UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

TROY DAVIS, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:99CV-675-S

BRECKINRIDGE COUNTY, et al. DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the motion of the Plaintiffs, current and former inmates of the Breckinridge County Jail, to alter or amend our order granting summary judgment in favor of the Defendants. We will also address two additional motions filed by the parties.

FACTS and PROCEDURAL HISTORY

This case arises out of a fire at the Breckinridge Count Jail ("Jail"). On October 17, 1998, Two Jail inmates started a fire in the duct system. The fire spread and required the Jail to be evacuated. The Plaintiffs allege that, as a result of the fire, they suffered smoke inhalation and other ill effects. They have filed suit under 42 U.S.C. § 1983 claiming that the Defendants, acting under color of state law, deprived them of their Eighth Amendment right to be free from cruel and unusual punishment.

On December 21, 2000, we granted a motion for summary judgment dismissing Breckinridge County (the "County"), the Breckinridge County Fiscal Court, Louis D. Carmen ("Carmen"), and Jerry Malone ("Malone") as Defendants. We held that there was not sufficient evidence to create a genuine issue of material fact as to whether the Defendants were deliberately indifferent to fire safety. In the present motion, the Plaintiffs ask us to reconsider and amend our decision with respect to the County and Carmen.

DISCUSSION

The Plaintiffs argue that we erred in granting the Defendants' motion for summary judgment in two ways. First, they claim that we granted the motion before the close of discovery. Second, they contend that we should have considered the reports of their expert witness who concluded that "Breckinridge County [] and its jailers disregarded and failed to adequately provide for the life safety of inmates." (Pl.'s Mot. Alter or Amend, Ex. 4.)

The Defendants' motion for summary judgment was filed before the close of discovery and before the Plaintiffs had the opportunity to depose the Defendants. As we noted in our original opinion, in deciding such a motion, a court should afford the non-moving party "adequate time for discovery, in light of the circumstances of the case." *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995). In the current motion, the Plaintiffs note that they had noticed the depositions of several witnesses but that these depositions had been postponed by the Defendants' counsel and that the period for discovery had been extended by the Magistrate.

Nevertheless, we did not err in considering the motion before the conclusion of discovery. As we noted in our opinion, the Plaintiffs did not follow the procedure outlined in Fed.R.Civ.P. 56(f) which requires them to file affidavits giving reasons why they cannot submit evidence sufficient to support their opposition to the motion. More importantly, though, the Plaintiffs wrote, "there is currently enough evidence before this Court, based solely on documents produced by defendants, showing that genuine issues of material fact exist . . .." (Pl.'s Mem. Resp. Summ.J., p.1.) This statement indicates that the Plaintiffs waived any objection to our consideration of the motion before the close of discovery.

Motion to Amend or Alter

The second question is whether we should reconsider our decision based upon the reports of the Plaintiffs' expert, Gregory Cahanin ("Cahanin"). There are three basic situations in which a court will reconsider its order: 1) there has been an intervening change in the controlling law, 2) there is new evidence which has become available, and 3) there is a need to correct clear legal error or to prevent manifest injustice. *Plaskon Electronic Materials v. Allied-Signal*, 904 F.Supp. 644, 669 (N.D.Ohio 1995)(citing *Bermingham v. Sony Corp. of America, Inc.*, 820 F.Supp 834, 856 (D.N.J. 1992)). The Plaintiffs' motion implicates the second of these situations.

In their response to the motion for summary judgment, the Plaintiffs argued that there was sufficient evidence in the record, "based solely upon documents produced by defendants," to require us to deny the motion for summary judgment. (Pl.'s Mem. Resp. Summ.J., p.1.) We disagreed and granted the motion. The Plaintiffs noted in their response, however, that their "fire safety expert ha[d] not inspected the jail premises." He inspected the Jail five days after the filing, and the Plaintiffs filed his initial report twelve days later. The Plaintiffs, obviously, were unable to cite to the report or mention it in their response. Likewise, they failed to bring it to our attention when they filed Cahanin's initial and supplemental reports. Therefore, these reports are new information which was not available to us when we considered the Defendants' motions. There is, however, a question as to whether the reports amount to 'evidence' which we can consider in a motion for summary judgment.

Expert disclosures are compiled and submitted into the record pursuant to Fed.R.Civ.P. 26(a)(2), a discovery rule, and are not intended to be admissible evidence. Likewise, Rule 56(c) does not list these reports as evidence permitted to be used to defend against a motion for summary

judgment. We have some discretion in deciding which material may be considered in a motion for summary judgment. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 494 F.Supp. 1161 (D.C.Pa. 1980). We do not consider these reports, although they contain Cahanin's findings and opinions, to be admissible evidence unless they are sworn to in an affidavit or deposition testimony.

We would be willing to provide the Plaintiffs time to get a sworn statement from Cahanin regarding his reports before ruling on the motion to alter or amend. However, we have considered whether the alleged facts contained in these reports, if sworn to in their entirety by Cahanin, would be sufficient to have us amend our granting of the Defendants' motion for summary judgment and have concluded that they would not.

Deliberate Indifference

The Plaintiffs have not challenged the standards set forth in our original opinion in which we stated:

> The Eighth Amendment prohibition against "cruel and unusual punishment" protects the Plaintiffs from "unnecessary and wanton infliction of pain." *Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir.1995)(citing *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291-92, 50 L.Ed.2d 251 (1976)). To establish that this protection has been violated, the Plaintiffs must show that the Defendants were "deliberately indifferent" to their needs. *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991)(citing *Estelle,* 429 U.S. at 106, 97 S.Ct. at 293). Prisoners have the right not to be "subjected to the unreasonable threat of injury or death by fire." *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985). However, there is no violation of the Eighth Amendment unless the defendant is "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists" and he draws "that inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994). Even then, a defendant is not liable if he took reasonable steps to avert the harm. *Id.* at 844, 114 S.Ct. at 1982-83. In short, negligent exposure to a risk is not sufficient. *Farmer*, 511 U.S. at 835-36, 114 S.Ct. at 1978.
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> Thus, in order to find these Defendants liable, the Court must find four things: (1) there was a substantial risk of serious harm from fire; (2) the Defendant knew of this risk; (3) the steps taken by the Defendant to avoid the harm were not reasonable; and (4) the Defendant is not entitled to immunity.

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(Mem. Opinion, Dec. 21, 2000, p.4.) Cahanin's report, when coupled with the other evidence already in the record, must be sufficient to create a genuine issue of material fact on each of these elements with respect to the County and Carmen.

Breckinridge County

A county can only be held liable under §1983 if the Constitutional deprivation results from a county policy. *Monell v. Dep. of Social Servs. of New York City*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). A county policy can be evidenced by a showing that there is a deeply-rooted custom or practice by the county and its officials. *Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970). Thus, in order to be liable to the Plaintiffs, there must be evidence that the County had a deeply-rooted practice of intentionally allowing a substantial risk of serious harm from fire to exist.

Cahanin's reports contain facts indicating that the Jail was improperly maintained. However, the County was in the process of planning and building a new Jail which would have eliminated many of the deficiencies noted by Cahanin. This fact establishes that the Defendants took reasonable steps to eliminate the harm and shows that the County, while possibly negligent in fulfilling its duties to the Plaintiffs, did not have a deeply-rooted practice of ignoring the Plaintiffs' safety from fire.

Carmen

In his report, Cahanin found that Carmen failed to follow required fire prevention regulations, to train jailers properly in emergency procedures, to develop or coordinate a jail emergency plan, to maintain proper means of egress lighting, exit signs, and emergency lighting,

or to comply with Kentucky's administrative requirements for prison safety conditions. (Pl.'s Mot. Alter or Amend, Ex. 4.) He also found that the sole deputy jailer on duty the night of the fire, lacked adequate training in dealing with a fire emergency. (*Id*.) Cahanin filed a supplemental report in which he noted some additional violations which included the County's failure to comply with its own promise to install a smoke evacuation system with any future renovation of the Jail. (Pl.'s Mot. Alter or Amend, Ex. 5.)

Although courts readily recognize that prisoners have a right not to be subjected to unreasonable threats of fire, few have addressed the requirements of the Eight Amendment in the context of fire safety. Of those decisions which we have discovered, none lays out a test or formula to determine when standards are so lax as to evidence deliberate indifference on the part of prison officials. *See, e.g., Standish v. Bommel*, 82 F.3d 190 (8th Cir. 1996); *Coniglio v. Thomas*, 657 F.Supp. 409 (S.D. N.Y. 1987).[1] In *Standish*, the court granted a motion for summary judgment against a former inmate despite his claims that the prison work place had "no smoke detectors or water sprinklers, was inadequately ventilated, . . . lacked sufficient emergency procedures" and had experienced recent fires. 82 F.3d at 191-92. The court found that the prison officials had taken reasonable actions to prevent the fires, for example, by prohibiting smoking, and therefore, that the plaintiff's "allegations did not rise above mere negligence." *Id*. at 192.

On the other hand, *Coniglio*, a memorandum decision, found that the Eighth Amendment required prison officials to construct a smoke barrier and a system of effective smoke management, which could be satisfied by placing smoke detectors in each room. 657 F.Supp at 414. However,

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[1]For additional cases dealing with fire safety in prisons, but which apply, respectively, a due process standard and no discernable standard, *see Jones v. City and County of San Francisco*, 976 F.Supp 896 (N.D. Cal. 1997); *Leeds v. Watson*, 630 F.2d 674 (9th Cir. 1980).

the court also found that it could not require a sprinkler system to be installed and admitted that it was erring on the side of caution, given the unclear line between reasonable and unreasonable dangers. *Id*.

We find that, between these two cases, *Standish* represents the better reasoning. We have the authority to require a prison to install smoke barriers and management systems in order to remedy unconstitutional conditions, as was done in *Coniglio*. However, we do not find that the absence of these protections is sufficient, in itself, to rise to the level of an Eighth Amendment violation. It is not clear, from the *Coniglio* opinion, how the court arrived at its conclusion, but we think that its admission that it erred on the side of caution, when coupled with the fact that the plaintiff sought an injunction rather than damages, led it to apply too strict a standard.

The alleged facts in this case closely resemble those in *Standish*, and we believe that they warrant the same conclusion. The Eighth Amendment only protects against *substantial* risks of *serious* harm from fire. We find that the evidence, construed in the light most favorable to the Plaintiffs, fails to meet this standard.

We note that in this instance, the Jail structure did not accidentally catch fire. Instead, the fire was set with paper products in the duct work of the Jail by two inmates. The Plaintiffs have not identified to the Court any prior instances of fire or any reasons why Carmen should have foreseen the likelihood that inmates would intentionally set a fire. Thus, there was not a substantial risk of harm from a fire originating with the deficiencies of the Jail structure.

There is evidence which suggests that the Jail failed to meet standards set by Kentucky regulations and by the National Fire Protection Association. Cahinin notes some conditions which relate to the structure of the building. Most of these were beyond Carmen's control. The remaining

conditions did not rise above the level of ordinary negligence. In fact, Cahanin's expert conclusion is that the conditions of the Jail, including those beyond Carmen's control, created "unnecessary risk [and] danger" to the Plaintiffs, not a substantial risk of serious harm. (Pl.'s Mot. Alter or Amend, Ex. 4.) An unnecessary risk is simply a negligent one, and thus, Cahinin's report does not create a genuine issue of material fact as to whether Carmen was deliberately indifferent to the Plaintiffs' fire safety.

Therefore, were Cahanin to swear to the veracity of the facts laid out in his reports, we would still be unpersuaded to alter or amend our order dismissing the County or Carmen. We will deny their motion by a separate order entered this date.

Additional Motions

Motion to be Relieved as Counsel

There are two additional motions before the Court. First, Plaintiffs' counsel has moved to be relieved as counsel. There is no objection filed by the Defendants, and the time for response has passed. Also, we find no reason to believe that her removal would prejudice the Plaintiffs. Therefore, we will grant her motion to be relieved as counsel.

However, in her motion, counsel also requests that we hold the action in abeyance for sixty days. Because we have already dismissed the action against the Defendants and because counsel has fully briefed the motion to alter or amend, we find no reason to hold the case in abeyance before ruling upon that motion. Also, we do not have discretion to stay the time for the Plaintiffs to file an appeal to the United States Court of Appeals for the Sixth Circuit. Even so, the Plaintiffs have had since July 11, 2001 to begin the search for new counsel and would not be prejudiced by being required to follow the standard procedures for appeal. Therefore, we will deny that portion of

counsel's motion which requests that we hold the case in abeyance for sixty days.

Motion for Attorney's Fees

The Defendants have also filed a motion seeking attorney's fees for the Plaintiffs' claims against the Breckinridge County Fiscal Court and Malone, two Defendants to whom we granted summary judgment.

The prevailing defendant in an action under §1983 is entitled to attorney's fees if the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The claims against the Fiscal Court and Malone do not meet this standard. The Plaintiffs had factual foundations for their claims against these two Defendants. With respect to the Fiscal Court, it appears, in an exercise of caution, that the Plaintiffs named both the County and the Fiscal Court to ensure that the proper party was brought into the suit. However, once the Defendants indicated that the County was the proper Defendant, the Plaintiffs did not pursue their claims against the Fiscal Court. With respect to Malone, the Plaintiffs had enough of a factual foundation to make a good faith claim that he may have violated the Plaintiffs' Constitutional rights.

CONCLUSION

An order will be entered this day denying the Plaintiffs' motion to alter or amend and the Defendants' motion for attorney's fees and granting, in part, Plaintiffs' counsel's motion to be relieved as counsel.

This _____ day of _____, 2001.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that :

the Plaintiffs' motion to Alter or Amend is **DENIED**;

the Defendants' motion for attorney's fees is **DENIED**;

the Plaintiffs' counsel's motion to be relieved as counsel is **GRANTED in part**. Jennifer Jordan Hall shall have no further responsibility in this action. To the extent this motion requests us to hold this case in abeyance for sixty days, it is **DENIED**.

IT IS SO ORDERED this _____ day of _____, 2001.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record