UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LINDA ROSE, *et al.*,

Plaintiffs,

Case No. 01-10337

v.

SAGINAW COUNTY, *et al.*,

Hon. David Lawson

Defendants.

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING PLRA "PHYSICAL INJURY" ISSUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

THE EXPRESS LANGUAGE OF THE PLRA AND THE BEST-REASONED DECISIONS COMPEL THE CONCLUSION THAT PERSONS NOT IN CUSTODY NEED NOT ESTABLISH PHYSICAL INJURY

42 U.S.C. § 1997e(e) of the Prison Litigation Reform Act provides:

> No Federal civil action may be brought by a **prisoner confined in a jail**, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. [Emphasis added.]

The plain language of § 1997e(e) thus requires the Court to reject Defendants' position. So does virtually every decision addressing the question, including the best reasoned decisions.

The Sixth Circuit has not directly interpreted the language in § 1997e(e), but, in *Cox v. Mayer*, 332 F.3d 422 (6th Cir.2003), the Court interpreted § 1997e(a) — which also uses the "prisoner confined in jail" language — and the PLRA applies only where the plaintiff is a prisoner at the time suit is instituted:

> As should any court considering the application of a statute, we begin with the plain language of the text. That text is straightforward and unmistakable, and not prone to ambiguity. It reads:
>
> > (a) Applicability of Administrative Remedies
> >
> > No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law by a **prisoner confined in any jail**, prison, or other correctional facility until such administrative remedies as are available are exhausted.
>
> 42 U.S.C. § 1997e(a).
>
> A natural reading of the statute suggests that its application requires consideration of three simple questions. First, is plaintiff "a prisoner confined in [a] jail, prison, or other correctional facility?" If not, the statute is inapplicable. * * * [332 F.3d at 425. Emphasis added.]

The Sixth Circuit continued:

> First — and most significant — even assuming that the statutory purpose may be characterized as plaintiff suggests, because the statute is unambiguous it is inappropriate for us even to consider it. In directing the court's attention to legislative intent, plaintiff overlooks the well-established and long-recognized rule that, where a statute is free of ambiguity, it is to be applied as written. The Supreme Court has instructed ad nauseam: "[I]n interpreting a statute a court should always turn first to

> one, cardinal canon before all others," which is "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." The Court has made clear that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." * * *
>
> The court would note that, while the discrete issue presented by the instant case is one of first impression, its holding today is in keeping with recent Supreme Court and circuit precedent. Significantly, both the Supreme Court and this court have recently declined to carve out exceptions to the plain language of § 1997e(a). [332 F.3d at 226. Internal citations omitted.]

In *Kerr v. Puckett*, 138 F.3d 321, 322-323 (7th Cir. 1998), the Seventh Circuit expressly considered the "physical injury" provision in § 1997e(e) and rejected the position now being advocated by Defendants. Judge Easterbrook, who wrote the *Kerr* opinion, explained:

> Kerr brought the suit after he had been released on parole and was therefore no longer "confined in a jail, prison, or other correctional facility". Nonetheless the district court applied this statute, because "common sense and the overall purposes of the PLRA favor application of § 1997e(e) to actions brought by former prisoners." 967 F.Supp. at 362, quoting from *Zehner v. Trigg*, 952 F.Supp. 1318, 1325 (S.D.Ind.), affirmed on other grounds, 133 F.3d 459 (7th Cir.1997). What sense would it make, the judge wondered, to say that a person may not recover damages for mental injuries while he remained in prison, but may seek that remedy the day after release?
>
> "Common sense" is a treacherous guide to statutory interpretation. One person's "common sense" is another's bête noire. Statutes are compromises among legislators who may hold incompatible conceptions of the public weal. Some legislators opposed the PLRA outright; others wanted more sweeping restrictions on prisoners' litigation; the actual statute satisfied few completely. Instead of relying on "common sense", which is an invitation to treat the law as if one side or the other had its way, a court should implement the language actually enacted — provided the statute is not internally inconsistent or otherwise absurd. *E.g., Salinas v. United States*, 522 U.S. 52, —, 118 S.Ct. 469, 473-74, 139 L.Ed.2d 352 (1997); *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996).
>
> **Section 1997e(e) as enacted is self-consistent and simple to understand.** A "prisoner" cannot bring an action for mental injury unless he has suffered physical injury too. Just in case anyone might be tempted to equate "prisoner" with "ex-prisoner" — to think that "prisoner" refers to the plaintiff's status at the time of the injury rather than at the time the

> litigation begins, *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) — the statute says that its object is a "prisoner confined in a jail, prison, or other correctional facility" (emphasis added). Then there is an explicit definition in § 1997e(h):
>
> > As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.
>
> **The statutory language does not leave wriggle room; a convict out on parole is not a "person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole".** Most sections of the PLRA use the term "prisoner," and we held in *Robbins v. Switzer*, 104 F.3d 895 (7th Cir.1997), that in 28 U.S.C. § 1915(b) this term does not comprehend a felon who has been released. § 1997e(h) shows that the same reading is right for § 1997e. So by waiting until his release from prison Kerr avoided § 1997e(e). *Cf. Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir.1996) (holding with respect to another part of the PLRA that the court must determine the prisoner's status on the date the suit or appeal is "brought" rather than at some other time). [Emphasis added.]

Similarly, in *Harris v. Garner*, 216 F.3d 970, 976-80 (11th Cir.2000) (en banc), the Eleventh Circuit rejected the position now advocated by Defendants:

> The legislative history of the PLRA shows that Congress was concerned with the number of prisoner cases being filed, and its intent behind the legislation was to reduce the number cases filed, which is why Congress made confinement status at the time of filing the decisive factor. [216 F.3d at 978]

See also Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000) (specifically approving *Kerr*); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998) (holding that, because plaintiff was not incarcerated or detained when he filed complaint, PLRA did not apply); *Kelsey v. County of Schoharie*, 2005 WL 1972557 at *1-3 (N.D.N.Y., Aug. 5, 2005) (discussed below); *Gibson v. Kendrick*, 2005 WL 1309161 at *1 (E.D.La., May 19, 2005) (because Gibson was not a prisoner when he brought this suit, the PLRA and its physical injury requirement do not apply); *Billingsley v. Shelby County Dept. of Correction*, 2004 WL 2757915 at *7 n.4 (W.D.Tenn., Nov.

24, 2004) ("However, as the Plaintiff was not incarcerated at the time the complaint was filed, the PLRA does not apply.").

Defendants rely on *Cox v. Malone*, 199 F.Supp.2d 135, 140 (S.D.N.Y. 2002), *aff'd*, 56 Fed.Appx. 43, 2003 WL 366724 (2d Cir. 2002). Second Circuit Rules bars use of the opinion outside the Cox litigation. *See* 2d Cir. R. 0.23, cited in *Kelsey*, at *3.

In *Kelsey*, another district judge in the Second Circuit refused to follow *Cox* on the grounds that (1) the court of appeals' decision was explicitly non-precedential under governing rules and (2) the analysis is incorrect. The *Kelsey* court explained:

> The issue presented here is whether § 1997e(e) applies where plaintiffs were no longer incarcerated when the action was commenced. The plain language of § 1997e(e), the declared purpose of the PLRA, and case law support the conclusion that the limitation of § 1997e(e) is inapplicable where a plaintiff is no longer incarcerated. The plain language of § 1997e(e) limits its applicability to "a prisoner confined in a jail, prison, or other correctional facility." That language clearly limits the provision to individuals who are incarcerated when an action is commenced. There is no dispute here that the named plaintiffs and potential class members were not incarcerated when the action was commenced.
>
> This interpretation of that language is supported by the purpose of the PLRA, which was "to curtail what Congress perceived to be inmate abuses of the judicial process." *Ortiz v. McBride*, 380 F .3d 649, 658 (2d Cir.2004); *see also Greig v. Goord*, 169 F.3d 165, 167 (2d Cir.1999) (finding that the Congressional concern motivating the enactment of the PLRA was that lawsuits had become a "recreational activity for long-term residents of our prisons" and presented "a means of gaining a short sabbatical in the nearest Federal courthouse"). Thus, where, as here, the plaintiffs are not inmates when an action is commenced, the purposes of the PLRA would not be served by application of the statute.
>
> Although the Second Circuit has yet to address the issue, it appears that the two courts of appeals which have considered the issue have drawn the same conclusion. See *Harris v. Garner*, 216 F.3d 970, 976-80 (11th Cir.2000) (en banc) ("Because section 1997e(e) applies only to claims filed while an inmate is confined, it does not prevent a former prisoner from filing after release a monetary damages claim for mental and emotional injury suffered while confined, without a prior showing of physical

injury."); *Kerr v. Puckett*, 138 F.3d 321, 322-23 (7th Cir.1998) (holding that "by waiting until his release from prison Kerr avoided § 1997e(e).").

With two exceptions discussed below, district courts have held the same. *See, e.g., Smith v. Franklin County*, 227 F.Supp.2d 667, 676 (E.D.Ky.2002) (holding that plaintiff who had been released from the county jail before commencing an action concerning the conditions of her incarceration was not bound by the limitations of the PLRA); *Doan v. Watson*, 168 F.Supp.2d 932, 935 (S.D.Ind.2001) (holding that where former inmates filed suit to recover damages based on strip searches conducted by defendants, "[b]ecause Plaintiffs filed their claims following their detention, the PLRA does not require them to produce evidence of physical injury to pursue their claims."); *Lee v. State of New York Dep't of Correctional Servs.*, No. 97 Civ. 7112(DAB), 1999 WL 673339, at *4 & n. 7 (S.D.N.Y. Aug. 30, 1999) ("Moreover, at the time that this suit was filed, Plaintiff's son was no longer even incarcerated, thereby removing him even further from the definition of 'prisoner' under the PLRA.")

Defendants rely on *Cox v. Malone*, 199 F.Supp.2d 135 (S.D.N.Y.2002), *aff'd*, 56 Fed.Appx. 43 (2d Cir.2003). There, a former state prisoner sued state officials alleging the excessive use of force during a search in violation of 42 U.S.C. § 1983. Defendants moved for summary judgment on the ground, inter alia, that the physical injury alleged by plaintiff was de minimis and, therefore, failed to satisfy the physical injury requirement of § 1997e(e). The district court granted the motion, holding that § 1997e(e) applied to plaintiff even though he had been released from custody before commencing the action. The court reasoned that

> Section 1997e(e) . . . is a substantive limitation on the type of actions that can be brought by prisoners. Its purpose is to weed out frivolous claims where only emotional injuries are alleged. This purpose is accomplished whether section 1997e(e) is applied to suits brought by inmates incarcerated at the time of filing or by former inmates incarcerated at the time of the alleged injury but subsequently released. The fortuity of release on parole does not affect the kind of damages that must be alleged in order to survive the gate-keeping function of section 1997e(e). Because plaintiff's suit alleges only emotional injuries, it is barred by the PLRA irrespective of his status as a parolee at the time of filing.

Id. at 140. The Second Circuit affirmed the district court's holding in an unpublished opinion "for substantially the reasons stated in the district court's thorough and well-reasoned opinion." 56 Fed.Appx. 43; *see also Lipton v. County of Orange*, 315 F.Supp.2d 434, 456 & n. 29 (S.D.N.Y.2004) (following *Cox*).

***Cox* does not address the contrary authority discussed above and its rationale appears founded on an analysis not supported by the plain language of § 1997e(e) upon which other courts have relied.** Cox correctly notes that limiting § 1997e(e) to those incarcerated at the time an action is commenced leaves to the "fortuity" of a prisoner's release date whether he or she will fall under or escape § 1997e(e)'s limitations. However, if Congress intended § 1997e(e) to apply to prisoners released from custody when an action is commenced, statutory language to accomplish this end was available. The language chosen by Congress in § 1997e(e) plainly limited its applicability to prisoners incarcerated at the time an action is commenced, was consistent with the purposes of the PLRA, and such Congressional determination and intent are not unreasonable.

The *Cox* decision, of course, does not constitute binding precedent for this Court. Were it simply a matter of analyzing the *Cox* decision in light of the *Kerr* line of cases addressing the scope of § 1997e(e), the *Kerr* line of cases holding that the plain meaning of the language in § 1997e(e) limits its applicability to prisoners incarcerated at the time an action is commenced is most persuasive. The Second Circuit's affirmance described that decision as "thorough and well-reasoned." That affirmance, however, was unpublished and by Second Circuit rule, may not be cited as authority outside the *Cox* litigation. See 2d Cir. R. 0.23. Thus, the question becomes whether the Second Circuit's unpublished affirmance of *Cox* should lead a court in these circumstances to follow *Cox*.

For at least two reasons, it does not. First, Second Circuit Rule 0.23, restated on the *Cox* affirmance, explicitly limits the precedential value of the affirmance to the *Cox* case itself and bars its use in this and other cases. That rule should be followed unless and until the Second Circuit directs otherwise. Second, neither *Cox* nor the Second Circuit have directly considered or addressed the *Kerr* line of cases and their compelling rationale. Accordingly, for the reasons discussed above, the rationale of the Kerr line of cases is adopted. **Because plaintiffs were not incarcerated at the time this action was commenced, § 1997e(e) is inapplicable and the defense which the County seeks to add in its proposed amended answer would be futile. Therefore, the County's motion to file and serve an amended answer is denied.**

CONCLUSION

The plain language of the PLRA compels the conclusion that the PLRA and its physical injury requirement do not bar Plaintiffs' claims for relief. Therefore, the Court should reject Defendants' motion to add PLRA affirmative defenses because the amendment would be futile.

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Dated: November 10, 2005
KH073535

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2005, I electronically filed the foregoing

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING PLRA

with the Clerk of the Court for the Eastern District of Michigan using ECF system which will send notification of such filing to the following registered participants of the ECF system as listed on the Court's Notice of Electronic Filing:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

NONE

/s/ Stephen Wasinger

STEPHEN WASINGER