

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 27, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF CINDY LOU HILL, by
and through its personal representative,
Joseph A. Grube,

Plaintiff,

v.

NAPHCARE, INC., an Alabama
corporation; and SPOKANE COUNTY,
a political subdivision of the State of
Washington,

Defendants.

No. 2:20-CV-00410-MKD

ORDER DENYING NAPHCARE’S
MOTIONS FOR JUDGMENT AS A
MATTER OF LAW, NEW TRIAL,
AND REMITTITUR

ECF No. 286

Before the Court is Defendant NaphCare, Inc.’s (“NaphCare”) Rule 50 and 59 Motions for Judgment as a Matter of Law, New Trial, and/or Remittitur. ECF No. 286. On November 16, 2022, the Court held a hearing on the motion. Edwin S. Budge and Hank L. Balson appeared on behalf of Plaintiff Estate of Cindy Lou Hill (“the Estate”). Eric B. Wolff, David A. Perez, and Michelle M. Maley

1 appeared on behalf of NaphCare. John E. Justice appeared on behalf of Defendant
2 Spokane County (“the County”).

3 The Estate brought a 42 U.S.C. § 1983 claim and a state negligence claim,
4 alleging that NaphCare and the County caused the death of decedent Cindy Lou
5 Hill at the Spokane County Jail. ECF No. 1 at 20-22 ¶¶ 39-42. On July 19, 2022,
6 a jury returned a verdict in favor of the Estate on both claims and awarded
7 compensatory and punitive damages. ECF No. 240. The jury found NaphCare
8 ninety percent at fault and the County ten percent at fault for the Estate’s
9 negligence damages. ECF No. 240 at 4. The jury awarded punitive damages
10 against NaphCare in the amount of \$24,000,000 for the Estate’s Section 1983
11 claim. ECF No. 240 at 5.

12 NaphCare challenges the jury verdict pursuant to Fed. R. Civ. P. 50. ECF
13 No. 286 at 9-10. NaphCare moves for a new trial, arguing (1) that the weight of
14 the evidence was against the jury’s verdict, (2) that the Court’s instructions to the
15 jury were improper, and (3) that the Court’s failure to bifurcate the claims against
16 NaphCare and the County caused prejudice. ECF No. 286 at 9-10. NaphCare
17 seeks a remittitur of the \$24,000,000 punitive award, arguing that the award is in
18 excess of what due process and federal common law will allow, and is against the
19 weight of the evidence. ECF No. 286 at 10. For the reasons stated below,
20 NaphCare’s post-trial motion is **DENIED**.

1 **BACKGROUND**

2 **A. Facts Established by Stipulation or at Trial**

3 The following factual recitation is derived from the evidence presented at
4 trial. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

5 *1. Ms. Hill*

6 On August 21, 2018, Ms. Hill was arrested for drug possession and taken to
7 the Spokane County Jail. ECF No. 261 at 167:19-24; ECF No. 218 at 2 ¶ 5.

8 NaphCare had a contract with the County to provide medical care at the Jail. ECF
9 No. 261 at 167:12-17. Upon arrival, a NaphCare nurse saw Ms. Hill for an intake
10 assessment. ECF No. 261 at 167:25-168:12; ECF No. 231 at 38:9-14; Ex. 1.

11 Ms. Hill was fifty-five years old and suffered from several medical conditions,
12 including methamphetamine and heroin abuse, hypertension, chronic obstructive
13 pulmonary disease, and gastroesophageal reflux disease. ECF No. 231 at 16:18-
14 24.

15 On August 22, 2018, Ms. Hill informed a NaphCare nurse that she used
16 heroin. ECF No. 261 at 168:20-169:2; ECF No. 218 at 2 ¶ 6. NaphCare nurses
17 placed Ms. Hill under NaphCare’s standard withdrawal assessments, which apply
18 the “Clinical Opiate Withdrawal Scale,” known as “COWS screenings.” ECF No.
19 261 at 169:12-170:2, 172:6-11. Ms. Hill underwent several COWS screenings
20

1 from August 22 to August 24, 2018. ECF No. 261 at 178:14-20. Her withdrawal
2 symptoms were reported in the mild range. ECF No. 261 at 178:21-23; Ex. 4.

3 On the morning of August 25, 2018, NaphCare nurse Hanna Gubitz (“Nurse
4 Gubitz”) went to Ms. Hill’s cell to conduct a COWS screening. ECF No. 261 at
5 180:22-181:16; ECF No. 267 at 613:5-16. Ms. Hill was on the concrete floor
6 shirtless and screaming in pain, exclaiming that she was too sick to move. ECF
7 No. 261 at 182:6-11; ECF No. 267 at 620:11-622:18; Ex. 4 at 27. Ms. Hill’s
8 roommate rolled Ms. Hill on a blanket and dragged her to the cell door, where
9 Ms. Hill laid in the fetal position, screaming. ECF No. 267 at 622:12-625:8; Ex. 4
10 at 27. Nurse Gubitz attempted to check Ms. Hill’s vitals; Ms. Hill again screamed
11 and claimed that Nurse Gubitz was causing her pain, even before Nurse Gubitz had
12 touched her. ECF No. 267 at 625:24-626:5; Ex. 4 at 27.

13 This exchange lasted about five-and-a-half minutes, and at its conclusion,
14 Nurse Gubitz transferred Ms. Hill to “medical watch.” ECF No. 261 at 200:5-25;
15 ECF No. 267 at 643:8-12, 647:1-4. Jessica Wirth, a corrections officer, arrived at
16 Ms. Hill’s cell and took Ms. Hill to cell 2-West-27 (“2W27”) in a wheelchair.
17 ECF No. 262 at 330:20-331:6.

18 While on medical watch, Ms. Hill was alone in a cell, and every thirty
19 minutes a corrections officer would pass by and observe her status through a cell
20 window, noting brief observations on a form. ECF No. 262 at 376:1-9.

1 Corrections officers recorded whether she was sleeping or awake during these
2 periodic observations, and that she refused lunch at 11:09 a.m. that day. ECF No.
3 262 at 376:6-9; Ex. 5. Corrections officers noted that Ms. Hill was awake at 11:09
4 a.m., 1:43 p.m., 3:00 p.m., and 3:20 p.m. Ex. 5. She appeared asleep for each of
5 the seven other observations in the morning and afternoon. Ex. 5. No medical
6 staff observed Ms. Hill during these check-ins. ECF No. 231 at 97:13-18, ECF No.
7 261 at 95:20-96:6. Around 3:00 p.m., Nurse Gubitz saw Ms. Hill for less than two
8 minutes, noting a normal presentation with no signs of medical distress. ECF No.
9 231 at 98:23-3; ECF No. 261 at 96:21-97:8; Ex. 6.

10 Around 4:20 p.m., a corrections officer brought Ms. Hill a meal. ECF No.
11 261 at 99:14-18. At approximately 5:25 p.m., a corrections officer realized that
12 Ms. Hill was unconscious and began CPR. ECF No. 261 at 99:19-23, 100:9-12.
13 The staff made further resuscitative efforts before taking Ms. Hill to a hospital,
14 where she was soon pronounced dead. ECF No. 261 at 100:2-9. An autopsy later
15 revealed that Ms. Hill died from “acute bacterial peritonitis due to ruptured
16 duodenal-liver adhesions with perforation of duodenum.” Ex. 8 at 2; ECF No. 231
17 at 53:2-4; ECF No. 261 at 56:2-5.

18 2. *NaphCare’s Policies and Customs at the Spokane County Jail*

19 NaphCare employs nurses and physicians to provide care for inmates at its
20 jail facilities. ECF No. 263 at 558:12-18. NaphCare nurses conduct intake

1 assessments as inmates enter the Jail. ECF No. 261 at 167:25-168:12; ECF No.
2 231 at 38:9-12. Nurses have access to internal systems to connect with on-call
3 providers to answer questions. ECF No. 263 at 559:9-13. On weekends,
4 NaphCare staffs the Jail with two registered nurses, two licensed practical nurses,
5 and one medical assistant. ECF No. 267 at 637:19-641:23. The inmate population
6 at the Jail on a given weekend may range from 450 to 800. ECF No. 267 at
7 637:19-641:23. Nurses are not permitted to make medical diagnoses. ECF
8 No. 261 at 18:4-8, 38:3-8, 93:2-4; ECF No. 267 at 698:21-23.

9 When NaphCare staff determines that an inmate needs to go to the hospital,
10 they contact the Jail's sergeant on duty, who calls an ambulance. ECF No. 262 at
11 332:11-18. Two officers accompany the ambulance to the hospital. ECF No. 262
12 at 332:16-18. There are also procedures for sending patients to the hospital in the
13 County's vehicles. ECF No. 262 at 333:2-5.

14 In NaphCare facilities, certain areas are designated "medical observation
15 areas" or "medical watch," where inmates are placed outside of general population.
16 ECF No. 262 at 318:1-319:22; ECF No. 263 at 560:20-25. At the Spokane County
17 Jail, NaphCare nurses determine who is sent to medical watch, which is in an area
18 called 2-West. ECF No. 262 at 318:11-319:15, 368:21-23, 399:8-10; ECF No. 267
19 at 647:11-16.

20

1 3. *Medical Watch*

2 NaphCare nurses place inmates with medical issues on medical watch, with
3 the aim of providing the inmates privacy and closer observation. ECF No. 267 at
4 647:11-15. NaphCare does not have written policies about the use of medical
5 watch at the Spokane County Jail. ECF No. 263 at 591:15-592:10. 2-West is often
6 used to monitor inmates at risk of suicide or self-harm. ECF No. 262 at 422:22-24.
7 NaphCare nurses assess inmates on medical watch at least once a shift. ECF No.
8 267 at 649:14-18.

9 The cells used for medical watch are essentially the same as the cells in the
10 rest of the Jail. ECF No. 262 at 324:7-21. The medical watch cells do not have
11 video or audio monitoring. ECF No. 262 at 325:15-25. There are no medical staff
12 stations in 2-West. ECF No. 262 at 398:11-18. Inmates put on medical watch are
13 placed in cells without cellmates. ECF No. 262 at 325:5-8. The cells have an
14 emergency light button that, when triggered, will activate a light on the outside of
15 the door and sound an alarm at the guard station. ECF No. 262 at 326:12-16.

16 Corrections officers are responsible for monitoring medical watch, which is
17 added to their normal rotation. ECF No. 262 at 318:7-9, 319:7-15; 399:11-400:13.
18 Inmates on medical watch are subject to check-ins every thirty minutes, or more
19 frequently if NaphCare staff so direct. ECF No. 261 at 201:4-15; ECF No. 262 at
20 317:9-319:18; ECF No. 267 at 648:24-649:6. Thirty-minute check-ins are standard

1 procedure in the rest of the Jail. ECF No. 261 at 201:16-202:1; ECF No. 262 at
2 318:25-319:22, 400:13-19, 418:8-12. Medical watch check-ins are substantially
3 the same as check-ins in general population: corrections officers look through a
4 small window and check for signs of life. ECF No. 261 at 201:16-202:1; ECF
5 No. 262 at 318:25-319:15, 327:7-17, 400:20-402:23. The only additional protocol
6 for medical watch check-ins is that corrections officers must document the check-
7 ins on a Medical Watch Observation form posted outside of each medical watch
8 cell. ECF No. 261 at 201:16-202:1; ECF No. 262 at 318:25-319:15.

9 The Medical Watch Observation form includes sections to note an inmate's
10 name and identification number, and the employee who initiated the medical
11 watch. Ex. 5. The form includes a list of physical symptoms to report to medical
12 including, for example, nausea or vomiting, changes in speech, facial droop,
13 difficulty breathing, weakness to one side of the body, and worsening abdominal
14 pain. Ex. 5. The form includes a list of "Codes" including, among others, Awake,
15 Sleeping, Pacing, Upset, or Talking with Officer, for noting inmate activity during
16 each check-in. Ex. 5. The form is generated by the Jail and filled out by
17 corrections officers. ECF No. 263 at 566:14-17.

18 Corrections officers are not instructed to ask the patient how they feel, check
19 for symptoms, or otherwise investigate medical conditions. ECF No. 261 at
20 202:18-23, 203:11-204:22, ECF No. 262 at 319:23-320:8. Corrections officers

1 assigned to medical watch receive no training on medical observation or treatment.
2 ECF No. 262 at 319:23-320:8, 417:8-418:13. If corrections officers witness a
3 patient in medical distress, they contact medical staff. ECF No. 262 at 402:21-
4 405:15.

5 **B. Procedural History**

6 The Estate and Cynthia Metsker, Ms. Hill's sole-surviving child, filed a
7 Complaint on November 4, 2020, which named NaphCare, Spokane County, and
8 Nurse Gubitz as defendants. *See* ECF No. 1.

9 On May 9, 2022, the Court granted default judgment for liability against the
10 County on the Estate's negligence and Section 1983 claims.¹ ECF No. 88 at 44.

11 On May 24, 2022, NaphCare and Nurse Gubitz moved for a bifurcated trial,
12 seeking for an initial trial on their liability, then another on compensatory and
13

14
15 ¹ The Jail had a camera aimed at the hallway outside of Ms. Hill's room, 2W27.
16 ECF No. 88 at 8. In discovery, the County produced portions of footage from that
17 camera, from 8:43 a.m. to 9:15 a.m. and from 4:00 p.m. to 6:30 p.m., but could not
18 produce the most relevant portions of the footage. ECF No. 88 at 8-9. The Court
19 granted default judgment as a sanction for the spoliation of evidence. *See* ECF
20 No. 88.

1 punitive damages against all Defendants. ECF No. 115 at 1-2. On June 14, 2022,
2 the Court denied the motion. ECF No. 147.

3 On June 21, 2022, the parties filed a stipulation dismissing the Estate's
4 claims against Nurse Gubitz. ECF No. 166. On June 24, 2022, the parties filed a
5 stipulation dismissing all claims pursued by Ms. Metsker. ECF No. 171. The
6 remaining claims were the Estate's negligence and Section 1983 claims against
7 NaphCare and the County.

8 This case proceeded to trial on July 11, 2022. ECF No. 222. On July 18,
9 2022, the Estate rested, and NaphCare made an oral Fed. R. Civ. P. 50(a) motion.
10 ECF No. 233 at 3; ECF No. 267 at 759:14-771:5. The Court took the motion under
11 advisement. ECF No. 233 at 3; ECF No. 267 at 779:25-780:1. NaphCare and the
12 County also rested the same day. ECF No. 267 at 781:3-8.² On July 19, 2022, the
13 Court submitted the case to the jury. ECF No. 236 at 1-2.

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16 ² Due to witness scheduling limitations, the parties agreed to call witnesses out of
17 order. The Estate called witnesses on July 12 and July 13. ECF Nos. 261, 262.
18 NaphCare called witnesses on July 14, ECF Nos. 231, 263. The Estate then called
19 its final witness on July 18 and rested, and Defendants rested shortly thereafter.
20 ECF No. 267 at 759:14-781:8.

1 The jury returned a verdict for the Estate. ECF No. 236 at 2. The jury found
2 NaphCare liable under Section 1983 and for negligence, and awarded \$2,750,000
3 in compensatory damages. ECF No. 240 at 2-4. The jury found NaphCare
4 responsible for ninety percent, and Spokane County ten percent, of the total
5 combined negligence that proximately caused the Estate’s damages. ECF No. 240
6 at 4. The jury awarded \$24,000,000 in punitive damages for the Estate’s
7 Section 1983 claim against NaphCare. ECF No. 240 at 2-5. On July 29, 2022, the
8 Court denied NaphCare’s oral Fed. R. Civ. P. 50(a) motion. ECF No. 250. On
9 August 24, 2022, NaphCare filed the instant renewed Fed. R. Civ. P. 50(b) motion
10 and motion for new trial. ECF No. 286.

11 **LEGAL STANDARD**

12 **A. Judgment as a Matter of Law**

13 A court may grant a motion for judgment as a matter of law only where the
14 nonmoving party has been fully heard on an issue and the jury has no legally
15 sufficient evidentiary basis to find for that party on that issue. *Velazquez v. City of*
16 *Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015) (quoting Fed. R. Civ. P. 50(a)).
17 In other words, such a motion is granted only where “under the governing law,
18 there can be but one reasonable conclusion as to the verdict.” *Anderson v. Liberty*
19 *Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted).

1 Fed. R. Civ. P. 50(a)(2) requires that a motion for judgment as a matter of
2 law be made before the case is submitted to the jury. *Williams v. Gaye*, 895 F.3d
3 1106, 1131 (9th Cir. 2018). If the motion is denied or the ruling is deferred, the
4 party who so moved may renew its motion, limited to the grounds asserted therein,
5 under Fed. R. Civ. P. 50(b). *See EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951,
6 961 (9th Cir. 2009).

7 “[I]n entertaining a motion for judgment as a matter of law, the court should
8 review all of the evidence in the record [and] draw all reasonable inferences in
9 favor of the nonmoving party, and it may not make credibility determinations or
10 weigh the evidence.” *Reeves*, 530 U.S. at 150. “[T]he court . . . must disregard all
11 evidence favorable to the moving party that the jury is not required to believe
12 That is, the court should give credence to the evidence favoring the nonmovant as
13 well as that evidence supporting the moving party that is uncontradicted and
14 unimpeached, at least to the extent that that evidence comes from disinterested
15 witnesses.” *Id.* at 151 (quotation and citations omitted). “A jury’s verdict must be
16 upheld if it is supported by substantial evidence, which is evidence adequate to
17 support the jury’s conclusion, even if it is also possible to draw a contrary
18 conclusion.” *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

1 **A. Motion for Judgment as a Matter of Law³**

2 NaphCare represents that it “will not appeal or challenge the jury’s finding
3 of negligence” and concedes to “paying its share of the compensatory award.”
4 ECF No. 286 at 8. In Washington, punitive damages are prohibited unless
5 expressly authorized by the legislature. *Dailey v. North Coast Life Ins. Co.*, 919
6 P.2d 589, 591 (Wash. 1996) (en banc); *Barr v. Interbay Citizens Bank*, 635 P.2d
7 441, 444 (Wash. 1981) (en banc). Punitive damages are available in Section 1983
8 cases. *Dang v. Cross*, 422 F.3d 800, 807-09 (9th Cir. 2005) (citing *Smith v. Wade*,
9 461 U.S. 30, 34 (1983)). For the jury’s \$24,000,000 punitive damage award to
10 stand, it must have had legally sufficient evidence supporting *Monell* liability
11 against NaphCare.

12 1. *Section 1983*

13 Section 1983 provides, in relevant part:

14 Every person who, under color of any statute, ordinance,
15 regulation, custom, or usage, of any State or Territory or
16 the District of Columbia, subjects, or causes to be
17 subjected, any citizen of the United States or other person
within the jurisdiction thereof to the deprivation of any
rights, privileges, or immunities secured by the
Constitution and laws, shall be liable to the party injured

18 ³ NaphCare moved for judgment as a matter of law before the case was submitted
19 to the jury, preserving the arguments in the instant renewed motion. ECF No. 233;
20 *see Go Daddy Software*, 581 F.3d at 961 (citing Fed. R. Civ. P. 50(a)).

1 in an action at law, suit in equity, or other proper
2 proceeding for redress

3 “[Section] 1983 is not itself a source of substantive rights, but merely provides a
4 method for vindicating federal rights elsewhere conferred.” *Graham v. Connor*,
5 490 U.S. 386, 393-94 (1989) (internal quotation marks omitted). To state a claim
6 under Section 1983, a plaintiff must show that she was “deprived of a right secured
7 by the Constitution or laws of the United States, and that the alleged deprivation
8 was committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526
9 U.S. 40, 49-50 (1999).

10 The basic elements of a Section 1983 claim are met. First, NaphCare does
11 not challenge that Ms. Hill’s Fourteenth Amendment rights were violated, at least
12 under the standard applied by the Ninth Circuit.⁴ ECF No. 286 at 18. Pretrial

13 ⁴ NaphCare “preserves the argument that the Ninth Circuit’s ‘objective’ standard
14 for proving deliberate indifference in a medical-care case under the 14th
15 Amendment is erroneous” ECF No. 286 at 18. NaphCare cites to *Farmer v.*
16 *Brennan*, which discusses “deliberate indifference” in the context of a prisoner’s
17 failure-to-protect claim against an individual prison official. 511 U.S. 825, 837-38
18 (1994). *Farmer* and related analyses in cases *Kingsley v. Hendrickson*, 576 U.S.
19 389, 396-97 (2015), *Castro*, 833 F.3d at 1067-73, and *Gordon v. Cnty. of Orange*,
20 888 F.3d 1118, 1124-25 (9th Cir. 2018) (hereinafter *Gordon I*), concern claims

1 detainees have a constitutional right to adequate medical care while in the custody
2 of the government and awaiting trial. *Russell v. Lumitap*, 31 F.4th 729, 738 (9th
3 Cir. 2022); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 667 (9th Cir. 2021).

4 The jury found that Nurse Gubitiz denied Ms. Hill needed medical care, which put
5 Ms. Hill at a substantial risk of suffering serious harm, and that the denial caused
6 Ms. Hill harm. ECF No. 236 at 39-41. Second, the parties have stipulated that

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8 _____
8 against individual defendants. The Estate voluntarily dismissed its claim against
9 the only individual defendant. ECF No. 168. NaphCare may be found liable
10 through *Monell* if one of its policies or customs violated Ms. Hill’s constitutional
11 rights. *Castro*, 833 F.3d at 1073. The “deliberate indifference” required for
12 liability to attach in the *Monell* context is different than that used in the failure-to-
13 protect context. *Farmer*, 511 U.S. at 840-42 (“[W]hile deliberate indifference
14 serves under the Eighth Amendment to ensure that only inflictions of punishment
15 carry liability, the term was used in the *Canton* case for the quite different purpose
16 of identifying the threshold for holding a city responsible for the constitutional
17 torts committed by its inadequately trained agents”) (quotation marks and
18 citation omitted). NaphCare’s challenge on this ground is not before the Court,
19 and the Court treats it as conceded that Ms. Hill suffered a deprivation of her
20 constitutional rights.

1 both Nurse Gubitz and NaphCare acted under color of state law at all relevant
2 times, and the jury was instructed as to that stipulation. ECF No. 218 at 2 ¶¶ 1-2;
3 ECF No. 268 at 855:16-19; *see Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138-
4 40 (9th Cir. 2012).

5 Therefore, the parties agree that Ms. Hill was “deprived of a right secured by
6 the Constitution” and that the deprivation “was committed under color of state
7 law.” *Am. Mfrs. Mut. Ins.*, 526 U.S. at 49-50.

8 2. *Monell*

9 NaphCare argues that the deprivation of Ms. Hill’s constitutional rights
10 cannot be attributed to it. ECF No. 286 at 18. “A municipality or other local
11 government may be liable under [Section 1983] if the governmental body itself
12 ‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’
13 to such deprivation.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting
14 *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 692 (1978)).
15 Municipalities may not be held “vicariously liable” or liable under a theory of
16 “respondeat superior” for the acts of their employees. *Id.*; *see also Castro*, 833
17 F.3d at 1073. Private entities may be subject to Section 1983 liability for acts
18 committed under color of state law. *Tsao*, 698 F.3d at 1139.

19 NaphCare offers three arguments to contend that the Estate failed to
20 demonstrate the requisite elements to support *Monell* liability. ECF No. 286 at 18.

1 First, NaphCare contends that the Estate failed to show that NaphCare maintained
2 a policy or custom that violated Ms. Hill’s constitutional rights. ECF No. 286 at
3 19-21. Second, NaphCare contends that the Estate failed to show that NaphCare
4 ignored a pattern of constitutional violations committed under its watch, or that
5 NaphCare ignored such a substantial risk of constitutional violations that it should
6 have known that violations would occur—in other words, that NaphCare was
7 “deliberately indifferent.” ECF No. 286 at 21-27. Third, NaphCare contends the
8 Estate failed to show that, insofar as NaphCare had a “practice,” its “practice” did
9 not cause Ms. Hill’s harm. ECF No. 286 at 26-27. The Court will first consider
10 whether a policy or custom was established, then whether that policy or custom
11 caused Ms. Hill’s constitutional injury, and then turn to deliberate indifference.

12 i. Policy or Custom

13 A *Monell* plaintiff must demonstrate that “an official policy, custom, or
14 pattern” on the part of the municipal defendant “was the actionable cause of the
15 claimed injury.” *Tsao*, 698 F.3d at 1143. The custom or policy must be a
16 “deliberate choice to follow a course of action . . . made from among various
17 alternatives by the official or officials responsible for establishing final policy with
18 respect to the subject matter in question.” *Castro*, 833 F.3d at 1073 (citing
19 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).
20

1 There are three ways to establish a “policy” sufficient to hold an entity
2 defendant liable under *Monell*,⁵ *Gordon v. Cnty. Of Orange*, 6 F.4th 961, 973 (9th
3 Cir. 2021) (hereinafter *Gordon II*): first, where the entity “acts pursuant to an
4 expressly adopted official policy,” *id.* (citing *Thomas v. Cnty. of Riverside*, 763
5 F.3d 1167, 1170 (9th Cir. 2014) (per curiam)); second, where a “longstanding
6 practice or custom” causes a constitutional injury, including where the defendant
7 “fails to implement procedural safeguards to prevent constitutional violations or,
8 sometimes, when it fails to train its employees adequately,” *id.* (citing *Tsao*, 698
9 F.3d at 1143; *Connick*, 563 U.S. at 61); and third, where the constitutional
10 tortfeasor is an official with final law-making authority or where that official
11 ratified a subordinates’ unconstitutional act. *Id.* (citation omitted).⁶

13 ⁵ Elsewhere, the Ninth Circuit has explained more broadly that “policies” for
14 *Monell* purposes include “written policies, unwritten customs and practices, [and]
15 failure to train municipal employees on avoiding certain obvious constitutional
16 violations.” *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021).

17 ⁶ In some cases, the Ninth Circuit has described policies giving rise to *Monell*
18 liability as policies either of “action” or “inaction.” *See, e.g., Park v. City & Cnty.*
19 *of Honolulu*, 952 F.3d 1136, 1141 (9th Cir. 2020); *Jackson v. Barnes*, 749 F.3d
20 755, 763 (9th Cir. 2014); *Tsao*, 698 F.3d at 1143; *Waggy v. Spokane Cnty. Wash.*,

1 The custom that the Estate sought to establish at trial is narrow. The Estate
2 argues that NaphCare violated the Constitution by “using medically untrained jail
3 guards to monitor NaphCare patients in need of medical monitoring by medical
4 professionals.” ECF No. 300 at 8-9; *see also* ECF No. 236 at 39. NaphCare
5 argues that Nurse Gubitz, not NaphCare, denied Ms. Hill healthcare, and that
6 Nurse Gubitz was not acting pursuant to any NaphCare policy or custom in doing
7 so. ECF No. 286 at 21. To the contrary, the evidence at trial was sufficient to
8 establish that Nurse Gubitz (1) believed Ms. Hill needed monitoring for medical
9 issues, and (2) sent Ms. Hill to medical watch pursuant to NaphCare’s unofficial
10 custom.⁷

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13 594 F.3d 707, 713 (9th Cir. 2010); *Long v. Cnty. of Los Angeles*, 442 F.3d 1178,
14 1185 (9th Cir. 2006).

15 ⁷ NaphCare does not defend medical watch as a sufficient means of providing
16 medical care to inmates. ECF No. 286 at 12. That medical watch was not
17 “medical” in nature, and does not constitute “medical” care or monitoring in any
18 genuine sense, was well established at trial. ECF No. 261 at 201:16-202:23,
19 202:34-204:22; ECF No. 262 at 318:7-9, 319:7-320:8, 324:7-21, 325:5-25, 398:11-
20 18, 399:11-402:23, 417:8-418:13; ECF No. 267 at 648:24-649:6.

1 First, the evidence, although conflicting, is sufficient to support a jury
2 finding that Nurse Gubitz believed Ms. Hill needed medical monitoring by medical
3 professionals when she decided to send Ms. Hill to medical watch. To be clear,
4 Nurse Gubitz testified to the contrary.⁸ Nurse Gubitz testified that her assessment
5 of Ms. Hill’s presentation was consistent with withdrawal, but that she put Ms. Hill
6 on medical watch to “keep a better eye on the symptoms she was presenting with.”
7 ECF No. 267 at 713:25-717:17. Nurse Gubitz documented in an email the day
8 following Ms. Hill’s death that she believed Ms. Hill was experiencing symptoms
9 of withdrawal. Ex. 6; ECF No. 267 at 725:18-21.

10 However, in a note made prior to Ms. Hill’s death, Nurse Gubitz wrote that
11 she placed Ms. Hill on medical watch not due to withdrawal, but “for severe
12 abdominal pain and having to be dragged to door by cellmate to be assessed.” Ex.
13 3 at 1. Nurse Gubitz also recorded that Ms. Hill’s withdrawal symptoms were
14 minimal and described in detail Ms. Hill’s apparent pain and the circumstances of
15

16 ⁸ The Court, when entertaining a Fed. R. Civ. P. 50(b) motion, is required to “draw
17 all reasonable inferences in favor of the nonmoving party” and “disregard all
18 evidence favorable to the moving party that the jury is not required to believe.”
19 *Reeves*, 530 U.S. at 150. The jury was free to disbelieve Nurse Gubitz’s testimony
20 as self-serving and contradicted by other evidence.

1 their interaction. Ex. 4 at 25-27. Further, Nurse Gubitiz admitted on cross
2 examination that she placed Ms. Hill on medical watch not due to opioid
3 withdrawal protocols, but because of severe abdominal pain. ECF No. 267 at
4 755:9-12.

5 Experts Dr. Schubl and Dr. Roscoe testified that someone with Nurse
6 Gubitiz's qualifications would likely have identified that Ms. Hill had a significant
7 condition needing medical monitoring, rather than mere withdrawal. ECF No. 261
8 at 88:6-90:9, 195:16-198:8. Nurse Gubitiz herself testified that someone presenting
9 with Ms. Hill's symptoms might have an acute abdomen, ECF No. 267 at 625:14-
10 23, a medical condition that, as an expert explained, should raise significant
11 concern to any medical professional. ECF No. 261 at 86:20-89:19. Nurse Gubitiz
12 testified that, based upon Ms. Hill's presentation and the limited examination, it
13 was possible that Ms. Hill was suffering from a number of life-threatening
14 conditions:

15 Q. Okay. So whatever is happening, it's happening deep
16 within, correct?

17 A. You could say that, yes.

18 Q. Could have been appendicitis, do you agree?

19 A. Sure.

20 Q. Could have been pancreatitis, right?

A. Yes.

Q. Could have been acute diverticulitis, right?

A. Yes, though I think that usually occurs on the left more
often.

Q. Okay. Could have been an intestinal ischemia, which is
where --

1 A. Sure.

2 Q. -- the blood flow to the intestine through an artery is
3 blocked, right?

4 A. Mm-hmm. Yeah.

5 Q. Could have been a hole in her digestive tract, right?

6 A. Correct.

7 ECF No. 267 at 637:21-638:24. The jury had evidence to conclude that Nurse
8 Gubitz offered “withdrawal” as an after-the-fact and contrived justification for her
9 decisionmaking. The evidence supports that Nurse Gubitz believed Ms. Hill
10 needed medical monitoring when she referred Ms. Hill to medical watch.
11

12 Second, the evidence was sufficient for the jury to conclude that Nurse
13 Gubitz sent Ms. Hill to medical watch pursuant to NaphCare’s custom for patients
14 like Ms. Hill. Nurse Gubitz’s testimony supports the theory, as she testified that
15 everything she did relating to Ms. Hill was pursuant to regular NaphCare customs
16 and practices. ECF No. 267 at 675:22-676:12.

17 Lieutenant Donald Hooper, acting director for Spokane County corrections
18 services, testified that 2-West was primarily for suicide or self-harm watch, but
19 that some individuals located at 2-West have medical conditions. ECF No. 262 at
20 422:22-423:2. Lt. Hooper affirmed that nurses “want a little bit more attention for
these individuals[.]” ECF No. 262 at 423:4-6. NaphCare’s use of 2-West for
monitoring inmates with medical conditions was sufficiently persistent to warrant
the development of the Medical Watch Observation form. Ex. 5. Although the
form was made by the County, ECF No. 263 at 566:11-18; ECF No. 267 at 724:14-

1 15, it is, at least circumstantial evidence that NaphCare nurses regularly entrusted
2 corrections officers with monitoring patients for the symptoms listed. The form
3 identifies serious symptoms such as “[w]eakness to one side of the body[,]”
4 “[d]ifficulty breathing[,]” and “[w]orsening abdominal pain[.]” Ex. 5.

5 As further circumstantial evidence, Lt. Hooper testified as to a financial
6 motive for NaphCare’s preference for sending inmates in medical distress to
7 medical watch rather than the hospital. ECF No. 262 at 413:8-21. Under
8 NaphCare’s contract with the County, if a NaphCare nurse sent a patient to the
9 hospital, NaphCare would pay up to \$15,000 per patient per incident in resulting
10 expenses. ECF No. 262 at 413:8-12; Ex. 31 at 2 ¶ 1.7. Medical watch, on the
11 other hand, was free. ECF No. 262 at 413:18-21.

12 Nurse Gubitza testified that when she sent patients to medical watch and
13 completed the Medical Watch Observation form, it was her standard practice not to
14 check off or mark items in the “Examples of Important Changes to Report to
15 Medical” section because she “didn’t want to limit what the officers were looking
16 for.” ECF No. 267 at 725:5-6. She testified that, following a NaphCare nurse’s
17 identification of a medical issue, corrections officers “would keep an eye on how
18 patients were doing and notify medical if they were concerned about something or
19 if anything changed that they wanted us to take a look at before we came back
20

1 around.” ECF No. 267 at 654:8-11.⁹ With regard to Ms. Hill, Nurse Gubitz
2 “expected officers to look for any change in her condition[,]” specifically to “look
3 at [Ms. Hill] and contact her if they have a concern.” ECF No. 267 at 725:17-18.

4 NaphCare presented its Chief Medical Officer, Dr. Jeffrey Alvarez, who
5 testified that some jails have an infirmary with higher levels of care, and medical
6 watch at the Spokane County Jail is for patients who need to be “closer to nursing
7 or more close eyes in some ways.” ECF No. 261 at 38:4-10. Dr. Alfred Joshua,
8 NaphCare’s expert in correctional medicine, testified that the Spokane County Jail

9 _____
10 ⁹ There is some dispute over what Nurse Gubitz meant when she testified that
11 NaphCare nurses used medical watch for “acute” medical monitoring. ECF No.
12 267 at 647:11-16. She testified at trial that “acute,” as she used the word in
13 context, meant “a short amount of time.” ECF No. 267 at 647:24-648:1. The
14 Estate argues that her testimony at trial was a “post hoc explanation” to downplay
15 the significance of her prior use of the term, ECF No. 300 at 10, as “acute” can
16 also mean “gravely sick or ill.” ECF No. 261 at 112:1-3. Her deposition was read
17 into the record as impeachment evidence. ECF No. 267 at 647:17-648:1.

18 Depositions may be used to contradict or impeach the testimony of the deponent.
19 Fed. R. Civ. P. 32(a)(2). The Court finds this dispute has no significance to the
20 ultimate disposition of the instant motion.

1 was a relatively small jail, and “in a smaller jail, the correctional officers take a
2 larger role versus in a larger jail, more medical staff might take a larger role based
3 on just the sheer number of people.” ECF No. 231 at 104:4-7.

4 In sum, the circumstantial evidence presented at trial sufficiently illustrated
5 that it was NaphCare’s custom for its nurses to place patients with concerning
6 medical conditions on medical watch in 2-West, where observation was largely
7 carried out by corrections officers with no medical training.

8 To dispute this evidence, NaphCare points to its protocols for medical
9 assessment, arguing that “a correct application of NaphCare’s policies would have
10 resulted in Ms. Hill being sent to a hospital immediately upon the onset of her
11 severe abdominal pain.” ECF No. 286 at 19. NaphCare introduced screenshots
12 from its nursing protocols, which included a protocol for abdominal pain. Ex. 18
13 at 201. The screenshots include as a purported instruction to staff, “[r]efer to
14 Provider for sick call if [abdominal] pain is severe[.]” Ex. 18 at 201. Several
15 experts opined that NaphCare’s nursing assessment protocol, if applied to Ms. Hill,
16 would have required Nurse Gubitza to call a doctor. ECF No. 261 at 235:7-18; ECF
17 No. 262 at 479:22-480:12; ECF No. 231 at 90:25-91:11. However, as Dr. Roscoe
18 explained, what was presented was not a “policy,” it was a protocol in NaphCare’s
19 electronic system where nurses, if they entered “abdominal pain” in the search
20 form, could find next steps toward treatment, checking boxes about the patient’s

1 particular condition along the way. ECF No. 261 at 240:18-241:1. The evidence
2 at trial did not conclusively demonstrate that this protocol was in use at the
3 Spokane County Jail, and the jury was free to conclude to the contrary.

4 In fact, NaphCare presented no evidence indicating that the abdominal-pain
5 protocol was used at the Spokane County Jail other than its existence within
6 NaphCare’s computer system.¹⁰ No one who worked at the Spokane County Jail
7 testified that they had ever applied the protocol or knew it existed. That NaphCare
8 had written policies does not legally defeat the conclusion that there was “a custom
9 or practice of violating a written policy; otherwise an entity, no matter how
10 flagrant its actual routine practices, always could avoid liability by pointing to a
11 pristine set of policies.” *Castro*, 833 F.3d at 1075 n.10.

12
13
14 ¹⁰ The only evidence suggesting the abdominal-pain protocol was used came from
15 Dr. Alvarez, who had been to the Spokane County Jail “a few times[,]” testified
16 that nurses were trained on NaphCare’s policies and procedures. ECF No. 263 at
17 554:1-6; 560:14-16. He testified as to a broad policy of “[w]hen in doubt, send
18 them out.” ECF No. 263 at 562:18-22. However, Dr. Alvarez did not know why
19 Nurse Gubitz failed to consult the abdominal protocol or call a provider. ECF
20 No. 263 at 583:4-13. Dr. Alvarez’s testimony was inconclusive at best.

1 NaphCare relies on *Gordon II*, which explained that “[g]enerally, a single
2 incident of unconstitutional activity is not sufficient to impose liability under
3 *Monell*.” 6 F.4th at 974. In *Gordon II*, the decedent was detained in jail. *Id.* at
4 965. The jail had a detoxification protocol for alcohol and another for opioids. *Id.*
5 The jail placed the decedent, a heroin user, on the alcohol protocol, and the
6 decedent died. *Id.* at 965-66. The Ninth Circuit affirmed summary judgment on a
7 Section 1983 claim from the decedent’s estate because the plaintiff failed to
8 identify any other instances where the alcohol withdrawal protocol was used for
9 heroin withdrawal. *Id.* at 974 (“[T]he record lacks evidence of any other event
10 involving similar conduct or constitutional violations and plaintiff’s reference to
11 the subsequent changes to operating procedures is insufficient.”). The record here
12 is not so devoid of evidence, as Nurse Gubitz’s testimony, correctional officer
13 testimony, and the Medical Watch Observation form indicate that NaphCare
14 regularly used medical watch for detainees in need of medical monitoring.

15 As explained in *Castro*, that a plaintiff must “prov[e] prior instance of harm”
16 is “legally inaccurate.” 833 F.3d at 1073 n.7 (citing *Bd. of the Cnty. Comm’rs v.*
17 *Brown*, 520 U.S. 397, 409 (1997)). The *Castro* court, sitting *en banc*, affirmed
18 judgment against a municipal defendant. *Id.* at 1078. The policy at issue in *Castro*
19 was the defendant’s use of sobering cells without adequate monitoring, which was
20 evidenced by testimony as to the practice. *Id.* at 1075. The plaintiffs in *Castro*

1 attempted to introduce evidence of prior incidents in the sobering cell, but the trial
2 court excluded the evidence. *See* Plaintiff’s Memorandum, *Castro v. Cnty. of Los*
3 *Angeles*, No. 10-cv-5425-DSF (C.D. Cal. Aug. 20, 2012), ECF No. 151 at 20 n.6.
4 The plaintiffs instead relied upon expert testimony to demonstrate that the sobering
5 cells were a known risk that state regulations were imposed to curb, and the fact of
6 the incident giving rise to the lawsuit, as evidence of a practice. *Id.* at 15.

7 Similarly, in *Sandoval*, the Ninth Circuit considered an informal policy of
8 verbal communication regarding a jail’s placement of inmates in cells used for
9 both medical care and general holding. 985 F.3d at 681. The suit concerned an
10 inmate who needed medical monitoring but did not receive it. *Id.* at 681-82.
11 Reversing a grant of summary judgment, the Ninth Circuit found sufficient
12 evidence for a jury to determine that the informal communication practices
13 constituted a policy of using a mixed-use cell without necessary safeguards. *Id.*
14 The evidence submitted was largely deposition transcripts from staff at the jail. *Id.*
15 at 681-82; *see also* Briefing, *Sandoval v. Cnty. of San Diego*, No. 3:16-cv-01004-
16 BEN-AGS (S.D. Cal. 2010), ECF Nos. 20, 20-3, 24, 25-4, 25-5.

17 As *Sandoval* and *Castro* indicate, another instance of a constitutional
18 violation is not a necessary finding for a jury to conclude that a *Monell* defendant
19 had a “final policy” sufficient to give rise to liability. *Castro*, 833 F.3d at 1075.
20 The evidence presented in this case demonstrated that NaphCare maintained a

1 custom of sending patients in need of medical monitoring to medical watch, and
2 that Nurse Gubitz acted pursuant to that custom when she sent Ms. Hill to medical
3 watch.

4 ii. Causation

5 To establish liability under Section 1983, there must be a “direct causal link”
6 between a *Monell* defendant’s policy or custom and the plaintiff’s constitutional
7 injuries. *Sandoval*, 985 F.3d at 681 (quoting *Castro*, 833 F.3d at 1075).

8 NaphCare argues that the evidence at trial “pinpointed the moment things
9 went wrong in this case: Nurse Gubitz’s initial encounter with Ms. Hill.” ECF No.
10 286 at 26-27. NaphCare argues that “[t]he monitoring Ms. Hill received on
11 ‘Medical Watch’ was comparable to the monitoring she would have received in her
12 original cell. Accordingly, the move to ‘Medical Watch’ was not the *cause* of
13 Ms. Hill’s death.” ECF No. 286 at 27. NaphCare argues that “[t]he cause was an
14 intestinal rupture and the judgment call not to elevate her care to a higher-level
15 medical provider upon the onset of her severe stomach pain.” ECF No. 286 at 27.
16 The Estate counterargues that “[h]ad NaphCare not permitted its nurses to send its
17 ill patients to be monitored by medically untrained jail guards on ‘medical watch,’
18 Nurse Gubitz instead would have had to either (1) transfer Ms. Hill to the hospital,
19 (2) consult with a higher-level provider, or (3) direct that Ms. Hill be monitored on
20 a regular basis by nurses.” ECF No. 300 at 17. In reply, NaphCare argues curtly

1 that “[t]hat makes no sense[,]” and that “[n]o Medical Watch almost certainly
2 would have meant keeping Ms. Hill in her original cell on the existing monitoring
3 protocols (COWS/safety checks) because of the mistaken belief that Ms. Hill was
4 suffering from opioid withdrawal.” ECF No. 302 at 10.

5 Whether the practice was for Nurse Gubitz, upon belief that Ms. Hill was in
6 medical distress worth medical monitoring, to send Ms. Hill to medical watch or to
7 leave Ms. Hill in her original cell is of no moment. Indeed, the care and
8 monitoring that Ms. Hill received in medical watch was substantively similar to
9 what she would have received in her original cell. *See* ECF No. 262 at 321:13-16,
10 366:10-12, 366:2-5, 369:3-5, 369:24-370:2, 367:25-368:11 (corrections officer
11 testimony regarding medical watch).

12 The relevant causal factor of NaphCare’s custom was that it denied Ms. Hill
13 the medical care that she needed. Dr. Schubl and Dr. Roscoe testified that they
14 would expect a healthcare provider to have identified the severity of Ms. Hill’s
15 condition and sent her to the emergency room, which, if done, would likely have
16 prevented Ms. Hill’s death that day. ECF No. 261 at 89:14-19, 107:18-108:22,
17 195:16-197:8. Instead, the only further “medical monitoring” that occurred was
18 when Nurse Gubitz returned for a two-minute interaction at 3:00 p.m. ECF No.
19 267 at 726:17-25.

1 The facts of this case are comparable to *Castro*, where the Ninth Circuit
2 found that “the absence of frequent visual checks and the lack of audio monitoring
3 clearly made the risk of serious harm to such prisoners substantial.” 833 F.3d at
4 1076. This case is also comparable to *Sandoval*, where the Ninth Circuit found
5 that “[a] jury could find that had [the decedent] been monitored by the nursing
6 staff—instead of being abandoned for nearly eight hours—his deteriorating
7 medical condition would have been discovered earlier.” 985 F.3d at 682. Here,
8 the jury was presented evidence sufficient to conclude that NaphCare’s custom of
9 sending patients in need of medical monitoring to medical watch, or, as NaphCare
10 suggests, leaving them in their original cells, created a substantial risk that those
11 patients would die from their illnesses.

12 iii. Deliberate Indifference

13 NaphCare argues that the Estate “failed to show that NaphCare was on
14 actual or constructive notice of, and therefore deliberately indifferent to, the
15 alleged constitutional inadequacy of that practice.” ECF No. 286 at 21. The Estate
16 argues that deliberate indifference was not a requisite showing and, in the
17 alternative, that the jury had evidence of deliberate indifference. ECF No. 300 at
18 15-16.

19 A. The Estate was Not Required to Demonstrate Deliberate
20 Indifference at Trial.

1 The role that deliberate indifference plays in *Monell* claims in this circuit is
2 not easily discerned from case law. In *Rodriguez v. Cnty. of Los Angeles*, the
3 Ninth Circuit described “deliberate indifference” as one of three “type[s] of *Monell*
4 liability[.]” 891 F.3d 776, 803 (9th Cir. 2018) (citing *Hunter v. Cnty. of*
5 *Sacramento*, 352 F.3d 1225, 1234 n.8 (9th Cir. 2011)). According to *Rodriguez*,
6 this “deliberate indifference” theory is where the defendant “fail[s] to train
7 employees in a manner that amounts to ‘deliberate indifference’ to a constitutional
8 right[.]” *Id.* at 802. In other cases, where the Ninth Circuit divides the policies
9 underlying *Monell* claims into policies of “action” or “inaction,” when “a plaintiff
10 pursues liability based on a failure to act, she must allege that the municipality
11 exhibited deliberate indifference[.]” *Park*, 952 F.3d at 1141 (citing *Tsao*, 698 F.3d
12 at 1143); *see also Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1185-86 (9th Cir.
13 2002), *overruled in part by Castro*, 833 F.3d at 1076 (9th Cir. 2016).

14 More often, the Ninth Circuit has included “deliberate indifference” as one
15 element in a four-part test generally describing a *Monell* claim, which *NaphCare*
16 cites here. ECF No. 286 at 18. The test is, “(1) that the plaintiff possessed a
17 constitutional right of which she was deprived; (2) that the municipality had a
18 policy; (3) that this policy amounts to deliberate indifference to the plaintiff’s
19 constitutional right; and, (4) that the policy is the moving force behind the
20 constitutional violation.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir.

1 2011); *see also Gordon II*, 6 F.4th at 973; *Lockett v. Cnty. of Los Angeles*, 977 F.3d
2 737, 741 (9th Cir. 2020); *Plumeau v. Sch. Dist. #40*, 130 F.3d 432, 438 (9th Cir.
3 1997); *Oviatt v. Pearce*, 954 F.2d 1470, 1475 (9th Cir. 1992). On its face, the third
4 element suggests that, in every *Monell* case, the plaintiff must show deliberate
5 indifference to establish liability regardless of the theory pursued. A closer look at
6 the cases reciting this four-part test is not so conclusive.

7 The Ninth Circuit recently applied the four-part test in *Gordon II*, 6 F.4th at
8 973, citing to *Dougherty*, 654 F.3d at 900, which cites to *Plumeau*, 130 F.3d at
9 438, which cites to *Oviatt*, 954 F.2d at 1474. *Oviatt* conceives the four-part test as
10 a summary of the Supreme Court’s decision in *City of Canton v. Harris*. 954 F.2d
11 at 1474 (citing 489 U.S. 378, 389-91 (1989)). With *Canton*, the Supreme Court
12 resolved a circuit split as to the “degree of fault” that a municipality must exhibit
13 before liability attaches in a failure-to-train case, pronouncing that a *Monell*
14 defendant’s failure to train employees to avoid violations of constitutional rights
15 must “amount[] to deliberate indifference” to those rights. *Id.* 489 U.S. at 389.
16 *Oviatt* distilled *Canton*’s analysis into four parts and instructed that this four-part

1 test applies “[t]o impose liability . . . for failing to act to preserve constitutional
2 rights[.]” 954 F.2d at 1474.¹¹

3 Following *Oviatt*, the Ninth Circuit recited the four-part test in a number of
4 failure-to-act cases. See *Van Ort v. Est. of Stanewich*, 92 F.3d 831, 835 (9th Cir.
5 1996) (applying the four-part test “for failing to act”); *Lewis v. Sacramento*
6 *County*, 98 F.3d 434, 446 (9th Cir. 1996), *rev’d on other grounds*, 523 U.S. 833
7 (1998) (applying the four-part test to a failure-to-train claim). However, in 1997,
8 the Ninth Circuit cited the four-part test “[t]o impose municipal liability under
9 [Section] 1983 for a violation of constitutional rights,” without qualifying that the
10 four-part test is specifically for failure-to-train or failure-to-act cases. *Plumeau*,
11 130 F.3d at 438. Still, *Plumeau* clarified in a footnote that “a municipality’s

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15 ¹¹ In *Oviatt*, the Ninth Circuit found that a municipal defendant, acting through its
16 sheriff, the lone policymaker, failed to act to end a criminal defendant’s 114-day
17 incarceration without a prompt court appearance, in violation of the Fourteenth
18 Amendment. 954 F.2d at 1477-78. Because the municipality was on notice that
19 other incidents like this occurred, and the lack of procedures to alleviate the issue,
20 “it was virtually certain” that more violations would occur. *Id.* at 1478.

1 *failure to train* must amount to ‘deliberate indifference’ to the rights of others.” *Id.*
2 at 439 n.4 (emphasis added).¹²

3 In 2011, the Ninth Circuit in *Dougherty* reviewed the dismissal of a
4 complaint for failure to state a *Monell* claim; a decision that has also since been
5 cited for the four-part test. 654 F.3d at 897; *see Gordon II*, 6 F.4th at 973; *Lockett*,
6 977 F.3d at 741. The Ninth Circuit affirmed dismissal because “[t]he Complaint
7 lacked any factual allegations regarding key elements of the *Monell* claims, or,
8 more specifically, any facts demonstrating that his constitutional deprivation was
9 the result of a custom or practice of the [municipal defendant] or that the custom or
10 practice was the ‘moving force’ behind his constitutional deprivation.” 654 F.3d at
11 900-01. Therefore, deliberate indifference was not the dispositive concern in
12 *Dougherty. Id.*

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¹² *Plumeau* concerned Section 1983 claims on behalf of a child against a school
16 district for sexual abuse at a school. 130 F.3d at 438. The Ninth Circuit affirmed
17 summary judgment because there was no evidence genuinely disputing that the
18 sexual abuse was not pursuant to a custom or practice, was an unconstitutional
19 action by individuals with policy-making authority, or occurred in spite of an
20 affirmative duty to protect. *Id.* at 439.

1 In *Lockett*, the Ninth Circuit cited the four-part test to reject a *Monell* claim
2 not for a lack of deliberate indifference, but for the lack of any underlying
3 constitutional violation. 977 F.3d at 742. In *Gordon II*, the Ninth Circuit cited the
4 four-part test to reject a *Monell* claim because the appellant had not demonstrated
5 that his rights were violated pursuant to a policy, custom, or practice of the
6 municipality defendant. 6 F.4th at 973-74.

7 After review of Ninth Circuit case law following *Oviatt*, the Court has not
8 found a decision of the Ninth Circuit that recited the four-part test and rejected a
9 *Monell* claim because the plaintiff had failed to demonstrate deliberate
10 indifference.

11 With another formulation of *Monell* liability, the Ninth Circuit sitting *en*
12 *banc* in *Castro*, did not reiterate any of its prior standards and instead cited directly
13 to *Canton* to observe that “[t]he [Supreme] Court has further required that the
14 plaintiff demonstrate that the policy or custom of a municipality ‘reflects deliberate
15 indifference to the constitutional rights of its inhabitants.’” 833 F.3d at 1073
16 (citing 489 U.S. at 392). The Ninth Circuit found deliberate indifference in the
17 municipal defendant’s failure to adhere to its own city ordinances and police
18 manuals, which suggested the defendants knew the danger of using noncompliant
19 sobering cells. *Id.* at 1076-78. However, four-and-a-half years later, in *Sandoval*,
20 the Ninth Circuit clarified that “[t]his deliberate indifference standard does not

1 apply when a *Monell* defendant’s policies, customs, or practices directly require
2 unconstitutional conduct.” 985 F.3d at 682 n.17.

3 Supreme Court precedent following *Canton* also suggests that deliberate
4 indifference only applies to failure-to-act cases. To be sure, the Supreme Court has
5 reaffirmed, time and time again, that to hold a municipality liable under *Monell*,
6 the plaintiff must establish that her rights were violated pursuant to a policy or
7 custom of the defendant. *See, e.g., Connick*, 563 U.S. at 60; *Los Angeles Cnty. v.*
8 *Humphries*, 562 U.S. 29, 34-36 (2010); *Brown*, 520 U.S. at 403-04. As the
9 Supreme Court explained in *Connick*, “[i]n limited circumstances, a local
10 government’s decision not to train certain employees about their legal duty to
11 avoid violating citizens’ rights may rise to the level of an official government
12 policy for purposes of [Section] 1983.” 563 U.S. at 61. The Supreme Court
13 continued, “[a] municipality’s culpability for a deprivation of rights is at its most
14 tenuous where a claim turns on a failure to train” and for liability to attach in such
15 cases, “a municipality’s failure to train . . . must amount to ‘deliberate indifference
16 to the rights of persons with whom the [untrained employees] come into contact.’”
17 *Id.* (citing *Canton*, 489 U.S. at 388) (alteration in original).

18 The above case law, although difficult to read in concert, indicates that
19 “deliberate indifference” is not a stand-alone element required in every *Monell*
20 case. “Deliberate indifference” is used to establish a policy or custom;

1 specifically, where the alleged policy or custom is the “decision not to train certain
2 employees about their legal duty to avoid violating citizens’ rights[,]” *Connick*,
3 563 U.S. at 61, or, more broadly, whenever “a plaintiff pursues liability based on a
4 failure to act[.]” *Park*, 952 F.3d at 1141.

5 Returning to this case, the jury had sufficient evidence to determine that
6 NaphCare maintained an unwritten custom of sending patients in need of medical
7 monitoring to medical watch, as explained above. This is not a case involving a
8 failure to train or act.

9 Some Ninth Circuit jail-injury opinions have considered similar claims in
10 the failure-to-act context. In *Sandoval*, the Ninth Circuit explained that deliberate
11 indifference was required because the constitutional injury was “a tragic
12 consequence of [the municipality defendant’s] failure to implement measures
13 necessary to ensure the nursing staff knew when an individual was being held in
14 [the mixed-use cell] for medical reasons.” 985 F.3d at 682 n.17. Specifically,
15 there was “no evidence that the [municipality defendant] wanted nurses to ignore
16 all inmates in [the mixed-use cell], even those suffering from medical problems,”
17 and the evidence suggested that nurses knew they were supposed to monitor the
18 mixed-use cell when it was occupied by someone needing medical care. *Id.* In
19 *Castro*, the Ninth Circuit found that “substantial evidence supported the jury’s
20 finding that the County knew that its cell design might lead to a constitutional

1 violation among its inhabitants.” 833 F.3d at 1076. The *en banc* panel required
2 deliberate indifference and found it in the municipality defendant’s regulations and
3 policy manuals that revealed it “knew of the risk of the very type of harm that
4 befell [the plaintiff].” *Id.* at 1076.

5 In both *Sandoval* and *Castro*, the municipal defendants’ policies created a
6 risk that inmates would have their constitutional rights violated, and the municipal
7 defendants ignored that risk. Here, the relevant policy supported by evidence at
8 trial necessarily resulted in the violation of constitutional rights. Rather than
9 ignore a risk that a medically compromised inmate would be ignored for hours, as
10 in *Sandoval*, 985 F.3d at 682 n.17, or a risk that an inmate would be attacked by a
11 belligerent bunkmate, as in *Castro*, 833 F.3d at 1077, NaphCare’s custom violated
12 the Constitution with certainty—patients who needed medical care were denied it.

13 In short, the Court considers NaphCare’s practice as a “polic[y] of action[,]”
14 *Tsao*, 689 F.3d at 1143, that NaphCare “*itself* violate[d] federal law, or direct[ed]
15 an employee to do so[,]” *Park*, 952 F.3d at 1141 (emphasis in original), and that
16 NaphCare’s “policies, customs, or practices directly require unconstitutional
17 conduct[,]” *Sandoval*, 985 F.3d at 682 n.17. The Estate was not required to
18 demonstrate deliberate indifference as outlined in *Canton*, 489 U.S. at 388-89,
19 *Connick*, 563 U.S. at 61, and *Castro*, 833 F.3d at 1076-77.

20

1 B. There was Sufficient Evidence of Deliberate Indifference
2 Presented at Trial.

3 Even should the Court find that NaphCare’s deliberate indifference was a
4 required element of the Estate’s Section 1983 claim, the jury had sufficient
5 evidence to conclude that NaphCare’s policy or custom of sending seriously ill
6 patients to “medical watch” where they would be monitored by individuals with no
7 medical training was deliberately indifferent to detainees’ constitutional rights.

8 A municipal defendant is deliberately indifferent when “the need for more or
9 different training is so obvious, and the inadequacy so likely to result in the
10 violation of constitutional rights, that the policymakers of the city can reasonably
11 be said to have been deliberately indifferent to the need.” *Castro*, 833 F.3d at
12 1076. Deliberate indifference requires “actual or constructive notice that the
13 particular omission is substantially certain to result in the violation of the
14 constitutional rights.” *Id.* at 1076.

15 Deliberate indifference can be inferred from “sufficient circumstantial
16 evidence.” *Sandoval*, 985 F.3d at 683. In *Sandoval*, the Ninth Circuit reversed
17 summary judgment because the plaintiff presented evidence that the jail had in
18 place more rigorous policies for tracking inmates in sobering and safety cells,
19 compared to the mixed-use cell that the decedent died in. *Id.* The Ninth Circuit
20 explained that “[a] reasonable jury could conclude that the [defendant]
implemented these practices [in the sobering and safety cells] because it

1 understood they were necessary to ensure that inmates requiring medical care
2 would not fall through the cracks.” *Id.*

3 Similarly, in *Castro*, the Ninth Circuit found sufficient evidence of
4 deliberate indifference in the county defendant’s own ordinances and manual,
5 which required that sobering cells allow maximum visual supervision and audio
6 monitoring. 833 F.3d at 1076-77. The Ninth Circuit explained that “[t]he
7 [defendant’s] affirmative adoption of regulations aimed at mitigating the risk of
8 serious injury to individuals housed in sobering cells, and a statement to the same
9 effect in the station’s manual, conclusively prove that the [defendant] knew of the
10 risk of the very type of harm that befell [the plaintiff].” *Id.* at 1077. Similarly,
11 here, NaphCare’s experience in correctional medicine, and the obvious inadequacy
12 of medical watch as a method of medical monitoring or care, constitute evidence of
13 its constructive notice that sending inmates requiring medical monitoring to
14 medical watch would result in constitutional injury.

15 To begin, Dr. Alvarez—who writes NaphCare’s policies—testified that
16 NaphCare operates in many jails, some of which have “infirmaries or higher-level
17 case,” and others like the Spokane County Jail have less sophisticated monitoring
18 areas. ECF No. 263 at 561:1-565:10, 590:21-591:5. Broadly, the evidence showed
19 that NaphCare was a sophisticated provider of medical care in correctional
20 facilities. *See* ECF No. 263 at 549:8-16.

1 Nurse Gubitz testified that, on a typical weekend, NaphCare staffed the
2 Spokane County Jail with three registered nurses, two licensed practical nurses, a
3 medical assistant, and no other medical staff. ECF No. 267 at 637:19-640:5.
4 Nurse Gubitz testified that as a registered nurse, she could not diagnose significant
5 medical concerns. ECF No. 267 at 643:3-7. Nurse Gubitz testified that she
6 expressed frustration with the lack of a medical provider onsite on weekends to her
7 supervisors, which the jury may have concluded put NaphCare on notice of the
8 deficiency. ECF No. 267 at 641:3-643:2.

9 Lt. Hooper testified that officers on medical watch had no medical training
10 and could not assess inmates for worsening abdominal pain. ECF No. 262 at
11 398:11-24, 401:10-18. He testified that NaphCare had not coordinated with him,
12 and he was not aware of any coordination between the County and NaphCare,
13 regarding what officers should be doing on medical watch. ECF No. 262 at 406:5-
14 15. Nurse Gubitz was unaware of any effort by NaphCare to coordinate with the
15 County to develop protocols and expectations for medical watch. ECF No. 267 at
16 654:14-24. As repeatedly stated above, medical watch was insufficient to monitor
17 patients in medical distress. ECF No. 261 at 321:13-16; ECF No. 262 at 366:2-12;
18 367:25-368:11, 369:3-370:2.

19 The evidence, viewed in totality, shows that NaphCare's custom at the
20 Spokane County Jail was to send patients requiring medical monitoring to medical

1 watch. A reasonable juror could conclude that NaphCare, a sophisticated provider
2 of correctional medical services, was on constructive notice that this practice was
3 substantially certain to violate the inmate's right to medical care while detained,
4 due to its experience in the field, warning from Nurse Gubitz, and the obvious
5 deficiency in care provided to those on medical watch. ECF No. 261 at 38:3-8,
6 93:2-4; ECF No. 267 at 653:25-655:13; 698:21-23. Therefore, the jury had legally
7 sufficient evidence of deliberate indifference. *See Sandoval*, 985 F.3d at 683;
8 *Castro*, 833 F.3d at 1076.

9 **B. Motion for a New Trial**

10 NaphCare moves for new trial on the following grounds: (1) that the Court's
11 jury instructions were incorrect, (2) that the weight of the evidence cannot sustain
12 *Monell* liability, and (3) that the failure to bifurcate prejudiced NaphCare. ECF
13 No. 286 at 9-10. NaphCare also seeks a remittitur. ECF No. 286 at 9-10.

14 *1. The Monell Jury Instructions*

15 NaphCare argues that “[a]n error in the jury instructions wrongly allowed
16 the jury to hold NaphCare responsible for the actions of Nurse Gubitz.” ECF
17 No. 286 at 16. NaphCare admits that it did not object to the purportedly faulty
18 instructions. ECF No. 286 at 17.

19 “Jury instructions must be formulated so that they fairly and adequately
20 cover the issues presented, correctly state the law, and are not misleading.”

1 *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999). “[E]rroneous
2 jury instructions, as well as the failure to give adequate instructions, are . . . bases
3 for a new trial.” *Murphy*, 914 F.2d at 187. “A court may consider a plain error in
4 the instructions that has not been preserved as required by Rule 51(d)(1) if the
5 error affects substantial rights.” Fed. R. Civ. P. 50(d)(2); *see C.B. v. City of*
6 *Sonora*, 769 F.3d 1005, 1016 (9th Cir. 2014). “The plain error standard requires
7 the party challenging an instruction to show that: (1) there was error; (2) the error
8 was plain; (3) the error affected that party’s substantial rights; and (4) the error
9 seriously affected the fairness, integrity, or public reputation of judicial
10 proceedings.” *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020) (citing
11 *C.B.*, 769 F.3d at 1017-19). The court “consider[s] the entire set of instructions as
12 a whole to determine whether an individual instruction was misleading or
13 incorrectly stated the law.” *Id.* at 1139-40.

14 NaphCare challenges Instruction No. 31, ECF No. 286 at 16-17, which, in
15 full, reads as follows:

16 **INSTRUCTION NO. 31**

17 In the Section 1983 claim, the Plaintiff contends that
18 Defendant NaphCare violated the U.S. Constitution by
19 maintaining a longstanding practice of using medically
20 untrained jail guards to monitor NaphCare patients in need
of medical monitoring by medical professionals. In order
to prevail on this claim, the Plaintiff must prove each of
the following elements by a preponderance of the
evidence:

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1. NaphCare acted under color of state law;
2. The acts of a NaphCare employee deprived Cindy Hill of her particular right to needed medical care under the Fourteenth Amendment to the United States Constitution while detained at the Spokane County Jail as explained in Instruction No. 32;
3. NaphCare’s employee acted pursuant to a widespread or longstanding practice or custom of NaphCare; and
4. NaphCare’s widespread or longstanding practice or custom caused the deprivation of Cindy Hill’s rights by Hannah Gubitz; that is, NaphCare’s widespread or longstanding practice or custom is so closely related to the deprivation of Cindy Hill’s rights as to be the moving force that caused the ultimate injury.

A person acts “under color of state law” when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. The parties have stipulated that NaphCare and Nurse Gubitz acted under color of state law.

“Practice or custom” means any longstanding, widespread, or well-settled practice or custom that constitutes a standard operating procedure of NaphCare.

If you find that the Plaintiff has proved each of these elements, and if you find that the Plaintiff has proved all the elements it is required to prove under Instruction No. 32, your verdict should be for the Plaintiff. If, on the other hand, you find that the Plaintiff has failed to prove one or more of these elements, your verdict should be for NaphCare.

1 ECF No. 236 at 39-40. Instruction No. 31 is based upon the Ninth Circuit’s Model
2 Jury Instruction No. 9.5. NaphCare argues that Instruction No. 31 fails to instruct
3 that the jury must find that it adhered to the relevant practice with deliberate
4 indifference. ECF No. 286 at 17. NaphCare highlights that Instruction No. 31
5 references Instruction No. 32, which instructs that the jury must find that Nurse
6 Gubitz, as a NaphCare employee, acted with deliberate indifference to prevail
7 against NaphCare. ECF No. 286 at 17; ECF No. 302 at 12.

8 The Court begins with whether its failure to instruct the jury on the
9 deliberate indifference standard constituted error. *Bearchild*, 947 F.3d at 1139.
10 Instruction No. 31 properly listed the elements of a *Monell* claim, namely, that
11 NaphCare acted under color of state law, that a NaphCare employee deprived
12 Ms. Hill of needed medical care while detained, that the employee acted pursuant
13 to NaphCare’s custom, and that the custom or practice caused the deprivation of
14 Ms. Hill’s rights. ECF No. 236 at 39. The jury found each of these elements when
15 it found in favor of the Estate on the Section 1983 claim. ECF No. 240 at 2.

16 NaphCare argues that the instructions improperly led the jury to “h[o]ld
17 NaphCare responsible under *Monell* and for punitives for the results of one nurse’s
18 error.” ECF No. 302 at 12-13. NaphCare argues that Instruction No. 32, which
19 “referred only to *Nurse Gubitz’s* culpable conduct . . . further entwined NaphCare
20 with Nurse Gubitz and heightened the risk of an improper verdict based upon

1 *respondeat superior.*” ECF No. 302 at 12 (emphasis in original). An incorrect
2 jury instruction is sufficiently prejudicial where it is “impossible to determine from
3 the jury’s verdict and evidentiary record that the jury would have reached the same
4 result had it been properly instructed.” *Bearchild*, 947 F.3d at 1139 (quotations
5 omitted).

6 The comment to Model Jury Instruction 9.5 directs a court to give the
7 instruction in conjunction with a “particular rights” instruction. However, the
8 Court’s near-verbatim use of Model Jury Instruction 9.30 as the “particular rights”
9 instruction in this case required more than was necessary for the Estate to succeed
10 in its Section 1983 claim. The Court’s instructions, in effect, asked the jury
11 whether Nurse Gubitz was liable, under the standard applied to Section 1983
12 claims against individual defendants denying medical care to detainees. *See*
13 *Sandoval*, 985 F.3d at 667-68; *Castro*, 833 F.3d at 1070-71.

14 Despite the error, it is far from “impossible to determine from the jury’s
15 verdict and evidentiary record that the jury would have reached the same result had
16 it been properly instructed.” *See Bearchild*, 947 F.3d at 1139 (quotations omitted).
17 Proper instruction would have asked only whether NaphCare’s employee deprived
18 Ms. Hill of needed medical care while in custody and whether that denial of care
19 was pursuant to NaphCare’s custom. Presuming that the jury followed the
20 instructions as given, as the Court must do, *see Leatherman Tool Grp. v. Cooper*

1 *Indus.*, 285 F.3d 1146, 1150 (9th Cir. 2002), the jury found each of those elements
2 and further found that Nurse Gubitiz acted with deliberate indifference, as the term
3 is applied in suits against individual Section 1983 defendants. *See Castro*, 833
4 F.3d at 1070-71.

5 Although there was error, and “plain” in that at the time it was given it was
6 an incorrect statement of the Estate’s burden, the error did not affect NaphCare’s
7 substantial rights nor the fairness, integrity, or public reputation of the judicial
8 proceedings. *See Bearchild*, 947 F.3d at 1139. If the error caused prejudice, it was
9 to the Estate, as it increased the Estate’s burden.

10 Further, if this case were construed as one requiring a finding of deliberate
11 indifference, the Court finds no error affecting NaphCare’s substantial rights. As
12 the Estate highlights, Instruction No. 44 instructs the jury on punitive damages.
13 ECF No. 236 at 44. Instruction No. 44 explains that the jury may award punitive
14 damages after finding

15 . . . that NaphCare’s conduct that harmed Cindy Hill was
16 in reckless disregard of Cindy Hill’s rights. Conduct is in
17 reckless disregard of a person’s rights if, under the
18 circumstances, it reflects a complete indifference to the
19 person’s safety or rights, or if the defendant acts in the face
20 of a perceived risk that its actions will violate a person’s
rights under federal law.

19 ECF No. 236 at 44.

1 Deliberate indifference, comparatively, is when “the facts available to city
2 policymakers put them on actual or constructive notice that the particular omission
3 is substantially certain to result in the violation of the constitutional rights of their
4 citizens.” *Castro*, 833 F.3d at 1076 (quoting 489 U.S. at 396).

5 The Court finds no error affecting substantial rights in failing to give a
6 deliberate indifference instruction, given the Court’s instruction and the jury’s
7 finding on punitive damages. The jury found that NaphCare’s conduct either
8 “reflect[ed] a complete indifference to [Ms. Hill’s] . . . rights,” or that NaphCare
9 “act[ed] in the face of a perceived risk that its actions w[ould] violate Ms. Hill’s
10 rights under federal law.” ECF No. 236 at 44. Under either prong, the punitive
11 damages instruction is not a substantial departure from the deliberate indifference
12 standard, which asks whether NaphCare was “on actual or constructive notice that
13 the particular omission is substantially certain to result in the violation of . . .
14 constitutional rights. . . .” *See Castro*, 833 F.3d at 1076 (quoting *Canton*, 489 U.S.
15 at 396). Therefore, although there was error, the error did not affect NaphCare’s
16 “substantial rights.” *See Bearchild*, 947 F.3d at 1139.

17 *2. Weight of the Evidence*

18 When considering a motion for a new trial based upon the weight of the
19 evidence, “the district court has the duty to weigh the evidence as the court saw it,
20 and to set aside the verdict of the jury, even though supported by substantial

1 evidence, where, in the court’s conscientious opinion, the verdict is contrary to the
2 clear weight of the evidence.” *Molski*, 481 F.3d at 729 (citing *Murphy*, 914 F.2d at
3 187) (alterations and quotations omitted). The standard applied upon a Fed. R.
4 Civ. P. 59 motion differs from that of a Fed. R. Civ. P. 50 motion in that the
5 district court is not required to consider evidence in the light most favorable to the
6 non-movant or make reasonable inferences in the non-movant’s favor. *Dees v.*
7 *Cnty. of San Diego*, 960 F.3d 1145, 1151, 1153-54 (9th Cir. 2020).

8 As discussed at length above, the evidence at trial was sufficient to establish
9 a *Monell* claim against NaphCare. *See supra* § A. In addition to legal sufficiency,
10 the verdict was not against the clear weight of the evidence. *See Molski*, 481 F.3d
11 at 729.

12 NaphCare argues that the Estate failed to establish an unconstitutional
13 practice and deliberate indifference. ECF No. 286 at 19-20. Although NaphCare
14 argues that the Estate only showed “a one-time mistake by a nurse,” the evidence
15 at trial demonstrated to the contrary. ECF No. 286 at 28. Expert testimony
16 demonstrated that someone in Nurse Gubitiz’s position likely knew that Ms. Hill
17 required monitoring by medical professionals. ECF No. 261 at 88:6-90:9, 195:16-
18 198:8. Nurse Gubitiz all but admitted that she believed Ms. Hill was suffering from
19 serious medical distress separate from opiate withdrawal. ECF No. 267 at 625:14-
20 23, 637:21-638:24. Nurse Gubitiz testified that her interactions and decisions

1 related to Ms. Hill were all “done pursuant to the usual and the regular customs
2 and practices of NaphCare.” ECF No. 267 at 675:22-25.

3 The Medical Watch Observation form demonstrates that the practice was
4 persistent enough to require a specialized form directing corrections officers to
5 look for certain signs of distress. Ex. 5. Nurse Gubitz testified that she avoided
6 marking the form because she did not want to limit the officers’ observations to
7 certain conditions. ECF No. 267 at 725:5-6. The evidence at trial supports the
8 jury’s conclusion that NaphCare nurses regularly used corrections officers, with no
9 medical training, to monitor patients that they knew required observation by
10 medical professionals, and that NaphCare never trained them on medical watch.
11 ECF No. 261 at 201:16-202:1; ECF No. 262 at 318:11-319:15, 318:7-9, 319:7-15,
12 399:11-400:13, 422:22-423:2; ECF No. 263 at 591:9-592:19; ECF No. 267 at
13 647:11-15, 655:5-13, 675:22-676:12, 725:5-6; Ex. 5.

14 NaphCare highlights its “abdominal pain policy” and insists that its practice
15 was to send patients with abdominal pain to the hospital. ECF No. 286 at 10-11.
16 As stated above, a written and “pristine set of policies” is insufficient to avoid
17 liability. *Castro*, 833 F.3d at 1075 n.10. Paramount are the actual practices
18 employed, and NaphCare failed to introduce evidence in support of its theory. Not
19 one person who regularly works at the Spokane County Jail testified that the
20 abdominal pain policy was employed as regular practice.

1 NaphCare argues that the evidence did not support causation. ECF No. 286
2 at 26-27. Again, the clear weight of the evidence is not against the jury's
3 conclusion that NaphCare's use of medical watch at the Spokane County Jail
4 substantially increased the risk of harm to prisoners, and that, had Ms. Hill been
5 provided monitoring by medical professionals, her deteriorating medical condition
6 would have been discovered earlier, and her life saved. *See Castro*, 833 F.3d at
7 1076; *Sandoval*, 985 F.3d at 682.

8 Upon review of the evidence, the Court declines to upend the jury verdict.
9 *Molski*, 481 F.3d at 729. Each element of the Estate's claim was supported by
10 evidence presented at trial.

11 *3. Bifurcation*

12 NaphCare argues that the Court's denial of its motion to bifurcate resulted in
13 unfair prejudice that now requires a new trial. ECF No. 286 at 29-31. NaphCare
14 argues that the Court's instruction that the County was already at fault caused the
15 jury to preemptively conclude that NaphCare did something wrong as well, and
16 permitted the Estate to "aim their full firepower at NaphCare[.]" ECF No. 286 at
17 30. NaphCare argues that the jury's finding that NaphCare was ninety percent at
18 fault for negligence and the large punitive damages award are the product of unfair
19 prejudice. ECF No. 286 at 30-31.

1 The County filed a response addressing only NaphCare’s argument
2 regarding bifurcation. ECF No. 301. The County opposes a new trial on this
3 ground, arguing that the Court’s decision not to bifurcate was not an abuse of
4 discretion. ECF No. 301 at 2-3.

5 The Court considered NaphCare’s pretrial motion for bifurcation and denied
6 NaphCare’s request for two trials, one on liability and another on damages. ECF
7 No. 147. The decision to bifurcate is well within a trial court’s discretion. *Est. of*
8 *Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016). The Court declines to
9 reconsider its order denying bifurcation and construes NaphCare’s arguments
10 relating to bifurcation as an attempt to establish a “miscarriage of justice”
11 sufficient to grant a new trial. *Molski*, 481 F.3d at 729.

12 First, NaphCare’s characterization of the Estate’s trial strategy as
13 “prejudicial” is unavailing. *See* ECF No. 286 at 30. The Court asked the jury
14 whether NaphCare was liable—if NaphCare now complains that it was the County,
15 and not it, that was mostly responsible for Ms. Hill’s injury, its choice to avoid
16 presenting any evidence to that effect at trial is not a miscarriage of justice. The
17 fact that the Estate “cast NaphCare as the villain” is hardly a unique or surprising
18 strategic choice for a plaintiff, and certainly not one that has caused a miscarriage
19 of justice. ECF No. 286 at 30-31.

1 Second, NaphCare complains that the Estate’s “campaign for punitive
2 damages” was “stressed . . . to punish solely NaphCare.” ECF No. 286 at 30.
3 Punitive damages are just that—punitive—and are not available against
4 municipalities in Section 1983 suits. *City of Newport v. Fact Concerts, Inc.*, 453
5 U.S. 247, 271 (1981). The Court finds no miscarriage of justice in the decision to
6 hold a single trial on liability and damages in this case.

7 *4. Remittitur*

8 “Where the court determines that a damage award is excessive, the court
9 may either grant the motion for a new trial or deny the motion conditional on the
10 plaintiff accepting a remittitur, that is, agreeing to pay a lesser amount of damages
11 that the court considers justified.” *Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.*,
12 593 F.Supp.2d 1088, 1093 (N.D. Cal. 2009) (citing *Fenner v. Dependable*
13 *Trucking, Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983)); *see also Gasperini v. Ctr.*
14 *for Humanities*, 518 U.S. 415, 433 (1996); *Oracle Corp. v. SAP AG*, 765 F.3d
15 1081, 1094 (9th Cir. 2014).

16 NaphCare confuses several principles of law related to punitive damages in
17 its attempt to establish that the punitive damages award in this case is legally
18 impermissible and not supported by the evidence. ECF No. 286 at 31-36. The
19 Court starts by detangling the legal arguments, then turns to the evidentiary
20 arguments.

1 i. Punitive Damages and Due Process

2 NaphCare is correct that the Constitution, as a matter of due process, limits
3 punitive damages awards and the Supreme Court “ha[s] announced due process
4 standards that every award must pass.” *Exxon Shipping Co. v. Baker*, 554 U.S.
5 471, 501 (2008); *see also State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S.
6 408, 416 (2003). The limit is rooted in “elementary notions of fairness enshrined
7 in our constitutional jurisprudence [that] dictate that a person receive fair notice
8 not only of the conduct that will subject him to punishment, but also of the severity
9 of the penalty” *State Farm*, 538 U.S. at 416 (quotation and citations omitted).

10 The Supreme Court has instructed courts reviewing punitive damages for
11 constitutionality to consider three guideposts:

12 (1) the degree of reprehensibility of the defendant's
13 misconduct;

14 (2) the disparity between the actual or potential harm
15 suffered by the plaintiff and the punitive damages award;
16 and

17 (3) the difference between the punitive damages awarded
18 by the jury and the civil penalties authorized or imposed
19 in comparable cases.

20 *State Farm*, 538 U.S. at 418.

First, the degree of reprehensibility of a defendant’s conduct is “the
weightiest factor.” *Hardeman v. Monsanto Co.*, 997 F.3d 941, 972 (9th Cir. 2021).

Reprehensibility is reviewed by consideration of five factors:

1 [1] the harm caused was physical as opposed to economic;
2 [2] the tortious conduct evinced an indifference to or a
3 reckless disregard of the health or safety of others;
4 [3] the target of the conduct had financial vulnerability;
5 [4] the conduct involved repeated actions or was an
6 isolated incident; and
7 [5] the harm was the result of intentional malice, trickery,
8 or deceit, or mere accident.

9 *Id.* at 972-73 (quoting *State Farm*, 538 U.S. at 419). Here, the harm was physical
10 and mortal. Physical harm “highlight[s] the reprehensibility of causing serious
11 physical harm and the need to deter future harm.” *Id.* at 973. As explained at
12 length above, although NaphCare contests that the evidence demonstrated that it
13 was its custom to deny medical care to those who needed it, the jury disagreed, as
14 does the Court, and such a custom highlights its “indifference to or [] reckless
15 disregard of the health or safety” of inmates in need of medical care. *See id.*
16 Financial vulnerability “is not particularly relevant in a mostly noneconomic
17 damages case like this one.” *Id.* at 973-74. However, the Court finds it relevant
18 that “this is a case of a large corporation and an individual[,]” and that the
19 individual at issue was vulnerable and placed in NaphCare’s care. *Id.* at 974.
20 These three factors support a finding of reprehensibility that justifies a significant
punitive damages awards, within the bounds of due process.

The fourth and fifth factors are less conclusive. As to whether this case
involved repeated actions or was an isolated incident, although only evidence
pertaining to Ms. Hill was presented, the fact that the constitutional deprivation

1 was committed pursuant to NaphCare’s custom broadly suggests that others may
2 be subject to similar risk. And, although there is indication that NaphCare’s
3 custom disregarded the safety of those in its care, there was no evidence suggesting
4 that NaphCare intended for inmates to suffer or die from medical distress.

5 Irrespective of the fourth and fifth factors, the Court finds sufficient
6 reprehensibility justifying a significant punitive damages award. Moreover, the
7 Court finds it significant that the custom established at trial is a dereliction of the
8 very responsibility that NaphCare voluntarily assumed for its financial benefit—to
9 provide professional medical care to inmates like Ms. Hill. ECF No. 262 at 407:3-
10 8. The Court cannot ignore the significance of NaphCare’s voluntary assumption
11 of the responsibility and finds that the manner in which it conducted its business at
12 the Spokane County Jail constituted “particularly egregious” conduct. *See*
13 *Hardeman*, 997 F.3d at 974.

14 Second, there are no “concrete constitutional limits on the ratio between
15 harm, or potential harm, to the plaintiff and the punitive damages award.” *State*
16 *Farm*, 538 U.S. at 425. However, where compensatory damages are “substantial,”
17 due process may only allow a “lesser ratio, perhaps only equal to compensatory
18 damages[.]” *Id.* The Ninth Circuit has suggested that compensatory awards are
19 “substantial” when in the millions of dollars. *Hardeman*, 997 F.3d at 976.

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1 More broadly, the Supreme Court has suggested that “few awards exceeding
2 a single-digit ratio between punitive and compensatory damages, to a significant
3 degree, will satisfy due process.” *State Farm*, 538 U.S. at 425. The Ninth Circuit
4 has explained that “[i]n cases with significant economic damages and more
5 egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional.”
6 *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life*
7 *Activists*, 422 F.3d 949, 962 (9th Cir. 2005). Overall, “[t]he precise award in any
8 case, of course, must be based upon the facts and circumstances of the defendant's
9 conduct and the harm to the plaintiff[,]” and “courts must ensure that the measure
10 of punishment is both reasonable and proportionate to the amount of harm to the
11 plaintiff and to the general damages recovered.” *State Farm*, 538 U.S. at 426.

12 The jury calculated Ms. Hill’s compensatory damages at \$2,750,000 and
13 awarded punitive damages in the amount of \$24 million, producing an approximate
14 ratio of 8.7 to 1. ECF No. 240. NaphCare argues that \$2,750,000 in compensatory
15 damages is “unquestionably substantial.” ECF No. 286 at 33. Even if the Court
16 were to agree, the punitive award is not unconstitutional. In *Planned Parenthood*
17 *of the Columbia/Willamette*, where “[m]ost of the compensatory awards [we]re
18 substantial[,]” the Ninth Circuit found that the defendants’ conduct was
19 “particularly reprehensible.” 522 F.3d at 963. The panel explained that, in the
20 circumstances of that case, “[o]ur constitutional sensibilities are not offended by a

1 9 to 1 ratio.” *Id.* In another case concerning “highly reprehensible conduct,
2 though not threatening to life or limb, that caused economic harm to a
3 corporation[,]” the Ninth Circuit explained that a 9 to 1 ratio was the upper limit
4 that due process would allow, applying *State Farm. Bains LLC v. ARCO Prods.*
5 *Co.*, 405 F.3d 764, 777 (9th Cir. 2005).

6 In cases where the Ninth Circuit or the Supreme Court have determined that
7 a punitive damages award should be reduced to 4 to 1, the reason given was that
8 the conduct at issue was not particularly reprehensible. *Hardeman*, 997 F.3d at
9 975 (holding that limiting punitive damages to 4 to 1 was appropriate in a case
10 with significant economic damages and conduct that was not “particularly
11 egregious”); *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir. 2020),
12 *rev’d on other grounds*, 141 S. Ct. 2190 (2021) (limiting punitive damages to 4 to
13 1 because, although the defendant’s “conduct was reprehensible, it was not so
14 egregious as to justify a punitive award of more than six times an already
15 substantial compensatory award”). NaphCare’s custom as demonstrated at trial
16 was particularly egregious, and the Court finds sufficient reprehensibility such that
17 due process does not require a punitive damages ratio below 8.7 to 1.

18 Third, a punitive damages award should be compared to “civil penalties
19 authorized or imposed in comparable cases.” *State Farm*, 538 U.S. at 428.
20 NaphCare errantly urges the Court to consider punitive damages awarded in

1 comparable Section 1983 litigation. ECF No. 286 at 34-35. When the Supreme
2 Court and the Ninth Circuit refer to “civil penalties,” it refers to statutorily
3 imposed fines for similar conduct, not awards in comparable civil cases. *See, e.g.,*
4 *State Farm*, 538 U.S. at 428 (“The most relevant civil sanction under Utah state
5 law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of
6 fraud”); *BMW of N. Am. v. Gore*, 517 U.S. 559, 583-84 (1996) (“[A]
7 reviewing court . . . should accord substantial deference to legislative judgments
8 concerning appropriate sanctions for the conduct at issue.”) (quotations omitted);
9 *Hardeman*, 997 F.3d at 975 (“The parties failed below, and again on appeal, to
10 explain what the relevant civil fines are”); *Planned Parenthood of the*
11 *Columbia/Willamette*, 422 F.3d at 963 (“We need not go beyond [the relevant
12 statute] itself, as it provides for criminal fines . . . and civil penalties”).

13 The Supreme Court has cautioned against comparing punitive damages
14 awards in the due process analysis, albeit in a pre-*Gore* opinion. *TXO Prod. Corp.*
15 *v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993). The purpose of this factor is to
16 ensure that defendants are not punished severely in excess of an amount that
17 should be anticipated by looking to a relevant statute. *See Gore*, 517 U.S. at 584
18 (“[T]here does not appear to have been any judicial decision in Alabama or
19 elsewhere indicating that application of that policy might give rise to such severe
20 punishment.”); *Planned Parenthood of the Columbia/Willamette*, 422 F.3d at 963

1 (“[The statute]’s provision for punitive damages is uncapped, so [defendants]
2 would have known that its exposure to penalties in a civil action for violating that
3 Act could be significant.”).

4 The Estate suggests that the closest civil sanction is the Civil Rights of
5 Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, which offers only
6 “equitable relief.” 42 U.S.C. § 1997a. As the parties have not identified a
7 comparable civil sanction, the Court finds, as the Ninth Circuit did in *Hardeman*,
8 that “this guidepost is not particularly helpful here.” *See* 997 F.3d at 975
9 (quotations omitted).

10 Considering the reprehensibility of NaphCare’s underlying conduct and that
11 the ratio that the jury imposed does not exceed single digits, the Court finds no
12 violation of due process by allowing the award to stand.

13 ii. Punitive Damages and Federal Common Law

14 NaphCare argues that the jury’s punitive damages award, in addition to
15 violating due process, is in excess of what federal common law will allow. ECF
16 No. 286 at 33. NaphCare argues that the Supreme Court’s opinion in *Exxon*
17 *Shipping Co.* is controlling. 554 U.S. 471 (2008).

18 *Exxon* is a decision of maritime law and imposes a limit on punitive
19 damages for claims arising out of federal maritime law. *Id.* at 475-76. The
20 Supreme Court concluded, after considering alternative options and the history of

1 punitive damages, that “a 1:1 ratio . . . is a fair upper limit in such maritime cases.”
2 *Id.* at 513. NaphCare argues that “Section 1983 permits punitive damages because
3 the common law permits punitive damages.” ECF No. 302 at 14. Therefore,
4 NaphCare argues, *Exxon* imposes a 1:1 ratio between punitive and compensatory
5 damages in Section 1983 cases. ECF No. 302 at 14.

6 Section 1983 creates a “species of tort liability in favor of persons deprived
7 of federally secured rights.” *Smith*, 461 U.S. at 34. Section 1983 does not provide
8 rules concerning damages recoverable for constitutional deprivations. *Id.*
9 “Constitutional torts are governed by the federal common law, subject to the
10 authority of Congress to legislate otherwise.” *Mendez v. Cnty. of San Bernardino*,
11 540 F.3d 1109, 1122 (9th Cir. 2008). “In the absence of more specific guidance,
12 [the Supreme Court] looked first to the common law of torts (both modern and as
13 of 1871), with such modification or adaptation as might be necessary to carry out
14 the purpose and policy of the statute.” *Smith*, 461 U.S. at 34.

15 The Ninth Circuit discussed *Exxon* in *Mendez*, which concerned a Section
16 1983 claim. 540 F.3d at 1122. The punitive damages award in *Mendez* violated
17 due process, and the Ninth Circuit declined to consider whether the award was also
18 impermissible as a matter of federal common law. *Id.* Although not deciding the
19 issue, the Ninth Circuit observed that *Exxon* concerned “the federal common law
20 of maritime torts[,]” and that “[a]ny attempt to fashion a federal common law rule

1 of reasonableness for punitive damage awards for constitutional torts, however,
2 would have to make ‘such modification or adaptation [to the common law] as
3 might be necessary to carry out the purpose and policy’ of § 1983.” *Id.* (quoting
4 *Smith*, 461 U.S. at 34).

5 NaphCare offers no authority suggesting that the *Exxon* limit should be
6 extended to cases arising out of Section 1983, and the Court cannot find such
7 authority. Further, NaphCare makes no attempt to demonstrate how the purpose
8 and policy of Section 1983 should require such a limit. The Court declines to
9 apply NaphCare’s novel and sweeping theory to this case absent clear authority.

10 iii. Punitive Damages as Supported by the Evidence

11 Finally, separate from considerations of the Constitution or federal common
12 law, a district court has discretion to order remittitur or a new trial when an
13 excessive damages award “resulted from passion and prejudice of the jury
14 connected to its misunderstanding of the injuries for which [a defendant] could
15 properly be held responsible.” *Watson v. City of San Jose*, 800 F.3d 1135, 1142,
16 1142 n.11 (9th Cir. 2015). A court considering a request for remittitur views the
17 evidence in the light most favorable to the prevailing party and will not disturb a
18 damages award unless it is “clearly not supported by the evidence.” *See Thomas v.*
19 *Cannon*, 289 F.3d 1182, 1205 (W.D. Wash. 2018) (citations omitted). “An
20 otherwise supportable verdict must be affirmed unless it is grossly excessive or

1 monstrous or shocking the conscience.” *Brady v. Gebbie*, 859 F.2d 1543, 1557
2 (9th Cir. 1988) (quotations omitted).

3 NaphCare argues that “[t]he punitive damages award is not supported by the
4 evidence[,]” specifically, that the evidence failed to show deliberate indifference
5 toward incarcerated individuals or that NaphCare had notice that its practices were
6 deficient. ECF No. 286 at 31-34. NaphCare argues that the evidence failed to
7 show that NaphCare exhibited the type of reprehensibility justifying punitive
8 damages. ECF No. 286 at 34.

9 The Court refers to its above discussion of reprehensibility. NaphCare
10 largely disputes the conclusions the jury reached from the evidence. While the
11 record lacks evidence of intentional malice, trickery, or deceit, the evidence
12 demonstrates NaphCare’s reckless disregard and derogation for the rights of those
13 under its care, which it was hired to protect. Further, the consequence of its
14 dereliction of duty under its contract with the County was a loss of life, which it
15 should have been well positioned to prevent as a professional and institutional
16 provider of correctional medicine. ECF No. 262 at 407:3-8. The evidence
17 supports the punitive damages award.

18 NaphCare further argues that the “sting” of the jury’s punitive damages
19 award is grossly excessive. ECF No. 286. A jury may consider a defendant’s net
20 worth when assessing punitive damages. *White v. Ford Motor Co.*, 500 F.3d 963,

1 976 n.10 (9th Cir. 2007). The jury had evidence of NaphCare’s net worth. ECF
2 No. 262 at 515:19-517:13. NaphCare urges that punitive damages are meant to
3 “sting” but not “kill” the defendant. ECF No. 286 (quoting *Morris v. Parke, Davis*
4 *& Co.*, 573 F. Supp. 1324, 1328-29 (C.D. Cal. 1983)). Indeed, the large punitive
5 damages award will undoubtedly cause financial difficulty to NaphCare.
6 However, in a case involving death such as this one, the Court does not find that
7 the \$24 million punitive damages award is “grossly excessive,” “monstrous,” or
8 “shocking to the conscience.” *See Brady*, 859 F.2d at 1557.

9 **CONCLUSION**

10 NaphCare’s Fed. R. Civ. P. 50(b) motion for judgment as a matter of law is
11 denied because the Court finds there was legally sufficient evidence in support of
12 the jury’s verdict. NaphCare’s Rule 59 motion for a new trial is also denied
13 because the Court finds no error in jury instructions affecting NaphCare’s
14 substantial rights or impugning the fairness, integrity, or public reputation of the
15 judicial proceedings; the verdict was not against the clear weight of the evidence;
16 and the decision not to bifurcate did not cause prejudice requiring a new trial.
17 NaphCare’s motion for a remittitur is denied because the punitive damages award
18 does not violate due process or run contrary to federal common law, and is
19 supported by the evidence.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 **1.** NaphCare's Rule 50 & 59 Motions for Judgment as a Matter of Law,
3 New Trial, and/or Remittitur, **ECF No. 286**, is **DENIED**.

4 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
5 Order and provide copies to the parties.

6 DATED September 27, 2023.

7 *s/Mary K. Dimke*
8 MARY K. DIMKE
9 UNITED STATES DISTRICT JUDGE
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