No. 22-2958

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Bettye Jackson, as Independent Administrator of the Estate of Eugene Washington, deceased, *Plaintiff-Appellant,* v. Sheriff of Winnebago County, in his official capacity, and Jeff Valentine, Individually and as Agent, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois No.: 3:30-cv-50414 The Honorable Iain D. Johnston, Judge Presiding

APPELLEES' BRIEF

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HINSHAW & CULBERTSON LLP

ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2958

Short Caption: Bettye Jackson v. Sheriff of Winnebago County, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IS ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Sheriff of Winnebago County, Jeff Valentine

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:):

Hinshaw & Culbertson, LLP; Charlotte Ann LeClercq; Winnebago County State's Attorney's Office

(3) If the party, amicus or intervener is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener's stock:

None.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

None.

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None.

Attorney's Signature: s/Joshua G. Vincent Date: 3/14/23

Attorney's Printed Name: Joshua G. Vincent

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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None.

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Attorney's Signature: s/Gilberto Gonzalez Date: 3/14/23

Attorney's Printed Name: Gilberto Gonzalez

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ___ No __X_

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JURISDICTIONAL STATEMENT

The plaintiff-appellant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Did plaintiff adduce any evidence that would allow a jury to reasonably find the decedent was harmed by defendants' failure to provide basic life support less than thirteen minutes before the decedent was found with no detectible pulse, not breathing, cyanotic and cold to the touch due to a fatal cardiac arrythmia?

2. Did plaintiff adduce any evidence that would allow a jury to reasonably find that the alleged mishandling of the two intercom calls from the decedent's cellmate was "purposeful, knowing and reckless" and objectively unreasonable, as opposed to merely negligent or grossly negligent?

STATEMENT OF THE CASE

This statement of the case repeats certain facts from plaintiff's statement of the case in order to place in context the relevant facts that plaintiff's brief omits.

Audio Issues with the Jail's Intercom System

A correctional officer cannot hear and understand an inmate's call on the jail's intercom system if the inmate stands too close to the microphone or speaks too loudly – or both. Inmate Parks testified, "If you yell into the intercom, they're not really going to understand what you're saying." DE 56-

12, p. 83. *See also*, DE 56-8, p. 42: "Those intercoms aren't exactly the best . . . The quality is not great, I would say. Sometimes it's very hard to hear what people are saying."; DE 56-9, p. 40: "Yelling would be the issue with just the sound and the concrete walls . . ."; DE 56-7, p. 30: "It is sometimes hard to hear them . . . inmates will put stuff in the speakers . . . [which] alter[s] us hearing what their emergency is or what they're trying to tell us."; DE 56-5, p. 33-4: "If they're talking too loud, it can be hard to understand them. If they're standing too close to it, it can be hard to understand."

Inmate Parks' cell was connected to the decedent's cell by the jail's ventilation system. The common ventilation system allowed Parks to hear the decedent's cellmate, Simmons, yelling into the intercom system during both calls for assistance. DE 56-12, pp. 14-15: "I heard the faint two-tone beep of the medical button that's in the cell, and then I heard yelling." *See also* DE 56-12, p. 20: "And then I hear the beeping again, and then I hear him screaming again, 'My celly's not breathing. He needs to see medical.'"

Inmates Frequently Misuse the Jail's Intercom System

The intercom system's purpose is to allow inmates to report emergencies to correctional officers during lock-down periods. DE 56-8, p. 31; DE 56-9, pp. 40-1; DE 56-7, p. 29. Nevertheless, inmates regularly use the system for non-emergencies such as to request toilet paper, soap, and their tablet computers, to open their cell doors or to find out about their bond or their next court date. DE 56-8, pp. 39-40; DE 56-12, p. 34; *see also* DE 56-5, pp.

27-8: "It's relatively frequent that it ends up that they are pressing the button for some totally unrelated matter, or asking for toilet paper or something simple, instead of using the button for what it's intended to be used for."

Even after guards correctively counsel an inmate about an improper non-emergency use of the intercom, many will call back multiple times anyway and make the same non-emergency request. That, in turn, can affect how quickly control desk officers answer successive calls from the same cell. DE 56-5, p. 39.

Inmate Simmons' Two Intercom Calls Were Garbled

Inmate Simmons was awakened in the early morning hours of October 28, 2019, by what he believed was the sound of his cellmate, Eugene Washington, gasping for air in his top bunk. DE 56-10, p. 9. A similar thing had happened in the middle of the night about two weeks earlier. DE 56-10, pp. 12, 36. The first time, Simmons was able to easily rouse Washington by yelling his name, after which Washington assured Simmons he was fine. DE 56-10, pp. 12, 36-7. Simmons did not report the earlier incident to the jail staff, and there was no evidence defendants were ever on notice that Washington had any type of medical or health problem. DE 56-10, pp. 13, 37.

The second time Simmons was awakened by Washington in the middle of the night was different. Simmons described the sound Washington was making as "hemorrhaging" – "gasping hard enough that his body was sort of lifting part way off the bed." DE 56-10, pp. 9, 11-12. Washington's eyes were

closed and "his arms were like locked up straight in the air." DE 56-7, p. 44. Simmons yelled Washington's name, shook him and yelled "wake up." DE 56-10, p. 9. Washington was completely unresponsive. Simmons realized he "wasn't getting up." DE 56-10, pp. 11-12, 13, 14-15. He pushed the call button at 4:37 a.m., about a minute after he first tried to rouse Washington. DE 56-10, pp. 14, 15; DE 45-17, p. 2.

Defendant Jeff Valentine was the correctional officer stationed at the Pod 3 control desk when Simmons pushed the call button. DE 56-6, p. 46; DE 45-17, p. 2. There are multiple screens an officer monitors at the control desk – one shows security camera footage throughout the pods, another is a computer monitor with jail communications, and a third screen has a flashing green light to identify a cell whose call button has been pushed. There is also a telephone. DE 56-6, p. 49.

Valentine was alerted to Simmons' call by a flashing green light from Cell 23, where Simmons and Washington were housed. DE 56-6, p. 46. There is a simultaneous beeping sound when the call button is pushed, but Valentine said the audio alert was very soft. Someone else had apparently turned down the volume before Valentine rotated into the control desk position that morning. DE 56-6, pp. 47-8.

Valentine opened the intercom channel and asked what was the emergency. DE 56-6, p. 49. Simmons claimed he told Valentine in a normal tone of voice, and without shouting, "my cellie [sic] can't breathe." DE 56-10,

pp. 9, 25-6. To Valentine, Simmons "sounded very loud." "[I]t was really hard to make out what [Simmons] was trying to say." "It sounded like he was saying something along the lines that the toilet or the sink were not working." DE 56-6, pp. 52-3.

Valentine said he asked Simmons to repeat himself; Simmons claimed Valentine admonished him that the call button was only for emergencies. DE 56-10, pp. 19, 25. Either way, Simmons did not give Valentine any further information. Instead, Simmons said he rhetorically asked Valentine, "Who pushes the button at this time of night and it's not an emergency?" DE 56-10, pp. 18, 19. To Valentine, however, it sounded "like he was saying the same thing previously, that the toilet and the sink were not working." DE 56-6, p. 53. He told Simmons the button was for "medical use only" and ended the call. DE 56-6, p. 54.

Simmons shook Washington again in an effort to wake him. He "wanted to give him CPR" but didn't know if "they would put it on me," or consider him "at fault" and "blame[] me." DE 56-10, pp. 9, 10, 11, 15. Eight minutes passed. At that point, it was 4:46 a.m. and Simmons pushed the call button a second time. DE 56-10, pp. 9, DE 45-17, p. 2. Valentine opened the intercom channel approximately 90 seconds later. DE 45-17, p. 2. Simmons told Valentine "My cellie [sic] can't breathe, he needs help," "Man, can you all please get somebody in." DE 56-10, pp. 18, 20.

At the same moment Simmons pushed the call button a second time, two other correctional officers, Posada and Arbisi, had just returned to the third floor where the Pod 3 control desk was located. They were about to resume their rounds after taking the trash to the basement. DE 56-4, pp. 15-16. Posada walked over to the control desk where Valentine was seated and saw the flashing green light from Cell 23 just as Valentine answered the call. DE 56-4, p. 19. Posada did not recall hearing the audio alert on the control board. DE 56-4, p. 18.

Valentine asked the caller what was the emergency, or words to that effect. DE 56-4, pp. 21-2. Posada described the audio of the caller's voice as "very broken up." DE 56-4, pp. 23, 27. But he could tell the call had "something [to do] with breathing," "[h]aving a hard time breathing type of thing. His cellie [sic] was having a hard time." DE 56-4, p. 23.

Even though "the communication was broken" and "wasn't very clear," Posada believed some kind of issue was going on because the caller sounded "kind of frazzled." He "wasn't talking slow," he "was fast about it." DE 56-4, p. 25. The applicable training protocol in this situation was "We go to the cell and we check on the inmate. And then we make a call to the medical department over the radio." DE 56-4, p. 26. Conversely, "if you know exactly what happen[ed] because the communication is clear, you can call the code [for a medical emergency] from the desk. But it wasn't clear, so we ran to the pod" to investigate. DE 56-4, p. 27.

The Efforts to Resuscitate Washington

Posada and Arbisi immediately went to the entrance of Pod 3, entered, went up to the second tier and opened the door to Cell 23. DE 56-4, pp. 31-4, 38. Washington was lying on the top bunk and Simmons was standing at the back of the cell. DE 56-4, pp. 31-4. Simmons told Posada and Arbisi that Washington wasn't breathing and had made "a choking sound." DE 56-1, pp. 32, 67. Washington was lying motionless on his back. DE 56-4, p. 33. His mouth and eyes were open. DE 56-1, p. 33. Simmons testified he didn't know whether the guards could have helped Washington if they had reacted any faster to his calls. DE 56-10, p. 10.

Arbisi checked for a pulse. He was unable to detect one. DE 56-1, p. 33. Arbisi then climbed onto the top bunk to further assess Washington's condition. DE 56-1, p. 33. Washington was not breathing, his lips were blue, his eyes were wide open and he was cold to the touch. DE 56-1, p. 34. Arbisi called a "Code 100" over his radio and immediately began performing chest compressions on Washington. DE 56-1, pp. 34-5. He estimated the Code 100 was broadcast within a minute after he and Posada left the Pod 3 control desk in response to Simmons' second call. DE 56-1, p. 36. Washington remained completely unresponsive. DE 56-1, p. 35; DE 56-4, p. 38.

The Code 100 alerted everyone working in the jail that a medical emergency was in progress. DE 56-1, p. 34. Correctional Officer Kryder, who was stationed at the jail's central control desk, immediately repeated the Code

100 and Washington's cell number over the jail's radio system. DE 56-5, p. 46. Correctional Officers Shumaker, Ditto and Heizenroth responded and made their way to Cell 23 in about a minute. DE 56-9, p. 49; DE 56-3, pp. 39-40; DE 56-7, p. 40. They were joined by Sergeant Jacobson and Lieutenant Lolli. DE 56-8, pp. 49-51. Jacobson ordered Kryder to call 9-1-1 and request an ambulance. Kryder immediately made the 9-1-1 call from the central control desk. DE 56-5, pp. 49-50.

When Heizenroth and Shumaker arrived, they saw Arbisi on the top bunk performing chest compressions. DE 56-3, p. 40. Together, they moved Washington from the top bunk to the floor where the chest compressions would be more effective. DE 56-3, p. 42; DE 56-4, pp. 39-40. Heizenroth checked Washington's carotid artery for a pulse. There was still none.

Shumaker then took over for Arbisi and continued to perform chest compressions. DE 56-3, p. 44. The officers are trained to do 100 chest compressions per minute and to rotate responsibility to keep the strength of the compressions consistently high. DE 56-3, pp. 45-6; DE 56-1, pp. 37, 39-40. Shumaker's efforts to resuscitate Washington fared no better than Arbisi's. DE 56-1, pp. 39-40.

Valerie Lewis, one of the jail's staff nurses, arrived with an automatic electronic defibrillator (AED) within one to two minutes after the Code 100 was called. DE 56-1, pp. 40-1; DE 56-3, pp. 46-7; DE 56-4, pp. 41-2. The AED instructed the officers to administer shocks and to continue CPR. The officers

did as instructed. DE 56-1, pp. 41-3; DE 56-4, pp. 43-5; DE 56-9, pp. 52-3. The electrical shocks caused Washington's body to flinch involuntarily, but he made no volitional movements whatsoever and remained totally unresponsive. DE 56-9, pp. 53-4; DE 56-4, pp. 44-5. Narcan, which is used to treat known or suspected opioid overdose, was also administered. DE 56-4, p. 42; DE 56-11, p. 32. Washington did not respond to any of these lifesaving efforts. DE 56-1, pp. 41-2; DE 56-4, pp. 43-5.

Emergency medical technicians were in the cell ten to fifteen minutes after Kryder's 9-1-1 call. DE 56-4, pp. 46-7. The EMTs placed Washington on a gurney and attached a chest compression device to him that provided continuous CPR. They wheeled him through the jail to the sally port where the ambulance was parked. DE 56-1, pp. 43-4.

Inmate Parks, whose cell was on the tier just below Washington's, saw Washington go by on the gurney. "When they wheeled him by my cell, it was – he was unconscious. He didn't look like he had any – I don't know how to say it. It didn't look like – he looked pale. It looked like he didn't have any blood going through his face, if that's makes any sense. He looked deceased, I guess, you know . . . I remember his head kind of turned to the side a little bit, and from the movement of the stretcher, you know, there was no resistance in his movements." DE 56-12, pp. 38-9.

Kryder rode in the ambulance while Shumaker followed in a squad car. Kryder saw no signs of life during the ambulance ride. DE 56-5, p. 58. About

ten minutes after they arrived at the hospital, Kryder and Shumaker were told that Washington had been declared dead. DE 56-5, p. 60; DE 56-9, p. 60.

Death from Cardiac Arrythmia Can Occur "Very Fast" or "Very Slowly"

Dr. Mark Peters, a forensic pathologist in private practice, performed Washington's autopsy at the request of the Winnebago County deputy coroner. DE 56-11, pp. 8, 13. The autopsy was performed the day after Washington died. DE 56-11, p. 17. Dr. Peters' understanding of the circumstances surrounding Washington's death was derived from an Illinois State Police investigative report. DE 56-11, pp. 15-16; DE 45-17.

There was an isolated hemorrhage found in one section of Washington's lungs which Dr. Peters considered a "CPR artifact." He also noted aspirated bacteria in another lung section. Dr. Peters explained that people commonly aspirate oral flora or gastric contents as they die. Finally, Dr. Peters found congestion and edema in the lungs, a common perimortem condition that develops as part of the dying process. DE 56-11, pp. 29, 31. The external and internal examinations were otherwise completely unremarkable with no signs of trauma, illness or disease. DE 56-11, pp. 29-30.

Dr. Peters concluded that the cause of death was cardiac arrythmia caused by sleep apnea. DE 56-11, p. 32. A cardiac arrythmia "is an abnormal heart rhythm that is a big risk factor for cardiac arrest." DE 56-11, p. 33. Sleep apnea can be either "obstructive" or "central." DE 56-11, p. 33.

The risk factors for obstructive sleep apnea are gender (male), age, obesity, smoking and craniofacial or upper airway abnormalities. Washington was male, but he was young and neither overweight nor obese. Peters did not observe any craniofacial or upper airway abnormalities. DE 56-11, p. 34. Central sleep apnea does not have the same associations as obstructive sleep apnea. It is more uncommon and is caused by a brain abnormality. DE 56-11, p. 35.

Plaintiff's counsel asked Dr. Peters how quickly death from cardiac arrythmia could occur. Dr. Peters said it could happen very quickly or very slowly:

> Q: In your experience and education as a forensic pathologist, how quickly could cardiac arrhythmia caused by sleep apnea actually cause a person to die once that person's stricken?
>
> A: Well, it can happen very fast or very slowly, you know, you can be in an arrhythmic state for minutes, you know, many minutes before you finally reach that fatal arrhythmic state of arrhythmia.
>
> Q: How would a cardiac arrhythmia actually cause a person to die? What actually is the mechanism that causes that?
>
> A: Well, cardiac arrhythmia in this case is likely due to ischemia, you know, lack of oxygen in the blood that causes the heart to go into an abnormal rhythm. Eventually that rhythm can generate ventricular fibrillation and then asystole.
>
> Q: What is asystole?
>
> A: It's absence of a heart rate or heartbeat.

DE 56-11, pp. 38-9. Dr. Peters also said he had "no idea" how long Washington may have been in an arrhythmic state before Simmons noticed there was a problem and called for help. DE 56-11, p. 49.

Plaintiff's counsel never asked Dr. Peters to give opinions on such things as: Whether Washington had obstructive or central sleep apnea; how long Washington may have been oxygen-deprived by his sleep apnea; how quickly the lack of oxygen might have triggered the cardiac arrythmia; how quickly the arrythmia progressed to the point that it became fatal; when Washington's heart stopped; at what point CPR and use of a defibrillator might have saved Washington; Washington's chances of survival if correctional officers had responded any sooner; or whether defendants' lifesaving efforts were executed properly.

The District Court's Decision

Defendants moved for summary judgment on two grounds: (1) Valentine's conduct was objectively reasonable under the circumstances, DE 44, pp. 6-11; and (2) the absence of any verifying medical evidence that the alleged delay in providing Washington with medical care harmed Washington, caused his death or was otherwise detrimental, DE 44, pp. 11-15.

The district court did not address defendants' first argument. Instead, it held plaintiff failed to adduce any verifying medical evidence, expert or otherwise, to show defendants' alleged delay in providing medical care was detrimental to Washington.

Specifically, the district court found that plaintiff's reliance on the testimony of Dr. Peters and the autopsy report he prepared was insufficient: "[T]his testimony is merely a post-mortem diagnosis of the manner and cause of death, which standing alone is insufficient to assist the jury in determining whether the delay exacerbated Washington's condition and therefore does not meet the 'verifying medical evidence' requirement." DE 57, p. 13. The district court added, "The proffered evidence is not verifying medical evidence tying harm to the delay. Dr. Peters does not state any opinion on if the delay was detrimental to Washington, nor does he express a view on the timeliness or adequacy of the care that Washington eventually received." DE 57, p. 13.

Accordingly, the district court held "the record does not confirm or corroborate Plaintiff's claim that the delay in medical treatment was detrimental to Washington." DE 57, p. 13. Instead, "there is evidence that Washington was unconscious and unresponsive from the time when Simmons first tried to wake him to when the officers arrived after the second intercom call. Simmons testified that he never saw Washington open his eyes, and when the responding officers arrived, Washington had no pulse and was cold to the touch." DE 57, pp. 13-4.

SUMMARY OF ARGUMENT

The problem with plaintiff's case is there is no way to tell from this record how quickly Washington died and whether earlier intervention would have made any difference. The pathologist's testimony and autopsy report –

the only medical evidence in the case – failed to address those questions. As the district court correctly recognized, the record showed only that Washington died from a cardiac arrythmia and was completely unresponsive from the moment Simmons first pushed the call button to when the guards arrived thirteen minutes later and found him cold to the touch, not breathing, cyanotic and without any pulse.

This was a medically complex case that raised critical questions about how quickly someone can die – and whether and when they can be saved – from sleep apnea-induced cardiac arrythmia. Expert medical testimony was essential to a lay jury's ability to decide at what point along the thirteen-minute timeline the guards' intervention might have made a difference and prevented Washington's death or improved his chances of survival, if at all. Without any medical evidence to assist them with those medical questions, jurors could only guess what may or may not have happened if help had arrived sooner. "Speculation of this sort is not enough for a plaintiff to escape summary judgment." *Pulera v. Sarzant*, 966 F.3d 540, 551 (7th Cir. 2020), *citing King v. Hendricks Cty. Comm'rs*, 954 F.3d 981, 985 (7th Cir. 2020).

Plaintiff's reliance on the "common sense" notion that seconds and minutes matter when someone is deprived of oxygen and their heart stops beating is misplaced. No one disputed that point. The unanswerable question for a jury in this case was *how many* seconds or minutes mattered for Washington? There is simply nothing in the record that would permit a jury to

infer that the outcome for Washington would have been any different if CPR or use of an AED had been initiated by the guards within one or two minutes, or ten minutes, of Simmons' first call. That is a question only a physician, and probably a cardiologist, could answer. *See Bass v. Wallenstein*, 769 F.2d 1173, 1179, 1184 (7th Cir. 1985). Plaintiff cannot rely on medical articles gleaned from the internet to backfill this evidentiary gap; that is inadmissible hearsay.

The judgment can also be affirmed on the alternative basis that defendants' conduct was neither reckless nor objectively unreasonable, an issue the district court did not decide. Under the Constitution, reasonableness is the standard, not immediacy or perfection, and each case must be reviewed in light of the totality of circumstances. *Pulera v. Sarzant*, 966 F.3d 540, 550, 554 (7th Cir. 2020).

Defendants had no notice or knowledge that Washington suffered from sleep apnea, and Valentine did not know someone had turned down the volume of the audio alert at the control desk before he assumed that position shortly before Simmons called. He still answered Simmons' first call within 60 seconds which, given the circumstances and his other responsibilities at the control desk, is not objectively unreasonable.

No one contradicts Valentine's testimony that he heard Simmons complain about a problem with the sink or toilet, and there is a plethora of evidence from guards and inmates that the audio quality of the intercom system is poor. And even if Simmons' testimony that he spoke calmly and

clearly is credited, there was still evidence inmates stuffed things in the speaker box that affected the sound. Posada heard the second call from Simmons and confirmed it was broken up and that Simmons was hard to hear and understand.

Valentine did not simply terminate the first call after hearing what he thought was a non-emergency complaint about a plumbing problem. Valentine admonished Simmons the call button was only for emergencies. That signaled to Simmons that Valentine must not have understood what he said. But instead of trying to explain Washington's plight, Simmons made a wise-crack about how no one would call at that hour unless it was an emergency.

Valentine's decision to terminate the conversation at that point was not unreasonable when every guard – and even one of Simmons' fellow inmates – said the call button was frequently used by inmates for non-emergencies. The fact that Valentine took 90 seconds to answer Simmons' second call was not unreasonable, either. The undisputed evidence was not just that inmates frequently used the call button for non-emergencies, they often made successive non-emergency calls after being reminded the call button was only for emergencies.

No one disputes that as soon as Valentine learned Washington was having breathing problems, the guards responded immediately and with urgency, initiated all the appropriate lifesaving efforts and called 9-1-1. While

it is tragic that Washington did not survive, it was not because of any unconstitutional deprivation of prompt and timely medical care by the defendants.

ARGUMENT

I. Plaintiff Failed to Adduce Any Verifying Medical Evidence That the Alleged Delay in Medical Treatment Caused Washington Any Harm

A. Standard of Review

A district court's decision on summary judgment is reviewed *de novo.* *Sherrod v. Lingle*, 223 F.3d 605, 610 (7th Cir. 2000). To overcome a motion for summary judgment, the non-moving party must adduce enough evidence that a jury could reasonably find in their favor. *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008). Courts "are not required to draw every requested inference [on summary judgment]; they must only draw reasonable ones that are supported by the record." *Williams v. Ortiz*, 937 F.3d 936, 941 (7th Cir. 2019).

B. A Jury Could Only Speculate Whether the Alleged Delay In Medical Care Affected Washington's Chances of Survival

Section 1983 was adopted against a background of common law tort principles on causation. *Taliferro v. Augle*, 757 F.2d 157, 161-62 (7th Cir. 1985). As a result, "elementary principles of legal causation * * * are as applicable to constitutional torts as to common law torts." *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988). That means that in a section 1983 action, as in any civil case, proximate cause "must be based upon provable facts and cannot be

based on mere guess, conjecture, surmise, possibility or speculation." *Collins v. Am. Optometric Ass'n*, 693 F.2d 636, 640 (7th Cir. 1982).

For purposes of causation, *Williams v. Liefer*, 491 F.3d 710, 715 (7th Cir. 2007), explained that there is a difference between a section 1983 case that alleges a delay in medical care and one that alleges a denial of medical care. In a denial-of-medical-care case a jury may infer from the plaintiff's disability or death that the failure to provide any care was both the legal cause and the cause-in-fact of the injury. *See e.g. Ortiz v. City of Chicago*, 656 F.3d 523, 534-5 (7th Cir. 2011) (jury can infer causation where "an obviously ill detainee dies in custody" after receiving no medical care at all); *see also Estate of Perry v. Wenzel*, 872 F.3d 439, 459 (7th Cir. 2017) (evidence of causation is sufficient "where the jury could infer that although Perry ultimately died of a heart condition, it was the delay in providing *any* treatment that caused the harm.") (emphasis in original).

Conversely, "verifying medical evidence" is required to prove a delay in medical care "caused some degree of harm." *Williams v. Liefer*, 491 F.3d 710, 715 (7th Cir. 2007). Expert testimony is one form of verifying medical evidence; medical records may suffice if they demonstrate that prompt care would have lessened the plaintiff's pain and suffering. *Williams*, 491 F.3d at 716, *citing Gil v. Reed*, 381 F.3d 649, 662 (7th Cir. 2004) (jury could infer a 24-hour delay in dispensing antibiotic caused plaintiff unnecessary pain from infected surgical site where evidence showed the medication quickly relieved

plaintiff's symptoms once plaintiff had it); *see also Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (jury could infer a 36-hour delay in getting plaintiff medical care for an obviously broken nose resulted in unnecessary pain and suffering).

Plaintiff has squarely framed her case as a delay-in-medical-care claim rather than a denial of care. (Pltf. Br. 22.) She is driven to that position because it is undisputed defendants did everything possible to save Washington's life as soon as they became aware he had a serious medical problem. And it cannot be gainsaid that once the guards reached Washington's cell, they took all the appropriate steps to try and resuscitate him. Plaintiff levels no criticism whatsoever at defendants' lifesaving efforts or the speed of defendants' response once they knew Washington needed help.

Rather, plaintiff complains that Valentine took too long to answer Simmons' two intercom calls and mishandled them. According to plaintiff, this delayed the guards response to the medical emergency and caused Washington to suffer a "diminished chance of survival," "increased pain and unnecessary suffering . . . and the likelihood that [he] would die." (Pltf. Br. at 22, 24.) This Court's delay-in-medical-care jurisprudence recognizes the "diminished chance of survival" or "loss of chance" doctrine as a viable theory of liability under section 1983. *See Bass v. Wallenstein*, 769 F.2d 1173, 1184 (7th Cir. 1985); *Miranda v. County of Lake*, 900 F.3d 335, 347 (7th Cir. 2018). *Miranda* cited the Illinois Supreme Court's decision in *Holton v. Memorial Hospital,* 176

Ill. 2d 95, 119 (1997), for the proposition that the loss of chance doctrine does not require the plaintiff to prove the chance of survival would have been 100%. *Bass* made the same point.

But none of the Court's delay-in-medical-care cases suggest the loss of chance doctrine somehow relaxes the standard for proving causation in a section 1983 case or relieves the plaintiff of her burden to adduce verifying medical evidence tying conduct to harm. To the contrary, it is precisely because a delay-in-medical-care case requires a jury to decide the medical question of whether earlier intervention would have made a difference – either to the plaintiff's suffering or survival – that verifying medical evidence is essential to prove causation.

In fact, that was the very question presented in *Holton* – whether Illinois' parallel loss of chance doctrine in medical malpractice cases "lessens the plaintiff's burden of proving proximate cause." 176 Ill. 2d at 98. *Holton* specifically held it did not. The plaintiff in a loss of chance case must conform to "traditional principles of proximate cause" and present evidence that the defendant's conduct, "to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery." 176 Ill. 2d at 118.

This Court's decisions on the necessity of "verifying medical evidence" in delay-in-medical-care cases is similar to *Holton*'s "reasonable degree of medical certainty" standard in loss of chance cases. *Bass* is a good example. There, an inmate experienced chest pain while locked down for the night and

repeatedly requested help. The correctional officers provided some medication, but were otherwise slow to respond until the next morning when the inmate was found with barely a pulse. Basic life support was initiated in the cell and the inmate was rushed to the prison hospital. However, the doctor on staff ignored repeated calls to report to the emergency room to initiate advanced cardiac life support measures. By the time the doctor showed up ten to fifteen minutes after he was first paged, the inmate was dead. 769 F.2d at 1183.

The defendants were found liable after a jury trial that included a claim that the prison doctor's delay in providing advanced cardiac life support was causally connected to the prisoner's death. 769 F.2d at 1184. But unlike the instant case, the delay-in-medical-care claim was supported by the testimony of a board-certified cardiologist that an unconscious person with a "feeble pulse" has a "10-30%" chance of survival "if basic life support is provided within five minutes and advanced cardiac life support within eight to ten minutes." 769 F.2d at 1183.

The defendant doctor argued on appeal that the evidence purporting to connect his delay to the prisoner's death was too speculative. The *Bass* court held the plaintiff did not need to prove the prisoner's "chance of survival would have been 100%" if the doctor had acted more quickly. The cardiologist's expert testimony quantified how much the delay reduced the

decedent's chance of survival and was enough to support the jury's verdict. 769 F.2d at 1184.

Miranda, in which a pre-trial detainee died of starvation and dehydration, also involved a delay-in-medical care/diminished chance of survival claim. The plaintiff lost on a directed verdict, but this Court reversed. The Court held the testimony of expert witnesses in psychiatry and internal medicine established that delay by the jail's doctors – their decision to take a "wait-and-see" approach when the detainee displayed signs of mental incompetence, cardiovascular problems and renal failure after rapid weight loss – would allow a jury to infer their "failure to intervene contributed to the [detainee's] demise and ultimate death." 900 F.3d 347. The same evidence was held sufficient to support the proximate cause element of the plaintiff's state-law malpractice claims. *Id.* at 348.

Williams presented what the Court characterized as the "in-between" case – where the medical evidence was less than expert testimony but more than a bare record of the plaintiff's diagnosis. There, the plaintiff suffered from either coronary artery disease or acute hypertension. He complained to guards of severe chest pain while moving his belongings from a segregation unit to his cell. The guards told him he could get medical attention after the transfer, but the plaintiff blacked out and collapsed as he carried a heavy box up the cellhouse stairs. Nitroglycerine immediately relieved the severe chest pain, and other medications provided at the hospital quickly lowered the

plaintiff's blood pressure. 491 F.3d at 713. Because the medical records showed how rapidly the nitroglycerine and other medications worked, the Court held that a jury could reasonably infer the delay in their administration "prolonged and exacerbated Williams' pain and unnecessarily prolonged his high blood pressure." *Id.*, at 716.

Williams cited *Gil v. Reed*, 381 F.3d 649 (7th Cir. 2004), as support for the proposition that in some cases, medical records alone may suffice to overcome summary judgment on a delay-in-medical-care claim. In *Gil*, the plaintiff-prisoner suffered from a severe infection following surgery for an anal prolapse. A correctional officer in charge of the prison infirmary refused to give the plaintiff the antibiotics he had been prescribed. As a result, the plaintiff suffered excruciating pain from the infection. The medical records showed that his pain quickly subsided after he finally got the prescribed medication. Noting that causation principles did not require the court to "check our common sense at the door," *Gil* held a jury could reasonably infer from the plaintiff's quick response to the medication that the correctional officer's mean-spirited delay in handing it over "caused Gil that many more hours of needless suffering for no reason." 381 F.3d at 662.

There is simply no comparable verifying medical evidence in this case that would allow a jury to find it more probably true than not that defendants' alleged delay hurt Washington's chance for survival, or that a quicker response would have improved it. The only medical evidence in this case is

the testimony of Dr. Peters and his autopsy report. As the district court correctly recognized, Dr. Peters' testimony, like his report, merely diagnosed the cause of death – cardiac arrythmia induced by sleep apnea. DE 57, p. 10. Dr. Peters never said how quickly (or slowly) he believed Washington died, nor did he opine on whether and to what extent basic life support at two minutes versus ten would have affected Washington's chance of survival, if at all.

Indeed, Dr. Peters' testimony that death by cardiac arrythmia can happen either "very fast or very slowly" (DE 56-11, p. 38) is what made verifying medical evidence crucial to overcoming defendants' summary judgment motion. Peters' "fast-or-slow" statement, together with his testimony about the different types of sleep apnea and how it leads to fatal cardiac arrythmia and asystole, raised a multitude of unanswered, complex medical questions that would make any attempt by a jury to decide whether the alleged delay harmed Washington a matter of pure speculation and conjecture.

For example, it is unknown whether Washington suffered from obstructive or central sleep apnea. Washington had none of the co-morbidities associated with obstructive sleep apnea other than being male. Dr. Peters said he may have suffered from central sleep apnea, which is caused by a brain abnormality. DE 56-11, pp. 34, 35. The record contains no medical evidence on whether central sleep apnea could result in a longer period of undetected

breathing problems and ischemia (decreased oxygenation of the blood) than obstructive sleep apnea.

How long Washington was ischemic is a critical detail given Dr. Peters' testimony that oxygen deprivation is what causes the heart to go into the abnormal rhythm known as arrythmia. Peters also testified that an "arrythmic state" can become a "fatal arrythmic state" and lead to asystole either "very fast or very slowly." DE 56-11, p. 38. That, in turn, makes it impossible to know at what point Washington's cardiac arrythmia began and when it became fatal. Dr. Peters agreed that Washington had a cardiac arrythmia from "at least" the time Simmons first noticed a problem, but candidly testified he had "no idea" how long Washington suffered from an arrythmia "before then." DE 56-11, p. 49.

Without any expert medical testimony on how long Washington may have been ischemic, how long his arrythmia lasted or how quickly his arrythmia progressed to a fatal state from which he could not be resuscitated, it is impossible to know at what point medical intervention would have made a difference in Washington's chance of survival. This is not, as plaintiff contends, a simple matter of "common sense" and timing. For all anyone knows, Washington was hypoxic and in cardiac arrythmia an hour before Simmons noticed anything was wrong. Indeed, Washington may have been in the fatal arrhythmic state Dr. Peters described the moment Simmons found him unconscious with his eyes closed, his arms "locked up straight in the air"

and his back arching off the bunk. DE 56-7, p. 44. It is also uncontradicted that Washington was unconscious and totally unresponsive from that point on.

Unlike *Bass*, there is no evidence in this record that would allow a jury to reasonably infer that Washington had a "10-30%" chance of survival if basic life support had been initiated in "five minutes" or if advanced cardiac life support began in "eight to ten minutes." 769 F.2d at 1183. Plaintiff Bass at least had a "feeble pulse" when he was found. Here, the uncontradicted evidence is that Washington was not only completely unresponsive when Simmons first awakened, he was cyanotic, had no pulse at all and was cold to the touch just 13 minutes later. That strongly suggests Washington was dead long before the guards arrived. Even Simmons volunteered that he did not know if the guards could have helped Washington if they had reacted any faster, which suggests he knew Washington died well before the guards arrived. DE 56-10, p. 10.

Instead of the verifying medical evidence *Williams* requires, plaintiff relies initially on a "timeline of events" and "common sense" to argue a jury could infer the guards' alleged delay prolonged Washington's suffering and diminished his chance of survival. (Pltf. Br. at 24.) This argument is constructed not from any medical evidence, but from Simmons' observation that Washington "gasped for air," the "common knowledge" that breathing difficulty is detrimental to a person's health and Correctional Officer Heizenroth's belief that because the AED instructed the officers to administer shocks, Washington "still had a chance." (Pltf. Br. at 23-4; DE 56-3, p. 58.)

None of this evidence furnishes a basis that would allow a jury to find it more probably true than not that the guards' alleged delay harmed Washington or affected his chance of survival.

Simmons' observation that Washington gasped with his arms locked straight up in the air might allow a physician to form an opinion on Washington's physiological state at that moment and his chance of survival. But a jury of lay people would have no way to determine its medical significance. It requires medical training to interpret what was happening to Washington's body in that instant and its relationship to his chance of survival if basic life support was provided sooner. A jury could only guess about that question.

Moreover, Simmons testified that he was awakened not by the sound of someone "gasping for air," but by the sound of Washington "hemorrhaging," which was a very unusual choice of words. DE 56-10, pp. 9, 12. The deposition transcript also indicates that Simmons tried to demonstrate what he saw and/or heard. DE 56-10, pp. 9-10. It was plaintiff's counsel, not Simmons, who first suggested "hemorrhaging" meant "gasping for air." DE 56-10, pp. 11-12.

Simmons went along with counsel's leading characterization, but no attempt was made to clarify what Simmons physically tried to demonstrate during the deposition. The medical significance of these details is unknown. What Simmons observed could have been the moment Washington's arrhythmia turned fatal and his heart stopped after a prolonged period of

oxygen deprivation; what Simmons heard may have been the sound of a "death rattle" – the aspiration of gastric contents or oral flora that Dr. Peters said occurs when someone dies. DE 56-11, p. 29. A jury requires the assistance of a medical professional to connect the dots between quicker intervention and Washington's chance of survival.

Simmons' observations are also not evidence that Washington experienced any conscious pain and suffering in the thirteen minutes between the first use of the call button and the guards' arrival at the cell. Again, only a medical expert could explain the significance of what Simmons saw and heard. The evidence was that Washington's eyes were closed and that he was unconscious and unresponsive from the moment Simmons first checked on him to when the guards arrived. A lay jury would have no way of knowing whether Washington was aware of what was happening to him or able to sense any of it, given his unconscious state. That is yet another medical question beyond the jury's ken.

Correctional Officer Heizenroth's statement that Washington may have "still had a chance" because the AED instructed the guards to administer shocks is not verifying medical evidence, either. Heizenroth was not qualified to give a medical opinion on Washington's chance of survival merely because the AED purportedly detected some degree of electrical activity in Washington's heart – assuming that's even how the AED works, which is also not an evidentiary fact. A physician or a medical technician might be able to

explain to a jury exactly what the AED detects and its significance at any particular moment in time, but Heizenroth's lay opinion is of no value. It is undisputed that Washington had no pulse and was cold to the touch when the guards arrived.

Whether earlier CPR or faster use of the AED would have made a difference is completely unknowable on this record – a jury could only speculate on that question, much as plaintiff does in her brief. "Speculation of this sort is not enough for a plaintiff to escape summary judgment." *Pulera v. Sarzant*, 966 F.3d 540, 551 (7th Cir. 2020), *citing King v. Hendricks Cty. Comm'rs*, 954 F.3d 981, 985 (7th Cir. 2020).

Plaintiff's citation to an article from the Journal of the American Society of Anesthesiologists on the efficacy of CPR and defibrillation (Pltf. Br. at pp. 24-5) does not assist her argument. This is no different than a juror's independent internet research during a trial. It is improper. The article is at most an out-of-court statement an expert witness might rely upon under Federal Rule of Evidence 703, but it is not admissible evidence; it is hearsay. When reviewing a summary judgment motion, courts may only consider admissible evidence. Fed. R. Civ. P. 56(c)*; McGreal v. Vill. of Orland Park,* 850 F.3d 308, 312-14 (7th Cir. 2017).

At pages 25-26 of her brief, plaintiff claims the testimony of Dr. Peters "would also allow a reasonable jury to infer that Washington was suffering a serious, time-sensitive medical emergency when Simmons first called

Valentine and that a prompt response could have prevented harm to Washington." That is not a fair representation of Dr. Peters' testimony.

First, plaintiff's claim that Dr. Peters said cardiac arrhythmia can last "many minutes" before it leads to cardiac arrest and eventually death, while true, omits Dr. Peters' contemporaneous testimony that this process can also happen "very fast." DE 56-11, p. 38. Hence, it cannot be reasonably inferred from Dr. Peters' "either-or" testimony that "a prompt response could have prevented harm to Washington." On this record, that is just plaintiff's conjecture.

Second, while it is true that Dr. Peters testified Washington was likely suffering cardiac arrhythmia from "at least" the time of Simmons' first call, plaintiff ignores that Dr. Peters also said he had "no idea" how long *before* the first call Washington's heart was in a state of arrhythmia. DE 56-11, p. 49. So while no one really disagrees that Washington experienced a medical emergency, Dr. Peters was unable to say when it began. Nor was he asked how close to death Washington was when Simmons made his first call or whether a faster response would have made any difference. Dr. Peters' testimony actually created, rather than filled, the evidentiary gaps that made it impossible for a jury to decide the issue of causation without guesswork.

It goes without saying that Washington's death was tragic. But this is not the "in-between" case like *Williams*, where the medical records demonstrated the administration of nitroglycerine instantly relieved the

plaintiff's severe chest pain and could have been given much sooner. Nor is this the "common sense" case like *Gil*, where the medical records proved an antibiotic the prison infirmary maliciously withheld quickly relieved the plaintiff's extreme pain as soon as he was finally able to obtain it 24 hours later. And this is not a case like *Grieveson*, where the medical records showed the plaintiff had to wait 36 hours for treatment of an obviously broken nose. Those are the types of cases where expert testimony was unnecessary and medical records of the plaintiff's treatment and diagnosis sufficed to satisfy the "verifying medical evidence" causation standard.

This case is more medically complicated. It is more akin to *Bass*, where an expert cardiologist provided verifying medical evidence that a quicker response by the prison doctor would have given the plaintiff a 10-30% chance of surviving a heart attack. Another comparable case is *Miranda*, where experts in psychiatry and internal medicine explained to the jury how the defendant doctors should have realized the decedent was at risk of organ failure and sent her to the hospital as soon as they saw she had lost 18% of her body weight.

All of these cases demonstrate that the type of verifying medical evidence that will suffice in a delay-in-medical-care case really depends on the nature of the medical problem. A jury can rely on medical records to decide simple questions about the causal relationship between the withholding of an

antibiotic that relieves a painful infection, or the delayed administration of nitroglycerine that instantly relieves painful angina, without expert testimony.

But in medically complex cases like this one – where causation depends on (1) how quickly a heart compromised by oxygen deprivation will become arrhythmic; (2) how quickly the abnormal rhythm will progress to the point that it becomes an irreversible, fatal arrythmia that causes asystole; (3) the signs and symptoms of that fatal, irreversible state; and (4) whether and when CPR and defibrillation will make a lifesaving difference in that chain of events – much more is required than a pathologist's report on the cause of death and the "common sense" understanding that oxygen deprivation can cause harm.

Plaintiff failed to carry the evidentiary burden necessary to overcome defendant's summary judgment motion on the element of causation. The district court's decision should be affirmed.

II. The Judgment Can Be Affirmed On The Alternative Ground That Defendants' Conduct Was Neither Reckless nor Objectively Unreasonable.

The district court did not decide defendants' alternative argument for summary judgment – that defendant Valentine's conduct was neither purposeful, knowing or reckless, nor objectively unreasonable. However, this Court may "affirm summary judgment on any basis it find[s] in the record." *Whitlock v. Brueggemann*, 682 F.3d 567, 574 (7th Cir. 2012). The record shows that Valentine's conduct was, at most, negligent and did not rise to the level of a fourteenth amendment due process violation.

To raise a triable issue of fact on her claim that Washington was denied adequate medical care, plaintiff had to show that: (1) there was an objectively serious medical need; (2) defendants committed a volitional act concerning the decedent's medical need; (3) the act was objectively unreasonable under the circumstances; and (4) the defendants acted "purposefully, knowingly, or perhaps even recklessly" with respect to the risk of harm. *Gonzalez v. McHenry County*, 40 F.4th 824, 827-8 (7th Cir. 2022). Mere negligence or even gross negligence is not enough to establish liability under the objective reasonableness standard. *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018).

Defendants' summary judgment motion did not dispute the first two elements of plaintiff's due process claim. Washington experienced a serious medical need, albeit unknown to Valentine during Simmons' first call, and Valentine's reactions to both calls were volitional – he knew what he was doing and why. But there was no evidence to support plaintiff's claim that Valentine was reckless or objectively unreasonable in his handling of Simmons' first or second intercom calls, and therefore plaintiff did not meet her evidentiary burden on these two elements. *See Pulera v. Sarzant*, 966 F.3d 540, 549 (7th Cir. 2020) (the plaintiff must provide evidence on "every element of his claim for which he bears the burden of proof.").

The focus of plaintiff's argument is that Valentine waited 60 seconds before answering Simmons' first call, terminated the call without determining

whether there was an emergency, waited 90 seconds before answering Simmons' second call, and did not immediately report a Code 100 after the second call. According to plaintiff, this was purposeful, knowing and reckless behavior because Valentine did not pay close enough attention to the emergency intercom system while stationed at the Pod 3 control desk and knew breathing problems could be life-threatening. (Pltf. Br. at 30-1.) Plaintiff further contends Valentine's conduct was objectively unreasonable because it differed from how other officers described how they were trained to handle calls on the intercom system. (Pltf. Br. at 32-4.)

But reasonableness "must be determined in light of the totality of the circumstances." *Pulera*, 966 F.3d at 550, *citing McCann v. Ogle Cty.*, 909 F.3d 881, 886 (7th Cir. 2018). Here, there are at least eight undisputed facts that foreclosed plaintiff's ability to raise a triable issue of fact over the reasonableness of Valentine's conduct in handling the first and second calls from Simmons. Fairly assessed, the *undisputed* evidence demonstrates that Valentine's conduct was, at worst, negligent, but not reckless or unreasonable.

A finding of purposeful, knowing or reckless conduct depends initially on what the defendant knew and did not know. *Pulera*, 966 F.3d at 552. It was undisputed that Washington's medical appraisal when he was booked into the jail revealed no health problems at all. DE 45-15. It is also undisputed that Simmons never reported the earlier incident of sleep apnea he observed. DE 56-10, pp. 13, 37. Consequently, no one at the jail (except Simmons) had any

prior notice or knowledge that Washington had any medical or health problems whatsoever, including Officer Valentine.

Another undisputed fact is that up until the moment of Simmons' first call, Valentine did not know someone had turned down the volume of the audio alert on the control panel. DE 56-6, pp. 47-8.[1] It was also undisputed that inmates frequently used the emergency call button for non-emergencies. DE 56-8, pp. 39-40; DE 56-12, p. 34; DE 56-5, pp. 27-8. And still another undisputed fact is that the control desk officer has to multi-task – watch the security cameras that monitor the pod, read and respond to messages that come through the jail's computer system, answer phone calls, and attend to the emergency call monitor. DE 56-6, p. 49. Plaintiff did not explore what else Valentine may have been doing at the control desk when Simmons called the first or second time.

Under the totality of these circumstances, no rational jury could agree with plaintiff's hindsight-laden assessment of Valentine's 60-second delay in answering Simmons' first call. "The [due process clause] requires reasonableness, not immediacy." *Pulera*, 966 F.3d at 554, *quoting Sallenger v. City of Springfield*, 630 F.3d 499, 504 (7th Cir. 2010). Given that Valentine (1) had no prior knowledge Washington suffered from a medical problem, (2) did

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[1] Plaintiff claims that Valentine himself "routinely" turned down the volume, but that's not quite fair. (Pltf. Br. at 30.) Valentine testified that whenever he adjusted the volume, it was only to ensure it was audible and would not cause a disturbance. DE 56-6, p. 48.

not know someone had turned down the volume of the audio alert, (3) was responsible for other tasks at the control desk, and (4) knew that inmates often used the call button for non-emergencies, no jury could reasonably find the 60-second delay before he noticed the flashing green light and answered was "reckless" or "unreasonable." That is true even if, as plaintiff suggests, Valentine was drowsy because he was at the end of a graveyard shift. (Pltf. Br. at 11, 30.) Being drowsy at work is not a constitutional violation.

There was also nothing reckless or objectively unreasonable about Valentine's handling of the first call after he answered it. It was undisputed that inmates can be very difficult to hear and understand if they speak too loudly when using the intercom, or if they stand too close to it. DE 56-12, p. 83; DE 56-8, p. 42; DE 56-9, p. 40; DE 56-7, p. 30; DE 56-5, p. 33-4. Valentine testified it was hard to make out what Simmons was saying and that it sounded to him like Simmons complained about a problem with the toilet or sink in his cell. DE 56-6, pp. 52-3.

Plaintiff argues Valentine's claimed misunderstanding of what Simmons said presents a fact question because Simmons claimed he spoke to Valentine in a calm and deliberate manner. Pltf. Br. at 31; DE 56-10, pp. 9, 25-6. But Simmons admitted he did not know what Valentine heard on his end of the line, DE 56-10, pp. 38-9, and there is no witness who contradicts Valentine's testimony that he did not hear Simmons say there was a medical

emergency. Instead, there is only evidence that corroborates Valentine's testimony that Simmons was hard to understand.

Inmate Parks heard the first call through the jail's ventilation system and said Simmons was shouting. DE 56-12, pp. 14-15. But even if Simmons claim that he was not shouting is credited, there was also undisputed evidence that inmates routinely stuffed things in their cells' call boxes and that this affected the guards' ability to hear and understand what they were saying. DE 56-7, p. 30. Officer Posada, who overheard Simmons' second call, confirmed the audio was "broken up" and that Simmons was hard to hear. DE 56-4, pp. 23, 27.

The undisputed circumstances of this particular case – the problems with the audio, Valentine's uncontradicted testimony about what he heard Simmons say, the evidence that corroborated the difficulty understanding Simmons on the intercom – all combine to make Valentine's failure to announce a medical emergency during that first call reasonable, not reckless.

Plaintiff's criticism that Valentine did not do more to flesh out the reason for Simmons' call is a non-starter. (Pltf. Br. at 31-2) Simmons testified that after he said Washington had breathing difficulty, Valentine told him the call button was only for emergencies. Accepting Simmons' testimony about that exchange as true, all that means is Valentine told Simmons he did not understand Simmons had called about an emergency. But rather than try and clarify the reason for his call, Simmons sarcastically replied that no one would

call at that hour unless it was an emergency. DE 56-10, pp. 18, 19. To Valentine, however, it sounded "like he was saying the same thing previously, that the toilet and the sink were not working." DE 56-6, p. 53. He told Simmons the button was for "medical use only" and ended the call. DE 56-6, p. 54.

Again, given Valentine's knowledge that inmates often used the intercom for non-emergency calls and his uncontradicted testimony, later corroborated by Posada, that Simmons was hard to understand, there was nothing reckless or unreasonable about how Valentine handled the first call. He answered within a reasonable time, told Simmons the button was only for emergencies because he thought the call was about a plumbing problem, and hung up after Simmons replied with a wise-crack.

These undisputed circumstances do not rise to the level of a due process violation for delayed medical care. And just because other officers testified that it's important to answer calls quickly, and to try and clarify what an inmate may be trying to communicate, does not mean any of them would have handled the first call differently than Valentine if confronted with the same or similar circumstances. At most, the other officers' testimony suggested Valentine did not handle the first call "perfectly," but Valentine was not "reckless," which denotes "conduct so dangerous that the deliberate nature of the defendant's actions can be inferred." *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010).

Plaintiff's only remaining complaint about Valentine's conduct is that he took 90 seconds to answer Simmons' second call. (Pltf. Br. at 32.) But once again, the *undisputed* facts undermine plaintiff's bare, 20/20 hindsight assertions of recklessness and unreasonableness. It was not only undisputed that inmates frequently used the intercom for non-emergencies. Several officers testified inmates would often persist in that behavior, calling back multiple times even after guards reminded them that the intercom was only for emergency use. DE 56-8, pp. 39-40; DE 56-12, p. 34; DE 56-5, pp. 27-8. One guard testified that the inmates' abuse of the intercom system can lead to delays in answering successive calls from the same cell. DE 56-5, p. 39.

Given Valentine's foreknowledge of the misuse of the intercom, and his good faith belief that Simmons' first call was about a plumbing problem and not a medical emergency, there is nothing reckless about his 90-second delay in answering Simmons' second call. And, again, the fact that another guard explained how successive non-emergency calls will affect how quickly a control desk officer may answer what is perceived to be repeated non-emergency calls from the same cell, there is nothing objectively unreasonable about how long Valentine took to answer the second call.

Finally, there is the undisputed fact that Valentine sent guards to Washington's cell the instant he became aware that there was a medical emergency. DE 56-6, p. 59. Ultimately, that is what counts in the Constitutional calculus – how the defendants responded once they were

aware of a medical problem. On that score, plaintiff cannot fault anything the defendants did or did not do.

It was plaintiff's burden to show that Valentine knew, or should have known, that the condition posed an excessive risk to health or safety and that he failed to act with reasonable care to mitigate the risk. *Miranda*, 900 F.3d at 353-4. This is a high burden and, as noted above, it is not enough to show only negligence or even gross negligence. *Id.*

This case differs significantly from *Miranda*, where the defendants purposely took a wait-and-see approach as plaintiff's weight plummeted and she became more and more debilitated. Valentine lacked that level of foreknowledge about Washington's situation. Posada testified that because Simmons was so hard to understand, he and Arbisi went to investigate first, before announcing a Code 100. DE 56-4, p. 27. That shows Valentine's decision not to announce a Code 100 immediately after Simmons' second call was *not* unreasonable compared to what another officer would have done.

The circumstances presented here are more akin to the example of negligence that *Miranda* provided – Valentine misunderstood what Simmons was trying to say, no different than if the doctors in *Miranda* "mixed up the [decedent's] chart with that of another detainee," or "forgot to take over coverage for Dr. Kim when he went on vacation." 900 F.3d at 354; *see e.g.*, *Gonzalez v. McHenry County*, 40 F.4th 824, 828 (7th Cir. 2022) (affirming dismissal because there were no plausible allegations that the jail staff acted

recklessly in handling of the decedent's medical condition, as the complaint did not allege that Sheriff Nygren "knew about the decedent's . . . poor medical condition"); *Ortiz v. City of Chicago*, 656 F.3d 523, 533 (7th Cir. 2011) ("The question is . . . whether the defendant, based on what she observed herself and learned from others, should reasonably have known that [the detainee] needed medical care.").

An analogous case is *Kemp v. Fulton County*, 27 F.4th 491(7th Cir. 2022). There, the detainee was beaten by his cellmates. He complained that guards failed to provide adequate protection. One of the plaintiff's claims was that his injuries were caused by a particular guard's failure to wear his hearing aids that day, which affected the guard's ability to hear the plaintiff's cries for help. Summary judgment for the defendants was affirmed because the plaintiff "did not present any evidence showing that any of [officers were] on notice" that the plaintiff was at risk of being attacked or needed protection, and because the guard's failure to wear his hearing aids was not objectively unreasonable absent evidence his hearing was so impaired he could not perform his job. 27 F.4th 497.

Like the guards in *Kemp*, no one at the Winnebago County Jail was on notice or aware that Washington suffered from sleep apnea. And just as the failure of the defendant-guard in *Kemp* to wear his hearing aids was not the cause of the plaintiff's injuries, Valentine's inability to hear the audio alert on the control panel or to clearly understand what Simmons was saying was not

the cause of Washington's death. This is particularly so given the undisputed evidence that someone else turned down the audio alert on Valentine's control board, that Posada also had difficulty understanding Simmons, that inmates frequently used the intercom system for non-emergencies, and that the intercom system worked fine if inmates didn't shout or stand too close to it.

The ultimate question for this Court is "whether a jury could find that it was objectively unreasonable for [Valentine] to take no action to seek medical care for [Washington] *based on what [he] knew at the time*." *Ortiz*, 656 F.3d at 531-32 (emphasis added). Valentine had an imperfect understanding of Simmons' first call. He knew the inmates abused the intercom system. His failure to announce a medical emergency in response to the first call, or to immediately "jump" on the second call and announce a Code 100 before Posada and Arbisi had a chance to investigate, was not objectively unreasonable and was not enough to create constitutional liability. *See Pulera v. Sarzant*, 966 F.3d 540, 552 (7th Cir. 2020) (affirming summary judgment because "Dr. Butler made a reasonable decision on imperfect information"); *see also Robinson v. Moran*, 2008 U.S. Dist. LEXIS 16843, at *53 (C.D. Ill. Mar. 5, 2008) ("The failure to respond to the activation of a cell call button, without more, does not constitute such an obvious violation of an inmate's constitutional rights.").The judgment should be affirmed.

CONCLUSION

For all of the foregoing reasons, the defendants-appellees, Sheriff of Winnebago County and Jeff Valentine, respectfully request that this Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATES

Fed.R.App.P.32(a)(7) Certificate

This brief complies with the type-column limitation of Fed.R.App.P.32(a)(7)(B) because this brief contains 10,570 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

s/Joshua G. Vincent

Circuit Rule 30(d) Certificate

The undersigned certifies that all materials required by Cir.R.30(a) and (b) are included in the appendix.

s/Joshua G. Vincent
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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I certify that on March 14, 2023, I electronically filed the foregoing Appellees' Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Joshua G. Vincent