EFiled: Feb 17 2016 03:43PM EST
Filing ID 58587985
Case Number 323,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREAT STUFF, INC., a Delaware corporation; JEFFREY S. BRUETTE and BRIAN KUEHN Defendants Below-Appellants, v. ANDREW CODY COTTER Plaintiff Below-Appellee.	No. 323,2015 Court below: Superior Court of the State of Delaware C.A. No. N13C-02-009 FSS

APPELLANTS GREAT STUFF, INC., JEFFREY S. BRUETTE AND BRIAN KUEHN'S CORRECTED AMENDED OPENING BRIEF

LAW OFFICES OF
MICHELE D. ALLEN, LLC

/s/ Michele D. Allen
Michele D. Allen (#4359)
724 Yorklyn Road, Suite 310
Hockessin, Delaware 19707
(302) 234-8600
(302) 234-8602 (fax)
michele@micheleallenlaw.com
Attorney for Defendants

Dated: February 17, 2016

TABLE OF CONTENTS

Exhibits

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules

NATURE OF THE PROCEEDINGS

Andrew Cody Cotter ("Plaintiff") filed this action on February 1, 2013, asserting seven claims.[1] Defendants filed a Motion for Summary Judgment on all Counts on April 9, 2014.[2] Oral argument was held on May 15, 2014, wherein counsel presented their respective arguments.[3] The Court granted Defendants' Motion with respect to Count I, violation of 10 *Del. C.* §8145, but denied the Motion as to the six remaining counts without prejudice.[4] Discovery ended on August 29, 2014. Defendants filed another Motion for Summary Judgment on all remaining counts on September 26, 2014. On October 31, 2014, the Court held a teleconference to discuss Defendants' Motion, Plaintiff's Motion to Apply Delaware Law, Defendants' five (5) Motions *in Limine*, and remaining pre-trial issues.[5] During the teleconference, Plaintiff withdrew his claim for negligence against all parties. To date, the Court never ruled on Defendants' Motion for Summary Judgment or issued any written opinion from the October 31st teleconference. On November 3, 2014, trial commenced. On November 6, 2014, at the close of Plaintiff's case, Defendants motioned for a directed verdict in favor of the Defendants on all remaining counts. After oral argument, the Motion was denied. On November 7, 2014, preceding jury instructions, Defendants renewed their Motion and it was again denied. The same day, the jury awarded Plaintiff substantial damages against all Defendants.[6] On November 21, 2014, Defendants filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") and

[1] Complaint ("Compl.") D.I. 1. The only claims that remained at trial were battery and IIED.
[2] Appendix at A78-A81.
[3] See Exhibit E, Appendix A82-A144
[4] Appendix at A145
[5] The conference was held off the record despite the substantial arguments and rulings made.
[6] Compensatory damages of $30,000 against Bruette, $50,000 against Kuehn, and $200,000 each in punitive damages. $100,000 in punitive damages against Great Stuff, Inc.

Remittitur Pursuant to Super. Ct. Civ. R. 50(b) and 59(d).[7] On April 10, 2015, the Court denied Defendants' Motion for JNOV and granted Defendants' Motion for Remittitur.[8] On April 17, 2015, Defendants filed a Motion for Reargument of the Court's April 10, 2015 Order.[9] The Court denied Defendants' Motion on May 12, 2015.[10] Shortly thereafter, an Order of Judgment was entered by the Court.[11] A Notice of Appeal to this Court was filed on June 23, 2015, and a briefing schedule was issued. Defendants' Opening Brief with a more exhaustive series of issues and arguments was filed and accepted on December 17, 2015.[12] This is Defendants' revised Opening Brief on appeal from the Superior Court's decision on Defendants' dispositive and post-trial motions, as well as the Court's rulings at trial.[13]

[7] Appendix at A277-A297
[8] Exhibit C at 7. The punitive damages award against Defendants was reduced to $240,000 total.
[9] Appendix at A298-A304.
[10] See Exhibit B.
[11] See Exhibit A.
[12] Defendants filed a Motion for Leave to Exceed the Page Limit on December 9, 2015, which was denied on December 10, 2015.
[13] A Notice of Brief Deficiency was filed by the Court on Dec. 23, 2015. That same day, Defendants filed a second Motion for Leave to Exceed the Page Limit and a teleconference to discuss that Motion was held on Jan. 6, 2016, resulting in a revised briefing schedule and extension to 45 pages.

SUMMARY OF ARGUMENT

1. Defendants were entitled to judgment as a matter of law both before and after this matter reached a jury. The case proceeded to trial without a showing of the existence of a material fact in dispute. Defendants were entitled to judgment as a matter of law because the evidence was insufficient to support Plaintiff's claims. The Trial Judge erred as a matter of law and abused his discretion in denying Defendants' Motion for JNOV, only partially granting the Motion for Remittitur and denying Defendants' subsequent Motion for Reargument when the evidence submitted at trial did not support Plaintiff's claims.

2. The Court prevented a fair trial in rendering decisions on evidentiary matters that greatly prejudiced the Defendants, individually and collectively. The Trial Judge's evidentiary rulings, separately and cumulatively, amounted to reversible error.

3. The Court erred as a matter of law and abused its discretion by failing to properly instruct on battery, punitive damages and mitigation of damages. As a result, the Defendants were substantially prejudiced.

4. The Trial Judge committed an error of law in denying Defendants' Motion for Summary Judgment for lack of subject matter jurisdiction because no supported allegations of battery and IIED in Delaware existed.

5. This Court should vacate the judgment of the Superior Court and enter judgment for Defendants based on the absence of an issue of material fact prior to the matter being allowed to proceed to a jury trial. In the alternative, this Court should find that the damages awarded against Defendants were improper as a matter of law and should be vacated. Further, this Court should find that the prejudicial errors committed should afford Defendants, at the very least, the granting of a new trial.

STATEMENT OF THE FACTS

Plaintiff filed a civil cause of action against three separate Defendants: Great Stuff, Inc., Jeffrey S. Bruette ("Bruette") and Brian Kuehn ("Kuehn") on February 1, 2013, asserting seven claims: 1) violation of 10 *Del. C.* §8145, (2) assault and battery - Delaware, (3) negligence - Delaware, (4) intentional infliction of emotional distress ("IIED") - Delaware, (5) assault and battery - Maryland, (6) negligence - Maryland, (7) intentional infliction of emotional distress ("IIED") - Maryland.[14] The action was brought for injuries Plaintiff alleged he sustained as a result of battery and IIED by Bruette and Kuehn, and with the alleged approval of Great Stuff, Inc. Defendants denied committing any wrongful acts toward Plaintiff. Defendants also denied and disputed the nature and extent of Plaintiff's alleged damages. Still, it was necessary to present all defenses in response to Plaintiff's accusations that Defendants engaged in the conduct Plaintiff alleged. Accordingly, Defendants also argued that even if the alleged conduct occurred between Plaintiff and the Defendants, Plaintiff's disjointed and preposterous story paints a picture of consensual contact that Defendants cannot and should not be held civilly liable.

During the first day of Plaintiff's deposition testimony, he denied having suffered from either an assault or battery in Delaware.[15] Plaintiff also testified that no sexual abuse occurred at the workplace (also in Delaware).[16] While he changed his

[14] Complaint D.I. 1. There were two additional Plaintiffs; Nicholas DeLucia and Joy Cooley. Following their depositions, both of these Plaintiffs filed voluntary stipulations of dismissal.
[15] Deposition of Andrew Cotter ("Cotter Dep."), June 19, 2013 at 299.
[16] Id.

testimony shortly after admitting this, Plaintiff also testified in his deposition that no assault and battery occurred at the Defendants' home in Maryland.[17]

Defendants filed a Motion for Summary Judgment on April 9, 2014, seeking to dismiss all counts of Plaintiff's Complaint for lack of subject matter jurisdiction.[18] After oral argument, the Trial Judge held that "…the record seems to not support the claim that anything happened in Delaware, that amounts to a violation of a Delaware criminal statute contemplated by 8145,"[19] granting Defendants' Motion with respect to Count I, violation of 10 *Del. C.* §8145.

After Discovery ended, and before the deadline for Dispositive Motions, Defendants-below filed a second Motion for Summary Judgment on all Counts.[20] On September 24, 2014, the Court filed a Judicial Action Form stating that the Court would "read [the] briefing to decide if trial will proceed or be postponed and to notify counsel of further action."[21] Plaintiff was never required to file a response and the Court never issued a decision on this Motion. Accordingly, this matter was allowed to proceed to the jury without the Plaintiff making out his claims or showing that a genuine dispute of material fact existed.

On October 9, 2014, Defendants filed *Motions in Limine*, one specifically related to the exclusion of testimony of Nicholas DeLucia ("DeLucia") and any reference to him. Plaintiff sought the testimony of DeLucia as well as references to alleged incidents of misconduct between DeLucia and Bruette.[22] Defendants contend

[17] Cotter Dep., June 19, 2013, at 301.
[18] See Appendix at A78-81 (Defendants' Motion for Summary Judgment)
[19] Appendix at A82
[20] Appendix at A149-189
[21] Appendix at A148
[22] See Appendix at A214-219

Plaintiff had to be barred from admitting any evidence or testimony regarding DeLucia, particularly because DeLucia's testimony and any reference to him had to be precluded under DRE 403.[23] While DeLucia did not testify, there was mention of him throughout the trial and Defendants repeatedly objected to that testimony.

The Proposed Pre-trial Stipulation and Order filed on October 9, 2014, listed Defendants' objections and references to Defendants' *Motion(s) in Limine*.[24] A conference was held on October 31, 2014; however, no court reporter was present. The same day, a Judicial Action Form was filed, which stated "…Court reviewed outstanding issues to be memorialized in a letter." No such memorialization occurred; nothing further was filed in regard to the issues discussed.

During trial, Plaintiff admitted to using alcohol and smoking marijuana prior to ever knowing Defendants.[25] Plaintiff alleged the first occasion of inappropriate conduct occurred a week before his 18th birthday.[26] Plaintiff alleged he voluntarily and knowingly ingested drugs and became intoxicated at the Defendants' home in Maryland.[27] Plaintiff testified he and Kuehn engaged in acts of mutual masturbation, on another occasion Kuehn provided him with oral sex, and on a separate occasion Bruette masturbated him one time.[28]

[23] The Trial Judge ruled in the October 31st teleconference that DeLucia would not be permitted to testify as a witness unless there was a need for impeachment and there could not be any reference to DeLucia as a former plaintiff or any settlement with him. This led counsel to believe that there could not be any reference to DeLucia.
[24] See Appendix at A190-213.
[25] Appendix at A331.
[26] Appendix at A336.
[27] Appendix at A340, A351, A354.
[28] Appendix at A341.

Plaintiff admitted he voluntarily returned back to the Defendants' residence each time[29] and of his own free will decided to take drugs.[30] Plaintiff further testified he was well aware of and knew the side effects of the drugs he allegedly took prior to taking them.[31] When questioned about his intoxicated state, Plaintiff testified he could stand up, walk around, and use his cell phone.[32] He was also able to speak clearly enough for someone to understand him, yet never called for help.[33] Plaintiff admitted he never told the Defendants "no" during any of the alleged occasions. Plaintiff never alleged to have put Defendants on notice he was not consenting to the alleged physical contact.

Despite the alleged sexual contact, Plaintiff testified he involved Bruette and Kuehn in special events in his life such as preparing for his prom, graduation[34] and planned to go on a cruise vacation with his family and Defendants Bruette and Kuehn.[35] All while he was allegedly being exposed to nonconsensual sexual contact.

Although Plaintiff testified at trial that in the months after the alleged sexual contact he mainly felt disgusted, hated himself, was more reclusive, and not as outgoing,[36] he admitted he was not making a claim for memory loss, mental development disorders, or physical distress.[37] Plaintiff testified he received counseling because he was forced by his mother and the police to do so.[38] Plaintiff admitted he had only attended counseling "two or three times" and he terminated his counseling

[29] Appendix at A348.
[30] Appendix at A351.
[31] Id.
[32] Appendix at A351-352.
[33] Appendix at A352.
[34] Appendix at A354.
[35] Appendix at A361.
[36] Appendix at A344-345.
[37] Appendix at A349-350.
[38] Appendix at A350.

because he thought he was handling everything fine and could deal with it on his own.[39] Despite reporting the alleged conduct to law enforcement in Maryland, Plaintiff also admitted he returned to work the very same day after reporting the alleged conduct.

During Plaintiff's direct examination by Plaintiff's counsel, DeLucia was brought up. Counsel for Defendants promptly requested a side bar. The Trial Judge stated Plaintiff counsel's reason for asking about DeLucia (to establish the reason Plaintiff told his mother about the alleged sexual contact with Bruette and Kuehn) was a "collateral thing" and was "somewhat beside the point."[40] Yet, the Trial Judge permitted the line of questioning, but for a "very limited purpose."[41]

On the second day of Plaintiff's counsel's direct examination of Bruette, DeLucia was brought up again and Defense counsel promptly requested a side bar. In asking Plaintiff's counsel about his line of questioning, the Trial Judge clearly noted the potential unfair prejudice to Defendants more than once:

> THE COURT: Do you see any risk of unfair prejudice in doing that? The idea that maybe the defendant was getting ready to molest a 13-year-old, I think the jury might hold that against him. Do you think the jury unfairly might in your effort to bolster plaintiff's justification for having brought the thing to light, weighing what you're trying to prove versus the risk of unfair prejudice, what do you think about that?[42]
>
> We're not going to have a trial on what went on in that bedroom. ***It's risky enough under 403 to let the jury hear that the defendant was sleeping in the same bedroom with an underage***

[39] Appendix at A350-351.
[40] Appendix at A321-323.
[41] Appendix at A343.
[42] Appendix at A365-367.

> ***male.*** And if we get into that, then, again, I'm going to give the jury a cautionary instruction about this.[43]

Despite a noticed danger of prejudice to Defendants, counsel for Plaintiff was permitted to continue this line of questioning. DeLucia was brought up repeatedly throughout the trial and Defense counsel continually raised objections and attempted to recover. The Court attempted to remedy the risk of prejudice with one instruction:

> [L]adies and gentlemen of the jury, that evidence can be admitted for one purpose and not for any other purpose. You've heard some testimony about [] DeLucia, let me caution you that this case does not involve claims by [] DeLucia. So, you are not to consider evidence about [] DeLucia in this case for any other purpose other than the bearing it may have on the credibility of the witnesses who are testifying in this case.[44]

The Trial Judge commented he found Bruette's testimony to be self-serving.[45] Despite making that comment, the Trial Judge recognized the prejudice to Defendants. During sidebar, the Trial Judge stated he believed the testimony regarding DeLucia and where he slept to be ***collateral*** "because the question really is what happened between Bruette and Plaintiff."[46]

> …all of these other people so far have been denying there's sexual contact, so what you're doing is trying to create a series of circumstances that would lead one to conclude through suspicion that they are all not telling the truth, and the jury should believe that defendant probably has engaged in misconduct with the others, and therefore he probably has engaged in misconduct with plaintiff. ***That seems tenuous. So far nobody is testifying about sexual misconduct other than plaintiff.***

Plaintiff testified at trial that prior to knowing the Defendants he had experimented with another male that involved touching each other's penises and

[43] Appendix at A321-323.
[44] Appendix at A369.
[45] Appendix at A379.
[46] Appendix at A379-380.

masturbating each other and that it was consensual.[47] Plaintiff denied telling his girlfriend, Ashley Justus, that these instances were *not* consensual.[48] During Ms. Justus' deposition, she testified Plaintiff informed her about his sexual encounter with this other male.[49] Contrary to Plaintiff's testimony, Ms. Justus also testified Plaintiff told her the other male forced him to engage in the sexual encounter.[50] Based on the lack of veracity concerning Plaintiff's testimony as well as Ms. Justus' testimony, Defense counsel attempted to question Ms. Justus about Plaintiff's prior inconsistent testimony. Upon objection, the Trial Judge excluded the questioning on this matter.[51]

Nearly two years prior to Plaintiff's civil action, Plaintiff made an assault complaint with the Cecil County Sheriff's Office in Maryland against Bruette and Kuehn.[52] The State of Maryland ultimately dismissed all assault charges against Bruette and Kuehn.[53] Dennis Campbell, Plaintiff's stepfather, was a sergeant in the same police department charged with investigating Plaintiff's allegations in Maryland.[54] During trial, Defense counsel was prevented from asking Mr. Campbell what his understanding was of why the criminal charges were dropped in Maryland and whether or not the reason was because of the credibility of the witness (Plaintiff).[55] Despite the probative value of the witness' testimony, the Trial Judge implied that it was ***collateral*** and stated that Mr. Campbell was a poor witness to

[47] Appendix at A324.
[48] Appendix at A325.
[49] Appendix at A69-70.
[50] Appendix at A69-70.
[51] Appendix at A370-374.
[52] Compl. D.I. 1 ¶ 17, 18.
[53] Compl. D.I. 1 ¶ 21.
[54] Appendix at A376.
[55] Appendix at A376.

inform the jury about what happened in Maryland.[56] As a result of this ruling, Defendants were unable to refute the impermissible admission of testimony regarding an alleged Maryland plea agreement and protective order (discussed below).

On September 16, 2014, Defendants filed a Status Report with the Court, requesting the Court exclude any information obtained from the Cecil County Sheriff's Office which was produced after the close of discovery, specifically any plea agreement made with Bruette.[57] Any Maryland plea agreement was also objected to in the Proposed Pretrial Stipulation and Order filed on October 9, 2014.[58] It is Defendants' understanding the Trial Judge excluded reference to anything related to Maryland plea documents during the October 31, 2014 teleconference. Despite, the Court's assurances, rulings from that teleconference were never memorialized.

During trial, upon completion of opening statements, counsel for Plaintiff requested a side bar to discuss the statements Defense counsel made in her opening statement about the Maryland criminal charges against Bruette being dropped.[59] Counsel for Plaintiff argued the charges were not dropped, but that Bruette took a plea agreement. Defendants' counsel explained to the Court that two separate criminal indictments regarding Bruette existed; one which resulted from the Plaintiff's allegations regarding sexual abuse and another for possession of marijuana that was not even charged until a month after the sexual abuse case had been closed. Charges brought against Bruette and Kuehn in relation to the alleged sexual abuse of Plaintiff in the present case were in fact *entirely dismissed*. The Trial Judge acknowledged the

[56] Appendix at A377-378.
[57] Appendix at A146-147.
[58] Appendix at A190-213.
[59] Appendix at A306.

Plaintiff might have some latitude to challenge any suggestion that the charges in Maryland were false, but stated "I'm not going to allow there to be a minitrial about what happened with the criminal charges in Maryland."[60] Despite this, the Court permitted testimony about the Maryland charges.

In Plaintiff's direct examination of Plaintiff's mother, Tracy Campbell, he asked about the Maryland criminal charges against Bruette, whether there was a plea agreement and whether the plea agreement required Bruette to not have any contact with Plaintiff's family.[61] Defense counsel objected, and in the resulting side bar discussion Plaintiff's counsel admitted he was not in possession of a written plea agreement; only a transcript which the Trial Judge previously ruled inadmissible.[62] The Trial Judge noted the absence of a written plea agreement was problematic and the witness was "emotionally charged and not particularly responsive to the questioning."[63] COURT: "Well then, I'm totally confused. I hear you because now what you've got is she's already told the jury about them violating a no contact order that apparently you say did not exist at the time. Where does that leave Ms. Allen?"[64] The Trial Judge cautioned Plaintiff's counsel to be prepared when the time comes to show when Plaintiff received the transcript and when it was turned over to Defendants.[65] This proof never occurred.

[60] Appendix at A309.
[61] Appendix at A312.
[62] Appendix at A315.
[63] Appendix at A315-316.
[64] Appendix at A316-317.
[65] Appendix at A319.

After presentation of Plaintiff's case, Defendants moved for a Directed Verdict. The Trial Judge allowed only "two or three minutes[66]" for counsel to present the Motion, and despite the lack of evidence to support Plaintiff's claims, denied the Motion and allowed the case to go to the jury.[67] The arguments presented during Defendants' Motion were nearly identical to those submitted in support of Defendants' Motion for Summary Judgment in September.

The Trial Judge improperly concluded the Plaintiff's testimony that he was allegedly supplied drugs by the Defendants was somehow sufficient to show that he did not consent to the alleged activity; even though his testimony was that he knew he was voluntarily taking drugs (regardless of the source) and voluntarily returned to the Defendants' home in Maryland repeatedly and of his own free will after the alleged sexual contact occurred. The Trial Judge also stated that "[i]f the jury believes that the Defendants took advantage the way that Plaintiff says they did, then the jury could decide that that was as extreme as it has to be in order to meet the [IIED] standard."[68]

The Trial Judge provided his proposed Jury Instructions and Proposed Verdict Sheet to counsel on November 6, 2014.[69] At the conclusion of the day's testimony there were preliminary discussions on the Court's proposed instructions.[70] Counsel was required to submit proposed revisions to the Court no later than 8:00 p.m.[71] On November 7, 2014, the Trial Judge held that after reviewing the submissions of the

[66] See Trial Transcript 11/6/14 at 249:19-23.
[67] Appendix at A388.
[68] Appendix at A388
[69] On November 5, 2014, the trial judge stated that he was still working on the instructions and that they were going well, but that he was also "a little bit concerned about the instructions relating to the corporate defendant." Appendix at A327
[70] See Appendix at A381.
[71] Trial Transcript 11/6/15 at 249:12-17.

parties, he would no longer instruct the jury on voluntary versus involuntary intoxication.[72] Defense counsel objected to the revised instruction and further proposed alternative instructions requiring the jury be instructed that the Defendants had to be aware that the Plaintiff was so intoxicated that he was unable to exercise reasonable judgment.[73] Upon further discussion, Defense counsel renewed her request for the Court's original draft proposed instruction on battery.[74]

Additionally, the Trial Judge declined Defendants' request for an instruction on mitigation of damages. Defendants requested this instruction in their letters to the Court; however, the Trial Judge reasoned that the instruction would be inappropriate because it would leave the jury to speculate about what would have happened if Plaintiff had gone to therapy more than the two instances mentioned on the record.[75]

Further, Defense counsel argued the jury should not receive any instruction on punitive damages for any of the Defendants, but particularly with regard to Great Stuff, Inc., because the evidence did not support that instruction.[76] Counsel also asserted that because Plaintiff failed to set forth any compensatory damages, an instruction on punitive damages would be improper.[77] The Trial Judge quickly concluded "I think I'm going to instruct on punitive damages for the corporation. I'm not promising, Mr. Fletcher, that any of this survives post-trial motion practice."[78]

After the jury awarded substantial compensatory and punitive damages, Defendants engaged in post-trial arguments that were ultimately unsuccessful.

---

[72] See Exhibit F at 46.
[73] Appendix at A394-395.
[74] Appendix at A398; see also Trial Transcript 11/7/14 at 5:1-21.
[75] Appendix at A405-406.
[76] Appendix at A390-392.
[77] Appendix at A391.
[78] *Id.*

ARGUMENT

I. DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING DEFENDANTS' DISPOSITIVE MOTIONS.

A. Question Presented

1. Did the Trial Judge err as a matter of law in denying Defendants' Motion for Directed Verdict and JNOV when the evidence submitted at trial did not support Plaintiff's claims and the jury verdict was against the great weight of the evidence?[79]

B. Scope of Review

The Delaware Supreme Court examines *de novo* questions of law decided by a lower court and thus exercises plenary review.[80] The Court's standard of review of a denial of a motion for a directed verdict or for JNOV is "whether the evidence and all reasonable inferences that can be drawn therefrom, taken in the light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury."[81] It is clear that a Court can set aside a jury verdict when it is against the great weight of the evidence.[82]

C. Merits of the Argument

Defendants continue to contend that summary judgment should have been granted in their favor and this case should not have reached the point of being tried in front of a jury. Defendants filed a Motion for Summary Judgment on September 26, 2014, however, the Court did not require Plaintiff to respond to the Motion or argue

[79] Appendix at A149-189, A277-297, A298-304, A388.
[80] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (*citing Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927 (Del. 1982)).
[81] *Emory Hill, McConnell & Assoc., Inc. v. Snyder*, No. 63, 1992, 1992 Del. LEXIS 293, 3-4 (Del. 1992) (*citing Russell v. Kanaga*, 571 A.2d 724, 731 (Del. 1990)).
[82] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

any material facts were in dispute. As a result, this matter proceeded to trial and Plaintiff's baseless allegations fell upon the sympathetic ears of a jury that reached a verdict for the Plaintiff that was against the great weight of the evidence presented.

The basis for Defendants' Motions for a Directed Verdict and JNOV related specifically to the evidence, or lack thereof, presented by the Plaintiff. It was also argued the damages award was unreasonable and unjust. Specifically, the jury found the Defendants committed battery upon the Plaintiff and the Plaintiff suffered from IIED. The evidence presented at trial, however, does not legally support those findings, and instead, for the reasons set forth below, shows the jury relied on emotion and disregarded the evidence and the law before them.

It was an abuse of discretion for the Court to deny Defendants' Motion for JNOV in light of the apparent lack of evidence to support Plaintiff's claims and the judge's ability to view all evidence without the requirement of favoring the Plaintiff. "A trial judge can set aside a verdict if, after reviewing the entire evidence, including credibility and demeanor, he finds that the jury verdict exceeds the bounds of reason."[83] Unlike the directed verdict situation, he is not forced to look solely to the evidence favoring the non-moving party.[84] Pursuant to Super. Ct. Civ. R. 50(b),

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion…If a verdict was returned, the Court may...allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.[85]

[83] *Storey v. Camper*, 401 A.2d 458, 464 (Del. 1979).
[84] *Id.* (*citing Millman v. Millman*, 359 A.2d 158, 160 (Del. 1976)).
[85] *Gillenardo v. Connor Broad. Delaware Co.*, 2002 WL 991110 at *5 (Del. Super. 2002).

Further, "[w]hether directed at the conclusion of the plaintiff's case, or post-trial…the entry of a verdict in favor of the defendant is appropriate only when, under the evidence presented by the plaintiff, reasonable minds could draw but one inference…that a verdict favorable to the plaintiff is not justified."[86] A court may disturb a jury's verdict when it is determined to be the result of "passion, prejudice…or if it is clear that the jury disregarded the evidence or law."[87]

In a tort action, it is the plaintiff's burden to establish a prima facie basis for recovery as to all elements of his claim.[88]

1. **Plaintiff failed to present legally sufficient evidence to the jury to establish the intentional infliction of emotional distress ("IIED") claim.**

In order for Plaintiff to have proven IIED, he must have shown the Defendants engaged in extreme and outrageous conduct which intentionally or recklessly caused him to suffer from "severe" emotional distress.[89]

Under Maryland law, to succeed on a claim for IIED, a plaintiff must show (1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.[90] "Conduct is deemed outrageous and extreme only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

[86] *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997).
[87] *Littleton v. Ironside*, 2010 WL 8250830, at *1 (Del. Super. 2010) (*citing Young v. Frase,* 702 A.2d 1234, 1237 (Del. 1997)); See e.g. *Larson by Larson v. Miller*, 76 F.3d 1446, 1452 (8th Cir.1996) (delineating that J.N.O.V is appropriate when "the record contains no proof beyond speculation to support the verdict.").
[88] *Fritz v. Yeager*, 790 A.2d 469, 470-471 (Del. 2002) (*citing Farm Family Mut. Ins. Co. v. Perdue, Inc.*, 608 A.2d 726 (Del. 1992)).
[89] *Restatement (Second) of Torts* § 46.
[90] *Ford v. Douglas*, 144 Md. App. 620, 625 (Md. Ct. Spec. App. 2002).

atrocious, and utterly intolerable in a civilized community."[91] Whether the conduct complained of meets this test is, in the first instance, for the court to determine.[92]

Plaintiff failed to present evidence he suffered from severe emotional distress as a result of Defendants conduct, and fell far short of showing any alleged emotional distress was "so severe as to have disrupted [his] ability to function on a daily basis."[93] In *Takacs v. Fiore*, the plaintiff filed suit alleging IIED against her employer, citing several "debilitating conditions" such as: "severe depression, anxiety, sleeplessness, headaches and [being] sick to her stomach."[94] In denying plaintiff's IIED claim, the court delineated that the plaintiff's failure to "allege that she has been unable to function on a daily basis" was fatal to her claim.[95] Further, in *Caldor, Inc. v. Bowden*, the plaintiff's claim for IIED based upon socializing less with others was deemed insufficient because evidence showed "he was able to keep up his performance at school and find another job."[96] Additionally, "the intensity and duration of the distress are factors to be considered in determining its severity."[97]

In contrast, Courts have found severe emotional distress where the plaintiff pleads a *devastating* effect from the defendant's conduct is so acute that the plaintiff is unable to function and unable to attend to a necessary matter.[98] However, Maryland

---

[91] *Id.*
[92] *Id.*
[93] *Takacs v. Fiore*, 473 F. Supp. 2d 647, 652 (D. Md. 2007); *See also Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990); *Mattern v. Hudson*, 532 A.2d 85, 85-86 (Del. 1987).
[94] *Id*.
[95] *Id*.
[96] *Caldor, Inc. v. Bowden* , 625 A.2d 959, 963 (Md. 1993).
[97] DEL. P.J.I. CIV. § 14.1 (2000).
[98] *Griffin v. Clark*, 2012 U.S. Dist. LEXIS 134809, 9-10 (D. Md. 2012) (*citing Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101 (1986)).

courts have found that mere embarrassment, public humiliation, feelings of inferiority, or shame do not rise to the level of severe emotional distress.[99]

Similar to *Takacs* and *Caldor*, the Plaintiff in the present case failed to present evidence he was suffering from "mental duress" daily to satisfy the IIED requirements set forth in Maryland. While Plaintiff testified at trial that in the months after the alleged sexual contact he mainly felt disgusted, hated himself, was more reclusive, and was not as outgoing, these disruptions are insufficient to substantiate a showing of "severe emotional distress." "[T]he emotional distress must in fact exist, it must be "severe" and "no reasonable man could be expected to endure it."[100] Here, Plaintiff failed to present evidence that any emotional distress he alleged was so severe that no reasonable man could be expected to endure it.[101]

To the contrary, the evidence at trial established Plaintiff is highly functioning. He obtained gainful employment, maintained a long-term relationship with his girlfriend, and attended college.[102] By Plaintiff's own admission, he terminated his counseling with SOAR in December 2011, after just two or three sessions, because he was fine and could deal with any stress from the alleged conduct on his own. Plaintiff also testified he, at one point, was angry and upset and he did not think those feelings would ever go away, but he has learned how to deal with them better.[103] Accordingly, it is clear the jury disregarded the evidence and law in reaching its verdict as to

---

[99] *Griffin v. Clark*, 2012 U.S. Dist. LEXIS 134809, 9-10 (D. Md. 2012) (*citing B.N. v. K.K*, 538 A.2d 1175 (1988)) (Granting defendant's motion to dismiss the plaintiff's IIED claim, the Court stated that merely pleading that the defendant's conduct "impaired" the plaintiff's grades at school, resulting in the loss of certain scholarships, without alleging that the plaintiff was emotionally debilitated by the defendant's conduct, the complaint failed to state a claim for emotional distress.).
[100] Prosser, Law of Torts §18 & 66, p. 51; Rest.2d Torts, § 46, Com. j.
[101] *Id.*
[102] Appendix at A346, 360.
[103] Appendix at A346.

Plaintiff's alleged severe emotional distress, and therefore, Defendants were, and still are, entitled to judgment notwithstanding the verdict.

In denying Defendants' Motion for JNOV, the Court agreed for Plaintiff's IIED claim to succeed, Plaintiff was required to submit evidence he suffered "severe emotional distress," and went on to cite case law to support the flawed conclusion that Defendants' misconduct alone was sufficient for an inference of severe emotional distress, but then continued to state that the employer-employee relationship also permitted the jury to infer severe emotional distress based on the parties' special relationship and what Defendants were found to have done.[104]

While the Court began its decision by stating that the Court may not do its own fact-finding, it appears that the Court did just that, rather than actually review what evidence, if any, supported Plaintiff's claim that he suffered from "severe" emotional distress. The Court misapprehended the legal principles of IIED by concluding in the present case that the jury could properly infer severe emotional distress resulted from the Defendants' alleged "extreme and outrageous conduct alone."

Respectfully, the Court's reliance on the case law cited to support its decision was misplaced; particularly, the case of *Reagan v. Rider*.[105] The Court in *Reagan* was not limited to considering only extreme and outrageous conduct, as was the case here. In that case, the Court concluded the jury could properly find that the emotional distress was severe from the very nature of the defendants' conduct ***and*** from the intensity and duration of the plaintiff's emotional distress. [106]

---

[104] See Exhibit C.
[105] *Reagan v. Rider*, 521 A.2d 1246, 1251 (Md. 1987).
[106] *Id.* (The testimony of the plaintiff ***and*** the medical expert was sufficient to establish causation. From the very nature of the outrageous conduct -- sexual molestation of a child by a person in a

In comparison to the present case, here, there are no claims for sexual molestation of a child. Second, this Plaintiff did not suffer or testify to suffering any feelings of a severe nature, and certainly none that Plaintiff would have needed ongoing therapy for since he stopped going after only two or three sessions. The Court in *Reagan* specifically analyzed the mental distress suffered by the plaintiff in making its decision;[107] testimony of a forensic and clinical psychiatrist was also considered.[108] In the present case, the Court acknowledged that the only testimony in support of the plaintiff's emotional distress was his own minimal self-diagnosis for which he failed to allege any severe emotional distress.[109]

The depth of analysis the Court in the present case underwent, in comparison to the analysis in *Reagan*, was insufficient to support Plaintiff's claim for IIED.[110] Accordingly, the Plaintiff failed to present evidence he suffered from severe emotional distress and Defendants were entitled to judgment as a matter of law.

Furthermore, Plaintiff's failure to retain an expert is fatal to his case because there was no way for the jury to determine whether a causal connection existed between the alleged actions of the Defendants and any emotional distress of Plaintiff.[111] Without expert testimony, Plaintiff failed to show that he suffered from the requisite severe emotional distress and failed to make the requisite causal connection between any emotional distress and the alleged conduct of the Defendants.

---

position of authority and trust during six of her more critical formative years; and from the intensity and duration of the emotional distress -- a severe depression deteriorating over a three-year period and requiring an additional two years of therapy, the jury could properly find that the emotional distress was severe.).

[107] *Id.*

[108] *Id.* at 1247.

[109] Appendix at A342

[110] *See*

[111] *Petit v. Country Life Homes, Inc.*, 2005 Del. Super. LEXIS 344 (Del. Super. 2005).

Medical expert testimony is necessary to show proximate cause between a defendant's actions and a plaintiff's resulting psychic and emotional harm for claims of IIED resulting from alleged sexual abuse where unrelated actions, occurrences, and conditions may have affected a plaintiff's alleged injuries.[112]

Plaintiff was required to produce expert testimony related to causation of his alleged emotional distress. Plaintiff failed to produce evidence that any emotional distress developed concurrently with, or within a reasonable time after the alleged conduct of Defendants. Plaintiff admitted during trial that his emotional distress did not develop simultaneously with the alleged conduct of Defendants. In fact, Plaintiff testified at trial that, during the time of the alleged conduct, he enjoyed being with Bruette and Kuehn and cared about both of them.[113] Defendants Exhibit 1 at trial, the surveillance video, clearly showed the Plaintiff was not suffering from severe emotional distress, as it depicted Plaintiff initiating playful interaction with Kuehn in the days immediately following the alleged sexual assault. Likewise, Plaintiff testified that he had a lot of fun on Memorial Day weekend with Bruette and Kuehn, which was after the alleged conduct.[114] Plaintiff admitted his feelings did not begin until months after he made a disclosure to his mother.[115] Furthermore, Plaintiff admitted that during the time period of February 2012 to early March 2012, his mother noticed that he was withdrawn.[116] This is a time period when he and his mother were having conflicts regarding his recreational use of illegal drugs by himself or with his peers,

---

[112] *Doe v. Wildey*, 2012 Del. Super. LEXIS 136**,** 22 (Del. Super. 2012); *See Kazatsky v. King David Mem'l Park, Inc.,* 527 A.2d 988, 995 (Pa. 1987) *(*holding that "those truly damaged should have little difficulty in procuring reliable testimony as to the nature and extent of their injuries.").
[113] Appendix at A355.
[114] Id.
[115] Appendix at A345.
[116] Appendix at A353.

and well before any alleged sexual contact with the Defendants.[117] These facts, established at trial, amount to "unrelated actions, occurrences, and conditions" that may have affected Plaintiff's alleged injuries and required Plaintiff to submit expert testimony related to the causation of his alleged "severe" emotional distress. Without such expert testimony, Plaintiff's evidence was legally insufficient to establish that he suffered "severe" emotional distress as a result of Defendants' alleged conduct. Therefore, Plaintiff's claim of IIED should not have been submitted to the jury and Defendants were entitled to judgment as a matter of law.

2. **Plaintiff failed to present legally sufficient evidence to the jury to establish the claim of battery.**

The evidence submitted at trial by Plaintiff was not legally sufficient to support a claim for battery because his actions showed a willingness to engage in the alleged conduct and, therefore, as a matter of law could not be a battery. The only evidence presented at trial by Plaintiff was that he became voluntarily intoxicated and he manifested a willingness to engage in the alleged sexual conduct with Defendants through his own reciprocal actions and conduct.[118]

Voluntary intoxication alone is insufficient to have invalidated Plaintiff's consent.[119] Consent "may be manifested by action or inaction and need not be communicated to the actor."[120] "When a Plaintiff "manifests a willingness to engage in conduct and the defendant acts in response to such a manifestation, his consent negates the wrongful element of the defendant's act, and prevents the existence of a

[117] Appendix at A353.
[118] Appendix at A354.
[119] *Poole v. Hudson*, 83 A.2d 703, 704 (Del. Super. 1951) (finding that "incapacity does not necessarily result from 'being under the influence'.").
[120] Restatement (Second) of Torts § 892(1) (1979).

tort."[121] It is a fundamental principle of tort law that "[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."[122] In other words, capacity to consent should not be confused with whether Plaintiff regrets what he *alleges* happened with Bruette and Kuehn after the fact. If Plaintiff consented, his consent cannot be revoked *ex post facto* if he realizes it was all a big mistake or his story needs to better align with the requisite elements of the tort.

Additionally, in a tort action, a person who negligently or intentionally becomes intoxicated must be held to the same standard of conduct as a sober person.[123] To the extent that voluntary intoxication cannot vitiate the intent element of battery for a defendant,[124] neither should it vitiate a plaintiff's consent to alleged harmful or offensive conduct.

Although the jury instructions in the present case will be discussed in later paragraphs, it should be noted here that the Court refused to include in the battery instruction verbiage related to mutual intoxication of the accused and the accuser with regard to consent. Plaintiff testified to being voluntarily intoxicated and Defendants denied all of Plaintiff's allegations. This testimony was sufficient for the Court to allow an instruction on voluntary intoxication invalidating Plaintiff's consent. In contrast, Plaintiff also testified Kuehn was also using substances that could have rendered him intoxicated. This testimony was somehow insufficient to allow further instruction on mutual intoxication. Instead, the Trial Judge stated that "the jury cannot

---

[121] Prosser & Keeton § 66 at 467; *McQuiggan v. Boy Scouts of America*, 73 Md. App. 705 (1988).
[122] *Beyond Sys. v. Kraft Foods, Inc.*, 972 F. Supp. 2d 748, 768 (D. Md. 2013) (*citing* Restatement (Second) of Torts § 892A (1979)).
[123] *Janelsins v. Button*, 648 A.2d 1039, 1042 (Md. Ct. Spec. App. 1994).
[124] See *Id. (citing State v. Hatfield*, 78 A.2d 754 (1951)).

be left to speculate. They can't create a scenario out of almost whole clothe."[125] However, the Trial Judge's failure to properly instruct the jury on mitigation, voluntary intoxication and consent forced the jury to speculate against the interest of the Defendants.

Nevertheless, Plaintiff failed to submit any evidence at trial that he was involuntarily intoxicated or so intoxicated he was rendered incapable of exercising reasonable judgment during the alleged incidents involving Defendants. The intoxication, as instructed by the Court, had to be so severe that it rendered Plaintiff incapable of exercising reasonable judgment. By Plaintiff's own admission, he had previously engaged in consensual sexual activity while intoxicated, thus reaffirming intoxication alone does not invalidate his consent.[126] Plaintiff testified at trial that, although he was intoxicated, he could stand up, walk around, and use his cell phone.[127] He further testified during his prior deposition that he was able to speak clear enough for someone to understand him.[128] Plaintiff testified that during the times of the alleged sexual contacts he did not call for help or object to participation in any sexual contact with the Defendants, even though his motor skills and ability to communicate remained intact.[129] Therefore, according to Plaintiff's version of the events that allegedly occurred with the Defendants, Plaintiff failed to introduce any evidence at trial that he was involuntarily intoxicated, that his voluntary intoxication rendered him incapable of exercising reasonable judgment during the alleged incidents, or that he ever manifested an unwillingness to engage in the alleged conduct

[125] Appendix at A397.
[126] Appendix at A360.
[127] Appendix at A351-352.
[128] Id.
[129] Id.

with Defendants. To the contrary, Plaintiff testified he continually returned to the Maryland residence despite the unwelcome nature of the alleged sexual activity he claims he engaged in. He continued to repeat the conduct that allegedly resulted with him being in vulnerable positions susceptible to sexual advances by Defendants. Plaintiff did not refute that he engaged in this voluntary conduct. Despite Plaintiff's own testimony, the Trial Judge improperly concluded the record permitted the jury to find that Plaintiff was impaired and lacked the ability to exercise reasonable judgment to respond to Defendants' conduct, despite voluntary intoxication.[130]

The Trial Judge's conclusion with regard to Plaintiff's battery claim, again, seems to be injected with the Court's own fact finding, and completely disregards Plaintiff's own testimony, particularly since the jury was improperly instructed on consent. The Trial Judge's mere reliance on the conclusion the jury found Plaintiff under the influence and therefore impaired and unable to exercise reasonable judgment fails to apply the law to the facts in this case and therefore, the Court not only abused its discretion but erred as a matter of law.

In accordance with Maryland law, an individual may not consensually engage in sexual contact with a person that is mentally incapacitated and the person performing the act knows or reasonably should know the victim is a mentally incapacitated individual.[131] "Mentally incapacitated individual" is defined as "an individual who, because of the influence of a drug, narcotic, or intoxicating substance

[130] Exhibit C at 5.
[131] Md. Code Ann., Crim. Law § 3-307 (West).

…is rendered substantially incapable of: (1) appraising the nature of the individual's conduct; or (2) resisting vaginal intercourse, a sexual act, or sexual contact."[132]

The trial record is void of any evidence that would support the fact that Plaintiff was a mentally incapacitated individual when he engaged in the alleged sexual conduct with Bruette and Kuehn. Plaintiff testified he could appraise the nature of his conduct because he made the conscience decision to allegedly reciprocate the sexual conduct by masturbating Kuehn and knowingly permitted Kuehn, without objection, to provide him with oral sex.[133] Plaintiff further testified that during these encounters he would ejaculate and then go to sleep.[134] Additionally, Plaintiff testified he could not recall any specific acts or comments that he made to Kuehn or Bruette during the alleged sexual contact that would have placed them on notice that he was not consenting to the conduct.[135] Plaintiff never stated he was incapable of resisting the sexual contact. Plaintiff admitted he never tried to call for help, even though he admitted he could use his phone and speak clearly.[136]

Plaintiff was required to prove he did not consent to the alleged tortious conduct of the Defendants.[137] Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action,

[132] § 3-301. Definitions, MD CRIM LAW § 3-301 (West).
[133] Appendix at A337.
[134] Id.
[135] Appendix at A341, A360.
[136] Appendix at A351-352.
[137] Prosser & Keeton § 18, at 113 ("Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it might be to the interests of others."); *See also* Restatement (Second) of Torts § 892A.

indicating an apparent willingness for the conduct to occur.[138] The consent must be to the "defendant's conduct, rather than to its consequences."[139]

In *Browne v. Saunders*, the plaintiff claimed that the defendant, "would sexually abuse him when she wanted sex, first she would ask and then threatened to go out and have sex with somebody else…the plaintiff in that case also alleged that the defendant often took sex from him."[140] This Court affirmed the decision of the Superior Court and dismissed plaintiff's claim because he had not adequately plead facts that, even if proven, would give rise to an assault or battery. The plaintiff failed to prove the conduct was unpermitted and was believed to be harmful or offensive.

In the present case, the record is void of any evidentiary support Plaintiff was battered. His testimony supports that he consented to the alleged sexual conduct. Accordingly, it is clear the jury disregarded the evidence and law related to consent and instead rendered an improper verdict based on sympathy, emotion and prejudice. The Trial Judge erred when he failed to enter judgment for Defendants.

[138] Restatement (Second) Torts § 892 cmt. b & c.
[139] Prosser & Keeton § 18, at 118.
[140] *Browne v. Saunders,* 768 A.2d 467 (Del. 2001) (dismissing plaintiff's allegations that he was physically and sexually assaulted during the period in which plaintiff and defendant lived together).

II. THE TRIAL JUDGE'S EVIDENTIARY RULINGS AND FORMULATION OF JURY INSTRUCTIONS AND VERDICT SHEET AMOUNTED TO REVERSIBLE ERROR.

A. Question Presented

1. Did the Trial Judge abuse his discretion in various evidentiary rulings and significantly prejudice the Defendants, preventing a fair trial and amounting to reversible error?[141,142,143]

2. Did the Trial Judge err as a matter of law and abuse his discretion by failing to properly instruct on battery, punitive damages and mitigation?[144,145,146]

B. Scope of Review

The Supreme Court reviews a trial court's evidentiary rulings for abuse of discretion.[147] "[T]his Court will review *de novo* a refusal to instruct on a defense theory (in any form); and it will review a refusal to give a "particular" instruction (that is, an instruction is given but not with the exact form, content or language requested) for an abuse of discretion."[148]

When a trial judge determines the probative value of evidence is not substantially outweighed by the danger of unfair prejudice under Rule 403, this Court's standard of review on appeal is deferential.[149] While the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of any

---

[141] Argument regarding testimony or reference to Nicholas Delucia: Defendants' Motion in Limine to Exclude Nicholas DeLucia D.I. 203; See Appendix at A321-322; A365-366.
[142] Argument regarding questioning of Ashley Justus and Dennis Campbell: Appendix at A370-375, A376-378.
[143] Argument regarding Maryland plea agreement and protective order: Appendix at A309-319.
[144] Battery: Appendix at A395.
[145] Punitive Damages: Appendix at A295.
[146] Mitigation of Damages: Appendix at A405-406.
[147] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009).
[148] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).
[149] *Middlebrook v. State*, 815 A.2d 739, 745 (Del. 2003); *citing Capano v. State*, 781 A.2d 556, 607 (Del. 2001); *Keperling v. State*, 699 A.2d 317, 320 (Del. 1997).

evidence,[150] a clear abuse of that discretion can result in a reversal of the trial judge's decision to admit testimony as relevant.[151] An abuse of discretion occurs when the trial judge "has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice."[152]

C. Merits of Argument

Defendants assert the following decisions by the trial judge amount to reversible error, both individually and cumulatively.

Where an appeal from a trial court's decision is grounded on allegations that the trial court erred as a matter of law or abused its discretion in submitting claims to the jury and in admitting certain evidence, the reviewing court will first consider whether the specific rulings at issue were correct.[153] If the court finds error or abuse of discretion in the rulings, it must then determine whether the mistakes constituted "significant prejudice so as to have denied the appellant a fair trial."[154] Errors which in themselves are deemed harmless, may cumulatively constitute reversible error.[155]

A new trial may be granted upon a finding that the trial court committed legal error in applying the law in its rulings at trial.[156] A court commits reversible legal

---

[150] *Id.* (*citing Capano v. State,* 781 A.2d 556, 607 (Del. 2001)).
[151] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009) (*citing Moorhead v. State*, 638 A.2d 52, 56 (Del. 1994) (citations omitted)).
[152] *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).
[153] *Adams v. Luciani*, 846 A.2d 237 (Del. 2003) (*citing Barrio Canal v. Gibbs*, 697 A.2d 1169 (Del. 1977))
[154] *Strauss v. Biggs*, 525 A.2d 992, 996-997 (Del. 1987) (*citing Eustice v. Rupert*, 460 A.2d 507, 510 (Del. 1983)).
[155] *Robelen Piano Co. v. DiFonzo*, 169 A.2d 240, 248 (Del. Supr. 1961); *see also Wright v. State*, 405 A.2d 685, 689 (Del. 1979) (*citing United States v. Freeman*, 514 F.2d 1314, 1318 (D.C. Cir. 1972) ("However, where there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether there was plain error.")).
[156] *Adams v. Aidoo*, 2012 Del. Super. LEXIS 135 (Del. Super. 2012); citing *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 539 (Del. 2006); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 24 (Del. 2005).

error if it instructs the jury in a manner that undermines its ability to "intelligently perform its duty to return a verdict,"[157] improperly comments about matters of fact in charging the jury, so as to convey an estimation of truth, falsity, or weight of evidence to the jury,[158] or abuses its discretion deciding whether to admit or deny evidence.[159]

1. The evidentiary rulings in this case amounted to reversible error as they significantly prejudiced the Defendants, preventing a fair trial.

"[R]elevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[160] In analyzing if the testimony of DeLucia should have been precluded pursuant to D.R.E. 403, the Court should have considered "(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act would prolong the proceedings."[161]

The Trial Judge committed reversible error by allowing testimony referencing Nicholas DeLucia. Considering the above factors, the weight heavily favored excluding the testimony and any reference of DeLucia. Any reference to DeLucia's prior allegations against Bruette only served to confuse and mislead the jury. While

---

[157] *Id.*; *citing Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2002); *Alexander v. Riga*, 208 F.3d 419, 426 (3d Cir. 2000).
[158] *Id.; citing Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1100 (Del. 2002).
[159] *Id.; citing Capano v. State*, 781 A.2d 556, 586 (Del. 2001).
[160] D.R.E. 403
[161] *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

DeLucia did not testify, there was mention of him throughout the trial and Defendants repeatedly objected to that testimony. Defendants assert that the evidence allowed into the record regarding DeLucia was incredibly prejudicial to Defendants. Evidence offered to suggest Bruette abused DeLucia was not probative of whether or not Kuehn and Bruette abused Plaintiff in the present case, therefore, should not have been allowed to be presented to the jury.

It was argued in Defendants' *Motion in Limine* and again in the October 31st teleconference, as well as throughout trial, the jury would become inflamed if permitted to hear about the allegations of DeLucia, which would substantially prejudice the Defendants. Although both DeLucia and Plaintiff made allegations regarding Bruette, the allegations were not even remotely similar in nature. The allegations made by DeLucia did not relate at all to Kuehn. Furthermore, the limited (and admittedly collateral) purpose for which the Trial Judge allowed questioning related to DeLucia during Ms. Campbell's direct examination was heavily outweighed by the prejudicial effect it would have, and indeed did have, on Defendants.

The Trial Judge repeatedly recognized the danger and prejudice of allowing testimony related to DeLucia, yet he refused to exclude it for reasons incomprehensible to Defendants. This immediately and irreparably prejudiced the Defendants. No limiting instruction could effectively cure the prejudice associated with the testimony referencing DeLucia. The Court's curative instruction was woefully insufficient to prevent the jury from reaching a verdict based on emotion.

In addition to the prejudicial testimony related to DeLucia, the Trial Judge's allowance of any reference to a Maryland plea agreement and protection order allowed the jury to imply that Defendants were guilty of some bad acts as a result of

their alleged activities with Plaintiff. This amounted to reversible error. In response to this testimony being allowed in by the Trial Judge, Defendants were forced to address the matter on cross-examination of Ms. Tracy Campbell, Plaintiff's mother, but the testimony allowed in with regard to the plea agreement had already sufficiently prejudiced Defendants. The prejudice caused by the Trial Judge's rulings was exacerbated by the rulings that precluded arguably exculpatory testimony to be introduced on behalf of the Defendants. The Court's allowance of testimony regarding a Maryland plea agreement and inconsistency with similar rulings that would have favored Defendants was unduly prejudicial and amounted to a reversible error.

Failure to allow certain questioning of Ashley Justus and Dennis Campbell also amounted to reversible error as Defendants were prevented from properly addressing very prejudicial information already in the record and heard by the jury. During Ms. Justus' deposition she testified that Plaintiff informed her about his sexual encounter with another male when he was just a few years younger. However, Ms. Justus also testified that Plaintiff told her the other male forced him to engage in the sexual encounter.[162] This directly contradicted Plaintiff's trial testimony that this prior sexual activity was consensual. Plaintiff denied he told his girlfriend that he was forced to engage in the sexual encounter with this other male. Based upon the fact that, in the present case, Plaintiff was alleging he was forced to engage in sexual encounters with Defendants, his prior inconsistent statements about his sexual encounter with another male when he was younger were clearly relevant.[163] Furthermore, Plaintiff's own

[162] Appendix at A69-70.
[163] Appendix at A370-375; "MS. ALLEN: …She says the plaintiff told her that this Hayden Hudson pressured him into doing things sexually with him and that he told her Hayden said no, that he told Hayden no multiple times, and that's it." Id. at A372.

admission that he had in fact engaged in sexual activity with another male prior to knowing the Defendants also contradicted a necessary element to Plaintiff's claim, that the alleged conduct was harmful or offensive. Accordingly, Defendants' counsel attempted to question Ms. Justus about Plaintiff's prior inconsistent testimony. On objection, the Trial Judge prevented this questioning.

The questioning was directly related to the Plaintiff's credibility, and therefore, it was an abuse of discretion for the trial judge to exclude such relevant testimony. Moreover, the Trial Judge's decision that the testimony would be more prejudicial than probative and could confuse the jury about why the testimony was being presented was disingenuous, particularly when compared to his reasoning and ruling on the admission of testimony regarding DeLucia.

The prohibited questioning of Dennis Campbell was similarly damaging to Defendants' ability to defend themselves against Plaintiff's baseless allegations. The line of questioning went directly to Plaintiff's credibility, and thus, the Trial Judge substantially prejudiced Defendants by disallowing the testimony. At a minimum, the Court should have allowed the questioning to refute the prior impermissible admission of the Maryland plea agreement or alleged protective order.

Based on this seemingly blatant bias towards excluding favorable evidence for the Defendants, and the resulting prejudice to the Defendants with the jury hearing only limited information that would question the Plaintiff's credibility[164], the Trial Judge's rulings can be considered nothing less than an abuse of discretion. Defense counsel should have been permitted to address these very relevant and probative topics, and not having the opportunity to do so amounts to reversible error. Overall,

the Trial Judge abused his discretion in allowing evidence that was substantially prejudicial against the Defendants and undoubtedly caused the jury to decide this case based on emotion and irrelevant facts.

2. **The trial judge erred as a matter of law in formulating jury instructions and a verdict sheet.**

Under Article IV, §19 of the Delaware Constitution, "[j]udges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law."[165] "This provision is meant to ensure that judges confine themselves to making determinations of law and leave juries to determine the facts.[166] "In jury trials, the court may not determine issues of fact from the evidence..."[167] While the trial judge is responsible for instructing the jury, the parties are responsible for bringing to the judge's attention instructions they consider appropriate.[168]

While some inaccuracies and inaptness in statements are to be expected in any [jury] charge, this Court will set aside a verdict if a deficiency in the jury instructions undermined the jury's ability to intelligently perform its duty in returning a verdict."[169] "Therefore, this Court must also determine whether the instructions to the jury were erroneous as a matter of law, and, in the event any objections were not raised already, "whether those errors so affected [the parties'] substantial rights that the failure to object to the instruction at trial is excused."[170] "In evaluating the propriety of a jury charge, the instructions must be viewed as a whole."[171]

---

[165] *Del. Const. art. IV,* § 19.
[166] *Herring v. State,*805 A.2d 872, 875 (Del. 2002).
[167] *Storey v. Camper,* 401 A.2d 458, 462 (Del. 1979).
[168] *Beebe Med. Ctr., Inc. v. Bailey,* 913 A.2d 543, 546 (Del. 2006).
[169] *Id.* (*citing Riggins v. Mauriello,* 603 A.2d 827, 830 (Del. 1992)(*citing Probst v. State,* 547 A.2d 114, 119 (Del. 1988)). *See also Adams v. Aidoo,* 2012 Del. Super. LEXIS 135 (Del. Super. 2012).
[170] *Id.* (*citing Probst v. State,* 547 A.2d 114, 119 (Del. 1988)).
[171] *Corbitt v. Tatagari,* 804 A.2d 1057, 1062 (Del. 2002).

Viewed as a whole, the jury instructions in this case undermined the jury's ability to intelligently perform its duty in returning a verdict; specifically with regard to the instructions on battery and consent, the individual Defendants and the corporate Defendant, punitive damages and mitigation of damages.

First, the Trial Judge erred as a matter of law and abused his discretion with regard to the consent instruction and Plaintiff's battery claim and failing to properly instruct on Plaintiff's alleged intoxicated state. The Trial Judge's rationale was unresponsive and generally dismissive.[172]

Failure to instruct the jury on the consequences of Plaintiff's voluntary intoxication, and further failure to instruct the jury that the Defendants had to be aware that Plaintiff was so intoxicated that he was incapable of exercising reasonable judgment, prevented the jury from intelligently performing its duty in returning a verdict. Furthermore, the final instruction on battery as it related to consent and intoxication was confusing and amounted to more than a mere inaccuracy or inaptness.[173] An excerpt from the draft battery instruction read:

> Further, if you find that Plaintiff consented to the contact ***but that consent was due to Plaintiff's involuntary intoxication, then the consent was invalid. If, however, Plaintiff's intoxication was voluntary, then consent may be a defense to the battery***.

The final version actually read to the jury on this issue was:

> Further, if you find plaintiff consented to the contact ***but that plaintiff's consent was due to his intoxication that rendered him incapable of exercising reasonable judgment, and his intoxication was apparent to Defendant Bruette and/or Kuehn then the consent was invalid.***[174]

[172] Appendix at A395-396.
[173] See Appendix at A249-269.
[174] Appendix at A253.

The most obvious omission is any alternative for the jury to find that consent could be a defense to Plaintiff's battery claim and Plaintiff's voluntary intoxication would not automatically void consent.

After reviewing the proposed jury instructions drafted by the Trial Judge (the first battery instruction), and expressing Defendants' objections, subsequent discussion on the last day of trial left Defendants noting several objections for the record.[175] Among other things, there was disagreement with the Court's interpretation of the evidence about whether or not there was testimony, if the jury believed Plaintiff's story, that both Plaintiff and Kuehn were intoxicated and whether that warranted an additional instruction regarding consent.[176] The Trial Judge decided that the jury could not be left to speculate, as discussed in earlier argument regarding battery and consent.[177] After further discussion and reluctance of the Court to include language and defenses Defendants requested to provide the jury with clear instructions, Defendants finally requested the Trial Judge revert to his original instruction and instruct on voluntary versus involuntary intoxication.[178] This did not happen. Defendants assert that the resulting jury instruction left the jury little choice to find in favor of Defendants.

Second, the Trial Judge declined Defendants' request for an instruction on mitigation of damages. The Plaintiff had a duty to mitigate his damages and the

[175] See Appendix at A394-395 (Defendants requested that a sentence be added about their inability to know that Plaintiff was unable to consent; Defendants objected to the Court's position on intoxication).
[176] Id. Defendants then requested to instruct the jury that the Defendants have to be aware of the intoxication and the Plaintiff's unwillingness to participate in that conduct.
[177] See Appendix at A397.
[178] See Appendix at A399.

Defendants should not have been required to call an expert witness, as the Court suggested, to prove additional therapy would have benefited the Plaintiff.[179] This is particularly true considering Plaintiff failed to call an expert witness in support of any damages and the jury was permitted to speculate about Plaintiff's alleged emotional distress. Accordingly, the Trial Judge erred as a matter of law.

Third, Defendants argued that the jury should not receive any instruction on punitive damages for any of the Defendants.

Defendants objected to the instruction for "Punitive Damages – Employer or Principal Tortfeasor" on the grounds that there was no basis to support an instruction for punitive damages against Great Stuff, Inc.[180] The Verdict Form also did not include a space for a decision on the issue of whether or not Bruette and Kuehn were acting within the scope of their employment,[181] it only asked whether the corporation was liable for the conduct of the Defendants towards Plaintiff.[182]

The evidence presented in this case did not support such an instruction. Great Stuff, Inc. cannot be liable for Defendants' alleged conduct because Plaintiff failed to prove the doctrine of *Respondeat Superior*. According to Plaintiff's own testimony, any of the time he spent at the Defendants' residence in Maryland was not as an employee, and Bruette and Kuehn were not acting as Plaintiff's boss(es).[183] Accordingly, the evidence was legally insufficient to show that Bruette and Kuehn

[179] Appendix at A405-406.
[180] Appendix at A390-392.
[181] Trial Transcript 11/7/14 at 65-66. The scope of employment language was only included in the jury instructions.
[182] Verdict Form, D.I. 235.
[183] Appendix at A349; See also Cotter Dep. June 19, 2013, at 277, 300.

were acting within the scope of their employment and the jury could not conclude that Great Stuff, Inc. was liable for battery or IIED allegedly committed by Defendants.

Defendants also argued that, because Plaintiff failed to set forth any compensatory damages, an instruction on punitive damages would be improper.[184] After the Trial Judge concluded that he would instruct on punitive damages, Defendants requested that a question be asked related to Plaintiff's contribution to his damages, and that if the jury answered yes, they not be questioned about punitive damages.[185] Despite Plaintiff's own testimony that he repeatedly returned to the residence and became voluntarily intoxicated,[186] the Trial Judge ruled that an instruction on punitive damages was still appropriate, but left the door open for Defendants to argue this issue in post-trial motions.[187]

In addition to allowing the issue of punitive damages to go to the jury against the overwhelming lack of evidence, the actual jury instruction was erroneous as a matter of law. The jury instruction on punitive damages included two standards of proof (clear and convincing evidence and preponderance of the evidence), one was arguably consistent with Maryland law, the other only served to further mislead and confuse the jury. While this instruction alone should be sufficient to vacate the jury's award of punitive damages, the Plaintiff also failed to meet the appropriate standard to support his claim for punitive damages, clear and convincing evidence.

---

[184] Appendix at A391; *See Baltimore Transit Co. v. Faulkner*, 20 A.2d 485, 488 (1941) (holding that evidence of a Plaintiff's provocation "is admissible in mitigation of exemplary damages, and whether there was sufficient provocation is a question that should be left to the consideration of the jury.").
[185] Appendix at A407.
[186] Id.
[187] See Appendix at A408, 409 ("If defendants can convince the Court in post-trial motion practice that the law is as you just suggested, then I'm prepared to say that as a matter of law plaintiff is not entitled to punitive damages…").

In Defendants' post-trial briefing, it was argued that Plaintiff was required to show that he was entitled to an award of punitive damages by clear and convincing evidence.[188] However, the Trial Judge did not vacate the punitive damage award.

In Maryland, to support a claim for punitive damages, "in any tort case[,] a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages."[189] Maryland courts apply the same standard in both intentional and non-intentional torts cases: "the trier of fact may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., 'actual malice.'"[190] Even if a plaintiff makes out a *prima facie* case of an intentional tort by a preponderance of the evidence, because it is possible for a civil battery to be committed without actual malice, a plaintiff must also show, to a clear and convincing standard, the tort was committed with "actual malice."[191] Actual malice requires more than the general intent necessary to prove a civil battery; it requires proof of a specific intent to injure the plaintiff.[192] In the present case, there was no evidence to support a finding of actual malice on the part of any of the Defendants. The record is void of any evidence that Great Stuff, Inc. acted with actual malice. The evidence presented also does not clearly and convincingly prove that either Bruette or Kuehn acted with actual malice. Instead, Plaintiff testified to how much he cared about and respected the Defendants and how well they treated him. Accordingly, not only did the jury reach a verdict

---

[188] Appendix at A295.
[189] *Beall v. Holloway-Johnson*, 2016 Md. LEXIS 2, 29 (Md. Jan. 21, 2016) (*citing Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992)).
[190] *Id.* at 29 (*citing Zenobia*, 601 A.2d at 652).
[191] *Id.* at 29, 30-31 ("…adducing a *prima facie* case for battery would not support submitting a punitive damages prayer to the fact-finder.").
[192] *Id.* at 30-31.

contrary to the evidence in the record and the appropriate law to be considered, the jury instructions and verdict sheet prevented the jury from intelligently performing its duty in returning a verdict.

Additionally, the jury did not award any compensatory damages against Great Stuff, Inc., so the award for punitive damages should have been set aside. Under Maryland law, a plaintiff cannot collect for punitive damages unless compensatory damages are first awarded.[193] "When and if the jury awards compensatory damages, then the trial judge can instruct fully on punitive damages after the presentation of evidence of the defendant's ability to pay."[194] Great Stuff, Inc. was ordered to pay a total of $100,000.00 in punitive damages. However, as the verdict sheet shows, the jury failed to award any compensatory damages against Great Stuff, Inc.[195] The Trial Judge relied on *Embry v. Holly*,[196] to support the conclusion that Great Stuff, Inc., Bruette and Kuehn were jointly and severally liable for the total compensatory damages. Here, Great Stuff, Inc. was not liable for any compensatory damages, and even if punitive damages in light of no award of compensatory damages were appropriate, there was still no evidence that Great Stuff, Inc. authorized or ratified the acts of Bruette and Kuehn. Therefore, the instruction on punitive damages against Great Stuff, Inc. was error and an abuse of discretion and the subsequent jury award of punitive damages must be set aside as a matter of law.

---

[193] *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 274-275 (Md. 2004) (*see also Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1077 (Del. 1983) (finding that "[t]he award of punitive damages cannot be made unless the plaintiff also receives compensatory damages.")).
[194] *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828, 843 (Md. 2004).
[195] Appendix at A270-273
[196] 422 A.2d 966, 973 (Md. 1982).

In *Robelen Piano Co.,* Defendant appealed a judgment in favor of plaintiff for personal injuries and denial of its motion for JNOV.[197] Defendant argued for entry of judgment in its favor, and alternatively, remand for a new trial, on the grounds that certain prejudicial errors occurred during trial, and in addition, the excessiveness of the verdict. While the court agreed to some extent that the award was high, it reserved opinion on that point after addressing each of the defendant's contentions about the alleged errors.[198] The Court commented on whether the judge had committed error(s), however, it did not state whether any one of the errors standing alone carried sufficient prejudice to require the award of a new trial.[199] Instead, the Court held that the errors cumulatively amounted to prejudice and, a new trial was awarded.[200]

Like the defendant in the *Robelen* case, Defendants here have presented several prejudicial errors that individually amount to reversible error. While Defendants urge this Court to make a finding that each of these errors, standing alone, would be sufficient to grant a new trial, like the Court reasoned in *Robelen*, that determination is not necessary. This Court can and should find that the aforementioned prejudicial errors, considered cumulatively, amounted to prejudice and award Defendants a new trial. Further, this Court should vacate the jury's award of punitive damages, if not in response to the arguments made above, then based on the due process reasoning of the U.S. Supreme Court.[201]

---

[197] *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 242 (Del. 1961).
[198] *Id.* at 248.
[199] *Id.*
[200] *See also Wright v. State*, 405 A.2d 685 (Del. 1979).
[201] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (U.S. 2003) ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

III. THE COURT COMMITTED LEGAL ERROR IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS BECAUSE THE COURT DID NOT HAVE JURISDICTION OVER THE CAUSES OF ACTION.

A. Question Presented

1. Did the Trial Judge err as a matter of law in denying Defendants' Motion for Summary Judgment for, *inter alia,* lack of subject matter jurisdiction when there were no supported allegations of battery and IIED in Delaware.[202]

B. Scope of Review

This Court examines *de novo* questions of law and statutory interpretation decided by a lower court and thus exercises plenary review.[203]

C. Merits of Argument

The Court's failure to dismiss Plaintiff's claims stemming from alleged acts in Maryland and further holding Defendants amenable to suit in this forum was an error of law. Defendants filed a Motion for Summary Judgment on April 9, 2014, seeking to dismiss all counts of Plaintiff's Complaint for, *inter alia,* lack of subject matter jurisdiction.[204] The Court may have subject matter jurisdiction over a *class* of claims in the judicial sense, however the Court's jurisdiction is limited by statute. The Superior Court's general powers do not extend to the causes of actions alleged by Plaintiff. Accordingly, the Court correctly dismissed Plaintiff's Count I, 10 *Del. C.* §8145.[205] In support of its decision the Court held, "…the record seems to not support the claim that anything happened in Delaware, that amounts to a violation of a

[202] Exhibit E.
[203] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (*citing Fiduciary Trust Co. v. Fiduciary Trust Co.,* 445 A.2d 927 (Del. 1982)).
[204] See Appendix at A78-81 (Defendants' Motion for Summary Judgment).
[205] See Exhibit E; Appendix at A128-129.

Delaware criminal statute contemplated by 8145…" The Court, however erred as a matter of law in failing to dismiss the remaining claims based on the interpretations of 10 *Del. C.* §542 and due process limitations on the Superior Court's power.

Pursuant to 10 *Del. C.* §542, the Delaware Superior Court "shall administer justice to all persons, and exercise the jurisdiction and powers granted it, *concerning the premises*, according to law and equity."[206] [emphasis added]. Plaintiff denied having suffered from assault and battery in Delaware in his deposition.[207] Thus, all of the allegations by Plaintiff occurred in Maryland and would not be "*concerning the premises"* of Delaware under 10 *Del. C.* §542. Actions that may be considered tortious which occur exclusively outside the State do not concern any premise in Delaware should not be permitted to be litigated in Delaware. The Superior Court has already recognized it would be unreasonable and unfair to permit assaults that took place in another state to be civilly tried in Delaware.[208] In *Tell v. Roman Catholic Archbishop of Baltimore*[209], the Court held that even if it had personal jurisdiction over the defendants "it could not entertain claims based upon the assaults taking place in Maryland, the Bahamas, Colorado and San Francisco."[210] Thus, the subject matter of Plaintiff's claims is not sufficient to confer jurisdiction of the Superior Court over the claims.

For the Delaware Court to entertain such claims would require the Court to interpret and apply another states' laws and regulations; a power that is best conferred

---

[206] 10 *Del. C.* §542 (c).
[207] Cotter Dep., June 19, 2013, at 299.
[208] *Tell v. Roman Catholic Archbishop of Baltimore*, 2010 Del. Super. LEXIS 162 (Del. Super. 2010).
[209] *Id.*
[210] *Id.*

upon the Court by the laws of the state of Delaware.[211] While Delaware has an interest in providing a forum for one of its citizens, Maryland had a far greater interest in this dispute. There are multiple factors that point to Maryland's significant interest in the civil litigation. The genesis of Plaintiff's civil claims in Delaware was the result of criminal charges brought in Maryland; the charges were dismissed by the State of Maryland. Additionally, acts that would be considered criminal in nature in Delaware based upon the age of consent would otherwise be lawful in Maryland. The Court properly concluded that Maryland law would apply. However, the Superior Court's opportunity and experience in applying and interpreting Maryland criminal statutes which are implicated in this case surrounding the issues of voluntary and involuntary consent, related to alleged sexual abuse is limited. The procedural and substantive policies of Maryland were more applicable. Thus, the Court's conclusion to retain jurisdiction over a case which exclusively occurred in Maryland was an error of law.

CONCLUSION

For the reasons stated herein and in Defendants' pleadings in support of similar arguments throughout this litigation, Defendants respectfully request this Court to vacate the lower Court's ruling and grant Defendants' Motion for Judgment Notwithstanding the Verdict and Remittitur. In the alternative, Defendants request this Honorable Court to vacate the award of all damages, but most significantly the punitive damages. As a remedy of last resort, Defendants ask that this Court reverse and remand this matter for a new trial.

[211] 10 *Del. C.* §541 "The Superior Court shall have such jurisdiction as the Constitution and laws of this State confer upon it."