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Verdict Complicated But Not Inconsistent

LAW AND ORDER



**Robin
Topping**

The jurors in Central Islip deliberated for more than two days and asked the judge on the case to answer several legal questions. The panel of four men and six women even requested a legal dictionary — it didn't get one — and wanted to know the difference between negligence and gross negligence.

At one point, U.S. District Judge Arthur Spatt commented, "They're giving me a workout."

In the end, the jury sitting last week on Greenport resident John Mims' civil lawsuit against the Southold police came in with a very precise verdict — one that laypeople, at first, might not understand. Jurors said Southold police officers did not violate Mims' civil rights by either using excessive force or using racial slurs when they arrested him twice in December 1998 for charges that were later dropped.

But the jury did find that one of the officers, Steven Zuhoski, committed battery against Mims while he was arresting him for allegedly driving a stolen car. Mims suffered a concussion during that

Mims, according to the judge's instructions given to jurors before deliberations began.

If the jury decided Zuhoski used force and caused the injuries but — in his mind at the time — only used as much as he thought he needed in that situation, it should have cleared him.

Paul Millus, a federal litigator from Manhattan who is often in federal court defending police officers in these types of claims, makes the distinction this way: "It may seem, at first blush, that the verdict is inconsistent, but it's entirely possible to prove a state battery and not prove the federal claim."

"An unlawful battery may start out lawful and appropriate but then you go too far, but it's not going to rise to the level of a sadistic, malicious and planned use of excessive force."

It also may seem strange that a jury should be considering a state battery claim in federal court. But the law allows for attorneys to bring in state claims and fold them into federal lawsuits. "The other alternative would be to make the plaintiff go to two separate forums . . . this way, you have one proceeding, one judge and one jury," said Joel Weiss of Melville, another federal litigator.

This type of mixed verdict also seemed to give something to everyone. On Mims' side, he received more than a quarter of a million dollars, although, success on the federal claims would have

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incident, was hospitalized and unconscious for more than two hours and had to have 10 stitches and 18 staples placed in his scalp. He had asked for more than \$2 million in damages.

The jurors gave Mims \$260,000 in damages to compensate him for past and future pain and suffering and awarded him \$10,000 in punitive damages, which was designed to actually punish Zuhoski.

Think about it. Jurors found the officer didn't use excessive force yet still caused these injuries in a "battery" of Mims?

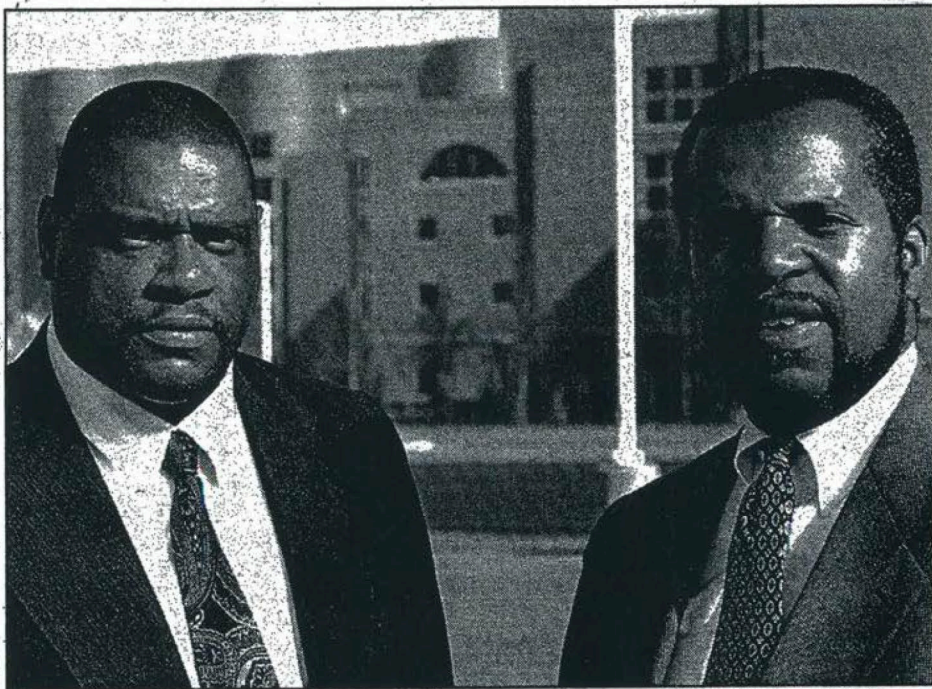
In a legal sense, these findings are not inconsistent. The reason is that the two violations, which both relate to Mims being injured, require different kinds of proof. One claim is federal and the other is state-based.

The federal claim is filed to compensate someone who has been deprived of a constitutional right by someone "under color of law," meaning in this case as a police officer. In Mims' case, the officer was sued for using excessive force.

In this context, excessive force means the officer "unnecessarily and wantonly inflicted pain" on Mims and did so "maliciously and sadistically for the purpose of causing him harm." Jurors apparently did not believe that was true in Mims' case.

The jury is instructed to evaluate what was in the officer's mind and his actions from the perspective of a reasonable officer in that situation and figure out whether the harm he did was serious enough to deprive a person of a constitutional right.

A state battery claim also requires the jury to get inside the head of the officer. But it must determine whether the officer "reasonably believed that he used no more force than he reasonably believed necessary" to perform his duty and subdue



Newsday File Photo / Dick Yarwood

John Mims, left, and his lawyer Fred Brewington won a very precise verdict.

meant he did not have to give any of that award to his lawyers because the other side would have been compelled to pay attorneys' fees. That is not the case on state claims.

The verdict is enough for one of Mims' attorneys, Gary Ireland of Manhattan, to ask Gov. George Pataki to appoint a special prosecutor in the case. Then-Suffolk District Attorney James Catterson looked into criminal charges against Zuhoski and others when the incident happened but decided not to file them. His successor, Thomas Spota, would need to get a special prosecutor because he previously represented some of the Southold officers as a defense lawyer.

Mims' other lawyer, Fred Brewington of Hempstead, said, the verdict "sends a clear message that you can't just beat people up unnecessarily."

On the defense side, the attorney for Southold police, Kevin McMorrow of Albertson, said, "Clearly, the jury decided that there were no constitutional violations and no wrongfully intended acts that violated anyone's civil rights... and those were the keystones of the plaintiff's complaints."