

1997 WL 613232

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United States District Court, W.D. New York.

Akil AL-JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Maria Santos, Mother and Legal Representative of Santiago Santos, deceased; Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernon Lafranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip" Crowley; William Maynard, Jr.; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haiku, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip "Wald" Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Haynes; Raymond Sumpter; Omar Sekou Toure a/k/a Otis McGaughey; Dacajeweah, a/k/a John Hill; and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

Kurt G. OSWALD, as Administrator of the Estate of Russell G. Oswald; John S. Keller, as the Administrator of the Estate of John Monahan; Vincent Mancusi; and Karl Pfeil, Defendants.

No. 75-CV-0132E(M).

|
Oct. 2, 1997.

MEMORANDUM and ORDER

ELFVIN.

*1 Presently before the Court are two motions by defendant Karl Pfeil, the former Assistant Deputy Superintendent of Attica Correctional Facility ("Attica"), wherein Pfeil seeks judgment as a matter of law or, in the alternative, new trials on the issue of damages¹ with respect to two plaintiffs, Frank Smith and David Brosig, in whose favor separate juries have returned verdicts awarding compensatory damages. For the reasons hereinbelow stated, such motions will be denied in their entirety.

Although familiarity with the prior proceedings in and factual background of this action is presumed, a brief summary thereof is necessary to frame the issues presently before this Court. This case arises out of the inmates' riot and the subsequent quelling thereof at Attica in September, 1971. The plaintiffs in this action are more than 1,200 inmates then incarcerated at such facility who allege, *inter alia*, that subsequent to the retaking of the prison, correctional officers and others acting in conjunction with said officers engaged in violent reprisals against the inmates, which reprisals constituted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. A trial on liability *vel non* with respect to certain defendants was held in 1991-1992 wherein a jury found that, after the retaking of the prison, Pfeil had personally engaged in or had ordered reprisals against inmates or was wantonly and deliberately indifferent to the same.² Pfeil moved against such liability verdict, which was unparticularized as to individual plaintiffs, on several grounds. By Order dated January 16, 1993 this Court denied such motion.

From May 29th to June 4, 1997 a trial on damages was held with respect to plaintiff Smith against Pfeil ("the Smith trial"). The jury found for Smith and awarded him monetary damages in the amount of \$4,000,000. A damages trial for plaintiff Brosig against Pfeil ("the Brosig trial") was held June 23rd through June 26, 1997 and resulted in a separate jury's returning a monetary award to Brosig of \$75,000. Pfeil moved to set aside such verdicts and arguments were heard August 22, 1997.

Pfeil moves for judgment as a matter of law with respect to each of Smith and Brosig on several grounds. Rule 50 of the Federal Rules of Civil Procedure ("FRCvP") provides that a court may direct entry of judgment as a matter of law after an issue has been determined by a jury.

In considering a FRCvP 50 motion, “the trial court may not weigh evidence, assess credibility, or substitute its opinion of the facts for that of the jury.” *Vermont Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272, 277 (2d Cir.1996). All reasonable inferences regarding the weight of the evidence and the credibility of the witnesses must be drawn in favor of the non-moving party. *Ibid.*

*2 Firstly, Pfeil argues that neither plaintiff introduced evidence sufficient to establish that Pfeil possessed the requisite culpable state of mind, because “a prison official can be held liable for an Eighth Amendment excessive force violation only when acting ‘maliciously and sadistically for the very purpose of causing harm.’” Defendant’s Brief at 5 (quoting *Whitley v. Albers*, 475 U.S. 312, 320–321, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).³ While the defendant states the correct standard in the case of an officer who is alleged to have used excessive force, such standard is inapplicable in this case.

“The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody.” *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 620 (2d Cir.1996) (citing *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). “[P]rison officials are liable for harm incurred by an inmate if the officials acted with ‘deliberate indifference’ to the safety of the inmate.” *Ibid.* (citing *Morales v. New York State Dep’t of Corrections*, 842 F.2d 27, 30 (2d Cir.1988)). Here, Pfeil was found to have violated Smith’s and Brosig’s Eighth Amendment rights by, at the very least, failing to act to protect inmates following the retaking of the prison. The plaintiffs had established to the satisfaction of the liability trial jury that officers were committing violent acts of reprisal against the inmates and that Pfeil knew thereof and was wantonly and deliberately indifferent to same. This Court has previously found that there was sufficient evidence presented at the liability trial from which the jury could reach such verdict. Memorandum and Order dated Jan. 16, 1993 at 10. Furthermore and contrary to Pfeil’s assertion, each plaintiff who seeks damages—liability having been established—is not required to re-prove Pfeil’s state of mind. See Defendant’s Brief at 2. At the liability trial, such issue was properly presented to the jury and remains the law of this case.

Secondly, Pfeil argues that the respective juries in the damages trials were not properly presented with the issue of proximate causation and that insufficient evidence thereof was presented by the respective plaintiffs. The jury in plaintiff Smith’s damages trial was instructed as

follows:

“Mr. Smith’s injury and/or harm must have been proximately caused by reprisal or reprisals. In order for you to award him damages an injury and/or harm is proximately caused by an act whenever it appears from the preponderance of the evidence that the act played a substantial part in bringing about or actually causing the injury or harm and that the injury or harm was either a direct result or a reasonably probable consequence of the act.

*3 “ * * * It is your duty and yours alone to find and determine whether this plaintiff suffered any injury or harm proximately caused by a reprisal or reprisals and, if he did, to find and determine a monetary award to which he is entitled to compensate him for any and all injury or harm proximately caused.” Transcript of Smith Jury Charge at 59–60 (June 4, 1997).

Said jury was further instructed that each of said plaintiff’s alleged injuries must be found to have been proximately caused by the reprisals in order to merit compensation. *Id.* at 60. The jury in the Brosig damages trial was similarly charged. Transcript of Brosig Jury Charge at 542–543 (June 26, 1997). The juries in the damages trials found that Smith and Brosig had each

“proven by a preponderance of the evidence that he has suffered * * * injuries *proximately caused* by reprisals against him following the retaking of Attica * * *.” Special Verdict Sheets (filed July 8th and July 16, 1997) (emphasis added).

Pfeil’s assertion that “the Court at the second trial refused to instruct the jury regarding causation issues” is simply false. See Defendant’s Brief at 8. Further, this Court finds that each plaintiff presented sufficient evidence upon which a reasonable jury could conclude that his injuries had been proximately caused by post-retaking reprisals. See, e.g., Transcript of Smith Testimony at 54 (“Q. And, while you were on the table, what physical pain were you experiencing? A. My head was hurting and my side was hurting, my back was hurting, my leg was hurting and the most excruciating pain I had was in my testicles. Q. And, what was that a result of? A. That’s from poking in ‘em”); *Id.* at 79 (“I was scared to death, I was pain, I was hurting and now my genital area was really hurting a lot and I had excruciating headaches and my wrists was real sore * * *. They was really, really pain, throbbing pain from me blocking and trying to protect myself.”); *Id.* at 81 (“My legs is beaten and they were swelling and they sore, and today they still are sore and swollen.”); *Id.* at 82–83 (“Q.

Now, did you have any burns on your body on that evening? A. Yes Q. And, where were they? A. On my stomach, in this area [pointing to his abdomen]. * * * Q. And, what were the burns the result of? A. Cigarettes being dropped on me ."); Transcript of Brosig Testimony at 100–101 ("Q. Now, would you tell the jury what were the injuries that you had from the clubbings you received in the line of officers? A. I had—there were numerous, numerous welts on my legs and my back and shoulders, my butt, also one on the front. * * * Knots and bumps on my head.").

Pfeil further argues that he cannot be held liable for the acts of officers not under his charge and that the acts of reprisals by any such officer are intervening and/or superceding causes of each plaintiff's injuries. Defendant's Brief at 11–15. Such arguments are inappropriate where, as here, the defendant is liable for his knowing and wanton failure to protect inmates from such reprisals.

***4** This Court finds Pfeil's remaining arguments in support of his motion for judgment as a matter of law to be without merit.

Pfeil alternatively moves for new damage trials pursuant to FRCvP 59(a) based on numerous grounds arising out of alleged insufficiency of evidence, improper evidentiary rulings, errors and deficiencies in the jury charges and excessive damages verdicts. This Court will address each in its turn.

Firstly, Pfeil asserts that each plaintiff presented insufficient evidence to substantiate the respective verdict. "[A] motion for a new trial on the ground that the verdict was against the weight of the evidence is committed to the sound discretion of the trial judge." *Metromedia Co. v. Fugazy*, 938 F.2d 350, 363 (2d Cir.1992), *cert. denied*, 508 U.S. 952 (1993). "The standard for granting a new trial under Rule 59 is less strict than that for judgment as a matter of law under Rule 50(b), for a 'new trial motion may be granted even if there is substantial evidence to support the verdict.'" *Datskow v. Teledyne Continental Motors*, 826 F.Supp. 677, 683 (W.D.N.Y.1993) (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir.1978)). "Nevertheless, the mere fact that the trial judge may have reached a different result than the jury is not a sufficient reason to grant the motion * * *." *Ibid*.

This Court finds that the evidence that each plaintiff's damages were proximately caused by the reprisals

inflicted after the retaking and for which Pfeil bore responsibility was sufficient to support each respective verdict, even under the lower FRCvP 59(a) standard. However, Pfeil argues that each plaintiff's failure to substantiate both his alleged injuries and a causal link with the reprisals inflicted at Attica with "specific evidence," such as expert and/or medical testimony, renders the respective verdict untenable. However, the cases he cites in support of such proposition are inapposite. *Doe v. U.S.*, 976 F.2d 1071, 1086 (7th Cir.1992), *cert. denied*, 510 U.S. 812, 114 S.Ct. 58, 126 L.Ed.2d 28 (1993), upheld the denial of one item of damages where the plaintiff had failed to introduce *any* evidence, even circumstantial evidence, that nighttime terrors allegedly suffered by the plaintiff were the result of the abuse for which the defendant was held liable. In *Capello v. Maresca*, 921 F.Supp. 84 (D.Conn.1995), also cited by Pfeil, a monetary damages award was reduced—via an order for remittitur—by the trial judge where the plaintiff had sought, *inter alia*, recovery for lost income, but had failed to provide medical evidence of the seriousness or duration of certain "nonobvious injuries" or their effect on his ability to work as a roofer. The Court did not disallow recovery for the injuries *per se*. *Capello*, at 86. As discussed above, each plaintiff presented sufficient evidence of his injuries and their causal link to the respective reprisals to justify the jury verdict in his favor.

***5** The defendant also argues that improper evidentiary rulings during the course of the damages trials require that new trials be granted. A new trial based on erroneous evidentiary rulings is required where the improper admission or exclusion of evidence affects a substantial right of the moving party. *Malek v. Federal Ins. Co.*, 994 F.2d 49, 55 (2d Cir.1993). However, an erroneous evidentiary ruling cannot be grounds for granting a new trial unless the court finds that such measure is required by "substantial justice." FRCvP 61.

Pfeil first points to this Court's exclusion of certain medical records first brought to plaintiff Smith's attention on May 30, 1997—two days into his damages trial. Such records had been subpoenaed by Pfeil on May 28th. The only reason offered by Pfeil for his extraordinarily late request for said medical records is "certain pre-trial rulings by the Court shortly before the commencement of the damages trial of plaintiff Smith (which, of necessity, drastically altered the nature of defendant Pfeil's defense) * * *." Reply Affirmation of Mitchell J. Banas, Jr. ¶ 5 (Aug. 15, 1997). The defendant does not specify which of and in what manner this Court's pre-trial rulings thus

affected his defense and gives no further explanation for his failure to request such records until the eve of trial. “[I]f evidence is introduced so late that any reply to it will require an undue prolongation of the trial, the judge has discretion to refuse it * * *.” *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002, 1004 (2d Cir.1952). Nevertheless, a review of the medical records shows that they are of dubious relevance to Smith’s alleged injuries. Such records indicated, *inter alia*, that Smith had suffered from migraine headaches, that he had suffered a fractured wrist in August of 1969 and that he had “experienced possible bleeding from his penis.” Defendant’s Brief at 41. Smith testified to injuries which were far more serious than and divergent from those thus cited by Pfeil. Accordingly, this Court finds that the exclusion of such incidentally relevant evidence does not require a new trial.

Pfeil further challenges this Court’s exclusion from both damages trials of handwritten notes taken by doctors who, on September 21, 1971—eight days after the retaking—, had investigated the Attica uprising. Such notes were properly excluded as not within any of the exceptions to hearsay exclusion listed in Rule 803 of the Federal Rules of Evidence (“FRE”). They were not taken for the purpose of medical diagnosis or treatment and were not, as asserted by Pfeil, made public records by virtue of references to such in the “Goldman Report” and the Official Report of the New York State Special Commission on Attica. Smith Trial Transcript at 12 (June 3, 1997); Brosig Trial Transcript at 441–443 (June 25, 1997). The doctors’ notes were properly excluded.

*6 Lastly, Pfeil asserts that this Court erroneously admitted the hearsay testimony by each of the plaintiffs’ wives at the respective trials and of Dr. Richard G. Dudley at the Smith trial. Much of the challenged testimony was properly admitted pursuant to FRE 803(3) as declarations by Smith or Brosig of each’s then-existing state of mind, emotion or physical condition. *See United States v. DiMaria*, 727 F.2d 265, 270–272 (2d Cir.1984) (holding that relevant declarations within the parameters of FRE 803(3) are categorically admissible regardless of their self-serving nature or other indicia of untrustworthiness). Those portions of the admitted testimony which related the respective plaintiff’s own description of events that took place at Attica were arguably inadmissible hearsay, but this Court finds their admission to have been harmless in light of such plaintiff’s previous testimony and other evidence regarding said events. *See United States v. Rivera*, 22 F.3d 430, 436 (2d Cir.1994) (holding that the erroneous

admission of hearsay evidence is harmless where there is fair assurance that such evidence did not substantially influence the jury); Defendant’s Supplemental Memorandum of Law at 3 (citing as an example Mrs. Smith’s testimony that Smith “vaguely mentioned it, that he had been in Attica and that he had been beaten and tortured and he said he just didn’t wanna talk about it.”).

Pfeil also argues that several deficiencies and errors in the charge given to each jury mandate granting respective new trials. Firstly, Pfeil argues that the juries should have been charged that they could not award damages with the intention of punishment. This Court charged each jury, in pertinent part, to

“Now * * * to go back to the time when you were sworn in as jurors and you vowed that you would well and truly try the issues joined in this case and a true verdict give therein according to the evidence, so help you God, and I suggest to you if you follow that oath and you try the issues without combining your thinking with any emotions that you will arrive at true and just verdicts. It must be clear to you that once you get into an emotional state and if you let bias or sympathy or prejudice interfere with your thinking you will not arrive at that sort of verdicts.” Transcript of Smith Jury Charge at 62–63 (June 4, 1997); *see also* Transcript of Brosig Jury Charge at 546 (June 26, 1997).

Each jury was also given detailed instructions with respect to the requirement that each individual element of the respective plaintiff’s alleged damages had to have been shown to have been proximately caused by the post-retaking reprisals in order to merit compensation. Transcript of Smith Jury Charge at 59–61; Transcript of Brosig Jury Charge at 543–544. A new trial is not necessary unless the jury charge leaves the jury with a “misleading impression or inadequate understanding of the law.” *Luciano v. Olsten Corp.*, 110 F.3d 210, 218 (2d Cir.1997). This Court finds that, taken as a whole, the jury charge adequately protected Pfeil’s rights and that the failure to charge specifically against awarding damages with the intention to punish does not merit new damages trials.

*7 Pfeil also argues that this Court improperly charged the juries with an “inflammatory” characterization of the verdict rendered in the liability trial. This Court charged each damages trial jury regarding said verdict as follows:

“[I]t has been found and you must take as true that certain acts were done by those Officers⁴ without their

being reasonably justified by the circumstances, and such are what we have called and are calling reprisals. And that Mr. Pfeil was responsible therefor, not mainly as the perpetrator, but as one who knew that there then were reprisals and who could have but did not put a halt to such; he personally is responsible for any and all injury and harm, physical and/or mental, caused by such reprisals.” Transcript of Smith Jury Charge at 58 (June 4, 1997); *see also* Transcript of Brosig Jury Charge at 540–541 (June 26, 1997).

Such instruction was a short, accurate description of Pfeil’s liability in this case as had been found by the liability-trial jury. The jury in each damages trial was necessarily informed of such finding because it was required to determine which, if any, of the particular plaintiff’s alleged injuries had been proximately caused by reprisals in order to render a fair verdict. Pfeil’s argument in this respect must fail.

Pfeil further challenges the jury charges in each damages trial for improperly recapitulating the respective plaintiff’s evidence of damages and for failing to charge that the jury could not award damages for *de minimis* injuries. This Court finds such arguments to be without merit.

Lastly, Pfeil challenges each damages verdict as excessive. “It is well settled that calculation of damages is the province of the jury.” *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir.1990). Nevertheless, a jury verdict of compensatory damages may be overturned by the trial judge where the award is so high that it shocks the judicial conscience and constitutes a denial of justice. *Blissett v. Coughlin*, 66 F.3d 531, 536 (2d Cir.1995); *Ismail*, at 186. Plaintiff Smith presented evidence at his damages trial that he had been beaten by numerous officers with billy clubs about his head, neck, and body, including his genitals, that he had been repeatedly threatened with castration and death, that one officer had brandished a sword or similar instrument while making such threats, that he had been made to lie naked on a table in one of the prison’s yards with a football between his chin and his chest and threatened with death should the football fall from its place, that while lying on that table officers had thrown or dropped lighted cigarettes and hot shell casings onto his torso which burned and scarred him, that an officer had played “Russian Roulette” with a shotgun trained on his head, that he had been forced to “run a gauntlet” of officers with batons and other blunt instruments and that he had been made to crawl naked

through a corridor wherein broken glass was scattered about the floor. Smith also testified that, as a result of such treatment, he continues to suffer from, *inter alia*, scarring and swelling about his head, wrists and legs, flashbacks, nightmares and other symptoms of so-called post-traumatic stress disorder.⁵

*8 Even in light of the foregoing, the jury’s award of \$4,000,000 is admittedly large. However, such does not shock this Court’s conscience and does not require a new trial on damages if Smith would not agree to reduce the award to a specific lower amount. Considering the unique circumstances of this case and that the injuries which the Smith jury found and for which it rendered this verdict have caused hurtful stress over more than 25 years, this award finds adequate support in the record. *See, e.g., Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137–138 (2d Cir.1993) (upholding a compensatory damages verdict of \$1,750,000 for a woman who had suffered a two-hour ordeal which included a robbery and attempted rape despite Court’s finding that \$1,000,000 was for “intangible damages”); *Precise Eng’g, Inc. v. LaCombe*, 624 So.2d 1339, 1343 (Ala.1993) (upholding \$2,700,000 verdict where plaintiff suffered permanent pain in his back and legs, loss of bladder and bowel control, and mental anguish); *Knor v. Parking Co. of America*, 73 Ohio App.3d 177, 596 N.E.2d 1059, 1065 (Ohio App.1991) (upholding \$2,000,000 verdict where plaintiff had been kidnapped, held at knife-point for several hours and forced to perform sex acts).

Plaintiff Brosig presented evidence at his damages trial that he too had been forced to run a gauntlet of officers with batons and baseball bats, that he had been placed in a cell and threatened with death should he fall asleep and that he had been forced to crawl naked through a corridor littered with broken glass. He testified that, as a result of his ordeal, he has suffered severe welts, flashbacks, nightmares and other stress-induced symptoms. In light of the foregoing, this Court finds that the jury’s award of \$75,000 does not shock the conscience and does not merit conditionally granting a new damages trial.

Accordingly, it is *ORDERED* that defendant Pfeil’s motions for judgments as a matter of law or, in the alternative, for new trials on damages are denied.

All Citations

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Footnotes

- ¹ And, perhaps, a new trial as to his liability *vel non*.
- ² That jury was unable to decide whether Monahan (who then and there headed up a group of New York State Troopers who physically retook the occupied part of the prison) or Coughlin (who then was the Commissioner of New York's Department of Correctional Systems) or Mancusi (who then was the Superintendent at Attica) had violated the constitutional rights of the plaintiffs or any of them. At this juncture there is to be, at least, a retrial of Monahan's liability *vel non* and myriad additional damages trials.
- ³ References to the Defendant's Brief are to the Defendant's Memorandum of Law in support of his motion for judgment as a matter of law or for a new trial with respect to plaintiff Smith. Pfeil's Memorandum of Law with respect to plaintiff Brosig is substantially identical in its arguments for judgment as a matter of law.
- ⁴ Earlier in each charge I had instructed the respective jury that "by Correction Officers * * * I include those who are regular Correction Officers and a number of New York State Troopers and other law enforcement officers who then were working with and assisting the regular Correction Officers." Transcript of Smith Jury Charge at 57 (June 4, 1997); Transcript of Brosig Jury Charge at 539-540 (June 26, 1997).
- ⁵ Psychiatric opinion evidence concerning such stress was not adduced, this Court opining that the jurors did not need such help or assistance in this area.
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