SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 47EFM

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GRETCHEN KENNEDY,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE OFFICER ERIC LEE OF THE 20TH POLICE PRECINCT, NEW YORK CITY POLICE OFFICER BRIAN MULKERN OF THE 20TH POLICE PRECINCT, NEW YORK CITY POLICE SERGEANT SIOBHAN O'KEEFE OF THE 20TH POLICE PRECINCT SHIELD # 6,

Defendants.

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INDEX NO. 150284/2015

MOTION DATE 05/24/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

HON. PAUL A. GOETZ:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for SET ASIDE VERDICT.

Upon the foregoing documents, it is decided as follows:

In this excessive force, *Monell* claim case, defendants (also referred to as the "City") move to set aside the jury's verdict pursuant to CPLR § 4404(a) and grant judgment in favor of the defendants on the grounds that 1) the amount of force used by the officers against plaintiff on April 12, 2014, was reasonable as a matter of law, 2) there is insufficient evidence to support plaintiff's *Monell* claim as a matter of law and 3) plaintiff failed to establish a causal connection between the use of force and the alleged unconstitutional policy or in the alternative, if judgment is not granted in defendants favor, granting a new trial on these grounds as the verdict was against the weight of the evidence. Defendants further move to set aside the jury's verdict and grant judgment in favor of Sergeant O'Keefe claiming she is entitled to qualified immunity. Defendants also move to set aside the jury's verdict as to Sergeant O'Keefe and the City of New

York claiming they were denied a fair trial. Finally, if the jury's verdict as to defendants' liability is not set aside, defendants move to set aside the jury's award for damages unless plaintiff accepts a reduced award because the jury's damages award deviates materially from other damages awarded in similar cases. Plaintiff opposes arguing that there was enough evidence to support the jury's determinations on liability and damages.

After a three-week trial, the jury found, *inter alia*, that New York City Police Department ("NYPD") officers used excessive force on plaintiff on April 12, 2014, and that the excessive force used by NYPD officers was a substantial factor in causing plaintiff's injuries; that Sergeant O'Keefe used excessive force on plaintiff on April 12, 2014, and that the excessive force she used was a substantial factor in causing plaintiff's injuries; that the City had a policy of deliberate indifference with respect to the training and supervision of its police officers' interactions with emotionally disturbed persons, and that the City's policy of deliberate indifference led directly to the deprivation of plaintiff's Fourth Amendment right to be free of excessive force on April 12, 2014. The jury awarded plaintiff $300,000 for pain and suffering to the date of the verdict, $100,000 for future pain and suffering for a period of 10 years, and $500,000 in punitive damages as against Sergeant O'Keefe.

TESTIMONY AND EVIDENCE AT TRIAL

Sergeant O'Keefe and Officer Irwin's testimony

Sergeant O'Keefe and Officer Irwin responded to a 911 call on April 11, 2014, at about 3:22 a.m. from a woman at 33 West 69th Street, who said that her neighbor was trying to kick down her door. The 911 dispatcher issued a correction two minutes later that said her neighbor was trying to kick down her own door. According to Sergeant O'Keefe, she and Officer Irwin

never received that correction notwithstanding it appearing on NYPD's ICAD printout, a report of incoming calls to 911(Trial transcript ["Tr"] 166 – 173, Ex B).

When Sergeant O'Keefe and Officer Irwin arrived at 33 West 69th Street, they heard screaming and someone from a second-floor window indicated they should come into the building. Before entering the building, Sergeant O'Keefe drew her taser (Tr 184 – 187) and when she and Officer Irwin entered the building in addition to the screaming from an upper floor they heard banging (Tr 396). Sergeant O'Keefe and Officer Irwin first saw plaintiff as they were ascending the steps from either the first to second floor or the second to third floor. Plaintiff was leaning over the third-floor railing and said to Sergeant O'Keefe and Officer Irwin that the person they were looking for was upstairs or she may have said you must be here for the crazy lady (Tr 294 – 294 & 870 - 871). The officers observed that plaintiff was only wearing a tee-shirt, naked from the waist down and shoeless, and was pale and sweating (Tr 295 – 296 & 873). While the officers were walking up the stairs, Sergeant O'Keefe re-holstered her taser and called for an ambulance (Tr 308 & 311). Initially, the officers were called to the scene to investigate a possible crime, but the call was subsequently reclassified as an EDP – emotionally disturbed person - and the Emergency Services Unit ("ESU") was dispatched to the scene (Ex B1).

Sergeant O'Keefe was concerned that plaintiff might jump or fall over the stairway railing (Tr 296). Officer Irwin was the first to engage plaintiff by asking her to go downstairs with them to the ambulance. Plaintiff responded by yelling and screaming at him, so Officer Irwin let Sergeant O'Keefe take over the questioning of plaintiff (Tr 874). Sergeant O'Keefe first asked plaintiff to step away from the railing; plaintiff responded by screaming at her and running from one end of the hallway to the other and kicking an apartment door (Tr 296). Sergeant O'Keefe asked plaintiff her name, where her clothes were, whether she lived in the

building, and whether she needed help, but plaintiff did not respond (Tr 298). Sergeant O'Keefe asked plaintiff to go to the other end of the hallway and sit down and plaintiff complied (Tr 297 & 301). The officers knocked on an apartment door on the third floor where plaintiff was and asked the woman who answered the door whether she knew plaintiff; the woman responded that she did not and closed her door (Tr 301 & 875).

Meanwhile, plaintiff resumed kicking the door at the end of the hallway and the officers became concerned that she might injure herself (Tr 302 & 878). Plaintiff threatened to kick Officer Irwin and this concerned Sergeant O'Keefe but Officer Irwin testified that notwithstanding plaintiff hit his legs a couple of times (Tr 879) he was not concerned for his safety (Tr 302 & 837). After plaintiff kicked the apartment door again, Sergeant O'Keefe and Officer Irwin determined it was time to restrain her; Officer Irwin was able to place one of plaintiff's hands in handcuffs but was unable to place the other hand in the handcuffs because plaintiff was flailing her free arm and kicking (Tr 302 – 303 & 878). Sergeant O'Keefe did not attempt to assist Officer Irwin in his struggle to handcuff plaintiff by grabbing plaintiff's free arm (Tr 229 – 230). At some point during the struggle, plaintiff bit Officer Irwin. Officer Irwin does not remember when plaintiff bit him, but Sergeant O'Keefe testified plaintiff bit Officer Irwin before Sergeant O'Keefe tased plaintiff (Tr 304 – 305 & 879).

In response to plaintiff refusing to allow her other hand to be placed in handcuffs, Sergeant O'Keefe took her taser out again and told plaintiff that if she refuses to be handcuffed she will be tased. Sergeant O'Keefe then attempted to tase plaintiff, but plaintiff struck or kicked the taser and one of the taser darts went up towards the ceiling and the other taser dart went into Sergeant O'Keefe's left hand (Tr 303).

While Sergeant O'Keefe removed the wire connecting the taser to the dart in her hand, Officer Irwin attempted to use his pepper spray on plaintiff, but the canister failed to spray so he performed a controlled takedown of plaintiff to the floor (Tr 304 - 303 & 880 - 881). Officer Irwin is 6'1" tall and weighs approximately 200 pounds and plaintiff is 5'6" and weighs 125 pounds (Tr 851 & Ex 11). Sergeant O'Keefe testified that she then used the taser on plaintiff in touch stun mode fewer than three times (Tr 73). An NYPD taser data document shows that the taser was discharged seven times in less than a minute and a half (Ex C). Additional officers arrived on the scene and assisted Officer Irwin in placing plaintiff's other hand in the handcuffs (Tr 861). Plaintiff continued to scream and yell and was removed to a waiting ambulance for transport to Weill Cornell hospital[1] (Tr 624).

Sergeant O'Keefe testified that using the taser on plaintiff seven times would constitute excessive force (Tr 96) and Officer Irwin testified that using the taser on plaintiff more then three times would constitute excessive force (Tr 857 – 858).

Plaintiff's testimony

Plaintiff testified that on April 11, 2014, she was distraught because she had learned that a second friend in the span of 12 months had committed suicide. She went to a café and talked on her phone with another friend about what had happened. While at the café, plaintiff drank a bottle of wine and a "few" drinks and acknowledges that she became intoxicated. She then left the café and walked the two blocks back to her apartment, arriving home around 12:30 a.m. Plaintiff's apartment at the time was on the third floor of a walk-up building on the upper west

[1] NY Mental Hygiene Law section 9.41 authorizes the NYPD to take an individual into custody for admission into a hospital for immediate observation and treatment if the individual appears to be mentally ill and is behaving in a manner likely to result in serious harm to themselves or others.

side of Manhattan and she had only lived there a few weeks. Upon arriving at her apartment plaintiff fell asleep on the sofa and about 2 hours later woke up to use the bathroom. When she was in the bathroom plaintiff removed her jeans and underwear and then headed to her bedroom wearing only a tee shirt. While heading to her bedroom plaintiff passed the front door to the apartment and heard a noise in the hallway. She opened the door of her apartment to look down the stairs while holding the door open with her foot, but she lost her hold on the door and it closed and locked automatically. Plaintiff then started banging the door with her shoulder and kicking it. After some time, plaintiff went down to the lobby of the building hoping she might be able to waive someone down on the street to assist her, but she did not see anyone outside and returned to her floor where she banged her apartment door again (Tr 474 – 483).

A couple minutes after plaintiff returned to the third floor of her building, two NYPD officers arrived at the building while plaintiff was jiggling the doorknob to her apartment door and ordered her to "freeze" or "stop". Plaintiff turned to face the officers while trying to cover herself. In response Officer Irwin immediately went to plaintiff and tried to force her hands behind her back and Sergeant O'Keefe joined in the attempts to restrain plaintiff. While Officer Irwin held plaintiff's hands behind her back, Sergent O'Keefe knocked on a neighbor's door and when the neighbor opened the door Sergeant O'Keefe asked her if she knew plaintiff. After the neighbor responded that she did not know plaintiff, the neighbor closed her apartment door. Plaintiff, confused and frightened, attempted to break free from the officers. In response to plaintiff's attempts to evade restraint, Sergeant O'Keefe took out her taser. Plaintiff responded to seeing a weapon pointed at her by kicking it out of Sergeant O'Keefe's hand. After plaintiff kicked the taser, Officer Irwin took plaintiff to the floor with her hands behind her back. While plaintiff was on the floor with Officer Irwin on top of her holding her down, she was shocked

with the taser in stun mode on her back. Plaintiff did not recall the precise number of times she was tasered because she was in and out of consciousness, but she did recall experiencing "real agony" from "getting hit that many times." At some point after she was tasered the original two officers were replaced by four other officers. Those four officers beat plaintiff with their hands and feet while plaintiff screamed for help. After beating plaintiff, the officers then dragged her down the stairs to the lobby where she was put on a stretcher, taken out to the street and placed in an ambulance. The ambulance took plaintiff to Weill Cornell hospital (Tr 487 – 494).

At Weill Cornell plaintiff was put in the psychiatric ward where she admits that she yelled at the nurses. The next day when plaintiff looked in the mirror she noticed that she had a torn earlobe notwithstanding that she had not been wearing earrings and that she had two black eyes. Photographs of plaintiff taken two days after her encounter with NYPD and entered into evidence show plaintiff's black eyes, and torn earlobe, bruises on her arms and legs, and burn marks on her back. Plaintiff's Weill Cornell records document plaintiff sustained a facial trauma, a contusion to her forehead, ecchymosis and a laceration to her left ear and had dried blood around her mouth. (Tr 495 – 502, Exs. 1A – K & 10).

NYPD Patrol Guide

Excerpts from the NYPD Patrol Guide were entered into evidence (Ex 4) including:

Procedure No. 203-11- Use of Force

ECESSIVE FORCE WILL NOT BE TOLERATED (capitals and underscore in original).

All member of the service at the scene of a police incident must: b. Use minimum necessary force . . . (underscore in original).

Procedure No. 216-05 - Mentally Ill or Emotionally Disturbed Persons

EMOTIONALLY DISTURBED PERSON (EDP) – a person who appears to be mentally ill or temporarily deranged and is conducting [themselves] in a manner which a police officer reasonably believes is likely to result in serious injury to [themselves] or others (capitals and underscore in original).

ZONE OF SAFETY – The distance to be maintained between the EDP and the responding member(s) of the service. This distance should be greater than the effective range of the weapon (other than a firearm), and it may vary with each situation (e.g., type of weapon possessed, condition of EDP, surrounding area, etc.). A minimum distance of twenty feet is recommended. An attempt will be made to maintain the "zone of safety" if the EDP does not remain stationary. . . (underscore in original).

b. If EDP is unarmed, not violent and is willing to leave voluntarily:

(1) EDP may be taken into custody without the specific direction of a supervisor.

c. In all other cases, if EDP's actions do not constitute an immediate threat of serious physical injury or death to [themselves] or others:

(1) Attempt to isolate and contain the EDP while maintaining a zone of safety until arrival of patrol supervisor and Emergency Service Unit personnel.

(2) Do not attempt to take EDP into custody without the specific direction of a supervisor. . .

(underscores in original).

Procedure No. 212-117 – Use of Conducted Energy Devices (CED)

USE OF CONDUCTED ENERGY DEVICE (CED)

14. Assess situation and determine if the use of a CED would be appropriate. . .

When a CED is used against a subject it shall be for one standard discharge cycle and the member using the CED must then reassess the situation. Only the minimum number of cycles necessary to place the subject in custody shall be used. In no situation will more than three standard discharge cycles be used against any subject. . .

(italics in original).

Experts and treating psychologist's testimony

Plaintiff's expert in police procedure and practices, William Bayer, opined that Sergeant O'Keefe's use of the taser constituted excessive force and that the amount of force used to put plaintiff in handcuffs was not the minimum amount of force necessary to do so (Tr 916, 945 – 947). Mr. Bayer testified that the hallway where Officer Irwin and Sergeant O'Keefe encountered plaintiff was an ideal place to isolate and contain her (Tr 928 – 929). Mr. Bayer further testified that plaintiff did not pose an immediate threat of serious physical injury (Tr 931) and that Officer Irwin and Sergeant O'Keefe's actions led to an escalation of the situation with plaintiff when Officer Irwin tried to handcuff plaintiff (Tr 935). Mr. Bayer opined that the officers should have given plaintiff some space and an opportunity to calm down to bide time for the ESU to arrive, a unit with specialized training in handling EDP's (Tr 933 – 934).

Defendants' expert in police procedure, John Monaghan, opined that Sergeant O'Keefe acted reasonably under the circumstances and with restraint and that no member of the NYPD used excessive force on plaintiff (Tr 1087, 1136 – 1137). Mr. Monaghan testified that when Sergeant O'Keefe and Officer Irwin were in the hallway with plaintiff, she was somewhat contained but that did not matter if she was about to harm herself. Mr. Monaghan further testified that plaintiff did not pose an immediate threat of serious physical injury to herself or others (Tr 1102 - 1103). Mr. Monaghan opined that none of the officers used excessive force

against plaintiff and that Sergeant O'Keefe and Officer Irwin acted reasonably under the circumstances (Tr 1136 – 1137). Defendants' toxicologist, Dr. Michael Holland opined that plaintiff was highly intoxicated at the time of her encounter with the NYPD (Tr 1057 & 1078).

Plaintiff's treating neuropsychologist, Dr. Hannah Geller, testified that she treated plaintiff for approximately a year, starting on April 24, 2014, at 25 to 26 sessions and diagnosed her with a mild brain injury and post-traumatic stress syndrome ("PTSD") (Tr 653, 661 & 671). Dr. Geller strongly recommended that plaintiff continue treatment when plaintiff stopped seeing her (Tr 682). In March, 2019, Dr. Geller evaluated plaintiff again and determined that plaintiff continues to struggle with PTSD (Tr 683).

Defendants called an expert in psychiatry to testify, Dr. Michael Aronoff, who after reviewing plaintiff's medical records and meeting with plaintiff, determined that she did not exhibit symptoms of PTSD but rather symptoms of a longstanding personality disorder (Tr 736, 741, 744, 746).

NYPD Office of the Inspector General (OIG) Reports

Plaintiff entered into evidence three NYPD-OIG reports dated, March 31, 2015, October 1, 2015, and December 1, 2015. (Exs 6B, 6C and 7 respectively). The NYPD-OIG is the "oversight office charged with investigating, reviewing, studying, auditing and making recommendations relating to the operations, policies, programs and practice of the NYPD " (Ex 6B pg 1). The NYPD-OIG after, among other things, analyzing excessive force cases during the period 2010 to 2014, assessing the NYPD patrol guide procedures on the use of force, and reviewing the policies of other police departments, reached several conclusions regarding the NYPD's use of force policies, practices, training and discipline (Ex 6C pg 3). "NYPD's current use-of-force policy is vague and imprecise, providing little guidance to individual officers on

what actions constitute force. NYPD's current use-of-force Patrol Guide procedure, which is barely more than a page of text, is completely silent on what actions constitute 'force'. The patrol guide likewise prohibits 'excessive force' while offering no clarity on what constitutes 'excessive force.' Officers are given few clear-cut rules when determining whether their actions constitute force and whether such actions must be reported. As a result, NYPD should adopt a more precise use-of-force patrol guide procedure that includes greater clarity on what is meant by force, excessive force, and deadly physical force" (*id.*).

Regarding de-escalation of NYPD encounters with the public the NYPD-OIG concluded that the "NYPD's patrol guide does not properly instruct officers to de-escalate encounters with the public. Considering NYPD's stated commitment to de-escalation training, the overall benefits of such strategies in policing, and the strides that have been made in updating the policies of peer law enforcement agencies, the department should include de-escalation principles as part of its use-of-force procedures in the patrol guide" (*id.*).

In addition, "NYPD training does not adequately focus on de-escalation. There is little to no substantive focus on de-escalation in NYPD's training programs. The Department should bolster its efforts to train officers in de-escalation and do more to reinforce its importance. NYPD should add a specific police academy course on de-escalation and incorporate such tactics more heavily in its classroom and practical training environments" (Ex 6C pg 4).

"As recognized in New York City and across the nation, de-escalation policies and tactics have the potential to greatly mitigate the use of excessive force by police officers. De-escalation tactics have a proven track record of not only limiting force, but also ensuring officer safety. . . OIG-NYPD's investigation suggests that NYPD officers rarely use de-escalation and the

Department's policies and training do not adequately address de-escalation as a useful tactic for officers in the field" (Ex 6C pg 28).

DISCUSSION

Defendants argue in support of that portion of their motion pursuant to CPLR § 4404 (a) seeking to set aside the jury's verdict and for a judgment as matter of law in their favor that the officers use of force was reasonable and that the jury's verdict on the *Monell* claim is unsupported by the evidence. Plaintiff opposes, arguing that the jury's verdict is supported by valid lines of reasoning based on the evidence presented at trial.

When determining whether to set aside a jury's verdict and grant a judgment as a matter of law to the movant, courts apply the "utterly irrational" test (*Killon v Parrotta*, 28 NY3d 101, 104 [2016]. "If the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, then [the] Court may not conclude that the verdict is as a matter of law not supported by the evidence" (*Turturro v City of New York*, 28 NY3d 469, 483 [2016] [internal quotation marks omitted]). The "issue is limited to whether there is a valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial" (*id.* [internal quotation marks omitted]). In other words, the court "may not disregard a jury verdict as against the weight of the evidence unless the evidence so preponderate[s] in favor of the moving party that it could not have been reached on any fair interpretation of the evidence" (*Killon*, 28 NY3d at 107 [internal quotation marks omitted]). In contrast to the stricter "utterly irrational" test, "the question of whether a jury verdict is against the weight of the evidence involves a less rigorous standard and is essentially a discretionary and

factual determination involving a balancing of many factors" (*Yalkut v NY*, 162 AD2d 185,188 [1st Dept 1990]; *see also Candela v NYS Sch. Constr. Auth.*, 97 AD3d 507, 509 [1st Dept 2012]).

Excessive Force

For plaintiff to prevail on her excessive force claim, the evidence at trial must show that the officers' use of force exceeded the Fourth Amendment's objective reasonableness standard (*Pacheco v City of New York*, 104 AD3d 548, 549 – 550 [1st Dept 2013]; *accord Elias v City of New York*, 173 AD3d 538 [1st Dept 2019]). As the Court in *Elias* observed, when considering the reasonableness of officers' use of force, several factors must be considered:

> Use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. The determination of an excessive force claim requires consideration of all of the facts underlying the arrest, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect was actively resisting arrest.

(*Elias*, 173 AD3d at 539 [internal citations and quotation marks omitted]).

In *Pacheco* the Court considered facts similar to the facts presented here. The plaintiff's girlfriend called 911 because he had suffered one or more seizures. After EMTs examined plaintiff and told him he needed to be hospitalized, he attacked the personnel attempting to aid him. After six or seven responders restrained plaintiff into an EMT transport chair, a sergeant verbally tried to calm him and when unsuccessful, subdued him with a taser (*Pacheco*, 104 AD3d at 549). The First Department held that "given plaintiff's repeated outbursts and the police officers' testimony that he was emotionally disturbed, it was reasonable to taser him so that he could be hospitalized". In reaching its decision the First Department relied on the NYPD

Patrol Guide procedure allowing officers to use a taser to restrain an EDP who threatens injury to himself or others and determined that the officer's actions were in accordance with acceptable police practice (*id.* at 550). Putting aside that the First Department apparently gave its imprimatur to officers tasering an already restrained EDP, there are significant material facts in this case that distinguish it from *Pacheco*.

Here, based upon the evidence presented at trial, the jury could find that plaintiff did not pose an immediate threat of serious physical injury to Sergeant O'Keefe and Officer Irwin or to herself. Plaintiff was wearing only a tee shirt and thus, was unable to conceal any weapons or other objects that could be used against the officers. While the officers testified that plaintiff threatened to kick Officer Irwin and indeed, she made contact with Officer Irwin a couple of times, Officer Irwin testified that he was not concerned for his safety. Likewise, while the officers testified that they were concerned that plaintiff might injure herself when she was banging and kicking the door, the jury also heard from Sergeant O'Keefe that plaintiff sat down when requested to do so and plaintiff's testimony that Officer Irwin immediately tried to restrain plaintiff after telling her to "freeze" or "stop". Further, defendants' expert in police procedure, John Monaghan testified that plaintiff was "somewhat" contained by the officers and that she did not pose an immediate threat of serious physical injury to herself or others. Plaintiff's expert in police procedure, William Bayer, testified that the hallway where the officers found plaintiff was an ideal place to isolate and contain her and that by attempting to handcuff plaintiff, the officers escalated the encounter. Mr. Bayer concluded that the officers should have given plaintiff some space and time to calm down and that they should have waited for the ESU to arrive. Hearing this conflicting testimony, the jury could reasonably conclude that plaintiff was not an immediate threat of serious injury to the officers or to herself.

There is no dispute that plaintiff was actively resisting being restrained but, as just mentioned, plaintiff's police expert testified that Officer Irwin and Sergeant O'Keefe should not have even attempted to restrain plaintiff, under the circumstances they should have waited for the ESU to arrive and let them take her into custody. But even assuming that Sergeant O'Keefe and Officer Irwin lawfully undertook to restrain plaintiff, the jury could still find that the amount of force employed to restrain plaintiff was objectively unreasonable under the circumstances and therefore, excessive.

After plaintiff kicked or hit Sergeant O'Keefe's taser as it was being discharged, causing one of the darts to embed into Sergeant O'Keefe's hand, Officer Irwin, who weighs 200 pounds, took plaintiff, who weighs 125 pounds, to the floor. There is conflicting evidence on how many times Sergeant O'Keefe then used her taser on plaintiff in touch stun mode; fewer than three times according to Sergeant O'Keefe or seven times according to the taser discharge report. It was for the jury to determine Sergeant O'Keefe's credibility, and great deference is accorded their determinations in this regard (*KBL, LLP v Comm. Counseling & Mediation Servs.*, 123 AD3d 488, 489 [1st Dept 2014]). Considering the photographs entered into evidence depicting multiple burn marks on plaintiff's back and the taser discharge report, a reasonable inference that the jury could draw (*id.*; *Udeogalanya v Kiho*, 169 AD3d 957, 958 [2nd Dept Feb 20, 2019]), is that Sergeant O'Keefe was angry that plaintiff caused a taser dart to pierce her hand and reacted by tasering plaintiff four to seven times, thereby rejecting Sergeant O'Keefe's testimony that she only tased plaintiff fewer than three times. Indeed, plaintiff's police procedure expert testified that the way the taser was used against plaintiff constituted excessive force, Officer Irwin conceded that using the taser on plaintiff more than three times would constitute excessive force

and Sergeant O'Keefe conceded that using the taser on plaintiff seven times would constitute excessive force.

Accordingly, when the evidence at trial is viewed in a light most favorable to plaintiff and according her the benefit of ever reasonable inference, the jury's verdict that the NYPD officers used excessive force on her was not utterly irrational nor contrary to the weight of the evidence and therefore, defendants' motion for a judgment in their favor or for a new trial on this claim must be denied.

Monell claim

To establish a claim of deliberate indifference on the part of the City under 42 USC § 1983,[2] plaintiff must meet three requirements. First, plaintiff must establish that the City knows to a moral certainty that their officers will confront a given situation (*Walker v NYC*, 974 F2d 293, 297 [2nd Cir 1992] *see also Valdiviezo v Boyer*, 752 Fed Appx 29, 31 [2nd Cir 2018]). Failure to train for rare or unforeseen events does not constitute deliberate indifference on the part of the City (*Walker*, 974 F2d at 297). Second, plaintiff must establish "that the situation either presents the [officers] with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of [officers] mishandling the situation" (*id.*). Third, plaintiff must establish "that the wrong choice by the [officer] will frequently cause the deprivation of citizen's constitutional rights" (*id.*).

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[2] Referred to as a *Monell* claim after *Monell v NYC Dept. of Social Services*, wherein the Supreme Court established that a municipality could be held liable under section 1983 for its "execution of government policy or custom" (436 US 658, 694 [1978]). In *Oklahoma City v Tuttle*, the Supreme Court held that a municipality could be held liable under section 1983 for a policy of failing to properly train and supervise police officers (471 US 808 [1985]). An inadequate training claim only triggers municipal liability where "the failure to train amounts to deliberate indifference to the rights" of those with whom municipal employees will come into contact (*City of Canton v Harris*, 489 US 378, 388 [1989]).

The section in the NYPD patrol guide on how to interact with EDPs establishes that the City knew to a moral certainty that NYPD officers would encounter EDPs, the first element of a deliberate indifference claim.

As to the second element of a deliberate indifference claim, defendants argue that the evidence at trial fails to establish a history of NYPD officers mishandling other encounters with EDP's. However, the second element may also be satisfied by evidence that NYPD Officers will be faced with a difficult choice that training would make less difficult. The December, 2015 NYPD-OIG report concluded that while the NYPD patrol guide prohibits excessive force, it fails to clarify what constitutes excessive force. The December, 2015 OIG report recommends that NYPD devise a more precise use-of-force procedure. Similarly, the December, 2015 OIG report concludes that the patrol guide does not properly instruct officers to de-escalate encounters with the public, there is little to no training on de-escalation techniques, notwithstanding NYPD's stated commitment to de-escalation training, and officers rarely use de-escalation techniques. The report recommends including de-escalation principles as part of its use-of-force procedures in the patrol guide and adding a specific police academy course on de-escalation and incorporate and emphasize these techniques heavily in the classroom and through practical training. The report further concludes that de-escalation tactics have a proven track record of mitigating excessive force by officers and helping to ensure officer safety. These portions of the NYPD-OIG report, among others, and reasonable inferences that may be drawn from them, as well as the testimony of plaintiff's expert in police procedure and practices that rather than de-escalating their encounter with plaintiff, the NYPD escalated the situation, establish that NYPD officers when encountering an EDP are faced with a difficult choice of how to interact with the EDP and

that guidance and training on use-of-force and de-escalation techniques would make the encounters with EDPs less difficult.

Regarding the third requirement of a deliberate indifference claim, defendants argue there is no nexus between the NYPD policy of deliberate indifference and the injuries alleged because plaintiff undercuts her argument by arguing that Sergeant O'Keefe failed to follow the NYPD patrol guide. However, while one of the sections plaintiff argues Sergeant O'Keefe violated pertains to EDPs, as the December, 2015 NYPD-OIG report suggests, these procedures and the training pertaining to EDPs are inadequate because they do not sufficiently address use-of-force and de-escalation techniques. Therefore, the jury could rationally conclude both that Sergeant O'Keefe and other officers violated the NYPD patrol guide section addressing EDPs based on the testimony at trial and that the policy and training for interacting with EDPs was inadequate based on the conclusions and recommendations of the NYPD-OIG reports. The evidence of inadequate training is sufficient to imply a causal connection between the City's policy of inaction and the injuries suffered by plaintiff (*cf Bastista v Rodriguez*, 702 F2d 393, 398 [2nd Cir 1983]). The causal connection is further established by the October, 2015 OIG report's conclusion that a more precise use-of-force procedure would provide greater clarity as to what is excessive force and the December, 2015 OIG report's conclusion that incorporating de-escalation policies have the potential to greatly mitigate the use of excessive force by the NYPD. In other words, a rational inference the jury may draw from these conclusions is that the failure to de-escalate encounters with EDP's and the failure to provide a precise use-of-force procedure will frequently cause the use of excessive force, a deprivation of an EDP's section 1983 rights.

Accordingly, when the evidence at trial is viewed in a light most favorable to plaintiff and according her the benefit of ever reasonable inference, the jury's verdict that the City had a

policy of deliberate indifference with respect to the training and supervision of its police officers' interactions with EDPs, and that the City's policy of deliberate indifference led directly to the deprivation of plaintiff's Fourth Amendment right to be free of excessive force on April 12, 2014, was not utterly irrational nor contrary to the weight of the evidence and therefore, defendants' motion for a judgment in their favor or for a new trial on this claim must be denied.

Qualified Immunity

Defendants argue that Sergeant O'Keefe is entitled to qualified immunity because her actions failed to violate clearly established statutory or constitutional rights of which a reasonable person would have known. Plaintiff argues that Sergeant O'Keefe waived the qualified immunity defense because she failed to request special interrogatories to resolve necessary issues of fact and in any event Sergeant O'Keefe's actions violated a clearly established right known to officers of reasonable competence.

"Even where an officer is found to have used excessive force, [ ] the doctrine of qualified immunity will shield that officer from liability for damages if [their] conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Outlaw v City of Hartford*, 884 F3d 351, 366 [2nd Cir 2018] [internal quotation marks and brackets omitted]). "The constitutional prohibition against use of excessive force in making an arrest had been established long before" plaintiff's encounter with the NYPD in April, 2014 (*id.* at 367). "Where the right at issue in the circumstances confronting police officers was clearly established but was violated, the officer will still be entitled to qualified immunity if it was objectively reasonable for [them] to believe that [their] acts did not violate those rights" (*id.*). Whether an officer's conduct was objectively reasonable, i.e. whether a reasonable officer in the officer's position would reasonably believe their conduct did not violate a clearly

established statutory or constitutional right, is a mixed question of law and fact (*id.*). "If there is a dispute as to the material historical facts, the factual questions must be resolved by the factfinder" (*id.* internal quotation marks, ellipses and brackets omitted]). And, since qualified immunity is an affirmative defense, with the burden of proof on the defendant, to the extent that a particular finding of fact is essential to the defendant's qualified immunity defense "it is incumbent on the defendant to request that the factfinder be asked the pertinent question" (*id.* [internal brackets omitted]). Where the case is tried before a jury, "[i]f the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding[s]" (*Zellner v Summerlin*, 494 F3d 344, 368 (2nd Cir 2007).

The City misses part of the question that must be resolved; it is not only, as the City contends, whether a reasonable officer in Sergeant O'Keefe's position would have used a taser on plaintiff, but also, whether a reasonable officer in Sergeant O'Keefe's position would have used the taser on plaintiff the number of times Sergeant O'Keefe used the taser on plaintiff. But the number of times Sergeant O'Keefe used the taser on plaintiff was in dispute. The factual dispute of whether Sergeant O'Keefe used her taser on plaintiff two or seven times or some number in between must be resolved by the jury through the use of special interrogatories. However, the City did not request special interrogatories to resolve this contested issue of fact, the resolution of which would allow the court to then determine whether Sergeant O'Keefe's use of the taser was objectively reasonable. The court cannot resolve the factual dispute as to how many times Sergeant O'Keefe used her taser on plaintiff. Because the City did not request that the jury resolve the question of fact necessary to determine whether qualified immunity applies in this case, the City has not carried its burden and qualified immunity for Sergeant O'Keefe

must be denied (*Bah v City of NY*, 319 F Supp 3d 698, 712 [SDNY 2018]; *app dismissed* 2019 US App LEXIS 19054 [2nd Cir Mar. 28, 2019]).

Fair Trial

Defendants move for a new trial based on five separate grounds: 1) improper privileged communications were allowed; 2) the court applied different standards when making rulings on plaintiff's and the City's evidentiary objections; 3) defendants were improperly prevented from questioning plaintiff's treating psychologist about a 2018 episode involving plaintiff; 4) introduction into evidence of certain sections of the patrol guide was improper and prejudicial to the City; and 5) plaintiff's counsel was permitted to make improper and prejudicial statements during his summation including that Captain Dennedy's report was the result of a negligent investigation as well as mischaracterizations of the OIG report, and the court's curative instructions regarding plaintiff's counsel's improper statements were insufficient.

Regarding the privileged communications, over defendants' objection, plaintiff's counsel was permitted to ask Officer Irwin about a conversation he had with the City's attorney in the hallway outside the courtroom shortly before he took the stand. Subsequently, the court reconsidered its ruling on the City's objection, sustained the objection and struck any testimony pertaining to this conversation from the record (Tr 404). The City argues that it was prejudiced because the bell could not be un-rung. The jury hearing the subsequently determined privileged communication alone does not establish prejudice to the City. Indeed, as plaintiff correctly avers, the testimony added to Officer Irwin's credibility since he testified that he was not instructed as to what he should say during his testimony and that he had not been told about any testimony that had previously been given during the trial. Therefore, the motion for a new trial based on improper privileged communications were allowed during the trial must be denied.

The City complains that Sergeant O'Keefe and Captain Dennedy were prevented from reading from documents in evidence but that plaintiff's counsel was allowed to ask plaintiff and other witnesses to read from documents. The City cites to pages 371, 373, 377, 378, and 410 in the trial transcript to support this argument, however, none of these pages include plaintiff's testimony. Pages 371 – 378 include questioning by plaintiff's counsel of Officer Irwin and page 410 contains questioning by plaintiff's counsel of Captain Dennedy; both witnesses were being asked about provisions in the patrol guide. The City is correct that different standards were applied but to the extent that the City posits the context for each set of witnesses was the same, the City is mistaken. The City asked Sergeant O'Keefe to read from her memo book (Tr 331) and Captain Dennedy to read from the written report he prepared concerning Sergeant O'Keefe's discharge of her taser (Tr 442). Plaintiff's counsel was allowed to ask Officer Irwin and Captain Dennedy to read from the patrol guide because they did not prepare the patrol guide and because they were then asked questions about the sections they read. In contrast, Sergeant O'Keefe was not allowed to read from her memo book and Captain Dennedy was not allowed to read from his report because these were documents prepared by the witnesses, the documents speak for themselves and allowing Sergeant O'Keefe and Captain Dennedy to read from them would constitute cumulative testimony/evidence.

The City complains that plaintiff was allowed to pose hypothetical situations to lay witnesses but the City was not permitted to pose hypothetical questions to plaintiff's expert. The City cites pages 255, 376, 413 and 951 from the trial transcript to support its position. The City posits that no explanation was provided for the "seemingly different standards to which each side was being held." The City mischaracterizes the questions posed to the lay witnesses by plaintiff's counsel as hypotheticals; they were not hypotheticals but rather questions seeking

clarification of testimony already given (Tr 255, 376, 412 – 413). The only page cited by the City to support their assertion that they were not permitted to pose hypothetical questions to plaintiff's expert is page 951 and it contains one question where plaintiff's objection was sustained to the City's palpably improper question: "If the officers had done nothing and plaintiff had, in fact fallen over that banister, would that have been appropriate action?" This question was improper because plaintiff's expert had not testified that the officers should do "nothing" but rather that they should have isolated and contained plaintiff to give her an opportunity to calm down and to allow additional time for the ESU to arrive.

Without citation to the record, the City argues that "the court improperly prevented plaintiff from testifying to two subsequent incidents that resulted in her detainment by the NYPD." These incidents were relevant, according to the City, because plaintiff testified that her behavior towards the NYPD on the night of the incident involved in this case was an aberration. In opposition, plaintiff cites to pages 466 – 469 of the trial transcript where the City attempted to enter into evidence defendants' Exhibit 10-A. Although the City does not explicitly describe what Exhibit10-A is on the record in this portion of the trial transcript, it can be gleaned that it is records pertaining to a subsequent interaction plaintiff had with the NYPD. Even assuming that Exhibit 10-A is relevant, that is that "it has any tendency in reason to prove the existence of any material fact . . . it may still be excluded in the exercise of the trial court's discretion if its probative value is substantially outweighed by the potential for prejudice" to plaintiff (*People v Harris*, 26 NY3d 1, 5 [2015]). After hearing argument from counsel, the court ruled that the probative value of defendants' Exhibit 10-A was far outweighed by the prejudice to plaintiff. Since this ruling was squarely within the court's discretion and nothing in the City's post-trial motion compels revisiting this ruling particularly in light of the City's failure to cite to the

relevant portions of the trial transcript, the motion for a new trial on this basis must be denied. Moreover, as shown above, the City's argument that the court applied different standards when making rulings on plaintiff's and the City's evidentiary objections is without merit and the motion for a new trial on this basis must be denied.

The City complains that they were improperly prevented from questioning plaintiff's treating psychologist about a 2018 incident involving the NYPD and plaintiff when she was intoxicated. The City argues that these questions were necessary to "attack" the psychologist's testimony that plaintiff continues to suffer from PTSD and that the City has the right to rebut plaintiff's evidence. The City offered no evidentiary basis for its position that plaintiff's psychologist's PTSD diagnosis would have been undermined had this incident been considered by the psychologist. Indeed, plaintiff's psychologist testified on cross-examination that a 2016 incident of plaintiff being publicly intoxicated and taken to the hospital, did not change her diagnosis (Tr 713 – 714). Since there is no support for the City's position that this additional incident in 2018 would change plaintiff's psychologist's opinion, it was well within the court's discretion to limit the scope of the City's cross examination to the 2016 incident (*Salm v Moses*, 13 NY3d 816, 817 [2009]; *Hoberg v Shree Granesh, LLC*, 85 AD3d 965, 967 [2nd Dept 2011]). Likewise, the City's right to rebuttal argument is unavailing since the City was not seeking to affirmatively introduce evidence to rebut an affirmative fact which plaintiff sought to prove, and in any event, whether such evidence may be precluded is again within the sound discretion of the court (*Coopersmith v Gold*, 223 AD2d 572, 573 [2nd Dept 1996]). Therefore, the motion for a new trial based on the City being denied the opportunity to cross-examine plaintiff's treating psychologist about the 2018 incident involving plaintiff and the NYPD must be denied.

Next on the City's list of complaints is allowing sections of the patrol guide into evidence was improper and prejudicial to the City, an argument previously made by the City in a motion *in limine*. In its post-trial motion the City once again ignores case law in this jurisdiction and argues that the standards in the patrol guide are merely guidelines and not standards that the NYPD must follow. While "violation of the NYPD Patrol Guide does not, in of itself, constitute unreasonable conduct in an excessive force case . . . several courts in [the Second] Circuit have permitted parties to introduce Patrol Guide excerpts as relevant and helpful to determining the reasonableness of an officer's conduct" (*Bermudez v NYC*, 15-CV-3240(KAM)(RLM), 2019 US Dist LEXIS 3442 * 14 [SDNY Jan 8, 2019] [collecting cases]; *see also Pacheco*, 104 AD3d at 550 [patrol guide considered to determine if "the officer's action comported with acceptable police practice"]). The City's argument that plaintiff's counsel's reference to "violations" of the patrol guide was confusing to the jury is unpersuasive since any confusion on the part of the jury was ameliorated by the closing instructions to the jury; the court instructed, *inter alia*, that the patrol guide "may be considered some evidence of what constitutes reasonable [police] conduct . . . However, the patrol guide is not the only standard. What you must decide is whether taking all the facts and circumstances into account the defendants acted with reasonable care" (Tr 1376 – 1377). Therefore, the motion for a new trial based on sections of the patrol guide being admitted into evidence and based on comments made by plaintiff's counsel must be denied.

The last category of complaints about the trial on the City's list concerns comments made by plaintiff's counsel primarily during his closing and the insufficiency of the court's curative instructions as to those comments. "[T]rial counsel is afforded wide latitude in presenting arguments to a jury in summation. During summation, an attorney remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of

[defendant']s proof without depriving [defendant] of a fair trial. However, an attorney may not bolster [their] case . . . by repeated accusations that the witnesses for the other side are liars" (*Gregware v NYC*, 132 AD3d 51, 61 [1st Dept 2015] [citations and internal quotation marks omitted]). Here, the City cites to one instance where plaintiff's counsel referred to the City's witnesses as "liars" and to instances where plaintiff's counsel characterized the City's witnesses as creating a false narrative of the incident to avoid liability. The one instance during his closing when the plaintiff's counsel called the City's witnesses "liars", the City objected and the objection was sustained; the City did not request that the comment be stricken from the record or a curative instruction (Tr 1289). Plaintiff's counsel's comment that the City's witnesses were creating a false narrative and that the City was just trying to ram a "story into the jury's mouth" were not objected to by the City (Tr 1301). While calling the City's witnesses "liars" was improper and some of plaintiff's other comments may have been inflammatory, plaintiff's counsel's comments "did not create a climate of hostility that so obscured the issues as to have made the trial unfair" and plaintiff's counsel was entitled to express skepticism regarding the officers' testimony (*Gregware*, 132 AD3d at 61).

The City argues that because plaintiff's counsel characterized Captain Dennedy's investigation of the incident as negligent, a curative instruction should have been given to the jury. However, the City did object to plaintiff's counsel's characterization of Captain Dennedy's investigation and did not request a curative instruction during the trial. Moreover, while the City is correct that there is no cause of action for negligent investigation, (*see Ball v Miller,* 164 AD3d 728, 729 [2nd Dept 2018]), plaintiff's counsel did not suggest that such a cause of action exists, he merely suggested to the jury that given the people Captain Dennedy did not interview

during his investigation, the jury should not credit the conclusions of the investigation, which is well within the bounds of permissible counsel commentary (*see Gregware*, 132 AD3d at 61).

Finally, the City contends that plaintiff's counsel mischaracterized the "OIG report" in his summation. The City cites to the pages in the trial transcript where it takes issue with plaintiff's counsel's comments (Tr 1320 – 1321), the City then in conclusory fashion opines that these comments do not reflect the conclusion of the "OIG report."[3] The first comment by plaintiff's counsel the City takes issue with is plaintiff's counsel's statement that "according to OIG report, the OIG made a decision . . . that they knew that the city and NYPD had a problem in dealing with emotionally disturbed persons; they were not trained to do so" (Tr 1320). This statement by plaintiff's counsel, not objected to by the City, is "within the broad bounds of rhetorical comment" (*Gregware*, 132 AD3d at 61) because the OIG report states "NYPD's patrol guide does not properly instruct officers to de-escalate encounters with the public" (Ex 6C pg 3) and "NYPD training does not adequately focus on de-escalation. There is little to no substantive focus on de-escalation in NYPD's training programs" (Ex 6C pg 4). "Emotionally disturbed persons" are a subsection of the "public" and a reasonable inference may be drawn that the context in which de-escalation techniques are most important is when the NYPD is interacting with an EDP. The next comment the City takes issue with is plaintiff's counsel's statement "[the OIG report] was addressing situations where officers were dealing with EDP's and use of force between the years of 2010 and 2014, smack around when Ms. Kennedy was tased" (Tr 1321). This statement was not objected to by the City and it is an accurate statement of the period when the OIG was analyzing excessive force cases (Ex 6C pg 3). Therefore, the motion for a new trial

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[3] The City does not indicate which OIG report it is referring to; three were entered into evidence as Exhibits 6B, 6C and 7 dated March 31, 2015, October 1, 2015, and December 1, 2015 respectively.

based on comments made by plaintiff's counsel during his closing and the insufficiency of the court's curative instructions as to those comments must be denied.

Punitive Damages

The City contends that the court "improperly allowed the question of punitive damages to go to the jury when the record was completely devoid of evidence of wanton, reckless, or malicious conduct by Sergeant O'Keefe."

"Punitive damages are available in section 1983 actions when a defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to federally-protected rights of others" (*Cardoza v NYC*, 139 AD3d 151, 165 [1st Dept 2016]; *quoting Smith v Wade*, 461 US 30, 56 [1983]). The purpose of punitive damages is "not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future" (*id.* at 166; *quoting Walker v Sheldon*, 10 NY2d 401, 404 [1961]). Here, contrary to the City's view, there was sufficient evidence for the jury to conclude that Sergeant O'Keefe acted with reckless indifference or malice. The jury could have reasonably concluded from the evidence at trial that Sergeant O'Keefe was angry because plaintiff caused a taser dart to pierce Sergeant O'Keefe's hand. Based on the photographs depicting multiple burn marks on plaintiff's body, the NYPD taser report and plaintiff's testimony, the jury could have also reasonably concluded that Sergeant O'Keefe tased plaintiff seven times in a minute and a half while she was being held down by Officer Irwin. The jury could have further reasonably concluded that Sergeant O'Keefe acted with a deliberate knowledge of plaintiff's rights and with the intent to interfere with those rights or that by using the taser in this manner she demonstrated an utter disregard of the taser's effect on the health, safety and rights of plaintiff (PJI 2:278).

As to the amount of punitive damages awarded by the jury, the City argues that the award is grossly excessive. In reviewing punitive damages awards, courts should consider three factors: 1) the degree of reprehensibility of the defendant's conduct; 2) the disparity between the harm or potential harm suffered by plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded and civil or criminal penalties authorized for the defendant's misconduct (*BMW of N. Am. v Gore*, 517 US 559, 575 – 584 [1996]).

The first *Gore* consideration, degree of reprehensibility, is "[p]erhaps the most important indicum of the reasonableness of a punitive damages award" (*id.* at 575) because punitive damages are intended to punish, and the severity of punishment, as in the case of criminal punishments, should vary with the degree of reprehensibility of the conduct being punished" (*Payne v Jones*, 711 F3d 85, 101 [2nd Cir 2012]). The City argues, in effect, that Sergeant O'Keefe was only performing what she honestly believed was her duty and therefore, punitive damages are not appropriate. This argument is unpersuasive since it negates the jury's determination that Sergeant O'Keefe's conduct was not reasonable under the circumstance and that the force used was excessive (*accord Greenaway v County of Nassau*, 327 F Supp 3d 552, 570 – 571 [EDNY 2018]). Sergeant O'Keefe maintained a significant position of power over plaintiff when she excessively used the taser on plaintiff while Officer Irwin held her down. The resulting injuries to plaintiff, multiple burn marks on her back, a mild traumatic brain injury, a torn ear lobe, multiple bruises, a black eye and PTSD are the physical and emotional manifestations of Sergeant O'Keefe's reprehensible conduct.

The second *Gore* consideration is the ratio between the damages suffered and the punitive damages awarded and here, the ratio is not even 2 to 1 since the jury awarded $500,000 in punitive damages and a total of $400,000 in compensatory damages. There is no "bright-line

ratio which a punitive damages award cannot exceed" (*State Farm Mutual Auto Ins. Co. v Campbell*, 538 US 408, 425 [2003]). "A larger punitive-to-compensatory ratio may be appropriate where a particular egregious act has resulted in only a small amount of economic damages and similarly when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (*Johnson v Nextel Communications, Inc.*, 780 F3d 128, 149 [2nd Cir 2915] [internal quotation marks omitted]). A $400,000 compensatory damages award while significant does not clearly fall within what may be characterized as substantial. Given that the amount of a punitive damages award is soundly within the jury's discretion and is not to be lightly disturbed (*Ferguson v NYC*, 73 AD3d 649 [1st Dept 2010]), the court cannot find as a matter of law that a less than 2 to 1 (but greater than 1 o 1) ratio of punitive damages to compensatory damages is excessive taking into account the facts and circumstances of Sergeant O'Keefe's conduct and the harm to plaintiff (*State Farm*, 538 US at 425).

The third *Gore* consideration is the difference between the punitive damages awarded and any civil and criminal penalties authorized for Sergeant O'Keefe's misconduct. The City posits that there was no proof that Sergeant O'Keefe's conduct approached criminality. Again, the City ignores the jury's finding that Sergeant O'Keefe's conduct was not reasonable under the circumstance and that the force she used was excessive. Under the Penal Law an individual is guilty of assault in the second degree when "[w]ith intent to cause physical injury to another person, he causes such injury to such person . . . by means of . . . a dangerous instrument. . . (Penal Law § 120.05 [2]). "Physical injury means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Plaintiff testified that the taser caused her "real agony" and the Second Department has held that a taser constitutes a "dangerous instrument"

(*People v Jones*, 173 AD3d 1062, 1064 [2nd Dept 2019]). Thus, Sergeant O'Keefe could have been charged with second degree assault, a class D felony.

In addition to the three *Gore* considerations above, when determining whether a punitive damages award is excessive courts compare rulings on the same question in other similar cases (*Cardoza*, 139 AD3d at 151; *Payne*, 711 F3d at 105). The standard of review in New York state courts is whether the punitive damages award "deviates materially from what would be reasonable compensation" (*Cardoza*, 139 AD3d at 166; *quoting* CPLR 5501 (c)]). The Second Circuit employs a similar analysis to determine "what amounts [the Second Circuit] has found acceptable, and what amounts [the Second Circuit] has deemed excessive" (*Payne*, 711 F3d at 105). The process of comparing, however, "is precarious because the factual differences between cases can make it difficult to draw useful comparisons" (*Payne*, 711 F3d at 105). This case highlights the difficulty since the parties do not cite to any cases addressing punitive damages and misuse by an officer of a taser and the court's research did not result in finding any such cases. Nevertheless, it is still instructive to examine excessive force cases where punitive damages were imposed even though these cases did not involve tasers.

In *Cardoza*, the plaintiff refused to produce identification demanded by NYPD officers after being observed by the officers with an open container on the street (*Cardoza*, 139 AD3d at 156). While the officers attempted to place the plaintiff under arrest, he stiffened his arms at his sides prompting one of the officers to pepper-spray him (*Id.*). Further struggle ensued during which the plaintiff grabbed onto a fence; unable to pry one of the plaintiff's hands from the fence, one of the officers struck the plaintiff's hand multiple times with a baton until the plaintiff released his grip (*Id.* at 157). The plaintiff suffered fractures to his hand requiring surgery and sustained permanent loss of strength and range of motion in that hand (*Id.* at 158). The plaintiff

was also diagnosed with post traumatic stress disorder and major depressive disorder as result of his encounter with the NYPD which would require up to 20 years of treatment (*Id.*). The jury awarded the plaintiff $750,000 in punitive damages against each of the two officers. The First Department held that these amounts deviated materially from what is reasonable and reduced the punitive damages award to $75,000 against each of the officers (*Id.* at 167).

Several Second Circuit decisions are also instructive on the issue of whether a punitive damages award is excessive in an excessive force case. In *Payne v Jones*, the officer punched the plaintiff in the face and neck seven to ten times and kneed him in the back several times. The encounter aggravated the plaintiff's existing back pain and his post-traumatic stress disorder (*Payne*, 711 F3d at 88). The jury awarded the plaintiff $300,000 in punitive damages (*id.* at 88). The Court, after observing that the Second Circuit has never upheld a punitive damages award against an individual officer as large as $300,000, remanded for a new trial on punitive damages unless the plaintiff agreed to a reduced punitive damages award in the amount of $100,000 (*id.* at 87).

In *King v Marcri*, state court officers punched plaintiff multiple times and used a choke-hold on him while placing him under arrest (993 F2d 294, 296 [2nd Cir 1993]). The plaintiff was strip-searched and held at Rikers Island for two months awaiting trial. All the criminal charges against the plaintiff were resolved in his favor. The jury awarded the plaintiff punitive damages in the amount of $175,000 against one officer and $75,000 against the other. The Second Circuit reduced those amounts to $100,000 ($166,250 in 2014[4]) and $50,000 ($83,125 in 2014) (*id.* at 299).

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[4] Using the US Department of Labor Statistics Consumer Price Index calculator at www.bls.gov/data/inflation_calculator.htm.

In *Ismail v Cohen*, a police officer struck the plaintiff in the back of the head after an argument over a parking ticket (899 F2d 183, 185 [2nd Cir 1990]). The plaintiff briefly lost consciousness and when he awoke, he discovered the officer pressing a gun to his head and a knee in his back. The plaintiff sustained two displaced vertebrae, a cracked rib and serious head trauma. The trial court found that the jury's punitive damages award of $150,000 ($279,127 in 2014) was excessive but the Second Circuit disagreed and reinstated the award (*id.* at 189).

Finally, in *O'Neil v Krzeminski*, two officers attacked the handcuffed plaintiff at the police station, with one hitting the plaintiff in the head with a blackjack (839 F2d 9, 10 [2nd Cir 1988]). The officers then dragged the plaintiff across the floor by the throat. The plaintiff suffered a fractured nose and lacerations on his forehead (*id.*). The Second Circuit affirmed punitive damages in the amounts of $125,000. ($256,128 in 2014) and $60,000. ($122,941 in 2014) against the two officers (*id.* at 13 – 14).

Based on the foregoing and taking into account the misconduct on the part of Sergeant O'Keefe, the punitive damages awarded to plaintiff in the amount of $500,000 deviates materially from what is reasonable. Punitive damages in the amount of $100,000 would serve the dual purpose of punishing Sergeant O'Keefe for her conduct and deterring her and others from similar conduct in the future. Therefore, the City's motion is granted to the extent that a new trial is directed on the issue of punitive damages unless the parties stipulate to reducing the verdict on punitive damages from $500,000 to $100,000 and to entry of amended judgment in accordance therewith.

Damages for Pain and Suffering

The City argues that the jury's awards of $300,000 for past pain and suffering and of $100,000 for future pain and suffering are excessive and deviate materially from what is

reasonable compensation. The City posits that mere claims of emotional pain and mental anguish cannot support an award of damages for excessive force under section 1983. Further, in the City's view, because plaintiff was not undergoing psychological treatment at the time of trial, psychological damages are speculative and therefore, not warranted. Putting aside for a moment that the City ignores plaintiff's other injuries – mild traumatic brain injury, burns, bruises and a torn earlobe – the cases cited by the City (without pinpoint citations for direct quotations) are all inopposite. The City cites *D'Attore v NYC*, (2013 US Dist LEXIS 40537 [SDNY 2013]) and *Davis v US* (2004 US Dist LEXIS 2551 [SDNY 2004]) for the proposition that a claim of mental anguish and heightened anxiety is insufficient to support an excessive force claim. However, plaintiff established through the testimony of Dr. Geller that plaintiff suffers from more than "garden variety" emotional distress to wit: PTSD (*Small v NY State Dept. of Corr. & Cnty Supervision*, 2019 US Dist LEXIS 64132 *31 [WDNY Ap 15, 2019] [recognizing three levels of emotional distress claims: "garden variety" based on vague or conclusory testimony which generally merits $30,000 to $125,000 in damages; "significant" emotional distress claims sometimes supported by medical testimony which merit awards at least as high as $175,000; and, "egregious" emotional distress claims which generally involve outrageous or shocking conduct on the part of the wrongdoer or has a significant impact on the physical health of the plaintiff]). Although the City's expert in psychiatry, Dr. Aronoff, disputed Dr. Geller's diagnosis, it was well within the jury's provenance to accept plaintiff's treating psychologist's opinion and to reject the City's expert in psychiatry's opinion (PJI 1:41). Therefore, the City's argument that plaintiff may not recover damages for mere claims of emotional pain and mental anguish is without merit in light of the evidence presented at trial.

In support of their argument that plaintiff's psychological damages are speculative, the City cites *Roman v Bx.-Lebanon Hosp. Ctr.* (51 AD2d 529, 530 [1st Dept 1976]) wherein the First Department held that the plaintiff's psychiatrist's testimony was speculative because the psychiatrist only testified "as to *possible* emotional problems" in the future [emphasis provided], and *Rivera v NYC* (40 AD3d 334 [1st Dept 2007]) wherein the First Department held that damages for psychological injuries were speculative because the testimony of the plaintiffs' psychiatrist was based on seeing the plaintiffs eight years after the incident, solely for litigation purposes and having never treated them. But here, Dr. Geller, plaintiff's treating neuropsychologist for approximately a year starting shortly after plaintiff's encounter with the NYPD, opined that plaintiff has and continues to suffer from PTSD as result of her encounter; Dr. Geller did not testify that plaintiff will possibly have PTSD in the future. The City also cites *Hernandez v NYC Tr. Auth.* (52 AD3d 367 [1st Dept 2008]) in support of their speculative argument wherein the First Department held that "the award for future psychotherapy expenses is speculative" because the plaintiff was not undergoing psychotherapy. Here, plaintiff did not seek and was not awarded future psychotherapy expenses and she did undergo psychotherapy with Dr. Geller for approximately a year. Therefore, the City's argument that plaintiff's psychological damages are speculative is wholly without merit.

Having considered the City's arguments against an award for pain and suffering and finding them unpersuasive, the question of what is adequate compensation must now be addressed. While no two cases are factually identical, nevertheless, determining whether an award deviates materially from what would be reasonable compensation requires a survey of appellate authority where Courts considered the material deviation issue in cases involving injuries similar to plaintiff's injuries (*Donlon v NYC*, 284 AD2d 13, 15 [1st Dept 2001]). For

example, the First Department in *Cardoza* (discussed in detail above) held that damages in the amount of $400,000 for past pain and suffering and $1,250,000 for future pain and suffering do not deviate from what is reasonable compensation where the plaintiff suffered a fractured hand and from post-traumatic stress disorder (139 AD3d at 168). In *Figueroa v NYC*, the First Department ordered a new trial on damages for past pain and suffering unless the parties stipulated to a reduction in damages from $2,500,000 to $1,250,000 where a police officer pointed a gun at the then 13 year old plaintiff, smacked him, hit him with the gun, and stomped on him causing a fracture to the plaintiff's hand and post-traumatic stress disorder (78 AD3d 463 [1st Dept 2010]; *see also Frederic v NYC,* 117 AD3d 899 [2nd Dept 2014] [upholding an award of $300,000 for past pain and suffering and $150,000 for future pain and suffering where the plaintiff suffered a permanent instability in his thumb and PTSD at the hands of a police officer]). The Second Circuit in *DiSorbo v Hoy*, held that $250,000 ($321,062 in 2014) falls within a reasonable range for compensatory damages where the plaintiff suffered bruises and psychological injuries (unsupported by medical testimony) as a result of the defendants using excessive force and committing a battery against the plaintiff (343 F3d 172, 186 [2nd Cir 2003]).

Based on the foregoing the award to plaintiff of $300,000 for past pain and suffering and of $100,000 for future pain and suffering does not materially deviate from what is reasonable.

CONCLUSION

Accordingly, based on the foregoing it is hereby

ORDERED that the City's post-trial motion is granted solely to the extent that a new trial is directed on the issue of punitive damages as against Sergeant O'Keefe unless the parties stipulate to reducing the verdict as to punitive damages from $500,000 to $100,000 and to entry

of an amended judgment in accordance therewith within 30 days of service of a copy of this order with notice of entry; and

ORDERED that the City's motion is otherwise denied.

11-15-2019
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE