

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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| JASMINE PEEPLE, |) | CASE NO. CV 09 687554 |
| |) | |
| Plaintiff, |) | JUDGE BRENDAN J. SHEEHAN |
| v. |) | |
| |) | |
| ENCORE MARKETING GROUP, INC., |) | |
| <i>et al.</i> , |) | OPINION AND JUDGMENT |
| |) | ENTRY |
| Defendants. |) | |

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on Defendant Encore Marketing Group, Inc.'s ("Encore's") Motion for Judgment Notwithstanding the Verdict or, Alternatively, Motion for a New Trial or, Alternatively, for Remittitur and Plaintiff's Application for Attorneys' Fees. The issues have been fully briefed to the Court and a full day evidentiary hearing was held on the issue of attorneys' fees.

A jury trial on Plaintiff's claims against Encore for negligent hiring, retention and/or supervision and negligent/intentional infliction of emotional distress proceeded to a jury trial on February 8, 2010.

This case arises out of at least two incidents of young women interviewing for employment at Encore's offices in Beachwood, Ohio. Several months prior to March 2005, a young woman named Saletha Gore interviewed at Encore with Defendant Anthony Jones. Defendant Jones was a recruiter for Encore. His job responsibilities included placing ads for potential employees and scheduling interviews; however, Mr. Jones' regular employment responsibilities did not include interviewing candidates at Encore's offices. Rather, Steven T. Bruns, the residential sales manager of the Encore office in Beachwood, had the authority to hire

candidates and, consequently, was responsible for interviewing the candidates. Mr. Jones interviewed candidates only when Mr. Bruns was unavailable to conduct a scheduled interview.

After her interview with Mr. Jones, Ms. Gore accepted employment but worked for a very brief time before quitting her job. She returned to Encore to pick up her check and spoke with Mr. Bruns, informing him that she quit her job because Mr. Jones had exposed his penis to her during the interview. As Mr. Bruns testified:

Q: Okay. Can you tell the members of the jury specifically what you described to Mr. Briggs concerning the Saletha Gore incident?

A: As far as what transpired at that incident?

Q: Yes, describe for them the conversation that you had with Mr. Briggs.

A: Well, again, the – the actual words that transpired there is hard for me to say for sure.

Q: Sure.

A: As far as what the Saletha Gore incident involved, it was, you know, she'd – she'd come in to be an employee of Encore on the residential side. I had trained her. She had gone out. She had sold I imagine for a week or two – again, I'm – I'm estimating at that – and then disappeared.

That was not uncommon, so I didn't really think that much of it. She came back in – again, to estimate, I'm guessing a couple of months later – and said that she was looking for a paycheck and wanted to speak with me. And I then directed her into my office so we could have a private conversation and then that's when she informed me that – that Anthony – she asked me why or if I had known why she was leaving. And I said, you know, no. I just assumed that you were no longer interested in the position, you know. Nothing more than that.

And she said well, that Anthony had behaved inappropriately, that he had exposed himself. I then advised her that, you know, if what she was saying was, in fact, the case that she needed to go to the authorities, that there was not, you know, wasn't any – that that had kind of gone above my head, in which case that that would I felt be the next best thing for her to do.

And, of course, because, you know, at that point it was just an allegation and I had no idea as to the validity of it. So I directed her to do – to take that action. And during that time – I had a

couple, you know, minutes while I was talking with her for that to kind of sink in a little bit because it – it was fairly shocking.

Testimony of Steven Bruns, 19:8-25, 20:1-23.

Mr. Bruns' actions upon hearing Ms. Gore's allegations were less than certain:

Q: Did you ever address Saletha Gore's allegations with Anthony Jones?

A: I believe that I had.

Q: Okay.

A: I believe that I had to – I – I don't recall for sure, but I think that I did.

Q: You may have and you may not have?

A: Yeah. I – I wish I could tell you better than that.

Id., at 25:12-20.

However, Encore did not investigate Ms. Gore's allegations further. *Id.*, at 27:5-9.

Encore had no policies for addressing sexual misconduct in the workplace. *Id.*, at 33:8-25, 34:1-

3. Encore continued to allow Mr. Jones to interview young women in the Encore offices.

A few months later, on or about March 3, 2005, Ms. Peeple, an 18-year-old woman, arrived by public transportation to Encore's offices in Beachwood, Ohio and was interviewed by Defendant Jones. Ms. Peeple and Mr. Jones discussed the job in Mr. Jones' office, went to the office lobby to view informational and returned to Mr. Jones' office. At that time, Mr. Jones closed the door to his office, turned Ms. Peeple toward the door, pulled down her pants and penetrated her with his penis.

Ms. Peeple left the office and took a bus to her mother's place of work. On her mother's advice, Ms. Peeple went to a hospital where a rape kit was performed on her. Ms. Peeple brought charges against Mr. Jones. Mr. Jones was terminated sometime thereafter: Encore testified that Mr. Jones was terminated on March 4, 2005, the investigating officer testified that

he interviewed Mr. Jones at Encore on March 11, 2005 and Encore's payroll records indicate that Mr. Jones was terminated on March 16, 2005.

After a trial on the matters, the jury returned a verdict finding Defendant Encore liable for negligent hiring, retention, supervision or training of Anthony Jones and assessed damages in the amount of \$300. The jury found Encore liable for negligent infliction of emotional distress, determined that Encore was 45% comparatively negligent and assessed total compensatory damages against Encore in the amount of \$5000.

The jury also determined that, in addition to actual damages, Encore was liable for \$250,000 in punitive damages plus attorneys' fees.

II. LAW AND ANALYSIS

A. Standard for Consideration of Motions for Judgment Notwithstanding the Verdict.

A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence. See *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164. Thus, the standard of review when ruling on a motion for judgment notwithstanding the verdict is the same as that used when ruling on a directed verdict motion. See *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 121, fn. 2, citing *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 318-319; *Posin* at 275. If the record contains any competent evidence, when construed most strongly in favor of the nonmoving party, upon which reasonable minds could reach different conclusions, the court must deny the motion. See *Meyers v. Hot Bagels Factory, Inc.* (1999), 131 Ohio App.3d 82, 92.

Defendant claims that a judgment notwithstanding the verdict is warranted because there was no evidence that Encore "acted with malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or

omissions of an agent or servant that so demonstrate” as required by R.C. §2315.21(B)(1). As Defendant acknowledges, actual malice under Ohio law is found, among other circumstances, when there is “a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336. The Ohio Supreme Court has repeatedly noted actual malice may be proven by conduct and surrounding circumstances characterized as reckless, wanton, or willful. See, e.g., *Davis v. Tunison* (1959), 168 Ohio St. 471, 475; *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 184; *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 23.

B. Standard for Consideration of Motions for New Trial.

Alternatively, Defendant seeks a new trial pursuant to Civ.R. 59. Defendant contends that a new trial is warranted because counsel were permitted to use the word “rape” during the proceedings to describe Ms. Peeple’s claim while the jury was not informed that Defendant Jones was acquitted of criminal rape charges, that hearsay evidence of emotional distress was permitted at trial and, in its view, excessive damages were awarded under the influence of passion or prejudice.

In ruling upon motion for a new trial, like a motion for judgment notwithstanding the verdict above, the trial court applies the same standard as required in order to rule upon a motion for a directed verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1988), 81 Ohio St.3d 677, 679.

In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury’s assessment absent an affirmative finding of passion and prejudice *or* a finding that the award is manifestly excessive. See *Toledo, Columbus & Ohio River RR. Co. v. Miller* (1923), 108 Ohio St. 388, 402-403. The trial judge is in the best position to determine whether an award is so excessive as to be

deemed a product of passion or prejudice, and the trial court's determination on that issue will not be disturbed absent an abuse of discretion. *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 569; see, also, *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 655.

C. Testimony Presented at Trial.

As set forth above, if the record contains any competent evidence, when construed most strongly in favor of Plaintiff as the nonmoving party, upon which reasonable minds could reach different conclusions, this Court must deny Defendant's motions.

The record is replete with competent evidence supporting the jury's verdict. For example, Craig Stapel, president and CEO of Encore Marketing Group testified:

Q: You heard Mr. Bruns testify he was informed by Saleetha Gore a few months before the Jasmine Peeple incident that Anthony Jones had exposed himself during the course of her job interview, correct?

A: Yes, sir.

Q: Is there any set of circumstances where that type of behavior is acceptable?

A: No, sir.

Q: And regardless, whether Ms. Gore's complaint was credible or not credible, do you agree with Mr. Bruns that the allegation itself was of a serious nature?

A: Yes, sir.

Q: Would you agree with me that a serious allegation such as this should be investigated?

A: I'm sorry. Repeat the question.

Q: Sure. Would you agree with me that a serious allegation such as this should be investigated?

A: Yes, sir.

Q: Would it be prudent for a company to immediately address a serious allegation such as this, one that was made by Saleetha Gore?

A: Yes.

Q: Would you agree that one of the reasons why it would be important to address an allegation such as the one that was made by Saleetha Gore is to determine the credibility of the complaint?

A: Yes.

Q: Another reason, it would be potentially prudent – or I’m sorry. It would be prudent is to prevent a similar thing like this from occurring in the future, correct?

A: Yes.

Q: Because you know that the rights and safety of others could be affected if you don’t investigate, you don’t determine the credibility because it could happen again, right?

A: Correct.

Q: And it would be reckless and irresponsible of a company to not do anything with this information, correct?

A: Yes.

Testimony of Craig Stapel, 131:17-133:8.

Viewing the evidence and testimony presented strongly in favor of the nonmoving party, ample support for the jury’s verdict on each claim, including Plaintiff’s claim for punitive damages, exists. For the foregoing reasons, Defendant’s Motion for Judgment Notwithstanding the Verdict or, Alternatively, Motion for a New Trial must be denied.

D. Analysis of Punitive Damage Award

Encore also seeks to set aside or reduce the jury’s award of punitive damages in part because it believes the award was excessive when compared to the award of compensatory damages.

A large disparity between actual and punitive damages by itself is insufficient to set aside a jury’s award. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 438. As the Ohio Supreme Court explained:

A large disparity is allowable because a punitive damages award is more about a defendant’s behavior than the plaintiff’s loss. “The

purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.” *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651, 635 N.E.2d 331, 343.

Id., at 439.

Rather than focus on the compensatory damages awarded, a review of punitive damages must examine the defendant’s actions. The Supreme Court has noted that most attention should be directed at the degree of reprehensibility of the defendant’s conduct. *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 575-576. In assessing the reprehensibility of the defendant’s conduct, several factors should be considered: whether the harm caused was physical as opposed to economic; whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or was an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.*, at 576-577.

Upon examination of these factors, the Supreme Court further advised:

The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

State Farm Mut. Auto. Ins. Co. v. Campbell (2003), 538 U.S. 408, 419 (internal citations omitted).

An examination of the factors relevant to an award of punitive damages in the current case weighs heavily in Plaintiff’s favor. The jury found that Plaintiff was raped¹; thus

¹ The term “rape” is used not as a legal term of art but with its ordinary and customary definition as: “unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat

the harm caused to her was both physical and psychological. Plaintiff was not only financially vulnerable – she was vulnerable in virtually every way that an analysis could be undertaken. She was 18 years old; Mr. Jones was 37. She is a petite woman while Mr. Jones is an adult male. Ms. Peeple was financially and emotionally vulnerable as a young woman seeking employment during an interview.

It is undisputed that Encore was on notice of a prior allegation of sexual misconduct during an interview involving Mr. Jones. Thus, the sexual assault on Ms. Peeple was not an isolated incident or mere accident. Encore had no policies or training in place to address sexual misconduct in the workplace. Encore chose to continue its business practices without alteration after Ms. Gore alleged that Mr. Jones exposed himself to her. Encore chose to let Mr. Jones continue to interview young women unsupervised in its offices even though interviewing was not part of his regular job responsibilities. Under these circumstances, the jury could reasonably find that Encore evinced an indifference and reckless disregard of the health and safety of others.

Based on the factors established by the Supreme Court, the Court finds that Encore's actions were highly reprehensible and that the award of punitive damages was properly assessed to punish Encore and deter similar future conduct. Accordingly, Defendant's Motion for Remittur is denied.

E. Determination of Reasonable Attorneys' Fees.

In addition to compensatory and punitive damages, the jury also determined that attorneys' fees should be awarded against Encore.

of injury against the will usually of a female or with a person who is beneath a certain age or incapable of valid consent", Merriam-Webster Online Dictionary; or "the unlawful compelling of a woman through physical force or duress to have sexual intercourse" or "any act of sexual intercourse that is forced upon a person." Dictionary.com

Reasonable attorneys' fees are determined by first deriving the lodestar figure, which is the number of hours expended multiplied by a reasonable hourly rate. *Perdue v. Kenny A. ex rel. Winn* (2010), 130 S.Ct. 1662, 1672 –1675; *Blum v. Stenson* (1984), 465 U.S. 886, 888; *Hensley v. Eckerhart* (1983), 461 U.S. 424.

The lodestar figure may be modified by analyzing the factors listed in DR 2-106(B): the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145.

However, enhancements of the lodestar amount may not be awarded for factors subsumed in the lodestar calculation. As the Supreme Court has held:

We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors “presumably [are] fully reflected in the number of billable hours recorded by counsel.” *Ibid.* We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar “[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate.”

Kenny A. ex rel. Winn (2010), 130 S.Ct. 1662, citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986), 478 U.S. 546, 566.

For example, enhancements, while rare, may be appropriate when the method used in determining the hourly rate does not adequately measure the attorney's true market value, if the litigation was exceptionally protracted and required an extraordinary outlay of expenses or when there is an exceptional delay in the payment of fees. *Kenny A. ex rel. Winn* (2010), 130 S.Ct. 1662.

The fee applicant bears the burden of proving that an enhancement is necessary by producing specific evidence that supports the award. *City of Burlington v. Dague* (1992), 505 U.S. 557, 561; *Blum v. Stenson* (1984), 465 U.S. 886, 901-902.

Plaintiff has stipulated to Defendant's calculation of appropriate fees to be awarded for paralegal services on Plaintiff's case at \$130.00 per hour for 21.5 hours.

Upon reviewing the arguments of counsel, the evidence and testimony presented, the Court finds that Plaintiff's proposed blended hourly rate of \$275 per hour is a reasonable hourly rate given the experience of counsel that worked on this matter.

Plaintiff's counsel states that 993 hours were expended in prosecuting this action through trial. Defendant contends that Plaintiff's fee bills should be reduced in the following instances:

1. Time billed to the case as initially filed should have been sufficient for all matters except trial preparation and trial;
2. Time billed to watching the criminal trial of Anthony Jones on charges related to his sexual misconduct at Encore were not justified;
3. Time billed for trial preparation was excessive; and
4. Time billed for trial was excessive.

The Court actively monitored progress of this case from its filing in March 2009 through trial in February 2010, conducting a case management conference on June 11, 2009, pretrials on August 18, 2009, October 16, 2009, November 16, 2009, and December 18, 2009 and a telephone conference with counsel on November 9, 2009. Throughout the proceedings, the Court discussed avoiding duplication of efforts from the previously filed case to the extent permissible by the Civil Rules. The Court finds no unnecessary duplication of time charged by Plaintiff's counsel in prosecuting the current action.

Plaintiff's counsel believed that it was important to observe the criminal trial of Anthony Jones to personally observe the demeanor of the witnesses in the actual courtroom setting.

Defendant contends that time so expended was unnecessary because a paralegal could have observed trial or the transcript of proceedings could have been obtained. The Court first notes that the cost of paralegal time, procuring a transcript and reviewing a transcript would have been, at most, slightly less than the actual attorney time spent observing the trial.

It is beyond question that personal observation of witnesses is an invaluable source of information at trial. That is the very reason that appellate courts defer to trial courts on numerous issues:

The trial court is in the best position to evaluate the witness and his demeanor. A stale transcript will normally not portray the inflection or emphasis given to certain responses of the witness.

Becker v. Lake County Memorial Hosp. West (1990), 53 Ohio St.3d 202, 207.

This same principle, that personal observation of witnesses cannot be entirely replaced by a written transcript, applies to Plaintiff's counsel's decision to personally observe proceedings involving many of the same witnesses and issues anticipated in the civil case. According, the Court finds that time spent observing other related court proceedings was not only reasonable, but also prudent.

Defendant's final two objections to Plaintiff's fee application concern the amount of time billed to trial and trial preparation. Throughout these proceedings, Defendant chose the strategy of opposing virtually every fact or issue that could be opposed. For example, Defendant contested Plaintiff's use of counsel in North Carolina although out-of-state counsel was employed to procure the depositions of Steven Bruns and Craig Stapel because they were, for some reason, unable to be deposed by agreement. Clearly, employing North Carolina counsel was necessary under the circumstances presented and the Ohio Uniform Foreign Depositions Act, R.C. §2319.09. Additionally, while applications for attorneys' fees awarded by a jury are

commonly determined based on affidavits or brief hearings, the hearing in this matter lasted an entire day.

The Court imposes no value judgment concerning this litigation tactic; however, parties who choose a sort of “scorched earth” strategy must anticipate that the opposing party, especially a plaintiff who bears the burden of proof, must respond in kind. Therefore, the time expended by Plaintiff must be viewed in light of the number of issues to which Plaintiff was required to respond and/or anticipate and the Court finds trial preparation time billed by Plaintiff’s counsel to be reasonable.

Similarly, trial was conducted on a rigorous schedule with full days and limited breaks for preparation. Based on the demands of trial, the Court finds trial time billed by Plaintiff’s counsel to be reasonable.

The Court determines the appropriate lodestar amount for time expended through trial to be \$275,873.00 comprised of \$273,075.00 in attorney time plus \$2,798.00 in paralegal time.

The Court further finds that the enhancement factors are largely subsumed by the lodestar amount and that none of the specific factors identified by the Supreme Court supporting an enhancement are present.

III. DISPOSITION

Judgment is rendered in favor of Plaintiff and against Defendant Encore Marketing Group, Inc. in the amount of \$2550.00 in compensatory damages (\$300 awarded on Plaintiff’s claim of negligent hiring, retention, supervision or training and \$2250.00 awarded on Plaintiff’s claim of negligent infliction of emotional distress reduced by the jury’s determination of comparative fault), \$250,000.00 in punitive damages and \$275,873.00 in attorneys’ fees.

Judgment is rendered in favor of Plaintiff and against Defendant Anthony Jones in the amount of \$3442.40 in compensatory damages (\$1292.40 awarded on Plaintiff’s civil assault

claim and \$2150.00 awarded on Plaintiff's claim of negligent infliction of emotional distress reduced by the jury's determination of comparative fault), together with \$60,000.00 in punitive damages.

Defendant Encore's cross-claim against Defendant Anthony Jones remains pending on the docket. The record does not reflect that service was perfected on Defendant Jones pursuant to Civ.R.5. Defendant Encore is granted until August 27, 2010 to demonstrate service on Defendant Jones and prosecute this claim or it shall be dismissed pursuant to Civ.R.4(E).

IT IS SO ORDERED.


JUDGE BRENDAN J. SHEEHAN

Dated: July 30, 2010

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GERALD E. FUERST, CLERK
BY  DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via regular mail and facsimile to the following this 30th
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