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)

REPLY BRIEF FOR APPELLANTS

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I. INTRODUCTION

Plaintiffs Kevin Keller and Benjamin Martin, in their Brief for Appellees, argue that defendants–appellants have waived every form of relief requested on appeal other than remittitur. In actuality, however, each of plaintiffs' claims of waiver is without merit.

As explained in this Reply Brief, at the close of all the evidence defendants moved for judgment as a matter of law. And, after the entry of judgment in plaintiffs' favor, defendants filed a timely motion for a new trial arguing that the judgment was manifestly against the weight of the evidence.

Plaintiffs are correct that defendants did not draw this Court's ruling in *Hubbard* v. *Taylor*, 399 F.3d 150 (3d Cir. 2005) — holding that pretrial detainees cannot pursue a claim of unconstitutional conditions of confinement because that claim arises under the Eighth Amendment — to the district court's attention, but plaintiffs overlook that this Court's ruling in *Hubbard* issued on February 23, 2005, *after* the parties' briefing of defendants' post–judgment motion had concluded. Defendants' inability to cite *Hubbard* did not prejudice plaintiffs, because *Hubbard* holds that plaintiffs who are pretrial detainees should instead pursue a

claim of having been subjected to punishment in violation of their Fourteenth Amendment right to be free of punishment while confined as pretrial detainees. *See id.* at 163–67. The district court allowed plaintiffs to take that very claim to the jury, so they will not be prejudiced in any legally relevant sense when this Court rules, in accordance with *Hubbard*, that their unconstitutional conditions of confinement claims fail as a matter of law.

And finally on the subject of waiver, plaintiffs in their Brief for Appellees incorrectly maintain that defendants have waived their right to argue that the district court's exclusion of Kevin Keller's *crimen falsi* convictions requires a new trial. Plaintiffs' waiver argument in their Brief for Appellees directly contradicts plaintiffs' correct assertion, in their trial court brief opposing defendants' motion for a new trial, that "[a]t trial in this case, the defense told the court that it should look to Defendants' Exhibit 59 for proof that Keller's prior convictions were crimen falsi." (App.881a).

Turning to the substance of this case, plaintiffs' Brief for Appellees focuses on the extra medical attention plaintiffs wished they had received and the hypothetical serious harms that plaintiffs might have

sustained if the medical attention that they actually received had not been provided. But the question here, of course, is not the amount of medical attention that plaintiffs wished they received or what harms might have befallen plaintiffs if they had not received the medical attention actually provided; rather, the issue before this Court is whether the medical attention actually provided constitutes deliberate indifference to plaintiffs' serious medical needs. Because it does not, a new trial should be ordered.

Plaintiffs offer no relevant response on the merits to show that *Hubbard* does not preclude their Eighth Amendment conditions–of–confinement challenge. Their citation to the law of another circuit, to establish that in another circuit a pretrial detainee could pursue such an Eighth Amendment claim, is besides the point given the precedential nature of this Court's ruling in *Hubbard*.

And plaintiff Kevin Keller, who prevailed on his claim of unconstitutional punishment in violation of the Fourteenth Amendment, has failed to show that his quarantine in solitary confinement on returning from his hospitalization following treatment for his MRSA infection was imposed for the purpose of punishment. Nor has he rebutted defen-

dants' argument in the Brief for Appellants that the solitary confinement was both reasonably related to a legitimate government objective and was not excessive in relation to that objective. Accordingly, a new trial should also be granted on Keller's claim of unconstitutional punishment.

With regard to defendants' argument that the district court improperly excluded evidence of Keller's *crimen falsi* convictions, plaintiffs argue harmless error. Yet the argument that evidence of non–*crimen falsi* convictions renders the improper exclusion of *crimen falsi* convictions harmless overlooks the very purpose behind Federal Rule of Evidence 609(a)(2), which is that *crimen falsi* convictions are relevant to a witness's credibility in a way that other convictions are not. While the exclusion of some *crimen falsi* convictions might be harmless if others were admitted, that is not (nor do plaintiffs argue that it is) what happened here. No *crimen falsi* convictions were before the jury, necessitating a new trial.

Finally, on the issue of remittitur, whatever pain and suffering the plaintiffs experienced was limited in duration, and plaintiffs have by their own testimony made essentially complete recoveries. None of the

remittitur cases cited in the Brief for Appellees upholds awards of this magnitude for non–permanent injuries so limited in duration. The jury's awards of $800,000 in favor of Kevin Keller and $400,000 in favor of Benjamin Martin cry out for reduction. It is noteworthy that plaintiffs, in their Brief for Appellees, do not even attempt to address the fact that upholding verdicts of this great size could result in ruinous consequences for the defendants, given that these two plaintiffs are not the only inmates who became infected with MRSA at the Bucks County Correctional Facility.

For these reasons, addressed in more detail below, defendants respectfully request the grant of a new trial on appeal or, if defendants' request for a new trial is denied, the entry of an order directing a substantial remittitur of the judgment in plaintiffs' favor.

II.ARGUMENT IN REPLY

A. Plaintiffs' Waiver Arguments Are Entirely Without Merit

In their Brief for Appellees, plaintiffs assert that defendants have waived the ability to obtain every form of relief sought on appeal other than a remittitur. Because plaintiffs' waiver arguments pervade the

Brief for Appellees, and because those waiver arguments are utterly devoid of merit, defendants dispose of those arguments first before revisiting the substance of this appeal.

1. Defendants have not waived the ability to obtain a new trial based on evidentiary insufficiency

In the Brief for Appellees, plaintiffs assert that defendants have waived the ability to obtain a new trial based on insufficiency of the evidence because defendants purportedly failed to move for judgment as a matter of law at the close of all the evidence.

Yet plaintiffs' assertion that defendants failed to move for judgment as a matter of law at the close of all the evidence is demonstrably false. Defendants' motion for judgment as a matter of law at the close of all the evidence was presented orally, and discussion of the motion is found in the Appendix at pages 753a through 756a. On the record, the district court evaluated the evidence on plaintiffs' claims against each defendant, and the district court at that juncture dismissed various defendants from the case but denied the request for judgment as a matter of law made on behalf of the defendants who were later found liable by the jury. Thus, even if, as plaintiffs assert, in order to obtain a new trial

post–judgment, a party must have moved for judgment as a matter of law at the conclusion of all the evidence *pre–judgment*, here the defendants–appellants on the record did move for judgment as a matter of law pre–judgment at the conclusion of the evidence. (App.753a-56a).

Not only is the factual premise of plaintiffs' waiver argument erroneous, but so is its legal premise. Even if — contrary to what actually happened here — defendants had not moved for judgment as a matter of law at the close of all the evidence, defendants would nevertheless not be precluded under Third Circuit law from seeking a new trial based on the fact that the jury's verdict was against the manifest weight of the evidence. *See Greenleaf* v. *Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999). Although *Greenleaf* involved a new trial that the proponent of a cross–claim was seeking, this Court has more recently applied *Greenleaf* to allow consideration of a defendant's post–judgment motion for a new trial filed in the absence of a pre–judgment motion for judgment as a matter of law.

In *Fillebrown* v. *Steelcase, Inc.*, 63 Fed. Appx. 54 (3d Cir. 2003), this Court considered a defendant's appeal from a district court's denial of the defendant's motion for a new trial. In rejecting the plaintiff's waiver

argument, this Court explained, citing *Greenleaf*: "Motions for a new trial based on the fact that the jury's verdict was against the weight of the evidence are not barred by a party's failure to move for judgment as a matter of law at the close of all evidence." 63 Fed. Appx. at 59.

The Brief for Appellees also cites twice to the U.S. Supreme Court's very recent ruling in *Unitherm Food Sys., Inc.* v. *Swift–Eckrich, Inc.*, 126 S. Ct. 980 (2006), each time preceding the citation with "Cf." As Circuit Judge Terence T. Evans has cogently explained on behalf of a unanimous three–judge panel of the U.S. Court of Appeals for the Seventh Circuit, "the value, generally, of 'Cf.' citations is often only revealed in the eye of the beholder." *Cabrera* v. *Hinsley*, 324 F.3d 527, 531 (7th Cir. 2003).

In any event, *Unitherm* does not assist plaintiffs' waiver argument here, because in that case the Supreme Court held that an appellate court is prohibited from granting a new trial in favor of a defendant that failed, post–judgment, to file *either* a motion for a new trial or a motion for judgment as a matter of law. *See* 126 S. Ct. at 983. Here, by contrast, defendants–appellants filed not only a timely post–judgment motion for a new trial, but also a timely supplemental post–judgment

motion for a new trial. App.823a–50a. And those motions advance the very arguments in support of a new trial that defendants are now raising on appeal.

For these reasons, plaintiffs' argument that defendants have waived their ability to seek a new trial on the ground of evidentiary insufficiency is entirely without merit.

2. Defendants have not waived the ability to obtain dismissal of plaintiffs' unconstitutional conditions of confinement claim based on this Court's intervening decision in *Hubbard*

After defendants' timely post–judgment motions had been fully briefed by both parties, this Court issued its ruling in *Hubbard* v. *Taylor*, 399 F.3d 150 (3d Cir. 2005). Therein, this Court held that pretrial detainees cannot pursue a claim of unconstitutional conditions of confinement because that claim arises under the Eighth Amendment. Rather, *Hubbard* holds that plaintiffs who are pretrial detainees should instead pursue a claim of having been subjected to punishment in violation of their Fourteenth Amendment right to be free of punishment while confined as pretrial detainees. *Id.* at 163–67.

Defendants' *Hubbard*–based argument that plaintiffs' claims for unconstitutional conditions of confinement must be dismissed is a legal argument whose basis did not exist until this Court issued its ruling in *Hubbard* clarifying what, as that opinion recognizes, had theretofore been a quite murky area of the law. *Hubbard* is, generally speaking, a plaintiff–friendly decision, because claims by pretrial detainees alleging unlawful punishment in violation of the Fourteenth Amendment, as *Hubbard* itself realizes, will ordinarily be easier to prevail on than claims alleging unconstitutional conditions of confinement under the Eighth Amendment.

In this case, plaintiffs will not be legally prejudiced in any relevant sense by having their unconstitutional conditions of confinement claims dismissed because plaintiffs also presented to the jury, and received verdicts on, plaintiffs' claims alleging unlawful punishment in violation of the Fourteenth Amendment.

In sum, defendants did not waive arguments available under *Hubbard* because that decision did not exist when the parties' post–judgment briefs were filed in the district court. And plaintiffs have no right to prevail on a claim that this Court, after the entry of judgment

in plaintiffs' favor on the jury's verdict, has held that pretrial detainees are as a matter of law unable to assert.

3. Plaintiffs' argument that defendants have waived their request for a new trial due to the district court's erroneous exclusion of *crimen falsi* evidence admissible under Fed. R. Evid. 609(a)(2) is unmeritorious

Plaintiffs are pursuing a two–pronged waiver argument in response to defendants' contention on appeal that the district court's exclusion of Keller's *crimen falsi* convictions mandates the granting of a new trial under Fed. R. Evid. 609(a)(2).

First, plaintiffs contend that the argument is waived because the district court's ruling on plaintiffs' motion in limine to exclude the evidence was somehow "tentative." And second, plaintiffs assert that defendants supposedly failed during the trial to draw the district court's attention to the specific evidence in question and why it was admissible, namely, for purposes of impeachment as *crimen falsi* evidence.

In ruling on plaintiffs' motion *in limine* to exclude evidence of defendants' criminal convictions, 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). Although that rul-

ing is tentative in one respect — inviting counsel for defendants to revisit with the district court whether the convictions are relevant to the issue of damages — the defendants were seeking to use the evidence for purposes of impeachment as envisioned in Federal Rule of Evidence 609(a)(2), and not specifically to disprove plaintiffs' damages. Thus, the district court's ruling on the motion *in limine* was not tentative with respect to the manner in which defendants intended to use the *crimen falsi* evidence. Rather, in that respect, the ruling was firm — "they will be kept out." (App.66a).

This Court has ruled that a district court's non–tentative ruling to exclude evidence at the motion *in limine* stage need not be followed by a formal offer of proof during trial in order to be appealable. *See Walden* v. *Georgia–Pacific Corp.*, 126 F.3d 506, 519 (3d Cir. 1997). Yet here, as plaintiffs conceded in their post–judgment brief in opposition to defendants' motion for a new trial, "[a]t trial in this case, the defense told the court that it should look to Defendants' Exhibit 59 for proof that Keller's prior convictions were crimen falsi." (App.881a). Thus, plaintiffs' other waiver argument in their Brief for Appellees — asserting that defendants supposedly failed to present the evidence in question to the dis-

trict court and describe why it was admissible — flies in the face of plaintiffs' correct, earlier admission that the issue was properly preserved for appeal.

Furthermore, the district court in ruling on this issue as renewed in defendants' post–judgment motion for a new trial did not hold that the issue had not been raised during trial. (App.6a–7a). Rather, the district court criticized the exhibit as originating from the internet and as being difficult to comprehend. (*Id.*). These issues, which do not involve waiver, were fully addressed in the Brief for Appellants at pages 45 through 53.

* * * * *

For the foregoing reasons, none of the various waiver arguments that plaintiffs assert in their Brief for Appellees has merit.

B. In Purporting To Set Forth The Evidence In A Light Most Favorable To Themselves, Plaintiffs Impermissibly Downplay And Ignore The Medical Treatment They Received

Plaintiffs understandably would rather focus on a leaky roof, a clogged shower drain, rusty air vents, and their own subjective claims of pain and suffering instead of focusing on the extensive medical attention that they received once their serious medical needs became known

to the medical staff of the Bucks County Correctional Facility. Yet while all concede that the appropriate prism through which to view the evidence at this juncture is in a light most favorable to plaintiffs, that does not give plaintiffs license to ignore the facts of record evidencing the medical care that they received at the prison.

As the evidence shows, MRSA is primarily spread through person–to–person contact (App.705a), and therefore the fact that the prison had a leaky roof, an occasionally clogged shower drain, or rusty air vents, while no doubt bothersome from an aesthetic perspective, is entirely irrelevant to the question of how Kevin Keller became infected with MRSA on the underside of his scrotum or Benjamin Martin became infected with MRSA on his thigh.

Likewise, the Brief for Appellees complains of the bumps on Keller's underarms, but that brief cannot show that the condition constituted a serious medical need or that the bumps were caused by MRSA. There is no evidence in the record supporting either of those allegations.

In the final analysis, the question of how Keller and Martin were exposed to MRSA is both unknowable and irrelevant, because exposure to MRSA itself is not an unconstitutional condition nor is it something

that can be prevented in even the most pristinely clean hospitals. Rather, in this case the focus is properly on the treatment that these two individuals received once they exhibited skin infections that were later diagnosed as MRSA.

As explained in the Brief for Appellants, it is undisputed that neither plaintiff was diagnosed with MRSA until they each arrived at Doylestown Hospital. Thus, plaintiffs' argument concerning whether the jail would have provided plaintiffs with the proper medication to cure MRSA is irrelevant. The cost of hospitalizing an inmate is of course much greater than the cost of providing proper treatment of a MRSA infection at the jail, so plaintiffs' argument foolishly assumes that defendants, in the hope of avoiding increased costs of medical care, would behave in an imprudent manner likely to cause healthcare costs to skyrocket.

The undisputed evidence shows, with respect to plaintiff Martin, that 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. (App.551a–52a, 565a–67a).

The prison doctor prescribed an antibiotic regimen for Martin immediately after his leg appeared infected (App.565a), 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. (App.593a, 597a). This testimony from a physician demonstrates that the jury's verdict in Martin's favor was against the manifest weight of the evidence. *See Norfleet* v. *Webster*, No. 05–1237, 2006 WL 508700, at *3 (7th Cir. Mar. 3, 2006).

These facts, described in even greater detail in the Brief for Appellants, establish that the jury's verdict is contrary to the substantial weight of the evidence. Accordingly, the trial court abused its discretion in failing to grant a new trial, and this Court should therefore reverse and remand for a retrial.

With regard to plaintiff Keller, the facts reveal 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 he walked 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). (App.112a–13a).

Before Keller 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. (App.626a–27a). On the very next day, the facility's medical staff transferred Keller to Doylestown Hospital for treatment of his condition. (App.629a). At the hospital, Keller's infection was drained, diagnosed as MRSA, and treated with antibiotics effective against that sort of infection. (App.692a).

Nor was the Correctional Facility's medical staff deliberately indifferent to Keller's serious medical needs after he returned from Doyles-

town 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. (App.634a, 692a–93a).

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. (App.635a, 1005a). This was confirmed through the negative results of the culture taken on September 17, 2002. (App.636a).

In sum, the facts directly relevant to plaintiffs' claims of deliberate indifference to their serious medical needs conclusively demonstrate that the jury's verdicts were against the manifest weight of the evidence. Accordingly, a new trial should be granted on those claims.

C. In *Hubbard*, This Court Ruled That Pretrial Detainees Cannot Assert A Claim For Unconstitutional Conditions Of Confinement

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 con-

finement 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.

Plaintiffs' response to the merits of this argument is unconvincing. They cite a First Circuit case, *Surprenant* v. *Rivas*, 424 F.3d 5, 18–19 (1st Cir. 2005), for the proposition that "there is no difference between the proof necessary to support" a claim of unconstitutional conditions of confinement and a claim of unlawful punishment under the Fourteenth Amendment. *See* Brief for Appellees at 34. Yet *Surprenant*, a First Circuit case, does not bind this panel, while *Hubbard*, a recent precedential Third Circuit ruling, does. Accordingly, this Court is not free to hold that these two claims are identical because *Hubbard* has recently held that they are not.

Moreover, plaintiffs' argument based on *Surprenant* also fails under the facts of this case, because the jury here ruled in favor of both plaintiffs on their claims for unconstitutional conditions of confinement —

the very claim which *Hubbard* holds that pretrial detainees do not possess — while the jury ruled against Martin on his claim for unlawful punishment in violation of the Fourteenth Amendment. Plaintiffs' Brief for Appellees fails to explain how, if those claims are in fact identical, the jury could find for Martin on one and against Martin on the other.

This Court's ruling in *Hubbard* is fully retroactive, and it mandates dismissal as a matter of law of plaintiffs' claims for unconstitutional conditions of confinement. That dismissal does not prejudice plaintiffs in any relevant sense, because they also presented to the jury claims for unlawful confinement in violation of the Fourteenth Amendment, the very claim that *Hubbard* says pretrial detainees are entitled to pursue.

Under the law of this circuit, given the jury's lump–sum compensatory damages award encompassing multiple claims on which each plaintiff prevailed, dismissal of plaintiffs' unconstitutional conditions of confinement claims will necessitate a new trial on the remaining claims on which the plaintiffs prevailed. *See Simone* v. *Golden Nugget Hotel and Casino*, 844 F.2d 1031, 1040–41 (3d Cir. 1988).

D. The Jury's Finding That Defendants Subjected Keller To Unlawful Punishment Is Against The Manifest Weight Of The Evidence

Keller's unlawful punishment claim focuses on his solitary confinement for thirteen days following his return to the jail from being treated at Doylestown Hospital. As the Brief for Appellants explained, 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.*).

The Brief for Appellees fails to rebut the argument found in the Brief for Appellants 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 had been cured was both reasonably related to a legitimate government objective and was not excessive in relation to that objective.

Keller's only answer to that argument consists of his assertion that inmates with MRSA could be safely housed together, and thus solitary confinement was unnecessary. *See* Brief for Appellees at 36 n.8. Yet Keller's argument overlooks a critical fact: at the time that he was placed in solitary confinement, the hope was that he no longer had MRSA. Although whether Keller still had MRSA could not be definitively confirmed until his culture results were received at the end of his thirteen–day period of solitary confinement, Keller's argument that he, as someone recovering from an MRSA infection, should have been housed with another inmate who had MRSA verges on the absurd, especially since Keller is simultaneously blaming defendants for having originally housed him in a cell with another inmate who had MRSA, which is what supposedly caused Keller to be exposed to the bacteria in the first place. *See* Brief for Appellees at 10.

The evidence even when viewed in a light most favorable to 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 in-

mates and detainees from the further spread of the MRSA bacteria. For these reasons, the district court erred in failing to grant a new trial on that claim, and this Court should reverse and order a new trial to occur on remand.

E. The District Court's Failure To Allow Admission Of Keller's *Crimen Falsi* Convictions Was Not Harmless Error

The drafters of the Federal Rules of Evidence recognized that one type of prior criminal conviction was more relevant to impeaching a witness's credibility than any other: convictions for crimes involving dishonesty or false statements. Accordingly, pursuant to Federal Rule of Evidence 609(a)(2), evidence of such crimes is automatically admissible as a matter of law, and "the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value." *Walden* v. *Georgia–Pacific Corp.*, 126 F.3d 506, 523 (3d Cir. 1997).

Ignoring the favored treatment for purposes of admissibility afforded *crimen falsi* convictions under the Federal Rules of Evidence, plaintiffs in their Brief for Appellees argue that because the jury learned that plaintiffs had been convicted of non–*crimen falsi* offenses, the district

court's failure to admit evidence of Keller's *crimen falsi* convictions was harmless. *See* Brief for Appellees at 42.

Defendants can envision instances where a district court's failure to admit a *crimen falsi* conviction under Rule 609(a)(2) might be harmless error. For example, if a hypothetical witness had five *crimen falsi* convictions but the district court only allowed evidence of four, the exclusion of the fifth *crimen falsi* conviction might be harmless error.

Here, by contrast, none of Keller's *crimen falsi* convictions were allowed into evidence, and the jury only learned that Keller had been convicted of non–*crimen falsi* offenses. Yet Federal Rule of Evidence 609(a)(2) recognizes that *crimen falsi* convictions are uniquely relevant to a witness's credibility, whereas Keller's convictions about which the jury did learn about did not directly impair his credibility in the way that *crimen falsi* convictions would.

With Keller's credibility unimpaired by the *crimen falsi* convictions that the district court erroneously, in violation of Rule 609(a)(2), excluded from evidence, Keller convinced the jury that he and Martin had valid claims for deliberate indifference to serious medical needs, unconstitutional conditions of confinement, and unlawful punishment in vio-

lation of the Fourteenth Amendment. And Keller was further able to convince the jury that his subjective pain and suffering should be compensated by a compensatory damages award of $800,000.

The district court's erroneous refusal to allow introduction of Keller's *crimen falsi* convictions, the admission of which was mandatory under Federal Rule of Evidence 609(a)(2), represents the antithesis of harmless error. Accordingly, this Court should reverse the district court's denial of defendants' motion for a new trial and order that a new trial on all claims occur on remand.

F. Because The Jury's Compensatory Damages Awards Are Shockingly Excessive, A Substantial Remittitur Should Be Ordered

Plaintiffs, while incarcerated at the Bucks County Correctional Facility, experienced skin infections that lasted for a relatively short period of time, after which they completely recovered, suffering no serious permanent injuries. Nevertheless, the jury awarded Keller $800,000 and Martin $400,000 for pain and suffering.

If this Court does not order a new trial of plaintiffs' claims, the Court should nevertheless order a substantial remittitur. None of the cases

cited in the Brief for Appellees involved plaintiffs who sued because they experienced infections that lasted a short time and that caused no serious permanent injuries. The damages awarded here are both unprecedented and shocking, and a substantial reduction is therefore required.

It is also worth noting that the Brief for Appellees entirely overlooks the argument raised in our opening brief that this case should not and cannot be viewed in a vacuum. The regrettable outbreak of MRSA at the Bucks County Correctional Facility affected not only these two inmates, but also other inmates and even some of the jail's staff. If individual inmates who suffered limited and largely non–permanent harm are allowed to obtain such shockingly large awards, then the overall financial liability facing Bucks County, Pennsylvania threatens to be crippling.

On this record, it is evident that the jury's awards were meant to punish defendants, instead of compensate the plaintiffs, and therefore the awards are impermissibly large and should be reduced.

* * * * *

MRSA can be a serious and potentially deadly type of bacterial infection, but it is also a form of infection that is only now coming to the forefront of the public's attention. Since the time the Brief for Appellants was filed, both *The Wall Street Journal* and *The Los Angeles Times* have published front page articles about this strain of bacteria. *See* "Defying Treatment, A New, Virulent Bug Sparks Health Fears; Drug–Resistant Staph Kills Quickly and Randomly; Antibiotics' Worrying Toll," *The Wall Street Journal*, Jan. 20, 2006, page A–1; "Infection Is Growing in Scope, Resistance; A virulent staph germ once largely confined to hospitals is emerging in jails, gyms and schools," *The Los Angeles Times*, Feb. 26, 2006, available online at http://www.latimes.com/news/science/la-sci-staph26feb26,0,3235434.story. What happened to plaintiffs could have happened to anyone, anywhere.

On the record of this case, it is evident that defendants were not deliberately indifferent to plaintiffs' serious medical needs, nor did defendants punish Kevin Keller in violation of his Fourteenth Amendment rights as a pretrial detainee. And in the event that this Court does not order a new trial on those claims and dismiss plaintiffs' unconstitu-

tional conditions of confinement claims, at a minimum a substantial remittitur should be ordered.

III. CONCLUSION

For all of the foregoing reasons, defendants respectfully request the grant of a new trial. 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 5,259 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Century Schoolbook font.

Dated: March 6, 2006

/s/ *Howard J. Bashman*
Howard J. Bashman

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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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Howard J. Bashman

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

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: March 6, 2006

/s/ *Howard J. Bashman*
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