Served 12/30/02 ANT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ELIZABETH GONZALEZ, MICHAEL FYVIE and CHARLES FRISBEE,

Plaintiffs,

-against- 1:00-CV-0824

THE CITY OF SCHENECTADY, RICHARD BARNETT, MICHAEL SILER, THOMAS MATTICE, MICHAEL GLASSER, MARISELA MOSHER, WILLIAM LACHANSKI, and ERIC HESCH, Individually and as Agents, Servants and/or Employees and Police Officers of the City of Schenectady and the City of Schenectady Police Department, and "JOHN DOE" and "JANE DOE," Individually and being Unnamed Agents, Servants and/or Employees and Police Officers of the City of Schenectady and the City of Schenectady Police Department,

Defendants.

DECISION & ORDER

McAvoy, D.J.

I. BACKGROUND

Plaintiffs commenced the instant action pursuant to 42 U.S.C. § 1983 alleging violations of their Fourth and Fourteenth Amendment rights arising out of their alleged arrests, detainments, and strip searches by defendants. Plaintiffs also asserted various supplemental state law causes of action.

In a Memorandum Decision and Order entered on April 5, 2001,

[Dkt. # 51], this Court granted partial summary judgment in favor of Plaintiff Michael Fyvie as to his claim against the City of Schenectady alleging that he was strip searched in violation of his Fourth Amendment rights pursuant to an unconstitutional strip search policy. The Court denied Plaintiff Gonzales' motion and Defendants City of Schenectady, Thomas Mattice, Michael Glasser, Marisela Mosher, William Lachanski, and Eric Hesch's cross-motion for summary judgment pursuant to Rule 56 on that same issue. In a separate Decision and Order dated September 14, 2001, [Dkt. # 86] the Court determined, *inter alia*, to sever the claims of Mr. Frisbee from the other plaintiffs' claims pursuant to Rule 21 of the Federal Rules of Civil Procedure.

The claims of Plaintiffs Gonzalez and Fyvie were tried together to a jury in April, 2002.[1] On plaintiff Michael Fyvie's Section 1983 and state common law claims of false arrest, the jury found no cause of action in favor of defendant Michael Glasser. Likewise, the jury found no cause of action in favor of defendant Michael Glasser on Fyvie's state common law claim of battery. However, as indicated above, in a Memorandum, Decision and Order dated April 5, 2001, the Court ruled as a matter of law that the City of Schenectady had a unconstitutional policy related to strip searching pre-trial detainees charged with misdemeanor and minor

[1] Inasmuch as Plaintiff Gonzalez's jury award is not the subject of this motion, the jury's determination as to her claims are not set forth in this Decision and Order.

offenses, and that plaintiff Michael Fyvie had been strip searched based upon this policy in violation of his constitutional rights. At trial, the Court determined as a matter of law that defendants Marisela Mosher and Thomas Mattice were also legally responsible for any actual damages that arose from this strip search based upon their participation therein. The jury further determined that defendant William Lachanski was legally responsible for any actual damages that arose from the strip search under a theory of supervisory liability. The jury awarded plaintiff actual damages in the amount of $75,000.00 arising from his illegal strip search, and further awarded Fyvie punitive damages in the amount of $2,500.00 against defendant Marisela Mosher and $10,000.00 against defendant William Lachanski. The jury found no basis to award punitive damages against defendant Thomas Mattice on this claim.

II. Discussion

Defendants now move pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure seeking judgment as a matter of law, a new trial, or remittitur. Defendants focus their arguments exclusively on the damage awards obtained by plaintiff Fyvie, arguing that the compensatory damages were excessive and that the punitive damages were not supported by the evidence at trial. Plaintiff Fyvie opposes the motion.

A. Legal Standards

1. Rule 50

"In this Circuit, a party seeking to vacate a jury verdict and enter judgment as a matter of law carries a 'heavy burden.'" Tesser v. Board of Educ. of City School Dist. of City of New York, 190 F.Supp.2d 430, 436 (E.D.N.Y. 2002)(citing Burke v. Spartanics Ltd., 252 F.3d 131, 136 (2d Cir. 2001); Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135, 142 (2d Cir. 2000)). "A motion for [JMOL] pursuant to FED. R. CIV. P. 50, may not properly be granted unless: (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [it]." Myers v. County of Orange, 157 F.3d 66, 73 (2d Cir. 1998) (internal quotations and citation omitted), cert. denied, 525 U.S. 1146 (1999).

"In ruling on a motion for JMOL, the trial court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." Tolbert v. Queens

College, 242 F.3d 58, 70 (2d Cir. 2001) (citation omitted). In reviewing the evidence, the Court should consider everything in the record, however, "it *must disregard all evidence favorable to the moving party that the jury is not required to believe*. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. (citation omitted) (emphasis in original).

2. Rule 59

Rule 59 of the Federal Rules of Civil Procedure provides that "[a] new trial may be granted ... for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The Second Circuit has interpreted this standard to permit the granting of new trials when "in the opinion of the district court, the jury has reached a seriously erroneous result or ... the verdict is a miscarriage of justice." DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124, 133 (2d Cir. 1998) (quotation marks and citation omitted). "A new trial may be granted, therefore, when the jury's verdict is against the weight of the evidence." Id.

"Unlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence supporting the jury's verdict. Moreover, a trial judge is free to weigh the evidence

himself, and need not view it in the light most favorable to the verdict winner. A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is egregious." Id. (internal citations and quotations omitted). Therefore, "a court should rarely disturb a jury's evaluation of a witness's credibility." Id. (internal citations and quotations omitted).

3. Remittitur

Remittitur is the "process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990). "The doctrine of remittitur recognizes that, although it is within the jury's discretion to compute damages, there is an upper limit, and whether that has been surpassed is a question of law, not fact." Kelleher v. New York State Trooper Fearon, 90 F.Supp.2d 354, 363 (S.D.N.Y. 2000)(citations omitted).

"The trial judge has 'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence. ... This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).'" Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 165 (2d Cir. 1998)(quoting Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)). The

district court "has authority to enter a conditional order of remittitur ... where the award is intrinsically excessive in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error." Id. (internal quotation marks and citations omitted). Here, there is no allegation by the defendants of any particular discernable error. Thus, in these circumstances, the jury's damage award may not be set aside as excessive unless "'the award is so high as to shock the judicial conscience and constitute a denial of justice.'" Id. (quoting O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir. 1988)).

When the challenged claim arises under only federal law, as does Fyvie's claim, the Court may take guidance as to whether the award shocks the conscience by comparing the award to other cases presenting similar circumstances.[2] See Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43, 56 (2d Cir. 2002); Lee v. Edwards, 101 F.3d 805, 812 (2d Cir. 1996); Rodick v. City of Schenectady, 856 F.Supp. 105, 109 (N.D.N.Y.

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[2] While a court should apply federal law in determining the excessiveness of a damages award on a federal cause of action, when a claim arises under New York Law, it is the law of that state that governs the excessiveness of a jury damage award. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 430-31 (1996); Morales v. City of New York, 2001 WL 8594, at *3 fn.2 (S.D.N.Y. Jan. 2, 2001). New York law applies a stricter standard to a court's review of a jury's damages award, instructing a court to determine whether the award "materially deviates from what would be reasonable compensation." N.Y. Civ. Prac. Law & Rules § 5501(c); see also Consorti v. Armstrong World Indus., 72 F.3d 1003, 1011 (2d Cir. 1995), vacated on other grounds, 518 U.S. 1031 (1996) (New York standard is "less deferential to the jury's verdict than the federal standard").

1994)(McAvoy, J.). However, reliance placed too heavily on a comparative analysis has been subjected to criticism, especially when the damages are wholly from emotional distress, as are the damages here. See Thomas v. Texas Dept. of Criminal Justice, 297 F.3d 361, 376 (5th Cir. 2002)(Dennis, J., concurring)(discussed *infra*).

If the Court determines that the jury's award is excessive, "it may grant a defendant's motion for a new trial in whole or limited to damages, or it may grant remittitur by conditioning denial of a defendant's motion for a new trial on a plaintiff's accepting damages in a reduced amount." Noga v. Potanza, 221 F.Supp.2d 345, 351 (N.D.N.Y. 2002)(Homer, M.J.)(citing Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 96 (2d Cir. 1995); Tanzini v. Marine Midland Bank, 978 F.Supp. 70, 77 (N.D.N.Y. 1997)(McAvoy, C.J.)). In such cases, "[the] district court should remit the jury's award only to the maximum amount that would be upheld by the district court as not excessive." Earl, 917 F.2d at 1330; see Ragona v. Wal-Mart Stores, Inc., 62 F.Supp.2d 665, 668 (N.D.N.Y. 1999)(McAvoy, J.)(a reduced award should represent "the maximum award that would not be excessive"), aff'd, 210 F.3d 355 (2d Cir. 2000).

B. Parties' Arguments regarding compensatory damages

Defendants have cited to cases involving Section 1983 strip search claims performed pursuant to an unconstitutional policy in

which: (1) the Second Circuit upheld a $1 award of nominal damages, Shain v. Ellison, 273 F.3d 56, 67 (2d Cir. 2001); (2) a jury awarded $19,645 in compensatory damages, Ciraolo v. City of New York, 216 F.3d 236 (2d Cir. 2000); and (3) the United States District Court for the Southern District of New York ordered remittitur from the jury's award of $125,000 to $25,000. Kelleher v. Fearon, 90 F.Supp.2d 354 (S.D.N.Y. 2000). Defendants argue that Plaintiff Fyvie has been subjected to no greater emotional damage than any of the other plaintiffs subjected to a strip search in the cited cases, and therefore the award is excessive.

Plaintiff argues that while Kelleher represents one end of the spectrum, there are numerous cases which have awarded substantially more than awarded to Mr. Fyvie for emotional distress. Some of the case cited by the plaintiff do not deal with strip searches, see Sulkowska v. City of New York, 129 F.Supp. 2d 274 (S.D.N.Y. 2001)(in non-jury trial, court awards $275,000 for "significant emotional injury which has required treatment" arising from false arrest, battery, and malicious prosecution by police); Noga v. Potanza, 99-CV-0941 (N.D.N.Y. 2002)(Homer, M.J.)(jury awards $235,000 from mainly emotional distress arising from false arrest and malicious prosecution), while the ones that do address strip searches are not from this Circuit. See, e.g., Joan W. v. City of Chicago, 771 F.2d 1020, 1025 (7th Cir. 1985)(holding reasonable a $75,000 award for a strip-search pursuant to a traffic stop); Mary

Beth G. v. City of Chicago, 723 F.2d 1263, 1276 n. 11 (7th Cir. 1983)(giving a range of $15,000 to $112,500 in strip-search cases).

C. Emotional Distress Damages

It is well-established that courts may award emotional distress damages in section 1983 cases. Miner v. City of Glens Falls, 999 F.2d 655, 662 (2d Cir. 1993). However, "the mere fact that a constitutional deprivation has occurred does not justify the award of [compensatory] damages; the plaintiff must establish that she suffered an actual injury caused by the deprivation." Patrolmen's Benevolent Ass'n., 310 F.3d at 55 (citing Carey v. Piphus, 435 U.S. 247, 263-64 (1978)). Here, there is no dispute that Plaintiff Fyvie's damages derive wholly from the emotional distress he contends he suffered by being subjected to the unconstitutional strip search. Thus, the first question to address is whether the plaintiff has adequately supported his compensatory damages award, or whether he is entitled to only nominal damages.

In this Circuit, a "plaintiff's testimony of emotional injury must be substantiated by other evidence that such an injury occurred, such as the testimony of witnesses to the plaintiff's distress, or the objective circumstances of the violation itself." Patrolmen's Benevolent Ass'n., 310 F.3d at 55 (citations omitted). Evidence that a plaintiff has sought medical treatment for the emotional injury is not necessarily required. Id. (citing Miner, 999 F.2d at 663).

At trial, plaintiff offered his own subjective testimony regarding his emotional distress damages, as well as that of his father. Fyvie testified that he felt humiliated by the strip search, was embarrassed to tell his parents the circumstances, and felt frightened to be in public places within the City of Schenectady for fear that he would be arrested and stripped searched again. Fyvie's father testified to the outwardly apparent manifestations of Fyvie's distress, including the father's observation that his son became sullen and uninterested in socializing with friends.

The actual damage award is supported by competent evidence of the nature that this Circuit has found sufficient to sustain some compensatory damages arising from the unconstitutional act. See Id.; Annis v. County of Westchester, 136 F.3d 239, 249 (2d Cir. 1998). Thus, there is no basis to strike the actual damage awarded or to impose only nominal damages. The more narrow question raised on this motion is whether the amount of these damages is excessive.

D. Excessiveness of Actual Damage Award

One of the more recent cases relied upon by the plaintiff as representing the upper range of justifiable emotional distress awards, Noga v. Potanza, 99-CV-0941 (N.D.N.Y. 2002)(Homer, M.J.), was itself subjected to a remittitur decision decided after plaintiff submitted his papers on this motion. See Noga v. Potanza,

221 F.Supp.2d 345 (N.D.N.Y. 2002).[3] The Noga decision underscores the fact that each damage award must be assessed for excessiveness based upon the facts of the case, including the particularities of the plaintiff and the circumstances surrounding the constitutional deprivation in issue.[4] The standard is whether the award shocks the judicial conscience. This standard contemplates a weighing of the character and strength of the evidence of damages and the effects on the plaintiff before the court. Other plaintiff's awards are only a point of reference.

Indeed, when addressing emotional injuries, a comparative analysis using other similar constitution violations has a somewhat limited utility because the emotional impact of a particular

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[3] In Noga, Magistrate Judge Homer determined that the award of $235,000 for the emotional distress arising from plaintiff's false arrest and malicious prosecution was excessive and should be reduced to $91,500 upon acceptance of a remittitur. Id. at 357-59. The $91,500 amount represents $40,000.00 for false arrest and $51,500 for malicious prosecution. Id. at 359. Mr. Noga paid his attorney $1,500.00 in attorney's fees, and therefore it appears that the additional $50,000.00 on the malicious prosecution claim was for emotional distress arising from the prosecution.

[4] As Magistrate Judge Homer noted, Mr. Noga, was born in Poland in 1935 and emigrated to the United States in 1965, becoming a citizen in 1970. Id. at 357. On the day of his arrest, Noga was preparing for a birthday party for his son. Id. He was directed to accompany a New York State Police Officer to the State Police station where he was photographed, fingerprinted and then transferred to Defendant Potenza's custody. Id. He was placed in a cell in the City of Schenectady Jail and held overnight. Id. Apparently, the cell was dirty and unsanitary, and the constant noise in the jail kept Noga from sleeping that night. Id. at 357-58. "During the night, Noga recalled how his father had been arrested in Poland when Noga was twelve and held in custody for two weeks." Id. at 358. Noga was released in the afternoon of the next day and, although prosecuted, made no personal appearances in court. Id. "Noga offered no evidence that, for example, he ever suffered loss of sleep or nightmares after the night in jail, that he ever sought or received treatment for mental or medical problems caused by the arrest or prosecution, or that he suffered any physical injury, loss of reputation, inconvenience or any other such injury." Id.

situation on specific person is a result of a constellation of factors including the actual conduct that occurred during the constitutional deprivation, the psychological make-up of the plaintiff before the incident, and the ability of the plaintiff to deal with the situation to which he or she has been subjected. See Thomas v. Texas Dept. of Criminal Justice, 297 F.3d 361, 376 (5th Cir. 2002)(Dennis, J., concurring).[5] Different people subjected to similar conduct can react in considerably different ways. Thus, the justifiable damages awarded to each for their emotional distress would necessarily be different.

Here, the jury's award indicates that at the time of the strip search, Plaintiff Fyvie, a college-aged male, was lawfully in custody. He testified that he was very distressed by the fact that he was strip searched and that a female matron was present during the search. Plaintiff further testified that he was humiliated and embarrassed by both the strip search the fact that he was taunted and insulted by the female defendant during the strip search.

In addressing a similar claim, Judge McMahon in the Kelleher

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[5] As Fifth Circuit Judge Dennis noted in his concurring opinion in Thomas v. Texas Dept. of Criminal Justice, 297 F.3d 361, 376 (5th Cir. 2002)(Dennis, J., concurring), the assessment of damages for emotional distress is so fact-driven and so largely a matter of judgment derived from weighing the character and strength of the evidence presented in each case that it does not yield itself to a comparison of prior written decisions which are devoid of the demeanor of the witnessess and the atmospher of the court room upon which the jury relied in reaching its verdict. Id. ("Without more insight into the nature and quality of [the] testimony [from a prior case], ... [and] [u]nless we aim to create an award schedule for intangible injuries like sleeplessness, marital difficulties, and loss of prestige, I see no way of determining whether a subsequent award is excessive based on the factual summary provided in [a prior case].").

case noted that the plaintiff in that case did not produce any evidence of medical treatment or other professional expenses related to his claim of emotional distress, finding that "[t]he award of $125,000 is clearly excessive given the lack of corroborating medical testimony concerning Plaintiff's emotional distress." Kelleher, 90 F.Supp.2d at 364. However, Judge McMahon noted that

> an unlawful strip search, in and of itself, is an egregious violation of Plaintiff's constitutional right to be free from unwarranted government intrusion of his person. Moreover, Plaintiff testified that he was touched during the search by Trooper Fearon, which is contrary to State Police policy for conducting a strip search. I therefore cannot find that Plaintiff is entitled to no damages.

Id.

After reviewing other damage awards in numerous other strip search cases in other Circuits, including the case primarily relied upon by the plaintiff here, Judge McMahon concluded that remittitur to $25,000.00 was in order. Id.

Plaintiff in this case argues that the presence of the female defendant during his strip search together with the insults and taunting that occurred during search constitutes "aggravating circumstances" such to bring this case out the realm of Kelleher and into the realm of Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985). The Court does not agree.

Joan W. involved a physician in her mid-thirties practicing in Chicago who was arrested for a traffic violation on January 28,

1978. Joan W., 771 F.2d at 1021. Pursuant to a City policy that was subsequently declared unconstitutional by the court, five female police department employees ("the matrons") strip searched her. Id. The Seventh Circuit's decision described the procedure of the search, the particulars of the plaintiff, and the search's psychological impact on the plaintiff.[6] After reviewing the particulars of eight other cases from the Northern District of Illinois which were tried before juries, the Joan W. Court reversed the district court and remanded the case with directions to hold a new trial unless plaintiff accepted the entry of a remittitur reducing the award from $112,000 to $75,000.[7] In doing so, the

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[6] In this regard, the Seventh Circuit decision in Joan W. indicated:

> During the search, Joan was forced to remove her clothing and to expose the vaginal and anal areas of her body. The matrons threatened her when she initially refused to comply, used vulgar language, and laughed at her. Joan testified that the incident caused her emotional distress that manifested itself in reduced socializing, poor work performance, paranoia, suicidal feelings, depression, and an inability to disrobe in any place other than a closet. She introduced evidence tending to show that she was peculiarly sensitive to the kind of physical violation she had endured because she was a private person who even during high school gym classes could not completely disrobe in front of others and was conscious of her physical disabilities caused by her chronic arthritis.

Joan W., 771 F.2d at 1021-22.

[7] In addressing the argument on appeal that the award of $112,000 for Joan W's damages was excessive, the Seventh Circuit noted that the applicable test was "severe," and cited the precedent in that circuit that allowed a trial judge to vacate a jury verdict for excessiveness only if it is "monstrously excessive" or if there is "no rational connection between the evidence on damages and the verdict," and that "appellate review is governed by the extremely limited abuse of discretion standard." Id. (citations omitted). The Court then explained that the test, like in New York, also required comparison with other similar cases. Id.

Seventh Circuit noted that the $112,000 award was "flagrantly extravagant and out of line with the other strip search cases." Id. The Seventh Circuit continued, stating that "[h]owever reprehensible the City's conduct, the jury does not have discretion to award what are essentially punitive damages where no punitive damages are pled or permitted." Id. (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)(municipalities are immune from punitive damages in section 1983 actions)).

Here, while the plaintiff and his father did testify to the emotional distress that arose for the strip search, it was not of the magnitude realized by the plaintiff in Joan W. There was no indication of suicidal thoughts, poor work performance, or other substantial effects on Fyvie's life beyond his humiliation and reduced socialization. Further, unlike in Joan W. or Noga, the facts of this case do not demonstrate that plaintiff had any particular sensitivity to the kind of physical violation he endured which would warrant any increased damage award.

While the Second Circuit has held that emotional distress damages can properly range from $1.00 upwards to almost $600,000.00, see Patrolmen's Benevolent Ass'n., 310 F.3d at 56, the claims for emotional damages that exceed $40,000.00 involve either long-term harassment, Phillips v. Bowen, 278 F.3d 103, 111-12 (2d Cir. 2002), or extreme conduct causing severe emotional distress. Hughes v. Patrolmen's Benevolent Ass'n of New York, Inc., 850 F.2d

876, 884 (2d Cir. 1988). This is not such a case.

Having viewed the evidence as it was presented, and having had the opportunity to weigh it and access the character and severity of the plaintiff's damages, the Court is left with the firm conviction that the jury's award of $75,000.00 to the plaintiff for the type and magnitude his emotional distress damages was excessive. While the type of search performed here constitutes a great human indecency,[8] $75,000 for the ensuring emotional damages realized by this plaintiff shocks the Court's conscious. The upper end of the scale for the type and magnitude of emotional distress damages suffered by plaintiff is $40,000. Therefore, the defendants' motion for a new trial on the issue of Fyvie's actual damages is granted unless Fyvie files and serves a written acceptance of remittitur of the award of actual damages on his strip search claim to $40,000 on or before January 28, 2003.

E. Punitive Damages

Regarding the punitive damages awarded, the defendants argue that the plaintiff failed to present proof that defendants Lachanski or Mosher were maliciously motivated in participating in the strip search, or that either acted recklessly or with callous indifference to the federally protected rights of others. The Court disagrees.

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[8] In his dissent in Bell v. Wolfish, 441 U.S. 520, 594 (1979) (Stevens, J., dissenting), Justice Stevens described body cavity searches as "clearly the greatest personal indignity."

From the evidence presented regarding the surrounding circumstances of the strip search, the jury could well have found sufficient facts to establish both defendants' malicious motives and culpable state of mind. See Smith v. Wade, 461 U.S. 30, 46 (1983)(Punitive damages are available in a section 1983 case "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."). The very fact that defendant Mosher, a female, was present during the strip search could establish the requisite elements for a punitive damage award against both Mosher and Lachanski, the supervisor. It is quite possible that the jury determined that the presence of a female during the degrading situation was intended solely for the purpose of increasing Fyvie's humiliation. Further, the jury could well have drawn their conclusions as to maliciousness and the culpable state of mind of each defendant based upon the defendant's knowledge and acquiescence of what was occurring, and/or from the insults that were hurled at the plaintiff during the search.

There is no basis to vacate the punitive damage awards as the defendants argue. Further, as plaintiff argues, the punitive damage awards cannot be deemed excessive especially in these circumstances where the defendants put on no evidence in mitigation of punitive damages. See Lee v. Edwards, 101 F.3d 805, 808-09 (2d Cir. 1996); Mathie v. Fries, 121 F.3d 808, 816 (2d Cir. 1997). There is no

reason to disturb the jury's determination as to punitive damages.

III. CONCLUSION

For the reasons discussed above, the defendants' motion [133-1] is **granted in part and denied in part.** The defendants' motion for a new trial on the issue of Fyvie's actual damages is **granted** unless Fyvie files and serves a written acceptance of remittitur of the award of actual damages on his strip search claim to $40,000 on or before January 28, 2003. The motion is **denied** in all other respects.

IT IS SO ORDERED.

DATED: December 28, 2002

Hon. Thomas J. McAvoy
U.S. District Judge