IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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LISA KING, as the special administrator
for the Estate of John P. King,

Plaintiff,

v.

SUE KRAMER and LA CROSSE
COUNTY,

Defendants.

OPINION AND ORDER

10-cv-123-wmc

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In this action Lisa King, as the special administrator for the Estate of John P. King, alleged that defendants Sue Kramer and La Crosse County violated John King's constitutional rights in their treatment of his serious medical conditions. After a jury returned a verdict in favor of defendants, plaintiff filed a motion to amend the jury's verdict, make new findings of fact and conclusions of law or for a new trial pursuant to Federal Rule of Civil Procedure 59. (Dkt. #693.) For the reasons that follow -- and for reasons previously articulated by the court in rejecting these same arguments -- the court will deny plaintiff's motion in its entirety.

## OPINION[1]

Plaintiff posits three bases for relief from the jury's verdict in her post-verdict motion, all of which concern alleged errors in the court's rulings on motions in limine.

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[1] This opinion assumes a general understanding of the undisputed facts and law of the case set forth in earlier opinions of this court.

First, plaintiff argues that the court improperly denied her request to have a jury determine liability under the "objective reasonableness" standard of the Fourth Amendment. Second, plaintiff contends that the court erred in refusing to instruct the jury that the contract between the County and Health Professionals, Ltd. ("HPL") delegated final decision making authority to HPL. Third, plaintiff argues that the court erred in excluding portions of the County's contract with HPL.

## I. Standard of Review

Plaintiff states that her motion is made pursuant to Federal Rule of Civil Procedure 59(a). This rule is broadly worded and allows for the court to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" Fed. R. Civ. P. 59(a)(1). "Under Rule 59(a) of the Federal Rules of Civil Procedure, the district judge must determine if 'the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party.'" *Frizzell v. Szabo*, 647 F.3d 698, 702 (7th Cir. 2011) (quoting *McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1993)).

Here, plaintiff's first and second challenges concern typical questions of law arising out of the court's rulings on jury instructions. *See* 11 Charles Alan Wright et al., *Federal Practice & Procedure* §2805 at pp.68-69 (2012) ("[T]he motion also may raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions."). Plaintiff's third challenge takes issue with the court's evidentiary ruling on the County's contract with HPL. For alleged evidentiary

errors, the court "will grant a new trial only if the error had a substantial influence over the jury and the result reached was inconsistent with substantial justice." *E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir. 2012) (internal citation, punctuation and quotation marks omitted). "Evidentiary errors satisfy this standard only when a significant chance exists that they affected the outcome of the trial." *Id.* (quoting *Old Republic Ins. Co. v. Emp'rs Reinsurance Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998)).

While not cited by plaintiff, plaintiff appears to also seek relief pursuant to Rule 59(e).[2] Specifically, plaintiff seeks an "amendment of the jury's verdict," a finding as a matter of law that defendants were objectively unreasonable under the Fourth Amendment and/or that La Crosse County delegated final decision making authority to HPL. A court may grant a motion brought pursuant to Federal Rule of Evidence 59(e) "to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Miller v. Safeco Ins. Co. of Am.*, 683 F.3d 805, 813 (7th Cir. 2012) (quoting *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996)). "This rule 'enables the court to correct its own errors and thus avoid unnecessary appellate procedures.'" *Miller*, 683 F.3d at 813 (quoting *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996)).

[2] As La Crosse County pointed out in its opposition brief, plaintiff did not file a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a), and therefore cannot seek relief under Rule 50(b).

**II. Treatment of Plaintiff's Last-Minute, Fourth Amendment Claim**

As the court pointed out in its decision on the motion in limine, both the complaint and the amended complaint plead a claim for deliberate indifference under the Fourteenth Amendment (*see* Compl. (dkt. #1) ¶¶ 101, 502-06; Am. Compl. (dkt. #21) ¶¶ 101, 308, 489, 502-06.); the parties and the court proceeded on this theory at summary judgment (*see, e.g.*, Pl.'s Summary J. Opp'n (dkt. #71)); and the Seventh Circuit considered plaintiff's claim in light of the deliberate indifference standard while on interlocutory appeal (*see King v. Kramer*, 680 F.3d 1013, 1017-18 (7th Cir. 2012)). At the same time, the court agrees with plaintiff that the facts demonstrate that John King was arrested without a warrant and had not yet received a probable cause hearing at the time of his death. Plaintiff should, therefore, have pursued her claim under the Fourth Amendment and its objective unreasonableness standard, not the Fourteenth Amendment and its deliberate indifference standard. *Lopez v. City of Chi.*, 464 F.3d 711, 719 (7th Cir. 2006).

Faced with these defects of the plaintiff's own making on the eve of trial, the court attempted to craft a solution, which recognized plaintiff's claim under the Fourth Amendment, but required plaintiff to demonstrate liability under the deliberate indifference standard. While perhaps not ideal, this solution seemed the only way to allow plaintiff to proceed on her claim without unduly prejudicing defendants with a last-minute, significant shift in plaintiff's theory of recovery at trial.

In the present motion, plaintiff argues, as she did in her motion in limine, that she need not have pleaded legal theories in the complaint, and therefore her switch from a

Fourteenth Amendment deliberate indifference to a Fourth Amendment objectively unreasonable legal theory is somehow justified by liberal pleading rules. In the prior order, the court explained, "[p]laintiff's attempt to apply pleading requirements to somehow justify her last-minute shift in legal theory is puzzling, since all parties *and* the parties' experts proceeded using the deliberate indifference standard before this court, on appeal to the Seventh Circuit and, until now, again before this court." (1/9/13 Op. & Order (dkt. #643) 4-7.) In the present motion, plaintiff utterly fails to address the court's finding of waiver. As in *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007), plaintiff waived any right to a Fourth Amendment claim premised on an objectively unreasonable standard by failing to pursue such a claim on a timely basis.

Plaintiff now replies that all that "the law requires is that Plaintiff draws the district court's attention to the theory at a time that Court is capable of addressing the issue." (Pl.'s Reply (dkt. #703) 7.) But this is exactly what plaintiff did not do. Instead, plaintiff attempted to shift her entire theory of liability on the eve of trial without any consideration for the previous development of the case or the opposing party's ability to build a defense. Moreover, whether the district court had an opportunity to consider an argument is but one factor in considering whether an argument has been waived, not the sole factor. The court must also consider the procedural posture of the case in determining whether a new legal theory would prejudice the opposing side or derail the case from its trial track. Here, plaintiff pursued a deliberate indifference theory through summary judgment and on interlocutory appeal and the court could not allow plaintiff to

proceed on an objectively unreasonable standard without unfairly prejudicing the defendants or derailing the trial.

In its reply, plaintiff also takes pains to review the trial testimony of experts, noting that none used the actual phrase "deliberate indifference" in expressing their opinions to the jury. Therefore, plaintiff argues, defendants would not have been prejudiced by instructing the jury on an objective reasonableness standard. (Pl.'s Reply (dkt. #703) 10-11.) However, the fact that none of the experts uttered the words "deliberate indifference" does not mean that their testimony did not touch on the elements of such a showing, or that the defendants did not prepare their defense in numerous other ways in light of that standard.[3]

**III. Allowing Jury to Determine Who Had Final Decision-Making Authority Issue**

In challenging this court's decision to allow the jury to determine whether defendant La Crosse County delegated final decision-making authority to HPL, plaintiff makes two, separate arguments: (1) the Seventh Circuit decided this issue as part of ruling on the interlocutory appeal, meaning that this court erred by disregarding the law of the case; and (2) even if the Seventh Circuit did not decide the issue, the language of

[3] For the first time in her reply brief, plaintiff also argues that the "verdict was against the weight of the evidence under [the deliberate indifference] standard." (Pl.'s Reply (dkt. #703) 15.) The court's general practice is not to consider arguments raised for the first time in a reply brief. *See Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009) ("[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited."). In any event, the court finds that a "rational jury could have rendered the verdict" based on the evidence presented. *Lewis v. City of Chi. Police Dep't*, 590 F.3d 427 444.

the contract makes HPL responsible for all medical decisions in the jail, requiring a finding of county liability as a matter of law.

As for the "law of the case argument," plaintiff relies on the following language from the Seventh Circuit's opinion reversing the court's grant of summary judgment to La Crosse County: "The County's express policies as embodied in the contract show that the County delegated to HPL final decision making authority to make decisions over inmates medical care." *King v. Kramer*, 680 F.3d at 1020-21. While the court agrees that this language appears absolute when quoted out of context, it ignores other language in the Seventh Circuit's opinion clarifying that a sufficient factual basis existed for *a jury* to find a policy or practice to implicate the County under *Monell*.

As the Seventh Circuit has cautioned, "it is essential to determine what issues were actually decided in order to define what is the 'law of the case.'" *Creek v. Vill. of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). One of the questions before the Seventh Circuit in the interlocutory appeal was "whether King had presented enough evidence to survive summary judgment with respect to his claim against La Crosse County." *King*, 680 F.3d at 1020. The court considered the evidence submitted at summary judgment, including the contract between the County and HPL, ultimately deciding "that King has presented sufficient evidence to survive summary judgment with respect to the County." *Id.* at 1021. The court did not, as plaintiff now argues, take the additional step to decide as a matter of law that La Crosse County had delegated final decision-making authority to HPL.[4] In the language relied on by plaintiff in pressing this argument, the Seventh

[4] If the Seventh Circuit had made a determination as a matter of law that La Crosse

Circuit did no more than adopt the voice of a reasonable fact finder -- a not unusual practice -- in weighing the evidence presented at summary judgment in the light most favorable to plaintiff.

As for plaintiff's second argument -- that the language of the contract plainly makes HPL responsible for all medical decisions in the jail without any language limiting HPL's authority -- the court agrees with the County, as it did in denying plaintiff's motion in limine, that "while the County contracted with HPL to provide medical care for inmates, 'it does not follow that the County delegated all control and had no oversight as to how this care was to be provided.'" (1/8/13 Op. & Order (dkt. #631) 4 (quoting County's Opp'n (dkt. #524) 2).) As the County previously argued in opposing King's earlier motion and in its presentation to the jury, certain provisions in the contract,[5] coupled with evidence of the County's actual oversight of HPL's medical treatment, provided a sufficient basis for the jury to find that the County retained at least some final decision-making authority over HPL. Accordingly, the court finds no error in allowing the jury to consider this arguably conflicting and ambiguous contract language or resolving the ultimate factual question, nor does it find error in the jury's finding that the County did not delegate final decision-making authority to HPL.

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County delegated final decision-making authority to HPL, there would have been no reason for the court to consider, in the alternative, whether there was a "question of material fact" as to the County's awareness that "HPL had policies that violated inmates' constitutions rights." *King*, 680 F.3d at 1021.

[5] Examples from the contract include: (1) ¶1.2.2, which provides the Sheriff with authority to remove HPL personnel; (2) ¶1.3.4, which calls for quarterly discussions between HLP, the County and Sheriff to discuss concerns and procedures; and (3) ¶4.2.3, which allows for the County to terminate for cause County believed the medical care was substandard in any way.

**IV. Exclusion of Indemnification Provision in HPL Contract**

Lastly, plaintiff argues that the court erred in excluding portions of the contract, namely the indemnification provision. The court already addressed this argument in motions in limine before trial, relying on Federal Rule of Evidence 411, which precludes evidence that a person was insured against liability to prove that the person acted negligently or otherwise wrongfully, and on the Seventh Circuit's extension in *Lawson v. Trowbridge*, 153 F.3d 368, 379 (7th Cir. 1998), of Rule 411 to indemnification agreements, effectively excluding introduction of the entire contract, including the indemnification agreement. (*See* 1/8/13 Op. & Order (dkt. #631) 19-20.)

In the present motion, plaintiff contends that the court erred in relying on *Lawson*. Plaintiff is correct to point out that the Seventh Circuit in *Lawson* rejected the "general" rule that indemnification provisions should be excluded, because in that case plaintiffs had "made their financial weakness the centerpiece of their testimony in the damages phase of the trial." 153 F.3d at 379. Here, plaintiff failed to articulate a valid reason why the indemnification provision would be probative in deciding whether the County had delegated final decisionmaking authority to HPL. Even if probative, the court continues to find that its value would be outweighed by the prejudicial effect of allowing the jury to consider it. Finally, even if the court erred in excluding the indemnification provisions, plaintiff has not met her burden of demonstrating "a significant chance exists that [this error] affected the outcome of the trial." *Mgmt. Hospitality of Racine, Inc.*, 666 F.3d at 440.

ORDER

IT IS ORDERED that plaintiff Lisa King's, as the special administrator for the Estate of John King, motion to amend the jury's verdict, make new findings of fact and conclusions of law, or for a new trial (dkt. #693) is DENIED.

Entered this 30th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge