UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PAUL DAVIS,

Plaintiff,

v.

PAUL RENNIE, RICHARD GILLIS, MICHAEL HANLON, LEONARD FITZPATRICK, NICHOLAS L. TASSONE, and JOYCE WEIGERS,

Defendants.

96-CV-11598-MEL

MEMORANDUM AND ORDER

LASKER, D.J.

Paul Rennie, Richard Gillis, Michael Hanlon, Leonard Fitzpatrick, Nicholas L. Tassone, and Joyce Weigers move, after verdict, for judgment as a matter of law under Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. The moving defendants, with the exception of Weigers, were mental health workers at the Westboro State Hospital on August 12, 1993. Davis was a patient at the hospital, and Weigers was a registered nurse in charge of an area to which Davis had been brought under the influence of alcohol. In accordance with Weigers' instructions, the other moving defendants controlled and subdued Davis. A fellow worker, Phillip Bragg, punched Davis a number of times in the face directly, injuring him, and, the jury might have found, causing post-traumatic stress disorder, which may still continue.

Davis contended that in connection with subduing him, each of the moving defendants deprived him of his constitutional right to be free of the use of excessive force and unreasonable restraint under federal and Massachusetts law, and of his right to protection by the intervention of fellow workers against the assault of Bragg.

In response to specific questions, the jury found that each of the defendants had deprived Davis of his constitutional rights on August 12, 1993, but that none of them was liable for false imprisonment.

I. Under Fed. R. Civ. P. 50(b),

> [t]he District Court may grant a judgment n.o.v. only if it finds that the evidence could lead a reasonable person to only one conclusion.

Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 (1st Cir. 1992). Moreover, as the Court of Appeals has most recently stated on motion for judgment as a matter of law under Rule 50(b), neither a District Court nor the Court of Appeals can evaluate:

> "the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of evidence," and we must affirm unless "the evidence, viewed from the perspective most favorable to the nonmovant is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome."

Criado v. IBM Corp., 145 F.3d 437, 441 (1st Cir. 1998) (quoting *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994)).

Judged by these standards, the renewed motion for judgment as a matter of law must be denied.

Assessing the evidence from the perspective of the plaintiff, in whose favor the jury decided, the jury could reasonably have concluded, as it did, that Bragg was acting under the color of state law on August 12, 1993; that Bragg punched and assaulted Davis; that the use of such force by Bragg was excessive and unreasonable; that each of the defendants was present at the scene of the alleged use of excessive force by Bragg; that each of the defendants actually observed Bragg using excessive force; that each of the defendants was in a position where he or she could have realistically prevented the use of excessive force by Bragg; and that there was sufficient time for each moving defendant to prevent Bragg's excessive use of force, which none of them did. The jury could also have reasonably found, as it did, that in connection with the two so-called "take-downs," each of the defendants implicated (namely, Rennie and Hanlon in the "open quiet room take-down," and all movants in the "hallway take-down") participated in the unreasonable restraint of Davis. Accordingly, the defendants' motion for judgment as a matter of law under Rule 50(b) must be denied.

To the extent that the comments of the mental health workers on page 9 of their memorandum imply that the jury's verdict is inconsistent because it found the defendants liable for failing to intervene but not for false imprisonment, the

defendants' failure to object to the questions put to the jury or to raise the issue upon the return of the jury verdict forecloses present objection. Under the rule of *Merchant v. Ruhle*, 740 F.2d 86, 91-92 (1st Cir. 1984), the Court, consisting of Judges Coffin and Breyer and retired Justice Potter Stewart, concluded:

> When the jury returned its verdicts, the problem could have been pointed out and both judge and jury given a chance to correct any misunderstanding.
>
> To countenance a setting aside of the verdicts in this case would place a premium on agreeable acquiescence to perceivable error as a weapon of appellate advocacy.

II. Before and during the course of the trial, the moving defendants moved for dismissal of the claims against them on the grounds that they were qualifiedly immune from liability for the actions they took on August 12, 1993. Decision on that motion was deferred for determination on the basis of the trial evidence. The motions, now appropriately renewed, are denied.[1]

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[1]Plaintiff contends that Weigers, who was represented by separate counsel until the making of the present motion, waived her right to a qualified immunity defense by failing to include it in her written Rule 50(a) motion. That omission, however, is excused in light of the Court's repeated declarations to all counsel that qualified immunity would be addressed on Rule 50(b) motions, and the Court's recollection that trial counsel for Weigers indeed adopted the Assistant Attorney Generals' repeated requests for confirmation that the issue would be revisited after trial. To the extent such discussions left Weigers with the impression -- or misimpression -- that she need not raise the argument in writing, it is the responsibility of the Court and should not be imputed to her. There was no waiver of the defense of qualified immunity.

The defendants argue that on August 12, 1993, it would not have been clear to a reasonable mental health worker or nurse in a state mental hospital that a worker or nurse would be obligated to intervene to prevent a fellow worker from physically assaulting an involuntarily committed patient. The argument is without merit for the following reasons.

In *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982), the Court held that under the substantive component of the Fourteenth Amendment's Due Process Clause a state is required to provide involuntarily committed mental patients with such services as are necessary to insure their "reasonable safety" from themselves and others. As the Court stated in *Youngberg*, and repeated in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199 (1989), "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed -- who may not be punished at all -- in unsafe conditions."

In *Gaudreault v. The Municipality of Salem, Mass.*, the Court of Appeals enunciated, not for the first time, the rule that "[a]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under section 1983 for his nonfeasance." 923 F.2d 203, 207 n.3 (1st Cir. 1990), *cert. denied*, 500 U.S. 956 (1991) (referring to *Byrd v. Brishke*,

466 F.2d 6 (7th Cir. 1972) and Hathaway v. Stone, 687 F.2d 708, 711-12 (D. Mass. 1988)). The Court held further that a police officer cannot be held liable for failing to intercede if he has "no realistic opportunity to prevent an attack." Id. (internal marks and citation omitted).

The sum of the decisions quoted above is that it was clear in this Circuit by 1990 that: (1) a person involuntarily committed to a state hospital was entitled to at least as much protection as a person involuntarily in the custody of the police (*Youngberg* and *DeShaney*); and (2) an officer present during the use of excessive force by his fellow officer upon a person in police custody was obligated to intervene to protect that person against that use of excessive force if the intervening officer had a reasonable opportunity to prevent or limit the attack.

Applying these propositions to the case at hand, a reasonable mental health worker or nurse should have known in 1993 that such a person, employed by the state in a state hospital, who was present during the use by a mental health worker of excessive force against an involuntarily committed patient, was obligated to intervene to protect the patient if he or she had a reasonable opportunity to do so.

It is true that no prior statute or judicial decision has come to this precise conclusion. However, as the Supreme

Court stated in *United States v. Lanier*, 520 U.S. 259, 271 (1997),

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

(quoting *Anderson v. Creighton*, 483 U.S. 635 (1987)). Here, the rulings of *Youngberg*, *DeShaney* and *Gaudreault* "apply with obvious clarity" to the conduct of the moving defendants.

The same precedent would have apprized both reasonable mental health workers and a reasonable nurse-in-charge that restraining Davis in an objectively unreasonable manner in the open quiet room and hallway "take-downs" was unconstitutional, regardless of the fact that there may have been some level of tension involved. The law was clear by 1990 that workers such as the defendants involved in the take-downs could not constitutionally restrain a state mental patient in an excessively forceful or otherwise unreasonable manner.

The moving defendants' reliance on *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691 (1st Cir. 1994), is misplaced. Roy was an arrestee who was shot by a police officer after he resisted arrest, having threatened the police with knives while he was intoxicated. The District Court found the police officer defendant's action to have been qualifiedly immune, and the

Court of Appeals affirmed. The case stands for the undisputed proposition that "the Supreme Court's standard of [objective] reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." Id., at 695 (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

The mere recital of the facts above distinguishes *Roy* from the case at hand. Although in the instant case Davis may be described as having "acted up" under the influence of alcohol on August 12, 1993, the jury could reasonably have found that he never aggressively threatened any of the defendants, and there was no evidence that he possessed a weapon. The defendant's conduct in *Roy* was found qualifiedly immune because the plaintiff had come at the defendant "carrying a steak knife in each hand" and making a "kicking-lunging motion [toward the defendant]." These facts substantially distinguish *Roy* from the instant case.

III. The moving defendants also contend that the jury's finding that they violated the plaintiff's rights under the Massachusetts Civil Rights Act is invalid because, according to the defendants, the evidence failed to establish threats, intimidation, or coercion. The contention is untenable for several reasons.

First, the defendants failed to object to the instructions given to the jury on the subject. Second, and

more importantly, the defendants' contention that no threats were made is inconsistent with the evidence, particularly if the evidence is viewed, as it must be, from the perspective most favorable to the nonmovant. The jury could reasonably have found that threats were made during the two "restraints," and that conduct employed by Bragg, in particular, and others, was coercive or intimidating.

IV. The moving defendants contend that the award of punitive damages was excessive. They make no motion with regard to the compensatory award of $100,000, nor could they since it is certainly reasonable in light of the evidence.

The determination of a proper level of punitive damages, if any are appropriate, is not an easy task for the jury or the courts. There is no question that most courts, including the courts of this Circuit, will not set aside or reduce an award of punitive damages except for compelling reasons. The policy of this Circuit is well-stated, for example, in *Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991) (quoting *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983)):

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained.

Cf., *Waganmon v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987); *Fishman v. Clancy*, 763 F.2d 485, 489-90 (1st Cir. 1985). On the other hand, the cases do recognize that it is proper

to set aside a jury's award of punitive damages if the amount is "grossly excessive," "inordinate," "shocking to the conscience of the court," or "so high that it would be a denial of justice to permit it to stand." *Waganmon*, 829 F.2d at 215 (quoting *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984)).

After considerable deliberation, and in exercising the conscience of the Court, I have concluded that although the jury was justified in granting punitive damages, the amounts it awarded were disproportionate, inordinate, and grossly excessive. Undoubtedly, the jury intended to express its outrage at the behavior of the defendants, but, as did the Court in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987), I "strongly question" whether the moving defendants' conduct "warranted" a total of $1,050,000 "worth of outrage." As the *Rowlett* Court observed, "to punish a defendant, the award "must be enough to smart," and "sufficient to deter others from such conduct in the future." Id. (quotations omitted). Having thought long and hard, I am convinced that an award of punitive damages totalling $525,000 (that is, reducing the award against each defendant by 50%) will accomplish the cited purposes of punitive damages and will do justice in the circumstances.

Accordingly, the defendants' motion for a new trial is denied on condition that the plaintiff accept a verdict in the

amount of compensatory damages granted by the jury plus a total of $525,000 punitive damages from the moving defendants, to be apportioned among the moving defendants as the jury apportioned its verdict for punitive damages.

The motion for judgment as a matter of law is denied. The motion for a new trial is denied on the condition stated above.

It is so ordered.

Dated: January 13, 1999
Boston, Massachusetts

Morris E. Cohen
U.S.D.J.