STATE OF MICHIGAN

COURT OF APPEALS

TRACY NEAL and All Others Similarly Situated,

Plaintiffs-Appellees,

v

DEPARTMENT OF CORRECTIONS, KENNETH MCGINNIS, JOAN YUKINS, SALLY LANGLEY, CAROL HOWES, ROBERT SALIS, CORNELL HOWARD, MARTIN TATE, THOMAS PORTMAN, WILLIAM ELLISON, CHRISTOPHER GALLAGHER, RODERICK ROBEY, WILLIAM OVERTON, DIRECTOR OF DEPARTMENT OF CORRECTIONS, CLARICE STOVALL, NANCY ZANG, JOHN ANDREWS, JAN BALDWIN, WES BONNEY, DAVID CRUKSHANK, JOSEPH DURIGON, DAVID HABITZ, EDWARD HOOK, JACK HUTCHINS, DENNIS IFORD, DERLE JONES, ART LANCASTER, ERIN RICHARDSON, ANTHONY SIMMONS, FRED WELCH, LYNN WILLIAMS, and CHARLES WILLIAMS,

Defendants-Appellants.

UNPUBLISHED
January 27, 2009

No. 285232
Washtenaw Circuit Court
LC No. 96-006986-CZ

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order that denied their motion for a judgment notwithstanding the verdict (JNOV) or new trial. We affirm.

This case was originally filed in 1996, and pertinent factual background is set forth in *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730, 732-733; 592 NW2d 370 (1998):

> This is a class-action suit brought, in relevant part, under the Civil Rights Act [CRA], MCL 37.2101 *et seq*. . . ., by female prisoners housed in facilities operated by the Michigan Department of Corrections (MDOC). Defendants are

> the department, its director, and several wardens, deputy wardens, and corrections officers employed by the MDOC. . . .
>
> The case arises out of allegations that male corrections personnel have systematically engaged in a pattern of sexual harassment of female inmates incarcerated by the MDOC. Specifically, plaintiffs' complaint alleged that the MDOC assigns male officers to the housing units at all women's facilities without providing any training related to cross-gender supervision; that women are forced to dress, undress, and perform basic hygiene and body functions in the open with male officers observing; that defendants allow male officers to observe during gynecological and other intimate medical care; that defendants require male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas; that women prisoners are routinely subjected to offensive sex-based sexual harassment, offensive touching, and requests for sexual acts by male officers; and that there is a pattern of male officers requesting sexual acts from women prisoners as a condition of retaining good-time credits, work details, and educational and rehabilitative program opportunities. The complaint also alleged that the inmates were subject to retaliation for reporting this gender-based misconduct. Plaintiffs claimed that these actions, and defendants' failure to protect female inmates from this misconduct through adequate training, supervision, investigation, or discipline of MDOC employees, constitute gender-based discriminatory conduct, sexual harassment, and retaliation in violation of the [CRA].

This action involves over five hundred plaintiffs and is to be tried in stages, with each stage involving a different "bundle" of plaintiffs.[1] The instant appeal involves the first bundle of ten plaintiffs, who raised claims of sexual harassment occurring at the Scott Correctional Facility from 1991 through 1999. After a trial that took place in January 2008, the jury found in favor of the ten plaintiffs and against defendants MDOC, Joan Yukins (the Scott warden), and Kenneth McGinnis (the MDOC director).[2] The jury reached separate verdicts for each plaintiff, with damages totaling $15,545,000, and the trial court thereafter entered individual judgments.

At trial, testimony and exhibits were introduced detailing the sexually hostile environment at the Scott facility. In addition, the ten plaintiffs testified about groping, rapes, inappropriate pat-down searches, sexual comments, and other harassing behavior perpetrated by Scott guards.

Defendants first argue that plaintiff failed to establish a violation of the CRA as a matter of law. We review de novo a trial court's decision with regard to a motion for a JNOV. *Attard v*

---

[1] The parties use the term "bundling" in their briefs, but we note that this case does not involve the Supreme Court's prohibition against bundled asbestos-related cases contained in Administrative Order No. 2006-6.

[2] In this first bundled trial, plaintiffs requested damages against only these three defendants.

Citizens Ins Co of America, 237 Mich App 311, 321; 602 NW2d 633 (1999). "In reviewing a trial court's denial of a defendant's motion for JNOV, this Court should examine the testimony and all legitimate inferences therefrom in the light most favorable to the plaintiff." *Id*. "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Id*.

A person may not be discriminated against on the basis of sex in the provision of public accommodations or public services. MCL 37.2102(1).[3]

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

In *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), the Supreme Court indicated that the following elements must be established for a prima facie case of hostile-environment sexual harassment:

> (1) the [person] belonged to a protected group;
>
> (2) the [person] was subjected to communication or conduct on the basis of sex;
>
> (3) the [person] was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the [person's] employment or created an intimidating, hostile, or offensive . . . environment; and

---

[3] A prison environment is encompassed by this language for claims accruing before March 10, 2000. *Neal v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2005 (Docket Nos. 253543 & 256506), slip op at 3, 10, remanded on other grounds 474 Mich 970 (2005).

(5) respondeat superior.

Respondeat superior liability exists when the defendant had sufficient notice of the harassment and failed to take adequate corrective action. *Elezovic v Ford Motor Co*, 472 Mich 408, 412; 697 NW2d 851 (2005).

In their appellate brief, defendants do not dispute that plaintiffs belonged to a protected group, that they were subject to unwelcome conduct or communication based on sex, or that the conduct or communication created an intimidating, hostile, or offensive environment. Instead, they focus on the alleged fact that there was no actual or constructive notice of the harassment.

Notice of a hostile environment may be actual or constructive. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). The pertinent inquiry is whether "the totality of the circumstances [was] such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000). Here, there was sufficient evidence for the jury to conclude that defendants had adequate notice of the hostile environment.

In 1997, Annabelle Romero was hired to investigate the problem of sexual harassment at Scott and another facility. In her extensive report, admitted as an exhibit at trial, she stated:

> It is my opinion that the level of sexual assault, sexual abuse, sexual harassment, and invasions of privacy reflected in inmate interviews, employee depositions, and MDOC's own documents, and summarized in the sections above, is far beyond the level that would be expected in a prison system that has made a serious, concerted effort to minimize instances of staff-inmate relationships, sexual assault, sexual abuse, sexual harassment, and invasions of privacy, and indicates that the [d]efendants are deliberately indifferent to protecting inmates from sexual misconduct of all types.

Another trial exhibit revealed that there were nearly two hundred sexual misconduct allegations at Scott from 1991 to 1999, out of a population of around eight hundred women. Another exhibit indicated that from 1994 to 1997, around thirty percent of the male staff at Scott were alleged to have taken part in sexual assaults.[4] It was also revealed at trial that Human Rights Watch had issued a report indicating that, based on an investigation from 1994 through 1996, Michigan had failed to take adequate steps to protect against the potential for custodial sexual misconduct in prisons. The report stated, in part:

---

[4] While these numbers refer to allegations, they nonetheless have some bearing concerning whether defendants should have been aware of a hostile environment.

> [t]hat officers often target like a radar women with histories of sexual or physical abuse or prisoners in emotional vulnerable positions such as those who lack support from family or friends, who are alienated or isolated by other prisoners or staff and younger women who are incarcerated for the first time.

In addition, many of the individual plaintiffs in this case testified that the sexually abusive behavior they endured was observed by or reported to supervisors. Yukins admitted at trial that, in her deposition, she stated that many women reported being assaulted by officer Lynn Williams before the assaults at issue in this case and that she should have fired Williams before he sexually assaulted any of the present plaintiffs.

This case is far different from the situation in *Elezovic*, *supra* at 427-428, where the plaintiff told "two [low-level] supervisors in confidence about one instance of . . . improper conduct . . . ." It also differs from *Sheridan*, *supra* at 629, in which the Court found that "the sexual harassment was not, as a matter of law, substantially pervasive enough to put defendant on notice of the sexual harassment." Instead, there was evidence of a pervasive, sexually harassing environment, and the jury was within its rights to conclude that defendants had adequate notice of the harassing environment.

Defendant next argues that the trial court, in allowing the present bundle of claims to go forward, failed to follow this Court's opinion in *Neal v Dep't of Corrections (Neal II)*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 1995 (Docket Nos. 253543 & 256506), remanded on other grounds 474 Mich 970 (2005). This issue involves a question of law that we will review de novo. *Frans v Harleysville Lakes State Ins Co (On Reconsideration)*, 270 Mich App 201, 203; 714 NW2d 671 (2006).

In *Neal II*, the Court considered the March 10, 2000, amendment to MCL 37.2301(b), which excepted imprisonment from the definition of "public service." The Court concluded that "the claims of class plaintiffs[] that accrued after March 10, 2000, must be dismissed." *Neal II*, *supra*, slip op at 10. The Court also addressed the statute of limitations and stated:

> While plaintiffs in this case were entitled to rely on the filing of the class action to toll their claims, MCR 3.501, and to rely on the relation-back doctrine to add claims arising out of the conduct, transactions, or occurrences set forth in that initial complaint, MCR 2.118(D), they were not permitted to add new parties by way of their amended complaint and rely on the tolling provisions of MCR 3.501 to justify the additions. Because the relation-back doctrine does not apply to the newly added defendants, the claims against them must be dismissed if those claims were time barred when the first amended complaint, naming the new defendants, was filed. January 27, 2003, the date that the amended complaint was filed, is the relevant date for computing whether any claims against the new defendants were timely filed. On remand, the trial court must consider whether any of the claims against the nineteen new defendants were filed within the applicable period of limitations. [*Neal II*, *supra*, slip op at 11.]

Defendants contend that because Lynn Williams stopped working at the MDOC in 1997 and was not added as a defendant until the 2003 amended complaint, all claims involving him

should be dismissed on the basis of the statute of limitations. They contend that the entire present bundle of claims is based on Williams' conduct and that therefore the entire bundle should have been dismissed.

Even assuming that defendants properly preserved this issue for appellate review, we find no basis for reversal. First, defendants' argument on appeal is fundamentally flawed because the present bundle of claims involved sexual harassment by multiple guards, not just Lynn Williams.[5] Second, the present case proceeded against three defendants – MDOC, McGinnis, and Yukins – and not against Lynn Williams. While actions perpetrated by Williams did constitute part of the basis of the lawsuit, the finding of liability was based on the failure of the three defendants to take appropriate remedial action in light of a hostile work environment. Accordingly, defendants' reliance on *Al-Shimmari v Detroit Medical Center*, 477 Mich 280; 371 NW2d 29 (2007), is misplaced. In *Al-Shimmari*, *supra* at 295-296, the Court held that because an individual defendant was dismissed based on the statute of limitations, the vicarious liability claims arising from that individual's actions also were required to be dismissed. The Court discussed vicarious liability as follows:

> Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. [*Id*. at 294 (internal citations and quotation marks omitted.]

The Court stated that "[t]he principal is only liable because the law creates a practical identity with his [agents], so that he is held to have done what they have done." *Id*. (internal citations and quotation marks omitted). This is *not* the situation in the present case. Instead, MDOC, McGinnis, and Yukins are being held liable for their own negligence in failing to take appropriate remedial action in response to a hostile prison environment. See, e.g., *Rymal v Baergen*, 262 Mich App 274, 312-313 n 13; 686 NW2d 241 (2004). Defendants' argument on appeal is without merit.[6]

---

[5] Defendants assert, without a citation to the record, that the first bundled trial was limited to harassment perpetrated by Williams.

[6] Defendants also briefly contend that plaintiff's claims are barred by the 2000 amendment to MCL 37.2301(b). This argument is not developed and therefore we will not consider it. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Also, we reject defendants' reliance on *Zsigo v Hurley Medical Center*, 475 Mich 215; 716 NW2d 220 (2006), a tort case in which the plaintiff sought to hold the defendant employer liable for an employee's act of assault. The instant civil-rights matter, as noted, involves a failure by the three pertinent defendants to properly address a sexually hostile environment.

Defendants next argue that plaintiffs should have been required to file individual complaints.[7] This was a matter within the trial court's discretion. See, generally, *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Defendants contend that the list of ten inmates that plaintiffs provided on August 31, 2007, was "wholly insufficient to inform [d]efendants of the nature of these individual prisoners' claims in order to even attempt a defense in this matter." Defendants' argument is disingenuous. Plaintiffs provided answers to interrogatories for the ten plaintiffs and offered depositions. Defendants at no point requested additional time for discovery. See *Porter v Henry Ford Hosp*, 181 Mich App 706; 450 NW2d 37 (1989) ("a motion for a more definite statement or interrogatories would insure that the defendant was fully informed"). There is no basis from which to conclude that defendants lacked adequate information to defend against the claims at issue in this appeal.

Defendants next argue that the trial court erred in allowing the ten plaintiffs' claims to be bundled together and heard before the same jury. We disagree.

This case proceeded as a class action, without objection, from 1997 through 2003, when defendants moved to decertify the class. The trial court attempted to balance judicial economy with defendants' concerns by ordering that claims involving the same facility, the same guards, and the same time periods would be tried together. The trial court properly exercised its discretion under MCR 2.505(A)(1), which states that a court may order a joint trial "[w]hen actions involving a substantial and controlling common question of law or fact are pending before the court . . . ." Moreover, defendants did not act promptly in pursuing this issue. The court addressed the bundling of claims in July 2007, yet defendants waited until days before trial, in January 2008, to ask the court to sever the claims. See *Bordeaux v Celotex Corp*, 203 Mich App 158, 162-163; 511 NW2d 899 (1993) (discussing the timeliness of severance requests). The trial court was within its discretion in ruling that the severance request "should have been [made] right at the beginning."

Defendants next argue that the jury verdict was excessive and against the great weight of the evidence and that remittitur is appropriate.[8] Defendants' argument in support of this claim, however, is muddled. Instead of focusing on the size of the jury's award, defendants focus on the facts that (1) defendants' counsel was not allowed to inform the jury that the claims against the individual assault perpetrators had been dismissed at plaintiffs' request and (2) the jury was allowed to hear testimony concerning sexual assaults that many of the plaintiffs endured before their incarceration. Evidently, defendants are arguing that the verdict might have been lower if they had been able to disclose the dismissal of the perpetrators and if the evidence of pre-incarceration sexual assaults had been excluded. However, plaintiffs did not, in actuality,

---

[7] We note that the trial court declined to order individual complaints but did not provide specific reasoning, on the record, for the ruling.

[8] We review a trial court's decision concerning a motion for a new trial for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

request that the individual perpetrators be "dismissed"; they instead indicated that they would not be requesting damages against any of the individual guards. Therefore, the court acted properly in declining to allow defendants to mention a "dismissal." Moreover, the court stated "fine" when defendants indicated that they wanted to argue to the jury that it must focus not on the damages caused directly by the individual officers but on the damages caused by MDOC, McGinnis, and Yukins. We simply cannot discern how the trial court's actions somehow provided a basis for remittitur.

Nor do we discern any basis for relief with regard to the evidence of pre-incarceration sexual assaults. First, defendants did not object to this evidence at trial and has therefore waived the issue surrounding its admission. *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987). "[T]here is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right." *Id*. at 228-229 (internal citations and quotation marks omitted). Second, the Human Rights Watch report indicated that women with histories of physical or sexual abuse are often targeted by officers, and Yukins agreed that women with histories of abuse are prone to re-victimization by males in authority. Yukins additionally testified that she did not take any steps to identify who these women were. Therefore, the testimony regarding pre-incarceration abuse was relevant to issues central to the case. Lastly, it is simply not clear to us how the admission of this evidence should result in remittitur, especially given that the trial court read the standard jury instructions regarding preexisting injuries.

Defendants next argue that the trial court erred in instructing the jury, as a discovery sanction, that notice of the hostile environment was to be presumed. On October 1, 2007, the court issued an order indicating that defendants had

> destroyed or failed to retain documents including, but not limited to, grievances filed by women prisoners complaining of sexual harassment, privacy violations and sexual misconduct by MDOC staff; grievance logs and reports; telephone monitoring logs; minutes of staff meetings for facilities housing women prisoners; and other monthly reports, log books and documents relevant to [p]laintiff's claims and [d]efendants' defenses. Defendants took such action despite their knowledge of [p]laintiffs' request for such documents, this [c]ourt's orders for the production of these documents and the [MDOC's] own practice of requiring maintenance of documents related to pending litigation.

The court further stated:

> It shall be presumed that [p]laintiffs have factually proven the necessary component of notice on any claim or issue requiring such proofs, subject to [d]efendants' ability to demonstrate that their contempt, failure to timely produce documents and/or inability to locate documents and/or their destruction of documents, has not, in any way, prejudiced [p]laintiffs' ability to demonstrate any element of notice on any particular claim or issue. Such proofs by [d]efendants shall be limited to referencing documents which have been produced in this case, prior to August 21, 2007. Should [d]efendants be able to demonstrate that their failures related to a specific notice issue were not material, then the notice issue shall become a question of fact for the jury.

The verdict forms submitted to the jury stated: "In this case it is presumed that defendants had notice of a sexually-hostile environment during the relevant period of time."

Defendants claim that they did not produce the documents in question because "[p]laintiffs had never filed any grievances" and therefore the documents never existed. However, as noted above, the trial court's order referred to more than just "grievances," rendering defendants' appellate argument disingenuous. More importantly, the verdict forms submitted to the jury contained the following question: "Do you independently find, based on the evidence in this case, that defendants had notice of a sexually-hostile prison environment?" The jurors answered in the affirmative in each plaintiff's case. Under the circumstances, there is simply no basis for appellate relief.

Defendants next argue that the trial court erred in prohibiting them from calling Nancy Zang, MDOC's special administrator for women prisoners, as a witness. The trial court disallowed her testimony because defendants had not listed her on their witness list. MCR 2.401(I)(1) provides that parties must provide witness lists by the deadline imposed by the court. MCR 2.401(I)(2) provides that "[t]he court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." It is within the trial court's discretion to prohibit a non-listed witness from testifying. *Carmack v Macomb Co Comm College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

Defendants claim that they did list Zang as a witness on their witness list. However, defendants are referring to the initial witness list filed in 2003; Zang was one of thousands of witnesses listed. The court later required the parties to identify which witnesses would testify at the first bundled trial. Defendants did not list Zang. Moreover, the discussion concerning Zang that occurred on the record is sparse concerning the content of Zang's proposed testimony. The court stated the following in summarizing a discussion that occurred at the bench:

> And my recollection was that you [defense counsel] indicated that Director McGinnis hadn't remembered some things as clearly as you thought he might or was unclear on some things and so you wanted to bring Ms. Zang. And I indicated he was called as a hostile witness. He was your representative, he was your director and that would not be fair under those circumstances to allow Ms. Zang.

Defense counsel then added that "there were things brought up with the experts" that he wanted Zang to discuss. Given this sparse offer of proof, we find no basis for reversal. See *Simonetti v Rinshed-Mason Co*, 41 Mich App 446, 457; 200 NW2d 354 (1972).

Defendants lastly argue that the trial court erred in prohibiting defendants from calling one of the plaintiffs as a witness during the presentation of defendants' proofs. However, defendants (1) do not cite to the record in raising this issue and (2) provide no information regarding *why* they wanted to recall a plaintiff. Under these circumstances, defendants have waived this issue due to inadequate briefing. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). At any rate, the trial court was within its discretion in disallowing the testimony. See *Linsell v Applied Handling, Inc*, 266 Mich App 1, 22; 697 NW2d

913 (2005) ("the mode and order of interrogation of witnesses is within the trial court's discretion"). Defense counsel stated the following when asked why he wanted to recall a plaintiff:

> I, I – well, the issue was her testimony the, the . . . . Was her parole suspended because of the – she said it was taken away from her and she didn't know why. And I wanted to – I got the parole documents that show that it was suspended because she had an outstanding criminal warrant for robbery and . . . cocaine possession.

The court acted properly in concluding that counsel would not be allowed to recall this witness because he had already had the chance to cross-examine her. *Id*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter