

**In the United States Court of Appeals
for the Third Circuit**

No. 05–2146

KEVIN KELLER and BENJAMIN MARTIN,
Plaintiffs/Appellees,

v.

COUNTY OF BUCKS,
Defendant/Appellant,

MICHAEL FITZPATRICK; CHARLES H. MARTIN,
SANDRA MILLER, Individually and as the Bucks County Board
of Commissioners; GORDIAN EHRLACHER, Individually and as
Director, Bucks County Department of Health; LEWIS POLK,
Medical Director, Bucks County Health Department, individually
and as Director of Correctional Health Svc. (CHS),
Defendants,

JOAN CROWE, individually and as CHS Director at BCCF;
HARRIS GUBERNICK, Individually and as Director,
Bucks County Department of Corrections; WILLIS MORTON,
Individually and as Warden, Bucks County Correctional Facility,
Defendants/Appellants.

On Appeal from the U.S. District Court for the Eastern
District of Pennsylvania, No. 03–cv–4017
(Honorable John P. Fullam, Senior District Judge)

BRIEF FOR APPELLANTS AND
APPENDIX VOLUME ONE OF FOUR
(Pages 1a–9a)

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs' complaint alleged claims arising under the federal civil rights act, 42 U.S.C. §1983, and therefore the district court possessed subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. (App.33a).

Following a jury trial, the district court on January 11, 2005 entered judgment against defendants/appellants. (App.3a). Thereafter, defendants/appellants filed a timely post-judgment motion seeking a new trial. (App.823a-50a).

On March 22, 2005, the district court denied the post-judgment motion in all respects. (App.4a-9a). On April 8, 2005, defendants/appellants filed a timely notice of appeal from the judgment and the district court's order denying the post-judgment motion. (App.1a). This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291.

II. ISSUES ON APPEAL

1. Are the jury's findings — that defendants were deliberately indifferent to plaintiffs' serious medical needs; that defendants subjected

plaintiffs to unconstitutional conditions of confinement; and that defendants subjected plaintiff Keller to punishment — against the manifest weight of the evidence, thus necessitating a new trial?

Where preserved: These issues were raised in defendants’ timely-filed post-judgment motion for a new trial. (App.823a–24a).

Standard of review: In *Pryer v. Slavic*, 251 F.3d 448, 453 (3d Cir. 2001), this Court explained that “[w]e review a district court’s order granting or denying a new trial for abuse of discretion, unless the court’s decision is based upon the application of a legal precept, in which case we exercise plenary review.”

2. Did the trial court err in refusing to allow into evidence the existence of Kevin Keller’s prior convictions for crimes involving dishonesty and false statements, thereby necessitating a new trial on all claims?

Where preserved: Defendants raised this issue in their amended motion for a new trial. (App.831a).

Standard of review: Because the admission of this evidence is mandatory, and not subject to an exercise of the trial court’s discretion, this Court exercises plenary review. As the U.S. Court of Appeals for

the Sixth Circuit explained in *United States v. Rattigan*, 996 F.2d 1218, 1993 WL 190910 (6th Cir. 1993) (non-precedential):

Since this issue involves the proper application of Fed. R. Evid. 609(a)(2), our review is *de novo*. Although some evidentiary decisions are within the broad discretion of the trial judge, the admission of prior convictions under Rule 609(a)(2) is not because, under the rule, the district court has no discretion to exclude evidence of prior convictions that involve crimes of dishonesty or false statement.

Id., 1993 WL 190910, at *4; *see also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 523 (3d Cir. 1997) (recognizing that a district court lacks discretion to exclude prior convictions admissible pursuant to Federal Rule of Evidence 609(a)(2)).

3. Is the jury's award of compensatory damages in plaintiffs' favor excessive, and therefore should a substantial remittitur be ordered or a new trial held?

Where preserved: Defendants, in their motion for a new trial, requested a new trial or remittitur due to the jury's excessive compensatory damages award. (App.826a–27a).

Standard of review: This Court reviews for an abuse of discretion a trial court's order denying a motion for remittitur or a new trial on the

ground that a jury's award of compensatory damages was excessive. *See Brennan v. Norton*, 350 F.3d 399, 431 n.25 (3d Cir. 2003).

III. STATEMENT OF THE CASE

Plaintiffs Kevin Keller and Benjamin Martin filed suit in the U.S. District Court for the Eastern District of Pennsylvania on July 7, 2003 alleging that, during their separate earlier confinements as pretrial detainees at the Bucks County Correctional Facility, defendants had been deliberately indifferent to plaintiffs' serious medical needs and had subjected plaintiffs to unconstitutional conditions of confinement. (App.13a, 24a–33a).

After discovery, defendants moved for summary judgment as to all claims. (App.17a, docket entry 31). Following briefing, the trial court denied the summary judgment motion (App.18a, docket entry 42), and the case proceeded to trial.

On the morning of the first day of trial, the district court considered a number of motions *in limine*. (App.44a–59a, 62a–66a). At that time, the district court granted plaintiffs' motion to preclude testimony concerning or any other evidence of plaintiffs' criminal records at trial,

stating from the bench: “Unless somebody can convince me that the criminal records bear on the issue of damages, they will be kept out.” (App.66a).

The jury trial lasted five days, and on Monday following the close of the evidence the jury returned a verdict awarding to plaintiff Kevin Keller \$800,000 in compensatory damages for pain and suffering and awarding to plaintiff Benjamin Martin \$400,000 in compensatory damages for pain and suffering. (App.820a). The total verdict for plaintiffs was \$1.2 million for pain and suffering in this prison conditions and deliberate indifference to medical needs case involving two former Bucks County Correctional Facility pretrial detainees, neither of whom sustained any serious permanent damage or presented any wage loss claim. (App.811a–12a).

The district court formally entered judgment in favor of the plaintiffs on January 11, 2005. (App.3a). On January 19, 2005, the defendants found liable by the jury filed a motion for a new trial (App.823a–27a), and on January 21, 2005 (still within the ten–business–days period specified in Federal Rule of Civil Procedure 59(b)) these defendants filed an amended motion for a new trial (App.831a–50a).

Following briefing, the district court on March 22, 2005 issued a memorandum and order denying the defendants' motion and amended motion for a new trial. (App.4a–9a). Thereafter, on April 8, 2005, the defendants filed a timely notice of appeal to this Court from the district court's judgment and order denying their post–judgment motion for a new trial. (App.1a).

IV. STATEMENT OF FACTS

Benjamin Martin, to whom the jury awarded \$400,000 in compensatory damages for pain and suffering, arrived at the Bucks County Correctional Facility on Tuesday, August 7, 2001 after turning himself in to authorities for violation of parole stemming from guilty pleas for retail theft and disorderly conduct. (App.196a, 220a).

During his intake screening at the Correctional Facility, Martin admitted that he had in the recent past injected heroin intravenously and had also used cocaine. (App.233a, 1010a). On Wednesday, August 8, 2001, Martin was seen by a nurse at the Correctional Facility for an abrasion on his leg sustained during a basketball game that he participated in before reaching the Correctional Facility. (App.201a–02a,

1011a). The nurse suspected that what appeared to be pimples on Martin's leg were the result of spider bites. (App.203a). The nurse made an appointment for Martin to see the prison doctor. (*Id.*).

The very next day, on Thursday, August 9, 2001, Martin was seen by the prison doctor, who observed that the skin on Martin's leg was infected. (App.551a–52a). The physician prescribed an antibiotic. (App.565a). One day later, on Friday, August 10, 2001, Martin was again seen by a nurse and then a physician after Martin complained that his leg was not improving and that he was allergic to the penicillin-based antibiotic that had originally been prescribed. (App.370a). As a result, on August 10, 2001, the prison physician prescribed a different antibiotic for the treatment of the infection on the surface of Martin's leg. (App.566a).

From Friday, August 10, 2001 through Tuesday, August 14, 2001, the Correctional Facility's staff provided Martin with the antibiotic that had been prescribed for him and Motrin for pain, but the condition of his leg did not appear to be improving and Martin continued to complain of pain. (App.205a–06a, 566a).

Upon inspecting Martin's leg on Tuesday, August 14, 2001, the prison physician ordered that Martin be transported to Doylestown Hospital for treatment. (App.566a–67a). Dr. Pierson, the physician who treated Martin at Doylestown Hospital, testified at trial that the medical treatment Martin received from Bucks County Correctional Facility before transfer to the hospital was appropriate. (App.593a, 597a). At the hospital, the infection that Martin had contracted was diagnosed as Methicillin Resistant Staph Infection (also known as Methicillin Resistant Staphylococcus Aureus or MRSA), a type of staph infection that does not respond to treatment from common antibiotics. (App.584a). At no point prior to Martin's arrival at Doylestown Hospital had Martin's leg been diagnosed as infected with MRSA. (App.567a).

Martin remained at Doylestown Hospital until August 30, 2001. (*Id.*). He underwent four surgeries for drainage and debridement of the infected area of his left leg. (App.586a). On August 28, 2001, the hospital took a culture of Martin's leg that revealed that the MRSA infection had been eradicated. (App.239a).

On August 30, 2001, Doylestown Hospital discharged Martin into the custody of the Bucks County Correctional Facility. (App.685a). On that

day, he was seen by the medical staff at the Correctional Facility. (App.567a). And from September 1st through September 12th, Martin was seen by the facility's nursing staff on a daily basis, at which times the nurses cleaned his wound and applied new dressings. (App.568a–69a). As of September 11th, the wound was healed to the point where only a band–aid was needed to cover it. (App.1016a). The very next day, on September 12, 2001, Martin was released from the Correctional Facility. (App.569a). Martin testified at trial that he had not suffered any recurrence of MRSA, nor had the infection caused any lasting disability. (App.218a–19a).

Plaintiff Kevin Keller, to whom the jury awarded \$800,000 in compensatory damages for pain and suffering, was confined to the Bucks County Correctional Facility on June 6, 2002 after he took his father's car without permission and his father decided to press criminal charges. (App.91a). Keller testified that he noticed pimple–like bumps on his armpits between August 3rd and August 7th of 2002, which led him to sign up for a sick call visit. (App.102a). Keller was not seen by the facility's medical staff at that time, but he did not continue to seek medical

attention because the pimple–like bumps went away without treatment. (App.105a–06a).

On Wednesday, August 28, 2002, pursuant to an order of the U.S. District Court for the Eastern District of Pennsylvania in another case, Keller was among those inmates at the Correctional Facility on whom nasal swabs were performed to check for the presence of MRSA. (App.107a, 141a). Keller’s results were negative, indicating that he had not been exposed to or colonized with the infection.

After the nasal swab test had been performed, Keller developed soreness in his armpits and a pimple–like sore on the underside of his scrotum, which he says he first noticed on Thursday, August 29, 2002. (App.108a, 144a). Keller claims to have signed up for sick call on the evening of Friday, August 30, 2002 but was not seen by anyone until Sunday, September 1, 2002, when he walked over to the Correctional Facility’s dispensary without authorization and exhibited his swollen scrotum to a nurse. (App.112a–13a).

The nurse immediately took a culture of the infected area on Sunday, September 1st, gave Keller a sterile medical pad to place over the infection, and ordered that Keller be placed in medical isolation at the facil-

ity. (App.626a–27a). In addition, the prison’s medical staff began treating Keller’s infection with an antibiotic. (App.627a). On Monday, September 2, 2002, which was the Labor Day holiday, Bucks County Correctional Facility transferred Keller to Doylestown Hospital for treatment. (App.629a).

Doylestown Hospital drained Keller’s infection, diagnosed the infection as MRSA, and treated the infection with antibiotics effective against that type of infection. (App.692a). Five days later, on September 7, 2002, Doylestown Hospital discharged Keller back to the Bucks County Correctional Facility, where he was examined by the nursing staff, placed on medical isolation, given antibiotics for the next ten days, and painkillers (Tylenol with codeine) for the next three days. (App.634a, 692a–93a).

A nurse at the Correctional Facility who examined Keller’s scrotum on September 8, 2002 noted that the area was nearly entirely healed. (App.635a, 1005a). A doctor examined Keller at the Correctional Facility on September 9th and ordered that he be kept in medical isolation until after the results of cultures for MRSA to be taken on September 17, 2002 were received and determined to be negative. (App.372a–73a,

1005a). September 17 was the date on which Keller's antibiotic treatment prescribed at the hospital was due to conclude. (App.634a–35a).

On September 17, 2002, medical personnel at the Correctional Facility took cultures from Keller's nose, armpits, and scrotum as the physician had ordered on September 9th. (App.636a, 1005a). When the Correctional Facility received the negative results of these cultures on September 20, 2002, Keller was promptly released from medical isolation. (App.636a). A little over one month later, Keller was released from the Bucks County Correctional Facility. (App.134a–35a). According to his testimony at trial, Keller has not experienced any additional MRSA infections, he has fully recovered from the infection to his scrotum, and he still remains able to procreate. (App.135a–36a).

The Bucks County Correctional Facility houses not only pretrial detainees. Also among the facility's population are those convicted of state criminal offenses whose sentences are of relatively short duration and who therefore are not sent to Pennsylvania's prison system to serve their sentences. (App.945a). And the Correctional Facility also houses inmates who are serving sentences in Pennsylvania's prison system but

who are returned to Bucks County to testify in cases pending before the Court of Common Pleas of Bucks County. (*Id.*).

The Bucks County Correctional Facility was constructed in 1985, and testimony at trial indicated that conditions within the prison in 2001 and 2002 were not entirely pleasant. (App.509a). The Facility had a leaky roof, which sometimes permitted water to seep into prison cells. (App.394a–95a). On occasion, the drains in the shower facilities would become clogged, leading to standing water in the showers, and the showers were not always in pristine condition. (App.169a).

At trial, counsel for plaintiffs attempted to link the less than optimally pleasant conduction of the Correctional Facility to the presence of MRSA. (App.773a–74a). Yet MRSA, unfortunately, is present wherever humans congregate *en masse*, even in hospitals that attempt to remain meticulously clean. (App.475a, 680a). When someone with an open wound is exposed to another person who has MRSA, it is possible for the infection to be transmitted no matter how pleasant the surroundings. (App.704a).

In the year 2000, MRSA was discovered at the Bucks County Correctional Facility. Between 2000 and the time of trial in 2005, 114 people

at the Correctional Facility had been diagnosed as having MRSA. (App.361a). The facility typically holds between 650 and 700 individuals in custody at a time, and testimony at trial established that over a year's time the Correctional Facility houses approximately 7,000 different people. (App.287a, 510a).

Since the events at issue in this appeal, the conditions at the Bucks County Correctional Facility have improved, and the spread of MRSA has been curtailed. (App.394a–95a, 507a–23a).

V. STATEMENT OF RELATED CASES AND PROCEEDINGS

There are other MRSA–related cases pending against the Bucks County Correctional Facility in the U.S. District Court for the Eastern District of Pennsylvania, but that court has not treated the cases as “related” for purposes of its own case management procedures.

VI. SUMMARY OF THE ARGUMENT

It is regrettable that plaintiffs contracted Methicillin Resistant Staph Infections during their brief periods of confinement at the Bucks County Correctional Facility, but the jury's verdict finding that defen-

dants exposed plaintiffs to unconstitutional conditions of confinement, that defendants were deliberately indifferent to plaintiffs' serious medical needs, and that defendants subjected plaintiff Kevin Keller to punishment are against the manifest weight of the evidence.

Rather, the evidence indisputably shows that defendants were attentive to plaintiffs' serious medical needs, provided treatment that the defendants reasonably believed was appropriate under the circumstances, and ensured that plaintiffs were hospitalized just as soon as possible after it became clear that the Correctional Facility was unable to provide the type of care and treatment that the plaintiffs required.

With regard to the conditions of confinement, while they were far from optimal in every respect, they certainly were not unconstitutionally deficient. Moreover, the jury's finding that defendants did not subject plaintiff Martin to punishment defeats his conditions of confinement claim, while the jury's finding that defendants subjected plaintiff Keller to punishment is likewise against the manifest weight of the evidence.

For these reasons, the district court abused its discretion in denying defendants' new trial motions, and this Court should order a new trial on both plaintiffs' claims.

With regard to the second issue raised on appeal, the district court committed an error of law in refusing to permit defendants to use for purposes of impeachment the fact that Kevin Keller had previously been convicted of crimes involving dishonesty and false statements. Under Federal Rule of Evidence 609(a)(2), a district court lacks any discretion to exclude such evidence.

Here, the exclusion of this evidence was not only legally erroneous, but it was devastatingly prejudicial, because Keller's testimony was not only integral to his whopping recovery of \$800,000 in compensatory damages for pain and suffering (based on testimony that the jury could only credit if it were otherwise believable), but Keller's testimony was also integral to Benjamin Martin's recovery, because much of the testimony that Keller provided was undoubtedly relied on by the jury in ruling in Martin's favor.

Counsel for plaintiffs did a tremendous job at trial of attempting to magnify the pain and suffering that each plaintiff experienced as the

result of having had a MRSA infection that did not respond to treatment for a few days before the plaintiffs were transferred to Doylestown Hospital. Yet not even the most plaintiff-friendly view of the facts can justify \$1.2 million in compensatory damages for just a few days of infection-related pain and suffering while incarcerated in the absence of any serious permanent damage.

For these reasons, which are addressed in more detail below, defendants respectfully request that a new trial be granted. In the event this Court does not grant a new trial, then this Court should order a substantial remittitur of the \$1.2 million damages award that the jury imposed for pain and suffering.

VII. ARGUMENT

A. The Jury's Verdict Finding Defendants Liable For Deliberate Indifference To Plaintiffs' Serious Medical Needs, For Subjecting Plaintiffs To Unconstitutional Conditions Of Confinement, And For Inflicting Punishment On Plaintiff Keller Are Against The Manifest Weight Of The Evidence, And Thus A New Trial Should Be Granted

The jury verdict in this case contained specific findings that defendants were deliberately indifferent to plaintiffs' serious medical needs, that defendants subjected plaintiffs to unconstitutional conditions of

confinement, and that defendants had inflicted punishment on pretrial detainee Kevin Keller. (App.819a–21a).

The jury’s verdict in each of these respects is against the manifest weight of the evidence. Accordingly, the district court abused its discretion in failing to grant defendants’ motion for a new trial, and this Court should therefore order a new trial to occur on remand.

1. The jury’s verdict that defendants were deliberately indifferent to plaintiffs’ serious medical needs is against the manifest weight of the evidence

In *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 581–82 (3d Cir. 2003), this Court held that a 42 U.S.C. §1983 claim filed by a pretrial detainee alleging unconstitutionally inadequate medical care, even though the claim arises under the Fourteenth Amendment to the U.S. Constitution, should be analyzed under the Eighth Amendment’s “deliberate indifference to serious medical needs” standard. *See also Askew v. Jones*, No. 04-3900, 2005 WL 3409617, at *2 n.6 (3d Cir. Dec. 13, 2005) (per curiam) (non-precedential) (“As noted by the District Court, at the time the underlying events occurred, Askew was properly considered a pretrial detainee rather than a prisoner. However, medical

claims of the type at issue here are governed by the same ‘deliberate indifference’ standard.”). The U.S. Supreme Court announced the applicable “deliberate indifference” standard in *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

As this Court explained in *Natale*, the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), more precisely clarified what the “deliberate indifference to serious medical needs” standard entails for liability to be imposed:

In *Farmer v. Brennan*, the Supreme Court held that finding a prison official liable for violating a prisoner’s Eighth Amendment rights requires proof that the official “knows of and disregards an excessive risk to inmate health or safety.” 511 U.S. 825, 837 (1994). He must be “both [] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and * * * draw the inference.” *Id.*

Natale, 318 F.3d at 582 (quoting *Farmer*, 511 U.S. at 837).

In accordance with the Supreme Court’s explanation in *Estelle* that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,” 429 U.S. at 106, federal courts (including this Court) have not permitted prisoners or pretrial detainees to use the Eighth Amendment as a vehicle for bringing medical malpractice claims, or as a substitute for state tort law. *See Spruill v. Gillis*, 372

F.3d 218, 235 (3d Cir. 2004) (“Allegations of medical malpractice are not sufficient to establish a Constitutional violation.”).

In *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), the Supreme Court explained that “[b]ecause society does not expect that prisoners will have unqualified access to health care,” a prisoner must first make a threshold showing of a serious medical need in order to have a valid Eighth Amendment claim. Similarly, in *Spruill*, this Court observed that “[t]he *Estelle* standard requires deliberate indifference on the part of the prison officials and it requires the prisoner’s medical needs to be serious.” *Spruill*, 372 F.3d at 235–36 (internal quotations omitted).

a. A new trial should be granted with respect to plaintiff Benjamin Martin, because the jury’s finding that defendants were deliberately indifferent to his serious medical needs is against the manifest weight of the evidence

With this relevant legal framework in mind, defendants now turn to examine the facts relating to plaintiff Benjamin Martin’s claim that defendants were deliberately indifferent to his serious medical needs. Martin arrived at the Bucks County Correctional Facility on Tuesday, August 7, 2001, and he was seen by a nurse the very next day in con-

nection with an abrasion on his leg accompanied by what appeared to the nurse to be spider bites. (App.196a, 203a, 1010a–11a).

The nurse on August 8, 2001 made an appointment for Martin to be seen by a prison doctor on the following day, Thursday, August 9, 2001. (App.203a). The prison doctor examined Martin's leg on August 9th, observed that the wound appeared to be infected, and prescribed an antibiotic. (App.551a–52a, 565a). On August 10th, Martin was seen again by both a nurse and the prison doctor, who prescribed a different antibiotic on learning that Martin was allergic to the antibiotic prescribed the day before. (App.370a).

From Friday, August 10, 2001 through Tuesday, August 14, 2001, the Correctional Facility's staff provided Martin with the prescribed antibiotic and also with the painkiller Motrin. (App.566a). On Tuesday, August 14, 2001, the prison physician ordered that Martin be transported to Doylestown Hospital for treatment because the leg infection did not appear to be responding to the antibiotics and Martin was continuing to complain of pain. (App.566a–67a). At Doylestown Hospital, the infection was diagnosed as MRSA. (App.584a). Dr. Pierson, the physician who treated Martin at Doylestown Hospital, testified at trial

that the medical treatment Martin received from Bucks County Correctional Facility before he was transferred to the hospital was appropriate. (App.593a, 597a).

Martin remained at Doylestown Hospital until August 30, 2001. (App.567a). The hospital performed four surgeries on Martin's leg for drainage and debridement of the infected area. (App.586a). On August 28, 2001, the hospital took a culture of the formerly infected area that revealed that the MRSA infection had been eradicated. (App.239a).

The hospital returned Martin to the Bucks County Correctional Facility on August 30, 2001. (App.685a). Martin was seen by medical staff at the Correctional Facility that day, and each day from September 1st through 12th, at which times the nursing staff cleaned the wound and applied new dressings. (App.567a–69a). As of September 11th, Martin's leg had healed to the point where only a band-aid was needed to cover the wound. (App.1016a). The very next day, September 12, 2001, Martin was discharged from the Correctional Facility. (App.569a).

The foregoing facts, which are undisputed in the trial record, reveal that Martin received no lack of attention from the Correctional Facility's medical staff for the condition of his leg. When Martin presented to

the nurse on August 8, 2001, the leg did not appear to be a serious medical need. Nevertheless, the nurse made an appointment for Martin to be seen by the prison's doctor the very next day.

On August 9, 2001, the prison's doctor examined Martin's leg and prescribed an antibiotic. While a failure of communication between patient and doctor led the doctor to prescribe an antibiotic to which Martin was allergic, it cannot be disputed that the doctor was seeking to treat and cure the infection he perceived. The very next day, on August 10, 2001, the doctor saw Martin once again and prescribed an alternative antibiotic to which Martin was not allergic.

Of course, antibiotics do not work instantaneously. The normal prescribed course for an antibiotic is ten days (App.326a), and usually signs of improvement from antibiotic treatment are not apparent for several days while the antibiotic builds in the patient's bloodstream and begins fighting infection.

One of Martin's specific complaints is that the Correctional Facility's medical staff did not begin treating him immediately with an antibiotic that would be effective against MRSA. But the undisputed facts reveal two reasons for this. First, Martin was not diagnosed with MRSA until

he arrived at Doylestown Hospital, and the prison physician who was treating Martin's leg did not suspect the infection to be MRSA or else he could have and would have tested for it. (App.564a–67a). Second, antibiotic-resistant bacteria such as those responsible for MRSA have resulted from the over-prescription and misuse of antibiotic treatments, and if the high-powered antibiotics that are effective against MRSA are themselves over-prescribed or misused, then it is likely that a different strain of MRSA would emerge that no currently-available antibiotics can effectively treat. (App.679a, 682a).

Thus, the usual medical regimen when treating a patient with an infection is to attempt to use common antibiotics to treat what appears to be a common infection. (App.562a). Only if the infection does not respond to the common antibiotics should the physician then employ the more specialized and potent antibiotics used to treat bacteria that have grown resistant to common antibiotics. (App.562a–63a).

Here, the medical staff at the Bucks County Correctional Facility gave the antibiotics they were using to treat Martin's leg infection four days to work, and when the infection did not appear to be improving, the medical staff ordered Martin's immediate transfer to Doylestown

Hospital, where Martin received appropriate treatment that addressed his leg infection and that left him with no lasting serious disability. Dr. Pierson, the physician who treated Martin at Doylestown Hospital, testified at trial that the medical treatment Martin received from Bucks County Correctional Facility before transfer to the hospital was appropriate. (App.593a, 597a).

Applying the operative legal standards to these facts introduced at trial, defendants concede that the evidence establishes that at some point between August 8, 2001 and August 14, 2001, Martin's leg infection began to constitute a serious medical need. But the evidence does not permit a rational jury to conclude that the defendants had been deliberately indifferent to that serious medical need.

A look at deliberate indifference to serious medical needs cases involving prisoners with infections from other federal appellate courts further confirms that the jury's verdict here cannot be allowed to stand. In *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997), Circuit Judge Terence T. Evans, on behalf of a unanimous three-judge panel, wrote that "Forbes is seeking a specific treatment and foolproof protection

from infection. The Eighth Amendment does not provide her with either.”

In *Franklin v. McCaughtry*, 110 Fed. Appx. 715 (7th Cir. 2004) (per curiam), the plaintiff alleged that defendants “were deliberately indifferent to Franklin’s cancerous right index finger, which initially appeared to be a fungal infection but ultimately required partial amputation.” In rejecting the prisoner’s claims against a prison nurse, the Seventh Circuit wrote:

Even though Franklin’s finger ailment turned out to be quite serious, Meier [the nurse] believed at the time that he had a mere fingernail infection. This belief was not so farfetched that it amounted to deliberate indifference, nor is a fingernail infection so obviously a serious condition that Meier’s failure to treat it amounts to an Eighth Amendment violation.

Id. at 720.

Moreover, in rejecting the prisoner’s claim against a prison doctor, the Seventh Circuit explained, “although in hindsight Belgado’s [the doctor’s] prescriptions for topical cream and triple–antibiotic ointment appear deficient, matters of medical judgment cannot serve as the basis of an Eighth Amendment claim.” *Id.*

Similarly, in *Jennings v. Al-Dabagh*, 97 Fed. Appx. 548, 550 (6th Cir. 2004) (per curiam), the Sixth Circuit explained that “Jennings claimed that his constitutional rights were violated when the defendant refused to properly treat his foot infection.” In rejecting that claim, the Sixth Circuit ruled:

The medical care Jennings received from the defendant constituted at worst substandard medical care, not deliberate indifference to Jennings’s serious medical needs. Jennings’s personal opinion that his care was substandard, or that he was not given the treatment he requested because of the costs associated with the treatment, raises claims of state-law medical malpractice, not constitutionally defective medical care indifferent to Jennings’s serious medical needs.

Id.

In *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999), the Fifth Circuit confronted a case in which a prisoner had died from decubitus ulcers, also known as bed sores. Notwithstanding that the prisoner died from his infected bed sores, the Fifth Circuit in *Stewart* affirmed a grant of summary judgment dismissing the deliberate indifference with serious medical needs claim against prison physicians because:

The doctors actively treated Stewart’s admittedly serious condition. Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs.

Id. at 537 (quotations omitted). Thus, although the prison medical staff's treatment of Stewart's bed sores was so ineffectual that the condition caused his death, the Fifth Circuit nonetheless held that the prison doctors, on whom Stewart had relied to treat that condition, did not even have to stand trial on the deliberate indifference claims asserted in court after Stewart's death.

Earlier, in *Logan v. Clarke*, 119 F.3d 647 (8th Cir. 1997), a unanimous three-judge panel affirmed the grant of summary judgment on a prisoner's claim that medical personnel had been deliberately indifferent to the inmate's painful fungal skin infection. Circuit Judge Richard S. Arnold, writing for the panel, explained: "Although the prison doctors may not have proceeded from their initial diagnosis to their referral to a specialist as quickly as hindsight perhaps allows us to think they should have, their actions were not deliberately indifferent." *Id.* at 650.

Finally, in *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997), the Seventh Circuit rejected the deliberate indifference to serious medical needs claim of an inmate who complained about the treatment he received for an infected pilonidal cyst on his lower back. The inmate's claim failed, the Seventh Circuit ruled, because he "repeatedly received

treatment over this ten-month period and * * * at most he experienced an isolated occasion or two where he did not receive prompt treatment.” *Id.* at 1374.

The Seventh Circuit’s recitation of the facts makes clear that there was an occasion when the cyst was infected for over a week but the prisoner was not seen by medical staff, nor did the prisoner receive any antibiotic during the delay. *Id.* at 1374–75. And the second occasion involved “a fourteen-day delay in receiving treatment.” *Id.* at 1375. Yet even though the Seventh Circuit recognized plaintiff’s condition as a serious medical need, the court ruled that the evidence did not permit defendants to be held deliberately indifferent.

These cases from other circuits establish that, even viewing the evidence in a light most favorable to plaintiff Benjamin Martin, the jury’s finding that defendants were deliberately indifferent to his serious medical needs cannot stand. The medical staff of the Bucks County Correctional Facility examined Martin’s leg nearly every day from the date of his admission as a pretrial detainee until Martin was sent to the Doylestown Hospital for additional treatment.

The prison doctor prescribed an antibiotic regimen for Martin immediately after his leg appeared infected, and the fact that the antibiotic was ineffective in treating MRSA did not amount to deliberate indifference because no one knew that Martin had an MRSA infection until it was diagnosed at Doylestown Hospital. Moreover, Dr. Pierson, the physician who treated Martin at Doylestown Hospital, testified at trial that the medical treatment Martin received from Bucks County Correctional Facility before transfer to the hospital was appropriate.

Accordingly, because the jury's verdict is contrary to the substantial weight of the evidence, the trial court abused its discretion in failing to grant a new trial, and this Court should therefore reverse and remand for a retrial.

b. A new trial should be granted with respect to plaintiff Kevin Keller, because the jury's finding that defendants were deliberately indifferent to his serious medical needs is against the manifest weight of the evidence

Plaintiff Kevin Keller arrived at the Bucks County Correctional Facility on June 6, 2002. At trial, Keller testified that he noticed pimple-like bumps on his armpits between August 3rd and August 7th of

2002, which led him to sign up for a sick call visit. (App.102a). Keller was not seen by the facility's medical staff, yet he did not persist in seeking medical attention because the pimple-like bumps went away without treatment. (App.105a-06a). Accordingly, those pimples never amounted to a serious medical need under applicable law, and therefore defendants cannot be liable for Keller's failure to be seen by the institution's medical staff at that time.

On Wednesday, August 28, 2002, Keller was among those inmates at the Correctional Facility on whom nasal swabs were performed to check for the presence of MRSA. (App.107a, 141a). Keller's results were negative, indicating no exposure to the infection. After the nasal swab test had been performed, Keller developed soreness in his armpits and a pimple-like sore on the underside of his scrotum, which he says he first noticed on Thursday, August 29, 2002. (App.108a, 144a).

Keller claims to have signed up for sick call on the evening of Friday, August 30, 2002 but was not seen by anyone until two days later when, on Sunday, September 1, 2002, Keller walked over to the Correctional Facility's dispensary without authorization and exhibited his swollen scrotum to a nurse. (App.112a-13a).

The nurse promptly took a culture of the infected area on Sunday, September 1st, gave Keller a sterile medical pad to place over the infection, and ordered that Keller be placed in medical isolation at the facility. (App.626a–27a). In addition, the prison’s medical staff started Keller on antibiotics to treat the infection. (App.627a). On Monday, September 2, 2002, which was the Labor Day holiday, the Bucks County Correctional Facility transferred Keller to Doylestown Hospital for treatment. (App.629a).

The hospital drained Keller’s infection, diagnosed the infection as MRSA, and treated the infection with antibiotics effective against that particular condition. (App.692a). Five days later, on September 7, 2002, Doylestown Hospital discharged Keller to the Bucks County Correctional Facility, where he was examined by the nursing staff, placed on medical isolation, given antibiotics for the next ten days, and painkillers (Tylenol with codeine) for the next three days. (App.634a, 692a–93a).

A nurse examining Keller’s scrotum on September 8, 2002 noted that the area was nearly entirely healed. (App.635a, 1005a). A doctor examined Keller at the Correctional Facility on September 9th and ordered

that he be kept in medical isolation until after the results of cultures for MRSA to be taken on September 17, 2002 were received and determined to be negative. (App.372a–73a, 1005a).

On September 17, 2002, medical personnel at the Correctional Facility took cultures from Keller’s nose, armpits, and scrotum as the physician had ordered on September 9th. (App.636a, 1005a). When the Correctional Facility received the negative results of these cultures on September 20, 2002, Keller was promptly released from medical isolation. (App.636a).

What these facts reveal is that in connection with the infection on his scrotum, Keller experienced a two–day delay in being seen by the Correctional Facility’s medical staff that ended when Keller ambled over to the dispensary and revealed his infection (which, given its location on the underside of his scrotum, was not apparent to anyone while he was fully clothed). That Keller possessed the ability to walk over to the dispensary demonstrates that defendants are not the only parties who shoulder blame for Keller’s failure to be seen any sooner.

In any event, before he appeared at the dispensary on September 1, 2002, the medical staff at the Correctional Facility had no knowledge

that Keller had an infection on his scrotum, and therefore defendants cannot be held liable for being deliberately indifferent to his infected scrotum before that date.

Once the medical staff at the Correctional Facility became aware of Keller's infection, the medical staff cultured the infection, immediately placed Keller in medical isolation, and began treating the infection with antibiotics. On the very next day, the facility's medical staff transferred Keller to Doylestown Hospital for treatment of his condition. At the hospital, Keller's infection was drained, diagnosed as MRSA, and treated with antibiotics effective against that sort of infection.

The prompt treatment that Keller received for his infected scrotum once it came to the attention of the Correctional Facility's medical staff was the absolute opposite of deliberate indifference. Nor was the Correctional Facility's medical staff deliberately indifferent to Keller's serious medical needs after he returned from Doylestown Hospital on September 7, 2002. On that day, Keller was examined by the nursing staff, placed on medical isolation, given antibiotics for the next ten days, and painkillers (Tylenol with codeine) for the next three days.

The facts demonstrate that as of September 8, 2002, because Keller's infected scrotum was almost entirely healed, he no longer had any serious medical condition. This was confirmed through the negative results of the culture taken on September 17, 2002. As for why the prison's doctor ordered that Keller be kept in medical isolation until the results of the culture taken on September 17, 2002 were known, the evidence shows that Keller's final dose of antibiotic would be consumed on September 17, 2002, so it would have been imprudent to test him for any remaining MRSA infection before then. (App.634a–35a).

Likewise, it would have been medically inadvisable to release Keller back into the Correctional Facility's general population, as someone who had just been treated for an MRSA infection, before the negative results of an MRSA culture were received, because doing so would have put both Keller and the rest of the inmates at risk in the event that Keller still carried the bacteria and was capable of spreading it further to himself or others.

Defendants do not seek to minimize the anxiety, pain, and suffering that Keller may have experienced as a result of the infection on his scrotum, but anxiety, pain, and suffering alone do not suffice to make

out a deliberate indifference to serious medical need claim. Under the facts and the law examined above, even when viewed in the light most favorable to Keller, the defendants were neither indifferent, nor *deliberately* indifferent, to Keller's serious medical needs, and the district court therefore abused its discretion in failing to order a new trial. Accordingly, this Court should reverse the district court's order denying defendants' motion for a new trial.

2. The jury's finding that defendants subjected plaintiffs to unconstitutional prison conditions is against the manifest weight of the evidence, and this Court has ruled that pretrial detainees cannot bring this type of claim

The jury also found that defendants had subjected both plaintiffs to unconstitutional prison conditions. In *Booth v. Churner*, 206 F.3d 289, 297 n.7 (3d Cir. 2000), *aff'd*, 532 U.S. 731 (2001), this Court recognized that in *Hudson v. McMillian*, 503 U.S. at 9, the Supreme Court had ruled that "extreme deprivations are required to make out a conditions-of-confinement claim."

Although defendants concede that the conditions at the Bucks County Correctional Facility in 2001 and 2002 were far from optimal, in that the facility had a leaky roof, shower drains would sometimes clog,

and some relatively small number of inmates were contracting MRSA infections, those conditions while unpleasant do not constitute the legally required “extreme deprivations” in order for conditions of confinement to be held unconstitutional under the Eighth Amendment.

To begin with, the Seventh Circuit has already rejected the argument that a clogged shower drain, resulting in standing water in the shower, constitutes an unconstitutional condition of confinement as alleged by an inmate whose toe had an open wound. In *Snipes v. DeTella*, 95 F.3d 586 (7th Cir. 1996), the Seventh Circuit explained:

Defendants provided an affidavit stating that the shower never had a standing water problem. Snipes says the prison fixed the problem shortly before he was paroled (though he submits no affidavit to that effect). The dispute is unimportant, however. Assuming Snipes’ story is true, the fact remains that an inch or two of water in the shower, even where one has a sore toe, is not “an excessive risk to inmate health or safety,” *Farmer*, 511 U.S. at 837, nor the “denial of the minimal civilized measure of life’s necessities.” *Id.* at 834. The shower condition he describes may require extra care on his part to keep the toe clean, but such needed precautions do not ignite a constitutional claim.

Id. at 592.

The same can be said of the leaky roof at the Correctional Facility. Indeed, for all of the hygiene–related evidence that plaintiffs introduced in an effort to link the presence of MRSA at the facility to unclean con-

ditions, it remains undisputed that MRSA is a bacteria that lives on humans and not something that survives for long if found in water or otherwise separated from a host from which it can draw nutrients. (App.704a–05a). The evidence at trial establishes that MRSA is even commonly found at hospitals, which for understandable reasons strive to keep their cleanliness levels as high as possible. (App.680a). Thus, the unpleasant conditions at the Correctional Facility, even when the evidence is viewed in the light most favorable to plaintiffs, did not constitute legally requisite “extreme deprivations” nor can they be linked to spread of the MRSA bacteria.

What does cause the bacteria to spread, of course, is if someone with an open sore or wound comes into contact with someone else who has a MRSA infection. Thus, if it were possible to confine those detained in the Correctional Facility in a way that they would never come into contact with another human during their stay, spread of the MRSA bacteria could perhaps be prevented entirely. But the facility does not have the ability to offer solitary confinement to everyone, nor to be sure would the inmates and detainees residing there desire such a remedy.

In sum, the evidence even when viewed in a light most favorable to plaintiffs does not contain any “extreme deprivations” necessary for plaintiffs to prevail on their unconstitutional conditions of confinement claim. Accordingly, the trial court erred in failing to grant defendants’ motion for a new trial, and this Court should order that a new trial occur on remand.

Moreover, this Court’s recent ruling in *Hubbard v. Taylor*, 399 F.3d 150 (3d Cir. 2005), compels a holding that pretrial detainees, such as plaintiffs here (App.769a), cannot pursue an unconstitutional conditions of confinement claim because such a claim arises under the Eighth Amendment. Instead, under *Hubbard*, the appropriate question to be asked in a case involving the confinement of pretrial detainees is whether the detainees have been subjected to punishment in violation of their Fourteenth Amendment right to be free from punishment while confined as pretrial detainees. *See id.* at 163–67.

Here, the jury was asked with respect to each plaintiff whether he was subjected to punishment. With respect to Benjamin Martin, the jury answered that question “no.” (App.819a). Accordingly, Martin’s

unconstitutional conditions of confinement claim must fail under this Court's recent ruling in *Hubbard*.

With respect to Kevin Keller, the jury answered “yes” to the question whether Keller had been subjected to punishment. (App.821a). Defendants now turn to explain why this finding is against the manifest weight of the evidence and therefore cannot be sustained on appeal.

3. The jury's finding that defendants subjected Keller to unlawful punishment is against the manifest weight of the evidence

In *Hubbard*, this Court explained, quoting from the U.S. Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979):

In order to determine whether the challenged conditions of pre-trial confinement amount to punishment,

[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination generally will turn on whether [it has] an alternative purpose * * * and whether it appears excessive in relation to [that] purpose * * *. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court may per-

missibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Hubbard, 399 F.3d at 158 (quoting *Bell*, 441 U.S. at 538–39).

Thus, under this Court’s recent ruling in *Hubbard*, applying the U.S. Supreme Court’s holding in *Bell v. Wolfish*, the first question to be asked in a pretrial detainee conditions-of-confinement challenge is whether the challenged conditions were imposed for the purpose of punishing the pretrial detainee. Here, the answer to that question is indisputably “no.”

Plaintiff Kevin Keller does not contend, nor would the evidence support such a contention, that defendants intended for Keller to contract a MRSA infection or that defendants believed that a MRSA infection was an appropriate way in which to punish Keller or any other inmate confined at the Bucks County Correctional Facility. Indeed, the evidence, as reviewed above, establishes that once Keller’s infection was brought to the attention of the facility’s medical staff, the staff took an immediate culture, isolated Keller from other inmates, started him on antibiotics, and the very next day transferred him to Doylestown Hospital.

Based on the evidence and the manner in which counsel for plaintiffs argued the case to the jury (App.782a), it appears that the jury based its finding that defendants subjected Keller to punishment on Keller's thirteen-day period of solitary confinement that followed his return to the Bucks County Correctional Facility after his treatment at Doylestown Hospital. Keller testified that he objected to his solitary confinement because he was not allowed to have access to personal items and reading materials of his choice, nor was he allowed to make phone calls. (App.124a–27a).

The evidence introduced at trial established that, during the time when Keller was confined at the Bucks County Correctional Facility, detainees in solitary confinement for medical reasons were treated the same as detainees in solitary confinement for disciplinary misconduct. (App.518a–19a). The facility had only one area for solitary confinement, and those operating the prison decided that the preferable way to administer the prison's restricted housing unit was for all those detained there to be subjected to the same conditions and restrictions. (*Id.*).

Under the Supreme Court's decision in *Bell*, as explained in this Court's recent ruling in *Hubbard*, Keller's conditions-of-confinement

claim must fail, because “the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial confinement and dispel any inference that such restrictions are intended as punishment.” *Hubbard*, 399 F.3d at 159 (quoting *Bell*, 441 U.S. at 540).

As this Court explained in *Hubbard*:

In determining whether conditions or restrictions are

reasonably related to the Government’s interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

Hubbard, 399 F.3d at 159 (quoting *Bell*, 441 U.S. at 540 n.23).

While Keller may have perceived his time in solitary confinement to be punitive and objectionable, under this Court’s ruling in *Hubbard* and the Supreme Court’s ruling in *Bell*, a pretrial detainee’s subjective perception of what constitutes punishment is insufficient to impose liability on the defendants. The deprivation of liberty that simply being a pretrial detainee entails is, to be sure, likely perceived by the average pre-

trial detainee as punitive in nature, and yet *Bell* and *Hubbard* teach that the mere fact of pretrial detention does not equate to punishment regardless of how the detainee perceives it.

Here, the evidence confirms that the reason for placing Keller in solitary confinement was to protect other inmates and detainees in the Correctional Facility's general population from being exposed to an inmate who was recovering from a MRSA infection and who may have retained the ability to infect others with the MRSA bacteria. Presumably Keller would not have viewed it as inappropriate punishment had the inmate from whom Keller contracted MRSA instead been in solitary confinement and thus unable to come into contact with other inmates such as Keller, and thus Keller should not be able to maintain that his solitary confinement, intended to protect other inmates from him, was punitive.

Under *Hubbard* and *Bell*, it is clear that the Correctional Facility's decision to house Keller in solitary confinement while he was completing his antibiotic regimen and awaiting the results of a culture to determine whether his MRSA infection was cured was both reasonably

related to a legitimate governmental objective and was not excessive in relation to that objective.

Accordingly, the evidence when viewed in a light most favorable to plaintiff Kevin Keller does not support a finding that the Correctional Facility or its medical staff intended for Keller to contract MRSA or that putting Keller into solitary confinement while he was recovering from his MRSA infection was intended to punish Keller instead of protecting him and other inmates and detainees from the further spread of the MRSA bacteria. For these reasons, the district court erred in failing to grant a new trial as to that claim, and this Court should reverse and order a new trial to occur on remand.

B. The Trial Court Erred And Abused Its Discretion In Refusing To Allow Plaintiff Kevin Keller To Be Cross-Examined About The Fact Of His Prior Convictions For Crimes Involving Dishonesty And False Statements

Federal Rule of Evidence 609 carries the title “Impeachment by Evidence of Conviction of Crime,” and subsection 609(a)(2) provides, in full:

a) General rule. For the purpose of attacking the credibility of a witness,

(1) * * *

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a)(2).

In *Walden v. Georgia–Pacific Corp.*, 126 F.3d 506, 523 (3d Cir. 1997), this Court recognized that Federal Rule of Evidence 609(a)(2) provides that “if the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value.”

At the outset of trial, counsel for plaintiffs moved *in limine* to exclude testimony or evidence of defendants’ criminal records at trial. In ruling on that motion *in limine*, the district judge stated on the record, “Unless someone can convince me that the criminal records bear on the issue of damages, they will be kept out.” (App.66a).

Based on the district court’s unequivocal ruling at the outset of trial that defendants’ criminal records could not be used to impeach plaintiffs’ testimony, counsel for defendants refrained from cross-examining Kevin Keller about his convictions on various Pennsylvania criminal law charges that involved dishonesty or false statement. In violation of

Federal Rule of Evidence 609(a)(2), the district court's rulings improperly prohibited the defendants from impeaching Keller's credibility, with respect to both liability and damages, using *crimen falsi* convictions that Rule 609(a)(2) gives the district judge no discretion to exclude.

As shown on defendants' exhibit 59, in December 1996 Keller pleaded guilty to having committed the criminal offense of [**redacted**]. (Defendants' Lodging at 1114a, 1117a). And in July 2000, Keller pleaded guilty to the criminal offenses of, among other things, [

redacted

]. (Defendants' Lodging at 1123a, 1126a).

In *Walden*, 126 F.3d at 523, this Court explained that "[b]ecause Rule 609(a)(2) does not permit the district court to engage in balancing, * * * Rule 609(a)(2) must be construed narrowly to apply only to those crimes that bear on a witness' propensity to testify truthfully." Here, it cannot legitimately be denied that plaintiff Keller's criminal convictions

for [**redacted**

] constitute crimes involving “dishonesty or false statement” that are automatically admissible for purposes of impeachment under Federal Rule of Evidence 609(a)(2).

The district court’s ruling at the outset of trial prohibited counsel for defendants from raising the fact of plaintiff Keller’s convictions for these *crimen falsi* offenses during cross-examination of Keller, and thus the jury was prohibited from learning of these convictions and from taking these convictions into account in assessing the credibility of Keller’s extensive testimony bearing on issues of both liability and damages.

Keller was a far more eloquent spokesman for plaintiffs’ case than was Benjamin Martin, and as a result the prejudice that defendants suffered because of the district court’s erroneous Rule 609(a)(2) ruling tainted with reversible error the verdicts in favor of both plaintiffs, requiring a new trial of the entire case.

Moreover, the jury awarded Keller a total of \$800,000 solely for pain and suffering, a form of damages that is entirely subjective and that of necessity must be based on the acceptance as credible of the plaintiff’s

explanation of the suffering and pain that he experienced. If the jury had before it evidence of Keller's convictions of crimes involving dishonesty and false statements, the jury may have been far less willing to credit Keller's assessment of his own pain and suffering, and counsel for defendants would have had a powerful basis on which to challenge Keller's testimony going to both the issues of liability and damages.

In denying that portion of defendants' post-judgment motion for a new trial that challenged the district court's refusal to admit this evidence under Federal Rule of Evidence 609(a)(2), Judge Fullam wrote:

With regard to the exclusion of Plaintiffs' criminal records, Defendants have not presented evidence of Plaintiffs' convictions on any charges that would bear upon their ability to testify truthfully. Their proposed Exhibit 60 consists of printed docket sheets from the internet which are not authenticated, which fail to give any coherent indication of the charges of which Mr. Keller might have been convicted, and which are unclear as to whether he was adult or a juvenile at the time of any offense. Defendants produced no information regarding Martin's criminal record.

App.6a-7a.

To begin with, proposed Exhibit 59 consisted of Keller's criminal record, while proposed Exhibit 60 consisted of Martin's criminal record. On appeal, defendants do not challenge the exclusion of Martin's criminal record, because while extensive that criminal record does not con-

tain any convictions that would be admissible under Rule 609(a)(2) as involving *crimen falsi*.

With regard to Keller, however, proposed Exhibit 59 cannot be reflexively dismissed merely because it originates from the internet. Much of the Joint Appendix in this appeal, including the PACER docket entries and many district court filings downloaded from that court's ECF (electronic case filing) system, have been acquired via the internet, and no one has any reason to doubt their authenticity. Similarly, Exhibit 59 consists of docket entries downloaded from the official web site of the Bucks County, Pennsylvania Court of Common Pleas.

The relevant pages of Exhibit 59 contain Keller's birth date, a specification of the charges against him (including the provisions of Pennsylvania law that he was charged with violating), and the disposition of those charges (via pleas of guilty with respect to the *crimen falsi* charges at issue here).

Proposed Exhibit 59 certainly gave counsel for defendants a good faith basis to ask Keller whether he was convicted of the crimes at issue. If Keller had answered "yes" under oath, as truthfulness would require, there would be no further need for the introduction of any other

evidence to establish the fact of these convictions. Had Keller answered “no” or claimed not to remember, then counsel for defendants could have attempted to refresh Keller’s recollection using Exhibit 59, because material used to refresh a witness’s recollection need not be admissible itself. *See United States v. Booz*, 451 F.2d 719, 724 (3d Cir. 1971) (“Witnesses may use any aid to refresh their recollections.”); *see also United States v. Faulkner*, 538 F.2d 724, 727 (6th Cir. 1976) (“Documents need not be admitted or admissible in evidence in order to be used to refresh the recollection of a witness.”).

Only if that attempt at refreshing Keller’s recollection failed would the issue arise of whether Exhibit 59 should be admissible on its own or whether counsel for defendants possessed some other admissible form of evidence (such as certified copies of the state court judgments of conviction) that would be admissible in the absence of testimony from Keller that he had been convicted of those *crimen falsi* offenses.

Before concluding on this issue, defendants wish to return to the district court’s ruling, at the outset of trial, that these *crimen falsi* convictions would be excluded “[u]nless someone can convince me that the criminal records bear on the issue of damages * * *.” (App.66a). As

defendants have explained above, Keller's *crimen falsi* convictions were relevant for the very same reason — Keller's questionable credibility — to the issue of liability *and* the issue of damages.

What the district court's on-the-record statement meant in context was that if the convictions were relevant to the issue of damages in some unique way — for example, if Keller was seeking lost wages (which he was not) for a period when he was in fact in prison as a result of another conviction — the conviction could be introduced to rebut Keller's entitlement to damages. Yet that was not the purpose for which defendants sought to use these convictions; rather, defendants sought to use the convictions for the very purpose that Federal Rule of Evidence 609(a)(2) allows, impeachment of the witness's overall credibility by means of *crimen falsi* convictions.

To summarize, Keller's criminal convictions for [

redacted

]

were presumptively admissible under Federal Rule of Evidence 609(a)(2), and the district court erred as a matter of law by excluding that impeachment evidence. Because the credibility, or lack thereof, of Keller's testimony was integral to his case on liability and damages,

and because Keller’s testimony was also integral to Martin’s case on liability, this Court should grant a new trial as to both plaintiffs’ claims.

C. The Trial Court Abused Its Discretion In Failing To Order A New Trial Or A Substantial Remittitur Due To The Jury’s Shockingly Excessive Awards Of Compensatory Damages For Pain And Suffering In Plaintiffs’ Favor

In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 436 (1996) (internal quotations and brackets omitted), the Supreme Court held that “nothing in the Seventh Amendment * * * precludes appellate review of the trial judge’s denial of a motion to set aside a jury verdict as excessive.”

Here, the district court tersely rejected defendants’ post–judgment motion for a new trial, insofar as it requested either a new trial or a substantial remittitur based on the jury’s shockingly excessive compensatory damages award. (App.8a). In so ruling, the district court cited this Court’s decision in *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 574 (3d Cir. 2002), where this Court affirmed the denial of remittitur or a new trial in an employment discrimination case arising under the Americans with Disabilities Act. (App.8a).

This Court’s brief discussion of remittitur in *Gagliardo* recognized that this Court’s leading remittitur decision remains *Gumbs v. Pueblo Int’l, Inc.*, 823 F.2d 768 (3d Cir. 1987). The lawsuit before this Court in *Gumbs* arose after “[a] bottle of cooking oil broke in a checkout lane at a supermarket owned by defendant” in the Virgin Islands and the plaintiff, “a shopper, slipped on the oil and fell, spreadeagled, to the floor, and fell again repeatedly trying to get up.” *Id.* at 769.

The plaintiff in *Gumbs* sued, alleging various injuries and pain and suffering that, she claimed, caused her to separate from her husband and to miss out on various activities that she enjoyed before the accident. This Court’s opinion explains that “[t]he jury awarded Gumbs \$900,000 for past and future pain and suffering, mental anguish, and loss of enjoyment of life. Her medical expenses were also included, but represented only an insignificant part of the award. No award was permitted for economic losses or future medical expenses.” *Id.*

On the supermarket’s post-judgment motion, the district court reduced the jury’s verdict to \$575,000, but the supermarket appealed to this Court seeking a further remittitur to an even smaller damages award, asserting on appeal that the \$575,000 award remained clearly

excessive. This Court agreed and ordered a further remittitur of the jury's original \$900,000 award to \$235,000. *Id.* at 775.

In *Gumbs*, 823 F.2d at 772, this Court quoted with approval from its earlier ruling in *Murray v. Fairbanks Morse*, 610 F.2d 149 (3rd Cir. 1979):

[T]here is a limit beyond which an appellate court must reverse an award as grossly excessive. The United States Supreme Court has cautioned that we must “make a detailed appraisal of the evidence bearing on damages” in deciding whether a verdict is excessive. *Grunenthal v. Long Island Rail Road Co.*, 393 U.S. 156, 159 (1968). We must therefore turn to the record to see if the district court was correct in concluding that the jury's award was not the product of irrational behavior.

610 F.2d at 153.

In *Gumbs*, this Court further explained that “Most recently, in *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030 (3d Cir. 1987), we noted ‘an increasing appellate trend to review the merits of a damage award, even though the scope of our review is limited.’ *Id.* at 1041. In *Williams*, this court ordered a remittitur of the pain and suffering portion of an award from \$317,000 to \$100,000.” 823 F.2d at 772. Further into the *Gumbs* opinion, this Court explained the facts in *Williams* as follows: “[T]he plaintiff had fallen off a roof and claimed chronic pain,

sexual dysfunction, and difficulty sitting for long periods. We held that the jury's award of about \$317,000 for pain and suffering was excessive, and that \$100,000 was the maximum permissible amount." *Id.* at 773.

In *Gumbs*, this Court proceeded to hold:

As we indicated in *Williams*, this court takes note of the increasing willingness of the appellate courts to review damages awards. There is no doubt that this trend is a response to the increasingly outrageous amounts demanded by plaintiffs and awarded by juries. A jury has very broad discretion in measuring damages; nevertheless, a jury may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket. There must be a rational relationship between the specific injury sustained and the amount awarded. In the present case, we do not believe that \$575,000 is within even the outermost limits of the range of reasonable and acceptable verdicts for the injury the plaintiff sustained and, therefore, excessive as a matter of law.

Id.

The rationale this Court employed in *Gumbs* and the cases cited therein compel the conclusions that the pain and suffering verdicts that the jury returned in this case — \$800,000 in favor of Kevin Keller and \$400,000 in favor of Benjamin Martin, for a combined total of \$1.2 million — were clearly excessive and, therefore, the district court abused its discretion in not ordering a remittitur.

Plaintiff Keller, according to his own testimony, had an infected sore on the underside of his scrotum for two days before he was seen by a nurse at the prison and for a total of three days before he was transferred to Doylestown Hospital. He then received five days of treatment at the hospital, after which he was discharged back to the Bucks County Correctional Facility. According to the facility's medical records, Keller's scrotum appeared entirely healed the day after he returned to the prison. The prison kept Keller in medical solitary confinement for thirteen days after he had been discharged from the hospital — the initial ten days to allow the antibiotic treatment prescribed by the hospital to run its course and the remaining three days to await culture test results showing that Keller was free of infection from MRSA. It is undisputed that Keller's scrotum has healed and that he remains capable of procreating. (App.136a). He has no permanent serious physical injury as a result of the MRSA infection. (*Id.*).

As compensation for the pain and suffering Keller experienced during a three-week period in 2002, the jury in this case awarded damages in the amount of \$800,000. Defendants respectfully submit that there is no rational relationship between the pain and suffering that Keller

experienced, its limited duration, and the lack of any serious permanent damage and the jury's award of \$800,000. This Court should therefore order a remittitur to the amount of \$80,000 in damages for Keller's pain and suffering or to any other amount less than \$800,000 that this Court believes to constitute the "maximum recovery without shocking the judicial conscience that a jury reasonably could have awarded" under the facts of this case. *Gumbs*, 823 F.2d at 775.

The jury awarded Benjamin Martin \$400,000 in damages for his pain and suffering — half the damages that the jury awarded to Kevin Keller — even though Martin underwent multiple surgeries for the MRSA in his leg and had his MRSA infection for nearly a month. As has Keller, Martin made a complete recovery from his MRSA infection, sustaining no serious permanent injury. (App.218a–19a).

Notwithstanding the arguably more sympathetic facts pertaining to Martin's alleged pain and suffering, the jury's award of \$400,000 in his favor is likewise clearly excessive for one month's pain and suffering associated with a skin infection that caused no serious permanent injury. This Court should therefore order a remittitur to the amount of \$40,000 in damages for Martin's pain and suffering or to any other

amount less than \$400,000 that this Court believes to constitute the “maximum recovery without shocking the judicial conscience that a jury reasonably could have awarded” under the facts of this case. *Gumbs*, 823 F.2d at 775.

The excessive size of the jury’s awards for pain and suffering when measured against the facts of record clearly cries out for the entry of a substantial remittitur in this case. But that is not the only reason why a substantial reduction in the jury’s award of damages is merited. The Bucks County Correctional Facility typically houses between 650 and 700 individuals at a time, and from 2000 through 2005 more than 100 people at the Correctional Facility have been diagnosed as having MRSA. (App. 287a, 361a, 510a).

If this Court were to rule in the context of this appeal that a compensatory damages award totaling \$1.2 million for pain and suffering associated with two MRSA infections was appropriate, Bucks County could be facing a staggering amount of liability — in the range of \$60 million to \$70 million — to the universe of inmates who sustained MRSA infections. The verdicts in this case should suffice to shock the judicial conscience by themselves, but in the unlikely event that they do not, surely

the staggering range of liability for damages to the universe of inmates infected with MRSA that these awards portend is quite shocking indeed.

For all of these reasons, this Court should hold that the district court committed a clear abuse of discretion in failing to order remittitur and should itself reduce the jury's award for pain and suffering to the maximum recovery without shocking the judicial conscience that a jury reasonably could have awarded under the facts of this case. Defendants suggest that it would be appropriate to remit Keller's award to \$80,000 and Martin's award to \$40,000, for a total award of \$120,000.

VIII. CONCLUSION

For all of the foregoing reasons, defendants respectfully request the grant of a new trial on appeal. In the event this Court does not grant a new trial, then this Court should order a substantial remittitur of the

\$1.2 million damages award that the jury imposed for pain and suffering.

Respectfully submitted,

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,706 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 27, 2005

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: December 27, 2005

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that I am serving two true and correct copies of the foregoing document via first class U.S. Mail, postage prepaid, on the attorney, at the address, and on the date shown below:

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Dated: December 27, 2005

/s/ Howard J. Bashman
Howard J. Bashman

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Counsel for appellant hereby certifies that the electronic copy of this Brief for Appellant is identical to the paper copies filed with the Court and served as indicated on the attached Certificate of Service.

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