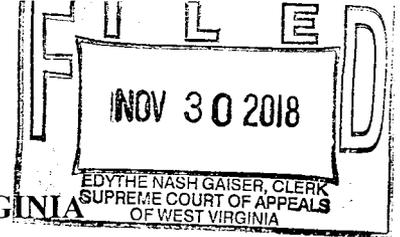


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PETER LUNSFORD, FRANKLIN KELLY
AND LLOYD ERWIN,**

Petitioners,

v.

**No. 18-0595
(Civil Action No. 16-C-156/17-C-155)**

CHRISTOPHER SHY,

Respondent.

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE1

 A. UNDERLYING FACTUAL BACKGROUND.....1

 B. PROCEDURAL BACKGROUND1

III. SUMMARY OF ARGUMENT3

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION4

V. STANDARD OF REVIEW4

VII. ARGUMENT4

 A. THE TRIAL COURT ERRED IN ALLOWING PUNITIVE DAMAGES TO
 BE RECOVERED WITHOUT AN AWARD OF COMPENSATORY OR
 NOMINAL DAMGES.....4

 B. THE TRIAL COURT ERRED IN ITS FAILURE TO APPLY THE
 PROVISIONS OF THE PRISON LITIGATION REFORM ACT TO
 PETITIONERS LUNSFORD AND KELLY8

VII. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Basista v. Weir</i> , 340 F.2d 74 (3d Cir. 1965)	6, 7
<i>Cowick v. Glen Campbell Det. Ctr.</i> , No. 5:17-cv-03001-JFA-KDW, 2018 U.S. Dist. LEXIS 20857	6
<i>Fredeking v. Tyler</i> , 224 W. Va. 1, 680 S.E.2d 16 (2009)	4
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W.Va. 656, 413 S.E.2d 897 (1991)	4, 6
<i>Givens v. O'Quinn</i> , 447 F. Supp. 2d 593 (W.D. Va. 2006)	6
<i>King v. Marci</i> , 993 F.2d 294 (2d Cir. 1993)	7
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993)	5
<i>Monessen S. W. Ry. Co. V. Morgan</i> , 486 U.S. 330 (1988)	7
<i>Montcalm Publ. Corp. v. Virginia</i> , 199 F.3d 168 (4 th Cir. 1999)	8, 9, 10
<i>People Helpers Found. v. City of Richmond</i> , 12 F.3d 1321 (4th Cir. 1993)	5, 6
<i>Watts v. Laurent</i> , 774 F.2d 168 (7th Cir. 1985)	5

Rules

Rule 19 of the <i>West Virginia Rules of Appellate Procedure</i>	4
Rule 21(d) of the <i>West Virginia Rules of Appellate Procedure</i>	4

Statutes

42 U.S.C. § 1997e	3, 5, 6, 7, 8, 9, 10
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1. ASSIGNMENTS OF ERROR

Assignment of Error #1: Whether the trial court erred in allowing punitive damages to be recovered without an award of compensatory or nominal damages?

Assignment of Error #2: Whether the trial court erred in its failure to apply the provisions of the prison litigation reform act to Petitioners Lunsford and Kelly?

2. STATEMENT OF THE CASE

A. Underlying Factual Background

The underlying factual predicate to the lawsuit is not significant to the resolution of the legal issues presented in this case. However, for context, this lawsuit arises out of an incident which occurred at Western Regional Jail (hereinafter “WRJ”) on August 23, 2015. A.R.0024-0025, at ¶2. Respondent Christopher Shy (hereinafter “Inmate Shy”) alleges that Petitioners Peter Lunsford, Franklin Kelly, and Lloyd Erwin (hereinafter collectively “Correctional Officer Defendants”), used excessive force against him so as to violate his 14th Amendment rights under the United States Constitution, as well as various common law tort claims. *See generally* A.R.0024-0034. More specifically, Inmate Shy alleged that Correctional Officer Defendants Inmate Shy into a visitation room shackled and then “beat” him “about the face, neck and other body parts.” A.R.0024-0025, at ¶2. Correctional Officer Defendants denied the allegations.

B. Procedural Background

On February 29, 2016, while incarcerated, Inmate Shy commenced Civil Action Number 16-C-156 by filing a lawsuit against the Correctional Officer Defendants and the West Virginia Regional Jail and Correctional Facility Authority (“WVRJA”). A.R.0001-0003. By Order of the trial court, on December 8, 2016, Correctional Officer Defendants Lunsford and Kelly were dismissed from Civil Action Number 16-C-156 because Inmate Shy failed to timely serve these

individuals. A.R.0035. As a result, on March 8, 2017, Inmate Shy filed a subsequent Complaint against the same parties, this one bearing Civil Action Number 17-C-155. A.R.0036-0053. At the time of the filing of Civil Action Number 17-C-155, Inmate Shy was not housed in a traditional correctional facility.¹ A.R.0006. Service of Process was obtained on Correctional Officer Defendants Lunsford and Kelly in Civil Action Number 17-C-155. A.R.0006. Ultimately, on July 19, 2017, Civil Action Number 17-C-155 was consolidated with Civil Action Number 16-C-156. A.R.0054-0055. The trial court stated, in an Order drafted by Inmate Shy, “the consolidated action shall proceed under the Complaint filed in Civil Action No. 16-C-156, that all pleadings filed after the date of entry of this Order shall be filed in Civil Action No. 16-C-156” A.R.0055. In effect, Civil Action Number 17-C-155 was merely a vehicle to effectuate service against Correctional Officer Defendants Lunsford and Kelly.

On December 5, 2017, the matter proceeded to a jury trial, which lasted three days. At the close of the evidence, Correctional Officer Defendants moved for judgment as a matter of law. A.R.0006. This motion was denied. A.R.0006. After deliberations, the Jury returned a verdict finding that Correctional Officer Defendants Lunsford, Kelly and Erwin used excessive force on Inmate Shy in violation of his Fourteenth Amendment Rights under the United States Constitution and that the same defendants committed the civil tort of battery. A.R.0056-0059. The Jury did not find liability on any remaining claim. A.R.0056-0059. The Jury, however, did find that Inmate Shy suffered damages as a proximate result of the conduct of Correctional Officer Defendants, but awarded zero dollars for compensatory damages. A.R.0056-0059. Finally, the Jury found punitive damages were appropriate and awarded punitive damages payable by Correctional Officer Defendants and assessed against each, the amount of \$1,500, totaling \$4,500. A.R.0056-0059.

¹ There is confusion as to whether Inmate Shy was participating in a community correctional program or whether he was a fugitive from custody at the time of the filing of Civil Action Number 17-C-155.

Prior to dismissing the Jury, counsel for Inmate Shy requested the Jury be ordered to return to deliberation to award nominal damages. A.R.0056-0059. This request was denied. A.R.0056-0059.

Thereafter, on December 18, 2017, Correctional Officer Defendants filed their Rule 50(b) motion for judgment as a matter of law. Subsequent, on March 26, 2018, the trial court entered a Judgment Order. A.R.0056-0059. In connection with the entry of the Judgment Order, Correctional Officer Defendants filed a Rule 59(e) motion for a new trial and a Rule 50(e) motion to alter or amend the Judgment Order. A.R.0095-0111. These motions, along with the Rule 50(b) motion for judgment as a matter of law, were denied. A.R.0004-0023.

3. SUMMARY OF ARGUMENT

The trial court erred when it allowed an award of punitive damages to stand absent an award of compensatory damages. The trial court, relying on federal law, due to the liability found related to a claim brought pursuant to 42 U.S.C. § 1983, relied upon non-Fourth Circuit precedent in sustaining the verdict. However, the Fourth Circuit, in line with the reasoning of this Court, precludes the recovery of punitive damages absent an award of compensatory damages. Because the trial court ignored this precedent and the trial court's holding will create disharmony in West Virginia regarding the recovery of punitive damages absent an award of compensatory damages, the trial court's ruling should be overturned.

The trial court also erred in its failure to apply the Prison Litigation Reform Act limitations to Correctional Officer Defendants Lunsford and Kelly. There is no dispute that Civil Action Number 16-C-156 was "brought by" a prisoner. Because the subsequent matter was consolidated with the action "brought by" a prisoner, the Prison Litigation Reform Act applies to all parties. This position was affirmed by the Fourth Circuit Court of Appeals. Finally, public policy would

dictate that Correctional Officer Defendants Lunsford and Kelly should not be prejudiced by Inmate Shy's failure to timely serve these individuals. As a result, the trial court's ruling should be overturned.

4. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Correctional Officer Defendants assert that oral argument is necessary and appropriate, pursuant to the criteria set forth in Rule 19 of the *West Virginia Rules of Appellate Procedure*. Correctional Officer Defendants further asserts that this matter may be appropriate for memorandum decision pursuant to Rule 21(d) of the *West Virginia Rules of Appellate Procedure*.

5. STANDARD OF REVIEW

The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* is *de novo*. Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

6. ARGUMENT

A. THE TRIAL COURT ERRED IN ALLOWING PUNITIVE DAMAGES TO BE RECOVERED WITHOUT AN AWARD OF COMPENSATORY OR NOMINAL DAMAGES.

The trial court correctly ruled that, under West Virginia law, when a jury does not award compensatory damages, a plaintiff may not recover punitive damages. A.R.0010-0011; *see also* Syl. Pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). The trial court, however, incorrectly ruled that under federal common law, an award of punitive damages may stand absent an award of compensatory damages. A.R.0014. In reaching this conclusion, the trial court relies exclusively on case law from outside of the United States Courts of Appeals for the Fourth Circuit and ignores the case law of the Fourth Circuit. This is improper, as it creates disharmony. Therefore, the trial court erred.

There is no dispute the Jury found in favor of Inmate Shy on the question of whether Correctional Officer Defendants used excessive force in violation of the Fourteenth Amendment to the United States Constitution, claim brought pursuant to federal law, 42 U.S.C. § 1983. A.R.0056-0058. Further, there is no dispute that the Jury awarded zero dollars for compensatory damages. A.R.0056-0058. However, the Jury did award punitive damages against the Correctional Officer Defendants. A.R.0056-0058. While state law would apply to the state law claims, federal law applies in analyzing the issue of whether a punitive damage award may be sustained in the absence of an award of compensatory damages pursuant to 42 U.S.C. § 1983. *See Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985) (“Federal common law principles of tort and damages govern recovery under section 1983.”); *see also* A.R.0011. As West Virginia sits in the United States Courts of Appeals for the Fourth Circuit, Fourth Circuit precedent should control in this matter.²

The Fourth Circuit has specifically held, “Thus, we are persuaded by the law of a majority of the states, the reasoning behind the law, and the federal case law applying the rule in the absence of statutory language to the contrary that punitive damages are not recoverable [without an award of compensatory damages].” *People Helpers Found. v. City of Richmond*, 12 F.3d 1321, 1327 (4th Cir. 1993). The Fourth Circuit reasoned:

[T]he belief that punitive damages are not appropriate in cases where a plaintiff has failed to demonstrate actionable harm. *See* James A. Ghiardi & John J. Kircher, *Punitive Damages: Law and Practice*, § 5.37 (1985 and Supp. 1993). When a plaintiff has failed to prove actionable harm, compensatory damages are not recoverable and logically it follows that punitive damages are also barred. To

² While Justice Clarence Thomas has opined that “[N]either federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation[.]” *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J. concurring), it logically follows that this Court would want to be consistent with the Fourth Circuit when the U.S. Supreme Court has not ruled on a particular issue. Otherwise, significant disharmony would occur for claims brought pursuant to a federal statute within West Virginia depending upon whether it was filed in state court or federal court.

hold otherwise would create a windfall by allowing the recovery of damages when no actionable harm has been suffered.

People Helpers, 12 F.3d at 1327. This is consistent with this Court's position on punitive damages. Specifically, this Court stated "Punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's actions and that generally means that punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm." *Garnes*, 186 W. Va. at 667, 413 S.E.2d at 908.

Finally, the Fourth Circuit's holding in *People Helpers* has been followed by courts within the Fourth Circuit to preclude the recovery of punitive damages where there has been no award of compensatory damages in 42 U.S.C. § 1983 claims. *See e.g. Cowick v. Glen Campbell Det. Ctr.*, No. 5:17-cv-03001-JFA-KDW, 2018 U.S. Dist. LEXIS 20857, at *6 (D.S.C. Jan. 3, 2018) (precluding recovery of punitive damages without an award of compensatory damages in a 42 U.S.C. § 1983 case); *see also Givens v. O'Quinn*, 447 F. Supp. 2d 593, 602 n.5 (W.D. Va. 2006). Therefore, based upon the authority of the Fourth Circuit, there is no entitlement to an award of punitive damages when there has been no award of compensatory damages.

Despite the above, the trial court relies on non-Fourth Circuit precedent to allow an award of punitive damages absent an award of compensatory damages to stand. This ruling is inconsistent with State law and Fourth Circuit precedent, as well as creates inconsistent results within West Virginia. For example, the trial court relied upon *Basista v. Weir*, a 1965 case from the Third Circuit. In that case, the Third Circuit's view was that federal common law allowed for the recovery of punitive damages absent an award of compensatory or nominal damages. *See Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965). This, however, is a different interpretation of the federal common law as reviewed by the Fourth Circuit in a case decided over 25 years later. *See People Helpers*, 12 F.3d at 1327. The Fourth Circuit's interpretation of the federal common law

on damage is “[i]n the absence of a specific statutory directive on this issue, *federal courts* have chosen to apply the majority rule that punitive damages are not recoverable when compensatory damages have not been awarded.” *Id.* Reliance, therefore, on *Basista* is unsuitable in this matter.

Additionally, the trial court relies upon a Second Circuit case of *King v. Marci*, 993 F.2d 294 (2d Cir. 1993). In *King*, however, the Second Circuit recognized that the issue of whether recovery of punitive damages absent an award of compensatory damages in a 42 U.S.C. § 1983 is split among the Circuits. *King v. Macri*, 993 F.2d 294, 297 (2d Cir. 1993) (“Though case law is divided on whether punitive damages may be awarded in the absence of a compensatory award . . .”). The Fourth Circuit falls within the group of Circuits prohibiting the award of punitive damages absent an award of compensatory damages. Additionally, *King* is factually inconsistent with this matter, as the jury in *King* was specifically instructed that it may award punitive damages absent an award of compensatory damages. *Id.* No such instruction was given here. As a result, reliance upon the Second Circuit case is improper due to the legal and factual distinctions.

In sum, while other Courts of Appeals may allow for such a recovery of punitive damages absent an award of compensatory damages, the Fourth Circuit and West Virginia do not. In order to create harmony and consistency between federal claims litigated either in a West Virginia state court or a federal court within West Virginia, this Court should adopt the Fourth Circuit precedent. Otherwise, disharmony would occur, creating confusion and inconsistent results. *See Monessen S. W. Ry. Co. V. Morgan*, 486 U.S. 330, 335 (1988) (indicating that a federal cause of action is a strong Congressional indication of the federal interest in the uniformity of remedies available to a party aggrieved). As a result, the trial court’s ruling allowing the award of punitive damages to be sustained absent an award of compensatory damages must be overruled.

B. THE TRIAL COURT ERRED IN ITS FAILURE TO APPLY THE PROVISIONS OF THE PRISON LITIGATION REFORM ACT TO PETITIONERS LUNSFORD AND KELLY.

The trial court refused to apply the Prison Litigation Reform Act, 42 U.S.C. § 1997e (“PLRA”) to Correctional Officer Defendants Lunsford and Kelly because, at the time Inmate Shy filed the second civil action, Civil Action Number 17-C-155, Inmate Shy was not housed in a traditional correctional facility. A.R.0019. The PLRA places limitations on actions brought by “prisoners.” *See generally* 42 U.S.C. § 1997e. The term “prisoner” is defined as “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.” 42 U.S.C. § 1997e(h). There is no dispute that at the time Inmate Shy filed Civil Action Number 16-C-156, he was a “prisoner” under the PLRA and subject to the limitations set forth therein.

However, at the time Inmate Shy filed the second civil action, a move necessitated solely by Inmate Shy’s inability to timely perfect service, even after an extension, A.R.0001, Inmate Shy was no longer confined in a traditional correctional facility. This fact is of no consequence because the matter was consolidated with the civil action wherein Inmate Shy was a “prisoner” as defined by the PLRA. *See Montcalm Publ. Corp. v. Virginia*, 199 F.3d 168 (4th Cir. 1999). In *Montcalm*, two inmates instituted a civil action against a Virginia correctional facility alleging a violation of their First Amendment rights due to a denial of access to magazines of a sexually explicit nature. *Montcalm Publ. Corp. v. Virginia*, 199 F.3d 168, 170 (4th Cir. 1999). A year after the initiation of the action, Montcalm Publishing Corporation intervened into the action. Obviously, Montcalm Publishing Corporation was not an inmate or otherwise constituted a “prisoner” for purposes of the PLRA. After prevailing, Montcalm Publishing Corporation sought its attorneys’ fees. The

trial court, however, limited recovery in accordance to the mandates of the PLRA. *Montcalm Publ. Corp. v. Virginia*, 199 F.3d 168, 171 (4th Cir. 1999).

On appeal, the Fourth Circuit upheld the application of the PLRA to the non-prisoner Montcalm Publishing Corporation. In so reasoning, the Fourth Circuit applied the plain language of the statute. Specifically,

The PLRA expressly imposes limitations on the amount of attorney's fees awarded "in any action brought by a prisoner who is confined to any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(d)(1). Thus, Congress has mandated that statutory fee limits apply not "solely to prisoners" but to "any action brought by a prisoner." Unquestionably, the case at hand is one "brought by a prisoner." Indeed, two prisoners, Hodges and Flora, initiated this case; Montcalm merely intervened. Thus, application of the PLRA is inescapable.

Montcalm Publ. Corp. v. Virginia, 199 F.3d 168, 171-72 (4th Cir. 1999). Here, the civil action for which this matter has proceeded, 16-C-156, was "brought by a prisoner." Applying the logic of *Montcalm*, the limitations provided by the PLRA should be applied to Correctional Officer Defendants Lunsford and Kelly.

Moreover, public policy dictates that Correctional Officer Defendants Lunsford and Kelly should be entitled to the limitations imposed by the PLRA. Procedurally, Correctional Officer Defendants Lunsford and Kelly were both parties to the civil action for which Inmate Shy was a "prisoner" as defined by PLRA. Only due to the failure of Inmate Shy to timely serve these individuals do they not receive the benefit of PLRA. This is significantly prejudicial to Correctional Officer Defendants Lunsford and Kelly, a prejudice which befalls them due to the failures of Inmate Shy. Clearly, prejudicing these individuals to the benefit of Inmate Shy is improper.

Finally, the trial court's ruling creates a fractured application of the PLRA. While the trial court discounted the application of the PLRA to the punitive damage award, assuming the verdict

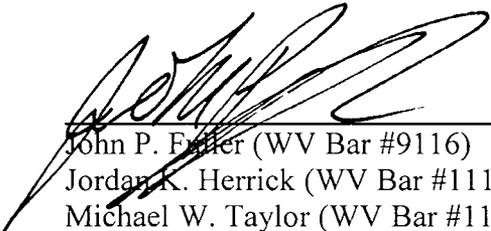
stands, the PLRA will play a role related to a potential attorney fee award. *See* 42 U.S.C. §1997e(d) (discussing limitations of attorneys' fees). The trial court's fractured application creates confusion as to how the remaining limitations of the PLRA will be applied. Moreover, this confusion is exacerbated by the fact that it was Inmate Shy's own inability to timely serve the Complaint resulting in this fractured application. In other words, the trial court is rewarding Inmate Shy to the detriment of Correctional Officer Defendants Lunsford and Kelly, while creating a fractured and confusing application.

In sum, based upon *Montcalm Publ.*, as well as the public policy reasons above, the trial court erred when it refused to apply the limitations of the PLRA to Correctional Officer Defendants Lunsford and Kelly. Therefore, this Court must overturn this ruling and hold that the limitations of the PLRA are applicable to Correctional Officer Defendants Lunsford and Kelly.

7. CONCLUSION

Based upon the foregoing, Correctional Officer Defendants pray this Court will overturn the trial court's ruling regarding the availability of recovering punitive damages absent an award of compensatory damages, as well as overturn the trial court's holding that the limitations provided by the Prison Litigation Reform Act are not applicable to Correctional Officer Defendants Lunsford and Kelly.

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