

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KENNETH BRODBECK and	:	CIVIL ACTION
SALLY BRODBECK	:	
	:	
v.	:	
	:	
NATIONAL RIFLE ASSOCIATION	:	
OF AMERICA	:	
and	:	
GORDON RUSSELL	:	NO. 98-5361
	:	
Newcomer, J.	:	September 1999

**M E M O R A N D U M**

Presently before the Court is Defendants' Motion for Judgment as a Matter of Law, or in the Alternative, For a New Trial, plaintiffs' response thereto, defendants' reply thereto, plaintiffs' sur-reply thereto, and defendants' sur-sur-reply thereto. For the reasons that follow, defendants motion for a new trial will be granted.

**I. Introduction**

After more than five days of testimony, the jury retired to consider plaintiff Ken Brodbeck's claim for battery against defendants Gordon Russell ("Russell") and the National Rifle Association ("NRA"), Ken Brodbeck's claim for false light publicity against the NRA, and Sally Brodbeck's claim for false light publicity against the NRA. Hours later, the jury returned with a verdict in excess of \$4,400,000 that, in light of the nearly complete lack of demonstrable injury sustained by either plaintiff, can only be described as "shocking." The jury awarded Ken Brodbeck a total of \$150,001 in compensatory damages, and

\$1,606,000 in punitive damages as a result of the battery they found he suffered at the hands of Gordon Russell, an NRA security guard. The jury also awarded Ken Brodbeck \$1 in nominal damages, and \$200,000 in punitive damages as a result of the statements made by Charlton Heston that the jury found placed plaintiff in a false light. The Jury also awarded Sally Brodbeck, an NRA Board member at the time, \$2,500,000 in compensatory damages, and \$1 in punitive damages for injury to her reputation as a Board member, as a result of Heston's statements.

Reluctantly, and after much reflection, the Court determines that this verdict cannot stand.

## II. Legal Standards

Defendants filed a timely post-trial motion, requesting both judgment as a matter of law pursuant to Fed. R. Civ. P. 50, or, in the alternative, a new trial pursuant to Fed. R. Civ. P. 59.

Concerning defendants' Rule 50 motion, a Court cannot consider grounds not advanced by defendants at trial. Inter Medical Supplies LTD. v. EBI Medical Systems, 975 F.Supp. 681 (D.N.J. 1997), aff'd, No 98-5158, 1999 U.S. App. LEXIS 14207 (3d Cir. June 28, 1999). A review of defendants' motion reveals that they never moved for judgment as a matter of law at the close of the evidence regarding virtually every point raised in their "renewed" motion for judgment as a matter of law. Accordingly, the Court will not consider those points here. Further, the one

point preserved for review, the ability of both plaintiff's to recover under a claim for false light publicity without a showing of special damages, was addressed thoroughly at trial, and the Court is not persuaded to disturb those rulings here. The Court now turns its attention to plaintiff's motion for a new trial.

A motion for a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). Such motions are committed to the discretion of the district court. Rotando v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992). A district court's power to grant a new trial, however, is limited to those circumstances where a miscarriage of justice would result if the verdict were permitted to stand. Olefins Trading, Inc. v. Han Yang Chem. Corp., 9 F.3d 282, 289 (3d Cir. 1993). A new trial may be granted based on, inter alia, a question of law, erroneous evidentiary rulings, prejudicial statements by counsel, or because the jury's verdict is against the weight of the evidence. See Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d Cir. 1993).<sup>1</sup>

#### New Trial or Remittitur based on Excessive Damages

A new trial or remittitur must be granted when a damage award is "so grossly excessive as to shock the judicial

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<sup>1</sup>Because the Court finds that a new trial is needed in this case to remedy the jury's shocking and prejudicial verdict, it does not reach defendants' other arguments in support of a new trial. To the extent that the issues raised in defendants' motion need to be resolved prior to the next trial, that will be done at the appropriate time.

conscience." Gumbs v. Pueblo Int's, Inc., 823 F.3d 768, 771 (3d Cir. 1987)(quoting Ednyak v. Atlantic Shipping Inc., 562 F.2d 215, 225-26 (3d Cir. 1977). Stated differently, the Court should order a new trial or remittitur "if a miscarriage of justice would result if the verdict were to stand." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 211 (3d Cir. 1992). If the verdict is a result of passion or prejudice by the jury, a new trial, rather than remittitur, is the appropriate remedy. Dunn v. Hovic, 1 F.3d 1371, 1383 (3d Cir. 1993)(en banc); see also 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure S 2815, at 165 (2d ed. 1995) (remittitur is "not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages"). The size of the award alone is not enough to prove prejudice and passion. Dunn at 1383. Damage awards that are merely excessive or so large as to appear contrary to reason are subject to remittitur rather than a new trial. Brunnemann v. Terra Int'l, Inc., 975 F.2d 175, 178 (5th Cir.1992). That an award is extremely generous, or that the Court would have awarded a different amount is not enough to disturb the jury's verdict, so long as the award is rationally based. Walters v. Mintec/International, 758 F.2d 73 (3d Cir. 1985)(citations omitted). However "a district court should be alert to its responsibility to see that jury awards do not extend beyond all reasonable bounds." Gumbs at 772 (citation omitted).

### III. Discussion

A. The Damages Award is so Grossly Excessive as to be Shocking.

The Court has little difficulty concluding that this verdict is grossly excessive and shocking to the conscience. There is simply no basis in the evidence adduced at trial to support this verdict.

The jury awarded Kenneth Brodbeck a total of \$1,756,001 in compensatory and punitive damages as a result of the battery they found to have been committed by Gordon Russell when Brodbeck refused to stop taping his wife, who was speaking at the annual directors meeting. Presumably, the jury found Russell did this by applying a carotid restraint to Mr. Brodbeck, and continuing the hold for some time (seconds) while Brodbeck was on the ground, causing Mr. Brodbeck to exhibit "seizure-like" activity, falling unconscious and jerking or shaking around on the ground. Within moments, Mr. Brodbeck was able to get to his feet, walk out of the room unassisted, and speak with reporters. The only injury he suffered was a scratch on his arm, for which he received a band-aid, and a bruise on his back. He neither sought nor received immediate medical attention for any other injury. It is uncontested that there were no lasting physical effects from this incident, nor was there any testimony concerning emotional injury. It would be a miscarriage of justice to permit a \$1,756,001 damages award to stand for the virtually complete

lack of injury suffered by Kenneth Brodbeck.<sup>2</sup>

The jury award of \$2,700,002 for being placed in false light is similarly shocking. The Jury found that Mr. Heston's statements to the New York Times and then to NRA members an hour later, where Mr. Heston stated that the video-tape/ battery incident with Kenneth Brodbeck was "bad acting" and "staged by opponents of the NRA to stir up trouble" were false, and placed both plaintiffs in a false light. There was absolutely no proof

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<sup>2</sup>Plaintiffs cite to several Philadelphia County Court of Common Pleas cases in attempt to justify the \$150,001 in compensatory damages awarded by the jury in this case. However, since there are virtually no injuries in the instant case, physical or emotional, there is nothing to be gained by attempting to analogize to other battery cases, and the Court would not be persuaded by any reasoning that would attempt to uphold this verdict with the evidence presented at trial. The Court finds as a matter of law that a compensatory damage award in this case is shocking to the conscience. The Court similarly finds that the jury's punitive damages verdict of \$1,606,000 is shocking in light of the facts of this case. While the Court finds there is sufficient evidence of record that, if believed by the jury, could warrant an award of punitive damages, there is no basis for the amount awarded. The degree of reprehensibility is relatively low. At its worst, a security guard lost control one time, using excessive, unnecessary force, that ultimately lasted for less than a minute, and resulted in no injuries. The jury also found, and there is evidence of record, that the NRA made false statements about the incident, and attempted to deny that a battery occurred. Certainly, a jury could find this conduct to be reprehensible, but no reasonable jury, guided by the evidence and not prejudice or bias, could have found it to the degree they did. Further, the Supreme Court, discussing punitive damages awards, noted in TXO Production v. Alliance Resources, 509 U.S. 443 (1993):

"Punitive damages should bear a reasonable relationship to the harm *that is likely to occur from the defendant's conduct* as well as the harm that has actually occurred. If the defendant's actions caused *or would likely cause* in a similar situation only slight harm, then damages should be relatively small. If the harm is grievous, the damages should be much greater." 186 W Va, at 668, 413 SE2d, at 909(emphasis added).

Id. at 460.

In the instant case, the battery was not a particularly egregious act, and although there was some testimony that serious injury or death was a possible outcome from Russell's use of force, there was nothing to suggest this was likely, and instead it was probably a very remote possibility. Accordingly, since the harm was only slight, the relationship between the actual harm and the punitive damages assessed is not reasonable.

of emotional, economic, or special damages of any kind adduced at trial for either plaintiff. As such, the Court restricted the jury to a compensatory award of nominal damages for Kenneth Brodbeck under Wecht v. P.G. Publishing, 725 A.2d 788 (Pa. Super. 1999). Since the Court found that the statements were slander per se as they applied to Mrs. Brodbeck's position as a director, the Court permitted the jury to award her damages for injury to her reputation as a director. Exactly what evidence of reputational harm Mrs. Brodbeck adduced at trial is vigorously contested, and, quite frankly, somewhat of a mystery to the Court. In their Response Brief, plaintiffs argue that she suffered "profound" damage to her reputation, because she was no longer doing pro bono work for the NRA, she suffered a defeat in her attempt for re-election to the Board, and some people were referring to her as a dissident. There is no affirmative evidence of a causal connection between the remarks of Mr. Heston and this sudden drop in stature, and plaintiffs rely almost entirely on inference. While the Court presently has serious doubts about the permissibility of allowing the jury to consider these as compensable damages without a more firmly established causation element (beyond an award of nominal damages), the Court has no doubt that the \$2.5 million dollar compensatory award is shocking to the judicial conscience.

Plaintiffs attempt to justify this amount with citations to other cases where large defamation awards have been upheld. In the first instance, this is not a defamation case, but a false

light case. Second, and more importantly, none of the cases cited remotely resemble the complete lack of measurable, compensable injury present in this case, nor were the juries restricted to only considering reputational harm in a limited context. That the jury awarded Mrs. Brodbeck \$2,500,000 in compensatory damages on the evidence strongly suggests that they considered other, impermissible considerations in their deliberations. This conclusion is buttressed by the bizarre award of \$1 in punitive damages, which serves to further undermine the Court's faith in this jury's verdict.<sup>3</sup>

Assuming that punitive damages were properly charged, the Court also finds infirmity and excessiveness in the punitive damages awarded to Kenneth Brodbeck, as \$200,000 for absolutely no injury and for statements that, even if maliciously said, were barely, if at all, reprehensible, is shocking.

The Court is convinced that virtually every damage award in this case is grossly excessive and shocking to the conscience. Initially, the Court approached the issue of how best to remedy this shocking verdict with an eye towards remittitur. It is a much less drastic remedy, avoiding the waste of judicial and litigant resources a retrial would necessarily entail. However,

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<sup>3</sup>With respect to the punitive damages awarded for the false light claim, \$1 for Sally Brodbeck, and \$200,000 for Kenneth Brodbeck, the Court is convinced that it instructed the jury with the wrong legal standard. Assuming arguendo that the Court correctly determined the negligence standard should apply to the liability determination (a determination that the Court believes is correct), the actual malice standard still should apply to a determination of punitive damages under Pennsylvania Law. Geyer v. Steinbronn, 506 A.2d 901 (Pa. Super 1986).

a closer scrutiny of this verdict, and a review of the trial transcript, reveals that remittitur is an inappropriate remedy under the circumstances of this verdict.

B. Evidence of Passion, Prejudice, or Bias

The Court is mindful that there is no amount of damages that is per se proof of passion, prejudice, or bias. Dunn at 1383. However, in light of the virtual complete lack of injury, and the relatively low degree of reprehensibility of defendants' conduct, the amount of damages awarded by the jury is strongly indicative of prejudice or bias.

The Court also finds other elements of the damages award particularly illuminating on the question of prejudice or bias. The jury found Gordon Russell liable for the battery, and awarded Mr. Brodbeck \$1 in damages against Russell, and \$150,00 against the NRA, who was only vicariously liable.<sup>4</sup> This is nonsensical. The jury only held the person who committed the act, who supposedly applied a carotid restraint causing Mr. Brodbeck to fall to the floor and go into some type of "seizure," liable for \$1 of \$150,001 in compensable injuries this jury found to exist, even though NRA, in the context of the battery, did nothing to

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<sup>4</sup>Defendants also argue that this award should not stand because it violates standard principles of agency in that the NRA, who is only vicariously liable for the conduct of Russell, can only be liable for the same amount as Russell. The Court agrees in principle that the charge insufficiently clarified the liability of the NRA for Russell's act. In light of the Court's ruling, however, the Court need not reach the merits of this argument here.

Mr. Brodbeck.<sup>5</sup> This is strongly suggestive of bias against the NRA. That the jury was likely confused regarding the nature of the agency relationship between Russell and the NRA was fortunate in the instant case, as it highlighted their bias against the NRA, and enabled the Court to prevent a miscarriage of justice from occurring. Similar logic applies to the Punitive damages award of \$6,000 against Russell and \$1,600,000 against the NRA.

Additionally, the bizarre award to Sally Brodbeck on her false light claim, \$2,500,000 in compensatory damages and \$1 in punitive further evidences prejudice. Clearly, even the jury did not find the NRA's conduct to be particularly outrageous, and there was no real evidence of reputational harm from which a jury could rationally fix an award, yet they awarded a compensatory amount that, based on the evidence, was strongly punitive in nature.

In the instant case, then, the Court is struck by not only the amount of the damages, but the way in which the jury assessed liability in their interrogatory answers. These two factors alone convince the Court that something other than the evidence was guiding the jury, and warrant a new trial. However, a review of the circumstances of this case, and the trial transcript reveals that there were many potential sources of bias, suggesting additional reasons to doubt this verdict.

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<sup>5</sup>They did employ him, of course, but there were no claims for negligent hiring or supervision.

This trial was fertile ground for bias, first and foremost based simply on the identity of the defendants. The NRA refers to themselves in their briefs before the Court as "the most reviled organization in America," and they are probably not far off the mark in today's political climate. The Court was probably not as sensitive to this reality as it could have been throughout this trial, and should have conducted the trial and instructed the jury accordingly to better ensure that the trial was about the evidence and not the defendant. Although the jurors were carefully questioned at the outset, and cautioned throughout the trial that they were to be guided by the evidence and not by prejudice or passion, considering some of the events at trial, the Court probably over-estimated their ability to accomplish this without firmer guidance.

One of the chief issues raised by defendants in their post-trial motions was the conduct of plaintiffs counsel throughout the trial. There were two motions for a mistrial, and extensive post-trial briefing on this issue. While the Court does not believe her conduct rose to a level of misconduct that would, without more, warrant a new trial, in retrospect, and in light of the verdict, there were numerous regrettable and improper statements or arguments made by counsel that should not have been heard by the jury, and the Court under-estimated their possible

impact.<sup>6</sup> These include improper remarks in her opening statement, improper cross-examination, and inappropriate argument in her closing. While plaintiffs concede in their sur-reply that counsel's use of "I think" and "I believe" numerous times in her closing was "inartful," the Court believes that, taking her argument as a whole, the probable impact of her infractions was far more egregious than that.

Specific examples of improper argument include counsel's statement to the jury suggesting evidence she was aware of but the jury was not when she said: "I've been working on this case a lot longer than you folks have and I don't know what they are talking about." (Tr. at 68, May 12, 1999). Counsel also improperly invoked her own personal experience when she argued to the jury that:

I'm sure many of you worked for companies in your past. I know I did. I'll tell you something. If there's ever any incident at any organization of any size, there is an investigation, and there are written documents relating to that investigation....Where's the written investigation? Where are the reports? Where are the witness interviews?

(Tr. At 85-86, May 12, 1999). Plaintiffs concede that this was improper, but argue that the Court cured any prejudice with its instructions. In light of the verdict, the Court disagrees.

The Court also believes that several statements of plaintiffs' counsel, whether by design or by accident, placed the

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<sup>6</sup>To grant a new trial on attorney misconduct, a Court must find that misconduct occurred, and that it is "reasonably probable" that the challenged conduct had a significant influence on the jury's deliberations. Greate Bay hotel and Casino v. Tose, 34 F.3d 1227, 1236 (3d Cir. 1994).

views of the NRA directly at issue, and had the effect of appealing directly to a public prejudice against the NRA that undeniably exists. For example, when questioning Dr. Phillips about the number of NRA officers on a conference call during a telephone deposition, plaintiff's counsel mockingly said, "[a]ren't all these people...aren't they supposed to be out securing our Second Amendment rights?" (Tr. at 208, May 10, 1999). This was objected to at trial, and the objection was sustained, but that does not justify or excuse this inflammatory statement, and it does not diminish its impact.

Although the Court is not holding that plaintiffs' counsel engaged in misconduct, the Court does find that a disappointingly large number of inappropriate and potentially prejudicial statements were placed before the jury, and, considering the outcome, likely influenced their deliberations. Unfortunately, most of these statements, and many more not excerpted to by the Court, went unobjected to at trial, and unchecked by the Court. All participants share in the blame for this. Plaintiffs' counsel should have been more disciplined and professional in her arguments, defense counsel should have raised the appropriate objections in a timely fashion, and the Court should have been more sensitive to the potential prejudicial impact of these statements, and more vigilant in policing the arguments of counsel. The Court expects that these will not be repeated at the next trial. This is not meant to curb zealous advocacy, but to prevent overzealousness, a problem that has plagued both sides

from the beginning of this case, and to ensure that, whatever the outcome, the result of the next trial is based on an unbiased evaluation of the evidence, and nothing else.

In addition, there were other aspects of this trial that likely contributed to this unfortunate result. There was "hair-splitting" over whether or not Mr. Brodbeck suffered a "seizure," or whether it was only "seizure-like activity" as a result of his encounter with MR. Russell. The distinctions drawn by counsel, arguing after a question by the Court that they were not claiming that MR. Brodbeck actually suffered a seizure, but only that he suffered from "seizure-like" activity are ones that likely only a medical professional, an attorney, a judge, or someone with access to the transcript could understand. This is particularly true in light the numerous references to a seizure by counsel and witnesses both before and after the Court's ruling. The Court was not comfortable with how it was resolved during the trial, and in retrospect believes that defense questioning of its expert was improvidently curtailed on the issue, and further does not believe the ruling or its impact was made sufficiently clear to the jury. The Court unquestionably believes that this had a prejudicial impact on defendants, in that it hampered their defense, and confused the jury.

Finally, there was extensive testimony by Sally Brodbeck and her doctor concerning emotional injuries she suffered as a result of the battery on her husband. The Court ultimately granted defendants' Motion for Judgment as a Matter of Law on Mrs.

Brodbeck's intentional infliction of emotional distress claim, making all of the testimony on emotional injury irrelevant. Although the Court instructed the jury that the intentional infliction of emotional distress claim was no longer to be considered, in light of the verdict, and after reviewing the transcript, the instructions were not sufficient to cure the confusion, or prevent the jurors from considering issues and testimony they should not have.

In short, the Court finds that the damages in this case are so grossly excessive as to be shocking, strongly suggesting bias. The distribution of the jury's damages award, \$6,001 dollars against the security guard who committed the battery, and \$1,750,000 against the NRA confirms this, making remittitur improper and warranting a new trial. A review of the transcript reveals that, although the Court does not believe counsel engaged in misconduct, considering the political unpopularity of the defendants, numerous potentially prejudicial statements were presented to the jury and likely impacted their verdict. In addition, the Court's ruling regarding the seizure evidence likely confused the jury and disadvantaged the defendants. Finally, the Court likely did not sufficiently remove the testimony of Sally Brodbeck and her expert regarding emotional injuries from the jury's purview.

As a result, the Court is convinced that defendants did not receive a fair trial, the verdict was not based on the evidence, and a new trial is necessary to prevent a manifest injustice.

#### IV. Conclusion

Upon receipt of the jury's verdict, the Court had grave concerns about the disproportionate enormity of the outcome. The damages awarded by the jury bore no resemblance to the evidence presented at trial. After months of reflection, and after a review of the trial transcript, the briefs of the parties and the cases cited therein, and despite this Court's steadfast belief in the sanctity of our jury system, the Court has reluctantly come to the inescapable conclusion that the damages awarded in this case is shocking to the judicial conscience. Further, as a result of the above analysis, the Court has no doubt that the excessive damages awarded were a result of passion, prejudice, or bias, and not because of the evidence. In such a situation remittitur is not proper since prejudice may have infected the decision of the jury on liability, as well as on damages. The Court, therefore, is compelled to exercise its discretion, and must vacate the verdict and order a new trial.

AN APPROPRIATE ORDER FOLLOWS.

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Clarence C. Newcomer, J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KENNETH BRODBECK and	:	CIVIL ACTION
SALLY BRODBECK	:	
	:	
v.	:	
	:	
NATIONAL RIFLE ASSOCIATION	:	
OF AMERICA	:	
and	:	
GORDON RUSSELL	:	NO. 98-5361

**O R D E R**

AND NOW, this            day of September, 1999, upon consideration of defendants' Motion for Judgment as a Matter of Law, or in the Alternative, For a New Trial, plaintiffs' response thereto, defendants' reply thereto, plaintiffs' sur-reply thereto, defendants' sur-sur-reply thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. Said Motion is DENIED to the extent the Court will not enter judgment as a matter of law in favor of defendants. Said Motion is GRANTED to the extent the Court Orders a New Trial. IT IS FURTHER ORDERED that the new trial is scheduled for Monday, December 6, 1999. IT IS FURTHER ORDERED that a status conference is scheduled for Monday, September 27, 1999 at 11:15 a.m. This conference is to be held in chambers, and the parties are to be prepared to discuss an amicable resolution to this case and any issues related to the upcoming trial.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.

