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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.



REPLY BRIEF OF PETITIONERS

John P. Fuller, Esq. (WV Bar #9116)
Jordan K. Herrick, Esq. (WV Bar #11128)
Michael W. Taylor, Esq. (WV Bar #11715)
Bailey & Wyant, PLLC
500 Virginia Street East, Suite 600
Post Office Box 3710
Charleston, WV 25337-3710
(304) 345-4222
jfuller@baileywyant.com
jherrick@baileywyant.com
mtaylor@baileywyant.com

Counsel for Petitioners

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I. ARGUMENT

A. FOURTH CIRCUIT PRECEDENT AND PUBLIC POLICY DOES NOT PERMIT PUNITIVE DAMAGES TO BE RECOVERED WITHOUT AN AWARD OF COMPENSATORY OR NOMINAL DAMAGES.

The sole issue for this Court is whether it will follow Fourth Circuit precedent in determining whether punitive damages may be awarded when the jury has refused to award compensatory or nominal damages in a 42 U.S.C. § 1983 action. The trial court and Respondent spend substantial ink detailing language and analysis from non-Fourth Circuit precedent. However, as outlined in Petitioner's Brief, the Fourth Circuit held punitive damages are not recoverable absent an award of compensatory or nominal damages *and statutory language to the contrary*. See *People Helpers Found. v. City of Richmond*, 12 F.3d1321, 1327 (4th Cir. 1993). While *People Helpers* involved a non-1983 case, courts within the Fourth Circuit have applied the reasoning to 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); *Givens v. O'Quinn*, 447 F.Supp.2d 593, 602 n.5 (W.D. Va. 2006). This is because the relevant statute, 42 U.S.C. § 1983 contains no statutory language to the contrary.

Despite the above case law, and the absence of statutory language to the contrary, which would be applicable if this matter was pending in the United States District Court for the Southern District of West Virginia, Respondent attempts to minimize the impact of only the *Cowick* decision and ignores the *Givens* decision, both of which have been relied on by Petitioners. In attempting to minimize *Cowick*, Respondent asserts the decision was a federal Magistrate report and recommendation, as opposed to a District Court order. While this is true, the legal proposition that punitive damages may not be recovered in a 1983 case absent an award of compensatory or nominal damages remains. Moreover, this legal conclusion was adopted by the District Court.

See Cowick v. Glen Campbell Det. Ctr., No. 5:17-3001-JFA, 2018 U.S. Dist. LEXIS 20621, at *1-2 (D.S.C. Feb. 7, 2018). As a result, the fact that a federal Magistrate relied upon the Fourth Circuit's *People Helpers* decision does not impact the legal proposition that punitive damages may not be recovered absent an award of compensatory or nominal damages. Finally, Respondent attempts to discredit the legal analysis because the plaintiff in this case was *pro se*. It is disingenuous of Respondent's counsel to assert that a plaintiff's status will affect the outcome of a court's legal analysis. As a result, this argument must be rejected. Therefore, Respondent has offered nothing to discredit the holding of *Cowick*.

While Respondent only addressed *Cowick*, Respondent failed to address the *Givens* case, which was also relied on by Petitioners for the proposition that District Court's within the Fourth Circuit have applied *People Helpers* to 1983 cases. In *Givens*, correctional officers were alleged to have assaulted an inmate. A jury returned an award of punitive damages, but did not award compensatory damages. *Givens*, 447 F. Supp. 2d at 602 n.5. The jury was returned to deliberate whether to award nominal damages, as the jury was instructed pre-verdict regarding the ability to award nominal damages. *Id.* The jury then returned a nominal damage award. *Id.* On a motion for judgment notwithstanding the verdict or motion for new trial, the District Court acknowledged that punitive damages may not be awarded absent an award of compensatory or nominal damages. *Id.* Ultimately, the District Court upheld the verdict because nominal damages were awarded. *Id.*

Here, however, nominal damages were not awarded by either the trial court or the jury. Respondent requested the jury return to deliberations for an award of nominal damages. A.R.0056-0059. This request was denied, which is completely within the discretion of the trial court. *See Givens*, 447 F. Supp. 2d at 602 n.5. The denial to send the jury back to consider nominal damages was not raised as an error on appeal. Additionally, Respondent never requested the trial court

simply enter a nominal damage award under the trial court's authority. *Id.* As a result, the only issue on appeal is whether the punitive damages award may stand in light of a failure for the trial court or a jury to award compensatory or nominal damages.

Because the relevant case law in this State and federal jurisdiction is against Respondent's position, Respondent attempts to preclude Petitioners' arguments regarding the invalid nature of the verdict by asserting "waiver." More specifically, Respondent, without support in law or logic, asserts that Petitioners cannot argue an invalid verdict because Petitioners objected to a post-verdict request by Respondent for a nominal damage instruction and Respondent's request to send the jury back into deliberations in light of the requested new instruction. This position is not supported by any citation to case law. As previously discussed, the decision to instruct a jury post-verdict on nominal damages and to return the jury to deliberations is a discretionary decision by the trial court. *Givens*, 447 F. Supp. 2d at 602 n.5. Whether Petitioners object to this request is not dispositive to whether it will occur and waiver simply cannot attach in such a situation. Moreover, this argument is simply a way to avoid the fact that Respondent did not request a nominal damage instruction in the first place. The trial court's denial of Respondent's request to create a new jury instruction post-verdict was a proper exercise of discretion that was not appealed. *Givens*, 447 F. Supp. 2d at 602 n.5. Therefore, Respondent's waiver argument is without merit in law or logic.

The fact is, Respondent did not, pre-verdict, request an instruction for nominal damages. Respondent did not request the trial court exercise its authority and award nominal damages post-verdict. As a result, procedurally before this Court is whether punitive damages may be awarded absent an award of nominal or compensatory damages in a 1983 case. Based upon the above

Fourth Circuit case law, the fact that compensatory or nominal damages were never awarded makes the punitive damage award an invalid verdict subject to reversal by this Court.

Finally, it is worth again noting the disharmony that would occur should this Court uphold the trial court's Order allow a verdict of punitive damages to stand absent an award of nominal or compensatory damages. Respondent did not dispute the Fourth Circuit case law above and did not provide any Fourth Circuit case law to counter the positions asserted above. As a result, the law is clear in the Fourth Circuit that punitive damages cannot stand absent an award of nominal or compensatory damages. Should this Court allow this verdict to stand, 1983 claims brought in state court will be subject to different set of punitive damage case law. This disharmony must be avoided. As a result, this Court must reverse the trial court's ruling allowing the award of punitive damages to be sustained absent an award of compensatory damages.

B. FOURTH CIRCUIT PRECEDENT AND PUBLIC POLICY DICTATES THAT THE PRISON LITIGATION REFORM ACT SHOULD APPLY TO PETITIONERS LUNSFORD AND KELLY.

The trial court failed to properly apply the Prison Litigation Reform Act ("PLRA") in this case to Petitioners Lunsford and Kelly. More specifically, the trial court created a fractured application of the PLRA by applying it to some parties, but not Petitioners Lunsford and Kelly, when such a fractured application is not supported by public policy and case law. *See Montcalm Publ. Corp. v. Virginia*, 199 F.3d 168 (4th Cir. 1999). Critically, in responding to these arguments, Respondent did not address the *Montcalm Publ. Corp. v. Virginia* case heavily relied on by Petitioners in their brief. This failure can only be seen as an acknowledgment of its dispositive application to this case. Because of this, Respondent makes a number of arguments that do not address the central holding of *Montcalm* and otherwise do not address the arguments advanced by Petitioners. As a result, these arguments must be rejected.

More specifically, Respondent attempts to minimize the failure of Respondent to serve Petitioners in this matter with the action subject to PLRA. Because of this failure, the trial court determined the PLRA did not apply to Petitioners Lunsford and Kelly. However, this ruling punishes Petitioners Lunsford and Kelly for Respondent's failure. Whether the failure to serve was strategic or not, the inequity remains. As a result, Respondent's failure should not be utilized to gain an advantage against Petitioners Lunsford and Kelly by stripping them of the protections of the PLRA had Respondent timely served these Petitioners. This is particularly true because this matter was consolidated with the initial lawsuit which no one disputes the applicability of the PLRA.

Finally, Respondent asserts that the law is on his side. This statement is made without any acknowledgement of *Montcalm*. Again, Respondent looks outside of the Fourth Circuit for the assertion that the time of the filing of the lawsuit is the determinative factor for the application of PLRA. The case relied on, however, does not actually address the issue here: whether the PLRA applies to an action against previously dismissed parties due to Respondent's failure to timely serve and is then consolidated with the initial action that is subject to the PLRA. The most analogous case, *Montcalm*, provides that the PLRA does in fact apply. As a result, Respondent's argument fails. Therefore, the trial court erred in its failure to apply PLRA to this matter and this Court must reverse that ruling.

II. CONCLUSION

Based upon the foregoing and the reasoning asserted in Petitioners' Brief, Petitioners 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.

**PETER LUNSFORD, FRANKLIN
KELLY and LLOYD ERWIN,**
By Counsel,



John P. Fuller (WV Bar #9116)
Jordan K. Herrick (WV Bar #11128)
Michael W. Taylor (WV Bar #11715)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
T: (304) 345-4222
F: (304) 343-3133