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

JEFFREY D. LEISER,

Plaintiff,

v.

BELINDA SCHRUBBE, R.N., *et al.*,

Defendants.

ORDER

11-cv-254-slc

Plaintiff Jeffrey D. Leiser filed this prisoner civil rights case under 42 U.S.C. § 1983, against several correctional officers and health care professionals at the Waupun Correctional Institution. Leiser alleged that, in one manner or another, the defendants were deliberately indifferent to a serious medical need stemming from chronic back pain. After a week-long trial, a jury returned a verdict in favor of the defendants on November 16, 2012.

Leiser has moved for a new trial under Fed. R. Civ. P. 59(a). Leiser claims that he is entitled to a new trial for two reasons. First, Leiser contends that a juror engaged in misconduct by sleeping through the testimony of three witnesses on the first full day of trial. Second, Leiser maintains that defendants' counsel engaged in misconduct by re-numbering his medical records at trial. The defendants have filed a response and Leiser has filed a reply.

I have reviewed all pertinent matters in this case. Based on this review, as well as my clear recollection of the proceedings, I am denying Leiser's motion.

A court "may, on motion, 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)(A). The standard for obtaining a new trial is high and the court's discretion is not unlimited where a jury verdict is concerned. *See Galvan v. Norberg*, 678 F.3d 581, 588-89 (7th Cir. 2012) (noting that the court may consider the general weight of the evidence, the credibility of the witnesses, and the comparative strength of the facts put forth at trial, but must accord "a certain deference to

the jury's conclusions"). A jury verdict may be set aside only if it is against the manifest weight of the evidence, the award of damages is excessive, or other reasons exist as to why the trial was unfair to the moving party. *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 440 (7th Cir. 2010). In other words, a new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.'" *Whitehead v. Bond*, 680 F.3d 919, 928 (7th Cir. 2012) (quoting *Clarett v. Roberts*, 657 F.3d 664, 674 (7th Cir. 2011)). Neither of the grounds advanced by Leiser meet this high standard.

Jury Misconduct

Leiser reports that, after the verdict was announced and the trial was over, an unidentified transportation officer told him that he observed one of the jurors sleeping on the first day of the proceeding. Leiser notes that this juror, described as the "heavy set juror in the back row in seat one," later served as the foreman. Leiser maintains that he was denied a fair trial because this juror slept through testimony given by defendant Tammy Giese and two of Leiser's witnesses, Antonio Maddox and Robert LeBotte. As support for his position, Leiser notes that the jury asked to have portions of Ms. Giese's testimony read back to them during deliberation.

First of all, Leiser cannot obtain a new trial based solely on the unsworn assertion that a juror was asleep at some point during the proceeding. Leiser's unsupported allegation, based solely on what a correctional officer supposedly said, does not constitute evidence of juror misconduct.

Second, and more importantly, Leiser's suggestion that the juror in question slept through the testimony of three witnesses is contradicted by my personal recollection of the trial. It is the court's responsibility to conduct the trial and this includes keeping an eye on the jury. *See, e.g., Tanner v. United States*, 483 U.S. 107, 127 (1987) (". . . during trial, the jury is observable by the court, by counsel and by court personnel"). It is my practice during every jury trial, including this one, to monitor the jurors for signs that any of them might be nodding off or otherwise not paying attention. As anyone who has participated in a trial can attest, this is particularly important in the middle of the afternoon in a warm courtroom. If I see any signs of drowsiness or inattention, then I call for a break at that time to make sure that no one misses any testimony or other evidence.

Like Leiser, I did see the juror in question with his head down at different times on different days. I also saw other jurors with their heads down at different times on different days. None of them ever was sleeping. In each instance, they were either taking notes or simply looking downward, as evidenced by their subsequent changes in position. If it ever had been otherwise, I would have called a break to prevent exactly the sort of problem of which Leiser now complains. The bottom line is that no jurors slept during trial, and Leiser's contention to the contrary is incorrect. There was no misconduct by any juror in this case and so this argument fails to warrant relief under Rule 59(a).

Misconduct by Opposing Counsel

Leiser's second claim is that he was "sandbagged" by defendants' counsel because they changed the numbering of his medical records at trial. Pointing the proposed exhibit list offered

prior to trial, Leiser argues that the last-minute change in numbering caused him to "fumble with trying to find the right exhibits" and prevented him from presenting his case fully to the jury. Leiser maintains, therefore, that he is entitled to a new trial on the grounds that defendants' counsel engaged in intentional misconduct.

This argument also is a non-starter. As Leiser acknowledges, he agreed to stipulate to the admissibility of his entire medical record for purposes of identifying those records as an exhibit. Although the defendants offered to admit just the relevant excerpts from Leiser's lengthy medical records, we ended up putting into evidence all of the records in order to alleviate Leiser's stated concern that a particular report from UW Hospital was missing. Leiser was given a copy of his medical records and he had ample time to familiarize himself with their contents. Although the medical records were voluminous, Assistant Attorney General Sullivan bent over backward to help Leiser locate and use exhibits during trial. In fact, Leiser expressed his appreciation more than once during the trial and at the close of the proceeding, for the assistance that AAG Sullivan provided. For Leiser now to complain that he was sandbagged or otherwise put to some sort of disadvantage at trial not only is inaccurate, it is crassly opportunistic.

Finally, to the extent that Leiser argues that he was somehow prevented from presenting his best case because of how the medical records were organized, he has not identified any particular exhibit that he was unable to find or use to his satisfaction at trial. Neither has Leiser explained how the presentation of any specific exhibit would have changed the result of the trial. To the contrary, Leiser was able to use–and did use–the medical records throughly with every witness whose treatment of his pain he found wanting. Leiser does not show–cannot show–that his trial was tainted by misconduct of any kind, whether on the part of defendants' counsel or an inattentive juror.

ORDER

It is ORDERED that plaintiff Jeffrey D. Leiser's motion for new trial, dkt. 139, is DENIED.

Entered this 29th day of March, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge