IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

CHRISTOPHER SHY,

Plaintiff,

v.

Civil Action Nos. 16-C-156 & 17-C-155
Judge Gregory L. Howard, Jr.

C.O. LUNSFORD, individually and in his official capacity;
C.O. KELLY, individually and in his official capacity;
C.O. ERWIN, individually and in his official capacity; and
WEST VIRGINIA REGIONAL JAIL AND
CORRECTIONAL FACILITY AUTHORITY, an
agency of the State of West Virginia,

Defendants.

ORDER DENYING DEFENDANTS' RULE 50(b) MOTION FOR JUDGMENT AS A MATTER OF LAW, DEFENDANTS' RULE 59(a) MOTION FOR A NEW TRIAL, AND DEFENDANTS' RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

On March 21, 2018, came Plaintiff Christopher Shy, by counsel Kerry A. Nessel; Defendants Peter Lunsford, Franklin Kelly, and Lloyd Erwin, by counsel John P. Fuller; and Defendant West Virginia Regional Jail and Correctional Facility Authority, by counsel William E. Murray, on Defendants' Rule 50(b)[1] Motion for Judgment as a Matter of Law. At the conclusion of the hearing, the Court took the matter under advisement and directed Plaintiff and Defendants to submit proposed orders to the Court by April 11, 2018, setting forth the parties' positions on the motion. The parties complied with this direction, presenting their proposed orders on the April 11, 2018 deadline.

On April 9, 2018, Defendants filed a Rule 59(a) Motion for a New Trial and a Rule 59(e) Motion to Alter or Amend the Judgment Order. The relief sought in these motions is premised on the same position Defendants' argued warranted the relief sought in their Rule 50(b)

[1] All "Rules" referenced in this Order are West Virginia Rules of Civil Procedure.

motion—that the jury's $4,500.00 award in punitive damages cannot stand in light of its award of $0.00 in compensatory damages. Having considered the parties' arguments and the relevant law with regard to all three motions, the Court makes the following findings of fact and conclusions of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant to the evaluation of Defendants' motions are not in dispute. On February 29, 2016, while he was incarcerated, Plaintiff commenced Civil Action Number 16-C-156 by filing this lawsuit against Defendants, asserting various state and federal causes of action which Plaintiff alleged arose from an incident occurring at Western Regional Jail on August 23, 2015. Included among the claims was a Section 1983 Civil Rights Act claim[2] through which Plaintiff sought damages for Defendants Lunsford, Kelly, and Erwin's alleged use of excessive force against him in violation of his Fourteenth Amendment rights under the United States Constitution.

By Order of this Court entered December 8, 2016,[3] Defendants Lunsford and Kelly were dismissed from Civil Action Number 16-C-156 for Plaintiff's failure to timely obtain service of process on these defendants. Plaintiff filed a second action, Civil Action Number 17-C-155,[4] on

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[2] Section 1983 of the Civil Rights Act provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1996).

[3] Judge Jane Hustead presided over the case until January 3, 2017.

[4] Civil Action Number 17-C-155 was initially assigned to Judge Christopher Chiles.

March 8, 2017 against all Defendants initially named in Civil Action Number 16-C-156, including Defendants Lunsford and Kelly, asserting claims arising from the incident on August 23, 2015. The parties do not dispute that Plaintiff was not incarcerated at the time he filed Civil Action Number 17-C-155. Plaintiff obtained service of process against Defendants Lunsford and Kelly in Civil Action Number 17-C-155. Upon the agreement of the parties, Civil Action Number 16-C-156 and Civil Action Number 17-C-155 were consolidated by Order entered July 19, 2017.[5]

The case proceeded to trial on December 5, 2017. During the ensuing three days, the parties presented their cases. Before making closing arguments, the parties submitted to the Court the instructions that were ultimately read by the Court to the jury and a verdict form for the jury. At the close of the evidence, Defendants made a motion for judgment as a matter of law, and the Court denied that motion.

On December 8, 2017, the jury began its deliberations, returning a verdict later that day in favor of Plaintiff. The jury found, by preponderance of the evidence, that Defendants Lunsford, Kelly, and Erwin used excessive force on Plaintiff on August 23, 2015, so as to violate his Fourteenth Amendment Rights under the United States Constitution and that Defendants Lunsford, Kelly, and Erwin committed the civil tort of battery on Plaintiff on August 23, 2015, all within the scope of their employment with Defendant West Virginia Regional Jail and Correctional Facility Authority. The jury did not find liability on any of Plaintiff's remaining claims. The jury found, by a preponderance of the evidence, that Plaintiff suffered damages as a proximate result of the conduct of Defendants Lunsford, Kelly, and Erwin. The jury awarded $0.00 in damages for past and present anxiety, humiliation, annoyance and inconvenience, pain and suffering, mental

[5] Civil Action Number 17-C-155 was also transferred to facilitate the consolidation of the cases.

anguish, and loss of ability to enjoy life. The jury assessed $1,500.00 in punitive damages against each of the individual defendants—Defendants Lunsford, Kelly, and Erwin—amounting to a total punitive damages award of $4,500.00 in favor of Plaintiff.

Directly following the Court's reading of the jury's verdict, Plaintiff's counsel requested that the Court not dismiss the jury but require it to return to deliberation to award nominal damages. Defendants objected to Plaintiff's request. The Court denied Plaintiff's request and dismissed the jury. The Court notes that prior to the submission of this case to the jury, no party requested a jury instruction that would require the jury to award nominal damages as a prerequisite to awarding punitive damages. Similarly, no party requested that the verdict form include a direction that punitive damages may not be awarded absent some nominal or compensatory damages. For the reasons discussed herein, however, such an instruction was unnecessary.

On December 18, 2017, Defendants filed their Rule 50(b) motion for judgment as a matter of law. Subsequently, on March 26, 2018, the Court entered a Judgment Order setting forth the jury's decision. The Court heard argument on Defendants' Rule 50(b) motion on March 21, 2018 before taking the motion under advisement. As mentioned above, following the hearing on Defendants' Rule 50(b) motion, Defendants filed a Rule 59(a) motion for a new trial and a Rule 59(e) motion to alter or amend the judgment order.

II. ANALYSIS

In their December 18, 2017 Rule 50(b) motion for judgment of a matter of law, Defendants argued that, under West Virginia law, because no reasonable relationship exists between the jury's compensatory damages award and the jury's punitive damages award, the punitive damages award must be set aside. During the hearing on the motion, Defendants also

argued that because the jury did not determine that Plaintiff suffered a compensable injury, the Prison Litigation Reform Act, 42 U.S.C. § 1997e (2013), which Defendants claim requires that there be a physical injury for a plaintiff to maintain a cause of action, mandates that Defendants are entitled to judgment in their favor. Additionally, citing to *Jackson v. Morgan*, 19 Fed. Appx. 97 (4th Cir. 2001). Defendants contend that because the jury's decision not to award compensatory damages signals its finding that Plaintiff did not suffer even a *de minimis* injury, Plaintiff is not entitled to judgment on his excessive force claim.

In their Rule 59(a) motion for a new trial and a Rule 59(e) motion to alter or amend the judgment order, Defendants argued that "it would be a miscarriage of justice to allow the award of punitive damages to stand without an award of compensatory damages" based on the same reasoning set forth in connection with the Rule 50(b) motion. Defendants also asserted that if the Court was not inclined to Order a new trial, the Court should reduce the award of punitive damages to $0.00 for the same reasons Defendants have argued in connection with the Rule 50(b) motion.

The West Virginia Rules of Civil Procedure provide several avenues for challenging judgment, which include those motions filed by Defendants. Rule 50(b) of the West Virginia Rules of Civil Procedure provides:

> (b) *Renewal of motion for judgment after trial; alternative motion for new trial.* — If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
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> (1) If a verdict was returned:
> (A) allow the judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:
(A) order a new trial, or
(B) direct entry of judgment as a matter of law.

In the present case, the Defendants' motion was filed prior to the expiration of 10 days after entry of judgment. Because a verdict was returned, in ruling on the motion, the Court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law in favor of Defendants. The West Virginia Supreme Court of Appeals has explained that "a trial judge may not enter judgment notwithstanding the verdict unless he or she determines that the evidence is clearly insufficient to support the verdict reached by a jury." *Gonzalez v. Conley*, 199 W. Va. 288, 291, 448 S.E.2d 171, 174 (1997) (citing *McClung v. Marion Cty. Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987)). Further,

> "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

Syl. pt. 6, *McClung v. Marion Cty. Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987).

Although Rule 50(b) states that in the alternative to filing a renewed motion for judgment as a matter of law a party may file a motion for a new trial under Rule 59, Defendants here have done both. Rule 59 provides, in relevant part:

> (a) *Grounds.* — A new trial may be granted to all or any of the parties and on all or part of the issues [] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law . . . .
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> (b) *Time for motion.* — Any motion for a new trial shall be filed not later than 10 days after the entry of the judgment.
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> . . . .

> (e) *Motion to alter or amend a judgment.* — Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

With regard to granting a motion for new trial, the Supreme Court has held:

> "A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." Syl. pt. 3, *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994), *cert. denied*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995).

Syl. pt. 1, *Witt v. Sleeth*, 198 W. Va. 398, 481 S.E.2d 189 (1996). This Court notes that Defendants' grounds for requesting a new trial are that the jury's punitive damages does not comply with West Virginia law and that Defendants may not be held liable on an excessive force claim where the jury determines that the injury was *de minimis* or that there was no injury.

Finally, with regard to a motion to alter or amend judgment, the Supreme Court has explained that Rule 59(e) "is applicable to situations where a party seeks to alter, amend, or revise a judgment that was entered as a result of a pretrial motion." *James M.B. v. Carolyn M.*, 193 W. Va. 289, 293, 456 S.E.2d 16, 20 (1995).

A. Whether an award of punitive damages may stand in the absence of an award of nominal or compensatory damages in a Section 1983 action

Defendants correctly point out that under the law of West Virginia, "[p]unitive damages must bear a reasonable relationship to the potential harm caused by the defendant's actions." Syl. pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) (in

part). Accordingly, in West Virginia, when a jury does not award compensatory damages, a plaintiff may not recover punitive damages. *See id.* (overruling syl. pt. 3, *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982) ("[T]he failure of the jury to return an award of compensatory damages against a particular defendant will not of itself allow that defendant to escape liability for punitive damages assessed against him.")).

Without a doubt, *Garnes* applies to limit recovery of punitive damages in actions brought under West Virginia law in West Virginia courts. However, the federal common law on damages must be applied to Section 1983 actions, rather than the state's law on damages, to provide national uniformity in such actions. *Basista v. Weir*, 340 F.2d 74, 86 (3rd Cir. 1965). Without such uniformity, "the Civil Rights Acts would fail to effect the purposes and ends which Congress intended." *Id.*

Under the federal common law on damages, "'the basic purpose' of § 1983 damages is 'to compensate persons for injuries that are caused by the deprivation of constitutional rights.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Carey v. Piphus*, 435 U.S. 247, 254 (1978)). "Where no injury [is] present, no 'compensatory' damages [should] be awarded." *Id.* at 308. "[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* at 308 n.11. "Nominal damages are presumed to follow from the violation of any valuable legal right, even if no actual damages are involved." *Tatum v. Morton*, 386 F. Supp. 1308, 1313 (D.D.C. 1974) (citing *Basista*, 340 F.2d 74 at 87)). "It is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled." *Basista*, 340 F.2d at 87. A jury may award punitive damages "to punish the defendant for his willful or malicious conduct and to deter

others from similar behavior." *Id.* at 306 n.9. "[S]ubstantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." *Carey*, 435 U.S. at 266.

"Generally[,] a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages." *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1214 (1995). However, punitive damages may be recovered in Section 1983 actions for violations of the United States Constitution even where there is no showing of a compensable injury. *See, e.g.*, *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, . . . we have indicated that such an award may be made in section 1983 cases . . . . as have most courts of appeals . . . ."); *People Helpers Found., Inc. v. City of Richmond*, 12 F.3d 1321, 1326 (4th Cir. 1993) ("There is no established federal common law rule that precludes the award of punitive damages in the absence of an award of compensatory damages."); *Glover v. Alabama Dep't of Corrections*, 734 F.2d 691, 694 (11th Cir. 1984) ("Punitive damages can be awarded under § 1983 even when a plaintiff suffers no compensatory damages."); *McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980) ("Punitive damages may also be awarded in a § 1983 even without actual loss, despite local law to the contrary."); *Basista*, 340 F.2d at 87 ("[F]ederal law permits the recovery of exemplary or punitive damages[, and] . . . it is not necessary to allege nominal damages[, which] are proved by proof of deprivation of a right to which the plaintiff was entitled."). The question presented by the case at bar is whether the law allows a punitive damages award in a Section 1983 action to be upheld where the jury awards neither compensatory damages nor nominal damages.

The Third Circuit, in *Basista v. Weir*, squarely addressed this issue. 340 F.2d 74. In that case, Frank Basista brought an action against police officers, alleging the officers violated his

Fourteenth Amendment right to be undisturbed in his home and his right not to be subject to unlawful arrest and detention. *Id.* at 80. The case does not state whether Basista requested nominal damages or that the jury be instructed on nominal damages. The jury returned a verdict in favor of Basista, awarding $0.00 in compensatory damages and $1,500.00 in punitive damages. *Id.* at 77. The Third Circuit reasoned that under the federal common law relating to damages, damages are presumed from the wrongful deprivation of a constitutional right, even in the absence "of actual loss of money, property, or other valuable thing." *Id.* at 88. The *Basista* court concluded, "Basista would be entitled to sustain his judgment were it not for the errors in the trial which we have pointed out." *Id.*

The Second Circuit, in *King v. Macri*, also addressed whether a punitive damages award may stand where no compensatory damages or nominal damages are awarded. 993 F.2d 294. In that case, the plaintiff, Edward King, brought a Section 1983 action against two police officers, arguing that they subjected him to excessive force in violation of his constitutional rights. *Id.* at 297. At trial, without objection, King asked that the jury not be instructed that it could award nominal damages. *Id.* The jury was instructed that it could "award punitive damages regardless of whether plaintiff has established actual damages." *Id.* The jury awarded no compensatory damages on his excessive force claim, but it awarded a total of $125,000 in punitive damages against the defendant police officers on the claim. *Id.* at 297. The *King* court said, "[I]f any threshold requirement is to be imposed upon an award of punitive damages for a claim of excessive force, it should be only that the evidence would have supported an award of compensatory damages, not that compensatory damages were actually awarded." *Id.* at 298. The *King* court held that in the circumstances of the case, "the punitive awards were not vitiated by the absence of compensatory

or nominal damages awards." *Id.* However, the Court ultimately determined that the case must be remanded to the trial court on the ground that the punitive damages award was excessive. *Id.*

In *Davis v. Mason Cty.*, 927 F.2d 1473 (9th Cir. 1991) *superseded by statute on other grounds as recognized in Davis v. City and County of San Francisco*, 927 F.2d 1536 (9th Cir. 1992), plaintiff Ed Rodius brought a Section 1983 action for excessive force against a police officer. *Id.* at 1477. It is not clear from the opinion whether the jury was instructed as to nominal damages. The jury returned a verdict against the police officer, awarding $0.00 in compensatory damages and $25,000.00 in punitive damages to Rodius. *Id.* at 1479. The *Davis* court upheld the punitive damages award on appeal, stating, "The Supreme Court has held that punitive damages may be available under Section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury." *Id.* at 1486 (citing *Smith v. Wade*, 461 U.S. 30, 55 n.21 (1983)).

Still other courts have permitted punitive damages awards to stand where neither compensatory damages nor nominal damages were awarded where the jury found that the plaintiff's constitutional rights had been violated. *See, e.g. Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991); *Acevedo Luis v. Zayas*, 419 F. Supp.2d 115, 118, 126 (D.P.R. 2006), *aff'd Acevedo-Luis v. Pagan*, 478 F.3d 35 (1st Cir. 2007) (upholding a jury's verdict awarding no compensatory damages and $5,000.00 in punitive damages in an Section 1983 political discrimination action where the jury determined that the defendant was liable for discrimination and an instruction on nominal damages was neither requested by the parties nor given to the jury).

Based on the cases discussed above, this Court concludes that in Section 1983 actions, where the jury finds that a plaintiff has been subjected to excessive force in violation of his or her constitutional rights and where the plaintiff has put on evidence that he or she suffered

compensable injury, an award of punitive damages shall not be set aside on the ground that the jury did not also award compensatory damages or nominal damages.[6] Applying this rule to the present case, Defendants cannot maintain their position that the jury's $4,500.00 punitive damages award must be set aside. The jury determined that Plaintiff was deprived of his constitutional right to be free from the application of excessive force and that Plaintiff suffered damages as a result of Defendants' conduct. That the jury did not award Plaintiff compensatory damages or nominal damages is of no moment.

B. Whether, if Plaintiff's injuries were de minimis *or non-existent, Plaintiff could recover on his excessive force claim*

Defendants have argued that by awarding $0.00 in compensatory damages, the jury determined that Plaintiff suffered no compensable injury, and that where there is no injury or *de minimis* injury, damages may not be awarded on a Section 1983 excessive force claim. Defendants relied on *Jackson v. Morgan*, 19 Fed. Appx. 97 (4th Cir. 2001).

In *Jackson*, plaintiff Quinten Jackson brought a Section 1983 action against prison officials for using excessive force against him in violation of rights under the Eighth Amendment. *Id.* at 98. The jury returned a verdict in favor of Jackson, awarding $1.00 for actual damages and

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[6] This Court observes that in cases where a jury finds that a plaintiff's constitutional rights have been violated in his or her Section 1983 action and the jury awards no compensatory damages, nominal damages, or punitive damages, courts are split as to whether nominal damages must be awarded automatically. *See* Mark T. Morrell, Comment & Note, *Who Wants Nominal Damages Anyway? The Impact of an Automatic Entitlement to Nominal Damages Under § 1983*, 13 Regent U. L. Rev. 225 (2000–2001). In such cases, whether the plaintiff receives nominal damages affects whether the plaintiff may be declared the prevailing party and whether the plaintiff may receive attorney's fees. *Id.* at 237.

The Court also observes that a similar rule does not apply uniformly to all actions under the Civil Rights Act. *See* Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 Ky. L.J. 581, 601–611 (2000–2011) (examining a circuit split regarding whether punitive damages may be awarded without an award of compensatory damages or nominal damages for violations of Title VII of the Civil Rights Act and 42 U.S.C. § 1981a).

$9,500.00 in punitive damages. *Id.* The prison officials' motion for judgment as a matter of law following the verdict was denied. *Id.* at 100. On appeal, the prison officials argued that Jackson failed to establish the objective and subjective requirements of his excessive force claim. *Id.*

Relying on *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), the *Jackson* court said, "To succeed on any Eighth Amendment claim for cruel and unusual punishment, a prisoner must prove: (1) objectively the deprivation of a basic human need was sufficiently serious, and (2) subjectively the prison officials acted with a sufficiently culpable state of mind." *Jackson*, 19 Fed. Appx. at 100 (internal quotation marks omitted).[7] The *Jackson* court went on to say that "[t]he objective element of an excessive force claim requires more than a de minimis use of force . . . unless that use of force is 'repugnant to the conscience of mankind.'" *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992)). According to the *Jackson* court, "De minimis injury is evidence of de minimis force." *Id.* (citing *Norman v. Taylor*, 25 F.3d 1259, 1262–63 (4th Cir. 1994)). Applying these rules to the prison officials' appeal, the Fourth Circuit decided, "Taking the evidence in the light most favorable to Jackson, no reasonable jury could find the force used in this case was 'repugnant to the conscience of mankind.'" *Id.* at 101. The Fourth Circuit went on to imply that a $1.00 award

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[7] Unlike *Jackson*, which involved the analysis of an excessive force claim under the Eighth Amendment, the case at bar involves the analysis of an excessive force claim under the Fourteenth Amendment. Under the Fourteenth Amendment, "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." *Kingsley v. Hendrickson*, ___ U.S. ___, ___, 135 S. Ct. 2466, 2473 (2015). "[A] pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose. *Id.* at ___, 135 S. Ct. at 2473–74. In determining whether a pretrial detainee has been subjected to excessive force under the Fourteenth Amendment, courts should examine

> the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (1973).

for actual damages could be construed as a finding of *de minimis* injury; however, in deciding the appeal, the court did not rely on the jury's verdict in deciding that the facts of the case established Jackson has suffered nothing more than *de minimis* injury. *Id.* at 101–103.

It is Defendants' position that the jury's award of $0.00 in compensatory damages in this case reflects the jury's conclusion that Plaintiff's alleged injury was *de minimis*, and that under *Jackson*, the *de minimis* injury nullifies Plaintiff's claim of a violation of his constitutional rights. Defendants' position is meritless as it is premised on abrogated law.

In *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997), the Fourth Circuit applied the Eighth Amendment *de minimis* rule announced in *Norman v. Taylor*, 25 F.3d 1259, 1263 (4th Cir. 1994), and applied in *Jackson*, to claims under the Fourteenth Amendment, holding that a plaintiff cannot prevail on a Fourteenth Amendment claim if his injuries are *de minimis*. *Id.* at 1166. However, in *Wilkins v. Gaddy*, 559 U.S. 34 (2010), the Supreme Court of the United States expressly abrogated *Norman* and *Riley*, holding that "[t]he 'core judicial inquiry,' . . . [is] not whether a certain quantum of injury [is] sustained, but rather 'whether force [is] applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7). The *Wilkins* court explained, "Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Id.* at 38.

In the present case, Plaintiff alleged that he was on the receiving end of violent acts, which included punches and kicks, and he claimed these acts constituted the application of excessive force in violation of his Fourteenth Amendment rights. *Cf. id.* ("An inmate who complains of a "'push or shove'" that causes no discernible injury almost certainly fails to state a

valid excessive force claim." (citing *Hudson*, 503 U.S. at 9)). In deciding whether Plaintiff's constitutional rights were violated, the jury was instructed to consider the relationship between the need for the use of force and the amount of force used; the extent of Plaintiff's injury; any effort made by Defendants Lunsford, Kelly, and Erwin to temper or limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by Defendants Lunsford, Kelly, and Erwin; and whether Plaintiff was actively resisting. The jury was further instructed that not every push or shove violates Plaintiff's constitutional rights. The parties have not challenged the legitimacy of these instructions. The jury's verdict, which does not include an award of compensatory damages, indicates that the jury determined Plaintiff's constitutional rights had been violated, but that Plaintiff had the good fortune to escape the ordeal without serious injury. Under *Wilkins*, that Plaintiff suffered no compensable injury is of no moment with regard to whether a constitutional violation occurred. The lack of a compensable injury does not preclude Plaintiff from recovering punitive damages.

C. Whether the Prison Litigation Reform Act mandates setting aside the punitive damages award on the basis that the jury did not determine Plaintiff suffered a compensable injury

Defendants have argued that the Prison Litigation Reform Act ("PLRA") applies to this case and that pursuant to it judgment must be entered in favor of Defendants.

The PLRA is codified at 42 U.S.C. § 1997e (2013). The PLRA places limitations on actions brought by "prisoners." 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).

The parties do not dispute that Plaintiff was neither incarcerated nor detained at the time Plaintiff's claims against Defendants Lunsford and Kelly were filed in Civil Action Number 17-C-155. Defendants contended that because the two civil actions were consolidated and because Defendants Lunsford and Kelly were named in the first civil action, the PLRA must apply to these two defendants; however, Defendants have not cited any law in support of this position, and the Court is aware of none. Plaintiff conceded that the PLRA applies to the claims against Defendant Erwin because those claims were filed while Plaintiff was incarcerated. Plaintiff disagreed that the PLRA applies to Defendants Lunsford and Kelly on the basis that the claims against these defendants were asserted in Civil Action 17-C-155 while Plaintiff was not incarcerated. Plaintiff has *not* conceded that even if the PLRA applies to his claims against Defendant Erwin, the jury's award for Erwin's conduct—$1,500.00—should be set aside.

This Court determines that under the clear language of Section 1997e(h) of the PLRA, the claims against Defendants Lunsford and Kelly do not fall under the PLRA. *See, e.g.*, *Harris v. Garner*, 216 F.3d 970, 975 (11th Cir. 2000) (deciding that Section 1997e(e) "turns upon the confinement status of the plaintiff at . . . the time the lawsuit is filed."); *Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1998) (concluding that a convict out on parole is not a prisoner within the meaning of the PLRA, making the PLRA inapplicable); *Doe v. Washington Cty.*, 150 F.3d 920 (8th Cir. 1998) (concluding that because pretrial detainee was not incarcerated nor detained in any jail, prison, or correctional facility at the time he filed his complaint, pretrial detainee was not a prisoner within the meaning of the PLRA, and PLRA did not apply). As observed *supra*, the parties do not dispute that the PLRA applies to the claims against Defendant Erwin. Thus, the question before the Court now is whether the PLRA requires that the $1,500.00 punitive damages award against Defendant Erwin be set aside.

With regard to maintaining actions, the PLRA 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 or the commission of a sexual act (as defined in section 2246 of Title 18).

Id. § 1997e(e).

The language of Section 1997e(e) bars an action by a prisoner for damages resulting from mental or emotional injury where physical injury is not also alleged. Courts have uniformly held that the alleged physical injury must be greater than a *de minimis* injury for a prisoner to maintain his or her action. *See, e.g.*, *Mitchell v. Horn*, 318 F.3d 523, 534 (3d Cir. 2003) (requiring that to satisfy the physical injury requirement in Section 1997e(e), the plaintiff must show "less-than-significant-but-more-than-*de minimis* physical injury."); *Jarriett v. Wilson*, No. 03-4196, 2005 WL 3830415 at *4 (6th Cir. 2005) ("[E]ven though the physical injury required by § 1997e(e) for a § 1983 claim need not be significant, it must be more than *de minimis* . . . ."). Defendants argue that the jury's award of $0.00 in compensatory damages evinces its determination that Plaintiff suffered no physical injury, mandating that the punitive damages award be set aside under Section 1997e(e).

The Court observes that prior to the submission of this case to the jury, Defendants did not assert during litigation that Section 1997e(e) could be applicable to any of Plaintiffs claims. Defendants did not request a jury instruction setting forth the law it now argues applies—that the jury could not award punitive damages if it determined that plaintiff had suffered no greater than a *de minimis* injury. Defendants lodged no objection to the instructions read to the jury on the ground that those instructions failed to address the law set forth in Section 1997e(e). It appears to this Court that by failing to request an instruction regarding Section 1997e(e) and by failing to

object to the absence of such an instruction, Defendants have waived any challenge under Section 1997e(e). *See Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999) (concluding that the failure to offer a jury instruction constituted waiver of the alleged error); *cf.* syl. pt. 1, in part, *Shia v. Chvasta*, 180 W. Va. 510, 377 S.E.2d 644 (1988) ("No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection . . . ."); Fed. R. Civ. P. 51(d)(1) ("A party may assign as error: . . . a failure to give an instruction, *if that party properly requested it* and—unless the court rejected the request in a definitive ruling on the record—also properly objected" (emphasis added)).

Even if Defendants' challenge had been properly preserved for post-trial consideration, the law does not support Defendants' position. The majority of United States Circuit Courts of Appeals that have addressed this specific issue have determined that a plaintiff may maintain a claim under Section 1997e(e) for nominal and punitive damages in the absence of physical injury when the plaintiff alleges a constitutional violation. *See, e.g.*, *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003) ("Section 1997e(e)'s requirement that a prisoner demonstrate physical injury before he can recover for mental or emotional injury applies only to claims for compensatory damages. Claims seeking nominal or punitive damages are typically not 'for' mental or emotional injury but rather 'to vindicate constitutional rights' or 'to deter or punish egregious violations of constitutional rights,' respectively. *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir.2000). . . . [Section] 1997e(e)'s physical injury requirement, [does] not affect [a plaintiff's] ability to seek nominal or punitive damages for violations of his constitutional rights."); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) ("Section 1997e(e) does not limit the availability of nominal

damages for the violation of a constitutional right or of punitive damages."); *Searles v. Van Bebber*, 251 F.3d 869, 881 (10th Cir. 2001) (determining that "punitive damages remain available, in the proper circumstances, in prisoner actions under section 1983" where physical injury has not been alleged); *Cassidy v. Indiana Dep't of Corrections*, 199 F.3d 374 (7th Cir. 2000) (permitting plaintiff to pursue all damages other than those for emotional or mental injury where there was no allegation of physical injury); *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred."); *but see Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011) (precluding prisoners' punitive damages claims where a physical injury is not alleged); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (same).

While the United States Court of Appeals for the Fourth Circuit has not addressed the issue, federal district court in the circuit have decided the issue along the same lines as the majority of circuit courts. *See, e.g., Carter v. Myers*, No. 0:15-2583-HMH-PJG, 2017 WL 3498878, *5 (D.S.C. 2017) ("[T]he court finds that § 1997e(e) does not preclude the recovery of nominal and punitive damages for the violation of a constitutional right where there is no physical injury."); *Carrington v. Easley*, No. 5:08-CT-3175-FL, 2011 WL 2119421, *3 (E.D.N.C. 2011) ("[A]lthough Plaintiff fails to allege physical injury arising from the sexual assault, the PLRA does not bar him from seeking nominal or punitive damages, if he can establish a constitutional violation."); *Jones v. Price*, 696 F. Supp.2d 618, 625 (N.D.W. Va. 2010) ("After due consideration, this Court adopts the majority's interpretation of § 1997e(e)'s limitation on recovery, and holds that § 1997e(e) of the PLRA does not bar recovery of nominal or punitive damages in the absence of a physical injury where an inmate can show an injury of constitutional dimensions."). This Court

agrees with the reasoning of the majority on this issue. Applying the majority rule to this case, because Plaintiff alleged a constitutional violation, and because the jury found a constitutional violation, Plaintiff is entitled to the jury's punitive damages award against Defendant Erwin. Because the PLRA does not apply to the claims against Defendants Lunsford or Kelly, the punitive damages awards against them may not be set aside pursuant to the PLRA.

D. Whether Defendants are entitled to the relief sought under Rule 50(b), Rule 59(a), or Rule 59(e)

Defendants' challenges to the jury's award were based entirely on law, not on fact. As established above, there is no merit to Defendants' legal arguments. Therefore, there is no legal ground for this Court to set aside the jury's punitive damages award pursuant to Rule 50(b) or to order a new trial under Rule 59(a). Because the judgment at issue was entered following a jury trial rather than pursuant to a motion to dismiss or a motion for summary judgment, Rule 59(e) is inapplicable and cannot afford Defendants the relief they seek.

III. CONCLUSION

For the reasons discussed herein, Defendants' Rule 50(b) Motion for Judgment as a Matter of Law, Defendants' Rule 59(a) Motion for a New Trial, and Defendants' Rule 59(e) Motion to Alter or Amend the Judgment Order are all **DENIED**.

The Clerk of this Court is directed to provide copies of this Order to all counsel of record.

Entered this 1st day of June, 2018.

GREGORY L. HOWARD, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON JUN - 1 2018
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS JUN - 1 2018
, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA