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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 REPLY BRIEF

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I. PLAINTIFF FAILED TO PRESENT LEGALLY SUFFICIENT EVIDENCE TO THE JURY TO ESTABLISH THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED") CLAIM.

Plaintiff's attempt to cure the fact he failed to produce any evidence of severe emotional distress at trial by relying on the mere inference of alleged extreme and outrageous conduct by Defendants must fail. Plaintiff fails to address each element of the tort, filling his argument with more theatrical and dramatic language than actual case analysis and evidence to adequately support his position. Defendants are not distracted by Plaintiff's fanciful account of what allegedly happened between himself and the Defendants, and assert no matter how dramatic a picture Plaintiff would like to paint, facts presented in this case failed to satisfy the requisite elements for a successful IIED claim.

Defendants do not concede the first and second elements required to prove a claim for IIED; that conduct was intentional or reckless and the conduct was extreme and outrageous.[1] Assuming, *arguendo*, Plaintiff met the first two elements of IIED, he did not and cannot support a claim for "severe" emotional distress as required. Accordingly, accepting Plaintiff's testimony as true, Plaintiff voluntarily ingested illegal substances, with his full knowledge and of his own free will, and was of the age where he was a consenting adult under Maryland law. The conduct alleged, while difficult to hear as evidenced by the jury's verdict, is not illegal. It did not involve deception or some grand sinister scheme to operate a business for the sole purpose of shuttling youth in and out of what Plaintiff would like the Court

[1] *Ford v. Douglas*, 144 Md. App. 620, 625 (Md. Ct. Spec. App. 2002).

to picture as some sort of drug-filled brothel. Nonetheless, even if Defendants' denials of what Plaintiff alleged were insufficient, Plaintiff's claim must still fail as the remaining elements required for IIED were not met.

Maryland Courts have intentionally set an extremely high standard for the recovery of IIED. In fact, in the State of Maryland, only four cases have ever been found to meet the required elements of intentional infliction of emotional distress.[2] "In the few cases where an IIED claim has been upheld, the Defendant exhibited continuous and ongoing extreme behavior."[3]

> The first case involved a surgeon, diagnosed with AIDS, who continued to operate on patients without informing them of his diagnosis. *Faya v. Almaraz,* 620 A.2d 327 (1993). The court limited their ruling, stating that the patients could only recover for the time period when they learned of the AIDS illness and when they received their HIV-negative test results. *Id.* The second case involved a psychologist who was counseling a patient on marital problems and at the same time, having a sexual relationship with that patient's spouse. *Figueireda-Torres v. Nichol*, 584 A.2d 69 (1990). In the third case, an insurer who knew of a plaintiff's suicidal tendencies engaged in a course of conduct requiring that the plaintiff submit to a psychiatric evaluation for the sole purpose of harassment and forcing the plaintiff to drop her claim or commit suicide. *Young v. Hartford Accident and Indemnity Co.*, 492 A.2d 1270 (1985). In the last case, a physician engaged in a sexual relationship with a nurse while the physician had active genital herpes and did not disclose this to the nurse. *B.N v. KK.*, 538 A.2d 1175 (1988).[4]

With regard to the cases relied on by Plaintiff in his Answering Brief, Defendants sufficiently distinguished the present case from the case of *Reagan v. Rider*[5] in their Opening Brief. Defendants see no reason to rehash this argument. Plaintiff attempts to point to the case of *Reagan v. Rider* to assert Maryland Courts

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[2] *Donahue v. Cong. Country Club, Inc.*, 2016 Md. Cir. Ct. LEXIS 1, 19-20 (Md. Cir. Ct. 2016).
[3] *Id.*
[4] *Id.*
[5] *Reagan v. Rider*, 521 A.2d 1246, 1249 (Md. Ct. Spec. App. 1987)

have tended to find legally sufficient evidence to support the existence of "severe" emotional distress where sexual abuse is involved. However, in *Reagan*, the plaintiff was a minor throughout the many year duration of the sexual abuse. Contrary to *Reagan*, Plaintiff in this case was, at all times alleged, of the majority age to consent and therefore, not considered a minor. Moreover, Plaintiff fails to address the distinguishing facts set forth in Appellants' Opening Brief regarding the fact the *Reagan* court considered testimony of a forensic and clinical psychiatrist along with the intensity and duration of the plaintiff's emotional distress. Appellee's Answering Brief fails to address the distinguishing facts because the record is void of any facts similar to *Reagan*.

The intensity and duration of the distress are factors to be considered in determining its severity."[6] Plaintiff's own testimony invalidates the severity of any alleged emotional distress, stating he felt mainly disgusted and kind of hated himself.[7] As stated below, the injuries must be so severe they are incapable of healing themselves. Plaintiff testified he was handling everything fine[8] and had learned not to hate himself.[9] In Appellee's Statement of Facts, it is admitted it was Plaintiff's mother who compelled him into therapy, therapy Plaintiff resisted, briefly entertained and soon ended because he did not want to go and "thought he was dealing with the 'sexual abuse' the best he could."[10]

[6] *Caldor, Inc. v. Bowden*, 625 A.2d 959, 964 (Md. 1993).
[7] Appellants' Appendix to Opening Brief (Appellants' Appendix) at 344-345.
[8] Appellants' Appendix at 350-351.
[9] Appellants' Appendix at 344-345.
[10] See Appellee's Answering Brief at 13.

Plaintiff also attempts to argue because he worked for Defendants Bruette and Kuehn, they were in a position of authority which would allow the Court to find support for the existence of "severe" emotional distress. This is not supported by Plaintiff's testimony. Taking Plaintiff's testimony as true, he alleges the source of his IIED is sexual battery which occurred in Maryland, outside of the work space and not during any scope of work and while in Maryland as friends, and not as an employee.[11] "[U]nder Maryland law, an employer is not vicariously liable for the torts of assault and battery based on sexual assaults by another employee as they are outside the scope of employment."[12]

Both in *Moniodis v. Cook* and *Harris v Jones* the plaintiffs claimed IIED at work, during the scope of work, by people in supervisory work roles, however, the courts failed to find IIED. In *Moniodis v. Cook*, the court specifically denied the plaintiff's claims because "none indicated that she was emotionally unable, even temporarily, to carry on to some degree with the daily routine of her life. They produced no expert testimony to that effect."[13]

Plaintiff also seems to rely heavily on the case of *Harris v. Jones*.[14] In that case, however, the Court of Appeals of Maryland emphasized close adherence to the requisite four elements to establish a claim for IIED would assure that "two problems which are inherent in recognizing a tort of this character can be minimized: (1) distinguishing the true from the false claim, and (2) distinguishing

[11] Appellants' Appendix at A348-349; See also Cotter Dep. June 19, 2013, at 277, 300.
[12] *Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 627 (D. Md. 2001)
[13] *Moniodis v. Cook*, 494 A.2d 212, 219 (Md. Ct. Spec. App. 1985)
[14] *Harris v. Jones*, 380 A.2d 611 (Md. 1977)

the trifling annoyance from the serious wrong."[15] The inherent problems associated with IIED claims remain concerning and Maryland Courts have acknowledged "[i]n developing the tort of intentional infliction of emotional distress, *whatever the relationship between the parties*, recovery will be meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves." [16] It is for this reason, the tort of intentional infliction of emotional distress is very difficult to establish and, as such, should be used sparingly and is "rarely viable."[17]

Furthermore, Plaintiff failed to address the decisions in *Takacs v. Fiore* and *Caldor, Inc. v. Bowden*, cited by Defendants in their Opening Brief,[18] which are more analogous to Plaintiff's testimony than *Reagan* and *B.N. v. K.K.*[19]

Contrary to Plaintiff's argument regarding expert medical testimony Defendants will concede that expert medical testimony may not *always* be required to make out a claim for IIED.[20] However, as previously argued by Defendants in their Opening Brief, the lack of expert testimony was fatal to Plaintiff's claim because no causal connection between Defendants' alleged conduct and Plaintiff's

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[15] *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977).
[16] *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. 1991) (quoting *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065 (Md. 1986)).
[17] *Respess v. Travelers Cas. & Sur. Co. of Am.*, 770 F. Supp. 2d 751, 757 (D. Md. 2011)
[18] See Appellants' Corrected Opening Brief at 18-21.
[19] *B.N. v. K.K*, 538 A.2d 1175 (1988) (Granting defendant's motion to dismiss on the plaintiff's IIED claim, the Court stated merely pleading 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.) See also *Thomas v. Bet Sound-Stage Rest*., 61 F. Supp. 2d 448 (D. Md. 1999) (failing to find the plaintiff suffered from IIED based on evidence Defendant groped plaintiff and "yanked" down her pants.).
[20] See Plaintiff's Answering Brief at 19.

alleged emotional distress was established. Plaintiff failed to appropriately address this in his Answering Brief.

Plaintiff testified the alleged sexual contact occurred in the months of March to May.[21] However, Plaintiff's mother, Tracy Campbell testified she noticed a change in Plaintiff's behavior in early February, prior to any alleged activity with the Defendants.[22] She testified Plaintiff was more distant, not his "happy-go-lucky self," was "just not happy" and wanted to move away.[23] Plaintiff testified the alleged emotional distress occurred in the months after the disclosure to his mother,[24] which occurred in June.

Psychological injuries, like those being alleged in this case, are far more uncertain than those of a nature within the general experience of all individuals.[25]

> Given the impalpable and abstruse nature of psychic and emotional injuries, it surely follows that 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 intentional infliction of emotional distress resulting from alleged sexual abuse where unrelated actions, occurrences, and conditions may have affected a plaintiff's alleged injuries.[26]

For the reasons discussed, Plaintiff has failed to establish a claim of intentional infliction of emotional distress and judgment should be entered in favor of Appellants.

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[21] Appellants' Appendix at A354.
[22] Trial Transcript Nov. 3, 2014, at 184.
[23] Trial Transcript Nov. 3, 2014, at 184-185.
[24] Appellants' Appendix at A344-345.
[25] *Doe v. Wildey*, 2012 Del. Super. LEXIS 136, *24 (Del. Super. 2012); *Id.* ("[T]he consequences of sexual abuse can include a myriad of mental and emotional injuries that vary significantly from individual to individual and are affected by other experiences.).
[26] *Id.*

II. PLAINTIFF FAILED TO PRESENT LEGALLY SUFFICIENT EVIDENCE TO THE JURY TO ESTABLISH THE CLAIM OF BATTERY.

Plaintiff insists Defendants "plied Cody with mind altering drugs… encouraged Cody to become intoxicated on a variety of drugs which Defendants supplied in abundance…and once Cody had been sufficiently groomed and disarmed by the intoxicating effects of the drugs, the defendants conducted their sexual battery."[27] Plaintiff asserts "[w]hether Cody voluntarily ingested the drugs is a factor of consideration for the jury, but consenting to drug use does not require a finding that Cody consented to the defendants' sexual conduct." However, at no point did Plaintiff testify he was forced to take drugs, he never testified he was tricked or fooled into consuming intoxicants. To the contrary, Plaintiff admitted he consumed alcohol and took drugs voluntarily, and admitted to engaging in this behavior prior to ever meeting the Defendants.[28]

Plaintiff contends he could not consent to any sexual contact because he was always intoxicated when it occurred.[29] However, Plaintiff failed to provide any testimony to suggest he did not consent to the alleged contact with Defendants.

As stated before, Defendants denied Plaintiff's allegations entirely. Even assuming Plaintiff's allegations as true, his claim of battery must fail as a matter of law because the evidence presented showed the alleged activity was as a direct result of Plaintiff's own choices. Not only did Plaintiff's previous sexual activity with another male discredit the claim he found Defendants' alleged behavior to be harmful and offensive; Plaintiff repeatedly returned to Defendants' home where the alleged

[27] See Plaintiff's Answering Brief at 20.
[28] See Appellants' Appendix at A331; A351-352.
[29] See Answering Brief at 20, Appellants' Appendix at A341.

unwelcome activity occurred showing he knowingly consented to what he knew or should have known from previous alleged experiences would transpire.

Despite a difference in age, if consenting adults make a decision to become intoxicated and engage in sexual activity under the influence, and continue that course of conduct with full knowledge of where the same exact conduct has led those same individuals in the past, where does a co-participant's liability start and end?

Again, taking Plaintiff's testimony as true, if after the first time the alleged conduct occurred Plaintiff never returned and communicated to his guardians and authorities something happened, perhaps Plaintiff's claims would have been pursued criminally in Maryland, perhaps they would survive on appeal. However, that cannot and must not be the case.

Plaintiff correctly states a battery occurs when one intends harmful or offensive contact with another without the person's consent.[30] While Plaintiff claims the alleged conduct by Defendants was harmful and offensive, his actual testimony and interaction with Defendants fails to support his conclusory statement.

Plaintiff's conduct failed to provide the jury with any evidence he viewed Defendants' alleged conduct as harmful and offensive. To the contrary, Plaintiff admitted to caring for Defendant Kuehn.[31] He admitted to sending Defendant Kuehn text messages asking him to marry him, referred to Kuehn as "future me," referred to him as the "special one," his "husband," and "two sexy peas in a pod."[32] Defendants'

[30] See Answering Brief at 22.
[31] Trial Transcript Nov. 5, 2014 at 145.
[32] Trial Transcript Nov. 5, 2014 at 145-148.

Exhibit 1 at trial, the surveillance video, showed Plaintiff initiating playful interaction with Kuehn within the week immediately following the alleged sexual contact.

Furthermore, Plaintiff returned to the Defendants' residence for an overnight the very next weekend after the first alleged sexual contact occurred with Defendant Kuehn, and alleges he slept in Defendant Kuehn's bed and engaged in the same type of conduct which happened the weekend before.[33] Undeterred by the alleged conduct Plaintiff claims was harmful or offensive and without his consent, he again goes back to Defendants' residence and continues to stay overnight.[34] Plaintiff also testified after the second alleged incident with Defendant Kuehn he was upset the following day at Defendant Kuehn for not showing up to Plaintiff's house for his birthday party, and the reason was because Plaintiff was upset at Defendant Kuehn for the conduct he alleges took place the night before.[35] This evidence cannot be sufficient to show Plaintiff was subjected to a battery because his behavior and testimony does not support a requisite element for the tort of battery, harmful or offensive conduct.

As stated in Appellants' Opening Brief, it is clear under Maryland law "that one who intentionally or negligently becomes intoxicated must be held to the same standard of conduct so far as his torts are concerned as if he were sober."[36] Plaintiff's own argument stating, "[i]ncapacity to consent ***may*** exist in the case of plaintiff's intoxication"[37] shows that voluntary intoxication alone is insufficient to have

[33] Plaintiff Trial Tr. at 44-46.
[34] Plaintiff Trial Tr. at 48-49.
[35] Plaintiff Trial Tr. at 46.
[36] *Janelsins v. Button*, 648 A.2d 1039, 1042 (Md. Ct. Spec. App. 1994) (*citing Smith v. Branscome*, 251 Md. 582, 592-96, 248 A.2d 455 (1968)).
[37] Appellee's Answering Brief at 23.

invalidated Plaintiff's consent. Plaintiff fails to cite to any Maryland case in support of his argument that his own voluntary intoxication negated his consent. The cases Plaintiff did cite are not binding or instructive on Maryland law.

Moreover, as stated in Appellee's Answering Brief, consent is "willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor."[38] 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.[39] "Mentally incapacitated individual" is defined as "an individual who, because of the influence of a drug, narcotic, or intoxicating substance …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."[40] There is no doubt Plaintiff's actions and conduct communicated his voluntary consent to the alleged conduct as set forth above, including, but not limited to, Plaintiff's testimony regarding Plaintiff and Defendant Kuehn engaging in acts of mutual masturbation, on another occasion Defendant Kuehn providing him with oral sex, and on a separate occasion Defendant Bruette masturbating him one time.[41] Moreover, Plaintiff failed to provide any evidence he was rendered substantially incapable of appraising the nature of his conduct. Plaintiff merely suggests in his Answering Brief he felt "out of it" and did

[38] See Answering Brief at 22.
[39] Md. Code Ann., Crim. Law § 3-301.
[40] Md. Code Ann., Crim. Law § 3-307.
[41] Appendix at A341.

not have a "fluid memory."[42] However, he fails to provide any specific instance or examples of how he was incapable of apprising the nature of his conduct. To the contrary, Plaintiff admitted he could stand up, walk around, and use his cell phone.[43] He was also able to speak clearly enough for someone to understand him, yet never called for help.[44] With all of those abilities, Plaintiff admitted he never told Defendants "no" during any alleged occasions. Plaintiff apparently could remember what drugs he allegedly took, when he took them, in what amounts, how much they cost, who he was with, but somehow his memory conveniently becomes hazy or nonexistent when it comes to the crux of his claims, particularly how and when he did not consent to the alleged conduct with Defendants.

For these reasons, the jury and Trial Court improperly concluded sufficient evidence existed in the record to render Plaintiff lacked capacity to consent.

[42] Answering Brief at 23.
[43] Appendix at A351-352.
[44] Appendix at A352.

III. THE SUPERIOR COURT'S EVIDENTIARY RULINGS AND JURY INSTRUCTIONS WERE INCORRECT AND AMOUNTED TO AN ABUSE OF DISCRETION.

A. The Court's Evidentiary Rulings on Witness Testimony Exceeded the Bounds of Reason, Were Erroneous and Created an Error Which Was Not Harmless.

1. Testimony Regarding Nicholas DeLucia

Plaintiff argues, without any support, authority or analysis, the Court's allowance of testimony regarding DeLucia was prejudicial but not unfairly prejudicial when considered in light of other evidence presented to the jury regarding Defendants' sleeping arrangements with other males. In fact, Plaintiff failed to provide the Court with any analysis under D.R.E 403 or any instructive case law in support of its conclusion the DeLucia testimony was not prejudicial. Plaintiff concedes the testimony he offered regarding DeLucia was offered because he believed DeLucia was being sexually abused. It is for that exact reason any speculative and non-relevant testimony about DeLucia should have been excluded. While Plaintiff may not have tried to prove Defendant Bruette sexually abused DeLucia, nearly every portion of the testimony regarding DeLucia insinuated abuse to the point where the Court was forced to instruct Plaintiff's counsel not to conduct a trial on what took place in the bedroom between Defendant Bruette and DeLucia.[45] Contrary to Plaintiff's argument, the testimony regarding DeLucia was not brief and limited. The testimony became so prevalent and confusing the Court was forced to provide a limiting instruction.[46] Unfortunately, with every additional

[45] Appellants' Appendix at A368-369.
[46] *Id.*

objection and sidebar discussion as a result of the testimony related to DeLucia, the jury continued to be drawn to the innuendo that something had occurred between Defendant Bruette and DeLucia. Thus, any attempt at a curative instruction by the Court was unsuccessful.

Lastly, Defendants objected to any mention of DeLucia both before and during trial. Therefore, Defendants preserved the right to have it addressed on appeal.[47]

2. Testimony Regarding Maryland Criminal Proceedings

Plaintiff's argument that Defendants placed a Maryland plea agreement before the jury is completely without support in the record. Defendants informed the jury in Opening Statements Plaintiff filed criminal charges against Defendants in Maryland for sexual abuse, but all charges on the indictment were dismissed. Defendants made no reference to any plea entered into by Defendant Bruette on a separate indictment of possession of marijuana that was filed a month after the dismissal of the charges stemming from Plaintiff's sexual abuse allegations. It was Plaintiff who first interjected the plea agreement by insinuating Defendant Bruette pled to reduced charges in exchange for dismissal of the sexual abuse charges. Thereafter, Defendants were forced to address the issue as Plaintiff had incorrectly referenced the plea agreement.[48] Moreover, any actual written plea agreement was never entered into evidence because it does not exist.[49] Defendants objected to

[47] Del. Supr. Ct. R. 8; Defendants' Motion in Limine to Exclude Nicholas DeLucia D.I. 203; See Appendix at A321-322; A365-366.
[48] Appellants' Appendix at A309-319.
[49] See Appellants' Opening Brief at 12; See Appellants' Appendix at A309-319.

testimony related to the plea agreement during trial and therefore, preserved the right to have it considered on appeal.[50]

3. Examination of Ashley Justus and Dennis Campbell

In response to Defendants' arguments regarding testimony of Ashley Justus and Dennis Campbell, Plaintiff merely reiterates the testimony Defendants sought to have admitted and states "[t]he trial court heard counsel on the objection, weighed the probative value of the proffered testimony to challenge Cody's credibility, and correctly determined that is was outweighed by the risk of unfair prejudice and jury confusion…"[51] Plaintiff fails to cite any cases or arguments in support of its conclusory argument and, therefore, Defendants rely upon the arguments set forth in their Opening Brief.[52]

B. The Superior Court's Jury Instructions Were Legally Erroneous and the Court's Formulation of the Special Verdict Form Was an Abuse of Discretion.

1. Jury Instruction on Battery and Consent

Failure to instruct the jury on the consequences of Plaintiff's voluntary intoxication, and further failure to instruct the jury the Defendants had to be aware the Plaintiff was so intoxicated he was incapable of exercising reasonable judgment, prevented the jury from intelligently performing its duty in returning a verdict. Plaintiff's argument that the Trial Court properly qualified the degree of intoxication required to render consent ineffective is unsupported by the instruction. In accordance with Maryland law, an individual may not consensually

[50] Del. Supr. Ct. R. 8; See Appellants' Appendix at A309-319; A312-313.
[51] See Answering Brief at 32.
[52] See Opening Brief at 33-35, 42.

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.[53] "Mentally incapacitated individual" is defined as "an individual who, because of the influence of a drug, narcotic, or intoxicating substance …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."[54] The final instruction stated the intoxication merely needed to render Plaintiff incapable of exercising reasonable judgment which is contrary to the definition of a mentally incapacitated individual.[55] Finally, the Trial Judge's failure to distinguish between whether the intoxication was voluntary or involuntary was confusing and misleading to the jury. The instruction as read to the jury allowed the jury to assume an individual whom is intoxicated cannot give valid consent which is an error of law.

2. Denial of Mitigation of Damages

Plaintiff's argument that the jury was not required to be instructed on his duty to mitigate his damages because Defendants did not provide expert testimony that he would have benefited from treatment is incorrect as a matter of law. A party has a general duty to mitigate his damages if it is feasible to do so.[56] Accordingly, the jury should have been instructed on Plaintiff's duty to mitigate his damages. If the jury was instructed on the duty to mitigate, both parties would

[53] Md. Code Ann., Crim. Law § 3-307.
[54] Md. Code Ann., Crim. Law § 3-301.
[55] See Appellants' Opening Brief at 36-37
[56] *American General v. Continental Airlines*, 622 A.2d 1, 11 (Del. Ch. 1992); *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 504 (Del. 1981).

have been provided the opportunity to argue whether mitigation would have been beneficial. Since Plaintiff was alleging severe emotional damages and only attended counseling for two or three sessions, the jury should have been instructed on Plaintiff's duty to mitigate. Neither Plaintiff nor the Trial Judge cited any authority to support the argument that Defendants were required to present evidence of expert testimony on the benefits of mitigation.

3. Instructions and Verdict Form on Vicarious Liability and Punitive Damages Were Erroneous.

Contrary to Plaintiff's argument, Defendants objected to the instruction on punitive damages in its entirety because there was no evidence to support such an instruction.[57] Furthermore, it cannot be argued the instruction on punitive damages properly included two burdens of proof, clear and convincing and preponderance of the evidence. While the appropriate, more difficult standard of clear and convincing evidence is set forth in the instruction, it clearly states in order for the jury to find an award on punitive damages it need only find by a preponderance of the evidence that the defendants acted intentionally and with malice.[58] The standard on which the jury was instructed was a clear error or law and therefore, the award of punitive damages should be vacated.

Plaintiff concedes Defendants' argument that Maryland law requires an award of compensatory damages before a jury may award punitive damages.[59] However, Plaintiff attempts to argue without any support or authority, except for

[57] See Appellants' Appendix at A390.
[58] Trial Transcript Nov. 7, 2014 at 134-135.
[59] See Answering Brief at 41.

mere speculation, the jury found Defendant Great Stuff, Inc. liable for IIED and Battery through *respondeat superior*. The problem with Plaintiff's argument is it is not based upon any evidence.

Further, the instruction on an award for punitive damages against Defendant Great Stuff, Inc. was equally erroneous as a matter of law because the standard of proof was limited to a preponderance of the evidence.[60] Accordingly, there is no evidence to support the conclusion argued by Plaintiff without an independent award of compensatory damages against Great Stuff, Inc. Therefore, the punitive damage award against Great Stuff, Inc. should be vacated.

[60] See Trial Transcript, Nov. 7, 2014 at 134-135.

IV. 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.

Subject-matter jurisdiction is the power of a court over the nature of a case and the type of remedy demanded.[61] A court must have jurisdiction to enter a valid, enforceable judgment on a claim.[62] The requirement that a court have subject-matter jurisdiction means the court can only assume power over a claim that the laws of the jurisdiction authorize it to hear.[63]

Subject-matter jurisdiction does not stop at a tort classification. Facts alleged to support a claim and remedy sought must fall within the adjudicatory power of the court conferred upon it by statute and not offend the Due Process Clause[64] and Full Faith and Credit Clause[65] of the U.S. Constitution. The court's "[j]urisdiction is power to declare the law," and "`[w]ithout jurisdiction the court cannot proceed at all in any cause,' "[66] "Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level."[67]

The Delaware Constitution establishes the courts' jurisdiction to be within the borders of the State.[68] The required statute establishing subject-matter jurisdiction is 10 *Del C.* §542(c) "The Court shall minister justice to all persons,

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[61] Wex Legal Dictionary, Cornell University Law School, 2016 https://www.law.cornell.edu/wex
[62] *Id.*
[63] *Id.*
[64] U.S. CONST. amend. XIV, § 1.
[65] U.S. CONST. art. IV, § 1
[66] *Ruhrgas Ag v. Marathon Oil Co.*, 526 US 574 (1999) (quoting *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (U.S. 1998))
[67] *Steel Co. v. Citizens for Better Env't,* 523 U.S. 83, 94-95 (1998).
[68] Del Constitution Article IV, §16

and exercise the jurisdictions and powers granted it, concerning the premises, according to law and equity." The law specifies the *premises*, not the citizens.

Plaintiff claims damages and punitive damages as a result of battery committed upon him *only* in Maryland.[69] Bruette and Kuehn moved for dismissal for lack of subject-matter jurisdiction on April 9, 2014, after extensive discovery.[70] Challenges to jurisdiction over the subject matter may be raised at any time, even on appeal."[71] The burden of proving jurisdiction exists lies with the plaintiff.[72] Plaintiff voluntarily chose to travel to Maryland each time.[73] The Court must prove the State of Delaware has a legitimate concern of what goes on inside the private domicile of an individual in another state, which it did not. The U.S. Supreme Court opined, "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[74]

The claim over which the forum state asserts jurisdiction (the burden) is related to the defendant's forum activities (the benefit), the burdens and benefits are proportionate, and the procedure is not "undue" or unfair. Battery and IIED are torts of first instance, insomuch as they start and stop upon the physical contact and the infliction, respectively.

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[69] Cotter Deposition, June 19, 2013, at 299. (Denied claims occurred in Delaware).
[70] Pursuant to Super. Ct. Civ. R. (12)(h)(3)
[71] See *Koutoufaris v. Dick*, 604 A.2d 390, 401 (Del. 1992).
[72] *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458, 464 (3d Cir. 2013)
[73] See Appellants' Appendix at A348.
[74] *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (citing *Bigelow v. Virginia*, 421 U. S. 809, 824 (1975))

The Superior Court held "Delaware's [long-arm] statute provides that it confers jurisdiction only for those assaults occurring within Delaware. Thus ***even if*** this Court had personal jurisdiction over the Archdiocese and St. Clare, it could not entertain claims based upon the assaults taking place in Maryland,…"[75]

For these reasons, Plaintiff's claims fail to invoke the subject-matter jurisdiction of the Court required by statute. Plaintiff's claims require inquiry into Maryland's criminal law. A State cannot declare the meaning of the law outside its jurisdiction, when it has no jurisdiction to do so.[76] Thus, "A State cannot punish a defendant for conduct that *may* have been lawful where it occurred."[77] To do so would be a violation of due process. "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[78] Both *State Farm* and *BMW*[79] held the exemplary damage awards violated the substantive component of a litigant's due process rights, in part because the respective awards infringed upon the sovereign interest of other states in our federal system by exacting punishment for acts committed outside the forum.

For these reasons, Plaintiff's suit in the Superior Court of Delaware makes claims that are outside both the statutory and constitutional requirements of the subject-matter jurisdiction of the court and the proceeding and Judgment are void *ab initio.*

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[75] *Tell v. Roman Catholic Archbishop of Baltimore,* 2010 Del. Super. LEXIS 162 (Del. Super. 2010).
[76] *Steel Co. v. Citizens for Better Env't,* 523 U.S. 83, 94-95 (1998)
[77] *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003)
[78] *Id.* at 421
[79] *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996)