IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Caron Nazario,	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:21-cv-00169
	)	
Joe Gutierrez, et. al.	)	
Defendants.	)	

PLAINTIFF CARON NAZARIO'S BRIEF IN SUPPORT OF HIS FEDERAL RULE OF CIVIL PROCEDURE RULE 50 AND 59 MOTION

Comes now the plaintiff by counsel and in support of his F.R.C.P. 50 and 59 motion for a judgment notwithstanding the verdict and/or a new trial as follows.

The motion for a new trial on the merits requires a review of the evidence under a different standard than used for F.R.C.P. 50 motions for a judgment notwithstanding the verdict. Under Rule 59, a trial court may weigh the evidence and consider the credibility of the witnesses. Indeed, a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, "if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice . . . ." *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959), *citing*, *Aetna Casualty & Surety Company v. Yeatts*, 122 F.2d 350 (4th Cir. 1941). It is not necessary, however, to consider whether under the "new trial" standards the jury verdict should have been set aside as contrary to the clear weight of the evidence. A court should grant a new trial when the jury was improperly instructed on the questions of liability or damages and reached their decision under an incomplete theory of law, or when a miscarriage of justice would result. *See Persinger v. Norfolk & W. R. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990).

The court should grant the motion for a new trial because the verdict (1) is the result of the jury failing to follow the law and instructions, (2) is based upon evidence which is false (3)

the jury was improperly instructed and reached its decision under an incomplete theory of the law, (4) is against the clear weight of the evidence, and (5) will result in a miscarriage of justice.

1. The verdict is the result of the jury failing to follow the law and instructions.

We begin by looking at the jury verdict in conjunction with the jury instructions. The federal rules of civil procedure permit a court to order a new trial after a jury has rendered a verdict for any reason for which a new trial has heretofore been granted in an action at law in federal court. **Fed. R. Civ. P. 59(a)(1)(A).** One of those "heretofore granted reasons" for a new trial is when the jury has failed to follow the jury instructions, as a verdict based on a jury failing to follow instructions is one of those reasons as it results in a miscarriage of justice. *See, e.g., Mattison v. Dallas Carrier Corp*, 947 F.2d 95, 108 (4th Cir. 1991). It is not necessary for the jury fail to follow the instructions intentionally, though intentional nullification is also among the Fed. R. Civ. P. 59(a)(1)(A) reasons. *See, United States v. Ward*, 2008 U.S. Dist. LEXIS 87744 at * 13 (W.D. N.C., 2008) (jury nullification issues make granting a new trial appropriate). While the jury is presumed to have followed the instructions, that presumption is rebuttable *E.g., United States v. Vogel*, 1994 U.S. App. LEXIS 28293 at *16 (4th Cir. 1994) ("Because jurors are presumed to follow their instructions, we should assume that they did so *absent any evidence to the contrary*")(internal citations omitted)(emphasis added). In this case, the jury's own verdict demonstrates that, be it a simple error or from intentional nullification, they failed to follow the instructions: it is not possible under the jury instructions for the jury to have found that Defendant Gutierrez assaulted Lt. Nazario without also finding that he battered and falsely imprisoned him. This failure to follow the instructions colors not only the verdict as to defendant Gutierrez on issues of the other claims but also on damages, and as to defendant

Crocker as well. Therefore, pursuant to Fed. R. Civ. P. 59(a)(1)(A) this Court should grant a new trial[1] on all issues other than the liability for Gutierrez' assault.

The jury found defendant Gutierrez liable for assault, **Doc. 238, p. 10, Question 21**. They found no further liability for any party. **Doc. 238.** Pursuant to the jury instructions, the assault triggered Lt. Nazario's right to resist and necessarily the right to refuse to exit the vehicle, **Doc. 240, pp. 42 – 43, Instructions 41 and 42**, which in turn meant that any force that Gutierrez used to overcome this legal resistance, if it touched Lt. Nazario, was a battery **Doc. 240, pp. 42 – 43, Instructions 41 and 42 and p. 46, Instruction 45.** If this battery extended the traffic stop, then it made the detention unlawful. **Doc. 240, p. 34, Instruction 33 and p. 37, Instruction 36.**

From the verdict form and the evidence, we can deduce that the assault by necessity occurred *prior* to the OC spray. The assault could not have occurred immediately prior to, or concomitant with a touching – as that touching following the assault would necessarily be a battery under the instructions[2]. **Doc. 240, p.40, Instruction 39 and p. 41, Instruction 40.** This excludes all actions after the OC spray, including the OC spray, as all of Gutierrez's actions from that point that could be colorable construed as an assault also involved a touching. **Plaintiff's Exhibit 6[3], from 18:38:34 to the end and Plaintiff's Exhibit 7**.[4] Thus, at the time that Lt. Nazario was OC

[1] Fed. R. Civ. P. 50(b)(3) and Fed. R. Civ. P. 59(e) also permit this court to direct entry of judgment against the parties in the alternative to ordering a new trial. Thus, the Plaintiff also moves in the alternative to the relief sought in Rule 59(a)(1)(A), and for the reasons stated below, for judgment for liability be entered against defendant Gutierrez for the assault, the battery, the search, and the false imprisonment as well as against defendant Crocker for the assault, the battery, and the false imprisonment. The court in this instance would still need to empanel a jury to determine damages. *See, Mattison,* 947 F.2d at 108.

[2] The alternative here is that the jury failed to find that the touchings were batteries which would be another failure to follow the jury instructions.

[3] Plaintiff's Exhibit 6 is the first part of defendant Crocker's body worn camera footage.

[4] The most reasonable example of the assault is the statement from Gutierrez that Lt. Nazario was "fixin' to ride the lighting" **Plaintiff's Exhibit 6 at 18:37:52** and telling Lt. Nazario that he

sprayed, the assault had triggered Lt. Nazario's right to refuse to exit the vehicle **Doc. 240, pp.42- 43, Instructions 41 and 42.** Refusing to exit the vehicle while keeping his hands up and open **Plaintiff's Exhibit 4, 00:01 – 2:28**; **Plaintiff's Exhibit 6, 18:37:55 – 18:39:08** was the *least* amount of force that Lt. Nazario could have used to resist the order to exit the vehicle[5]. As the defendants admitted to using the OC spray to cause Lt. Nazario to exit the vehicle, such use of OC spray was to overcome Lt. Nazario's lawful resistance **Doc. 240, pp.42- 43, Instructions 41 and 42**, meaning by necessity such use of OC spray was a battery and unreasonable. **Doc. 240, pp.42- 43, Instructions 41 and 42, p. 45, Instruction 45.** The jury instructions permit no other conclusion and yet the jury failed to return a verdict for battery against defendant Gutierrez. This means that the jury has failed to follow the jury instructions which warrants a new trial pursuant to **Fed. R. Civ. P. 59(a)(1)(A).** Further, as the OC spray was a battery under the instructions as written, the OC spray prolonged the traffic stop pursuant to Gutierrez's own admission that he would not have let Lt. Nazario leave if defendant Gutierrez felt that Lt. Nazario could not see and pursuant to Lt. Nazario's statement that he did not, due to, *inter alia*, the OC spray, feel free to leave. Thus, by necessity defendant Gutierrez *also* falsely imprisoned Lt. Nazario. **Doc. 240, p. 34, Instruction 33**, **and p. 37, Instruction 36** as the use of OC spray at that point pursuant to the instructions was "without legal right." **Doc. 240, pp.42- 43, Instructions 41 and 42, p. 45, Instruction 45.** Again, the jury failed to follow the jury

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should be afraid to exit the vehicle **Plaintiff's Exhibit 6 at 18:38:15** which even defendant Gutierrez admitted was "stupid." Both of these statements occurred *prior* to the OC Spray. **Plaintiff's Exhibit 6 at 18:39:08.**

[5] Even were the Court to accept the defendants' contentions that Lt. Nazario kept the door closed and locked it with his elbow, **Plaintiff's Exhibit 6 at 18:38:59 (approximately),** this does not change the calculus as the actions the defendants allege constitute such locking and shutting the door occurred after the "ride the lightning" and "you should be" assaults. **Plaintiff's Exhibit 6 at 18:37:52 and 18:38:15.**

instructions to the required conclusion given their assault verdict. Thus, a new trial pursuant to **Fed. R. Civ. P. 59(a)(1)(A)** is required.

This also means that, with a substantial likelihood, the jury failed to follow the instructions regarding damages.

Additionally this also means that with a substantial likelihood, the jury failed to follow the instructions regarding defendant Crocker as well – if they failed with Gutierrez, it follows that they more than likely had the same failures regarding defendant Crocker. For example, the record demonstrates that defendant Crocker actively participated in throwing Lt. Nazario onto the ground **Plaintiff's Exhibit 6 at 18:41:00 – 18:41:46**– a battery as Lt. Nazario's right to self-defense had been triggered. Yet there was no battery verdict. The record demonstrates that defendant Crocker, within the meaning of the phrase "aid and abet" as set forth in the jury instructions aided and abetted the OC battery, the battery when they placed Lt. Nazario on the pavement to handcuff him, as well as the false imprisonment. **Doc. 240, p. 38, Instruction 37; p. 44, Instruction 43, and p. 47, Instruction 46.** Yet the jury failed to return the verdict as the instructions required as there are no verdicts for assault, battery, or false imprisonment against defendant Crocker – and given the assault verdict against defendant Gutierrez, the jury instructions required such a verdict against defendant Crocker. Thus, a new trial pursuant to **Fed. R. Civ. P. 59(a)(1)(A)** is required to prevent this miscarriage of justice.

For this reason alone, the court should grant a new trial to prevent this miscarriage of justice.

2. The verdict is based upon evidence which is false

Keyhill Sheorn, MD's expert testimony was false. She knowingly and intentionally added diagnostic criteria to the Diagnostic and Statistical Manual of Mental Disorders, 5th

Edition ("DSM-V"), the generally accepted norms and standards for diagnosis of the injuries suffered by Lt. Nazario, in order to assert that he was not injured because he did not meet those added criteria. It is unrebutted that DSM-V is the "gold standard" for diagnosis of mental illness and injury. Dr. Sheorn even acknowledged this in her testimony on cross-examination and even provided Exhibit A in her report to the court showing the actual criteria for PTSD, Generalized Anxiety Disorder and Panic Disorder which did not include the criteria she invented.

Nevertheless, she told the jury falsely under oath that one of the diagnostic criteria for PTSD, was that that the trauma had to be "unspeakable and incomprehensible." She testified falsely that for General Anxiety Disorder was a disorder of dependency that whose diagnostic criteria required it to originate in childhood between the ages of 18 months and 2 years and for Panic Disorder the diagnostic criteria required it to be a consequence of separation anxiety in very early childhood. She then used these statements to the jury to support her opinion that Lt. Nazario suffered no psychiatric diagnosis, or injury.

During cross examination, Dr. Sheorn acknowledged that these statements she made to the jury under oath, that the diagnostic criteria were *not* in the DSM-V, that for PTSD the DSM-V did not require that the trauma be unspeakable and incomprehensible, that the DSM-V did not require that the illness originate in childhood between the ages of 18 months and 2 years for General Anxiety Disorder with her claim that it was a disorder of dependency, that the DSM-V did not require a very early separation and anxiety for diagnosis of Panic Disorder. Thus, her statements were false. She further admitted that she was not surprised that even the defense expert not called to testify disagreed with her opinions.

Similarly, Brandon Tatum's expert testimony was false and not based upon any empirical data but was simply ipso facto - "true because he says so" which was not only not helpful but was misleading to the jury. *Persinger*, 920 F.2d at 1188.

According to Daubert, "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Nease v. Ford Motor Co*., 848 F.3d 219, 231 (4th Cir. 2017) citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 593 (1993). Even Sheorn was forced to admit that her multiple added criteria were not part of the generally accepted scientific knowledge as evidenced by her admission that the DSM-5 was the gold standard and that these criteria were not a part of that standard.

The Fourth Circuit has made it clear that a thorough and extensive cross examination does not cure this problem with experts:

> The fact that an expert witness was "subject to a thorough and extensive examination" does not ensure the reliability of the expert's testimony; such testimony must still be assessed before it is presented to the jury. *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005). Thus, we are of the opinion that the district court abused its discretion here "by failing to act as a gatekeeper." *Id*.; *see Kumho*, 526 U.S. at 158-59 (Scalia, J. concurring) ("[T]rial-court discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function . . . [or] to perform the function inadequately.").

Nease, 848 F.3d at 231.

That said, the defendants, not plaintiff, have the burden to show that this testimony did not have an impact upon the jury, something they cannot do. The Fourth Circuit described that burden as follows:

> Moreover, "in harmless error analysis the beneficiary of the error . . . [Persinger] has the burden to show that the error almost surely did not affect the outcome of the case." Lusby v. T. G. & Y. Stores, Inc., 796 F.2d 1307, 1312 n.4 (10th Cir. 1986) (emphasis in original). We believe that Kroemer's testimony had a direct effect on the jury, since Kroemer testified as to the ultimate issue of negligence, and we find that Persinger has

> not carried his burden of proving that Kroemer's testimony did not affect the outcome of the case.

Persinger, 920 F.2d at 1189.

The court may also consider the impact of the objectionable statements of fact set forth in Gutierrez' closing argument for which there was a timely objection. The grossly inadequate award indicated the jury's reliance on improper closing arguments. .*Burgess v. Balt. Police Dep't*, 300 F. Supp. 3d 696, 712 (D. Md. 2018) citing *Christopher v. Florida*, 449 F.3d 1360, 1365-67 (11th Cir. 2006) (finding that a grossly excessive award indicated the jury's reliance on improper closing argument)

For this reason alone, the court should grant a new trial to prevent this miscarriage of justice.

3. The verdict resulted when the jury was improperly instructed and reached its decision under an incomplete theory of the law.

The plaintiff has already raised the issue and objection to the court's finding of probable cause for obstruction of justice without force and failure to obey contained in instruction # 27-A and eluding contained in instruction # 26 and incorporates those arguments and objections herein. Instruction No. 41 contradicts Instruction No 27-A, even when the instructions are read as a whole.

4. The verdict is against the clear weight of the evidence

The clear weight of evidence in the case shows that Lt. Nazario was profoundly injured. The testimony of all the witnesses that observed Lt. Nazario following the incident confirmed the trauma to him and a substantial change in him. The empirical tests confirmed the diagnosis given by his treating psychologist and psychiatrist. Probably most telling was Lt. Col. Reinhold who confirmed that contrary to the false claims of the defense that Lt. Nazario's duty

in the nation's capital in January showed that he was not injured or affected by the incident, Lt. Col. Reinhold explained that the impact was immediate and continued through the activation and duty at the nation's capital, where Lt. Nazario had to be propped up to succeed, something Lt. Col. Reinhold stated was not previously necessary.

The clear weight of evidence in this case shows that both Crocker and Gutierrez used excessive force. The jury found so for Gutierrez entering a verdict against him on assault but failed to follow the instructions to the necessary implication of that finding under the facts of this case. The clear weight of evidence shows that Lt. Nazario's resistance authorized by the law was passive at most and therefore as a matter of law based upon the finding by the jury is reasonable.

For this reason alone, the court should grant a new trial to prevent this miscarriage of justice.

5. The verdict will result in a miscarriage of justice.

For all of the reasons set forth above, letting this verdict stand will result in a miscarriage of justice.

Additionally, the jury should have been instructed that Lt. Nazario was exempt from arrest except for a breach of the peace or in the case of a felony since he was returning from a place he had been required to attend for military duty without the consent of his commanding officer pursuant to Virginia Code § 44-97 which was requested prior to the case being submitted to the jury.

Additionally, prior to the deliberations, the plaintiff brought to the court's attention its concern that juror # 88 was repeatedly observed to be sleeping during the trial. The Fourth Circuit has made it clear that a sleeping juror may implicate a party's Constitutional rights to due

process rights and an impartial jury and deny a party a fair trial. *See, United States v. Johnson*, 409 F. App'x 688, 692 (4th Cir. 2011)(unpublished) *citing, United States v. Springfield*, 829 F.2d 860, 864 (9th Cir. 1987); *See, also, N.O. v. Alembik*, 694 F. App'x 895, 901 (4th Cir. 2017) (unpublished). The sleeping juror might not have been so significant if #88 was not appointed the foreman--but he was. **(Exhibit 1 - Affidavits and Declarations**)The verdict adds additional weight to show that juror's sleeping caused him to be unable to consider the case fairly. Notwithstanding the fact that this might be much more difficult to reverse on appeal, that should not prevent the court in its consideration of the present Rule 59 motion to consider this fact in determining the fairness, integrity, or public reputation of judicial proceedings warranting a new trial.

For this reason alone, the court should grant a new trial to prevent this miscarriage of justice. The case for a new trial is made significantly stronger when all of these factors are combined.

Finally, the court explained that our system of justice is dependent upon the civil courts, it is what prevents litigants from engaging in self-help. But that falls apart when a verdict would result in a miscarriage of justice. Rule 59 empowers the court to grant a new trial when the verdict will result in a miscarriage of justice. This is the time to take action.

The nation has seen enough outcry on the streets from citizens who have found little hope that the system actually works - to prevent a miscarriage of justice this verdict must be set aside, and a new trial granted.

January 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed with the Court's CM/ECF system, which caused a Notice of Electronic Filing to be emailed to the following:

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This the 20th day of January, 2023

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