* at 586.[16]

But the City is careful to avoid mentioning the facts, analysis, or conclusion of *Bennett*, because they are devastating to the City's argument. Ellen Bennett was arrested following a domestic-violence incident, transferred to the custody of the county sheriff, and then released. *Id.* at 583. The sheriff returned to Ms. Bennett's home and waited for her, wearing his badge and gun, and then proceeded to rape her. *Id.* at 583-84, 588-89.

[16] There is no dispute that Richwood's warden was the final policymaker for the City in this context. CMB20.

This is where the City's "sphere of authority" standard comes in. In *Bennett*, the county argued it should not be liable for the sheriff, because rape "violated well-established County policy." *Id.* at 586. This Court rejected that argument, and it should do the same here with the City's identical one. As the Court explained, "the Sheriff's actions were those of the County because his relationship with Bennett grew out of the attempted murder investigation and because … he used his authority over the investigation to coerce sex with her." *Id.* Most importantly, this Court held, "[t]he fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function." *Id.*

To summarize, in *Bennett*, this Court ruled that sexually assaulting a suspect was *inside* the sheriff's sphere of authority, even though it was contrary to county policy and the criminal law. Yet somehow here, the City contends Richwood was *outside* the sphere of its authority when it adopted customs of punishing City detainees with chemical spray and physical abuse in a camera-free corridor of the jail.

Plaintiffs agree with the City that "it contracted with Richwood for the housing and detention of arrestees" and that it delegated

authority to Richwood "to develop policies on the use of force." CMB20. That was the sphere of authority—detention and correctional discipline—in which Richwood adopted its unwritten, abusive customs and carried them out against the City's detainees under color of law. It is immaterial that these customs contravened the official policy or were not legitimate uses of correctional force. This Court should apply *Bennett*, as the City urges, and reverse.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the judgments of the district court and remand for trial.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 1, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) and this Court's order granting leave to file an over-length brief because this brief contains 14,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

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