

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-3569

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DANIEL KHALAR, RODNEY L. EMERSON,

Plaintiffs-Respondents,

KEVIN KIRSCH,

Plaintiff-Respondent-Cross Appellant,

v.

JAMES MURPHY,

Defendant-Appellant-Cross Respondent,

CHRIS MERIGOLD, AND CLARENCE ALDERDEN,

Defendants,

HON. PATRICK FIEDLER,

Defendant-Appellant-Cross Respondent.

APPEAL from a judgment and CROSS-APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Judgment reversed; order affirmed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

DEININGER, J. James Murphy and Patrick Fiedler (officials) appeal from a judgment awarding Daniel Khalar, Rodney Emerson and Kevin Kirsch (inmates) a total of \$3,500 in damages, plus \$58,366.99 in costs and attorney fees. The trial court awarded the damages and costs on the inmates' claims under 42 U.S.C. § 1983 that the lack of a toilet and sink in a segregation cell, in which each was temporarily confined, violated their rights under the Fourteenth Amendment.¹

The officials argue that the judgment, which negates a jury verdict on the claims, is "contrary to the post-verdict provisions of chapter 805 Stats." We conclude that the trial court lost its competency to alter the jury verdict once the time limit under § 805.16, STATS., had expired.² Further, we decline to exercise our discretionary authority under § 752.35, STATS., to grant the inmates relief from a judgment on the verdict. Accordingly, we reverse and direct that judgment be entered on the jury's verdict.

Kevin Kirsch cross-appeals the trial court's order dismissing on summary judgment, a different § 1983 claim: that the cold temperature in his cell violated his rights under the Eighth and Fourteenth Amendments. We conclude that the record discloses no genuine issues of material fact on this claim, and that the officials are entitled, as a matter of law, to a judgment dismissing this claim. We therefore affirm the summary judgment in their favor.

¹ The Fourteenth Amendment to the United States Constitution provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

² Section 805.16(3), STATS., provides as follows:

(3) If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

BACKGROUND

The inmates brought this action under 42 U.S.C. § 1983, alleging numerous violations of their rights under the Eighth and Fourteenth Amendments. They complained of the lack of a toilet and sink in a certain segregation cell at Columbia Correctional Institution (CCI), cold temperatures in their cells, and receiving bag lunch meals instead of cooked meals. They also made a claim for damages under state negligence law on these same allegations. Officials Murphy and Fiedler were, respectively, the warden of CCI and the Secretary of the Department of Corrections during the relevant time period.

The officials moved for summary judgment dismissing all claims against them. The inmates also moved for summary judgment on their claims. The trial court denied the inmates' motion and granted the officials' motion to dismiss all claims relating to cold cell temperatures and bag lunches.³ The court did not dismiss the Eighth and Fourteenth Amendment claims or the negligence claim based on the lack of a toilet and sink in segregation cell number 46. These claims were tried to a jury on October 10 through 13, 1994. On October 13, 1994, the jury returned a verdict finding no constitutional violations with respect to any of the inmates, finding negligence on the part of the officials, but finding no causation of harm and zero compensatory damages. The jury also determined that the officials had not acted maliciously or wantonly, thus precluding a punitive damage award.

On November 2, 1994, the inmates filed post-verdict motions requesting the court to "set aside the portion of the juries [sic] verdict" finding no violation of their Eighth Amendment right to be free from cruel and unusual punishment. On this claim, the inmates asked the court for at least one dollar in nominal damages and for costs and reasonable attorney fees. They also requested the court to find that the zero compensatory damages verdict was perverse and to "affix an amount of damages for each plaintiff or in the alternative order a new trial on the issue of damages." The inmates requested no relief from the verdict on their Fourteenth Amendment due process claims.

³ Kirsch's cross-appeal is from the December 8, 1992 order for summary judgment dismissing his Eighth and Fourteenth Amendment claims based on cold cell temperatures.

The motions were initially set to be heard on November 18, 1994, but the hearing was rescheduled to December 14, 1994. The trial court heard arguments and set a supplemental briefing schedule. In a written decision dated and filed April 28, 1995, the trial court denied the inmates' motions for judgment notwithstanding the verdict on their Eighth Amendment claims and their motion for a new trial on the negligence claims. However, stating that "[d]uring the course of the trial the Court made a ruling that as a matter of law, the Defendants violated the Plaintiffs' civil rights when it placed the inmates in cell 46 which did not provide a sink or sanitary toilet," the court concluded the lack of a sink and toilet in cell 46 violated administrative rules and "deprived the Plaintiffs of a liberty and/or property interest without due process of law."

The court went on to conclude that the inmates "should" be awarded damages for "being deprived of this liberty interest," and that "[a] mere slap on the wrist or the award of the symbolic sum of one dollar does not teach a lesson or bring home a message." It determined damages as follows:

I award each plaintiff one hundred dollars for each day, or part thereof, in which they were housed in cell 46 during the period of time in question. This translates as follows: Khalar \$300; Kirsch \$700; and Emerson \$2500.

The inmates then moved the court, as prevailing parties, for an award of costs and attorney fees under 42 U.S.C. § 1988. Judgment was entered on October 24, 1995, awarding the inmates a total of \$3,500 "for violation of plaintiffs' fourteenth amendment due process rights." The judgment also awarded \$8,366.99 in costs and \$50,000 in fees to the inmates' attorneys. From this judgment, the officials appeal.

ANALYSIS

a. Trial Court's Competency to Alter Verdict

Section 805.16(3), STATS., requires that judgment be entered on a jury verdict if the trial court has not decided a post-verdict motion within 90

days after the verdict is rendered. A court's failure to act within 90 days after the verdict results in a loss of "competency to exercise its jurisdiction" to alter or set aside the verdict. *Jansen Co. v. Milwaukee Area Dist. Bd.*, 105 Wis.2d 1, 10, 312 N.W.2d 813, 817 (1981).

Here, the court's decision to enter a judgment contrary to the jury's verdict on the Fourteenth Amendment claims was made some 196 days after the jury's October 14, 1994 verdict.⁴ The record contains no orders enlarging the 90 day time limit, nor would any such orders be effective had they been made. See § 801.15(2)(c), STATS. (time for deciding motions after verdict under § 805.16(3) may not be enlarged); *Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 418-21, 405 N.W.2d 354, 362-64 (Ct. App. 1987); *Brookhouse v. State Farm Mut. Auto. Ins.*, 130 Wis.2d 166, 169-70, 387 N.W.2d 82, 83-84 (Ct. App. 1986). We conclude the judgment in favor of the inmates on their Fourteenth Amendment claim must be reversed and a judgment on the verdict entered under § 805.16(3), STATS.

Except for their general argument that the trial court's alteration of the jury verdict was "without lawful authority" and "contrary to the post-verdict provisions of chapter 805, Stats.," the officials do not raise the issue of the time bar under § 805.16(3), STATS. The inmates, therefore, do not specifically address the issue in their responsive brief. Rather, they argue that the trial court's action should be affirmed because there was no credible evidence that the inmates' Fourteenth Amendment rights were not violated, that the trial court's \$3,500 damage award was appropriate, that the officials were not entitled to qualified immunity, and that the attorney fees award was proper.

Even though the parties have not directly addressed in their briefs the grounds on which we conclude this judgment must be reversed, the law is well settled that the trial court's untimely post-verdict order was a "nullity." See *Brandner v. Allstate Ins. Co.*, 181 Wis.2d 1058, 1071, 512 N.W.2d 753, 759 (1994);

⁴ It is not clear what relief under § 805.14, STATS., the court was ordering in its April 28, 1995 decision, since the inmates had made no motion for either a directed verdict or judgment notwithstanding the verdict on their Fourteenth Amendment claims. In their brief, the inmates argue that the court "effectively granted a motion for direct[ed] verdict in favor of [the inmates] after withholding a decision after the close of evidence." As we later discuss, the record does not support this view since no such motion was made at the close of evidence.

Watts v. Watts, 152 Wis.2d 370, 377-78, 448 N.W.2d 292, 295 (Ct. App. 1989); *Manly v. State Farm Fire & Cas. Co.*, 139 Wis.2d 249, 254-55, 407 N.W.2d 306, 307-08 (Ct. App. 1987). If the inmates are to obtain relief from a judgment on the verdict in this case, it must come, if at all, from our discretionary authority under § 752.35, STATS.:

The expiration of the ninety-day time limit deprived the trial court of competency to exercise its jurisdiction to decide the motions after verdict. Pursuant to sec. 805.16, Stats., the motions should have been deemed denied.

We, then, proceed on the basis that the motions after verdict are deemed denied, but we review the record to determine whether, in the interest of justice, we should invoke our power under sec. 752.35, Stats., to accomplish the result the trial court attempted to accomplish

Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 38, 405 N.W.2d 672, 675-76 (Ct. App. 1987) (citations omitted). We will therefore consider the inmates' arguments only in the context of whether to grant discretionary relief under § 752.35.⁵

b. Discretionary Reversal under § 752.35, STATS.

Because the trial court granted relief from the verdict after its competency to alter the verdict had expired, it is appropriate that we review the record under § 752.35, STATS., to determine whether it is "proper to direct a

⁵ The inmates could perhaps argue that § 805.16(3), STATS., does not apply because the trial court was not "deciding a motion after verdict" when it sua sponte awarded the inmates damages on their Fourteenth Amendment claims. The inmates had not sought relief from the adverse verdicts on the Fourteenth Amendment claims in their post-verdict motions. We rejected a similar argument, however, in *Schmidt v. Smith*, 162 Wis.2d 363, 368-69, 469 N.W.2d 855, 857 (Ct. App. 1991), where we concluded that "a trial court's authority, whether express or implied, to sua sponte grant a new trial `is subject to statutory time limits governing the parties' motions.'"

judgment." See *Jansen Co. v. Milwaukee Area Dist. Bd.*, 105 Wis.2d 1, 10-11, 312 N.W.2d 813, 817 (1981). The inmates have not appealed the trial court's denial of their post-verdict motions regarding the Eighth Amendment and negligence claims. Thus, we only consider whether to exercise our discretionary authority under § 752.35 to grant relief to the inmates from the jury's verdict on their Fourteenth Amendment claims, as the trial court attempted to do.⁶

"[W]e should invoke our discretion only where we are convinced that there has been a probable miscarriage of justice if the jury's verdict were permitted to stand." *Jansen Co. v. Milwaukee Area Dist. Bd.*, 105 Wis.2d 1, 12, 312 N.W.2d 813, 818 (1981). We are not so convinced.

Probably the most striking aspect of the trial court's post-verdict decision is that it granted post-verdict relief that was not requested by the inmates. Before trial, they had moved for summary judgment on their Fourteenth Amendment sink and toilet claim, but this motion was denied by the trial court. The trial court at that time concluded that WIS. ADM. CODE § HSS 303.71, and other provisions of the Wisconsin Administrative Code, "arguabl[y] provides to occupant of a cell a limited property right to have a cell equipped with a toilet and sink" and that "arguably [inmates] were deprived of that right" when placed in cell 46. But, the court further determined that "the pieces of the puzzle are, in part, missing and a trial is necessary to determine if the [inmates'] due process rights have been violated."

At the close of the inmates' case, the officials moved for dismissal or directed verdict with respect to several claims and certain defendants. The

⁶ Section 752.35, STATS., provides as follows:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

officials claimed there was insufficient evidence on the inmates' negligence claims. The trial court reserved a ruling on that motion and later denied it. The officials also sought a directed verdict dismissing the Eighth Amendment claims, which was denied.

The record discloses no motions for directed verdict on any claims by the inmates at the close of all evidence.⁷ The jury instructions on the inmates' Fourteenth Amendment claims were submitted by their counsel and were modified at the instructions conference. The inmates' counsel told the court during the conference, "I think you already ruled you were going to find liberty interest, as a matter of law." The court responded "I am," and instructed the jury as follows:

First, [inmates] must show that they have a "liberty or property interest" that the [officials] have violated. I instruct you as a matter of law that the [inmates] have a liberty or property interest in being placed in a segregation cell with a sanitary toilet and sink. Therefore, [inmates] have met this element of their procedural due process claim.

The court's ruling on the existence of a liberty interest, given at the instruction conference, was as follows:

And I am prepared to -- at least in my reading of the case law, to say that that provision of the code which provides a sink and a sanitary toilet, provide a liberty interest. That does not mean that I am going to make any finding, because you can still -- well, even with the liberty interest, you may not prevail on due process. But that was a motion that was made, and I declined to make it at the time.

I am also going to find that there is evidence to sustain -- that the jury could sustain a finding of

⁷ The inmates had commenced their action pro se, but were represented by counsel at trial, and are represented on this appeal.

negligence on the part of the warden and of the then head of the Division of Corrections -- now Department. *And I would only say I would never go too far to grant summary judgment in either of those areas, because they are an issue of fact. And I think the defense put that squarely at issue by either necessity or emergency.*

(Emphasis supplied).

Thus, the trial court's ruling went only to the existence of a liberty interest; not to whether a deprivation occurred, or whether any deprivation was rationally related to a legitimate state interest, or whether a deprivation had occurred without proper procedural process. As to these latter issues, the court had apparently concluded that "even with the liberty interest, [inmates] may not prevail on due process" since there were "issue[s] of fact" that the officials had put "squarely at issue." These issues were put to the jury and were decided adversely to the inmates.

The inmates do not argue on appeal that the jury was improperly instructed on the Fourteenth Amendment claims, or that the form of verdict did not fairly and fully address the issues to be tried. They point to no improper evidentiary rulings or other errors by the court in the trial of their Fourteenth Amendment claims. Even though they failed to move for a directed verdict on those claims, either at the close of evidence or post-verdict, they now argue that there was no credible evidence to support the jury verdict.

In denying the inmates' post-verdict motions on their Eighth Amendment and negligence claims, the trial court made the following observations regarding the evidence at trial:

The three [inmates] in this action have extensive disciplinary records in the prison system and on many occasions have been violent and destructive.... In the instances that the [inmates] were placed in cell 46, they were, for the most part, initially on control status because of their violent and destructive behavior.... During this period of time, CCI was

overcrowded and some of the cells in the seg unit had been damaged and could not be used.

....

The three [inmates] were viewed as dangerous, difficult to manage and very destructive. Also the institution was overcrowded and some observation cells were out of order because of damage and could not be used.

....

Prisons in many ways are demeaning and humiliating to inmates. By their very nature, prisons deprive inmates of many liberties. For the most part, the three [inmates] testified how degrading and humiliating it was to be housed in cell 46 and any harm suffered was emotional. By choosing not to find any causation between the negligence of the [officials] and the alleged harm the [inmates] suffered, the jury could infer that [inmates] were in this area of segregation because of their violent and disruptive behavior and any emotional trauma visited upon them was their own doing.

Thus, the trial court was satisfied, based on the evidence at trial, that the jury could properly find that no acts of the officials caused harm to any of the inmates. Our review of the record does not lead us to conclude otherwise. There was credible evidence in the record to support the jury's findings that: (1) the officials did not violate the inmates' rights to procedural and substantive due process; (2) the officials' actions were not the cause of harm to the inmates; and (3) the inmates had not proven they suffered compensable damages.

"A probable miscarriage of justice exists only if the evidence and law are such that the defendants probably should have won and therefore deserve another chance, or if errors during the trial deprive the defendants of a fair and full trial of all the issues of the case." *Ford Motor Co. v. Lyons*, 137 Wis.2d 397, 422, 405 N.W.2d 354, 364 (Ct. App. 1987) (citations omitted). Our review of the record does not convince us that either circumstance is present.

We therefore decline to exercise our discretion under § 752.35, STATS., to reverse the judgment on the jury's verdict.

c. Cross Appeal: Summary Judgment on Cell Temperature Claims

We review an order for summary judgment de novo, applying the same standards as the trial court. See *Voss v. City of Middleton*, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maynard v. Port Publications, Inc.*, 98 Wis.2d 555, 558, 297 N.W.2d 500, 502-03 (1980). Inmate Kirsch claims that the trial court erred in dismissing on summary judgment his Eighth and Fourteenth Amendment claims regarding lack of adequate heat and improper restraint. He argues he had placed in dispute issues of material fact that precluded summary judgment.

We agree with the officials that Kirsch's claim for violation of his right to substantive due process under the Fourteenth Amendment must rise or fall with his concurrent claim for violation of the Eighth Amendment's prohibition against cruel and unusual punishment. See *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (Due Process Clause affords inmate no greater protection than does the Cruel and Unusual Punishment Clause). As to the claim that cold cell temperatures deprived Kirsch of a liberty or property interest without procedural due process, Kirsch's submissions acknowledge that he was in various forms of segregation status and often in full restraints when he was exposed to the allegedly inadequate cell temperatures. Yet, as the trial court noted, Kirsch makes no claim that his procedural due process rights were violated when he was placed in segregation and restrained. Thus, it is the deprivation of proper cell warmth, not Kirsch's segregated or restrained status, that must be examined for procedural inadequacies.

An affidavit by CCI's buildings and grounds supervisor states that the institution's heating, ventilation and air conditioning (HVAC) systems were computer regulated from a security access location in accordance with applicable provisions of the Wisconsin Administrative Code. Only "qualified, trained maintenance personnel have access" to the controls, and the settings in the segregation unit are maintained at 76 degrees during the heating season and

80 degrees in the summer. Kirsch's submissions do not contradict these statements.

Any deficiencies in segregation cell temperature that might have occurred were thus not intentional actions directed toward Kirsch but were "random and unauthorized," not unlike losing an inmate's mail. See *Parratt v. Taylor*, 451 U.S. 527, 541, 544 (1981) (Fourteenth Amendment not intended to be a font of tort law, supplanting state law remedies). Moreover, Kirsch himself alleges that he initiated complaints about the segregation cell temperature to various prison authorities. The existence of inmate complaint investigation and review procedures and the opportunity to seek common law tort damages in a post-deprivation civil suit, such as this one, provide Kirsch adequate remedies for the alleged cold cell temperatures. See *Irby v. Macht*, 184 Wis.2d 831, 850-51, 522 N.W.2d 9, 16-17, *cert. denied*, 115 S. Ct. 590 (1994).

We thus conclude that dismissal of Kirsch's Fourteenth Amendment claims for cold cell temperatures was proper. We next consider whether his Eighth Amendment claim based on cold cell temperatures was properly dismissed.

[I]n order for a condition of confinement to be considered cruel and unusual it must be either: (a) "grossly disproportionate to the severity of the crime" warranting punishment, (b) involve the [sic] "the wanton and unnecessary infliction of pain" or (c) deprive "inmates of the minimal civilized measure of life's necessities."

Mitchell v. Maynard, 80 F.3d 1433, 1441-42 (10th Cir. 1996) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). We agree with Kirsch that an allegation of inadequate heating may state an Eighth Amendment violation. See *Chandler v. Baird*, 926 F.2d 1057, 1064-65 (11th Cir. 1991); *Lewis v. Lane*, 816 F.2d 1165, 1171 (7th Cir. 1987). And, Kirsch's averments that cell temperatures were often between 50 and 60 degrees at times when he was naked and restrained, causing him to shiver uncontrollably, squarely places at issue whether he was deprived of a "minimal civilized measure of life's necessities."

The existence of an inhumane condition itself, however, is not sufficient to prove a violation of the Eighth Amendment:

[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety.... It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Whitley v. Albers, 475 U.S. 312, 319 (1986). The requisite state of mind on the part of officials that must be alleged and proven in prison-conditions cases is "deliberate indifference" to inmate health or safety," *Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970, 1979 (1994), which is to be determined subjectively:

We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.... But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id.

Kirsch stated in his affidavit that he and other inmates frequently told Murphy and another official of the cold cell temperatures, and that the officials not only failed to rectify the matter but made comments to the effect that better behavior would gain Kirsch a warmer cell. The officials' affidavits in

support of their motion for summary judgment set forth the previously cited facts regarding CCI's HVAC control system. The officials also provided Kirsch's prison medical records for the period he was in segregation.

Kirsch had regular and frequent contacts with medical personnel during this period. Entries indicate Kirsch was treated for leg and chest wounds and for various minor injuries resulting from his disruptive and destructive behavior. On many occasions he refused medications and dressing changes. Medical personnel were also called upon to monitor him when in full restraints. Although Kirsch avers that he complained to medical staff about the cold temperatures, the extensive medical records for the period in question contain no indication that Kirsch either complained of or exhibited any physical effects or symptoms as a result of cold cell temperatures.

Thus, while factual disputes may exist with respect to what the temperature in the cells was, at various times, and with respect to whom Kirsch complained and how they responded, there is no dispute that: (1) the HVAC system was centrally controlled by maintenance staff and was set to provide adequate heat and proper cooling to the segregation cells, and (2) Kirsch exhibited no symptoms or other manifestations that his health or safety was at serious risk from inadequate cell temperatures while in segregation. The undisputed facts remove Kirsch's claim from the realm of the Eighth Amendment, and place it instead within ordinary tort law negligence. *See Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970, 1979 (1994). Even if we accept, as we must on summary judgment, Kirsch's statements that the cell temperatures were too cold, and that he informed officials of that fact, the record on summary judgment establishes that the cold cell temperatures were not deliberately inflicted as punishment and that the officials did not know of and disregard "an excessive risk to inmate health or safety." *Id.*

We therefore conclude that the trial court did not err in dismissing on summary judgment Kirsch's constitutional claims based upon cold cell temperatures. He does not appeal, and we do not address, the trial court's dismissal of the cold cell claim grounded in state law negligence.

Based on the foregoing, we reverse the circuit court's judgment awarding damages to the inmates and direct that judgment be entered on the

jury's verdict. The December 8, 1992 order for summary judgment dismissing Kirsch's cold cell temperature claims is affirmed.

By the Court.—Judgment reversed; order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.