STATE OF OHIO	) IN THE COURT OF COMMON PLEAS
	) SS.
COUNTY OF CUYAHOGA	) Civil Case No. 606140
	)
	) **JOURNAL ENTRY AND**
	) **OPINION**
JANE DOE A.K.A. LISA PHELPS,	)
	)
Plaintiff,	)
	)
Vs.	)
	)
WILLIAM BARLOCK, Jr.,	)
	)
	)
	)
Defendant.	)

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

This matter comes before the Court on Defendant's post-trial motion for judgment notwithstanding the verdict ("JNOV") and motion for a new trial pursuant to Ohio Civil Rules 50(B) & 59.

This case proceeded to trial on Plaintiff's claims for invasion of privacy and intentional infliction of emotional distress. The jury returned a verdict in favor of Plaintiff and against Defendant on each claim in the amount of $25,000 in compensatory damages and $75,000 in punitive damages, plus attorney fees, for a total award of $200,000, plus attorney fees.

I. Motion for Judgment Notwithstanding the Verdict

In ruling on a motion for judgment notwithstanding the verdict, the Court must construe the evidence most strongly in favor of Plaintiff and decide whether Plaintiff provided substantial evidence in support of her case. See *Posin v. A. B. C. Motor Court*

Hotel, Inc. (1976), 45 Ohio St. 2d 271, 275. The weight of the evidence and the credibility of the witnesses are not considered in ruling on this motion. See *id.*

A. Invasion of Privacy

1. Publicity

The first element of an invasion of privacy claim examines whether there was publicity by the Defendant; that is, "the disclosure must be of a public nature, not private." *Killilea v. Sears, Roebuck & Co.* (10th Dist. 1985), 27 Ohio App. 3d 163, 166. "Publicity" means communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become public knowledge. *Id.*

Defendant argues that the evidence at trial was insufficient to prove that a public disclosure had occurred. There was substantial evidence in this case, however, that the disclosure at issue was of a public nature and not private. At trial, indisputable evidence showed that Defendant e-mailed nude photographs of Plaintiff to Plaintiff's place of employment. This dissemination was not private and was substantially certain to become public.

Defendant contends that the number of people who saw the photographs is not great enough for a public disclosure. In its September 18, 2007 analysis of Defendant's motion for summary judgment, however, this Court held that the number of people who saw the photographs does not conclusively determine whether or not the disclosure was of a public nature. Although testimony at trial revealed a relatively small number of people who initially viewed the photographs, "the character of the communications, and the likelihood that they would become public knowledge, wield more persuasive force

than the number of persons to whom the disclosures were initially made." *Roe v. Heap* (10th Dist.) 2004 Ohio 2504, P57. The case law that holds that "a public disclosure can occur to a single person" is persuasive on this issue. See *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004); see also, *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 486 F. Supp. 2d 1217, 1227 (Dist. Colo. 2007).

Considering the speed and relative ease at which e-mails are sent, in conjunction with the content of the photographs in this case, the Court finds that Plaintiff met her burden of providing substantial evidence that Defendant's e-mail was substantially certain to become public knowledge and that the disclosure was of a public nature.

2. Private Content

The second element of an invasion of privacy claim is whether the disclosure concerned the private life of Plaintiff, not her public life. See *Killilea v. Sears, Roebuck & Co.* (10th Dist. 1985), 27 Ohio App. 3d 163, 166. There is no liability when the Defendant gives further publicity to information about the Plaintiff that is already public, such as matters of public record about her birth or marriage date, or matters that the Plaintiff leaves open to the public eye, such as kissing her spouse in public. *Id.* at 166-167.

Defendant argues that the photographs were taken within view of the public. Construing the evidence most strongly in favor of the non-moving party, however, Plaintiff produced substantial evidence that the disclosure concerned the private life of Plaintiff and that the content of the photographs were not left open to the public. It is undisputed that Plaintiff and Defendant were alone and aboard a boat at the time the photographs were taken. Plaintiff testified that the boat "was probably a mile" from land

and that although there was boat traffic in the distance, no one was within one hundred yards of the boat. See Partial Transcript of Proceedings, p. 7-8. On cross-examination, Plaintiff further testified that the other boats were "very far away" and that no one saw her. See *id.* at 25-26; 44-45. When asked if the water on which the boat was located was open to the public, Plaintiff responded, "Sure, if a boat was going by. I would certainly probably go under. I wouldn't stand out there naked." *Id.* at 45. Furthermore, Plaintiff testified that she deleted the photographs from her camera the day after the photographs were taken. See *id.* at 9-11. Based on this testimony, Plaintiff met her burden of providing substantial evidence that the disclosure concerned her private life and that the content of the photographs was not left open to the public.

B. Intentional Infliction of Emotional Distress

1. Serious Emotional Distress

Defendant argues that Plaintiff provided insufficient evidence as to the fourth element of her claim for intentional infliction of emotional distress, namely: that she suffered mental anguish that is serious and of a nature that no reasonable person could be expected to endure it. See *Pyle v. Pyle* (8th Dist. 1983), 11 Ohio App. 3d 31, 34.

Plaintiff testified that she felt depressed and had periodic difficulty sleeping. See Partial Transcript of Proceedings, p. 18. On the way to work, she would sometimes become upset and cry. See *id.* at 16. She had been "angry, irritated, [and] short-fused." *Id.* at 18. Plaintiff also stated that she had "some self-image issues" and "tried to do some things to appear better." *Id.* at 15. She suffered from tightening of the throat, and she "pushed [her speaking responsibilities] off to the other managers for several months because [she] didn't want to [speak]." See *id.* at 16, 27. She also experienced a decrease

in productivity at work and eventually left her job because she was "demoted," "people had lost respect for [her]," and "[she] felt it was time to go." See *id.* at 19-20, 41, 51. Construing the testimony in a light most favorable to Plaintiff, this evidence of emotional distress is sufficient to overcome Defendant's motion for judgment notwithstanding the verdict. The Court reserves for further ruling the issue of whether the jury's verdict was sustained by the weight of the evidence. See *infra*.

2. Causation

Defendant also argues that Plaintiff failed to establish the third element of her claim for intentional infliction of emotional distress: that Defendant's actions were the proximate cause of psychic injury to the Plaintiff. See *Pyle v. Pyle* (8th Dist. 1983), 11 Ohio App. 3d 31, 34. Specifically, Defendant cites *Terry v. Caputo* (2007), 115 Ohio St. 3d 351, for the proposition that Plaintiff must establish the causation element of her emotional distress claim through the opinion of an expert.

The *Terry* case and the present case, however, are distinguishable. In *Terry*, the issue was whether expert testimony was required to establish both general and specific causation in mold exposure cases. See *id.* at 354. The Court held that "establishing general causation and specific causation in cases involving exposure to mold or other toxic substances involves a scientific inquiry, and thus causation must be established by the testimony of a medical expert." *Id.* at 355-356. In the present case, however, the question as to cause and effect is so apparent as to be a matter of common knowledge. See *id.* at 355. Jurors are able to comprehend how having one's nude photographs sent to one's workplace can result in emotional distress. Since no scientific explanation is required to assist the jury in making this finding, Plaintiff did not need expert testimony.

3. Intent

Defendant also argues that the first element of Plaintiff's intentional infliction of emotional distress claim, intent, was not satisfied. The Court disagrees.

C. Conclusion

As Plaintiff provided substantial evidence in support of each of the elements challenged by Defendant, Defendant's motion for judgment notwithstanding the verdict is denied.

II. Motion for a New Trial

Defendant has moved the Court for a new trial pursuant to Ohio Civil Rule 59(A), which reads, in pertinent part, as follows:

> (A) Grounds.
>
> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
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> * * *
>
> (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
>
> * * *
>
> (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case; [and]
>
> (7) The judgment is contrary to law[.]

A. Rules 59(A)(6)

In analyzing Defendant's motion for a new trial under Civil Rule 59(A)(6), unlike a motion for judgment notwithstanding the verdict, the Court must weigh the evidence. To find that the judgment is not sustained by the weight of the evidence, the

Court "must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim." *Tenaglia v. Russo* (8th Dist.), 2007 Ohio 833, P22.

1. Intentional Infliction of Emotional Distress

Plaintiff must prove four elements by the greater weight of the evidence to recover for intentional infliction of emotional distress. The fourth element, as stated previously, examines whether Plaintiff suffered mental anguish that is serious and of a nature that no reasonable person could be expected to endure it. See *Pyle v. Pyle* (8th Dist. 1983), 11 Ohio App. 3d 31, 34. "Serious" emotional distress requires an emotional injury that is both severe and debilitating. *Burkes v. Stidham* (8th Dist. 1995), 107 Ohio App. 3d 363, 375, citing *Paugh v. Hanks* (1983), 6 Ohio St. 3d 72. The Ohio Supreme Court has described serious emotional distress as follows:

> By the term "serious," we of course go beyond trifling mental disturbance, mere upset or hurt feelings. We believe that serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.
>
> A non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia.

Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 78 (internal citations omitted).

In this case, Plaintiff did not present such evidence of serious emotional distress. The jury's verdict on this issue shocks the Court's sense of justice and fairness and cannot be reconciled with the evidence. Although Plaintiff suffered some degree of

emotional distress, the events giving rise to this lawsuit did not preclude Plaintiff from performing her daily tasks. Plaintiff was actively occupied with her obligations and coped adequately, as a reasonable person.

For example, when questioned as to why she did not seek professional counseling in the months following the dissemination of the e-mail, Plaintiff testified that she "probably would have done it a lot sooner if [she] even had a minute to do that." See Partial Transcript of Proceedings, p. 34. Plaintiff justified her inaction by stating that she had been busy as a result of her work; her children; the need to obtain pre-approval for her insurance; as well as her job seeking activities. See *id.* at 35. Plaintiff stated that she "was barely keeping it together." *Id.*

Plaintiff's testimony reveals that she was indeed "keeping it together." In fact, Plaintiff remained employed by her company for several months and found ways to cope with her distress, noting that "it got easier over time." *Id.* at 16. Although the Court does not mean to diminish the significance of the distress that Plaintiff in fact endured, the weight of the evidence clearly shows that Plaintiff's distress did not rise to the level of severe and debilitating under the law.

Therefore, the jury's verdict on Plaintiff's claim for intentional infliction of emotional distress was not sustained by the weight of the evidence, and Defendant's motion for a new trial pursuant to Civil Rule 59(A)(6) is granted as to this claim.

2. Invasion of Privacy

The Court finds that the jury's verdict on Plaintiff's claim for invasion of privacy was sustained by the weight of the evidence.

B. Rule 59(A)(4)

In determining whether a verdict contained excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice, Ohio courts have held that the size of the verdict, without more, is insufficient for a finding of passion or prejudice. See *Roscoe-Herbert v. Fabian* (8th Dist.), 2007 Ohio 3263, P33; see also, *Tenaglia v. Russo* (8th Dist.), 2007 Ohio 833, P19. Although it is proper to consider the amount of the verdict, this Court must also consider whether incompetent evidence, attorney misconduct, or any other action may have improperly influenced the jury. See *id.* For Defendant to prevail, there must be something in the record that Defendant can point to that wrongfully inflamed the jury. See *id.*

Defendant does not point to any evidence or attorney misconduct that may have inflamed the jury or prejudiced the Defendant. Instead, Defendant argues that Plaintiff failed to prove actual damages. The Court disagrees. In Jury Instruction No. 11, the Court instructed the jury that "[i]n arriving at an amount of damages that would fairly or adequately compensate the Plaintiff for her loss, you may consider shame, humiliation, the hurt feelings, the outraged sensibilities, the invasion or interference with the Plaintiff's private activities and any out-of-pocket loss, medical expense, or lost income which naturally results from the Defendant's wrongful acts." At trial, Plaintiff testified as to both economic and non-economic losses. Plaintiff testified that after learning of the e-mail, she "was very upset"; "was horrified"; "felt terrible"; and "was sick to [her] stomach." Partial Transcript of Proceedings, p. 14. The remainder of Plaintiff's testimony further revealed damages in the form of shame, humiliation, hurt feelings, outraged sensibilities, and invasion of privacy. See *id.* at 14-21. This Court will not

invade the province of the jury in assessing the value of these damages. See *Kmetz v. MedCentral Health Sys.* (5th Dist.), 2003 Ohio 6115, P27, P38; see also, *Betz v. Timken Mercy Medical Ctr.* (5th Dist. 1994), 96 Ohio App. 3d 211, 222; *Mensch v. Fisher* (11th Dist.), 2003 Ohio 5701, P16. In addition, Plaintiff testified as to her economic losses in taking a different job as a result of this incident. She stated that she went from making over $70,000 per year in salary to $45,000 per year. See Partial Transcript of Proceedings, p. 47. Therefore, the jury's award of damages on Plaintiff's claim for invasion of privacy was not excessive.

Furthermore, the Court finds that the jury's verdict was not the result of passion or prejudice. Although Plaintiff's counsel urged the jury during closing argument to "send a message," the Court does not find this statement to be so egregious as to have inflamed the jury or prejudiced the Defendant. See *Roscoe-Herbert v. Fabian* (8th Dist.), 2007 Ohio 3263, P40-41.

Therefore, the Court finds that the jury's verdict on Plaintiff's claim for invasion of privacy was not excessive or appearing to have been given under the influence of passion or prejudice.

C. Rule 59(A)(7)

The Court finds that the jury's verdict on Plaintiff's claim for invasion of privacy was not contrary to law.

III. Conclusion

It is, therefore, ORDERED, ADJUDGED, and DECREED:

Defendant's post-trial motion for judgment notwithstanding the verdict ("JNOV") and motion for a new trial pursuant to Ohio Civil Rules 50(B) & 59 is granted

in part and denied in part. The motion for judgment notwithstanding the verdict is denied. Pursuant to Ohio Civil Rule 59(A)(6), the motion for a new trial is granted as to Plaintiff's claim for intentional infliction of emotional distress. The motion for a new trial is denied as to Plaintiff's claim for invasion of privacy.

The jury's verdict in favor of Plaintiff and against Defendant on Plaintiff's claim for intentional infliction of emotional distress is vacated. The case is reinstated to the active docket for further proceedings on this claim.

DATE: May ____, 2008

_____

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via facsimile and regular U.S. mail on this _____ day of May, 2008, to the following:

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