**No. 18-3105**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

JAMES PORTER,

Appellee,

v.

CITY OF PHILADELPHIA,

Appellant.

On appeal from the United States District Court
Eastern District of Pennsylvania
Case No. 13-cv-02008, Michael M. Baylson, District Judge.

# BRIEF OF APPELLEE JAMES PORTER

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*Issue Number 2:* A motion for a new trial asks a court to invade the province of the jury, and thus may only be granted if—construing the evidence in the non-movant's favor—the jury's verdict is against the clear weight of the evidence, the damages are excessive, or substantial trial errors have occurred. Here, the evidence supported the jury's verdict, the damages were not excessive, and no substantial trial errors occurred. Did the court err in denying the City's motion for a new trial?

*Issue Number 3:* When a party fails to object to a jury instruction or other issue in the trial court, the issue is waived on appeal. Here, the City failed to object to several of the jury instructions and issues about which it now complains. Are the City's arguments waived?

## II. STATEMENT OF RELATED CASES

This civil rights case has never been before this Court. One peripherally-related case to which Appellee James Porter was not a party was before this Court and affirmed on collateral estoppel grounds. With the exception of providing some background, all of the listed cases are—and were repeatedly held by the district court to be—irrelevant to the current matter. (Transcripts ("Tr.") at Joint Appendix ("JA") 106, 161, 193-94, 357, 361, 667.) Further, some of these cases were pending at the time of the civil rights violations here, so any attempt by Appellant City of Philadelphia to rely on their ultimate outcome is misplaced.

- *Porter v. Terra*, Philadelphia Common Pleas No. 060701487—Civil action filed July 17, 2006 by Appellee James Porter against real estate business partner in which Porter was awarded damages;
- *Commerce Bank v. Porterra*, Philadelphia Common Pleas No. 070203257—Foreclosure action in which no party to this case was named a party, affirmed at Pa. Super. No. 713 EDA 2011 (April 10, 2012);
- *Porter v. TD Bank*, No. 10-7243, 2012 U.S. Dist. LEXIS 121504 (E.D. Pa. Aug. 27, 2012)—Non-party Debra Porter's declaratory judgment action dismissed on collateral estoppel grounds, affirmed at 519 F. Appx. 109 (3d Cir. 2013);
- *Commonwealth v. Porter*, Philadelphia Common Pleas No. CP-51-CR-0001611—Criminal action brought by the City against Porter in which he was

acquitted of 9 charges and convicted of the misdemeanor of resisting arrest, affirmed at 2016 WL 5845787 (Pa. Super. Ct. Aug. 2, 2016).

## III. STATEMENT OF THE STANDARD OF REVIEW

### A. Denial of judgment as a matter of law is reviewed *de novo*.

Denial of a motion for judgment as a matter of law is reviewed *de novo*. *Powell v. J.T. Posey Co.*, 766 F.2d 131, 134 (3d Cir. 1985). The court must "[view] the evidence in the light most favorable to the nonmovant and [give] it the advantage of every fair and reasonable inference." *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). Such a motion may be granted only if, as a matter of law, the record is critically deficient of even the minimum amount of evidence to support the verdict. *Powell* at 133-34.

Crucial to the analysis is the admonition that a court may not invade the province of the jury. Neither the district court nor this Court may "weigh evidence, determine the credibility of witnesses or substitute its version of the facts for that of the jury." *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993).

### B. Denial of a new trial is reviewed for abuse of discretion unless it is based on a legal precept, in which case it is plenary.

Denial of a motion for a new trial is reviewed for abuse of discretion unless the denial is based on the application of a legal precept, in which case it is plenary. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 (3d Cir. 1995).

Ganting a new trial cannot be "lightly undertaken" because "it necessarily 'effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.'" *ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 638 (E.D.Pa. 2003) (quoting *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960)). A trial court may not set aside a verdict unless it is "against the clear weight of the evidence, the damages are excessive, or substantial trial errors have occurred." *GBS Meat Indus. Pty., Ltd. v. Kress-Dobkin Co.*, 474 F. Supp. 1357, 1358 (W.D. Pa. 1979). Where, as here, the evidence is in conflict, a court must be particularly reluctant to grant a new trial. *Id*.

As narrow a review as the district court must conduct, this Court's review is even narrower because it has not had the opportunity to observe the trial. *William A. Graham Co. v. Haughey*, 646 F.3d 138, 143 (3d Cir. 2011). Even greater deference is afforded where, as here, the district court denied the motion. *See, e.g. Tokash v. Foxco Ins. Mgmt. Servs.*, 548 Fed. Appx. 797, 801 (3d Cir. 2013) (citing *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992))

## IV. STATEMENT OF THE CASE AND FACTS

### A. The status of the underlying foreclosure action necessitated Porter's attendance at the sheriff's sale.

In 2006, the wife of Appellee James Porter, Debra, held a $2.8 million mortgage on a building that was co-owned by Porter and his partner. (4/3 Tr. at

JA599, 634.) Without Porter's consent, his partner obtained a second mortgage from a bank. (*Id.* at JA634.) Aware of Debra's first mortgage, the bank requested that she sign a subordination agreement, but she refused. (*Id.* at JA634, 636-38.)

Eventually the bank filed a foreclosure action but did not name Debra as a lienholder, leading the foreclosure court to conclude that the bank had a priority lien. (*Id.* at JA636.) The Porters learned of the action and retained counsel to file motions for reconsideration and to intervene, as well as to file a federal declaratory judgment action to have Debra's mortgage recognized as first in priority. (*Id.* at JA636-37.) The foreclosure judge scheduled a hearing for January 3, 2011, which was one day before the property was scheduled to go to sheriff's sale. (*Id.* at JA637.) Believing they would get their day in court, the Porters flew from Arkansas to Philadelphia to attend the hearing. (*Id.* at JA600, 637-38.)

Upon arriving in Philadelphia, however, the Porters learned that the foreclosure judge had *sua sponte* cancelled the hearing. (*Id.* at JA638.) The bank's attorney had represented to that court that Debra's interest would not be prejudiced by allowing the property to go to sale because he would ensure that an appropriate announcement was made at the sale. (4/2 Tr. at JA368; 4/3 Tr. at 638, 602; Trial Exhibit ("Tr. Ex.") PRN4, PAN3.) The bank's attorney wrote:

> [T]he successful bidder will take title to the Property subject to Debra Porter's pending federal court declaratory judgment action. An announcement as such will be made at Sheriff's Sale to all prospective bidders…. Once such an announcement is made at Sheriff's Sale, it is…

> likely that Commerce Bank will be the successful bidder on a credit bid. Commerce Bank as the owner of record at that point will have to await the outcome of Debra Porter's declaratory judgment action before it can convey clear title to a third party bona fide purchaser. In the less likely event a third party is the successful bidder at Sheriff's Sale, he too will take title subject to Debra Porter's pending declaratory judgment action. Accordingly, a sale of the Property by the Sheriff will not prejudice Debra Porter's alleged rights.

(4/2 Tr. at JA370-371; Tr. Ex. PRN4 at 10-11.)

That same day, the Porters' attorney sent an email to the bank's attorney confirming the representation:

> I am just confirming that, per our most recent conversation, should the sheriff's sale proceed forward as scheduled tomorrow, the bank will make sure that the sheriff announces the existence of the federal court action at the sheriff's sale to potential bidders so there is no issue down the road if the federal court ultimately concludes that Ms. Porter's mortgage has priority status over the bank's.

(4/2 Tr. at JA368; Tr. Ex. PAN2.) With the hearing cancelled, the Porters had no choice but to rely on the bank's promise. Their attorney told them to go to the sale to ensure the announcement was made. (4/2 Tr. at JA363; 4/3 Tr. at JA602, 665.)

**B. Porter and his family attend the sheriff's sale.**

The next day, Porter and Debra, as well as Porter's mother and brother, all attended the sheriff's sale to make sure that the promised announcement was made. (4/3 Tr. at JA426, 600-02, 604.) Counsel for the bank did not keep his promise, however, failing to even show up. (*Id.* at JA428, 645, 665.) Concerned, Porter called his attorney and inquired what to do. (*Id.* at JA428, 605, 643.) His attorney

advised that in the absence of the bank's attorney, Porter should make the announcement himself. (*Id*. at JA643; Tr. Ex. PAN4.) Porter's attorney explained:

> Well, I was concerned to make sure that [Debra's]… lien interest was protected, because I wanted to make sure that… there was actual notice to people who were bidding. Because my concern… was that if that announcement was not made, that anyone who purchased the property at the sheriff's sale would be considered a bona fide purchaser, and any interest that she may have by way of that first mortgage would be extinguished.

(4/2 Tr. at JA367.)

Porter asked his attorney what he should say in this announcement, and at 10:37 a.m., his attorney emailed him the points to cover:

> Jim, I'm just confirming what I told you to do today if the bank does not announce [Debra's] lawsuit at the sale. You are to say that Deb has filed a federal lawsuit claiming she has an unrecorded mortgage which would survive the sheriff's sale. While you're at it, you might as well also mention that you and [Debra] have a billboard easement on the property.

(4/2 Tr. at JA364; 4/3 Tr. at JA606-07, 643-44; Tr. Ex. PAN4.) Porter did not go to the sale planning to make an announcement, the need arose due to the bank's failure to appear and on the advice of counsel. (4/3 Tr. at JA440-41, 607, 665.)

When the property was called for auction and it was confirmed that the bank's attorney was not present, Porter stood from his chair and began to read what his attorney told him to say. (4/2 Tr. at JA248-49, 299; 4/3 Tr. at JA443-44, 645.) Within seconds, Edward Chew, attorney for the sheriff's department (4/3 Tr. at JA488), came running at Porter screaming for him to be quiet, that he was not allowed to speak, and that he must leave. (4/2 Tr. at JA234-35; 4/3 Tr. at JA429,

608, 645, 669.) Chew physically grabbed Porter, and just prior to grabbing him, signaled to other City employees, at least five of whom then surrounded Porter. (4/2 Tr. at JA234-35, 253-55, 302, 312; 4/3 Tr. at JA428-29, 443-44, 462-63, 608, 645-50.) Porter was yanked so hard his jacket ripped, tackled, choked, punched in the head, wrestled to the ground, and hit with a stun gun before being handcuffed and drug from the room. (4/3 Tr. at JA645-50.) Porter was then arrested. City police transported him to a holding facility, but the facility turned him away due to his visible injuries, requiring that he first go to a hospital. (*Id.* at JA591, 651-52.)

**C. The City criminally charges Porter.**

The evidence established that City officials and employees were the aggressors in the tussle at the sale. (4/2 Tr. at JA268; 4/3 Tr. at JA434, 608-09, 645-50.) Even the City's employees corroborated that fact. (4/2 Tr. at JA311-12, 320; 4/3 Tr. at JA462-66.) After City officials and employees rushed at Porter, he held his hands up, palms outward. (4/3 Tr. at JA330, 461, 648.) He admittedly did not voluntarily leave because he believed he had every right to be there and he was stunned by the sudden and unprovoked attack. (*Id.* at JA648, 659, 672, 677.) At no time, however, did he throw a punch or kick, or use any abusive, profane, or threatening language. (4/2 Tr. at JA312; 4/3 Tr. at JA434, 677, 725, 781.)

Nevertheless, the City brought a 10-count criminal charge against Porter. The City alleged such things as terroristic threats, criminal trespassing,

endangerment of life, aggravated assault, simple assault, disrupting a meeting, harassment, and resisting arrest. (4/3 Tr. at JA657.) Refusing any plea deal, Porter's criminal case eventually went to trial where the jury acquitted him of all charges except the misdemeanor of resisting arrest. (*Id.* at JA657, 659.) Initially, Porter disagreed with the one-and-only guilty verdict, but subsequently made peace with it: "looking back on it, yeah, I would say I was resisting arrest. I don't disagree with that, because once they were telling me I'm leaving, I knew I wasn't leaving, because it was my right to have the right to speak." (*Id.* at JA659.)

**D. The events at the sale prompted the underlying case.**

Porter filed a civil action against the City and various officials. (Complaint, Doc. 1 at JA1059.) Among the claims asserted against the City was what is known as a *Monell* claim. (*Id.* at JA1051-54.) He stated his intent to pursue that claim in his pretrial statement (Doc. 53), and provided the court with a related jury charge. (Doc 72 at 11-12.) At no time before trial did the City object to the *Monell* claim or argue that it was waived.

Jury selection and housekeeping matters began on March 29, 2018. At that time, the court *sua sponte* ruled for the first time that Porter's *Monell* claim was waived. (3/29 Tr. at JA64-65.) Although Porter vehemently argued that it was not waived, the court held firm. (*Id.* at JA64, 69-70, 157-160.)

On the morning of the first day of trial, April 2, 2018, Porter submitted an Emergency Motion for Reconsideration of the court's conclusion that his *Monell* claim was waived. (Doc. 79.) The City never responded to that motion.

With his unopposed motion pending, Porter proceeded to present his case without the *Monell* claim. Under Porter's *pro se* examinations, City employees, including the Sheriff, testified that Porter was silenced pursuant to an unwritten City policy prohibiting announcements at sheriff's sales. (4/2 Tr. at JA390; 4/3 Tr. at JA504-05.) The City acknowledged, however, that some announcements were permitted (4/2 Tr. at JA314, 390; 4/3 Tr. at JA466, 505), but the public was not advised as to what announcements were allowed, or who was allowed to make them. (4/2 Tr. at JA381; 4/3 Tr. at JA466, 504-05, 540, 589.) In fact, the public was not advised at all that announcements were not allowed. (4/2 Tr. at JA304, 381, 390-91; 4/3 Tr. at JA467, 505, 511, 540, 643; 4/4 Tr. at JA793.)

Hearing this testimony, on the next day of trial, April 3, the judge announced that he was reconsidering his exclusion of the *Monell* claim. (4/3 Tr. at JA559-61.) The court held a lengthy discussion on the issue, during which the City argued prejudice. (*Id.* at JA581-88.) Later that day, the court decided to allow the claim. (*Id.* at JA699.) The court specifically rejected the City's claim of prejudice, but nevertheless offered it wide latitude to recall witnesses or to bring in new ones that were not previously identified. (*Id.* at JA700.)

On April 5, the final day of trial, the jury returned its verdict for Porter on his *Monell* claim, awarding him $750,000 in damages. (Jury Interrogatories, Doc. 89 at JA6-9; 4/5 Tr. at JA1018-22.) The court entered judgment consistent with the jury verdict. (Journal Entry, Doc. 87 at JA10.) The City filed a post-trial motion for judgment as a matter of law, a new trial, or remittitur. ("Post-Trial Motion," Doc. 105.) On August 31, 2018, the court issued an order and a 46-page memorandum ("Opinion and Order") denying the City's motions. (Docs. 113-114, JA10-57.) It is from that judgment that the City appeals.

## V. SUMMARY OF THE ARGUMENT

Construing the evidence and making all reasonable inferences in Porter's favor, as this Court must do in this appeal, the evidence established that the City had a policy of not allowing announcements at sheriff's sales—a limited public forum—but inconsistently enforced it based on what the speaker wanted to say. The policy was not narrowly-tailored because it disallowed announcements that were directly related to the purpose of the forum, and in this case it disallowed an announcement where there was no alternative opportunity in which to make it.

In addition, enforcement of the policy was not viewpoint neutral because the City admittedly enforced it against Porter based on what it believed—incorrectly—that he wanted to say. Rather than allow Porter to make his brief, forum-relevant announcement—one expected by the foreclosure court and both attorneys in the

foreclosure case—the City immediately and violently attacked him. The jury, having observed the witnesses and considered the evidence, found that Porter's First Amendment rights were violated and awarded him damages. The court, also having observed the witnesses and considered the evidence, found that the jury's unanimous verdict was sufficiently supported and refused to overrule it.

Moreover, the City was not prejudiced by inclusion of the *Monell* claim. The City had every opportunity to prepare that claim for trial, and never explained how it was prejudiced when the court offered it great latitude to revise its case.

## VI. LAW AND ARGUMENT

The City argues here that the court erred in denying its motions for judgment as a matter of law and for a new trial. In the court's reasoned and detailed Opinion and Order, it thoroughly reviewed the evidence and refused to invade the province of the jury. The court did not err in denying the City's motions.

### A. The court did not err in denying the City's motion for judgment as a matter of law.

#### *1. The evidence established a First Amendment violation.*

The City argues that Porter did not have a First Amendment right to speak at the sale, and that its policy was reasonable. The evidence sufficiently established, however, that the City's policy violated Porter's First Amendment rights.

The court correctly instructed the jury—without objection from the City—that a sheriff's sale is a limited public forum. (4/4 Tr. at JA872, 946, 971.) A

limited public forum is created by the government and "limited to certain groups or to discussion of certain topics." *Eichenlaub v. Twp. of Ind.,* 385 F.3d 274, 280 (3d Cir. 2004). In such a forum, the government may restrict the time, place, and manner of speech if the restriction is reasonable and serves the purpose for which the forum was created. *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011). A restriction is reasonable if it: (1) is content neutral; (2) is narrowly tailored to serve an important governmental interest; and (3) leaves open ample alternatives for communicating the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-803 (1989). Even if the time, place, and manner restriction is reasonable, it is still unconstitutional if it is based on the viewpoint or identity of the speaker. *Wildinson v. Bensalem Twp.*, 822 F. Supp. 1154, 1158 (E.D. Pa. 1993). *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978).

The City's "total-prohibition policy" (Brief at 24) does not fit the bill for a reasonable restriction. It was not narrowly tailored, and far from "ample," it left open <u>no</u> alternative means for Porter to communicate the message. Further, it was not viewpoint-neutral.

*a. The City's policy was not narrowly tailored.*

The City states that it had a "total-prohibition policy" of not allowing any announcements at sheriff's sales from "outsiders." (Brief at 24, 26.) A "total-prohibition policy" cannot, almost by definition, be "narrowly tailored."

Initially, the court was correct that the City made no effort to establish at trial that its "total-prohibition policy" was narrowly tailored. (Opinion and Order at JA42.) The City's statement here that this is "self-evident" is not only wrong, it does not remedy the fact that the argument is waived. (Brief at fn. 7.)

Nevertheless, the argument fails on the merits. A narrowly-tailored time, place, and manner restriction cannot "burden substantially more speech than is necessary" to further a significant government interest. *Ward*, 491 U.S. at 799. The forum here was a sheriff's sale. The purpose of a sheriff's sale is selling and buying properties. The City's "total-prohibition policy" precluded substantially more protected speech than necessary because it prohibited all speech, including speech directly related to buying and selling property. Thus, it was not narrowly tailored or reasonable in light of the forum's purpose.

The case of *Kuerbitz v. Meisner*, No. 16-12736, 2017 U.S. Dist. LEXIS 152767 (E.D. Mich. Sep. 20, 2017), *aff'd* 2018 U.S. App. LEXIS 19007 (6th Cir., July 11, 2018), appears to be the only case in the country that is directly on topic. In that case, Kuerbitz announced to the foreclosure court his intent to attend a sheriff's sale to object to it and to effectuate an armed citizen's arrest of several public officials. *Id*. at *23. When he arrived at the sale, officials would not permit him entrance. *Id*. at *26. Kuerbitz alleged that this violated his First Amendment rights. *Id*. The court held that Kuerbitz's intent to object "plainly reflect[ed] a

desire to express speech that is protected under the First Amendment," and that his objection was "clearly a form of protected speech." *Id.* at *13, *17. The court ultimately found no First Amendment violation, however, because Kuerbitz's right to object, combined with his "disruptive and potentially dangerous" intent to make an armed arrest, was not protected. *Id*. at *13.

*Kuerbitz* is important both to instruct and to distinguish. It is instructive in that Porter's attempt to make a sale-related announcement was "clearly a form of protected speech." *Id*. at *17. It is distinguishable because there is no evidence whatsoever that Porter had any disruptive, violent, or potentially dangerous intent that could render his protected speech unprotected. In fact, Porter did not even intend to make the announcement until the bank's attorney failed to appear and his own counsel instructed him to do it. As instructed, when the property was announced, Porter simply stood by his chair and began to speak. There is no evidence that Porter intended to be disruptive or that there was any legitimate cause for concern that he would somehow thwart the intent of the sale.

As in *Kuerbitz*, Porter's attempted announcement was "clearly a form of protected speech," directly related to the limited purpose of the forum. The announcement was intended to inform potential buyers that there was pending litigation relating to one of the properties. The foreclosing bank's attorney recognized its relevance by promising that the announcement would be made. The

foreclosure court recognized its relevance by canceling the Porters' day in court based on that representation. Porter's attorney recognized its relevance by telling Porter to make the announcement when the bank's attorney failed to show up.

Reviewing the evidence in a light most favorable to Porter, he attempted to make a non-disruptive, non-violent announcement that was directly related to the limited purpose of the forum. The City's policy of prohibiting forum-relevant speech was not narrowly-tailored because it precluded all constitutionally-guaranteed rights to on-topic speech. This was more than the "minimum quantum of evidence" necessary to establish that the City's policy violated Porter's First Amendment right of free speech.

*b. The City's policy did not leave open ample alternatives.*

The City insists that Porter had ample alternatives by which to communicate his message. In making that argument, the City continues to miss the undisputed evidence and makes suggestions that it failed to make in its Post-Trial Motion and that do not comport with the evidence or reality.

The day before the sale, the foreclosure court unexpectedly cancelled the Porters' one opportunity to present argument relative to Debra's mortgage. It did so in reliance on the bank's representation that Debra would not be prejudiced by the sale because an announcement would be made warning potential buyers of the pending litigation. There was no other forum in which that warning could issue.

While the City may reasonably restrict the time, place, and manner of speech in a limited forum, here the City provided no time, no place, and no manner for Porter to make his announcement. The case relied upon by the City, *Galena v. Leone*, 638 F.3d 186 (3d Cir. 2011) (Brief at 26, 28), is easily distinguished because it involved a forum where time was specifically reserved for public comment. *Galena* at 204-205. There undisputedly was no such opportunity here.

Recognizing that there was no such opportunity, the City now argues—for the first time—that Porter could alternatively have spoken to people before the sale or carried a sign to communicate the message. (Brief at 24-25, 30.) Those suggestions do not comport with reality or the evidence. Estimates of the number of people attending the sale were as high as 350. (4/3 Tr. at JA455.) Porter could not possibly have communicated with all of them pre-sale even if he had known at that time that the bank's attorney would not show up, which he did not know. For the same reason, Porter could not carry a sign to make an announcement that he did not know he would have to make.

The City also claims that Porter had the "adequate alternative" to "protect Ms. Porter's interest" by "seeking redress through court order." (Brief at 29.) But that is exactly what the Porters were trying to do through the pending federal action, which was the very reason the announcement needed to be made.

Construed in Porter's favor, the evidence established that the City's policy deprived Porter of the one opportunity he had to alert bidders to the pending litigation. The City violated Porter's First Amendment rights because there was no alternative, let alone "ample" alternatives, in which to make the announcement.

*c. The City's policy was not viewpoint or content neutral.*

Even if the City's "total-prohibition policy" was a reasonable time, place, and manner restriction, it still violated Porter's First Amendment rights because it was not viewpoint neutral.

The United States Supreme Court draws a distinction between content discrimination, which may be permissible if it preserves the purpose of the limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limits. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-830 (1995). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id*. at 828-829. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id*. at 829.

Testimony at trial was telling on this point. Michael Riverso was employed by the sheriff's department. (4/3 Tr. at JA459.) He had attended dozens of sales

and had seen people try to make announcements. (*Id.* at JA466.) He testified that those people made their announcements and then were simply told to sit down. (*Id.*) He believed, however, that the City "anticipated [Porter] to be a problem that day" because of the circumstances surrounding this multi-million dollar property. (*Id.* at JA468.) He testified that everyone was "on alert" and that the sheriff's deputies seemed to be anticipating something because they were waiting in the aisle. (*Id.* at JA463, 481.) Riverso did not hear anyone ask Porter to sit down before he was tackled, and he had never seen anyone else treated as Porter was that day. (*Id.* at JA466-68.)

Phillip Kemmerer also worked for the sheriff's department. (4/2 Tr. at JA290.) He had seen people give announcements at sheriff's sales, and what happened to them "depend[ed] on the announcement," but most often nothing happened. (*Id.* at JA314.) Most were allowed to simply sit back down. (*Id.*) The response to Porter was unusual and "out of character." (*Id.* at JA314, 320.)

Rick Tyer also worked for the sheriff's department. (*Id.* at JA331.) He had attended hundreds of sales. (*Id.* at JA335-36.) He had seen people try to make announcements and they were simply asked to sit down. (*Id.* at JA366.)

Darryl Stewart was the supervisor of the sheriff's real estate department and had attended thousands of sales. When asked if people could make announcements, he said "It happens. Yes." (4/3 Tr. at JA529, 584.)

Perhaps most telling of all was Chew's testimony. He said that some announcements were allowed depending on what was being said. (*Id*. at JA500.) He would not allow announcements that might have a "chilling effect" on the sale or that might make someone decide not to bid. (*Id*. at JA500, 505.) While he testified that Porter was silenced for this reason (*id*. at JA502, 505, 522), it is apparent from his own testimony that he did not know what Porter intended to say. When asked why Porter was not allowed to make his announcement and sit back down, Chew testified that he believed Porter intended to "stop" the sale somehow:

> Q Oh, you think that I wanted to stop the sale.
>
> A Yeah, I mean, I think that's what you wanted to do. I mean, isn't -- I mean, that's what the litigation -- basically, all the litigation I've seen indicate that you -- Mr. Porter, and your mother, and your family, all felt that they had an interest in this property that was superior to the person, to the bank, that was bringing it to sale. So, you know, based upon your behavior, based upon your refusal to sit down, it became apparent to me that, by hook or crook, you were gonna stop -- try to stop that sale.

(*Id*. at JA515.)

Even following the undisputed trial evidence that Porter only intended to advise of the pending litigation, the City's Post-Trial Motion continued to prove that it silenced Porter based on its *incorrect* assumption of what he wanted to say. The City contended that the sale was not "a forum in which to object to a sale or to prevent it from occurring," and criticized the court for its "conclusion that Plaintiff had an absolute right to petition the Sheriff to stop the sale." (Doc. 105 at pp. 5-6.)

But that was not what Porter was doing and the court never drew any such conclusion. The undisputed evidence established that Porter was neither objecting to the sale nor trying to stop it. He was simply trying to provide important, relevant information that any potential buyer would want to know.

Had the City allowed Porter to make his brief announcement, it would have known what it was. Because the City shut him up based on his identity and its assumption of his viewpoint, it continued to misconstrue his purpose even as late as the post-trial briefing.

Even if the City's policy was otherwise reasonable as to time, place, and manner, it was not viewpoint neutral and was therefore unconstitutional. Viewing the evidence in a light most favorable to Porter, there was more than sufficient evidence to conclude that the City violated his First Amendment rights.

### 2. ***The jury's determination of damages was supported by the evidence.***

The second basis on which the City argues that it was entitled to judgment as a matter of law is that the jury's damages award was not supported by the evidence. Necessarily construing the evidence in Porter's favor, it was supported.

#### *a. The award of damages was not inconsistent with the resisting arrest conviction.*

The City first argues that the jury's award of damages must be overturned because it is somehow inconsistent with Porter's conviction for resisting arrest.

The City did not make that argument in its Post-Trial Motion, and regardless, the City is wrong.

The City claims that the resisting arrest conviction was somehow necessarily inconsistent with the verdict here because that conviction requires the conclusion that Porter initiated the violent attack. (Brief at 47.) This argument is waived.

At trial, the City argued that under *Heck v. Humphrey*, 512 U.S. 477 (1994), the resisting arrest conviction precluded Porter's First Amendment retaliation claim. (4/4 Tr. at JA709; 4/5 Tr. at JA720.) The court studied the issue but disagreed, explaining:

> Now, I am very familiar with Heck v. Humphrey, and I just looked at it again this morning.… I believe that… under the evidence, the first thing that happened, according to the plaintiffs, is that Mr. Porter… got up to make a statement, okay?
>
> And according to them, they were immediately trounced upon by different individuals… that's their testimony, and it was supported by some of the other witnesses in the trial, as we know.
>
> Now, and that was in a matter of seconds, you know, somewhere between 3 and 30 seconds, as I recall the testimony. That in my mind, the jury could rely on that… as finding of first amendment violation. The circumstances of what happened after that is what constituted resisting arrest, for which Mr. Porter was convicted. So in my mind, and I believe as a matter of law, they are basically two different situations. One is where the plaintiffs attempted to exercise their first amendment rights, and according to them, suffered violations of their constitutional rights, and then, they were taken into, Mr. Porter was taken into custody, and according to at least one of the witnesses we heard this morning, was resisting at some point.
>
> And so in my mind, the state court violation, the state court crime, resisting arrest, does not negate the first amendment violation that the plaintiffs assert.

(4/4 Tr. at JA870-71.)

When the court revisited this issue the next day, the City's counsel conceded and did not object further: "I understand. You made the distinction… there was a separation between the arrest and the… first amendment retaliation." (*Id.* at JA748.) The City never made the argument again, and never mentioned *Heck* in its Post-Trial Motion. "Generally, failure to raise an issue in the District Court results in its waiver on appeal." *Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006). This issue is waived.

Further, it is wrong. There is no evidence suggesting that Porter initiated the violence. Quite the opposite is true. Porter, his wife, his mother, and his brother all testified that the attack was unprovoked. (4/2 Tr. at JA234-35; 4/3 Tr. at JA429, 608-09, 645-50.) Even the City's employees corroborated that fact. Riverso testified that Porter did not punch or kick anyone. (4/3 Tr. at JA463-64.) Kemmerer testified that Porter was not hostile in any way, that he did not hit or kick anyone or use any profanity, and that his hands were open. (4/2 Tr. at JA311-12.) And contrary to the City's argument here, the criminal trial further established that Porter was ***not*** the aggressor. Porter's criminal jury acquitted him of nine of the ten charges the City brought against him, including the charges of assault and simple assault. (4/3 Tr. at JA657, 659.)

Porter's one conviction for resisting arrest does not demand another conclusion. Construing the evidence in Porter's favor, within mere seconds of

starting to speak, City officials surrounded and violently attacked him. (4/2 Tr. at JA235, 253, 268, 299, 302; 4/3 Tr. at JA429-34, 449-50, 645-50.) He was disoriented by the attack and held his hands up, palms outward, in defense. (4/2 Tr. at JA330; 4/3 Tr. at JA461, 649.) Although he never threw a kick or a punch or used any inappropriate language, he believed the attack was unfounded because it was in violation of his constitutional rights, and he resolved that he would not leave voluntarily, thus causing the tussle to continue. (4/3 Tr. at JA645-46). In hindsight, he accepts that he did, in fact, resist the arrest. (*Id.* at JA659.) That fact does not change the evidence here that the City initiated the violence, not Porter.

Although the discourse at trial on the *Heck* case was in the context of a different argument that was ultimately conceded by the City, the Court's analysis applies to the City's new argument here. There were two events, not one. There is no evidence to suggest—and the resisting arrest conviction does not require—that Porter initiated the attack. Porter did not assault anyone. Had the City properly preserved this argument, it would properly have been rejected.

*b. The evidence established the existence of the City policy that led to the violent enforcement and the court's decision to let the jury verdict stand was not "outrageous."*

The undisputed evidence was that the City had a policy of prohibiting people from speaking at sheriff's sales. The City argues that for the jury verdict to stand, the City's "policy" must necessarily be not just to stop people from speaking, but

to violently stop them, and that such a conclusion is "outrageous." (Brief at 7, 20.) That conclusion, however, is not necessary and was not drawn, and the argument is waived regardless.

The court instructed the jury that to prove his *Monell* claim, Porter had to prove that he was deprived of his First Amendment rights and that the City's "official policy or custom caused that deprivation." (4/5 Tr. at JA980.) To establish the second element, the court instructed the jury that "Porter must demonstrate a plausible nexus or affirmative link between the municipality's custom and the specific deprivation of his constitutional rights." (*Id.* at JA961.) The City seems to argue here that a "plausible nexus or affirmative link" between the policy and its violent enforcement was not sufficient, but instead the policy actually had *to be* the violent enforcement. That is wrong.

Initially, once again, the City's argument is waived. A party may not assign as error the giving or failure to give a jury instruction unless that party objects to it before the jury retires to deliberate. Fed. R. Civ. P. 51. "As a general rule, a party who fails to either cogently raise a specific objection or state the grounds of the objection at trial waives related arguments on appeal." *Lesende v. Borrero*, 752 F.3d 324, 335 (3d Cir. 2014).

Here, the City did not object at all to the "plausible nexus or affirmative link" instruction, let alone cogently or specifically. It thereby gave the court no

opportunity to consider this claimed error or to explain why it was not error. This argument must be overruled on this basis alone.

Even if the argument was not waived, it is wrong because the court's instruction comported with Third Circuit law. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (requiring plausible nexus or affirmative link between supervisor's instruction to violate constitutional rights and actual deprivation). *See also Langford v. City of Atlantic City*, 235 F.3d 845, 847 (3d Cir. 2000) (*Monell* held municipality is liable when it implements *or enforces* an unconstitutional policy). The jury clearly concluded that Porter proved the necessary link between the City's policy and enforcement of that policy against him, and the court correctly found that the evidence supported that conclusion:

> The affirmative link between the policy and its brutal implementation through physical force is obvious: the jury apparently believed that the policy was enforced through physical force applied in immediate retaliation for Porter's exercise of his First Amendment rights. Pursuant to the policy forbidding announcements, Chew apparently asked for such a response.

(Opinion and Order at JA43.)

Neither the jury nor the court drew the "outrageous" conclusion that the City's policy was violent enforcement. They both quite reasonably concluded that there was a plausible nexus between the City's policy and its violent enforcement *against Porter*. That was all that was needed to support the verdict.

The court did not err in denying the City's motion for judgment as a matter of law. Construing the evidence most favorably to Porter and giving him the benefit of every reasonable inference, there was more than the minimum quantity of evidence for a reasonable jury to find in his favor. The court properly refused to invade the province of the jury, and this Court should as well.

### B. The court did not err in denying the City's motion for a new trial.

#### *1. The court did not direct a verdict against the City.*

The City's claim that the court "directed a verdict" against it on the issue of viewpoint discrimination is based on the court's instructions to the jury. (Brief at 37.) At no time, however, did the court "direct a verdict" on viewpoint discrimination, and the court's instruction was an accurate statement of law.

The court instructed the jury that Porter had a First Amendment right to make the announcement, and that the City's policy that prevented it violated his rights. (4/5 Tr. at JA972-73.) The City argues that by this instruction, the court directed a verdict on viewpoint discrimination. (Brief at 37.) That is an unwarranted and illogical leap.

Whether a restriction on the time, place, or manner of speech is reasonable presents a question of law. *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009). There may be an underlying factual inquiry, such as whether there are ample alternatives for communicating the information, but even those issues need

not be submitted to a jury if the evidence applicable to a particular element entitles a party to judgment as a matter of law on that question. *Id*.

First, the City did not request jury instructions as to the reasonableness of its "total-prohibition policy." The court noted how lacking and incorrect the City's proposed instructions were and instructed the City to provide better ones. (4/2 Tr. at JA279, 281.) In its Opinion and Order, it wrote: "Defendants thus did not even seek to ask for the jury's findings on questions that they now complain should have been left to the jury." (JA48.)

Second, as established, the evidence of viewpoint discrimination was sufficient to warrant the court's instruction. But viewpoint discrimination was not the only fact warranting that instruction. As also established, there were <u>no</u> alternatives for Porter to communicate his message, and there was no evidence presented that the City's "total-prohibition policy" was somehow narrowly tailored. Each of these facts individually supported the court's instruction to the jury.

Finally, the court's instruction was an accurate statement of Third Circuit law. In *Primrose v. Mellott*, 541 F. Appx. 177 (3d Cir. 2013), when the court charged the jury on the plaintiff's First Amendment claim, it instructed that Primrose's "speech during her encounter… was protected under the First Amendment." *Id*. at 180. This Court held that the instruction "comport[ed] with

well-established case law." *Id*. (citing *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003)). *See also Knapp v. Whitaker*, 757 F.2d 827, 845-46 (7th Cir. 1985) (court properly instructed jury that plaintiff's speech was constitutionally protected as a matter of law, allowing jury to decide if that speech was motivating factor in defendant's actions).

The same is true here. As the court wrote: "It was clear that, if Porter's evidence was to be believed, the sheriff's department, both in its overbroad policy and its viewpoint-discriminatory implementation, violated Porter's First Amendment rights in silencing his brief announcement." (Opinion and Order at JA42.) It continued: "Porter's evidence was remarkably consistent and, if accepted, established a total lack of alternative means of communication through the policy forbidding announcements and a potentially viewpoint-discriminatory implementation." (*Id*. at JA47.)

The City's broad policy was not narrowly tailored, there was no evidence of "ample alternatives" for Porter to communicate his message, and testimony of City witnesses established viewpoint discrimination. If the jury chose to believe Porter's evidence, then the City's policy violated his First Amendment rights. The Court provided an accurate statement of the law, while still allowing the jury to apply it to the facts as they saw fit. There was no prejudice.

### 2. ***The City was not prejudiced, and never presented any evidence of prejudice, by allowance of the* Monell *claim.***

The City complains that it was unfairly prejudiced by the court allowing Porter's *Monell* claim to proceed. The City was not unfairly prejudiced, however, because it had a full and fair opportunity to conduct discovery on that claim and to develop it for trial, and the court offered the City great leeway in revising its case.

Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), a municipality may be liable under 42 U.S.C. § 1983 for the acts of its agents if those acts are pursuant to a municipal policy. Porter pled a *Monell* claim in his complaint, stated his intent to pursue it in his Pretrial Memorandum, and included a *Monell* instruction in his proposed jury charge.

Nevertheless, on Thursday, March 29, the court held that the *Monell* claim was waived. Porter vehemently objected and on the next morning that the court reconvened, he submitted an Emergency Motion for Reconsideration which the City never opposed.

At the end of the third day, after Porter's case was fully presented but for admitting exhibits, the court reversed itself and allowed the claim to proceed. (4/3 Tr. at JA699.) When the City claimed prejudice, the court disagreed, accurately noting that "the prejudice… has really been from Thursday until today. But, you know, you've known of the policy, your client proclaims this policy, and I assume that the two of you were aware of it." (*Id.* at JA577.) The court continued: "I

reject the Defendant's position that they're gonna be prejudiced… I can't imagine any discovery that would be half relevant or helpful… the witnesses said it was clearly the policy of the Sheriff not to allow announcements." (*Id*. at JA700.)

Despite the lack of prejudice, the court gave the City wide latitude to revise its case, allowing it to recall witnesses or identify new ones. (*Id*. at JA580-81, 584, 701-03.) The City argued that it was too late to find a policymaker to testify, but the court correctly pointed out that Barbara Deeley was the sheriff at the time, and Chew was the assistant City solicitor for years; both knew the policy and although both had already testified, they could be recalled. (*Id*. at JA585, 701.)

> THE COURT: Okay. Well, I wanna make sure, you can recall Ms. Deeley to testify. If you don't want to, you don't have to.
>
> MR. BRIGANDI: She said what she said. It's not gonna change.
>
> * * *
>
> THE COURT: Well, now -- wait, wait, but now that you know that there's a Monell claim, and about the policy, if you wanna ask her other questions about that policy, I'm gonna give you leave to do so, as a, she's the head of the office, she was the head of the office on the date in question, she was the Chief Deputy before that for -- working there for many years, and –
>
> MR. BRIGANDI: Here's the problem. Here's the problem. She had just taken over as Sheriff –
>
> * * *
>
> I would not use Ms. Deeley as that. It would probably be Mr. Chew.
>
> THE COURT: Well, he's already -- you can recall him.
>
> MR. BRIGANDI: I'll think about that.

(*Id*. at JA707-08.)

In fact, the City acknowledges that Deeley, as sheriff, was the "actual policymaker." (Brief at 35.) The City also acknowledges that witnesses who had already testified were "highly relevant to the City's Monell defense." (Brief at 15.) And throughout the trial, the City's witnesses and attorneys represented that Chew was the City solicitor for 20 years, was the director of legal affairs for the sheriff's office, and was in charge of, and could testify to, legal procedures at sheriff's sales. (3/29 Tr. at JA121, 148; 4/3 Tr. at JA477, 533; 4/4 Tr. at JA728.)

Despite the availability of both Deeley and Chew and the court's repeated offer to allow them or any other witness to be recalled, the City nevertheless argues to this Court that it was prejudiced because it did not have time to find the right witness, and because it did not want to recall its prior witnesses to "rehabilitate" them or "to contradict and correct" their prior testimony. (Brief at 42-43.)

First, the City has never identified any witness that it needed to call but could not. Second, if the City needed more time to locate some unidentified witness, it never asked for it. Third, the first-time argument of prejudice due to "rehabilitating" a witness or having a witness "contradict or correct" prior testimony is curious. The City identifies no testimony that needed to be rehabilitated, contradicted, or corrected, and assuming the witnesses testified truthfully, none of that could possibly be the case.

Given all the opportunities that the City had to prepare to address this claim and to revise its case in light of the court's revised ruling, and given further the City's failure to identify who it needed to call but could not and its failure to ask for any additional time, its claim of prejudice rings hollow.

Whether the City revised its game plan following the revised ruling was its own strategic decision; but Porter did not even have that opportunity. He presented his entire case without the *Monell* claim. If anything, the City was advantaged by this. It not only had the chance to prepare the *Monell* claim for trial, it had the chance to revise its case after Porter finished his.

The City was on notice from Porter's initial pleading to the day of trial that he intended to pursue a *Monell* claim. The City should have—and presumably did—prepare to address it at trial. It suffered no unfair prejudice from that claim proceeding, and the court did not err in denying the City's motion for a new trial.

### 3. ***The court properly entered judgment on the jury's determination of damages.***

The City next argues that it should have a new trial because the evidence did not support the damages award. The evidence supported the award, however, and the court did not abuse its discretion by letting the jury's verdict stand.

The determination of compensatory damages "'is within the province of the jury and is entitled to great deference.'" *Dee v. Borough of Dunmore*, 474 Fed. Appx. 85, 87 (3d Cir. 2012) (quoting *Spence v. Bd. of Educ.*, 806 F.2d 1198, 1204

(3d Cir. 1986)). "A jury's damages award will not be upset so long as there exists sufficient evidence on the record, which if accepted by the jury, would sustain the award." *Thabault v. Chait*, 541 F.3d 512, 532 (3d Cir. 2008). Substitution of the court's opinion for that of the jury should only occur if the verdict is "so grossly excessive as to shock the judicial conscience." *Rivera v. V.I. Housing Auth.*, 854 F.2d 24, 27 (3d Cir. 1988) (quotation omitted).

In addition to deference to the jury, deference must also be given to the district court which "is in the best position to evaluate the evidence presented and determine whether or not the jury has come to a rationally based conclusion." *Dee*, 474 Fed. Appx. at 87 (quoting *Spence*, 806 F.2d at 1201)).

It thus follows that this Court's review of the jury's damages award, affirmed by the district court, is "exceedingly narrow." *Cortez v. Trans Union, LLC*, 617 F.3d 688, 718 (3d Cir. 2010) (quoting *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1038 (3d Cir. 1987)). Such an award will not be overturned absent an abuse of discretion. *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 772 (3d Cir. 1987). In making that determination, this Court must make all reasonable inferences in Porter's favor. *Rivera*, 854 F.2d at 25.

*a. The City never objected to the court's instruction on damages and this Court must presume the jury acted reasonably.*

The City complains that the court "infected" the damages award by mentioning lost wages in a jury instruction. (Brief at 52.) The City never objected to that jury instruction, however, so the argument is waived.

As already established, the City may not assign as error the giving or failure to give a jury instruction if it did not cogently raise its objection at trial and state the grounds for it. *Lesende v. Borrero*, 752 F.3d 324, 335 (3d Cir. 2014). Here, the court instructed the jury as follows:

> Plaintiffs claim the following items of damages: first, physical harm to plaintiffs during and after the events at issue, including ill health, physical pain, disability, disfigurement, or discomfort, and any such physical harm that plaintiffs are reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.
>
> The second element that plaintiffs claim is emotional and mental harm to the plaintiffs during and after the events at issue, including fear, humiliation, and mental anguish, and any such emotional and mental harm that plaintiffs are reasonably certain to experience in the future.
>
> The third element is loss of past and future earnings.

(4/5 Tr. at JA985.)

The City argues that the court erred by mentioning lost earnings, but the City did not object to that instruction at all, let alone cogently or specifically; nor did it argue this in its Post-Trial Motion. The argument is waived and must be overruled.

Even if the argument was not waived, it still must be overruled. The district court provided the following further instruction to the jury:

> You are not to award damages for any injury or condition from which the plaintiff may have suffered or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the action of a defendant.

(*Id*. at JA986.)

The City contends that there was no evidence of lost wages resulting from the City's policy, but this instruction precludes any assumption that the jury awarded damages that were not caused by the City: "A jury is presumed to have acted rationally. We must assume that the jury followed the court's instructions and arrived at a verdict based on those instructions." *United States v. Zauber*, 857 F.2d 137, 154 (3d Cir. 1988). The jury is presumed to have awarded only damages caused by the City, and the City points to nothing suggesting that it did otherwise.

*b. The court did not abuse its discretion in concluding that the jury's determination of damages was supported by the evidence.*

"Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quotations omitted). "Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation…, personal

humiliation, and mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

"Damages for emotional distress are by their very nature incapable of precision." *Griffiths v. Cigna Corp.*, 857 F. Supp. 399, 409 (E.D. Pa. 1994), *aff'd* 60 F.3d 814 (3d Cir. 1995). "Emotional distress… is proved by showing the nature and circumstances of the wrong and its effect on plaintiff." *Spence*, 806 F.2d at 1199. This Circuit does not require "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award." *Cortez*, 617 F.3d at 720 (quotation omitted). "'[T]he factfinder may… award damages [for emotional distress] on the basis of plaintiff's testimony'" alone. *Pica v. Sarno*, 907 F. Supp. 795, 803 (D.N.J. 1995) (quoting *Hobson v. Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)). If the jury accepts the plaintiff's testimony without corroboration, the plaintiff should be allowed to recover. *Cortez*, 617 F.3d at 720.

Here, Porter's testimony as to his damages <u>was</u> corroborated by substantial testimony as to both the emotional and physical manifestation of his injuries. His mother testified that he was "attacked" and put in a "choke hold," and that people "jumped" on him. (4/2 Tr at JA235, 253.) She testified that they were "beating" him up, "dragging him around, and stun-gunning him." (*Id.* at JA276.)

Porter's brother, David, testified that during the attack, Porter looked "disoriented" and "dazed." (4/3 Tr. at JA433.) He heard Porter screaming that he could not breathe and saw him get punched. (*Id.* at JA436-37, 451-52.) David subsequently noticed "big cuts" on Porter's head and suggested he seek medical attention. (*Id.* at JA439.) He offered the following emotional testimony:

> [W]ithin ten seconds, at the most, my brother was pulled backwards, thrown down, and, you know, assaulted beyond, like, belief. Like, it was bizarre, and not only was it bizarre to me, it was scary. I mean, my brother did not do anything. He did not –
>
> * * *
>
> So then there was a guy that came flying over and threw a punch… definitely came flying at him and was like, to me, I was just like, what is going on? Why is this guy -- you know, he's not doing anything, he has his hands up, why is this guy coming at you like that. It was bizarre. And then from there, another guy came flying in, cut my brother from the knees, and everyone jumped on my brother, and they just -- I mean, it was a free for-all.
>
> My brother, I will say this under oath, did not throw a punch, did not throw a kick, did not do one thing to provoke anyone to attack him. He was absolutely assaulted beyond belief.
>
> * * *
>
> It was a disgusting, to me, event that occurred, and a scary event, to know that that can happen to someone. My brother did not deserve what happened to him at all.

(*Id.* at JA429, 434-35.)

Similarly, Porter's wife emotionally testified. She testified to his physical injuries. (*Id.* at JA610-11.) She also testified to his emotional injuries:

> I'm sorry. He -- well, before the incident, my husband was a very hard-worker, very -- a go getter, supports his family, very lovable guy, coached

> every one of our kids, he's a big bear, and anybody that knows him will tell you that. And then since -- when this happened, he was stripped away of everything. We lost everything because of what happened here. Took a lot of out of him and he's actually aged a lot because of it.

(*Id*. at JA613.)

Porter's father also testified to a change in his son following the incident. He noticed the stress he was under, that he was getting old before his time, and that it was sad. (*Id*. at JA626.)

Porter himself recounted how he was pulled backwards, hit with a stun gun, jerked hard enough to have his coat ripped, thrown to the ground, punched in the jaw, and hit in the head. (*Id.* at JA646-49.) He was disoriented, had people on top of him, and had difficulty breathing. (*Id.* at JA649.) He suffered a head injury and a sore shoulder and leg. (*Id*. at JA687.) He continued:

> [I]t's bad enough being embarrassed, bad enough being punched, kicked, you know, I'm saying it figuratively, they didn't kick me, it was only one punch, but bad enough being punched, kicked, beat-up, all this stuff, hit with a stun gun, all to, you know, be humiliated in that sense.
>
> * * *
>
> I've missed a lot of things. I've done the best I could. I try to coach my kids during soccer games, football games, baseball games. I missed a lot of things. A lot. Meaning that… I don't remember the events. My wife -- I almost think I have Alzheimer's, for crying out loud, because she'll say to me, well, do you remember this? I'm like, no. And she's like, you were there. I'm like, I don't remember. I have no memory, very little memory, of events that I've done with my family. And I've tried to do the best, but when they talk about something, I just don't remember. And I've had counseling with my pastor, I've had -- gone through some therapy classes, whatever, to try and deal with the stress, try to learn to cope with the stress,

> went into a community counseling thing and learned about it, and it's getting better.
>
> * * *
>
> And the real frustration is this, I only had to say three sentences… why in the world would they not allow me to say three sentences? That is absolutely ridiculous. Three sentences. Eight years of my life for three sentences.

(*Id*. at JA660-63.)

The City's employees corroborated Porter's injuries. Riverso testified that he saw Porter choked and kneed in the temple and heard him saying he could not breathe. (*Id*. at JA464, 477-78.) Kemmerer heard Porter yelling that he could not breathe. (4/2 Tr. at JA312.) Another employee testified that Porter was turned away from a holding facility due to his visible injuries and taken to a hospital. (4/3 Tr. at JA591.) Significantly, *the City did not introduce any evidence whatsoever to dispute that Porter suffered these injuries or to challenge their nature or extent*.

In allowing Porter to pursue emotional distress damages, the court instructed him not "to state any specific number." (4/5 Tr. at JA855.) "[Y]ou can argue for pain and suffering, but you can't set a figure. You can ask the jury to be generous and so forth, but you can't mention a figure." (*Id*.) Thus, it was up to the jury to decide what value to place on Porter's suffering.

The physical, psychological, and stress-related suffering that Porter and his family attested to is the very kind of injury one would expect from such a violent and unprovoked, public attack. *See, e.g., Cortez*, 617 F.3d at 719. The court

concluded: "Porter's and other witnesses' testimony regarding the more immediate effects of the implementation of the policy, which caused him physical injury and humiliation, are more than sufficient to support a jury verdict and an award of damages." (Opinion and Order at JA43.)

Porter presented substantial evidence of his emotional and physical damages, and pursuant to the court's instruction, it was entirely up to the jury to place a value on it. The jury heard the evidence—much of which was undisputed—observed the witnesses, and unanimously made its determination. The jury could reasonably—and clearly did—find significant emotional distress resulting from the incident, there is nothing clearly excessive about the award, and it should not shock anyone's conscience. The court properly refused to invade the province of the jury, and this Court should as well.

The court did not err in denying the City's motion for a new trial. The evidence supported the jury's verdict, the damages were not excessive, and there were no "substantial trial errors." *GBS Meat Indus. Pty., Ltd. v. Kress-Dobkin Co.*, 474 F. Supp. 1357, 1358 (W.D. Pa. 1979). There was no reason, let alone a compelling one, for the court to usurp the function of the jury by ordering a new trial. The City's motion was properly denied.

## VII. CONCLUSION

For all of the foregoing reasons, Porter respectfully requests that the district court's judgment denying the City's motions for judgment as a matter of law and for a new trial be affirmed.

Respectfully submitted,

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Dated: February 28, 2019 */s/Kimberly Y. Smith Rivera*

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I certify that I am a member of the Bar of this Court.

Dated: February 28, 2019 */s/Kimberly Y. Smith Rivera*

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## CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Appellee James Porter* was filed this 28th day of February 2019, using the Court's CM/ECF system, thereby providing electronic notice to:

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