

Case go any further? Oct.?

Good 1983

Case on

negligence for failing to  
train

No. 80-3010 - 3011

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

DONALD L. HAYS, JR., and MICHAEL  
C. POTTER,

*Plaintiffs-Appellees,*  
*Cross-Appellants,*

vs.

JEFFERSON COUNTY, KENTUCKY,  
WILBUR BILYEU and RUSSELL  
McDANIEL,

*Defendants-Appellants,*  
*Cross-Appellees.*

APPEAL from the  
United States District  
Court for the West-  
ern District of Ken-  
tucky.

Put in Kentucky Co  
Case

Hill

Decided and Filed January 4, 1982.

Before: MERRITT and JONES, Circuit Judges, and GIBSON,\*  
District Judge.

GIBSON, District Judge, delivered the opinion of the Court,  
in which JONES, Circuit Judge, joined. MERRITT, Circuit Judge,  
(pp. 13-16) filed a separate dissenting opinion.

GIBSON, District Judge. This civil rights case arose from  
a violent altercation between police and demonstrators on  
the night of September 26, 1975, at Bittersweet Shopping  
Center in southwestern Jefferson County, Kentucky. The

\* The Honorable Benjamin F. Gibson, Judge, United States District  
Court for the Western District of Michigan, sitting by designation.

~~Letter~~ & refer to  
between Counsel

Comment on  
inferences and

Conduct of

Counsel

Will not  
be considered

5924; 46

final judgment below awarded plaintiff Hays compensatory damages of \$20,000 against Jefferson County, and \$5,000 each against Col. Russell McDaniel and Major Wilbur Bilyeu. Plaintiff Potter was awarded compensatory damages of \$2,000 against Jefferson County, and \$500 each against McDaniel and Bilyeu. Jefferson County was further ordered to pay \$20,000 to counsel for plaintiffs as attorneys fees.

The court below, on a motion for judgment notwithstanding the verdict, remitted the jury's award of punitive damages to plaintiff Hays of \$81,000 against Jefferson County and \$9,000 against Bilyeu. The award of punitive damages to plaintiff Potter of \$9,000 against Jefferson County and \$1,000 against Bilyeu was also remitted.

The Bittersweet Shopping Center is across from Southern High School. The September 26, 1975 demonstration was one of many that took place during the preceding weeks to protest court ordered busing for school desegregation, which had been implemented on September 4, 1975 with the beginning of the school year. The demonstrations occurred at sites throughout Jefferson County and in downtown Louisville as well as the Bittersweet Center. Many of these demonstrations were peaceful and orderly, although some had resulted in varying degrees of violence.

The September 26th demonstration at Bittersweet began uneventfully. Later, a fire was built in the front of the parking lot, adjacent to Preston Highway. Although originally contained, the fire grew over time. The crowd also grew as the day progressed from about 50 to 75 people in the morning to approximately 300 to 500 people by late in the evening. At about 7:30 or 8:00 p.m. defendant Bilyeu made a determination that the fire was becoming dangerous and should be extinguished. He called in reinforcements and within a few minutes 40 to 50 police officers arrived. With the presence of these policemen the crowd became agitated. After consulting with some of the leaders of the demonstration Major

Bilyeu sent them away and called the fire department. When the firemen arrived, however, a small group of demonstrators prevented them from putting the fire out. At this time Major Bilyeu decided that the crowd was out of control and had to be dispersed. He sent the firemen away and recalled the police. The police assembled in the Southern High School parking lot and prepared to disperse the crowd.

The descriptions of various witnesses as to what occurred shortly before and at the time the police entered the Bittersweet parking lot were conflicting. There was conflicting testimony as to the number of warnings to disperse given to the crowd, the number of demonstrators that were still at the scene at the time the police entered the parking lot, the amount of tear gas used, and what the crowd was doing.

After the warnings to disperse, tear gas was fired into the crowd. Within 15 to 30 seconds the police crossed the street and entered the crowd. The police began their advance toward the crowd before Major Bilyeu ordered them to do so. He attempted to stop them with the repeated bullhorn command "don't cross the street." When this proved ineffective, however, he took no further action to control them.

Plaintiffs' witnesses from all areas of the Bittersweet Shopping Center testified to widespread damage to vehicles caused by police officers. There was even some police testimony as to property damage caused by police. Nor was the police violence confined to property. Several witnesses testified to seeing police officers striking demonstrators and passersby with their riot sticks and pushing and kicking some of them.

The police were all wearing blue jumpsuits, gloves, helmets and gas masks. Many witnesses testified to an inability to identify any individual police officers although they attempted to do so. Defendants admit that identification patches had not been sewn onto the jumpsuits, at least in part because the suits had been obtained only a short time before this incident. There was considerable testimony that the vast

majority of the officers were not wearing their nametags on the jumpsuits. A Jefferson County Police Department lieutenant testified that probably 90 percent of the police officers had no identification tags on.

During the course of the violence that evening plaintiff Potter was struck across the knuckles and repeatedly on the back and shoulders by a group of unidentified police officers. Plaintiff Hays was severely beaten and kicked into a grand mal seizure and unconsciousness by another group of five or six unidentified officers. They were also subjected to considerable verbal abuse. Both men were taken to the hospital where Potter was treated and released. Hays spent approximately ten days in the hospital. Each of the plaintiffs had been taking part in the demonstration and had taken part in others previously. Neither had had any difficulty at any other demonstration, nor was either arrested or charged with a crime for their activities at the Bittersweet Shopping Center.

The defendants in this action are the county and the chief and deputy chief of the county police department. Plaintiffs' theory of liability was based on the defendants' negligent training, supervision, and control of the unidentified officers. The trial court's instructions were based on a simple negligence standard.<sup>1</sup> Because this Court holds that simple negli-

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<sup>1</sup> The trial court stated that the action as based on "the alleged *negligent* acts or omissions" of the defendants, (Tr. Vol. IX, at 49), that the "burden of the proof is on the plaintiffs to establish by a preponderance of the evidence that the *negligence* of one or both of the officials" caused the damages (*id.*), and "that Chief McDaniel and Assistant Chief Bilyeu or either of them *negligently* supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such *negligence*" caused the injuries (*id.* at 50) (emphasis added).

The instructions defined the term negligence as follows:

You are further instructed that negligence is lack of ordinary care. It's the failure to exercise the degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances or, on the other hand, for failing to do an act which a reasonably prudent person would have done under the circumstances.

gence is insufficient to support liability of high police officials and municipalities for inadequate training, supervision, and control of individual officers, we must vacate the verdict and remand this matter to the District Court for a new trial.

The question of whether simple negligence is sufficient to support a civil rights action for the violation of constitutional rights, either under 42 U.S.C. § 1983 or directly under the constitution with jurisdiction based on 28 U.S.C. § 1331, has been troublesome to the bench and bar for some time. In *Baker v. McCollan*, 443 U.S. 137 (1979), Mr. Justice Rehnquist, writing for the majority of the Supreme Court, said “[W]hether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.” *Id.* at 139-40. Several of the lower federal courts have addressed the question in various contexts with seemingly varying results.

The law is clear that liability of supervisory personnel must be based on more than merely the right to control employees. Without more, such a theory would allow liability on a

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Negligence requires a foreseeable danger of injury to another and conduct which is unreasonable in proportion to the danger. A person is not responsible for the consequences of his conduct unless the risk of injury was reasonably foreseeable. The exact occurrence or precise injury need not have been foreseeable, but injury as a result of negligent conduct must have been not merely possible but probable. If a reasonably prudent person couldn't foresee any injury as a result of his conduct or if his conduct was reasonable in light of what he could foresee, there's no negligence.

Conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct and his conduct was unreasonable in the light of what he could foresee. Ordinary and prudent care is that care which persons of ordinary prudence, . . . would use in order to avoid injury to themselves or others.

*respondeat superior* basis—a basis expressly rejected by the Supreme Court in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) under § 1983, and by this court in *Jones v. City of Memphis*, 486 F.2d 622 (6th Cir. 1978) in a direct constitutional action pursued in accordance with the case of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Specifically, the Supreme Court in *Monell* stated: “By our decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See 423 U.S., at 370-371.” *Monell v. Department of Social Services*, 436 U.S. at 694 n.58. The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo v. Goode*, 423 U.S. at 370-71. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The language and history of § 1983 are silent as to whether supervisory officials and municipalities can be held liable for negligently having failed to adequately train, supervise, and control individual police officers who violate a plaintiff's constitutional rights. The language of § 1983 providing that a person who “subjects, or causes to be subjected” another to a deprivation of constitutional rights appears on its face to be broad enough to encompass merely negligent deprivations. The broad potential of this language is bolstered to some extent also by the Supreme Court's declaration that “[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” *Monroe v. Pape*, 365 U.S. 167, 187 (1961). The trend of the case law, however, has not been in this direction.



Rather, the case law has limited § 1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train, or control was involved. See, e.g., *Jamison v. McCurrie*, 565 F.2d 483 (7th Cir. 1977); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) (en banc); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir.), cert. denied, 419 U.S. 838 (1974); *Edmonds v. Dillon*, 485 F. Supp. 722 (N.D. Ohio 1980); *Rheuark v. Shaw*, 477 F. Supp. 897 (N.D. Texas 1979); *Leite v. City of Providence*, 463 F. Supp. 585 (D.R.I. 1978); *Schweiker v. Gordon*, 442 F. Supp. 1134 (E.D. Pa. 1977); cf. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976). But see, *Carter v. Carlson*, 144 U.S. App. D.C. 388, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds sub nom., *District of Columbia v. Carter*, 409 U.S. 418 (1973).

A major part of the doctrinal foundation for requiring a higher degree of culpability than ordinary negligence is the concern that such a standard would unduly impede or circumscribe the performance of official duties. The courts look for some proof that a defendant has a culpable state of mind — that the action or failure to act was to some degree deliberate rather than inadvertent. The verbal formulations of this concept have varied from gross negligence or recklessness, *Owens v. Haas*, 601 F.2d 1242 (2nd Cir. 1979); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Leite v. City of Providence*, 463 F. Supp. 583 (D.R.I. 1978); *Schweiker v. Gordon*, 442 F. Supp. 1134 (E.D. Pa. 1977); *Perry v. Elrod*, 436 F. Supp. 299 (N.D. Ill. 1977), to actions or failures to act which, though not intended to harm the plaintiff, were so likely to violate plaintiffs' rights and cause them injury that the harm was "substantially likely to result," *Rheuark v. Shaw*, 477 F. Supp. 897 (N.D. Texas 1979), to "purposeful non-feasance" in the face of a duty to act, see *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976), to an apparent requirement of intent, see *Edmonds v. Dillon*, 485 F. Supp. 722 (N.D. Ohio 1980), but in

practical terms the underlying concept appears to be similar in the vast majority of the cases.<sup>2</sup>

The major impediment to simple negligence as a basis for liability of supervisory officials and municipalities, however, is the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Rizzo* the Court reversed the lower court's grant of injunctive relief against Philadelphia city and police department officials because the plaintiffs had failed to show an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371. The Court made it clear that a showing of "direct responsibility" for the actions of the individual officers is a prerequisite for liability. The mere "failure to act [even] in the face of a statistical pattern" of incidents of misconduct was held to be insufficient to base liability on. *Id.* at 376. Although *Rizzo* involved equitable relief in the form of a somewhat comprehensive injunction of future conduct, and federalism concerns played a not insignificant part in the decision, this same standard has been adopted and applied in cases involving monetary relief. *E.g.*, *Leite v. City of Providence*, 463 F. Supp. 585, 590 (D.R.I. 1978); *Perry v. Elrod*, 436 F. Supp. 299, 303-04 (N.D. Ill. 1977); *Delaney v. Dias*, 415 F. Supp. 1351, 1354 (D. Mass. 1976). The result of *Rizzo* and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must

<sup>2</sup> But see, *Carter v. Carlson*, 144 U.S. App. D.C. 388, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.*, *District of Columbia v. Carter*, 409 U.S. 418 (1973) (negligent failure to train or supervise police force is actionable under § 1983). As will be seen, *infra*, it is significant that this case predates the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362 (1976).

show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. See, e.g., *Liete v. City of Providence*, 463 F. Supp. 585 (D.R.I. 1978).

Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g., *Liete v. City of Providence*, 463 F. Supp. at 590, or would properly be characterized as substantially certain to result, *Rheuark v. Shaw*, 477 F. Supp. 897 (N.D. Texas 1979).

Although many of the cases cited for the above analysis were brought pursuant to § 1983, the court finds the reasoning therein equally apposite to direct constitutional actions sanctioned by the Supreme Court's reasoning in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The court, at least on the facts here presented, sees no basis for different standards in the two types of actions.

There remain some significant issues to be disposed of so that on remand a new trial may be properly conducted. Defendant Jefferson County challenges the judgment against it as impermissibly based on a *respondeat superior* theory of liability. *Respondeat superior* was rejected as a sole basis for municipal liability in a 1983 action by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and in a *Bivens* action by this Court in *Jones v. City of Memphis*, 486 F.2d 622 (6th Cir. 1978). The heart of the County's challenge concerns the following jury instruction given by the trial judge below:

This is also a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, because of alleged negligent acts or omissions of high ranking Jefferson County officials, namely Police Chief

Russell McDaniel and Assistant Police Wilbur Bilyeu, arising out of actions of officers of the Jefferson County Police Force which took place on September 26, 1975 at the Bittersweet Shopping Center. A government can act in this case, only through its high ranking officials, Chief McDaniel and Assistant Chief Bilyeu. The burden is on the plaintiffs to establish by a preponderance of the evidence in this case that the negligence of one or both of the officials, Chief McDaniel and Assistant Chief Bilyeu, was a proximate cause of any injuries and consequent damages sustained by the plaintiffs.

In order for plaintiffs to recover against defendant, Jefferson County, the burden of proof is upon the plaintiffs to establish each of the following elements:

1. That officers of the Jefferson County Police Force knowingly beat, bruised and wounded plaintiffs or either of them about the body.
2. *That Chief McDaniel and Assistant Chief Bilyeu were employed by Jefferson County as Chief of Police and Assistant Chief of Police respectively, at the time of the injuries referred to herein.*
3. That Chief McDaniel and Assistant Chief Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such negligence in supervision, training and control was the proximate cause of the injuries of plaintiffs or either of them, inflicted upon them by police officers on the occasion complained of.

You are further instructed that you may not return a verdict against the defendant, Jefferson County, if you believe from the preponderance of the evidence that the plaintiffs were injured by policemen of Jefferson County merely because of the fact that these policemen were employees of Jefferson County, Kentucky. In other words, if you believe that Chief McDaniel and Assistant

Chief Bilyeu adequately supervised, trained and controlled the police officers, then you shall return a verdict for the defendant, Jefferson County, even though you may believe, from the preponderance of the evidence, that individual policemen in employment of Jefferson County knowingly beat, bruised and wounded the plaintiffs on the occasion complained of. (emphasis added)

Jefferson County argues, in spite of the last paragraph quoted above, that this instruction, in particular the emphasized section, bases its liability solely on the employment relationship between it and the other defendants, which it equates with the *respondeat superior* doctrine. This argument, however, ignores the fact that a governmental entity can only act through its principal officials, e.g., *Liete v. City of Providence*, 465 F. Supp. at 589. The distinction drawn by the trial judge in the final paragraph of the above instruction correctly distinguished the acts of the unidentified individual officers, for which Jefferson County can not be held responsible absent a policy or custom causing such conduct, e.g., *Monell v. Department of Social Services*, 436 U. S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976), and a failure to train, supervise, or control those officers by defendants Chief of Police McDaniel and Assistant Chief Bilyeu, whose failure, for this purpose, would be the failure of Jefferson County as well. The negligence standard in paragraph 3 of the instruction, of course, must be modified to accord with this opinion, but the instruction is otherwise proper.

Defendants next argue that the trial court's refusal to give a contributory negligence instruction to the jury was error. It is their contention that the plaintiffs' failure to leave the scene after police orders to disperse was contributorily negligent on their part. Such an argument on the facts of this case is groundless. Plaintiffs were not injured negligently, they were intentionally beaten by the unidentified police officers. Contributory negligence has never been a defense to

intentional tortious conduct. Such conduct differs from negligence not only in degree but in kind, and in the societal condemnation attached to intentional torts, *W. Prosser, Law of Torts*, 426 (4th ed. 1971). Plaintiffs' alleged negligence in failing to leave the area in no way relates to the allegations against the defendants in this case.

Addressing the other issues raised by the parties, relating to the good faith defense, punitive damages<sup>3</sup> and attorney fees, is not necessary in light of today's decision. The parties will have the opportunity to further address these issues below as appropriate.

Accordingly, the judgment below is vacated, and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

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<sup>3</sup> In the recent case of *City of Newport v. Fact Concerts, Inc.*, — U.S. —; 101 S. Ct. 2748, (1981), the Supreme Court held that municipalities are immune from punitive damages in § 1983 actions.

MERRITT, Circuit Judge, dissenting. This case raises two sets of issues. One concerns the standard of liability of the County under 42 U.S.C. § 1983 and directly under the Fourteenth Amendment. The other concerns the standard of liability of the police chief and his deputy as supervisory officials under § 1983.

### I. LIABILITY OF THE COUNTY

With respect to the County, I believe that the reasoning of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), requires that plaintiffs show that the County followed a "policy or custom" of encouraging, or at least not discouraging, police brutality in order to recover under § 1983 or in a direct action under the Fourteenth Amendment. The District Court directed a verdict on the § 1983 claim because plaintiffs failed to offer proof of a "policy or custom" under *Monell*. But the District Court let the direct Fourteenth Amendment action under § 1331 against the County go to the jury under a negligence standard. This was error. Although it is unclear after *Monell* whether the Supreme Court will approve this Circuit's implication of a *Bivens*-type direct action under the Fourteenth Amendment, it is clear that in this Circuit the *Monell* standard also applies to direct actions against municipalities, as Judge Phillips stated for the Court in *Jones v. City of Memphis*, 586 F.2d 622, 624-25 (6th Cir.1978). Since there is no evidence that the harm in question here resulted from a county "policy or custom," tacitly or expressly adopted or followed by the county or its officials, I would hold that the proof is insufficient to permit the case against the County to go to the jury on the direct *Bivens*-type action. In order to establish such a policy or custom, the plaintiff must at least show that the city had notice of a prior pattern of police misconduct likely to recur if no steps were taken to prevent it. As I understand the record, there was no such proof in this case.

## II. LIABILITY OF SUPERVISORY POLICE OFFICIALS UNDER § 1983

With respect to the two individual defendants, neither negligence alone, as the District Court charged the jury, nor gross negligence alone, as the majority seems to hold, should be the exclusive standard of liability for supervisory police officials under § 1983. If police officials do not directly participate in a federal constitutional violation, the question is under what circumstances should they be held accountable when their agents commit an illegal seizure of the citizen's person or engage in conduct amounting to summary punishment. Under what circumstances should such supervisory officials be liable for failing in their duty to "protect" citizens against police brutality?

Where the supervisory official does not direct, encourage, or otherwise participate in the wrong committed by his agent, it seems clear that "fault" — a "neglect" or refusal to train or take other protective action in advance — is only one element of liability. Another element is also necessary. The official must have "knowledge" that the constitutional injury is likely to occur unless action is taken. There must be some past pattern of misconduct, some prior misbehavior, or other prior act that puts the official on notice of the potential constitutional deprivation. In this case the police officials affirmatively tried to stop the advance of the policeman on the crowd of anti-busing demonstrators, and as our Court states at page 9 of its opinion, there is no allegation or proof that the brutality was "part of a pattern of past misconduct." Therefore, although a jury might find on the facts of this case a "neglect" to give police officers adequate riot training, it could not find the requisite "knowledge" or "notice" of prior misconduct.

The knowledge element is derived from the purpose of § 1983. It was part of the anti-Ku Klux Klan act of 1871, a



primary purpose of which was to impose a "duty of protection" on local officials, a duty to protect blacks from the night riders and others who systematically deprive them of their civil rights. In light of this purpose, it is clear that police officials should be liable when they fail to take any steps to remedy a *known* pattern of police brutality. Where, however, there is no proof of a pattern of prior misconduct known to the officials, they should not be held liable under § 1983 for simply failing to provide adequate training.

This "knowledge" element seems implicit in Justice Brennan's analysis of § 1983 for seven members of the Court in *Monell*, as well as in Justice Powell's concurring opinion. In analyzing the "language of § 1983" Justice Brennan states:

Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent. See *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

This sentence is followed by a footnote which states in pertinent part:

Support for such a conclusion can be found in the legislative history. . . . The primary constitutional justification for the Sherman Amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens. . . . and according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had *knowingly neglected its duty to provide protection*. (Emphasis added.)

436 U.S. at 692. This language from *Monell* indicates to me that knowledge of the impending constitutional violation is a necessary element of the constitutional tort.

In his concurring opinion which attempts to further explain the rationale of the majority opinion, Justice Powell

notes that liability under § 1983 should be read as limited to "affirmative conduct," *id.* at 706, or read "as a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Id.* at 707.

Thus, considering the language of §1983, its original purpose and the statements of the Supreme Court concerning liability in *Monell*, I conclude that in police brutality cases against supervisory officials § 1983 requires plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO FOLLOW INSTRUCTIONS

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CONSIDERATION OF THE EVIDENCE, ETC.

As stated earlier, it is your duty to determine the facts, and in so doing doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

IMPEACHMENT

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

BURDEN OF PROOF

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO DELIBERATE

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

THE JURY HAS BEEN INSTRUCTED THAT THE COURT HAS MADE A FINDING AND DETERMINATION AS A MATTER OF LAW THAT THE DEFENDANT, THURMAN PETE WYATT, HAS COMMITTED AN ACT CONTRARY TO TITLE 42 U.S.C.A. 1983. THEREFORE, THE JURY MUST MAKE A FINDING AND DETERMINATION WHETHER OR NOT AS A DIRECT AND PROXIMATE RESULT OF SAID ACT THE PLAINTIFF HAS BEEN INJURED AND WHETHER OR NOT BY REASON OF SAID INJURY, IF ANY, THE PLAINTIFF HAS SUFFERED ANY DAMAGE OR DAMAGES.

IN CONSIDERING THE ISSUE OF PLAINTIFF'S DAMAGES, YOU ARE INSTRUCTED THAT YOU SHOULD ASSESS THE AMOUNT YOU FIND TO BE JUSTIFIED BY A PREPONDERANCE OF THE EVIDENCE AS FULL, JUST, AND REASONABLE COMPENSATION FOR ALL OF THE PLAINTIFF'S DAMAGES, NO MORE AND NO LESS. DAMAGES MUST NOT BE BASED ON SPECULATION BECAUSE IT IS ONLY ACTUAL DAMAGES -- WHAT THE LAW CALLS COMPENSATORY DAMAGES -- THAT ARE RECOVERABLE.

ON THE OTHER HAND, COMPENSATORY DAMAGES ARE NOT RESTRICTED TO ACTUAL LOSS OF TIME OR MONEY; THEY COVER BOTH THE MENTAL AND PHYSICAL ASPECTS OF INJURY -- TANGIBLE AND INTANGIBLE. THEY ARE AN ATTEMPT TO RESTORE THE PLAINTIFF, THAT IS, TO MAKE HIM WHOLE OR AS HE WAS IMMEDIATELY PRIOR TO SAID INJURIES.

I.

ACTUAL - COMPENSATORY DAMAGES

YOU SHOULD CONSIDER THE FOLLOWING ELEMENTS OF DAMAGE TO THE EXTENT YOU FIND THEM PROVED BY A PREPONDERANCE OF THE EVIDENCE, AND, EXCEPTING AS STATED IN THE INSTRUCTION ON DAMAGES, NO OTHERS:

(a) INJURY, PAIN, DISFIGUREMENT, LOSS OF CAPACITY FOR ENJOYMENT OF LIFE:

ANY BODILY INJURY SUSTAINED BY THE PLAINTIFF AND ANY RESULTING PAIN AND SUFFERING, DISFIGUREMENT AND LOSS OF CAPACITY FOR THE ENJOYMENT OF LIFE EXPERIENCED IN THE PAST. NO EVIDENCE OF THE VALUE OF SUCH INTANGIBLE THINGS AS MENTAL OR PHYSICAL PAIN AND SUFFERING HAS BEEN OR NEED BE INTRODUCED. IN THAT RESPECT IT IS NOT VALUE YOU ARE TRYING TO DETERMINE, BUT AN AMOUNT THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE DAMAGES HE HAS SUFFERED. THERE IS NO EXACT STANDARD FOR FIXING THE COMPENSATION TO BE AWARDED ON ACCOUNT OF SUCH ELEMENTS OF DAMAGE. ANY SUCH AWARD SHOULD BE FAIR AND JUST IN THE LIGHT OF THE EVIDENCE.

(b) MEDICAL EXPENSE

IF YOU SHOULD FIND THAT THE PLAINTIFF IS ENTITLED TO DAMAGE FOR THIS ELEMENT, IN ARRIVING AT THE AMOUNT OF THE AWARD, YOU SHOULD INCLUDE:

(1) THE REASONABLE VALUE, NOT EXCEEDING THE ACTUAL COST TO THE PLAINTIFF, OF ANY EXAMINATION, ATTENTION AND CARE BY PHYSICIANS AND SURGEONS AND OTHERS SHOWN BY THE EVIDENCE IN THE CASE TO HAVE BEEN REASONABLY REQUIRED AND ACTUALLY GIVEN IN THE TREATMENT OF THE PLAINTIFF.

II.

NOMINAL DAMAGES

ONCE A DEPRIVATION OF A CONSTITUTIONAL RIGHT HAS BEEN FOUND, A JURY, IN ITS DISCRETION, MAY AWARD NOMINAL DAMAGES IN SOME NOMINAL SUM SUCH AS ONE DOLLAR, ALTHOUGH THE JURY IS UNABLE TO FIND THAT THE PLAINTIFF HAS SUSTAINED ACTUAL DAMAGES.

III.

PUNITIVE DAMAGES

THE PLAINTIFF ALSO CLAIMS THAT THE ACTS OF THE DEFENDANT WERE DONE WILLFULLY, INTENTIONALLY, OR WITH CALLOUS AND RECKLESS INDIFFERENCE TO PLAINTIFF'S RIGHTS, SO AS TO ENTITLE HIM TO AN AWARD OF PUNITIVE DAMAGES IN ADDITION TO COMPENSATORY DAMAGES.

IF YOU FIND FOR THE PLAINTIFF, AND IF YOU FURTHER FIND THAT THE DEFENDANT DID ACT WITH MALICE, WILLFULNESS, OR CALLOUS AND RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS, THE LAW WOULD ALLOW YOU, IN YOUR DISCRETION, TO ASSESS PUNITIVE DAMAGES AGAINST THAT DEFENDANT AS PUNISHMENT AND AS A DETERRENT TO OTHERS.

(a) "MALICE"

AN ACT IS DONE "MALICIOUSLY" IF PROMPTED OR ACCOMPANIED BY ILL WILL OR SPITE OR A GRUDGE TOWARD THE PERSON AGAINST WHOM THE ACT WAS DIRECTED.

(b) "WILLFULNESS"

AN ACT IS DONE "WILLFULLY" IF DONE VOLUNTARILY AND INTENTIONALLY, AND WITH THE SPECIFIC INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS TO SAY, WITH BAD PURPOSE EITHER TO DISOBEY OR TO DISREGARD THE LAW.

IF YOU FIND THAT PUNITIVE DAMAGES SHOULD BE ASSESSED AGAINST THE DEFENDANT, YOU MAY CONSIDER THE FINANCIAL RESOURCES OF THE DEFENDANT IN FIXING THE AMOUNT OF SUCH DAMAGES.

IF YOU FIND FOR THE PLAINTIFF AND AWARD HIM ACTUAL OR COMPENSATORY OR NOMINAL DAMAGES, YOU MUST DECIDE WHETHER IT APPEARS FROM A PREPONDERANCE OF THE EVIDENCE IN THE CASE THAT THE ACTS AND CONDUCT OF THE DEFENDANT TOWARD THE PLAINTIFF, AT THE TIME AND PLACE IN QUESTION, WERE MALICIOUSLY, OR WANTONLY, OR OPPRESSIVELY DONE; AND, IF SO, WHAT AMOUNT, IF ANY, OF PUNITIVE AND EXEMPLARY DAMAGES SHOULD BE ADDED TO THE AWARD OF ACTUAL OR COMPENSATORY OR NOMINAL DAMAGES.

IF YOU DO NOT FIND THAT PLAINTIFF SUSTAINED ANY ACTUAL OR COMPENSATORY DAMAGES, YOU MAY THEN AWARD THE PLAINTIFF NOMINAL DAMAGES AND ALSO SUCH PUNITIVE OR EXEMPLARY DAMAGES, IF ANY, AS YOU THINK ARE WARRANTED UNDER THESE INSTRUCTIONS.

YOU MAY AWARD PUNITIVE OR EXEMPLARY DAMAGES IN ADDITION TO ACTUAL, OR COMPENSATORY, OR NOMINAL DAMAGES, OR YOU MAY AWARD ACTUAL, COMPENSATORY, OR NOMINAL DAMAGES WITHOUT PUNITIVE DAMAGES, ALL IN ACCORDANCE WITH THE FACTS WHICH YOU FIND AND IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

VERDICT FORMS

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman or forewoman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

SPECIAL INTERROGATORY NO. \_\_\_\_\_

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, JEFFRY COMBS, INCURRED MEDICAL EXPENSE AS A DIRECT AND PROXIMATE RESULT OF THE ACTS OF THE DEFENDANT, THURMAN P. WYATT, AT THE TIME AND PLACE CONTAINED IN THE EVIDENCE AND AWARDS DAMAGE AGAINST THE SAID DEFENDANT.

YES \_\_\_\_\_ NO \_\_\_\_\_

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM, SO AWARDED, IN THE APPROPRIATE BLANK:

MEDICAL EXPENSE \$ \_\_\_\_\_

(THE TOTAL AMOUNT OF MEDICAL EXPENSE TO BE AWARDED, IF ANY, MAY NOT EXCEED THE TOTAL AMOUNT CONTAINED IN THE EVIDENCE OF \$ \_\_\_\_\_.)

\_\_\_\_\_  
FOREPERSON

DATE: \_\_\_\_\_



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

SPECIAL INTERROGATORY NO. \_\_\_\_\_

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT  
THE PLAINTIFF, JEFFRY COMBS, ENDURED INJURY, PAIN, DISFIGUREMENT,  
LOSS OF CAPACITY FOR ENJOYMENT OF LIFE AS A DIRECT AND PROXIMATE  
RESULT OF THE ACTS OF THE DEFENDANT AT THE TIME AND PLACE CONTAINED  
IN THE EVIDENCE, AND AWARDS DAMAGE AGAINST THE SAID DEFENDANT.

YES \_\_\_\_\_

NO \_\_\_\_\_

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY;  
IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM SO AWARDED,  
INT HE APPROPRIATE BLANK:

INJURY, PAIN, DISFIGUREMENT, LOSS OF CAPACITY FOR ENJOYMENT OF LIFE:

\$ \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

DATE: \_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

SPECIAL INTERROGATORY NO. \_\_\_\_\_

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, JEFFRY COMBS, IN ADDITION TO THE ACTUAL OR NOMINAL DAMAGES, IS ENTITLED TO AN AWARD OF PUNITIVE DAMAGES BY REASON OF THE ACTS OF THE DEFENDANT, THURMAN P. WYATT, AT THE TIME AND PLACE MENTIONED IN THE EVIDENCE:

YES \_\_\_\_\_

NO \_\_\_\_\_

IF THE JURY'S ANSWER IS "NO" AND ALL OTHER INTERROGATORIES HAVE BEEN ANSWERED, DATED, AND SIGNED, THE JURY WILL REPORT TO THE COURT; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM, SO AWARDED, IN THE APPROPRIATE BLANK:

PUNITIVE DAMAGES: \$ \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

DATE: \_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

SPECIAL INTERROGATORY NO. \_\_\_\_\_

THE JURY IS UNABLE TO FIND, BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, JEFFRY COMBS, SUSTAINED SUBSTANTIAL ACTUAL DAMAGES. HOWEVER, THE JURY FINDS THAT THE PLAINTIFF IS ENTITLED TO NOMINAL DAMAGES IN SOME NOMINAL AMOUNT AGAINST THE DEFENDANT, THURMAN P. WYATT.

YES \_\_\_\_\_ NO \_\_\_\_\_

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM SO AWARDED:

NOMINAL DAMAGES \$ \_\_\_\_\_

FOREPERSON \_\_\_\_\_

DATE: \_\_\_\_\_

Civil Action No. 82-273

Jeffery L. Combs v. Letcher County, Kentucky Sheriff's Department, et al.  
June 13, 1983

Appearances: Steven M. Fitten & Virginia M. Meagher for plaintiff  
James W. Craft & Harold D. Bolling for defendants

Court convened at 9 a.m. Jury not present. Shortly thereafter discussion as follows:

THE COURT: You are going to show that to this Court. I am not going to give a default judgment against Letcher County and unless you can convince me, which you haven't by your memorandum of witnesses, that is inadequate, but I am not going to permit a default judgment against Mr. Hall.

Was Mr. Hall present when Mr. Wyatt did this?

MR. FITTEN: No, sir.

MR. CRAFT: No, sir, he was not.

THE COURT: The only thing you are after Mr. Hall on is you claim he didn't properly manage the police department?

MR. FITTEN: That is primarily it and a failure to discipline Mr. Wyatt.

THE COURT: After this was over?

MR. FITTEN: Afterwards and before, Your Honor.

THE COURT: I won't permit any evidence as to what took place after this happened.

MR. FITTEN: I understand the Court's position and of course we note our exception.

---

THE COURT: Now I will do this: We will not try as to damages to him today but I will sustain the default judgment as to him but I will grant a trial as to them and of course we won't tell the jury that we have a default as to Mr. Wyatt.

MR. FITTEN: Your Honor, our position is the Court's order granted us a default against Mr. Hall.

THE COURT: Yes, sir, you have your default as to Mr. Wyatt.

MR. FITTEN: But the Court's order said also as to Mr. Hall and Mr. Wyatt.

THE COURT: Right, but I found out here today that Mr. Hall wasn't present during this. There is no evidence that he had any preconceived knowledge that this was going to happen.

Now, maybe on-- You might say he reasonably should have known this was going to happen. That is what you are going to contend, based on custom or practice. But now in order for us to proceed here today you are going to have to decide if you are going to have to abandon your claim altogether, waive your claim as to Mr. Hall, the sheriff and Letcher County. In order for us to have a hearing on the damages today.

Now, if you-- I don't want to feel I am coercing you. This is going to delay it some. This is going to delay it. But you have still got your default judgment against Mr. Wyatt, the defendant, upon the issues of liability.

MR. FITTEN: Your Honor, may we have a sidebar conference on this?

---

THE COURT: Just have you a seat, gentlemen. Well, let's do this: The parties are excused. Bring the jury up.

And before you leave, Mr. Craft, I want to see you back in Chambers.

(The jury returned to the courtroom at 10:19 a.m.)

THE MARSHAL: The jury panel is back in the courtroom, Your Honor.

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(Recess at 10:22 a.m.)

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

STATUS REPORT OF CASE ON APPEAL

Docket: PIKEVILLE

Date: DECEMBER 2, 1983

To: Judge G. WIX UNTHANK

Re: (style) JEFFERY L. COMBS VS: LETCHER COUNTY (No.) CIVIL 82-273  
KENTUCKY SHERIFF'S DEPARTMENT, THURMAN "PETE" WYATT, ET AL

Date of Entry of Order/Judgment appealed: June 14, 1983; November 1, 1983; November 1, 1983; November 3, 1983.

Date Notice of Appeal filed: December 2, 1983

By: Plaintiff - Defendant - Both

Appeal dismissed on motion of: Appellant - By Agreement

6CCA Action:

Judgment - Date filed District Court: \_\_\_\_\_

Order - Date filed District Court: \_\_\_\_\_

Mandate - Date filed District Court: \_\_\_\_\_

Affirmed - Reversed - Modified \_\_\_\_\_  
(date filed)

Dismissed for lack of prosecution: \_\_\_\_\_  
(date filed)

LESLIE G. WHITMER, CLERK

BY: *[Signature]*  
Deputy Clerk

Copy: G. Wix Unthank

ASSIGNED FOR PRELIMINARY CONFERENCE AT PIKEVILLE, KENTUCKY

ON DECEMBER 14, 1983 AT 3:00 P.M.

DIST.	OFF.	DOCKET YR. NUMBER	FILING DATE			J	N/S	O	D		R	S DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR. NUMBER
			MO	DAY	YEAR				PTF	DEF						
0643	7	83 221	7	11	83	4	110	2	13			15	Nearest \$1,000 J 4308 M	21071		83 221

PLAINTIFFS

DEFENDANTS

WILLIAM R. HEDRICK

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE  
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28: USC 1332- alleged breach of duty under policy by failure and refusal  
8: USC 1446 to provide defense.

(b)

be

ATTORNEYS

FOR: William R. Hedrick  
WILLIAM S. KENDRICK  
FRANCIS, KAZEE & FRANCIS  
111 East Court Street  
Prestonsburg, KY. 41653  
S/O 7/11/83-be

(FLOYD)  
FOR: State Farm Mutal Auto. Ins. Co.  
EUGENE C. RICE  
P. O. BOX 986  
PAINTSVILLE, KY. 41240  
(606) 789-8251  
S/O 7/11/83 - be

7/11/83 #1 PETITION FOR REMOVAL, of deflt w/cert record from Floyd Circuit Court  
11/30/83 #8 PRELIMINARY CONFERENCE MEMORANDUM, of plff  
#9 PRELIMINARY CONFERENCE MEMORANDUM, of deflt

DATE 1983	NR.	PROCEEDINGS
7/11	1	PETITION FOR REMOVAL of deft, w/ cert. copies from Floyd Circuit Ct. (NOTE: No exhibits attach. to complaint)
	2	BOND FOR REMOVAL of deft for Costs & Disbursements in sum of \$1,000 w/ Eugene C. Rice as surety. per requir. of 1446(5((d) of USC.
	3	VERIFICATION of counsel for deft
8/5	4	MOTION, of plff to remand action to state court., w/Exhb. attach.
8/15	5	RESPONSE, of deft to plff's mot. to remand.
8/17	6	ORDER:(GWU) plff's mot. to remand is DENIED. Copies as noted.
10/19	7	ORDER:(GWU) Prelim. Conf. set for 12/14/83 at 3:00 P.M.; on or bef. 11/30/83 parties fil prelim. trial memo. per 9/22/80 std. order attach. Copies as noted.
11/30	8	PRELIMINARY MEMORANDUM, of plff.
	9	PRELIMINARY CONFERENCE MEMORANDUM, of deft



HEARING ON ALL PENDING MOTIONS  
ASSIGNED FOR AND STATUS CONFERENCE AT PIKEVILLE, KENTUCKY

ON DECEMBER 14, 1983 AT 11:00 A.M.

PIKEVILLE CIVIL ACTION NO. 82-273

JEFFERY L. COMBS

STEPHEN M. FITTEN  
VIRGINIA MEAGHER

VS:

LETCHER COUNTY, KENTUCKY, SHERIFF'S  
DEPARTMENT and  
LETCHER COUNTY, KENTUCKY, FISCAL  
COURT

HEARING ON ALL PENDING MOTIONS  
& STATUS CONFERENCE

- 04/19/82 #1 COMPLAINT
- 8/16/83 #31 AMENDED COMPLAINT
- 10/31/83 #38 ADDITIONAL SUMMONS w/ret-Letcher Co. Sheriff's Dept. serv.  
10/28/83 by Martha Owen , atty by serv. Sheriff's office  
Whitesburg, Ky w/amended complaint & complaint.
- #39 ADDITIONAL SUMMONS w/ret. Letcher Co. Fisacl Court serv.  
on 10/31/83 by serv. office of Reuben Watts, Co. Judge  
Exec. on said date by Cecelia Bates, Sec. w/amend complaint  
& complaint
- 11/1/83 #44 ORDER: of court severing defts, Letcher Co., Ky. Sheriff's  
Dept & Letcher Co., Ky. Fiscal Court.
- 11/18/83 #54 ANSWER, of deft, Letcher County Fiscal Court
- 12/2/83 #56 NOTICE OF APPEAL of plff
- 12/7/83 #57 MEMORANDUM OF POINTS & AUTHORITIES of plff re: evid. of  
Sheriff's bond
- 12/12/83 #58 MOTION of plff for disqualification of judge & TO STAY  
proceedings w/AFFIDAVIT of Steven M. Fitten

DIST.	OFF.	DOCKET YR. NUMBER	FILING DATE MO DAY YEAR	J	N/S	O	D		R 23	\$ DEMAND	JUDGE/MAG. NO.	COUNTY	JURY DEM.	DOCKET YR. NUM
							PTF	DEF						
0643	7	82 273	04 19 82	3	440	5				Nearest \$1,000	J 4308 M	21133	P 82	27

PLAINTIFFS

JEFFERY L. COMBS

DEFENDANTS

LETCHER COUNTY, KENTUCKY  
 SHERIFF'S DEPARTMENT  
 THURMAN "PETE" WYATT  
 VERNON HALL  
 LETCHER COUNTY KENTUCKY FISCAL COURT (Added per Amend. complaint 8-16-83 REF#31)

**DEMAND FOR JURY**  
 BY Reff DATE 4-19-82

11/7/83 SEALED ORDER  
 (Placed in Vault)

-EXHIBITS ENT. AT TRIAL of 11/3/83  
 INDEXED & STORED IN VAULT A-2

CAUSE

42 U.S.C. §1981, 1983, (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)  
 1985, & 1986 - Police Misconduct selective law enforcement.  
 Transferred from Northern District of Ohio, Eastern Division #C82-1059A.

ATTORNEYS

\*Address change per telephone info. 4/26/83  
 STEPHEN M. FITTEN P. O. Box 431  
~~SUITE 1225 FIRST NATIONAL PLAZA~~  
 DAYTON, OH 45302-45402  
 (513) 461-9281 274-1566  
 Standing Orders sent 6/22/82  
 SHELDON S. MIRKIN  
 200 EAST MAIN STREET  
 HAZARD, KY 41701  
 (606) 436-5747  
 Standing Orders sent 6/22/82  
 VIRGINIA MEAGHER  
 1125 Main Street  
 Jackson, KY 41339  
 606/666-7778  
 S.O. sent 5/31/83

(Letcher)  
 FOR: Letcher Co. Fiscal Court  
 HAROLD D. BOLLING  
 COUNTY ATTY  
 P. O. BOX 1085  
 WHITESBURG, KY 41858  
 606/633-0126 (Std. Orders 6/22  
 JAMES L. CRAFT  
 P. O. BOX 786  
 WHITESBURG, KY 41858  
 606/633-4469  
 Atty For Defts.  
 Standing Orders sent 10/19/82)

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE M.
				JS-5	
				JS-6	

PIKE 82-273 \*Denotes Motion has been Ruled on PIKE 82-273

DATE	NR.	PROCEEDINGS
1982		JEFFERY L. COMBS LETCHER COUNTY SHERIFF'S DEPT.
Jeffrey L. Combs vs. Letcher County Sheriff's Dept., et al		
		<b>C82-1059A</b> JUDGE GREEN
04-19-82	1	AFFIDAVIT of plaintiff to proceed in forma pauperis filed. Endorsed Order granting motion filed. Noted 4-20-82 CM 4-19-82.
04-19-82	2	COMPLAINT filed. Summons issued. 3 copies of complaint, summons and consent form issued to U.S. Marshal. Copy of Consent form mailed to plaintiff's counsel.
4/29/82	3	SUMMONS Returned and filed. Served Vernon Hall on 4/22/82 by cert mail; Served Letcher County Sheriff's Dept. on 4/22/82 by cert mail; Served Thurman "Pete" Wyatt on 4/22/82 by cert mail. FEES:\$18.00
5/14/82	4	MOTION of defts to dismiss, filed. c/m 5/11/82
6/11/82	5	MOTION of pltf for change of venue and memorandum contra to motion to dismiss, filed. c/m 6/11/82
6/15/82	6	MEMORANDUM & ORDER That this action is transferred to the U. S. District Court for the Eastern District of Kentucky, filed. Green, J. c/m 6/15/82 (6/17/82)
6/21/82		RECORD received from Northern District of Ohio Given new number 82-273
7/9	7	ORDER:(GWU) ent. 7/12/82; Action set for PRELIM. CONF. on 9/30/82 at 3:30 P. M. n/U. S. Fed. Courthouse, Pike; on or bef. 9/16/82, each pty shall prepare & fil w/Court a prelim. conf. memo. SPECIFICALLY, the ptys are to address iss of where physically this case should be tried. - Copies as noted.
9/30	*8	MOTION, of plff for leave to fil late Prelim. Conf. Memo.
	9	PRELIMINARY CONFERENCE MEMORANDUM, of plff. Prelim. Conf. held at Pike on 9/30/82
10/1	10	CIVIL MINUTES:(GWU)/ (1) Mot. of plff to fil late prlim. conf. memo SUSTAINED; prelim. conf. memo fil this date; (2) Discovery &/or Depos to be complete & fil w/clerk on or bef 3/30/83; depos of any witness es to be fil w/clerk on or bef 5/30/83; (3) Pre-Trial set for 6/2/83 at 10:00 a.m. (4) Trial, by jury, set for 6/13/83 at 9:00 a.m. Copies as noted w/attached std. orders. *add'l copy of Pre-trial Order & Exhibit List per request to S.Fitten on 4/26/83
10/12	11	MOTION, of defts for ext. of time n/which to fil prelim. conf. memo.
10/18	12	ORDER:(GWU) ent. 10/19/82 deft hav. mov. for ext time of 30 days from 10/8/82 to fil prelim. memo, IT IS SO ORDERED. Copies as noted.
1983		
4/1	13	MOTION, of defts for ext. time to & inc. 4/30/83 to complete discovery &/or depositions.
4/25	14	ORDER:(GWU) defts having mov court for ext. time to & inc. 4/30/83 to complete discovery, IT IS SO ORDERED. Copies as noted.
5/24	15	NOTICE, of plff to take depos. of Edith Clark, L. Alan Bacon, DDS..PC on 5/25/83 at 3:00 p.m.
5/31	16	ENTRY OF APPEARANCE, of Virginia Meagher on behalf plff.
	17	MOTION, of plff for default judgment or alt. judg. on pleadings; MOTION to compel & impose sanctions w/MEMORANDUM of law.

PLAINTIFF		DEFENDANT	PIKE DOCKET NO. 82-
JEFFERY L. COMBS		LETCHER CO., KY., ET AL	PAGE ___ OF ___ P.
DATE	NR.	PROCEEDINGS	
1983			
5/31	18	MOTION, of plff for leave to fil amended pre-trial memorandum. <del>AMENDED-PRE-TRIAL-MEMORANDUM, of plff-TENDERED-5/31/83.-Rf. #2</del>	
6/2	19	NOTICE, of plff to take depo. of Medical Records Dept., Kingsport TN; Edith Clark, Director of Medial Records Holston Valley Community Hosp., Kingsport, TN; Thelma Coates, Director X-ray Dept, Kingsport, TN; Bud Hensley Kingsport, TN. Attest. Copy Handed to plff's atty. to obtain Foreign Dep. Subpoena.	
	20	CIVIL MINUTES:(GWU) Pre-Trial held at Pike on 6/2/83 ordered (1) Mot. of plff for default judgment on the issue of liability, and hereby is SUSTAINED; (2) Mot. of plff for leave to fil amended pre-trial memo. SUSTAINED; w/amended pre-trial memo fil as of date this order; (3) trial by jury prev. sched for 6/13/83 at 9:00 a.m. shall be on issue of DAMAGES ONLY. Copies as noted.	
	21	ORDER:(GWU) ORDERED Judgment ent. in favor plff, Jeffery L. Combs & against Vernon Hall and Therman Pete Wyatt, on all issues in action relating to the liability of the defts to be found due to the plff as damages IT IS FURTHER ORDERED action placed on calendar of court for trial on issue of damages alone on 6/13/83 at 9:00 A.M. Copies as noted.	
	22	AMENDED PRE-TRIAL MEMORANDUM, of plff. Rf. #21	
6/6	23	NOTICE, of plff to take depo. of W. A. BIRCHER, DDS on 6/9/83 at 3:00 p.m.	
6/8	24	MOTION AND NOTICE, of defts for court to set aside order ent. 6/2/83. w/notice of hearing at court's conven.	
6/13	25	MOTION, of plff to amend judgment.	
	26	RESPONSE, of plff to defts' mot. to set aside default judgment. (NO CERTIFICATE OF SERVICE ATTACHED)	
DEP#1		DEPOSITION, of Wendall A. Bricher, D.D.S. taken pur to notice on behalf plff, w/ Exhibits 1, 2, 3 (EXHIBITS TAKEN OUT OF DEPOSITION & ENTERED AS TRIAL EXHIBITS FOR PLFF # 5,6,7)	
DEP#2		DEPOSITION, of Thelma Coates, taken pur. to notice on behalf plff Exhibits 1,2,3 marked and placed in Vault, Shelf #2; Exhibit #4 is attach to deposition( EXHIBITS TAKEN OUT OF DEPOSITION & ENTERED AS TRIAL EXHIBITS FOR PLFF # 10(10,A.B.C.D) & 11	
DEP#3		DEPOSITION, of Bud Hensley taken pur. to notice on behalf plff. Collect. Exhib. #1 attach(4 pgs.EX.-REMOVED & ENT. AS TRIAL EXHIBIT)	
DEP#4		DEPOSITION, of Edith Clark taken pur. to notice on behalf plff. Collect. Exhb. #1 attach. (EXHIBIT REMOVED & ENT. AS TRIAL EXHIBIT)	
* DEP#5		EVIDENTIARY DEPOSITION, of Dr. Allen Bacon *(so captioned by Court reporter, however, no testimony reported. TENDERED 6/13/83.	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>82-273</u>
JEFFERY L. COMBS		LETCHER CO. KY. SHERIFF'S DEPT.	PAGE ___ OF ___ PAGES
DATE	NR.	PROCEEDINGS	
1983			
6/14	27	CIV. MIN. GEN'L (GWU) on 6/13/83 matter called for jury trial, w/ parties & counsel present, jury roll called & recessed to jury room WHEREAS, Court heard Counsel & ORDERED (1) mot. of plff amend Judg. fil 6/2/83 to include Letcher Co., KY. Sheriff's Dept OVERRULED (2) The Default Judg ent. on 6/2/83 as to V. Hall indiv or in representative capacity, is SET ASIDE. The Judgment for plff & against deft, Thurman Wyatt is REAFFIRM. & SHALL REMAIN IN FULL EFFECT (3) Mot. of defts to set aside the Default Judg on 6/2/83 is SUST. in part as noted in item #2 of this Order (4) The plff is given 30 days to & inc. 7/13/83 to amend plead to bring in other parties or designate other capacity of parties herein. If necessary plff shall cause process to issue & srvs thereon; (5) All parties shall complete disc. as to amend. plead & cause same to be filed into record on or before 9/15/83. (6) Statement of costs of jury reporting for service this date shall be prepared & filed into record by Clerk. (7) By reason of delay caused by defts, failure to: file an answer, file approp. memo as ordered by Court & to appear at pre-trial conf, the Court will impose monetary costs; (8) Pre-trial Conf set for 10/25/83 at 9:00 A. M. (9) Trial by jury will be called 11/1/83 at 9:00 A. M. Copies as noted.	
6/15	28	CLERK'S ASSESSMENT OF COSTS INCURRED BY ATTENDANCE OF JURORS ON JUNE 13, 1983.	
8/1	*29	MOTION, of plff for leave to fil amended complaint. <del>AMENDED COMPLAINT of plff TENDERED 8/1/83 (JURY TRIAL DEMANDED).</del> RF. #30	
8/16	30	ORDER: (GWU) amended complaint of plff FILED and service of summons be made thereon. Copies as noted.	
	31	AMENDED COMPLAINT - Summons & 1 copy iss. w/2 copies Form 18A Notice to Attys w/copy Orig. complaint & Amended Complaint and mag. order & stip. attach. / Summ. & 1 copy issu. on orig. & amend. comp. w/ Mag. Order & Stip. attach on Cty Judge Ex. Let. Co. 10/26	
9/7	32	SEPARATE ANSWER, of deft Thurman "Pete" Watt and Vernon Hall.	
10/12	33	PRE-TRIAL MEMORANDUM, of defts, Thurman "Pete" Wyatt and Vernon Hall.	
	34	WITNESS LIST, of defts, Thurman "Pete" Wyatt & Vernon Hall.	
	35	STIPILOTIONS OF FACT, of defts, Thurman "Pete" Watt & Vernon Hall.	
10/24	36	COPY OF SUMMONS w/ <u>Receipt for Cert. Mail</u> attach. #P446 530 560 to Letcher Co. Fiscal Court; #P446 530 559 to Harold D. Bolling, atty for County of Letcher., date stamped as mailed on 10/7/83	

PLAINTIFF		DEFENDANT	PIKE DOCKET NO. 82-2
JEFFERY L. COMBS		LETCHER CO., KY., ET AL	PAGE ___ OF ___ PA
DATE	NR.	PROCEEDINGS	
1983			
10/24	37	<p>CIVIL MINUTES:(GWU) Pre-Trial held at Pike 10/24/83 (1) imposit of costs atainst defts by reason of court's order of 6/14/83 i CONTINUED UNDER ADVISEMENT; (2) action cont'd to 11/1/83 at 9: a.m. for trial, by jury. further parties advised if settlement reached after necessitating attend. of jury panel costs will b assessed to parties equally. Copies as noted.</p> <p>Summons w/ 1 copy issued(per req. of atty of plff as to Cty Judge Ex. for Letcher Co. for Letcher Co. Fiscal Court) on:orig. com &amp; amend. complaint &amp; mailed to USM. for service w/ copy of In forma pauperis order (REF#1) &amp; Mag. Order &amp; Stip. Order on 10/</p> <p>ADDITIONAL SUMMONS &amp; 1 copy iss. w/copy in forma paup. order fi 4/19/82; w/attest copy Order dated 6/14/83; and complaint fil 4/19/82 and amended complaint fil 8/16/83 &amp; handed to plff's at for service, for deft., Letcher Co., Ky., Sheriff's Department. &amp; in forma paup order 4/</p> <p>ADDITIONAL SUMMONS &amp; 1 copy iss. w/copy/order fil 6/14/82; compl fil 4/19/82; attest copy order 6/14/83; &amp; amended complaint fil 8/16/83 &amp; handed to plff's atty for service, on Letcher Co., Ky Fiscal Court, Serve: Ruben Watts, County Judge Exec..</p>	
10/31	38	<p>ADD'L SUMMONS w/ ret- Let. Co. Sheriff's Dep. served on 10/28/83 by Martha Owen, attorney by serv Sheriff's office, Whitesburg w/ Amended Complaint &amp; Complaint</p>	
	39	<p>ADD'L SUMMONS w/ ret. -Letcher Co. Fiscal Court served on 10/31/83 by serving Office of Reuben Watts ,Co. Judge Exec. Execut. on said date by Cecelia Bates, SEc. w/ Amend. Comp. &amp; Complaint</p> <p>MOTION of plff for CONTINUANCE w NOTICE of hear on mot. at 9:00 on 11/1/83, AFFIDAVITS of V. Meagher, atty for plff &amp; MEMORANDUM of law in support of mot. for continuance - TENDERED 10/31/83</p>	
	40	<p>ORDER(GWU) on plff's application, X-ray exhibits listed as D on Exhibit List be permitted to be w/drawn to be used by plff for &amp; ret. to Clerk by 4:00 P. M. on 10/31/83. Copies as noted.</p>	
	41	<p>RECEIPT FOR EXHIBITS executed by S. M. Fitten ,atty for plff as noted in ORDER(PEF#40) X-rays listed as 1, 2, 3, as entered in the record w/ DEPOSITION #4(Thelma Coates) Copies as noted.</p>	
	42	<p>MOTION of plff for CONTINUANCE w/ Notice &amp; AFFIDAVITS of atty, V. Meagher &amp; MEMORANDUM of law w/ CERTIFICATE OF SERVICE fil 10/31/83</p>	
11/1	43	<p>CIVIL MINUTES:(GWU) Hearing on Mot. to Continue Trial held at Pi on 10/31/83 ordered. said motion, OVERRULED. Copies as noted.</p>	

CONTINUED

PLAINTIFF	DEFENDANT	PIKE 82-273
JEFFERY L. COMBS	LETCHER CO., KY., ET AL	DOCKET NO. _____
		PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS
1983		
11/1	44	ORDER:(GWU)on 11/1/83 at Pike matter was call for trial by jury. Out of pres. of jury court considered statements of counsel for the parties hereto & by reason thereof is of the opinion & finds that whether or not the defts, Letcher Co., Ky., Fiscal Court & Letcher Co., Ky., Sheriff's Dept. are properly before the court and, if so, the time when they were brought before the court has not been factually or legally determined. It, therefore appears that the issues between plff, Jeffery L. Combs & said defts are not properly joined & by reason thereof, IT IS ORDERED action SEVERED as to defts Letcher Co., Ky., Fiscal Court & Letcher Co., Ky. Sheriff's Dept. Copies as noted.
11/2	45	CIVIL TRIAL MIN:(GWU) At Pike Trial began on 11/1/83 as matter called for trial by jury as to defts Vernon Hall & Thurman "Pete" Wyatt w/jury being selected & sworn. Presentation of evid. on behalf of plff was begun But not concluded. Trial proceedings recessed to 9:00 A.M. w/counsel for pty to be present at 8:30 A.M. on 11/2/83. - Copies as noted.
	46	INSTRUCTIONS, offered by deft.
	47	INSTRUCTIONS TO JURY, offered by plff.
11/3	48	CIVIL TRIAL MIN: (GWU) At Pike Trial resum on 11/3/83; upon conclu. of defts evid. & rebuttal on behalf plff, court heard counsel out pres. of jury & ORDERED oral renew. mot. of defts for direct. verdict SUSTAINED as to deft, Vernon Hall; OVERRULED as to deft, Thurman "Pete" Wyatt; as to remain issue of damages; WHEREAS a Rule 51 conf. had & matter contd for further proceedings to 11/3/83 at 9:00 A.M. w/counsel direct to be present at 8:30 a.m. Copies as noted.
11/4	49	CIVIL MINUTES TRIAL; (GWU) Trial contd on 11/38/83 w/jury hearing closing statements by counsel & receiving instructs. of court. The jury returned a verdict by ansdrs to Spec. Interogs. 1 - 4 finding for the plff against the deft, Thruman "Pete" Wyatt. The court accepts the finding of the jury & enters judgm. for the plff in a total sum of \$26,071.46. A written judm of court pur. to Rule 58 of FRCP will be forthcoming; matter contd. to 12/14/83 at 11:00 a.m. for hearing on all pending mots & for a status conf. as to those defts previously severed by order of this court. Copies as noted.
11/3	50	VERDICT BY ANSWERS TO SPECIAL INTERROGATORIES (1) The Jury finds by a prepond. of evid. that plff, Jeffery Combs, endured injury, pain, disfigurement, loss of capac. for enjoyment of life as a direct & proximate result of the acts of deft at time & place contain in evid. & awards damage against said deft. <u>ANS. Yes.</u> ----If jury answer is yes it will insert sum so awarded. <u>ANS. \$20,000.00;</u> (2) The jury finds by prepond of evid. that plff, Jeffery Combs incur med. expenses as direct & prox. result of acts of deft Thurman P. Wyatt at time & place contain in the evid. & awards damage against said deft. <u>ANS. Yes.</u> CONTINUED NEXT PAGE

PLAINTIFF		DEFENDANT	PIKE DOCKET NO. 82-273
JEFFERY L. COMBS		LETCHER CO., KY., ET AL	PAGE ___ OF ___ PAGES
DATE	NR.	PROCEEDINGS	
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11/3	50	CONTINUED If Jury answer is yes, it will insert sum so awarded ANS. \$5,721.46 (3) The jury is unable to find by a prepond. of evid. that plff, Jeffery Combs sustain substan actual damages, however, jury finds that plff is entit. to nominal damages in some nominal amt. against deft, Thurman Pete Wyatt. ANS. No.; (4) If the jury finds by a prepond of evid. that plff, Jeffery Combs, in add. to act. or nominal damages, is entit. to an award of pun. damanges by reason of acts of deft, Thurman P. Wyatt at time & p mention in evid. ANS. Yes. If jury answer is "Yes" it will insert the sum so awarded <u>\$350.00.</u>	
11/4	51	JUDGMENT:(GWU) Pur. to FRCP 49, the court submit. jury interrogs for a finding of fact & as a special verdict, as to deft., Thurman Pete Wyatt, ORDERED & ADJUDGED That Judgm. be ent for plff, Jeffery Combs, & against deft, Thurman Pete Wyatt in sum \$26,071.00 toget. w/costs. Copies w/notice of entry as noted.	
11/7		SEALED ORDER (Note: placed in Vault).	
11/18	52	ORDER:(GWU) On 11/14/83 an in-chambers conf. held w/OCR & dep. clerk B. England pres.; the questionnaires concern deliberations of jury were open & view by court. IT IS ORDERED questionnaires shall be sealed & placed w/order of 11/7/83 pend. further order of court; & that counsel will be advis of results of questionnaires by subseq. memo opin of court & be furnish oportun to give the court memo of points & authorties; FURTHER court reporter & clerk direct that transc. of proceeds held herein & record are to be kept sealed pend. further orders of court. Copies as noted.	
	53	MEMORANDUM OPINION & ORDER:(GWU) At conclu of trial & after deli & discharge jury, it was reported to court "While jury was in transit, between the jury room & the courtroom, an off-hand remark was made by unidentified juror to the effect that the deft, Thurman Pete Wyatt would not have to personally pay a of the damages found agnst him by the jury except pun. damages" Before advis parties of info given to court & in an efft. to ascertain that a potential issue may exist, the court caused an inquiry to be made w/individ. members of jury. The inquiry was a questionnaire, a copy is attach, which was mail to indiv. jurors. It was to be ans, but not signed nor marked in any manner to identify the person answer. the questions. the ans. questionnaire was placed in an unmarked envelope which was to be placed in a large envelope for return via U.S. Mail to clerk of court. the court pres. clerk & court reporter exam. the answered questionnaires & Has ordered same sealed. The answers of jury reflect: (a) there was an atmosphere or understanding in the jury room that there a bond or some type of liabil. ins. (However it should be noted that the evid. reflect. that a part-time deputy had a bond in addition to the bond of the sheriff. Further the law, instructions of the court permits the jury to consid. the financ. resources of the deft. in assess. punitive damages. CONTINUED ON THE NEXT PAGE. -----	



PLAINTIFF		DEFENDANT	PIKE 82-273 DOCKET NO.
JEFFERY L. COMBS		LETCHER CO., KENTUCKY, ET AL	PAGE ___ OF ___ PAGES
DATE	NR.	PROCEEDINGS	
1983			
11/18	53	CONTINUED: (b) The amt.of the bond &/or ins. was unknown by 50% of the jury w/the remain. half being under the impress. of a sum of liability rang. from \$50,000 to \$200,000. (c) 2/3 of the jury did not believe the fact there was a bond &/or ins & the amt. thereof had any effect & the special verdict of the jury would have been the same. The remain. 1/3 had the opin. that it was question able as to the effect & one was of the opin. that it may have result. in a "hung jury" had there been no such bond &/or ins. The parties are request to furnish to the court, memo of points & auth as to the effect, if any, the foregoing may have upon the special verdict of the jury, new trial, &/or remittitur. IT IS ORDERED: memoranda be submitted not less than 7 days before the hearing in the U.S. Courthouse on 12/14/83 at 11:00 A.M. Copies as noted, w/attach questionnaire.	
	54	ANSWER, of deft, Letcher County Fiscal Court.	
11/29	55	SUMMONS, w/Marshal's return srv. on Kim Roberts by cert. mail return recpt. on 10/31/83 for Ruben Watts, Co. Judge Executive, Letcher Co. returned UNEXECUTED on 11/28/83.	
12/2	56	NOTICE of appeal of plff from Order filed 11/3/83 sust. mot. of deft V. Hall for directed verdict; 2) decision rendered on 11/3 83 striking plff's claims under 4th,5th,8th & 14th mands,28 USC Sec. 1331 & 1332 & pendent & diversity claims against V. Hall; 3) decision on 11/1/83 striking defts, Letcher Co. Ky. Sheriff dept & Letcher Co. Ky. Fiscal Court from complaint 4) ruling on 6/13/83 which did not grant default judgment against deft, Let. Co. Ky. Sheriff's Dept. 5) Order fil 6/13/83 setting aside default judg. against V. Hall. Copies to 6CCA w/ copy of Order fil 6/13/83; 11/1/83; 11/1/83; 11/3/83 w/ 6CA-33 & up date of docket sheet; copy w/ Form 411; copy of docket sheet 6CA 31 to S.Fitten, V. Meagher, J. Craft & H. Bolling.	
12/7	57	MEMORANDUM OF POINTS & AUTHORITIES, of plff re: evid. of Sheriff's Bond.	
12/12	58	MOTION of plff for disqualification of judge & to stay proceed. w/ AFFIDAVIT of Steven M. Fitten, atty for plff	
	59	TRANSCRIPT ORDER, of plff order pre-trial proceeds. June 2 & 13, 1983; testimony Vernon Hall, Pete Wyatt, Jury instructions, etc.	

To capsulize or summarize this matter:

On 19 April 1981, in Letcher County, Kentucky, Thurman "pete" Wyatt, a part-time or special deputy, shot and wounded Jeffery L. Combs, a citizen and resident of Letcher County, Kentucky.

Wyatt contended that Combs, who was drinking and under the influence, was riding a bicycle belonging to Wyatt's children ~~and~~ which had been taken without permission and authority. He stopped Combs and shot him after he flourished a knife.

Combs admits that he had been drinking, but denies that he was under the influence. He contends he was hitch-hiking and given a ride by a stranger from whom he purchased the bicycle. He denies having or flourshing a knife.

On 19 April 1982, Jeffery L. Combs filed a complaint in a United States District Court in the Eastern Division of the Northern District of Ohio. The basis of the Complaint is a civil rights action under 42 U. S. C. 1981-3-5 and 6. ~~Pendent~~ claims are asserted by way of diversity. *Pendent jurisdiction* The defendants are noted as Thurman "Pete" Wyatt, Vernon Hall, *Sheriff* and Letcher County Sheriff's Department. *as a separate entity*

A motion to dismiss was filed on behalf of Vernon Hall and Thurman P. Wyatt for improper venue.

Plaintiff concedes improper venue but "because of word" passed along to him by local law enforcement officials the trial should be elsewhere by reason of serious risk to physical being of plaintiff, adverse publicity, *black* prejudice, and poverty.

A preliminary conference was set on 30 September 1982. It subsequently appears that plaintiff married a young lady who worked for the County Government in Letcher County, Kentucky. He returned

to the County on an occasion thereafter and was not harmed nor arrested on a pending warrant for theft.

A pre-trial was set for the 2nd day of June 1983 and a trial on the 13th day of June 1983.

No one appeared on behalf of Vernon Hall and Thurman "Pete" Wyatt at the pre-trial hearing on 2 June 1983. The Court, by way of sanctions, sustained the motion of plaintiff for a default judgment against the defendant, Thurman P. Wyatt, upon the issue of liability and against the defendant, Vernon Hall, in a representative capacity upon the issue of liability.

On 13 June 1983, the Court was of the opinion that Vernon Hall, in a representative capacity, had a meritorious defense and it would not be fair to the <sup>government and/or the</sup> tax-payers to permit a default judgment to be entered as to said defendant in said capacity and the default judgment was set aside.

The Court was of the opinion the only defendants before the Court on this complaint were Vernon Hall, in a representative capacity, and Thurman P. Wyatt.

The plaintiff was given the option of going to trial as to the two defendants or a continuance with leave to file an amended complaint. The plaintiff chose the latter. A pre-trial was set for 24 October 1983 and trial for 1 November 1983.

An amended complaint was filed setting forth the same claims and noting as defendants, Letcher County Fiscal Court, Robert B. Collins, Judge; Letcher County Sheriff's Department, a separate entity; Thurman P. Wyatt and Vernon Hall.

On 24 October 1983, Steven M. Fitten did not appear and Ms Meagher appeared as lead counsel and announced that Fitten was unable to appear because of physical illness.

On 31 October 1983, Plaintiff admitted inability to effect service upon Letcher County, Kentucky, Fiscal Court, and moved for a continuance. This motion was denied.

Again, the Court was of the opinion, the only defendants upon which issues were joined were Vernon Hall, in a representative capacity, and Thurman P. Wyatt. The matter went to trial upon these two defendants upon the allegations of the complaint, by jury, on 1 November 1983.

Upon the conclusion of all the evidence, the Court entered

Tropo Bond

a directed verdict against the plaintiff and in favor of the defendant, Vernon Hall, in a representative capacity. The matter was submitted to the jury upon the issue of damages as to the defendant, Thurman P. Wyatt. The jury, by way of special interrogatories, found the damages to be: punitive in the sum of \$ 350.00; medical in the sum of \$ 5,721.46; pain and suffering in the sum of \$ 20,000.00. An interlocutory judgment was entered for the plaintiff, Jeffery L. Combs and against the defendant, Thurman P. Wyatt on 4 November 1983. The matter was continued until the 14th day of December 1983 to consider the remaining issues against the remaining party or parties.

The defendant, Letcher County Fiscal Court filed its answer to the plaintiff's amended complaint.

The plaintiff files a notice of appeal:

1. Order of Court sustaining the motion for a directed verdict for defendant, Vernon Hall, in a representative capacity.
2. Order of Court denying pendent jurisdiction.
3. Order of Court finding that Letcher County Sheriff's Department, as a separate entity, was not before the Court;  
Order of Court finding that Letcher County Fiscal Court was not before the Court.

The Court was advised of a potential of misconduct occurring in the jury room. The clerk, at the direction of the Court, by way of mail conducted an impersonal and anonymous inquiry to be the individual members of the jury. The answers, etc., are under seal and the parties are to be prepared to discuss the matter at the status conference on 14 December 1983.

Counsel for Plaintiff has moved the Court to disqualify itself because of bias and prejudice and to enter a stay pending the designation of another judge.

The grounds for the disqualification motion are:

- (1) Vacating default judgment against public official, i. e. government.
- (2) Refusing to grant default judgment against Letcher County Sheriff's Department, as a separate entity.
- (3) Refusing to exercise pendent jurisdiction.

- (4) Granting a directed verdict at conclusion of evidence in favor of the defendant, Vernon Hall, in a representative capacity.
- (5) Allowing witness to testify as to knife and causation when there was an issue of punitive damage.
- (6) Inquiry as to potential misconduct.
- (7) Private discussion of case with counsel for defendants and then ruling upon motions by reason of knowledge obtained from private discussion.

691 F2d 220

SMITH v. HEATH  
Cite as 517 F.Supp. 774 (1980)

*Thompson v. Railroad*, Slip Op. 79-1343-44 (6th Cir. 1980). The court makes no award for permanent injuries because the proof thereof merged into the category of impairment of enjoyment of life.

As to the defendant Rohtert, Mr. Smith shall recover compensatory damages as follows:

- (a) unlawful entry and search and seizure \$5,000.00
- (b) loss of three rifles when premises left unattended 450.00

[5] As to the defendant Rohtert, Mrs. Smith shall recover as compensatory damages for her unconstitutional arrest and retention for several hours, the sum of \$5,000.00. In addition, for her nervous condition she shall recover an additional \$5,000.00.

As before stated, the court finds that the defendants Heath and Rohtert were guilty of wilful misuse of police power. The court feels that an award of punitive damages is required. This type of conduct cannot be countenanced. Therefore, Mr. Smith shall recover from officer Heath the sum of \$25,000.00 and from officer Rohtert the sum of \$5,000.00 as punitive damages. Mrs. Smith shall recover from officer Rohtert the sum of \$2,500.00 as punitive damages.

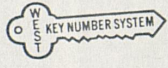
This is an appropriate case for the award of attorney fees. A separate hearing will be scheduled for this purpose.

The members of the police department who engaged in the unlawful search and seizure at the motel assert that since the shooting had taken place and the shootee was in dire distress, there was a compelling need for official action and thus no time to secure a search warrant. *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Suffice it to say that this court having found that Heath, a policeman operating under color of law, violated the constitutional rights of the shootee, the only compelling need or urgency was to hospitalize the shootee. Instead, in an effort to find some evidence to mitigate the impact of those unconstitutional acts, the defendant Rohtert and his subordinates engaged in an unconstitutional orgy of unique proportions. They were not performing routine nor normal police procedures. Under the peculiar circumstances of this case, the defendant officers did not believe that their acts were proper, they knew that their motives had no relation to the performance of their official duties, and there was no probable cause for the actions taken. Not one of the defendants is entitled to the defense of good faith or that there was probable cause for their actions.

In addressing the question of damages, the court will first consider the damages of Mr. Smith. At the time of the incident he was approximately 60 years of age and in good health. He was wounded by three projectiles, lost much blood, his stomach was opened by surgeons, and he felt he was going to die. For some days he was in a critical condition. Thereafter, he had a convalescent period of several weeks. He suffered much pain. He is nervous, and loud noises affect him adversely.

[4] As to the defendant Heath, Mr. Smith shall recover the following as compensatory damages:

- (a) pain and suffering \$80,000.00
- (b) impairment of enjoyment of life 5,000.00
- (c) violation of his constitutional right not to be shot 5,000.00
- (d) hospital bill 2,212.50





Judge:

This plttf is a black man who is suing the Letcher Co sheriff, deputy sheriff, and sheriff's department for civil rights deprivations.

Factually, he alleges that the deputy used his car to force plttf's bicycle off the road and that the deputy then put a revolver to plttf's jaw and fired it.

CURRENT PROBLEM:

Plttf says he fears for his life if he should have to return to Eastern Ky. to be heard.

Plttf says he couldn't be tried fairly by a jury here, due to publicity & prejudice.

Plttf, who is doing this in forma pauperis, says he can't afford to get his witnesses, most of whom are in Lexington, down here.

Plttf wants to be heard in Covington or Lexington; no response on that issue from defts.

Awaiting your instructions, since I don't know the process by which y'all assign cases within the district. . .

Thanks,

Maggie  
7/6/82