



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S CORRECTED ANSWERING BRIEF ON APPEAL

SCHMITTINGER & RODRIGUEZ, P.A.

/s/William D. Fletcher, Jr.

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DATED: March 15, 2016

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NATURE OF PROCEEDINGS

The instant matter is an appeal by the Defendants from the entry of judgment in a civil lawsuit filed in the Delaware Superior Court applying Maryland substantive law.¹ The Defendants are Great Stuff, Inc., a Delaware corporation, and Jeffery Bruette and Brian Kuehn, Great Stuff's CEO and President, respectively. Plaintiff is Andrew Cody Cotter ("Plaintiff" or "Cody"). On February 1, 2013, Plaintiff² filed the Complaint against Defendants alleging, *inter alia*, claims of battery and intentional infliction of emotional distress ("IIED") stemming from Defendants sexual abuse of Plaintiff.³ Plaintiff sought compensatory and punitive damages for Defendants' tortious conduct.⁴

A jury trial on Plaintiff's claims commenced November 3, 2014 and concluded November 7, 2014. After approximately three hours of deliberations, the jury returned its verdict.⁵ The jury found Defendant Kuehn liable for battery and IIED, awarding Plaintiff compensatory damages in the amount of \$50,000.00, and punitive damages in the amount of \$200,000.00. The jury found Defendant Bruette liable for battery and IIED, awarding Plaintiff compensatory damages in the amount of \$30,000.00, and punitive damages in the amount of \$200,000.00.

¹See Notice of Appeal, Supr. D.I. #1.

²"Plaintiff" refers to Andrew Cody Cotter. Former plaintiffs in this action included Nicholas DeLucia and Joy Cooley, both of whom were later dismissed from the case by stipulation of the parties. See Super. Ct. Docket Items No. 143 & 144.

³See B6-16 (Compl., Super. Ct. D.I. #1).

⁴See *id.*

⁵See B287; B17 (Jury Verdict Form).

The jury found that Defendant Great Stuff, Inc., was liable for the wrongful conduct of Defendants Bruette and Kuehn, awarding Plaintiff punitive damages in the amount of \$100,000.00.⁶

On November 21, 2014, Defendants filed post-trial motions for remittur, directed verdict, and relief from judgment, as well as a motion to stay execution of the judgment pending the court's disposition of Defendants' post-trial motions.⁷ On December 22, 2014 the trial court granted Defendants' motion to stay execution of the judgment.⁸

On April 10, 2015, the trial court issued its letter Opinion and Order on Defendants' post-trial motions.⁹ The trial court granted the Defendants' motion for remittur and reduced the total punitive damages awards from \$500,000.00 to \$240,000.00. The trial court denied the balance of Defendants' post-trial motions. On April 16, 2014, Plaintiff noticed his acceptance of the trial court's remittur.¹⁰

On April 17, 2015, Defendants' filed a motion for reargument on the denied post-trial motions. The trial court denied Defendants' motion in a May 12, 2015 letter Opinion and Order.¹¹ Thereafter, the trial court requested the parties prepare a form of order. On May 22, 2015, the trial court received the form of order, and

⁶See B17-18 (Jury Verdict Form).

⁷See Super. Ct. D.I. #245, 246 & 251.

⁸See *id.* D.I. #260.

⁹Ex. A (Letter Op. & Order (April 10, 2015) (J. Silverman)).

¹⁰B19-20 (Acceptance of Remittur).

¹¹Ex. B (Letter Op. & Order (May 12, 2015) (J. Silverman)).

on May 28, 2015, the trial court docketed its Order for Entry of Judgment.¹² The Order for Entry of Judgment identified the jury's awards of compensatory and punitive damages.

On June 22, 2015, Defendants filed a Notice of Appeal to this Court from the Superior Court's May 28, 2015 Order for Entry of Judgment, though Defendants' Notice does not designate the Superior Court's denial of Defendants' post-trial motions as being appealed.¹³ Defendants filed an Opening Brief on December 17, 2015, and then filed an Amended Opening Brief on February 5, 2016, and then filed a Corrected Amended Opening Brief on February 17, 2016. This is the Plaintiff-Appellee's Answering Brief.

¹²B21-22 (Order for Entry of Judgment).

¹³B1-5 (Notice of Appeal & Ex. A).

SUMMARY OF ARGUMENT

1. **Denied.** The Superior Court properly denied Defendants' Motion for Directed Verdict and Motion for Judgment as a Matter of Law as to IIED and Battery because sufficient evidence existed to support Plaintiff's severe emotional distress and absence of consent
2. **Denied.** The Superior Court did not exceed the bounds of reason in making ordinary evidentiary rulings on the scope of witness examination, nor did the Superior Court disregard the law when instructing the jury. To the extent error is assigned, it was harmless.
3. **Denied.** The Superior Court's jury instructions on Battery and punitive damages were legally correct, and Appellants waived any error as to the punitive damages instructions by failing to object. The Superior Court correctly declined to instruct the jury on mitigation without evidence of what form mitigation would take or what mitigation would have accomplished.
4. **Denied.** The Superior Court had subject matter jurisdiction to hear Plaintiff's civil law claims for money damages.
5. **Denied.** The jury verdict is supported by competent evidence and should not be disturbed. This Court should deny Appellants' appeal in all respects and affirm entry of judgment against Appellants.

APPELLEE'S COUNTER-STATEMENT OF FACTS

In the fall of 2010, at the age of 17, Plaintiff Andrew Cody Cotter ("Cody") began working part-time in the warehouse of a Middletown, Delaware business called Great Stuff, Inc. B141-142. Defendants Jeffery Bruette and Brian Kuehn ran the business. Bruette is Great Stuff's CEO and owns 100% of the corporation. B173. Kuehn is Bruette's right hand man and holds the title of President of Great Stuff. *See* B174. During Cody's employment at Great Stuff, Bruette was 49 years old, and Kuehn was 33 years old. B173; B201.

Cody was not the only teenage boy working at Great Stuff's Middletown warehouse. CEO Bruette thought that kids from the local high school were a good fit for his business model. *See* B190-191. Cody even recalled hearing an advertisement for jobs at the Middletown warehouse over the P.A. system at his high school. *See* B141.

Cody worked at Great Stuff from the fall of 2010 until just after Memorial Day weekend in May 2011. *See* B155-156. During the course of Cody's approximately seven-month employment at Great Stuff, Bruette and Kuehn showered Cody with gifts and special attention. *See* B94, B142, B146-147, B208-209. These two older men took Cody out to lunches and dinners, B142, bought him an iPhone, a laptop computer, expensive sunglasses and designer clothes, B146-147, took him for tanning sessions and massage, B206. They even helped

Cody purchase a replacement car after he crashed his old one, and drove him from school to the Great Stuff warehouse when he did have transportation. B178. B181. However, Kuehn and Bruette's apparent generosity towards Cody quickly became sinister.

Bruette and Kuehn began plying Cody with a cornucopia of illegal mind-altering drugs. B151, B152, B153. The two men lived together in a two-bedroom apartment on an estate in Earleville, Maryland, situated by the Bohemia River. B191. Bruette and Kuehn extended invitations to Cody to come to their apartment and do drugs. *See* B169. They represented their Earleville residence as a safe place where Cody could come and experiment with drugs. B169. At first, Bruette and Kuehn offered up marijuana and alcohol to Cody, B143. Later on, Bruette and Kuehn filled out the intoxicating buffet with salvia, K2, LSD, ecstasy, psychedelic mushrooms, "Papa Smurfs", ketaminc, and DMT. B141, B152, B153. Bruette and Kuehn encouraged use these drugs to the point of heavy intoxication. B157, B169. Their supply of drugs was plentiful, and when Cody came to the apartment, the defendants had all the drugs prepared for him, along with the appropriate paraphernalia to use them. B143, B169-170. Cody did not have to do much himself—the defendants ensured the drugs were ready and easy for Cody to use. B16-170. If the defendants were providing ecstasy pills, they would crush the pills up for Cody to consume. B170. If the defendants were providing marijuana or

K2, the defendants would keep packing bowls for Cody to smoke. B170. It soon became clear why Bruette and Kuehn were going to such lengths to make their Earleville residence into a devious Pleasure Island.

Cody's first visit to the defendants' residence was during his 2010 Christmas break from school. B143. The visit was not planned. B143. Cody and his teenage co-worker, Hacker, had gone to a party one evening and became intoxicated. B143. Neither felt comfortable driving home, so one of them called Bruette and asked for a ride. B143, B177. When Bruette arrived and picked up Cody and his friend, Bruette could tell that they were intoxicated. B177. Instead of taking Cody or Hacker to their homes, Bruette brought them back to his apartment. B177. Back at Bruette's apartment, there was another party going on with marijuana, salvia, and alcohol available. B143.

Cody and his friend smoked marijuana at Bruette's place. B143. Cody's friend passed out on Bruette's couch. B143-144. Bruette told Cody that he could use Kuehn's bedroom since his partner was out of town. B144. While Cody was lying in Kuehn's bed, intoxicated, Bruette came in and climbed onto the bed. B144. Bruette said he was checking on Cody, B177, though Cody found Bruette's behavior worrisome and uncomfortable, and he asked Bruette to leave, which Bruette eventually did. B144. The next morning, Bruette gave Cody and his friend a ride back to their car. B144. Bruette never informed either child's parents

about the events of the earlier evening; it was something he would keep just between himself and the boys. B144, B177, B200.

After Cody's stay over Christmas break, he visited the defendants' residence more frequently and would spend the night there. *See* B148, B176. 33-year-old Kuehn would share his bed with Cody, with Kuehn sleeping there with him. B148. Starting in March 2011, the defendants began exploiting Cody's intoxicated state to sexually abuse him, repeatedly. *See* B148, B151, B152. Defendants' first sexual predation of Cody occurred about one week prior to Cody's March 26th birthday. B148. Cody was seventeen at the time. *See* B148. He spent the evening at the defendants' apartment, and the defendants' provided Cody with a substantial amount of a drug called "K2", which is synthetic marijuana. B148. The defendants' gave Cody a special smoking device to use, and Cody had several hits of K2. B148. Cody became high and felt "out of it", intoxicated by the drug. B148. Cody remembers going to lie down, but cannot remember much more after that. B148. His intoxication prevented him from having a "fluid memory of the situation", and Cody remembered being "in quite an out state" B148.

At some point after he had gone to lie down, Cody recalls Kuehn was masturbating him. B148. Cody does not remember too much after that. B148. The next morning, Cody woke up and was very upset and asked Kuehn what had happened. B148. Kuehn said that he had masturbated Cody twice to climax, and

that Cody had masturbated him once. B149. Cody became loud and started yelling at Kuehn, shouting "What happened?" and "Why did this happen?". B149. Up to this point, Cody had thought of the defendants as friends and mentors. B148. Bruette came into the room during Cody's exchange with Kuehn and tried to calm Cody down. B149. Bruette assured Cody that what happened was a mistake and would not happen again. See B149. Bruette told him that this was a one-time thing, that everybody was high, and that things just happen and he should not make a big deal about it. B149. The defendants assured Cody that it would be fine for him to share a bed with Kuehn again in the future. B151. After the ordeal, Bruette never reported the incident to Cody's parents or any other adult. B151.

The next weekend after Kuehn masturbated Cody, the defendants had Cody back over to their apartment and gave him more drugs. B151. This time the defendants gave Cody a psychedelic drug called DMT, which puts the user into a dream-like state. B151. The defendants also provided Cody with K2 and marijuana. B151. Cody became intoxicated as a result of using these three different drugs. B151. Cody's memory of the rest of the night is fragmented. B151. Cody slept in Kuehn's bed, and Cody remembers Kuehn touching him and masturbating him. B151. When Cody woke up the next morning, he was again angry with Kuehn and felt distraught. See B151. Yet, the defendants' sexual conduct did not end.

Over the next couple months, Kuehn and Bruette accomplished about a half-dozen more sexual encounters with Cody. B152. Kuehn would masturbate Cody, and once performed oral sex on him. B152. Bruette also masturbated Cody, and on one or two occasions, would come watch Kuehn make sexual contact with Cody. B152. During each sexual encounter, Cody was under the influence of various drugs supplied by the defendants. *See* B152, B157. Cody recalled being heavily altered by the drugs and his judgment impaired. B157. On one occasion, defendants gave Cody a pill they told him was LSD. B153. Cody has no memory of about eight to ten hours after taking this pill, but does recall a brief moment when he woke up naked in bed with Bruette and Kuehn. B153. Cody remembered being very scared and crying profusely. B153. He ran from the bed to a couch and huddled there until the drugs took hold again. B153.

After each encounter, Cody would become upset, and the defendants would assure him that it was a mistake and would not happen again. B152. Bruette would try to smooth things over and maintain Cody's relationship with the defendants. *See* B153. Then-18-year-old Cody thought they could get past it and remain friends. B153. The defendants were promising to promote him to manager of Great Stuff, Inc., and giving him a pay raise. B153. Nevertheless, the repeated sexual contact made Cody feel disgusted, resentful, and confused. B154. He did not have any interest in men, but the defendants were trying to convince him that

he was gay or bisexual. B154. Cody was distraught and felt trapped, and he did not know how to get out of this bad situation. B154. Bruette and Kuehn wanted more and more control over his life, and Cody felt pressure to let them into personal events like prom and high school graduation. B170-171. Kuehn even wanted Cody to move in with him. B153. The defendants gave Cody gifts and took him to activities, and it made Cody feel guilty. B147. Cody's mother noticed a change in Cody. B97. She thought that the defendants were encompassing Cody's life, and she believed Cody was becoming angry inside, and depressed. B97.

The defendants' inappropriate conduct also extended to the Middletown warehouse. Bruette would sneak up on Cody at work and pull down his pants, acting as though it was a prank. B157. Cody did not care for Bruette's conduct and yelled at Bruette to stop. B134, B157. But Bruette was relentless, and even pulled down Cody's pants in front of Cody's mother in the parking lot of a Middletown sushi restaurant. B105, B157. This made Cody upset and angry, and Cody's mother told Bruette that his behavior was inappropriate. B105.

Kuehn used the warehouse to buy, sell, and distribute drugs. *See* B116-117, B153. Kuehn had his drug dealer, Jessica, come to the warehouse, B118-B145 and on one occasion, Kuehn took Cody to purchase drugs from his dealer at her Maryland apartment. B145. Kuehn gave Cody ketamine at the Great Stuff

warehouse, so that he could try it out. B153. One of Cody's teenaged co-workers, William Spicer, received drugs from the defendants at the Middletown warehouse. B116. At one point, Spicer was getting so much ecstasy from Kuehn that he had a breakdown. B134.

Cody found the courage to break free from the defendants' grasp during Memorial Day weekend in May 2011. *See* B155. Cody spent Memorial Day weekend over at the defendants' residence. B155. At the time, Bruette had Nicholas DeLucia staying over, who was about twelve or thirteen years old at the time. B155. Cody observed Bruette's interactions with DeLucia, seeing how enveloping and controlling Bruette was towards the young boy. B155. Cody was disillusioned. B155. He saw a version of himself reflected in DeLucia, and what he observed between Bruette and DeLucia painfully reminded him of the earlier stages of his experience with Kuehn. *See* B155. Cody started to worry for DeLucia. B155. The boy was so young and Cody did not want anything to happen to him. B155. During what would be his final evening over at the defendants' residence, Cody decided for himself that he was going to tell somebody what had been happening to him. B155. And he did.

The day after Memorial Day weekend, Cody called his mom from work and asked her to come pick him up from the Great Stuff warehouse. B156. Together

they went to Wawa, and Cody told his mom what Bruette and Kuehn had done. B156. The next morning, Cody went to the police. B156.

After disclosing the sexual abuse, Cody felt disgusted and hated himself. B156. He blamed himself and punished himself emotionally. B156. Cody's mother got Cody into therapy, which Cody resisted but pursued for two or three sessions. B156. Cody ended therapy because he did not want to be there and thought he was dealing with the sexual abuse the best he could. B156. In the aftermath of the sexual abuse Cody became more reclusive. B158. He was not as outgoing, and he found it difficult to make friends. B158. Cody spent a lot of time in his head, dealing with inner turmoil. B158. As time went by, Cody learned how not to hate himself as much, though he still feels angry and upset about the ordeal. B158. Cody explained that what the defendants did to him is something he will never forget. B156. In time, after the abuse, Cody began attending college and found new employment, and also began a relationship with his present girlfriend, Ashley Justice. B158.

It came to light at trial that defendants' sharing their bedrooms with much younger males was not unique to Cody. At times during Cody's association with the defendants, Bruette had 13-year old Nicholas DeLucia and a 14-year old named Nathan Cooley staying in his bedroom. B199, B207-208. Kuehn admitted that

everyone who stayed over at the Maryland residence during Cody's 2010/2011 school year were at least ten-years younger than Kuehn. B216.

In the recent past before starting Great Stuff, Inc., Bruette and Kuehn befriended the very young son of a co-worker named Middeke, and also Middeke's school friend, a young boy named Catalani. B210. Middeke was about seven years old when introduced to defendants, and Catalani was about twelve. B252, B259-260. Bruette and Kuehn maintained their relationship with Middeke and Catalani over the years as the boys grew up. B210. The defendants bought these boys many gifts over the years. B210, B253, and offered them jobs at Great Stuff when they were older. B178, B210. When Catalani was in high school, and still a minor, the defendants took him and Middeke to Florida for vacation. B179, B261. The foursome shared a hotel room and hotel beds, with Bruette sleeping with Middeke, and Kuehn sleeping with Catalani. B179, B257, B262. Cody recalls an occasion where Middeke and Catalani were at the defendants residence with him and they did psychedelic mushrooms. B145.

Kuehn and Bruette denied all of Cody's claims at trial. Although the defendants admitted that they gave Cody gifts, and that Cody stayed overnight at their apartment, they denied ever performing any sex act on Cody. B190, B208. The defendants denied sleeping with Cody, B190, B204, and they denied ever providing him with drugs. B179, B195. Bruette and Kuehn even professed

ignorance of the several illegal drugs Cody described. B179, B202-03, B204, Bruette said he has only done marijuana once, and that was in the 1980s. B181. Kuehn said he has not used marijuana since college in the 1990s. B204.

According to Bruette and Kuehn, it was Cody who desired to have an amorous relationship with Kuehn. B204. Bruette testified that Cody came to him in confidence one day and expressed his desire to have a closer relationship with Kuehn. B197. Bruette explained that he disclosed Cody's secret to Kuehn. B197. After hearing from Bruette, Kuehn met with Cody explained to him that they could only be friends. B214. The defendants argued at trial that Cody fabricated his allegations of sexual abuse after Kuehn rebuffed him. *See* B86, 88.

ARGUMENT

I. The Superior Court properly denied Defendants' Motion for Directed Verdict and Motion for Judgment as a Matter of Law.

A. First Question Presented

Did the Superior Court properly deny Defendants' Motion for Directed Verdict and Motion for Judgment as a Matter of Law as to HED and Battery where there existed ample evidence supporting Plaintiff's severe emotional distress and the absence of consent?

B. Scope of Review

Review of the legal sufficiency of the evidence to support the Superior Court's denial of Judgment as a Matter of Law is reviewed *de novo*.¹⁴ This Court "will not disturb a jury's findings of fact on the basis of legally insufficient evidence, however, if there is 'any competent evidence upon which the verdict could reasonably be based.'"¹⁵ Where under any reasonable view of the evidence the jury could have justifiably found for Plaintiff, this Court will not disturb the Superior Court's ruling denying Defendants' Motion.¹⁶

¹⁴*Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 24 (Del. 2005).

¹⁵*Id.*

¹⁶*Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998).

C. Merits of Argument

1. Plaintiff produced legally sufficient evidence to support a claim for IIED.

Under Maryland law, the tort of intentional infliction of emotional distress ("IIED") has four elements: "(1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe."¹⁷ Appellants' argument focuses on the fourth element of IIED, challenging the sufficiency of the evidence to show that Plaintiff suffered "severe" emotional distress.

The Maryland courts have explained that emotional distress is "severe" if it is "of such a nature that a 'reasonable person in a civilized society'" should not be expected to endure it.¹⁸ While the emotional distress must be "severe," it need not produce total emotional or physical disablement.¹⁹ However, recovery is not available for mere minor offenses and humiliation.²⁰ The Maryland Court of

¹⁷*B.N. v. K.K.*, 538 A.2d 1175, 1179-80 (Md. 1988) (citing *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977)).

¹⁸See *Reagan v. Rider*, 521 A.2d 1246, 1249 (Md. Ct. Spec. App. 1987).

¹⁹See *B.N. v. K.K.*, 538 A.2d at 1181-82 (citing *Reagan*, 521 A.2d at 1250 (Md. Ct. Spec. App. 1987)). See also *Reagan*, 521 A.2d at 1250 (rejecting defendant's argument that plaintiff could not make prima facie showing of "severe" emotional distress where plaintiff "was a college student with above average intelligence, receiving good grades, and able to function adequately in many of her daily activities" in aftermath of alleged sexual abuse).

²⁰See *Harris*, 380 A.2d at 617 (holding evidence legally insufficient to support finding of IIED where plaintiff claimed humiliation and nervousness of unspecified duration and weak intensity in response to his boss's sharp ridicule of his stutter) ("But a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility.").

Appeals has looked to the Restatement (Second) of Torts § 46, comment "j", for guidance:

Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity.²¹

"Severe" emotional distress sufficient to support a claim for IIED "may be inferred from the extreme and outrageous nature of the defendant's conduct alone."²² The nature of defendant's conduct must be placed into context with the surroundings in which it occurred when gauging its extreme and outrageousness.²³ Due account should be given to the plaintiff's personality and defendant's awareness of plaintiff's vulnerability.²⁴ The conduct of those holding a position of authority over the plaintiff, such as an employer or a parental figure, requires

²¹*Harris*, 380 A.2d at 616.

²²*Reagan*, 521 A.2d at 1251 ("When the acts of the defendant are so horrible, so atrocious and so barbaric that no civilized person could be expected to endure them without suffering mental distress, the jury may find as a matter of fact that "severe" emotional distress resulted."); *see also B.N. v. K.K.*, 538 A.2d at 1182.

²³*See Harris*, 380 A.2d at 615 ("In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred."); *B.N. v. K.K.*, 538 A.2d at 1181 (stating that the severity of plaintiff's emotional distress "must be measured in light of the outrageousness of the conduct and the other elements of the tort.").

²⁴*See Moniodis v. Cook*, 494 A.2d 212, 220 (Md. Ct. Spec. App. 1985) (highlighting as relevant the fact that plaintiff was a "middle-aged lady who did not have the hardened character of a 'Butte miner' or a 'United States marine.'").

careful scrutiny by the court.²⁵ Where sexual abuse is involved, Maryland Courts have tended to find legally sufficient evidence to support the existence of "severe" emotional distress.²⁶

Under Maryland law, expert medical testimony is not necessary to establish that plaintiff's emotional distress was "severe".²⁷ Nor is expert testimony required for the jury to find that plaintiff's emotional distress resulted from defendant's tortious conduct.²⁸

In this unfortunate case, the outrageousness of the defendants' pernicious, drug-fuelled, and predatory sexual exploitation of Cody was by itself more than

²⁵See *Harris*, 380 A.2d at 615-16 ("In cases where the defendant is in a peculiar position to harass the plaintiff, and cause emotional distress, his conduct will be carefully scrutinized by the courts.").

²⁶See *Reagan*, 521 A.2d at 1251 (holding that jury could properly find plaintiff endured severe emotional distress where plaintiff's stepfather used his position of authority and trust to perpetrate a sustained pattern of sexual abuse upon the plaintiff during her formative years). See also *B.N. v. K.K.*, 538 A.2d at 1182 (indicating that in case where defendant had sex with plaintiff without disclosing his active herpes infection, the medical consequences of genital herpes itself is competent to produce severe emotional distress) ("It is not surprising that the psychological trauma produced by the disease 'is often as debilitating as the physical consequences.'").

²⁷See *Moniodis*, 494 A.2d at 219-20 (holding that testimony from aggrieved plaintiff and her husband provided sufficient evidence for jury to find "severe" emotional distress despite the apparent lack of medical expert testimony). See *Reagan*, 521 A.2d at 513 ("While we do not suggest that medical evidence is an absolute prerequisite to recovery, it is an important factor in determining the severity of the distress."); see also *Vance v. Vance*, 408 A.2d 728, 730, 734-35 (Md. 1979) (explaining that Maryland courts have permitted lay persons to testify to their physical injuries and mental distress and recover damages without medical expert testimony).

²⁸See *Vance*, 408 A.2d at 735 (quoting *Wilhelm v. State Traffic Safety Comm'n*, 185 A.2d 715, 719 (Md. 1962)) ("There are, unquestionably, many occasions where the causal connection between a defendant's negligence and a disability claimed by a plaintiff does not need to be established by expert testimony. Particularly is this true when the disability develops coincidentally with, or within a reasonable time after, the negligent act, or where the causal connection is clearly apparent from the illness itself and the circumstances surrounding it, or where the cause of the injury relates to matters of common experience, knowledge, or observation of laymen.").

sufficient to permit the inference that Cody suffered severe emotional distress. The defendants used their Great Stuff warehouse as a base to meet teenage boys, like Cody. The defendants capitalized on their employment relationship with Cody to envelope his life, showering him with gifts and special attention. And after cultivating his trust and admiration, the defendants plied Cody with illegal mind-altering drugs. These defendants created their own Earleville Pleasure Island, cajoling Cody to visit them in their safe place for drug experimentation. The defendants encouraged Cody to become intoxicated on a variety of drugs which defendants supplied in abundance. Once Cody had been sufficiently groomed and disarmed by the intoxicating effects of the drugs, the defendants conducted their sexual battery. The sexual contact never occurred while Cody was sober and free of the influence of the defendants' drugs, and without the impairment of Cody's mental abilities, the defendants would never have been able to commit their sexual acts.

The defendants' conduct amounts to far more than "slight hurts which are the price of a complex society". Bruette and Kuehn, adult men at least twice Cody's age, perpetrated sexual acts of the most personal, private, and intimate nature. In no civilized society would we reasonably expect teenagers like Cody to endure the harm caused by repeated drugging and sexual battery. The defendants' conduct is

of the very nature which, wholly lacking in any social utility, would permit the inference that severe emotional distress was in fact sustained.

In addition to the atrocious behavior of the defendants, Cody's testimony of the emotional harm he suffered in the aftermath of his sexual abuse provided a legally sufficient basis to find he sustained severe emotional distress. The defendants' sexual behavior towards Cody caused him to feel disgusted about himself, to become resentful, and distraught. He felt trapped and confused. After breaking free from the defendants' grasp, Cody hated himself. He emotionally punished himself for all the things he might have done, in hindsight, to avoid his distressing association with the defendants. The abuse caused Cody to become more reclusive. He spent a lot of time in his own head trying to deal with what had happened, and he struggled with an inner turmoil.

It is not beyond the competence of the ordinary lay persons of the jury to relate Cody's emotional devastation to the repeated sexual abuses orchestrated by the defendants. Certainly the jury must account for Cody's capacity to move on from the abuse and pursue a semblance of normalcy by attending school and creating new social relationships. Cody's perseverance does not invalidate, as a matter of Maryland law, the severe emotional distress wrought by defendants, as evidence not only by their horrible conduct, but also the actual harm testified to by the vulnerable teenage boy they targeted.

2. Plaintiff produced legally sufficient evidence to support a claim for Battery.

Maryland courts follow the Restatement (Second) of Torts for the essential elements of the common-law claim for battery.²⁹ Under the Restatement, a battery occurs when one intends harmful or offensive contact with another without that person's consent.³⁰ Appellants' assignment of error focuses on the legal sufficiency of the evidence to show Cody's absence of consent. According to Appellants, Cody gave his apparent consent to defendants' sexual battery by failing to "manifest[] an unwillingness to engage" in the sexual acts performed on him.³¹

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."³² Apparent consent exists "[i]f words or conduct are reasonably understood by another to be intended as consent"³³ Consent must be effective to avoid liability.³⁴ In order for consent to be effective it must be: "(a) by one who has the capacity to consent or by a person empowered to consent for him; and (b) to the particular conduct, or to substantially the same conduct."³⁵ Consent is not effective if "such person

²⁹See, e.g., *Nelson v. Carroll*, 735 A.2d 1096, 1099 (Md. 1999).

³⁰*Id.*

³¹Op. Br. 25-26.

³²Restatement (Second) of Torts § 892.

³³*Id.*

³⁴See *id.*; Prosser & Keeton Torts § 18 (5th ed. 1984).

³⁵Restatement (Second) of Torts § 892A (2)(a)-(b)

lacked capacity to consent to the conduct."³⁶ Incapacity to consent may exist in the case of plaintiff's intoxication.³⁷

There was sufficient evidence presented in this case to permit the jury to find that Cody lacked the capacity to consent to sexual contact with the defendants due to his drug-induced intoxication, and the jury so found. Cody testified that he was heavily intoxicated from defendants' drugs on each occasion of sexual contact. He testified that he was encouraged by the defendants to use their drugs to the point of intoxication and to such a degree that his judgment was impaired. Cody described his stupor as the abuse occurred, explaining how he felt "out of it" and did not have a "fluid memory". When the influence of the drugs wore off, Cody became very upset with the defendants and demanded to know what had happened to him. During one instance, after defendants gave him LSD, Cody cannot recall eight to

³⁶*Id.*

³⁷*See* Prosser & Keeton Torts § 18 ("Generally . . . one who has reached the age of majority can give an effective consent to all kinds of conduct unless the defendant knows or has reason to know of some kind of abnormality, temporary or permanent, of the consenting person. The abnormality may be temporary and attributable to sedation caused by a prescription drug . . ."); *see also Flores v. Santiago*, 986 N.E.2d 1216 (Ill. App. Ct. 2013) (holding that complaint sufficiently alleged facts to support ineffectiveness of consent where plaintiff claimed dentist's sexual conduct routinely followed his plying plaintiff with illegal drugs); *Hollerud v. Malamis*, 174 N.W.2d 626, 634-35 (Mich. Ct. App. 1969) (reversing grant of summary judgment on battery and assault, and holding that plaintiff may proceed to trial and have jury determine whether the effect of intoxication on plaintiff's mental faculties rendered plaintiff incapable of freely and voluntarily engaging in "Indian wrestling contest" with bartender); *Linthicum v. Johnson*, 2006 U.S. Dist. LEXIS 33896, at *77-82 (S.D. Ohio May 26, 2006) (holding that factual issue for jury exists as to whether plaintiff consented to sex with defendants in light of plaintiff's alleged intoxication despite testimony that she could walk and talk leading up to encounter, and notwithstanding Plaintiff's lack of objection or submission to advances).

ten hours of his life except for a flash of terrified awareness that he was naked and in bed with the two defendants.

Appellants' argument that Cody failed to present evidence that his intoxication rendered him incapable of exercising reasonable judgment is entirely contradictory of Cody's trial testimony. Whether 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. Appellants' argument that Cody failed to manifest an unwillingness to engage in the sexual encounters with defendants is also unavailing. While contemporaneous objections to defendants' sexual advances may be evidence of the absence of consent, the jury could also find, and did, that Cody lacked the capacity to consent due to his intoxication. Furthermore, there was no evidence from which the jury could conclude that the defendants' were unaware of Cody's intoxicated state. The defendants denied having anything to do with drugs or sex with Cody. The evidence that the jury chose to accept was that defendants provided these mind-altering drugs to Cody and encouraged him to become intoxicated.

As the trial court properly held, there exists sufficient evidence in the record for the jury to find that Cody suffered severe emotional distress at the hands of the defendants, and that Cody could not consent to sex acts perpetrated upon him

because of the impaired judgment owing to his intoxication. This Court should reject Appellants' contentions on the same basis.

II. The Superior Court's evidentiary rulings and jury instructions were legally correct and did not amount to an abuse of discretion.

A. Second Question Presented

Did the Superior Court exceed the bounds of reason and disregard the law when making ordinary evidentiary rulings on the scope of witness testimony and instructing the jury?

B. Scope of Review

The trial court's evidentiary rulings are reviewed for an abuse of discretion.³⁸ This includes the trial court's determinations as to the relevancy of evidence under DRE 401, as well as balancing the probative value of proffered evidence against the danger of unfair prejudice under DRE 403.³⁹ This Court will not overturn the evidentiary rulings of the trial court unless there was an error or abuse of discretion, and the mistake constituted significant prejudice to the appellant.⁴⁰ If an error occurred, the trial judge's instructions can cure the error and mitigate the risk of undue prejudice.⁴¹

This Court reviews the trial court's jury instructions to determine if the instructions provided a correct statement of the substance of the law.⁴² A party is

³⁸*Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

³⁹*See id.*

⁴⁰*See id.*

⁴¹*See Kornbluth v. State*, 580 A.2d 556, 560 (Del. 1990).

⁴²*Flamer v. State*, 490 A.2d 104, 128 (Del. 1984).

not entitled to a particular instruction.⁴³ Some degree of inaptness in the trial court's jury instruction is expected.⁴⁴ The trial court's instructions to the jury are not erroneous if they are "reasonably informative and not misleading, judged by common practices and standards of verbal communication."⁴⁵ The trial court's instructions to the jury must be viewed as a whole, not parsed and evaluated in a vacuum.⁴⁶

C. Merits of Argument

1. The Superior Court's evidentiary rulings on witness testimony did not exceed the bounds of reason, and to the extent the rulings were erroneous, they were harmless errors.

In this case, Appellants raises a multitude of challenges to the trial court's discretionary authority to include or exclude certain testimony at trial. Appellants challenge (a) testimony referring to Nicholas DeLucia; (b) testimony referring to a Maryland plea agreement and protection order; and (c) the scope of permitted examination of Ashley Justus and Dennis Campbell. Appellant's challenges are without merit and do not establish an abuse of discretion by the trial court. Alternatively, to the extent error can be assigned, that error was harmless and did not significantly prejudice Appellants.

(a) Testimony Regarding Nicholas DeLucia

⁴³ *Id.*

⁴⁴ *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973).

⁴⁵ *Id.* 314 A.2d at 194 (citing *Baker v. Reid*, 57 A.2d 103, 109 (1947)).

⁴⁶ *Flamer*, 490 A.2d at 128.

Appellant fails to specify what testimony regarding Nicholas DeLucia was impermissibly prejudicial under DRE 403. The substance of the limited trial testimony referencing DeLucia concerned Cody's knowledge of DeLucia's presence at the defendants' Earleville residence and Bruette's sleeping arrangements with the young boy. The testimony regarding DeLucia was relevant and went to the circumstances that brought about Cody's revelation that he was trapped in a pattern of sexual abuse with adults who had manipulated him. Cody's observation of Bruette's interaction with DeLucia over Memorial Day weekend opened his eyes to the abuse he had been subjected to, and his concern for the young DeLucia boy provided the impetus and courage for Cody to inform his mother and the police about what had been happening.

The testimony regarding DeLucia was necessary for Plaintiff to rebut the primary theory of the defense. During opening statements, the defense argued that Cody fabricated his accusations against the defendants out of revenge for having been romantically rebuffed by Kuehn.⁴⁷ In fact, Appellants' agreed that Plaintiff could elicit testimony regarding Bruette and DeLucia for the purpose of establishing Cody's motive for escaping the defendants.⁴⁸ Contrary to Appellants' contentions, Plaintiff did not attempt to prove that Bruette was sexually abusing DeLucia. In fact, the trial court made clear that there would not be a minitrial

⁴⁷See B86-87.

⁴⁸See B154.

about what took place in the bedroom between Bruette and DeLucia.⁴⁹ Appellants point to the unsolicited testimony by Tracy Campbell, Cody's mother, who said that Cody told her that Bruette and Kuehn were sexually assaulting DeLucia. Interestingly, Appellants made no objection to Ms. Campbell's testimony at the time, and did not request a curative instruction.⁵⁰

The trial testimony referencing Nicholas DeLucia was brief and limited in scope, and at each juncture where reference to DeLucia was anticipated, the trial court addressed the subject matter with counsel at sidebar beforehand.⁵¹ The trial court also instructed the jury that they were to receive the testimony regarding DeLucia for a very limited purpose.⁵² While testimony regarding DeLucia may have been prejudicial to the defendants, it was not unfairly prejudicial, especially when considered in light of other evidence presented to the jury regarding the defendants sleeping arrangements with other young males. Appellants actually elicited testimony from Bruette that he had a 14-year-old boy living with him at the Earlville residence during Cody's association with the defendants.⁵³ Appellants

⁴⁹B186.

⁵⁰See B98.

⁵¹See B79, B154, B185-86, B243.

⁵²See III.7 ("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.").

⁵³See B186.

made no objection to testimony from defense witness Middeke who testified to sharing a bed with Bruette on a vacation to Florida when he was a minor.⁵⁴

In this case the trial court properly considered DRE 403 and appropriately limited testimony regarding DeLucia and cautioned the jury. There is no basis to find the trial judge abused his discretion. Moreover, the unfair prejudice now assigned by Appellants with respect to DeLucia's testimony was not raised in Appellants' post-trial motions.⁵⁵ This Court should consider the Appellants' assignment of error waived.

(b) Testimony Regarding Maryland Criminal Proceedings

Appellants assign error to testimony regarding the ultimate disposition of criminal charges in Maryland. To whatever extent the admission of testimony regarding the Maryland criminal proceedings was error, it was an error of Appellants own making.⁵⁶ Plaintiff never mentioned the Maryland plea agreement or protective order during opening statements. In fact, Plaintiff never even mentioned the police in opening statements. It was Appellants who injected the issue of Maryland criminal proceedings by telling the jury in opening statements that Cody went to the police and the police dropped all the criminal charges.⁵⁷ After Appellants put the Maryland plea agreement into play before the jury, it

⁵⁴See B262.

⁵⁵See A277-304 (Appellants' post-trial Opening Brief and Motion for Reargument).

⁵⁶See B189.

⁵⁷See B87, B89-90.

became necessary for Plaintiffs to address that issue, which the trial judge recognized and permitted with restrictions.⁵⁸ Appellants then repeatedly raised the issue of the plea agreement throughout the trial.⁵⁹ Appellants' assignment of error with respect to the Maryland plea agreement should be rejected. Not only was the matter raised in the first instance by Appellants themselves, they propagated the issue throughout trial. Moreover, the substantial prejudice now assigned by Appellants with respect to the Maryland plea agreement was, at best, mentioned in passing in Appellants' post-trial motions.⁶⁰ This Court should consider the Appellants' assignment of error waived and without merit.

(c) Examination of Ashley Justus and Dennis Campbell

The trial court properly exercised its discretion by disallowing certain examination of Ashley Justus and Dennis Campbell. At trial, Appellants called Ashley Justus, Cody's present girlfriend, and began to ask Justus about an individual named Hayden Hudson.⁶¹ The proffer was that Hayden Hudson was a boy with whom Cody had experimented with in a sexual manner when he was 13 or 14 years old, and that Cody told Justus many years later that the experimentation was not consensual but he was pressured into doing it.⁶² This, according to Appellants, was relevant to impeach Cody's credibility because Cody testified

⁵⁸See B90, B100-02.

⁵⁹See B108, B162, B198, B214.

⁶⁰See A277-304 (Appellants' post-trial Opening Brief and Motion for Reargument).

⁶¹B222.

⁶²See B168, B222.

earlier that the experimentation was consensual, and he does not remember telling Justus that it was nonconsensual.⁶³ The trial court heard counsel on the objection, weighed the probative value of the proffered testimony to challenge Cody's credibility, and correctly determined that it was outweighed by the risk of unfair prejudice and jury confusion that allowing an exploration of Cody's prior sexual conduct would create.⁶⁴

Also during trial, Appellants called Dennis Campbell, Cody's stepfather, and began to ask him about the Maryland criminal proceedings.⁶⁵ In particular, Appellants sought to ask Mr. Campbell if he had learned that the charges in Cody's criminal case were dropped because of Cody's credibility.⁶⁶ The proffer by Appellants was that Mr. Campbell had learned from somebody in Maryland that the criminal case was not strong because of Cody's credibility.⁶⁷ Plaintiff objected on the basis of hearsay, and the trial court judge appropriately sustained that objection.⁶⁸ The trial court reasoned, "Even if this were not collateral and even if the Court had already, I believe, cautioned the jury about not getting too involved in what happened in Maryland, this witness would still be, at best, a poor one with

⁶³See B168, B222.

⁶⁴See B221.

⁶⁵B225.

⁶⁶See *id.*

⁶⁷See *id.*

⁶⁸*Id.*

respect to informing the jury about what happened in Maryland and why, so the objection is sustained."⁶⁹

The trial judge's discretionary rulings limiting examination of Justus and Mr. Campbell should be upheld for the reasons stated by the trial court. Furthermore, the prejudice now assigned by Appellants with respect to the trial judge's rulings was, at best, mentioned in passing in Appellants' post-trial motions. This Court should consider the Appellants' assignment of error waived and without merit.

2. The Superior Court's jury instructions were not legally erroneous, and the Court's formulation of the special verdict form was not an abuse of discretion.

Appellants' assign scattershot error to the trial court's (a) instructions on battery and consent; (b) denial of damages mitigation instruction; (c) instructions on Great Stuff, Inc.'s vicarious liability; and (d) instructions on punitive damages. Appellants' challenges are without merit and do not establish an abuse of discretion by the trial court. Alternatively, to the extent error can be assigned, that error was harmless and did not significantly prejudice Appellants.

(a) Jury instructions on Battery and consent

The trial court's instruction on battery was as follows:

Battery. If you find that a defendant intentionally and without plaintiff's consent made contact with plaintiff in a harmful or offensive way, then the defendant is or the defendants are liable for a battery. If you find by preponderance of the evidence that plaintiff was at least 16 years old and consented to the alleged contact, and

⁶⁹B225.

defendants Bruette and/or Kuehn acted in response to plaintiff's consent, than you must find for defendants. Further, if you find plaintiff consented to the contact but that plaintiff's consent was due to his intoxication that rendered him incapable of exercising reasonable judgment, and his intoxication was apparent to defendant Bruette and/or Kuehn then the consent was invalid.⁷⁰

The trial judge's instruction to the jury on battery was legally correct and reasonably informative. The trial judge instructed the jury that the absence of consent is a necessary element of plaintiff's battery claim.⁷¹ The trial judge went on to state that consent was a defense to the claim of battery.⁷² And finally, the trial judge appropriately instructed the jury that incapacity by intoxication may invalidate consent.⁷³ The trial judge also qualified the degree of intoxication required to render consent ineffective.⁷⁴

Contrary to Appellant's implication, the trial judge did not instruct the jury to find defendants liable for battery if the plaintiff was intoxicated when he provided consent. The trial judge instructed the jury that the plaintiff's consent was only invalid if the intoxication was of a certain degree and it was apparent to defendants. Appellant faults the trial court for not instructing the jury on "the consequences of voluntary intoxication".⁷⁵ In determining the validity of Cody's consent, if given, there is no need for the jury to distinguish between the voluntary

⁷⁰B283. See also B23-43 (Jury Instructions).

⁷¹B283.

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵Op. Br. 36.

or involuntary origin of Plaintiff's intoxication. If the defendants forced the plaintiff to ingest the illegal drugs then defendants' liability for battery is a foregone conclusion. "Involuntary" intoxication necessarily entails the absence of consent. Even if the jury instructions included the term, "voluntary intoxication," it is erroneous to equate consenting to using illegal drugs with consenting to sexual contact. The consent must be specific to the conduct.⁷⁶ The jury's role, as they were correctly instructed, was to determine whether plaintiff's intoxication was of such a degree to render him incapable of exercising reasonable judgment, and also whether that intoxication was apparent to the defendants.

Appellants imply that the jury should have been instructed on the extent of defendants' intoxication while molesting Cody. The trial court correctly declined to give such an instruction since it would invite speculation from the jury.⁷⁷

Bruette and Kuehn did not testify that they were intoxicated. Instead, they testified that they never had any sexual contact with Cody and never did any drugs with him. Appellant also speculates that the instructions were confusing, yet there is nothing in the record suggesting the jury was confused. The jury apparently only asked one question of the court during the nearly 3-hours of deliberations, and that was to request a calculator.⁷⁸

⁷⁶See Restatement (Second) of Torts § 892A(2)(b).

⁷⁷See B248, B263-65.

⁷⁸See B288.

(b) Denial of instruction on mitigation of damages.

The trial judge correctly declined to instruct the jury that plaintiff had a duty to mitigate his damages.⁷⁹ There was no evidence presented at trial from which the jury could conclude that plaintiff could have done, but failed to do, something to mitigate his damages. The jury would have been left to speculate. As the trial judge aptly stated, "[S]omebody has to put their finger on what mitigation means and what mitigation actually would have accomplished. This case could have been tried differently . . . [b]ut based on the way it was put [to] the jury, the jury cannot say that if plaintiff had undergone more of this somewhat vague therapy . . . he would have been doing better now."⁸⁰

Appellants also contend that the trial court improperly concluded that Defendants required expert testimony on how plaintiff's damages would have been mitigated. The trial judge's reference to expert testimony served to underline the complete absence of evidence to support a jury finding that mitigation could have been accomplished by plaintiff. The trial judge reasoned, "I think the root of the proposal is the idea that there was a suggestion that defendants [sic] should have had more therapy than he did. But there's been no testimony, no – especially no expert testimony that I, as an expert, see defendant [sic] as having these problems. And had he gone in for such and such therapy then those problems would be much

⁷⁹B266.

⁸⁰*Id.*

less severe than they are now."⁸¹ Appellants' contentions over expert testimony ring hollow. During the course of discovery, defendants' retained psychologist Samuel Romirowsky, Ph.D. and had the doctor examine Plaintiff on two separate occasions.⁸² For reasons unknown to Plaintiff, Defendants never asked Dr. Romirowsky to issue a report on his evaluations of Plaintiff, and defendants chose not to use Dr. Romirowsky at trial.⁸³

(c) Instructions and Verdict Form Regarding Vicarious Liability

The special verdict form presented to the jury was not erroneous because the trial judge properly instructed the jury on the corporate defendant's vicarious liability. The Superior Court's use of special verdict forms is discretionary, but if the special verdict form is submitted to the jury, it is required that the court "give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."⁸⁴ Upon review by this Court, the special verdict form must be read in context with the entirety of the jury instructions given.⁸⁵ Under Delaware law, the jury is presumed to have followed the trial court's instructions.⁸⁶

⁸¹B266.

⁸²See B44 (Plaintiff's Motion to Compel).

⁸³See B46-55 (Mem. Op. Oct. 14, 2014) (granting Def. Mot. for Reconsideration).

⁸⁴Super. Ct. Civ. R. 49(a).

⁸⁵See *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011).

⁸⁶See *Reinco, Inc. v. Thompson*, 906 A.2d 103, 112 & n.20 (Del. 2006).

In this case, the Superior Court properly instructed the jury on Great Stuff's liability for misconduct of its agents, and Defendants' never challenged the form of the Superior Court's instructions.⁸⁷ The specific verdict form interrogatory sought by Appellants' is merely repetitious of the jury instructions and would add nothing helpful to the jury. In light of the jury instructions given, a special verdict form asking whether Bruette and Kuehn were acting within the scope of their employment is superfluous of the existing verdict form asking whether the jury finds Great Stuff, Inc., liable for the wrongful conduct of the defendant.⁸⁸

Appellants' also claim that Plaintiff failed to present sufficient evidence to support a *prima facie* case for Great Stuff's *respondeat superior* liability, and therefore the Superior Court should have never instructed the jury on vicarious liability. Appellants shoehorn this summary contention into the argument that the Superior Court's special verdict form was erroneous. The issue is mentioned in passing and not fully and fairly presented in Appellants' Opening Brief, and thus this Court should consider the matter waived. If not waived, Appellants' contention is without merit. Plaintiff presented sufficient evidence to show Great Stuff's vicarious liability. Bruette and Kuehn were the Great Stuff corporation. Bruette owned 100% of the corporation's interest, and together, Bruette, as CEO,

⁸⁷See B266, B287 (no objections raised as to the jury instructions on the liability of the corporate defendant).

⁸⁸B17-18 (Jury Verdict Form).

and Kuehn, as President, ran the business. The evidence at trial showed that Bruette and Kuehn used the Great Stuff warehouse to recruit teenage boys like Cody and cultivate inappropriate relationships with them. It was the Great Stuff warehouse that put Cody into the hands of Bruette and Kuehn, and it was the drugs delivered to and emanating from the Great Stuff warehouse that kept Cody there and permitted the defendants to sexually batter him. The evidence at trial also established that Great Stuff affirmed what Bruette and Kuehn were doing to Cody. Not once during the months long course of time when defendants were engaging in sexual misconduct with Cody did Bruette or Kuehn terminate the employment relationship, despite their knowledge of wrongdoing. To the contrary, Bruette and Kuehn used Great Stuff to maintain their abusive relationship with Cody, promising him a promotion and a pay raise at the company. There was ample evidence presented to support Great Stuff's vicarious liability for the misconduct of Bruette and Kuehn, and the jury so found.

(d) Instructions on Punitive Damages

Under Maryland law, punitive damages require proof by clear and convincing evidence that the defendant acted with "actual malice."⁸⁹ Maryland courts have defined the term "actual malice" as "conduct of the defendant

⁸⁹*Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828, 837 (Md. 2004).

characterized by evil motive, intent to injure, ill will, or fraud."⁹⁰ Evidence of the defendant's bad faith or consciousness of the wrongfulness of the conduct is a sufficient basis for the jury to conclude the defendant acted with actual malice.⁹¹

The Superior Court instructed the jury on punitive damages as follows:

Punitive damages are different from compensatory damages Punitive damages . . . are awarded in addition to compensatory damages when clear and convincing evidence supporting the award of such damages has been presented. You may award punitive damages to punish a party for outrageous conduct and deter a party and others like him from engaging in similar conduct in the future. To award punitive damages, you must find by preponderance of the evidence that the defendant acted intentionally and with malice toward the plaintiff.⁹²

Appellants suggest that the Superior Court's instruction produced juror confusion, although there is no indication of juror confusion reflected anywhere in the record. More importantly, Appellants failed to object to the form of the Superior Court's instructions on punitive damages either before or contemporaneous with their submission to the jury.⁹³ Nor did Appellants raise the issue in its post-trial motions.⁹⁴ Appellants' assignment of error should be deemed waived and without merit. Furthermore, the Superior Court did instruct the jury that clear and convincing evidence is necessary to award punitive damages, and

⁹⁰*Borzym*, 841 A.2d at 837 (citations omitted).

⁹¹*See id.* at 838.

⁹²B285.

⁹³*See* B266, B285, B287. Super. Ct. Civ. R. 51 (No party may assign as error the giving or failure to give an instruction unless a party objects thereto before or at the time set by the Court immediately after the jury retires to consider its verdict . . .").

⁹⁴*See* A277-304.

there was sufficient evidence in the record to support a finding of "actual malice." Bruette and Kuehn perpetrated their sexual predation of Cody on a repeated basis notwithstanding Cody's subsequent protestations every time his intoxication subsided. The defendants' intent to harm was evident in testimony establishing that Cody was plied with drugs to the point of intoxication before the sexual misconduct occurred. The jury was also presented with evidence that Bruette and Kuehn hid their sexual contact with Cody from Cody's parents. There was also evidence demonstrating Great Stuff knew of Bruette and Kuehn's misconduct and affirmed it.⁹⁵

Appellants also argue that no punitive damages against the corporate defendant can stand because the jury did not assess compensatory damages against Great Stuff, Inc. on the Jury Verdict Form. Appellants are correct insofar as Maryland law requires compensatory damages before a jury may award punitive damages on the same count. The reason for requiring a compensatory foundation as a prerequisite to punitive damages is to "protect[] defendants from being punished for acts that the trial court determines the defendant did not commit."⁹⁶ Contrary to the Appellants' assertion, the jury did find Great Stuff liable for IED and Battery by virtue of Great Stuff's *respondeat superior* liability. A corporation can only act through its agents, and here, the jury found that Bruette's and Kuehn's

⁹⁵See Argument II.3.C.2.(c), *supra*.

⁹⁶*Caldor, Inc. v. Bowden*, 625 A.2d 959, 974 (1993).

wrongdoing was Great Stuff's wrongdoing.⁹⁷ Appellants cannot separate the compensatory damages assessed against servants of a corporation from the corporation itself.⁹⁸ After the jury received appropriate instruction from the Superior Court on *respondeat superior* liability, the jury found that Great Stuff, Inc. was liable for the IIED and Battery done by Bruette and Kuehn. The punitive damages award against Great Stuff, Inc., therefore has the requisite compensatory foundation under Maryland law.

⁹⁷See B17-18 (Jury Verdict Form V, VI)

⁹⁸See *Embry v. Holly*, 442 A.2d 966, 971 (Md. 1982) ("All attempts, therefore to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of a corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment.") (quoting *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (1869)).

III. The Superior Court had subject matter jurisdiction to hear Plaintiff's civil law claims for money damages.

A. First Question Presented

Did the Superior Court have subject matter jurisdiction to hear Plaintiff's civil law claims for money damages?

B. Scope of Review

Whether the Superior Court has subject matter jurisdiction is a question of law reviewable *de novo*.⁹⁹

C. Merits of Argument

The Delaware Superior Court is a court of general jurisdiction that extends to "all causes of a civil nature, real, personal and mixed, at common law"¹⁰⁰ Appellants assert, without citation to any Delaware case law, that 10 Del. C. § 8145 somehow divests the Superior Court of jurisdiction for Plaintiff's common law claims of IIED and Battery. Appellants further confound the jurisdictional inquiry by conflating choice of law considerations with subject matter jurisdiction.¹⁰¹

There is no basis for Appellants' contention that the Superior Court lacked subject matter jurisdiction. In this case, Plaintiff, a Delaware resident, brought common law claims for money damages in a Delaware court of general jurisdiction

⁹⁹*Linn v. Del. Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999).

¹⁰⁰Del. Const. art. IV, § 7; 10 Del. C. § 541.

¹⁰¹*Sternberg v. O'Neil*, 550 A.2d 1105, 1123 (Del. 1988) (stating that choice-of-law concerns should not 'complicate or distort the jurisdictional inquiry').

against a Delaware corporate defendant, Great Stuff, Inc., and its officers, Bruette and Kuehn, for tortious conduct that occurred in Delaware and Maryland. Furthermore, all of the Defendants were served in Delaware.¹⁰²

¹⁰²See B56-58.

CONCLUSION

For the reasons set forth above, the appeal of the Appellants should be denied in all respects and the judgment entered in favor of the Appellee and against the Appellants' should be AFFIRMED.

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DATED: March 15, 2016