EFiled: Dec 17 2015 04:12PM EST
Filing ID 58315192
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 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: December 17, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules

Exhibits

NATURE OF THE PROCEEDINGS

Plaintiff Andrew Cody Cotter ("Plaintiff") filed this action on February 1, 2013 ("Compl."), asserting seven claims.[1] Defendants filed a Motion for Summary Judgment on all Counts on April 9, 2014. Oral argument was held on May 15, 2014, wherein counsel presented their respective arguments with regard to subject matter jurisdiction.[2] The Court granted Defendants' Motion with respect to Count I, violation of 10 *Del. C.* § 8145, but denied the Motion in regard to the six remaining counts without prejudice.[3] 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 for Summary Judgment, Plaintiff's Motion to Apply Delaware Law, Defendants' five (5) Motions *in Limine*, and remaining pre-trial issues.[4] During the teleconference, Plaintiff withdrew his claim for negligence against all parties. To date, the Court has not 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 to enter a directed verdict and judgment as a matter of law 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.[5] On November 21, 2014, Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur Pursuant to Super Ct. Civ. R. 50(b) and 59(d).[6] On April 10, 2015, the Court denied Defendants' Motion for Judgment Notwithstanding the Verdict and granted Defendants' Motion for Remittitur.[7] On April 17, 2015, Defendants filed a

[1] Complaint ("Compl.") D.I. 1. The only claims that remained at trial were battery and intentional infliction of emotional distress.
[2] See Exhibit E, Appendix A82-A144
[3] Appendix at A145
[4] The conference was held off the record even though substantial arguments and rulings were made.
[5] Compensatory damages of $30,000 against Bruette and $50,000 against Kuehn, and $200,000 each in punitive damages. $100,000 in punitive damages (no compensatory damages) against Great Stuff, Inc.
[6] Appendix at A277-A297
[7] The punitive damages award against Defendants was reduced to $240,000. Exhibit C at 7.

Motion for Reargument of the Court's April 10, 2015 Order.[8] The Court denied Defendants Motion in a Letter/Order filed on May 12, 2015.[9] Shortly thereafter, an Order of Judgment was entered by the Court.[10] A Notice of Appeal to the Supreme Court of Delaware was filed on June 23, 2015, and a briefing schedule was issued on November 17, 2015. This is Defendants' Opening Brief on appeal from the Superior Court's decision on Defendants dispositive and post-trial motions, as well as the lower Court's rulings at trial.

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law when it failed to grant Defendants' Motion for Summary Judgment because the Court lacked subject matter jurisdiction to hear Plaintiff's claims.

2. Defendants were entitled to judgment as a matter of law before this matter reached a jury. The Court below erred and abused its discretion in failing to require Plaintiff to respond to Defendants' Motion for Summary Judgment and failing to issue a decision on the Motion. The case proceeded to trial without a showing of the existence of a material fact in dispute.

3. Defendants were also entitled to judgment as a matter of law when they moved for a Directed Verdict at the close of Plaintiff's case. The Court erred as a matter of law and abused its discretion in denying Defendants' Motion because the evidence in the record was practically the same evidence available when Defendants filed their Motion for Summary Judgment, and the evidence was insufficient to support Plaintiff's claims. Further, the Court erred as a matter of law and abused its discretion in denying Defendants' Motion for Judgment Notwithstanding the Verdict and subsequent Motion for Reargument when the evidence submitted at trial did not support Plaintiff's claims.

4. The Court prevented a fair trial in rendering decisions on evidentiary matters that greatly prejudiced the Defendants, individually and collectively. The trial judge's decisions, whether considered separately or cumulatively, amounted to reversible error.

[8] Appendix at A298-A304.
[9] See Exhibit B.
[10] See Exhibit A.

5. 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.

6. In light of these errors, the Court should vacate the judgment of the Superior Court and enter judgment in favor of Defendants based on the absence of an issue of material fact prior to the matter being allowed to proceed to a jury 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 ("Compl."), 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.[11] The action was brought for injuries Plaintiff alleged he sustained as a result of battery and intentional infliction of emotional distress by Bruette and Kuehn, and with the alleged approval of the company Great Stuff, Inc. Defendants wholly denied committing any wrongful acts toward Plaintiff. Defendants also denied and disputed the nature and extent of Plaintiff's alleged damages.

Defendants filed a Motion to Exceed the Page Limit pursuant to Rule 14(d) on December 9, 2015. Despite the presence of three separate Defendants with numerous issues related to each of them, the Motion was denied on December 10, 2015. Accordingly, in an effort to preserve the remaining pages of this Opening Brief for the arguments in support of Defendants' appeal, Defendants incorporate the Statement of Facts sections from Defendants' Motion for Judgment Notwithstanding the Verdict and Remittitur Pursuant to Super Ct. Civ. R. 50(b) and 59(d)[12] and Defendants' Motion for Summary Judgment on Plaintiff's Complaint.[13]

[11] Complaint ("Compl.") 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.
[12] Appendix at A282-283
[13] Appendix at A158-164

ARGUMENT

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

A. Questions Presented

1. Did the Trial Court err as a matter of law in denying Defendants' Motions for Summary Judgment on all Counts for lack of subject matter jurisdiction?

2. Did the Trial Court err as a matter of law in denying Defendants' Motion for Judgment Notwithstanding the Verdict and subsequent Motion for Reargument when the evidence submitted at trial did not support Plaintiff's claims?

3. Did the Trial Court err as a matter of law in denying Defendants' Motion for a Directed Verdict after the presentation of Plaintiff's case at trial when the circumstances had not changed from when the Motion for Summary Judgment was filed and Defendants were entitled to judgment as a matter of law?

4. Did the Trial Court err as a matter of law when it failed to render a decision on Defendants' timely filed Motion for Summary Judgment on all Counts, failed to require Plaintiff to engage in briefing or even file a response to the Motion, and allowed the matter to proceed to a jury?

B. Scope of Review

The Delaware Supreme Court examines *de novo* questions of law decided by a lower court and thus exercises plenary review.[14] The Supreme Court's standard of review of a denial of a motion for a directed verdict or for judgment notwithstanding the verdict 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."[15] It is clear that a Court can set aside a jury verdict

[14] *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).
[15] *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).

when it is against the great weight of the evidence.[16] The evidence must preponderate so heavily against the jury verdict that a reasonable jury could not have reached such a result.[17]

A new trial may also be granted upon a finding that the trial court committed legal error in applying the law in its rulings at trial.[18] A court commits reversible legal error if it instructs the jury in a manner that undermines its ability to "intelligently perform its duty to return a verdict,"[19] 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,[20] or abuses its discretion in deciding whether to admit or deny evidence.[21]

On appeal of a grant or denial of a motion for summary judgment, the scope of review is *de novo*.[22] Accordingly, the Supreme Court will review, in viewing the evidence in the light most favorable to the non-moving party, whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there [was] no genuine issue as to any material fact and the moving party [was] entitled to judgment as a matter of law."'[23] A dispute about a material fact is genuine when "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party."[24] Where there are some disputed facts, summary judgment is still warranted if the undisputed facts and the non-movant's version of the disputed facts entitles the movant to judgment as a matter of law.[25] Thus, the issue is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law."[26]

---

[16] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[17] *Id.*; *citing Gatta v. Philadelphia, B. & W. R. Co.*, 25 Del. 551 (Del. 1911).
[18] *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).
[19] *Id.*; *citing Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2002); *Alexander v. Riga*, 208 F.3d 419, 426 (3d Cir. 2000).
[20] *Id.; citing Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1100 (Del. 2002).
[21] *Id.; citing Capano v. State*, 781 A.2d 556, 586 (Del. 2001).
[22] *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).
[23] *Kuratle Contracting, Inc. v. Linden Green Condominium Assoc.*, 2013 WL 6140000, at *9 (Del. Super. 2013) (*quoting* Super. Ct. Civ. R. 56(c)).
[24] *Id. (citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).
[25] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992)
[26] *Id. (quoting* Super. Ct. Civ. R. 56(c)).

C. Merits of the Argument

Defendants continue to contend, as they did at every appropriate stage before the Court below, 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.

1. The Court committed legal error in denying Defendants' Motion for Summary Judgment on all Counts Pursuant to Rule 56 and 12(h)(3) because the Court did not have subject matter jurisdiction.

Defendants-below 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.[27] During oral argument of that Motion on May 15, 2014, the Court granted Defendants' Motion with respect to Count I, violation of 10 *Del. C.* § 8145, but denied the Motion in regard to the six remaining counts.[28] The Court 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…" Still, and despite counsel's arguments regarding the Court's lack of subject matter jurisdiction, the Court allowed the remaining six claims to proceed through discovery, relying on Plaintiff's interpretation of 10 *Del. C.* §542. The Trial Court erred as a matter of law in failing to dismiss Plaintiff's claims based on the statutory interpretations of 10 *Del. C.* §542 and 10 *Del. C.* §3104.

Plaintiff denied having suffered from assault and battery in Delaware in his deposition testimony.[29] As such, the Trial Court was without subject matter jurisdiction over Counts II, III and IV in the Complaint.[30] The remaining three Counts (V, VI and VII) of the Complaint were specified as "Maryland" and stemmed from alleged assaults having occurred only in Maryland. Accordingly, these claims were also not subject to the Court's jurisdiction.

[27] See Appendix at A78-81 (Defendants' Motion for Summary Judgment)
[28] See Exhibit E; Appendix at A128-129
[29] Deposition of Andrew Cotter at 299.
[30] Assault and battery - DE, negligence - DE (which was later dismissed), and IIED - DE.

This Court reviews questions of statutory interpretation *de novo* because they involve questions of law.[31] Stated in 10 *Del. C.* §542 (c), " The Court shall minister justice to all persons, and exercise the jurisdictions and powers granted it, concerning the premises, …" In *Tell v. Roman Catholic Archbishop of Baltimore*[32], the Superior Court opined that 10 *Del. C.* §3104(j) "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, the Bahamas, Colorado and San Francisco."[33]

As was argued at this stage in the proceedings and in Defendants' Motion for Summary Judgment, all of the alleged assault and battery claims were alleged to have occurred outside the premise of Delaware. Accordingly, the Trial Court was without jurisdiction over these claims because the Superior Court does not have the power to preside over assault claims that are exclusive to the premises of another state. Because states, including Maryland, have their own laws and regulations defining what an assault is, age of consent, voluntary intoxication, et cetera; for the Court to entertain such claims would require the Court to interpret and apply another states' laws and regulations; a power that must be conferred upon the Court by the laws of the state of Delaware.[34] The only law empowering the Superior Court of Delaware to apply a choice of law is 6 *Del. C.* §2708, which relates to injury arising from or related to contracts, agreements, insurance policies and the like, not for claims of assault and battery. The Delaware Code does not provide recovery for assault and battery having occurred outside of the state.

Pursuant to Superior Court Rule 12(h)(3), "[w]henever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action." For the reasons set forth above, Defendants were entitled to summary judgment in their favor at this stage in

---

[31] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011)
[32] *Tell v. Roman Catholic Archbishop of Baltimore*, C.A. No. 09C-06-196 JAP, 2010 Del. Super. LEXIS 162 (Del. Super. 2010).
[33] *Id.*
[34] 10 *Del. C.* §541 "The Superior Court shall have such jurisdiction as the Constitution and laws of this State confer upon it."

the proceedings and the Court erred as a matter of law in failing to dismiss all Counts of Plaintiff's Complaint for lack of subject matter jurisdiction.

2. It was an abuse of discretion for the Court to deny Defendants' Motion for Judgment Notwithstanding the Verdict 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.

Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur Pursuant to Super. Ct. Civ. R. 50(b) and 59(d) on November 21, 2014.[35] The trial judge issued a decision on April 10, 2015, denying Defendants' Motion.[36] Defendants then filed a Motion for Reargument Pursuant to Rule 59(e) on April 17, 2015.[37] The trial judge denied this Motion on May 12, 2015.[38] The Court's denial of Defendants' Motion was an abuse of discretion because there was insufficient evidence to support Plaintiff's battery and IIED claims.

"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."[39] Unlike the directed verdict situation, he is not forced to look solely to the evidence favoring the non-moving party.[40] Pursuant to Superior Court Civil Rule 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.[41]

Under this Rule, "[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 and that inference is that a verdict favorable to

---

[35] See Appendix at A277-297; D.I. 245
[36] Exhibit C
[37] Appendix at A298-304.
[38] Exhibit B
[39] *Storey v. Camper*, 401 A.2d 458, 464 (Del. 1979)
[40] *Storey v. Camper*, 401 A.2d 458, 464 (Del. 1979); citing *Millman v. Millman*, 359 A.2d 158, 160 (Del. 1976).
[41] *Gillenardo v. Connor Broad. Delaware Co.*, 2002 WL 991110 at *5 (Del. Super. 2002).

the plaintiff is not justified."[42] 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."[43]

The basis for Defendants' Motion for Judgment Notwithstanding the Verdict related specifically to the evidence, or lack thereof, presented by the Plaintiff at trial and his testimony regarding battery and IIED.[44] Specifically, the jury found that the Defendants committed battery upon the Plaintiff and the Plaintiff suffered from intentional infliction of emotional distress. The evidence presented at trial, however, does not legally support those findings, and instead, for the reasons set forth below, shows that the jury relied on emotion and disregarded the evidence and the law before them.[45]

a) 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 that the Defendants engaged in extreme and outrageous conduct which intentionally or recklessly caused him to suffer from "severe" emotional distress.[46] Plaintiff failed to present evidence that he suffered from severe emotional distress as a result of Defendants conduct.[47]

Under Maryland law, to succeed on a claim for IIED, a plaintiff must show that the "emotional distress is so severe as to have disrupted [the] ability to function on a daily basis."[48] 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."[49] The court, in

---

[42] *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997).
[43] *Littleton v. Ironside*, 2010 WL 8250830, at *1 (Del. Super. Ct. 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.").
[44] It was also argued that the damages award was unreasonable and unjust.
[45] Defendants filed for Summary Judgment on September 26, 2014, which has not been ruled upon. Accordingly, Defendants incorporated those legal arguments in the Post-Trial Motion for Judgment Notwithstanding the Verdict [or a Directed Verdict as listed in the Opening Brief document title].
[46] *Restatement (Second) of Torts* § 46.
[47] *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990); *Mattern v. Hudson*, 532 A.2d 85, 85-86 (Del. 1987).
[48] *Takacs v. Fiore*, 473 F. Supp. 2d 647, 652 (D. Md. 2007)
[49] *Id*.

denying plaintiff's IIED claim, delineated that the plaintiff's failure to "allege that she has been unable to function on a daily basis" was fatal to her claim.[50] Further, in *Caldor, Inc. v. Bowden*, the plaintiff's claim for IIED based upon socializing less with others was deemed insufficient by the court because evidence showed "he was able to keep up his performance at school and find another job."[51] Additionally, "[i]n this regard, the intensity and the duration of the distress are factors to be considered in determining its severity."[52] Similar to *Takacs* and *Caldor*, the Plaintiff in the present case failed to present evidence that 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 is not as outgoing, these disruptions are insufficient to substantiate a showing of "severe emotional distress."[53] "[T]he emotional distress must in fact exist, it must be "severe" and "no reasonable man could be expected to endure it."[54] 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."[55]

To the contrary, the evidence at trial established that Plaintiff is highly functioning. He has obtained gainful employment, maintained a two year intimate relationship with his girlfriend, and attends college.[56] Moreover, by Plaintiff's own admission he testified that he has been able to deal with any stress from the alleged abuse on his own.[57] Plaintiff testified at trial that he terminated his counseling with SOAR in December 2011, after just two or three sessions, because he was fine and could deal with it on his own.[58] Plaintiff also testified that, at that the time of his testimony, he 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.[59]

---

[50] *Id*.
[51] *Caldor, Inc. v. Bowden* , 625 A.2d 959, 963 (Md. 1993).
[52] DEL. P.J.I. CIV. § 14.1 (2000).
[53] Appendix at A344-345
[54] Prosser, Law of Torts §18 & 66, p. 51; Rest.2d Torts, supra, § 46, Com. j.
[55] *Id.*
[56] Appendix at A346, 360
[57] Appendix at A351
[58] Appendix at A350-351
[59] Appendix at A346

Accordingly, it is clear that the jury disregarded the evidence and law in reaching its verdict in this case as to Plaintiff's alleged severe emotional distress, and therefore, Defendants were, and still are, entitled to judgment notwithstanding the verdict.

Furthermore, Plaintiff's failure to retain an expert is fatal to his case because there was no way for the jury to determine whether Defendants' actions proximately caused any emotional distress of Plaintiff.[60] Without expert testimony, Plaintiff is unable to show that he suffers from severe emotional distress, and even if he could show that he suffered from severe emotional distress, he failed to provide expert testimony relating the severe emotional distress to the Defendants' alleged conduct.

The Court in *Doe v. Wildey,* held that

> 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.[61]

Plaintiff was required to produce expert testimony related to causation of his alleged emotional distress to Defendants' alleged conduct, particularly in light of the fact that Plaintiff failed to produce evidence at trial that his alleged 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 Mr. Bruette and Mr. Kuehn and cared for both of them.[62] Plaintiff failed to submit any evidence of emotional distress during the time he alleges the conduct occurred. Defendants Exhibit 1 at trial, the surveillance video, clearly shows that the Plaintiff was not suffering from severe emotional distress, as it depicted Plaintiff initiating playful interaction with

---

[60] *Petit v. Country Life Homes, Inc.*, 2005 Del. Super. LEXIS 344 (Del. Super. 2005).
[61] *Doe v. Wildey,* 2012 WL 1408879, *6 (Del. Super. 2012) *appeal dismissed on other grounds,* 47 A.3d 971 (Del. 2012); See *Kazatsky v. King David Memorial 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.").
[62] Appendix at A355.

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 Mr. Bruette and Mr. Kuehn, which was after the alleged conduct.[63] Plaintiff admitted that his feelings did not begin until months after he made a disclosure to his mother.[64] Furthermore, Plaintiff admitted that during the time period of February 2012 to early March 2012, his mother noticed that he was withdrawn.[65] This is the time period when he and his mother were having conflicts regarding his recreational use of illegal drugs by himself or with his peers, and well before any alleged sexual contact with Defendants occurred.[66]

As stated previously, Plaintiff was required 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 and, 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.

In denying Defendants' Motion, the Trial Court stated that the parties agreed that for Plaintiff's IIED claim to succeed, Plaintiff was required to submit evidence that he suffered "severe emotional distress," and went on to cite to case law to support the flawed conclusion that

> Defendants' misconduct, having been proved by Plaintiff, is the sort of extreme and outrageous behavior that, by itself, allows an inference of severe emotional distress. Under the circumstances, Defendants were in a position to influence Plaintiff, both emotionally and physically. Bruette and Kuehn were mature adults, almost three times and twice Plaintiff's age. Plaintiff worked for them and, by their admissions, they provided for his guidance and welfare. Plaintiff was barely of age when his relationship with Defendants began. He was young, dependent, and impressionable… Therefore, this employer-employee relationship falls into the category of relationships carefully scrutinized by the courts. Here, the jury was entitled to infer severe emotional distress based on the parties' special relationship and what Defendants were found to have done.[67]

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

[63] Appendix at A355
[64] Appendix at A345
[65] Appendix at A353
[66] Appendix at A353
[67] Exhibit C

claim that he suffered from "severe" emotional distress. The Trial Court misapprehended the legal principles of intentional infliction of emotional distress 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*.[68] 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 that 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. [69]

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 sessions. The Court in *Reagan* specifically analyzed the mental distress suffered by the plaintiff in making its decision;[70] testimony of a forensic and clinical psychiatrist was also considered.[71] 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.[72]

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 intentional infliction of emotional distress. Accordingly, and incorporating Defendants' arguments made in both the Motion for Judgment Notwithstanding the Verdict and Motion for Reargument, the Plaintiff failed to present evidence that he suffered from severe emotional distress and Defendants were entitled to judgment as a matter of law.

---

[68] *Reagan v. Rider*, 521 A.2d 1246, 1251 (Md. 1987)
[69] *Reagan*, 521 A.2d 1246, 1251 (Md. Ct. Spec. App. 1987) (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 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.)
[70] *Id.*
[71] *Id.* at 1247.
[72] Appendix at A342

b) 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.[73]

Voluntary intoxication alone is insufficient to have invalidated Plaintiff's consent.[74] However, "[w]hen 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 tort."[75] Plaintiff failed to submit any evidence at trial that he was involuntarily intoxicated or so intoxicated that 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 that intoxication alone does not invalidate his consent.[76] Plaintiff testified at trial that, although he was intoxicated, he could stand up, walk around, and use his cell phone.[77] He further testified, under oath, during his prior deposition that he was able to speak clear enough for someone to understand him.[78] 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

[73] Appendix at A354
[74] *Poole v. Hudson,* 83 A.2d 703, 704 (Del. Super. 1951) (finding that "incapacity does not necessarily result from 'being under the influence'.").
[75] Prosser & Keeton on the Law of Torts § 66 at 467; *McQuiggan v. Boy Scouts of America,* 73 Md. App. 705 (1988).
[76] Appendix at A360
[77] Appendix at A351-352
[78] Id.

communicate remained intact.[79] 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 with Defendants. Despite Plaintiff's own testimony, both in his deposition and during trial, the Court below improperly concluded:

> The record permitted the jury to have found that while Plaintiff was under the influence of drugs and/or alcohol, he was impaired and lacked the ability to exercise reasonable judgment to respond to Defendants' conduct.[80]

The Court'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 testimony. Perhaps this could have been avoided if this were a case that did not involve applying another state's criminal code. Nevertheless, the Court's mere reliance on the conclusion that 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.[81] "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."[82]

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 encounters with Mr. Bruette and Mr. Kuehn. Plaintiff testified at trial that he could appraise the nature of his conduct because he made the conscience

[79] Id.
[80] Exhibit C at 5.
[81] Md. Code Ann., Crim. Law § 3-307 (West)
[82] § 3-301. Definitions, MD CRIM LAW § 3-301 (West).

decision to allegedly reciprocate the sexual conduct by masturbating Mr. Kuehn and knowingly permitted Mr. Kuehn, without objection, to provide him with oral sex.[83] Plaintiff further testified that during these encounters he would ejaculate and then go to sleep.[84] Additionally, Plaintiff testified that he could not recall any specific acts or comments that he made to Mr. Kuehn or Mr. Bruette during the alleged sexual contact that would have placed them on notice that he was not consenting to the conduct.[85] Furthermore, Plaintiff never stated that 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.[86]

Plaintiff was required to prove that he did not consent to the alleged tortious conduct of the Defendants.[87] Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur.[88] The consent must be to the "defendant's conduct, rather than to its consequences."[89] 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."[90] The Delaware Supreme 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.

---

[83] Appendix at A337
[84] *Id.*
[85] Appendix at A341, A360
[86] Appendix at A351-352.
[87] Levenson v. Souser, 384 Pa.Super. 132, 557 A.2d 1081, 1088 (Pa.Super.1989); 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."); Restatement (Second) of Torts § 892A ("One who effectively consents to the conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for the harm resulting from it.").
[88] Restatement (Second) Torts § 892 cmt. b & c.
[89] Prosser & Keeton § 18, at 118.
[90] *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) (citing Brzoska, 668 A.2d at 1360.).

Based on the evidence cited above, the record is void of any evidentiary support that Plaintiff was battered because his testimony supports that he consented to the alleged sexual encounters with Defendants. Accordingly, it is clear that the jury disregarded the evidence and law related to consent and instead rendered an improper verdict based on sympathy, emotion and prejudice. If the Court (and the jury) properly applied the law to the facts of this case, judgment should have been rendered in favor of Defendants notwithstanding the verdict.

3. The Court erred as a matter of law when it denied Defendants' Motion for a Directed Verdict despite the apparent lack of evidence to support Plaintiff's claims.

The standard of review in an appeal from a Superior Court's ruling upon a motion for directed verdict is whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury.[91] In a tort action, however, it is the plaintiff's burden to establish a prima facie basis for recovery as to all elements of his claim.[92] Defendants incorporate the arguments asserted in Defendants' Motion for Summary Judgment included in the Appendix at A167-189.

The Trial Judge allowed only "two or three minutes[93]" for counsel for Defendants to present the Motion for Directed Verdict, and despite the lack of evidence to support Plaintiff's claims, denied the Motion and allowed the case to go to the jury. The arguments presented during Defendants Motion for Directed Verdict were nearly identical to those submitted in support of the Defendants Motion for Summary Judgment because that Motion should have been granted.

The trial judge erred when he failed to rule as a matter of law that Plaintiff failed to offer any evidence that he did not consent to the alleged conduct.[94] In support of the Motion for Directed Verdict,

---

[91] *Fritz v. Yeager*, 790 A.2d 469, 470-471 (Del. 2002); *citing Russell v. Kanaga*, 571 A.2d 724, 731 (Del. 1990).
[92] *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).
[93] "With respect to the motion for directed verdict, see if you can present it in about ***two or three minutes***, Ms. Allen. I'll take it from there in terms of whether you need more argument and so forth." Trial Transcript 11/6/14 at 249:19-23.
[94] See Appendix at A387-388

Defendants made similar arguments to those discussed in the sections above as well as in their Motion for Summary Judgment filed over a month earlier.[95] The trial judge concluded that 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 taking drugs (regardless of who allegedly supplied them), voluntarily took drugs and voluntarily repeatedly returned to the Defendant's home in Maryland of his own free will after the alleged sexual contact occurred.

Defendants also argued, again, that Great Stuff, Inc. could not be liable because, 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).[96] Therefore, Plaintiff failed to prove the doctrine of *Respondeat Superior*. Accordingly, there was no evidence from which the jury could conclude that Great Stuff, Inc. was liable for any alleged battery or intentional inflection of emotional distress by Mr. Bruette or Mr. Kuehn. For these reasons, the Court below erred as a matter of law and abused its discretion in denying Defendants' Motion for a Directed Verdict.

Defendants also argued for a directed verdict on Plaintiff's IIED claims, "because we do not believe that the plaintiff's testimony, in addition to having no expert witness, meets the severe emotional distress required."[97] The trial judge 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 standard. Again, your motion is denied without prejudice."[98] The Court below erred as a matter of law in failing to properly apply the requisite elements of an IIED claim to the evidence in the present case. As argued previously, Plaintiff was required to prove extreme or outrageous conduct, which in turn caused Plaintiff to suffer severe emotional distress. Due to the fact that Plaintiff failed to provide any evidence of severe emotional distress, in addition to failing to provide any expert testimony supporting Plaintiff's claims, the Court below erred as a matter of law in denying Defendants' Motion for

[95] Appendix at A382
[96] Appendix at A382
[97] Appendix at A388
[98] Appendix at A388

a Directed Verdict and permitting Plaintiff's claims to proceed to the jury. Accordingly, each of the Defendants below were entitled to a directed verdict on Plaintiff's claims for assault and battery and IIED.

4. The Court erred as a matter of law when it failed to render a decision on Defendants' Motion for Summary Judgment on all Counts filed on September 26, 2014.

After the Discovery period ended, and before the deadline for Dispositive Motions, Defendants-below filed a second Motion for Summary Judgment on all Counts. [99] 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."[100] Plaintiff was never required to file a response and the Court never issued a decision on this Motion. Accordingly, the Court's failure to render a decision was tantamount to a denial.

Due to the limited amount of space afforded to present the legal arguments for three separate Defendants, and due to the fact that the arguments are similar to those already presented in this Opening Brief in the preceding pages, Defendants incorporate by reference the arguments presented in their Motion for Summary Judgment filed with the Court on September 26, 2014. In light of the evidence in the record and the arguments Defendants presented to the Court at that stage in the proceedings, the Court committed legal error by failing to grant judgment in favor of Defendants on Plaintiff's only surviving claims of assault and battery and IIED. Considering the facts in the light most favorable to Plaintiff, there was no genuine issue of material fact to support Plaintiff's claims.[101]

The Court erred as a matter of law in failing to grant summary judgment and allowing the Plaintiff to take the case in front of a jury without making out his claims or showing that a genuine dispute of material fact existed.

---

[99] Appendix at A149-189
[100] Appendix at A148
[101] *Since Plaintiff's claims for negligence were dismissed, the following argument will only address those claims that were still active at the time of trial on November 3, 2014.*

II. THE TRIAL JUDGE'S EVIDENTIARY RULINGS AMOUNTED TO REVERSIBLE ERROR, INDIVIDUALLY AND CUMULATIVELY BECAUSE THEY SIGNIFICANTLY PREJUDICED THE DEFENDANTS, PREVENTING A FAIR TRIAL.

A. Question Presented

Did the Trial Court abuse its discretion in various evidentiary rulings and significantly prejudice the Defendants, preventing a fair trial and amounting to reversible error?[102,103,104,105]

B. Scope of Review

The Supreme Court reviews a trial court's evidentiary rulings for abuse of discretion.[106] When a trial judge determines that 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.[107] While the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of any evidence,[108] a clear abuse of that discretion can result in a reversal of the trial judge's decision to admit testimony as relevant.[109] 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."[110]

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

---

[102] 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.
[103] Argument regarding questioning of Ashley Justus and Dennis Campbell: Appendix at A370-375, A376-378.
[104] Argument regarding Maryland plea agreement and protective order: Appendix at A309-319.
[105] Argument regarding *voir dire*: Appendix at A190-213, A244-245, A274-276.
[106] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009)
[107] *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).
[108] *Middlebrook v. State*, 815 A.2d 739, 745 (Del. 2003); *citing Capano v. State*, 781 A.2d 556, 607 (Del. 2001) (quoting *Smith v. State*, 560 A.2d 1004, 1007 (Del. 1989)).
[109] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009); *citing Moorhead v. State*, 638 A.2d 52, 56 (Del. 1994) (citations omitted).
[110] *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

evidence, the reviewing court will first consider whether the specific rulings at issue were correct.[111] 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."[112] Errors which in themselves are deemed harmless, may cumulatively constitute reversible error.[113]

C. Merits of Argument

The Proposed Pre-trial and Stipulation Order filed on October 9, 2014, listed Defendants' objections and which objections were specifically included in Defendants' Motion(s) in Limine.[114] A conference was held on October 31, 2014; however, no court reporter was present. That same day, a Judicial Action Form was filed, which stated "Clerk's Judicial Worksheet from Friday, October 31, 2014, teleconference. Court reviewed outstanding issues to be memorialized in a letter." No such memorialization occurred; nothing further was filed in regard to the issues discussed in that conference.

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

1. The trial judge committed reversible error by allowing testimony referencing Nicholas DeLucia.

Defendants filed a Motion in Limine to exclude the testimony of Nicholas DeLucia ("DeLucia") and/or any reference to him on October 9, 2014, because the Plaintiff was seeking to rely upon the testimony of DeLucia, as well as refer to specific alleged incidents of misconduct between DeLucia and Defendant Bruette.[115] Defendants contended that Plaintiff had to be barred from admitting any evidence or testimony regarding DeLucia for the reasons set forth in Defendants' Motion in Limine, which are

---

[111] *Adams v. Luciani*, 846 A.2d 237 (Del. 2003); *citing Barrio Canal v. Gibbs*, 697 A.2d 1169 (Del. 1977).
[112] *Strauss v. Biggs*, 525 A.2d 992, 996-997 (Del. 1987); *citing Eustice v. Rupert*, 460 A.2d 507, 510 (Del. 1983).
[113] *Robelen Piano Co. v. DiFonzo*, 169 A.2d 240, 248 (Del. Supr. 1961); *see also Wright v. State*, 405 A.2d 685, 689 (Del. Supr. 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.")).
[114] See Appendix at A190-213
[115] See Appendix at A214-219

incorporated herein. Particularly, Defendants argued that DeLucia's testimony and any reference to DeLucia had to be precluded under DRE 403.

"[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."[116] In analyzing whether or not 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."[117]

When considering the above factors, the weight clearly favored excluding the testimony and/or any reference of DeLucia. Any reference to DeLucia regarding his prior allegations against Defendant Bruette would only serve to confuse and mislead the jury.

While 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, both individually and collectively. Evidence offered to suggest Mr. Bruette abused DeLucia was not probative of whether or not Mr. Kuehn and/or Mr. Bruette abused the Plaintiff in the present case (Cotter), therefore, the information was not needed for the presentation of Plaintiff's claim and 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, that the jury would become inflamed if they were permitted to hear about the prior allegations of DeLucia, which would substantially prejudice the Defendants. Although both DeLucia and the Plaintiff made allegations regarding Mr. Bruette, the allegations were not similar in nature. There

[116] D.R.E. 403
[117] *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

was no limiting instruction that could effectively cure the prejudice associated with the testimony related to or referencing DeLucia. The trial judge decided to allow testimony referencing DeLucia, which immediately, substantially and irreparably prejudiced the Defendants.

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 that Plaintiff's counsel's reason for asking about DeLucia (to establish the reason Plaintiff told his mother about the alleged conduct of the Defendants) was a "collateral thing" and was "somewhat beside the point."[118] Still the trial judge permitted the line of questioning, but for a very limited purpose. However, that limited purpose was inflammatory and extremely prejudicial to Defendants.

On the second day of Plaintiff's counsel's direct examination of Defendant Bruette, Plaintiff's counsel again brought up DeLucia and Defendants' 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:

> 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?[119]

After further discussion, the trial judge also stated

> 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 male.*** And if we get into that, then, again, I'm going to give the jury a cautionary instruction about this.[120]

Despite the obvious prejudice to the Defendants, counsel for Plaintiff was permitted to continue this line of questioning. There were several instances where DeLucia was brought up throughout the trial, and counsel for Defendants repeatedly raised objections and attempted to recover. Still, the testimony allowed to be presented to the jury was significantly prejudicial to Defendants, and the Court's curative instruction below was woefully insufficient to prevent the jury from reaching a verdict based on emotion.

[118] Appendix at A321-323
[119] Appendix at A365-367
[120] Appendix at A321-323

> THE COURT: Let me interrupt for just a moment to point out, ladies 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 Nicholas DeLucia, let me caution you that this case does not involve claims by Nicholas DeLucia. So, you are not to consider evidence about Nicholas 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.[121]

While the trial judge found Mr. Bruette's testimony to be self-serving, he recognized the prejudice to Defendants.[122] During sidebar, the trial judge stated that he believed the testimony regarding DeLucia and where he slept to be collateral "because the question really is what happened between Bruette and Plaintiff."[123]

> …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.***

Even though the Court repeatedly recognized the danger and prejudice of allowing testimony related to DeLucia, he refused to exclude it for reasons incomprehensible to Defendants. Overall, the trial judge abused his discretion in allowing testimony regarding DeLucia that was substantially prejudicial against the Defendants and undoubtedly caused the jury to decide this case based on emotion and irrelevant facts.

2. Failure to allow certain questioning of Ashley Justus and Dennis Campbell was an abuse of discretion in that it disallowed Defendants to properly address very prejudicial information already in the record and presented to the jury.

Plaintiff testified at trial that he had experimented in the past with other males when he was 13 or 14**,** that the experimentation involved touching each other's penises and masturbating each other and that it was consensual.[124] Plaintiff denied telling his current girlfriend, Ashley Justus, that these instances were not consensual.[125]

---

[121] Appendix at A369
[122] Appendix at A379
[123] Appendix at A379-380
[124] Appendix at A324
[125] Appendix at A325

During Ms. Justus' deposition, however, she testified that Plaintiff informed her about his sexual encounter with another boy 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.[126] Based upon the fact that, in the present case, Plaintiff was alleging that he was forced to engage in sexual encounters with Defendants, his prior inconsistent statements about his sexual encounter when he was younger were clearly relevant.[127] Accordingly, Defendants' counsel attempted to question Ms. Justus about Plaintiff's prior inconsistent testimony. Upon objection, the trial judge excluded the questioning on this matter.

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 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 an abuse of discretion, particularly when compared to his ruling on the admission of testimony regarding Nicholas DeLucia.

Furthermore, Counsel was also prevented from asking Dennis Campbell, the Plaintiff's stepfather, what his understanding was of why the criminal charges against Mr. Bruette were dropped in Maryland and whether or not the reason was because of the credibility of the witness (Plaintiff).[128] Mr. Campbell was employed as a sergeant in the Cecil County Sheriff's Office, the same police department charged with investigating the Plaintiff's allegations in Maryland, at the time the Plaintiff, his stepson, made allegations of sexual abuse by the Defendants. Despite the probative value of this testimony, the trial judge implied that it was collateral and stated that Mr. Campbell was a poor witness to inform the jury about what happened in Maryland.[129] At a minimum, the Court should have allowed the questioning to refute the prior impermissible admission of the Maryland plea agreement and alleged protective order.

---

[126] Appendix at A69-70
[127] 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
[128] Appendix at A376
[129] Appendix at A377-378

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[130], the trial judge's rulings can be considered nothing less than an abuse of discretion. 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.

3. Trial judge's allowance of any reference to a Maryland plea agreement and protection order was prejudicial to Defendants in that it allowed the jury to imply that Defendants were guilty of some bad acts as a result of their alleged activities with Plaintiff.

On September 16, 2014, Defendants filed a Status Report with the Court, requesting that the Court exclude any information obtained and produced after the close of discovery from the Cecil County Sheriff's Office.[131] The Maryland plea agreement was also objected to in the Proposed Pretrial and Stipulation Order filed on October 9, 2014.[132] It is Defendants' understanding that the trial judge excluded the Maryland plea agreement and related documents during the October 31, 2014 conference.

During trial, upon the completion of opening statements, counsel for Plaintiff requested a side bar to discuss the statements Defendants' counsel made in her opening with regard the Maryland criminal charges against Mr. Bruette being dropped.[133] Counsel for Plaintiff argued that the charges were not dropped, and instead that Mr. Bruette took a plea agreement. Defendants' counsel explained to the Court that there were two criminal indictments, one that resulted from the Plaintiff's allegations regarding sexual abuse and another for possession of marijuana from a different time. The charges brought against Mr. Bruette in relation to the alleged sexual abuse of Plaintiff in the present case were in fact entirely dismissed. The trial judge acknowledged that the Plaintiff might have some latitude to challenge any

[130] The trial judge further prejudiced Defendants when he failed to rule on Defendants' Motion for Spoliation of Evidence due to Plaintiff's intentional destruction of evidence. D.I 26. The mere fact that Plaintiff destroyed evidence should have resulted in dismissal of Plaintiff's case. Alternatively, the Court should have given an adverse instruction to the jury stating that Plaintiff intentionally destroyed evidence, which would have substantially tainted the Plaintiff's credibility. Accordingly, the trial judge's decision was an error of law which prejudiced the Defendants.
[131] Appendix at A146-147
[132] Appendix at A190-213
[133] Appendix at A306.

suggestion that the charges in Maryland were false, but also stated "I'm not going to allow there to be a minitrial about what happened with the criminal charges in Maryland."[134]

In Plaintiff's direct examination of Plaintiff's mother, Tracy Campbell, he asked about the Maryland criminal charges against Mr. Bruette and whether there was a plea agreement and whether that plea agreement required Bruette to not have any contact with Plaintiff's family.[135] Defendants' counsel objected, and in the resulting side bar discussion Plaintiff's counsel admitted that he was not even in possession of a written plea agreement, only a transcript which the trial judge previously ruled inadmissible.[136] The trial judge noted that the absence of a written plea agreement was problematic and the witness was "emotionally charged and not particularly responsive to the questioning."

> 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?" [137]

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.[138] This proof never occurred.

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

---

[134] Appendix at A309
[135] Appendix at A312
[136] Appendix at A315
[137] Appendix at A316-317
[138] Appendix at A319

4. The trial judge abused his discretion in preventing Defendants the opportunity to include special *voir dire* questions that would have enabled them to obtain an unbiased jury.

The Proposed Pretrial Stipulation Order filed with the Court on October 9, 2014, contained a list of 16 special *voir dire* questions offered by Defendants. A Pretrial Conference was held on October 14, 2014, a Proposed Pretrial Stipulation Order was filed that same day with the trial judge's handwriting and rulings.[139] On October 16, 2014, Defendants' Revised Special *Voir Dire* questions were filed based upon the Court's rulings at the October 14th Pretrial Conference.[140] Only two of the special *voir dire* questions offered by Defendants were allowed.[141] Furthermore, the only mention of the nature of the case to ferret out any potential bias of prospective jurors was "[t]his is a civil case and the claims are for personal injury. It involved allegations of sexual abuse between male employers and a younger male employee…."

While the extent of a *voir dire* examination of prospective jurors and the questions to be permitted are within the broad discretion of the trial judge, "[t]he exercise of that discretion is restricted by constitutional requirements and the essential demands of fairness."[142] Accordingly, any limitation the trial judge imposes on the defendant's right to have prospective jurors questioned will constitute an abuse of discretion if the trial judge has clearly abused his discretion to prejudice the defendant.[143]

The failure of the trial judge to include any of the additional *voir dire* questions, that would have addressed more specifically particular views on homosexuality or bisexuality, prejudiced the Defendants

[139] See Appendix at A320-243
[140] See Appendix at A244-245
[141] See Appendix at A320-243; A274-276
[142] *Parson v. State*, 275 A.2d 777, 780 (Del. 1971); *Ortiz v. State*, 869 A.2d 285, 292 (Del. 2005).
[143] *Parson*, 275 A.2d at 781; s*ee also United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979) (The trial judge must exercise sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel for *voir dire* examination. Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality. Where the trial judge so limits the scope of *voir dire* that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error. The reason for this is that, as a result of such error, the number of meaningful peremptory challenges or challenges for cause available to a defendant necessarily is reduced and the inhibition of the right to challenge for cause or peremptorily is in that instance deemed to be prejudicial.)

by impeding their ability to obtain an impartial jury. The *voir dire* questions did not create reasonable assurances that prejudice would be discovered if present.

5. The trial judge abused his discretion by failing to grant Defendants' Motion to Sever.

The Defendants filed a Motion to Sever on April 22, 2013.[144] This Court held oral argument on May 10, 2013, and denied the Defendants' motion without prejudice and held that the Defendants may renew their motion "if it turns out that this case ought to be severed because events are so disconnected."[145] Defendants renewed their Motion on August 4, 2013, but that Motion was also denied.[146] Although the Plaintiff had made claims that generally implicated both Defendants Bruette and Kuehn, the specific allegations as to each of them differed in both number and duration. For example, the Plaintiff claimed that Kuehn had initially assaulted him when he was a minor, while claiming he was an adult when Bruette allegedly assaulted him. Also, the Plaintiff claimed that Bruette had assaulted him on one occasion, but claimed that Kuehn had assaulted him multiple times over numerous visits to their residence in Maryland. In the criminal matter in Maryland, the Court had even ruled that the criminal indictments against Bruette and Kuehn would be severed. While those matters were never taken to trial, the outcomes were significantly different. Kuehn made no agreement with the State to reach his *nolle prosequi*. Bruette agreed to *nolle prosequi* in exchange for a charge of possession of marijuana that would be filed by the State at a later date. The implications and prejudice caused by allowance of testimony related to the Maryland plea agreement to all Defendants has been addressed above, but in light of the denied Motions to sever the present matter, the testimony related to the plea agreement also created significant prejudice to the Defendants individually. The plea agreement as it related to Defendant Bruette implied that he was likely guilty of more heinous acts, which he is not. While the testimony certainly prejudiced Defendant Bruette, Defendant Kuehn was equally prejudiced by the implication because it had absolutely nothing to do with him. Defendant Bruette was also prejudiced by having to defend against and

[144] See Appendix at A64-67
[145] See Appendix at A68. See also Transcript of Oral Argument on May 10, 2013 D.I. 19.
[146] See Appendix at A351, A356

be associated with the number of encounters Plaintiff alleged to have occurred with Defendant Kuehn. The Maryland criminal court recognized this conflict; however, the Court in the present case did not find the risk great enough to warrant severance. In light of the trial judge's evidentiary rulings discussed above and the testimony the jury was allowed to hear, not granting the Defendants' Motion to Sever so that each Defendant could defend against claims pertaining directly to each of them was an abuse of discretion that further exacerbated the prejudice to Defendants in this case.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FORMULATING THE JURY INSTRUCTIONS AND VERDICT SHEET.

1. Question Presented

Did the trial judge err as a matter of law and abuse his discretion by failing to properly instruct on a) battery, b) punitive damages and c) mitigation of damages?

2. Standard of Review

"[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."[147]

3. Merits of Argument

A verdict will be set aside if a deficiency in jury instructions undermines "the jury's ability to intelligently perform in its duty to return a verdict."[148] Under Article IV, Section 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."[149] "This provision is meant to ensure that judges confine themselves to making determinations of law and leave juries to determine the facts.[150] "In jury trials, the court may not determine issues of fact from the evidence..."[151]

---

[147] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).
[148] *Adams v. Aidoo*, 2012 Del. Super. LEXIS 135 (Del. Super. 2012), *citing Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2002).
[149] *Del. Const. art. IV*, § 19.
[150] *Herring v. State*,805 A.2d 872, 875 (Del. 2002)
[151] *Storey v. Camper*, 401 A.2d 458, 462 (Del. 1979).

While the trial judge is responsible for instructing the jury, the parties are responsible for bringing to the judge's attention to instructions they consider appropriate.[152] "While some inaccuracies and inaptness in statements are to be expected in any [jury] charge, this Court will reverse if the alleged deficiency in the jury instructions undermined the jury's ability to intelligently perform its duty in returning a verdict."[153] "Therefore, this Court must determine whether the instructions to the jury were erroneous as a matter of law, and," in the event of 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."[154] "In evaluating the propriety of a jury charge, the instructions must be viewed as a whole."[155]

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 related to battery and consent, the individual Defendants and the corporate Defendant, mitigation and punitive damages. The trial judge erred as a matter of law and abused his discretion with regard to the consent instruction and Plaintiff's battery claim. The Court provided its proposed Jury Instructions and Proposed Verdict Sheet to counsel for review on November 6, 2014.[156] Counsel was required to submit their proposed revisions to the Court, no later than 8:00 p.m. that evening.[157] At the conclusion of the day's testimony on November 6, 2014, there were preliminary discussions on the Court's proposed draft instructions.[158] The draft battery instruction read:

> If you find that a Defendant intentionally, and without Plaintiff's consent, made contact with Plaintiff in a harmful or offensive way, then Defendant(s) is (are) liable for battery. Defendants allege that Plaintiff consented to Defendants Bruette and Kuehn's contact with Plaintiff's person. If you find by a preponderance of the evidence that Plaintiff was at least sixteen years old and was willing to engage in the alleged conduct, and Defendants Bruette and/or Kuehn acted in response to Plaintiff's willingness, then you must find for

[152] *Beebe Med. Ctr., Inc. v. Bailey,* 913 A.2d 543, 546 (Del. 2006)
[153] *Id., citing Riggins v. Mauriello,* 603 A.2d 827, 830 (Del. 1992)*(citing Probst v. State,* 547 A.2d 114, 119 (Del. 1988)).
[154] *Id.; citing Probst v. State,* 547 A.2d 114, 119 (Del. 1988).
[155] *Corbitt v. Tatagari,* 804 A.2d 1057, 1062 (Del. 2002).
[156] 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
[157] Trial Tr. 11/6/15 at 249:12-17.
[158] See Appendix at A381.

> Defendants. 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.

Defense counsel agreed that the instruction was acceptable.[159] After further discussions and concerns raised by the Court, Defense counsel submitted that the instruction would be acceptable even if the first sentence of the second paragraph was removed as proposed by the Court.[160]

On November 7, 2014, the Court held that after reviewing the submissions of the parties that he would no longer instruct the jury on voluntary versus involuntary intoxication.[161] Defense counsel objected to the revised instruction and further proposed alternative instructions requiring that 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.[162] Based upon further discussions of the parties Defense counsel renewed her request for the Court's original draft proposed instruction on battery.[163] The Court abused its discretion in failing to properly instruct on Plaintiff's alleged intoxicated state. The trial judge's rationale was unresponsiveness and generally dismissive.[164]

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 the Plaintiff was so intoxicated that he was incapable of exercising reasonable judgment resulted in a manifest injustice to Defendants and therefore, the judgment should be voided. 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. [165]

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

---

[159] Appendix at A381.
[160] See Appendix at A246-248.
[161] See Exhibit F at 46
[162] Appendix at A394-395
[163] Appendix at A398; see also Trial Transcript 11/7/14 at 5:1-21.
[164]Appendix at A395-396
[165] See Appendix at A249-269

what would have happened if Plaintiff had gone to therapy more than the two instances mentioned on the record.[166] The Plaintiff has a duty to mitigate his damages and the Defendants should not have been required to call an expert witness, as the Court suggest, to prove that additional therapy would have benefited the Plaintiff.[167] Particularly when the jury was permitted to speculate about Plaintiff's alleged emotional damages because the Plaintiff failed to call an expert witness in support of any said damages. Accordingly, the Court's decision was erroneous as a matter of law.

Furthermore, counsel argued that the jury should not receive any instruction on punitive damages for any of the Defendants, but particularly with regard to Defendant Great Stuff, Inc., because the evidence did not support that instruction.[168] Counsel also asserted that because Plaintiff failed to set forth any compensatory damages, that an instruction on punitive damages would be improper.[169] 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."[170]

Moreover, once the Court ruled it was going to instruct on punitive damages Defendants requested that a question be asked on the verdict sheet as to whether you find that the Plaintiff, contributed to his damages at all and that if the jury answered yes that they not be questioned about punitive damages.[171] Defense counsel further argued that the evidence was clear that the Plaintiff repeatedly returned to the residence and became voluntarily intoxicated and therefore, the jury should not have been instructed on punitive damages. [172] The Court ruled:

> Ms. Allen, if the jury comes back with a punitive award and 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. . . .Because no reasonable juror could conclude—under the evidence that was presented in this case . . . [o]n this record, plaintiff's continuing work and continuing to expose himself to this kind of behavior, at least had to play some role in what ultimately happened, even if it was not

[166] Appendix at A405-406
[167] Appendix at A405-406
[168] Appendix at A390-392
[169] Appendix at A391
[170] *Id.*
[171] Appendix at A407
[172] *Id.*

> enough of a role to knock out liability. It does knock out punitive damages, if the law is as Ms. Allen just argued that it is. [173]

After the jury awarded punitive damages Defendants submitted post-trial briefing and argued that the jury should have been questioned on Plaintiff's contribution to his damages before being asked about punitive damages.[174] Accordingly, the Court abused its discretion and as a result Defendants were substantially prejudiced when the jury awarded punitive damages.

Defendants further 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 the corporation. Furthermore, the jury did not award any compensatory damages against the corporation, 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. The same legal theory is also applicable in Delaware.[175] "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."[176] Defendant 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 Defendant, Great Stuff, Inc.[177] The trial Court relied on *Embry v. Holly*, 422 A.2d 966, 973 (Md. 1982), to support the conclusion that Defendant Great Stuff, Inc. and Defendants 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 no evidence introduced to suggest that Great Stuff, Inc. authorized or ratified

---

[173] Appendix at A408, 409.
[174] *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.").
[175] *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.").
[176] *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828, 843 (Md. 2004) (emphasis added).
[177] Appendix at A270-273

the acts of Defendants Bruette and Kuehn. Therefore, the punitive damages against Great Stuff, Inc. must be set aside as a matter of law.[178]

Accordingly, not only did the jury reach a verdict 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.

CONCLUSION

For the reasons stated herein and in Defendants' pleadings in support of similar arguments throughout this litigation, Defendants respectfully request this Court to dismiss 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 reverse and remand this matter for a new trial.

Respectfully submitted,

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: December 17, 2015

[178] Moreover, the evidence at trial was legally insufficient to support any finding against Great Stuff, Inc. for battery or IIED because there was no evidence to show that Defendants Bruette and Kuehn were acting within the scope of their employment when they allegedly committed battery and IIED.