[Cite as *West v. Curtis*, 2009-Ohio-3050.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JULIE WEST,	)	
	)	CASE NO. 08 BE 28
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
DR. RODNEY CURTIS, II,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 04CV300.

JUDGMENT: Affirmed in part; Reversed in part; Case Remanded.

APPEARANCES:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 8, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Dr. Rodney Curtis, II appeals from the decision of the Belmont County Common Pleas Court entering judgment in favor of plaintiff-appellee Julie West on her sexual harassment claim. Appellant raises issues with the jury instructions, the weight of the evidence on causal connection, and comments by opposing counsel in closing argument. He also contends that he was denied his right to a full jury on the amount of punitive damages and on liability for attorney fees. Finally, he contends that the prejudgment interest award was not proper.

¶{2} For the following reasons, the judgment finding appellant liable for sexual harassment is affirmed. However, we reverse and remand the amount of punitive damages and the issue of whether appellant was liable for attorney fees as appellant was denied his right to a full jury on these matters. Due to the fact that the total damage award is a significant factor to consider in awarding prejudgment interest, the matter of prejudgment interest is also reversed and remanded with instructions provided herein for addressing this topic on remand.

STATEMENT OF THE CASE

¶{3} In August of 2004, Ms. West filed a sexual harassment complaint against Dr. Curtis, a urologist for whom she worked until she was terminated on October 6, 2002. At trial, she pursued the case as one of quid pro quo, rather than hostile work environment, which theory she abandoned prior to trial due to her allegations that she was actually terminated as a result of the harassment.

¶{4} At the December 2007 jury trial, Ms. West testified that she met Dr. Curtis at the hospital where she worked as a nurse. During the three years they occasionally worked together, he did not act inappropriately toward her. (Tr. 274). In June of 1999, she left her job at the hospital in order to accept his offer to work as his office manager, which entailed both nursing components and administrative components including billing. Her starting salary was $29,500. (Tr. 275). She was pregnant at the time with her first child and was apparently due in January of 2000. (Tr. 356).

¶{5} Ms. West testified that after she started, Dr. Curtis told her that this would be the "perfect set up" because they were both married. He stated that they could have sex and no one would know. (Tr. 242-243).

¶{6} In October of 1999, Dr. Curtis brought Ms. West to a conference in Chicago, based upon his claims that he wanted to open a surgical center. Ms. West testified that Dr. Curtis said, "perhaps we could have sex", to which she responded that it was "probably not a good idea." (Tr. 243). Still, he came to her hotel room, sat on the bed where she was laying and watching television, placed his hand on her hip, ran his hand across her breast and tried to kiss her. (Tr. 245-246). When she said "no", he came to the other side of the bed and tried to kiss her from there.

¶{7} After she rejected these advances, he told her not to let this change how things were in the office. Ms. West also testified that on the airplane on the way home, Dr. Curtis theorized that she would not want to have sex while she was pregnant as she had a prior miscarriage. (Tr. 246).

¶{8} Shortly after this, Dr. Curtis made suggestions about attending another conference and provided her with a brochure. She testified that after he asked her multiple times without receiving an affirmative response, he brought her into his office, pinned her against the door and tried to kiss her. Ms. West testified that he revealed that he was trying to see if they were "on the same page" regarding the conference. She stated that they were not on the same page and that she would not be attending any future conferences with him. (Tr. 247).

¶{9} Ms. West testified that there were additional propositions, and she then reviewed some of them. For instance, she said that when the office staff went out on his boat, he once put his arm around her waist and pulled her toward him. (Tr. 248). She also stated that during a Christmas party at a bar, a co-worker asked Ms. West if she was wearing a thong. Dr. Curtis allegedly put his hand down her pants, rubbed her buttocks and pulled out her thong. (Tr. 249).

¶{10} He once brought in the resumé of a woman he was dating and told Ms. West not to worry because even if the date worked out, the woman would not be the next office manager. (Tr. 250). He would often talk about strippers, and he showed Ms. West a website from a local strip club. (Tr. 249-250). Strippers would call him with a code name if they wished to interrupt his appointments with patients. He dated a former stripper for a time and this woman and other strippers would come to the

office in inappropriate attire and use the facilities. (Tr. 251). He once indicated a desire to hire some of these strippers for office positions. (Tr. 250).

¶{11} When the former stripper's boyfriend threatened Dr. Curtis, Ms. West disclosed that Dr. Curtis started carrying a concealed weapon to work. Ms. West testified that at this same time, he would say irrational things about what he would do to his wife if she divorced him. As a result, she was concerned about how to confront him about his constant sexual commentary and touching. (Tr. 250, 252).

¶{12} When she was pregnant with her second child, Dr. Curtis told her she could be a stripper if she were not pregnant. She testified that when she was approximately six months along in that pregnancy, he told her she was sexy when pregnant, he tried to kiss her, and he pointed out that she would not have to worry about getting pregnant since she was already pregnant. (Tr. 249).

¶{13} While Ms. West was on maternity leave, she heard that Dr. Curtis was contemplating hiring a certain new nurse to help with billing during the leave. (Tr. 304). This did not occur when Ms. West complained, but Dr. Curtis again contemplated hiring this same nurse in September of 2002; this time to take over Ms. West's nursing responsibilities. Ms. West disagreed with this decision as they had just moved the office from Wheeling to St. Clairsville a few months prior and were still settling in to the new location.

¶{14} Appellant hired the new nurse in any event, and she started work some time near the end of September or the beginning of October of 2002. There were rumors that Dr. Curtis was having a sexual relationship with this new nurse. However, the new nurse testified that she never had a sexual relationship with Dr. Curtis. (Tr. 504).

¶{15} Due to the general dissatisfaction in the office, Ms. West informed Dr. Curtis that employees were having a hard time. He advised her to instruct them to be professional and respectful to the new hire. Thus, Ms. West called a meeting and instructed the employees to be professional with the new nurse. (Tr. 265). At the meeting, the physician's assistant contemplated quitting due to appellant's failure to pay him raises as promised but his simultaneous ability to hire the new nurse. Ms. West acknowledged that she agreed that he should get another job if he felt that way. However, she noted that since he was a physician's assistant, she was not his supervisor. (Tr. 309).

¶{16} In Ms. West's last week of employment, Dr. Curtis stated to her, "I'd still rather fuck you than her [meaning the new nurse]." (Tr. 257). Ms. West said that she then confided in a co-worker that it appeared Dr. Curtis finally realized that she was not going to have sex with him. (Tr. 266). This co-worker denied that Ms. West told her this but admitted that she called Dr. Curtis just prior to Ms. West's termination and told him that it was only Ms. West who had the problem with the new nurse. (Tr. 448-450).

¶{17} On October 6, 2002, Dr. Curtis called Ms. West at home and told her not to return to work on Monday. He informed her that if she refused to resign, he would spread negative information about her. Still, she refused to resign, so he fired her over the telephone. (Tr. 267). He followed up with a letter dated October 9, 2002, which stated that the reason for the termination was that he had decided to employ a billing service. (Tr. 224).

¶{18} In his trial testimony, Dr. Curtis admitted that he tried to kiss Ms. West in her hotel room in Chicago. (Tr. 167-168). He denied making any comments about hiring an office manager who would have sex with him but agreed that he testified at deposition that if he made any such comments, he was joking and was likely referring to a dancer, such as the former stripper he was dating. (Tr. 151, 154-155). He admitted that he brought in the resume of someone else he was dating. (Tr. 156). He also acknowledged showing Ms. West the website of the strip club. (Tr. 162).

¶{19} Furthermore, appellant admitted that he said, "I'd rather fuck you than her" in the days before he fired Ms. West. (Tr. 147). However, he denied that this actually meant that he was interested in having sex with Ms. West; rather, he explained that he was trying to assuage her ego. (Tr. 148, 634, 644, 646-647).

¶{20} Dr. Curtis denied that he made the comment about the "perfect set up" and how no one would know if they had sex. (Tr. 163). He denied ever asking Ms. West for sex. (Tr. 164). He denied trying to kiss her in his office while talking about another seminar. He denied that he touched her on his boat. (Tr. 171). He denied that he ever mentioned how it would be safe to have sex while she was pregnant. (Tr. 172).

¶{21} Dr. Curtis testified that some of the reasons for his decision to terminate Ms. West included his perception that Ms. West was trying to inhibit him from hiring the new nurse and his belief that she indicated to employees at the final meeting that

they may need to look for other employment. (Tr. 182-183, 209). He agreed that the termination had nothing to do with an allegation that she was spreading rumors about him and the new nurse. (Tr. 208). He explained that his main reason for terminating Ms. West was due to the problems she was having collecting from Medicare since the July 4, 2002 move to St. Clairsville. (Tr. 182, 184).

¶{22} Specifically, Ms. West explained to him that the checks arriving in Wheeling could not be forwarded to St. Clairsville as anticipated because Medicare had a standing order to not forward mail. Moreover, they needed to procure a new provider number when they moved to Ohio. (Tr. 618). He pointed out that seventy percent of his practice involved Medicare patients and that he had to take out a line of credit to cover his expenses until the Medicare checks recommenced. (Tr. 617, 622). He concluded that the billing problems were not remedied when he terminated Ms. West and that this, combined with her disagreement with his hiring the new nurse, caused him to terminate Ms. West. (Tr. 632-633). Yet, he also stated that he hired the new nurse to take over Ms. West's nursing duties and to give Ms. West more time to resolve the billing issues.

¶{23} As to the billing issue, Ms. West testified that she could not receive a Medicare pin number until they had an exact move date, Dr. Curtis could not decide on the date of the move, and the July 4, 2002 move was spur of the moment. (Tr. 254). She stated that upon realizing the problem that Medicare checks were being returned to Wheeling, she secured a provider number and was informed that there would be a thirty-day delay in their receipt of the returned payments. She also claimed that Dr. Curtis did receive the money within thirty days. (Tr. 255). She said that on the Friday before her termination, he asked her if they had collected the money, to which she responded that they had except for a small check here or there. (Tr. 255-256).

¶{24} It was noted that Dr. Curtis had talked about starting a billing service with Ms. West as a partner and had recommended Ms. West to another physician for billing purposes just a month before her termination. (Tr. 197-198, 591). It was also noted that she had received a $6,000 pay raise at the end of 1999 and at the beginning of 2001 and a $2,500 pay raise at the beginning of 2002. (Tr. 282-284). One week prior to her termination, she received another pay raise, resulting in a total salary of $52,000. (Tr. 239, 242, 314). She attributed this final raise to Dr. Curtis trying to prove that he could afford to hire another nurse and to his feelings of guilt over her

dismay. (Tr. 242, 314-315). Dr. Curtis denied that he approved this final pay raise. (Tr. 180-181).

¶{25} A representative of the new billing company testified as to various billing issues. Most of them were admittedly either minor (such as Ms. West's policy of refusing to attempt collection of nominal amounts from the secondary insurer) and/or were not the reason for Ms. West's termination as they were not known at such time. However, the billing representative seemed to say that the Medicare issue with the returned checks was not corrected until they opened a post office box for Dr. Curtis in Wheeling. (Tr. 546, 552).

¶{26} Ms. West's sister, who also worked at the office, testified that Dr. Curtis never stated that the Medicare problems were Ms. West's fault. (Tr. 344-345). She believed that the Medicare issue was fixed prior to her sister's termination. (Tr. 345, 362-363). She testified that they were receiving Medicare checks at the St. Clairsville office at the time of her sister's termination. In response to the testimony that Ms. West was flirtatious, she described her sister as bubbly and outgoing. (Tr. 453, 692, 732).

¶{27} Two co-workers stated that Dr. Curtis gave Ms. West preferential treatment with one attributing it to "sexual chemistry". (Tr. 481-482, 699). One co-worker also stated that Ms. West often spoke of sexual matters. (Tr. 692).

¶{28} On December 7, 2007, the jury found in favor of Ms. West and awarded her $35,000 in damages, which included $15,000 for backpay. Seven out of the eight jurors also found that Dr. Curtis was liable for punitive damages. Since the trial had been bifurcated, the case then proceeded as to the amount of punitive damages. However, only the seven jurors who voted for punitives were permitted to deliberate in the second phase. These seven jurors were also asked to determine if attorney fees should be awarded. Thereafter, the jury returned a $200,000 punitive damage award and voted that attorney fees should be awarded.

¶{29} A hearing on the amount of attorney fees and prejudgment interest was held before the court. The court awarded attorney fees in the amount of $61,290 plus $2,189.98 in costs and $15,758.63 in prejudgment interest. On April 17, 2008, the court entered its final order addressing all matters. On May 1, 2008, Dr. Curtis filed a timely motion for a new trial. See Civ.R. 59(B). The trial court denied this motion on July 29, 2008. Dr. Curtis filed timely notice of appeal. See App.R. 4(B).

ASSIGNMENT OF ERROR NUMBER ONE

¶{30} Appellant's first assignment of error alleges:

¶{31} "THE DISPARATE TREATMENT INSTRUCTION WAS ERRONEOUS."

¶{32} For background, we begin by reviewing certain portions of the sexual harassment jury instructions. The trial court instructed that Ms. West had to prove by the greater weight of the evidence that Dr. Curtis gave or promised to give a tangible job benefit in exchange for submission to unwelcome sexual demands or that he penalized or threatened to penalize her for refusing to submit to unwelcome sexual demands and that Dr. Curtis had actual authority to give tangible job benefits or detriments. The court further presented the following elements for Ms. West's quid pro quo sexual harassment claim: (1) the employee was a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or the request for sexual favors; (3) the harassment complained of was based on sex; and (4) the employee's submission to such unwelcome advances was an express or implied condition for advancement or favorable job conditions, or that the rejection of sexual advances resulted in a tangible job detriment.

¶{33} Because there was concern over how the jury was to treat appellant's claim that he terminated Ms. West for legitimate reasons, the court also instructed:

¶{34} "General - The employee must prove by the greater weight of the evidence that quid pro quo sexual harassment was a determining factor for her firing October 6, 2000.

¶{35} "Determining Factor - Determining factor means that quid pro quo sexual harassment made a difference in her being fired on October 6, 2002. There may be more than one reason for the Defendant's decision to fire Julie West. However, Julie West need not prove that quid pro quo sexual harassment was the only reason. It is not a determining factor if the employee would have been fired on October 6, 2002, regardless of quid pro quo sexual harassment." (See Written Jury Instructions).

¶{36} This instruction is contained in Ohio Jury Instruction 266.03 under the heading, "Disparate treatment claim -- indirect evidence," which was also the heading ascribed to the instruction by the court. Thus, appellant labels it a disparate treatment instruction. However, for clarity, we shall refer to it here as the "determining factor" instruction.

¶{37} Appellant initially argues that the determining factor instruction was improper because it only applies to a disparate treatment claim and because a disparate treatment claim is distinct from a quid pro quo claim. However, appellant is failing to grasp the structure of the sexual discrimination law.

¶{38} Although courts sometimes refer to a plain gender bias claim as a disparate treatment claim or a sexual discrimination claim while referring to a sexual harassment claim in the same case as either quid pro quo or hostile work environment, *a sexual harassment case is actually a specialized disparate treatment* or sexual discrimination case. See *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21499, 2003-Ohio-7190, ¶22-25 (for outline of employment discrimination). To support this conclusion, we stop to review the relevant law on employment discrimination.

¶{39} Pursuant to R.C. 4112.02(A), it is an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. In applying this statute, Ohio courts are guided by the federal court's application of the similar federal statute. *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 175.

¶{40} An employment discrimination claim is based upon either a disparate treatment or a disparate impact theory. See *Hazen Paper Co. v. Biggins* (1993), 507 U.S. 604, 610. Disparate treatment involves discriminatory motive and liability depends upon whether the protected trait actually motivated the employer's decision. Id. Disparate impact does not require discriminatory intent; rather, it involves a practice that is facially neutral but that affects a protected group more than another and is not justified by business necessity. Id. Here, discriminatory motive was alleged rather than a facially neutral practice. Thus, this case would entail a disparate treatment theory.

¶{41} Contrary to appellant's suggestion, merely because sexual harassment has been said to fall into two categories, does not mean that it stands apart from disparate treatment. That is, the *Hampel* Court identified two ways to prove sexual harassment: quid pro quo sexual harassment and hostile work environment sexual

harassment. Quid pro quo sexual harassment, which was the ultimate theory in the case before us, exists where the sexual advances are directly linked to the grant or denial of a tangible economic benefit. Id. at 176. These are not concrete categories but they merely illustrate the distinction between cases where the implied or express threat is carried out and cases of offensive conduct in general, the latter requiring pervasive or severe conduct. *Burlington Indus., Inc. v. Ellerth* (1998), 524 U.S. 742, 751-754.

¶{42} The statutory phrase "because of * * * sex" encompasses sexual harassment and can refer to sexual advances or commentary or purely gender-based harassment without sexual undertones. *Hampel*, 89 Ohio St.3d at 178-179. Although courts often require the plaintiff to show that he or she belongs to a protected class, this is not necessary for sexual harassment because there are only two sexes and both are entitled to protection under the statute. Id. at fn.2. See, also, *Olmstead v. LC ex rel. Zimring* (1999), 527 U.S. 581, 598 (that there are no similarly situated individuals given preferential treatment is not dispositive as discrimination can occur even in the absence of a comparison group); *Onacle v. Sundowner Offshore Serv., Inc.* (1998), 523 U.S. 75, 80 (reasonable to infer implicit or explicit proposal of sexual activity is based upon sex). Finally, *Hampel* essentially equates sexual harassment with unequal or disparate treatment. *Hampel*, 89 Ohio St.3d at 179, quoting *McKinney v. Dole* (C.A.D.C. 1985), 765 F.2d 1129, 1138-1139.

¶{43} In accordance, a person who proves the elements of sexual harassment has established that he or she was subject to disparate treatment. See *Hampel*, 89 Ohio St.3d at 176, quoting *Meritor Sav. Bank, FSB v. Vinson* (1986), 477 U.S. 57, 64-66 (discrimination law strikes at "disparate treatment" as one should not have to endure sexual abuse to maintain employment). In other words, if the harassment is based upon sex, then disparate treatment occurs. See *Kentucky Ret. Systems v. EEOC* (2008), 128 S.Ct. 2361, 2366 (disparate treatment is intentional discrimination because of sex). Here, one of the elements of sexual harassment that this jury was instructed upon was that the sexual harassment was based upon sex. See *Chamberlin v. The Buick Youngstown Co.*, 7th Dist. No. 02CA115, 2003-Ohio-3486, ¶28 (regarding elements).

¶{44} For all of these reasons, the determining factor instruction is not erroneous merely because it is a disparate treatment instruction as this quid pro quo

sexual harassment case entailed a type of disparate treatment. Thus, appellant's initial argument here is without merit.

¶{45} Appellant's next argument complains that the determining factor instruction presupposed that harassment occurred and that the court created confusion when it inserted the phrase "quid pro quo sexual harassment" into the determining factor instruction. The standard instruction contains a blank, which typically is filled by race, gender, age or other legally protected classification. See O.J.I. 266.03.

¶{46} A single jury instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶41. In *Dixon*, the trial court instruction contained the language, "assuming a finding of the defendant is guilty beyond a reasonable doubt * * *." Id. at ¶39. The Supreme Court found this an unfortunate but not reversible choice of words. Id. at 40-41, citing *State v. Price* (1979), 60 Ohio St.2d 136.

¶{47} Similarly, since the jury here had already been instructed in two forms that it must find the listed elements of sexual harassment, the insertion of "quid pro quo sexual harassment" into the determining factor instruction did not allow the jury to assume that the quid pro quo sexual harassment in fact occurred. Although gender could have been inserted into the instruction instead of quid pro sexual harassment, this may have been more confusing in a sexual harassment case. The firing is indirectly attributable to gender but directly attributable to the quid pro quo sexual harassment (which includes as an element that the harassment was because of sex).

¶{48} Thus, the insertion of "quid pro quo sexual harassment" into the determining factor instruction was not confusing or unlawful. Nor was it meaningless as appellant suggests. Appellant notes that the jury had already been instructed that quid pro quo means that rejection of sexual advances resulted in a tangible job detriment. However, as the trial court opined, where legitimate reasons for the termination are provided, the court can instruct the jury how to evaluate these reasons.

¶{49} That is, even if there are good reasons expressed for the firing, if the firing would not have occurred in the absence of the unlawful discrimination (in this case quid pro quo sexual harassment), then the employer is still liable. See *Kentucky Ret. Systems*, 128 S.Ct. at 2366 (the question is whether intentional discrimination "because of sex" actually played a role and had a *determinative* influence on the

outcome of the employer's decision); *Desert Palace, Inc. v. Costa* (2003), 539 U.S. 90, 94-95 (addressing mixed-motive cases and holding that plaintiff must show by preponderance of evidence that protected class was "a motivating factor"); *Hazen*, 507 U.S. at 610 (protected class actually played a role in the decision-making process and had a *determinative* influence on the outcome).

¶{50} There is no validly expressed rationale for the proposition that a woman fired merely because of her sex would have the benefit of a determining factor instruction, but a woman fired because of quid pro quo sexual harassment (which entails "because of sex" as an element) can never have the benefit of such instruction. The determining factor instruction merely assists in determining discriminatory intent (and was added to the instructions to simplify the confusing burden-shifting analysis from *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802). See *Brubaker-Schaub v. Geon Co.* (Jan. 18, 2001), 8th Dist. No. 75694, fn.3. See, also, *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 134, fn.2 (referring to *McDonnell Douglas* for burdens and presumptions involved in statutory sexual harassment).

¶{51} Since discriminatory intent is also required for sexual harassment and since sexual harassment is encompassed within the disparate impact theory, the determining factor instruction is permissible. In fact, it appears to be a way of clarifying the quid pro quo element that the submission or rejection of the sexual conduct was used as the basis for or resulted in the employment decision. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{52} Appellant's second assignment of error provides:

¶{53} "AS A MATTER OF LAW, THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE."

¶{54} Appellate review of the manifest weight of the evidence in a civil case is much more deferential to the trial court than in a criminal case. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶26. The civil manifest weight of the evidence standard provides that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. Id. at ¶24, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus.

¶{55} The reviewing court is obliged to presume that the findings of the trier of fact are correct. Id., citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. This presumption arises in part because the fact-finder occupies the best position to watch the witnesses and observe their demeanor, gestures and voice inflections and to utilize these observations in weighing credibility. Id., citing *Seasons Coal*, 10 Ohio St.3d at 80.

¶{56} "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." Id., citing *Seasons Coal*, 10 Ohio St.3d at 81.

¶{57} Appellant argues here that Ms. West failed to show a causal connection or a demonstrable nexus between the offensive conduct of appellant and her termination. He urges that the evidence was not such that a jury could reasonably determine that it is more likely than not that her termination was the result of her refusal to submit to his sexual advances. He states that Ms. West's self-serving beliefs about his state of mind are insufficient.

¶{58} He focuses on two cases that granted summary judgment to the employer based upon a purported lack of causal nexus. See *Weiss v. Target Stamped Prods.*, 11th Dist. No. 2003-T-0108, 2004-Ohio-7226, ¶29; *King v. Enron Capital & Trade Resource Corp.* (Apr. 5, 2001), 10th Dist. No. 00AP-761. Neither case is binding upon this court, and both cases are distinguishable.

¶{59} In *King*, evidence was presented that the employer fired the plaintiff's supervisor as a result of her claim that he sexually harassed her and that her new supervisor, who placed the plaintiff on probation, knew nothing about her sexual harassment allegation. In *Weiss*, a new employee starting under a ninety-day probationary period was terminated a month after starting. This termination took place one week after she asked a supervisor (but not the one she was working under) for her paycheck to which he responded by asking her if she wanted to "go cruising". As discussed in our statement of the case and as will be reiterated below, this case contains much more factual matter, much of which is conceded by appellant to have occurred.

¶{60} In any event, those cases are not binding precedent for this court and contain some statements in which we do not concur. For instance, besides noting that asking someone to "go cruising" does not connote anything sexual and is not gender-based, the *Weiss* Court focused on a lack of any implication *expressed* to the plaintiff that she would suffer a detriment if she did not accept the offer. As aforementioned in assignment of error number one, both parties here agreed to the jury instruction on the quid pro quo elements, and the fourth element is stated to be that the submission to unwelcome advances was an express or implied condition for receiving job benefits, *or that the employee's refusal to submit resulted in a tangible job detriment*. See *Chamberlin*, 7th Dist. No. 02CA115. This latter option does not require communication of any intent to terminate to be conveyed to the employee.

¶{61} Regardless, an Ohio Supreme Court case, cited by appellant, held as follows:

¶{62} "Where a party bears the burden of proof of establishing proximate cause and seeks to do so by an inference from a set of proven facts, he must further show that the actual cause he seeks to establish is more probable than other possible causes which could be inferred from those facts." *Westinghouse Electric Corp. v. Dolly Madison Corp.* (1975), 42 Ohio St.2d 122, 126-27.

¶{63} If an inference on unlawful motive can reasonably be drawn from appellant's actions and expressions, then there would exist more than just Ms. West's subjective belief about motive. As such, we continue our analysis here by evaluating whether some competent, credible evidence supported the jury's determination that appellant possessed a discriminatory intent in terminating Ms. West. Since none of her descriptions of incidents are incredible or irrational, we must take them as true for purposes of our weight of the evidence review.

¶{64} First, appellant notes that the Chicago trip was three years prior to Ms. West's termination and that she received raises thereafter. He claims that she did not allege any other propositions occurred near the time of her termination.

¶{65} Although the Chicago trip, where he verbally and physically expressed his desire to have sex with her, was not temporally proximate to her firing, Ms. West testified that the inappropriate commentary and touching never stopped. Evidence established that appellant believed that her refusal to have sex with him at that time was temporary. His actions over the next three years can be used by a rational fact-

finder to confirm that he believed her refusal was temporary and that he would eventually convince her to succumb.

¶{66} That is, Ms. West related a proposition occurring soon after the Chicago trip, where he pinned her against the door and tried to kiss her in his office while asking if they "were on the same page" regarding attending another conference. He made sexual advances after a Christmas party by feeling her bare buttocks under her pants and then pulling out her thong underwear. He pulled her toward him by putting his arm around her stomach on his boat.

¶{67} He had her view the website of a strip club which he attended. He mentioned a desire to hire some of these strippers to be office workers. He brought in the resume of a woman he was dating. He either expressly or impliedly suggested hiring an office manager who would have sex with him. Although he later claimed he was joking, the implication can still be used by the jury in determining his ultimate motive.

¶{68} When Ms. West was pregnant with her second child, which was in the same year as her termination, he told her she could be a stripper and that she was beautiful pregnant. When she was six months into the pregnancy, he pointed out that she could not get pregnant if they had sex at the time because she was already pregnant.

¶{69} He then suggested hiring a certain nurse to do billing while she was on maternity leave, even though she already had the matter covered. Although this did not occur at the time, he later hired this same nurse to take over Ms. West's nursing responsibilities, notwithstanding the alleged financial issues at the office and his failure to follow through on raises promised to the physician's assistant.

¶{70} At this time, he admittedly announced to Ms. West, "I'd still rather fuck you than her [referring to the new nurse]." This statement under the totality of the circumstances that existed in this case is much more damning than appellant makes it out to be. A rational fact-finder could find it to be a statement of discriminatory intent and an expression of unlawful motive for termination.

¶{71} Ms. West then told a receptionist that appellant seemed to realize that she would never have sex with him. The receptionist admittedly called appellant at home to report certain things about Ms. West. Although she denies that Ms. West

made this comment or that she relayed it to appellant, her testimony need not be taken as the absolute truth.

¶{72} Appellant then called Ms. West at home on a Sunday and told her not to come back to work, cryptically stating that he would tell her why "someday". He made threats of possible slander to attempt to get her to resign so he would not be on record as having fired her. Notably, the follow-up letter of termination made no mention of the Medicare billing issue or the personnel issues that he now claims to be the reasons for termination.

¶{73} The jury need not have believed his testimony that he would have terminated Ms. West even if she would have responded to his sexual advances. They could have permissibly concluded that the Medicare issue was pretextual and was not as extreme as appellant claimed. There was testimony that the issue was resolved prior to the termination, and it was undisputed that he would not actually lose the Medicare payments but rather they would be delayed.

¶{74} As for appellant's statement that Ms. West was terminated in part due to her issues with his hiring the new nurse, the jury could have reasonably disbelieved appellant. The jury could have concluded that appellant developed a discriminatory intent towards Ms. West prior to hiring the new nurse and even prior to the Medicare issues. The reason for hiring the new nurse could have been so that he had someone on hand to take over Ms. West's responsibilities when he finally decided to terminate her. Notably, the new nurse was the same person appellant had tried to hire during Ms. West's maternity leave, which was right after he had approached Ms. West about having sex while pregnant.

¶{75} Additionally, appellant acknowledged that as office manager (one who was charged with billing, supervision of employees and nursing), it would be appropriate for Ms. West to discuss with him both employee morale and the lack of a need for a new nurse. Yet, he used these issues as a reason for termination. Appellant also admitted that he specifically instructed Ms. West to discuss the proper treatment of the new nurse with the staff. That she called a meeting is not contrary to his instruction as he claimed. As for claims that Ms. West frightened the employees by suggesting that they needed to look for new jobs, other testimony showed that she made a supportive comment only to the physician assistant, who was not under her supervision and who was already voicing his desire to find new employment due to

appellant's failure to pay him promised raises but his simultaneous financial ability to hire a new nurse.

¶{76} A rational juror could conclude that appellant did not impliedly condition continued employment or continued office management responsibilities on the submission to his sexual advances and that he did not terminate her or replace some of her duties because of her rejection of his sexual advances and suggestions. However, this is not the only rational construction of the evidence.

¶{77} Contrary to appellant's suggestions, the examples provided in Ms. West's testimony need not be seen as isolated incidents. Rather, they can be viewed as a continuing course of conduct, which escalated into a realization that the much-fantasized sexual encounter would likely never occur and culminated in one last attempt ("I'd still rather fuck you than her") to impart that her job may not in fact be threatened by this perceived replacement if she would only relent.

¶{78} Considering all of the evidence presented, we conclude that the jury's sexual harassment finding was supported by some competent, credible evidence. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

¶{79} Appellant's third assignment of error provides:

¶{80} "INFLAMMATORY COMMENTARY BY PLAINTIFF'S COUNSEL CONSTITUTED REVERSIBLE MISCONDUCT, NECESSITATING A NEW TRIAL."

¶{81} In closing argument, plaintiff's counsel stated in part:

¶{82} "This isn't a sexual harassment case where a woman has come into the courtroom and said, I can't take the pictures. I can't take the talk at the office. Julie West did not come to you to tell you that she was offended by the banter in the office. She came to tell you that, as a career woman, she shouldn't have to put up with the sexual advances to keep her job as the office manager. That is what this case is about.

¶{83} "And what is the defense? I call it the Saudi defense, because you may have heard in the newspaper recently about **a young girl in Saudi Arabia who was gang-raped. And then she went to prison, because she met with a man that wasn't her family. And she was charged with the crime."** (Tr. 740-741) (Emphasis added to disputed portion).

¶{84} Appellant believes that this emphasized statement was not probative and prejudicially inflamed the jury. Although no objection was entered by his counsel, he believes the court was required to act sua sponte because the comment constitutes gross and abusive conduct. He notes that “if there is room for doubt whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party." *Harris v. Mt. Sinai*, 116 Ohio St.3d 139, 2007-Ohio-5587, ¶36.

¶{85} He also points to the holding: "[w]here gross and abusive conduct occurs, the trial court is bound, sua sponte, to correct the prejudicial effect of counsel's misconduct." *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, 501 (already remanding due to a misleading jury instruction but addressing other assignment in order to provide the trial court with guidance on remand), quoting *Snyder v. Stanford* (1968), 15 Ohio St.2d 31, 37, 44. The *Pesek* Court held that this duty of the trial court arises if counsel created an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished. Id. at 501-502.

¶{86} First, we add the civil plain error principle to the applicable legal doctrine here. It is well-established that where no timely objection was made, plain error is recognized in a civil case only in an "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶43, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122-123.

¶{87} Second, we note that the *Harris* Court specifically stated that appellate courts should defer to trial judges in their decisions on new trial motions on grounds of misconduct of counsel, as the trial judge witnessed the trial firsthand and relies upon more than a cold record to justify a decision. *Harris*, 116 Ohio St.3d 139 at ¶36 (upholding grant of new trial). "The determination of whether alleged misconduct of counsel was sufficient to taint the verdict with passion or prejudice ordinarily lies within the sound discretion of the trial court." Id. at ¶39.

¶{88} Third, we point out that the statements in *Pesek*, which the Supreme Court found worthy of sua sponte action, were more extreme than those contested

here. In *Pesek*, counsel degraded opposing counsel by saying that he evoked disgust as a lawyer, that he was laughing behind the jurors' backs, that he deliberately misrepresented evidence, that he suppressed evidence and that this all coincided with his personality. Counsel also accused the expert witness of lying, of trying to "screw over these good doctors" and of testifying in as many cases as possible to maintain a high standard of living. These were direct degradations of those involved in the suit, which were found to be unsupported by the record. See *Pesek*, 87 Ohio St.3d at 501.

¶{89} Fourth, we point out that counsel generally has wide latitude in closing arguments. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194. Moreover, counsel's closing argument must be read in its entirety, and the contested statement must be read in context. See, e.g., *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Here, counsel followed the comment about the Saudi girl with the following uncontested statements:

¶{90} "Because just as in a rape case where you [cannot accuse] a woman * * * of having other sexual acts as a [de]fense to being raped, it is not a defense to quid pro quo sexual harassment to say, Oh, but she talked about sex in the office. Oh, but she stripped down to her underwear amongst the girls and jumped in. And you know why it's not a defense? Because we do not want our daughters, our sisters, and mothers to have to keep their job to be a sexual play thing of an employer. That's what this case is about." (Tr. 741).

¶{91} The Supreme Court once reviewed a case where the defendant was accused of two murders, but the prosecutor's closing asked the jury to suppose he killed a whole stadium full of people or a whole school full of people. *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶84. The Court found that the comparison was improper as it did not properly rebut evidence or argument and that the comparison lacked relevance. Id. at ¶85. The Court concluded, however, that the prosecutor's improper argument made no difference in the outcome of the trial and was not plain error. Id.

¶{92} Here, counsel's comments were mere attempts to draw comparisons to outdated cultural mores that say a person is asking for quid pro quo (as opposed to hostile work environment) sexual harassment if she acts a certain way. This was in fact a response to evidence presented by the defense that Ms. West often initiated sexual topics of conversation in the office, that she was flirtatious and that she jumped

into the river off the boat in her underwear. Thus, the comparison had some relevance and was an attempt to rebut defense evidence and argument.

¶{93} Finally, no objection was entered to the contested statement. All eight jurors voted in favor of liability. The trial court denied a new trial on the ground of alleged misconduct in closing argument as it did not perceive an inflammatory atmosphere during closing argument. Even if the statement (that a Saudi Arabian girl had been blamed and punished for being gang-raped) was objectionable, it did not constitute gross and abusive conduct requiring the recognition of plain error. See *Pesek*, 87 Ohio St.3d at 501. There were not exceptional and rare circumstances here which seriously affected the basic fairness of the judicial process. See *Gable*, 103 Ohio St.3d 449 at ¶43, quoting *Goldfuss*, 79 Ohio St.3d at 122-123.

¶{94} In accordance, the court did not commit plain error at trial or abuse its discretion in denying new trial on this ground. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{95} Appellant's fourth assignment of error alleges:

¶{96} "DEFENDANT WAS DENIED HIS RIGHT TO A FULL JURY WITH RESPECT TO PUNITIVE DAMAGES AND ATTORNEYS' FEES."

¶{97} Prior to trial, the court ruled that the case would proceed in two stages. In the first stage, the jury would be asked to determine if the plaintiff was entitled to compensatory damages and if so whether the plaintiff was entitled to punitive damages. In the second stage, the jury would be asked to determine the amount of punitive damages. (Tr. 8). After the first stage, all eight jurors found appellant liable for sexual harassment and awarded $35,000 in compensatory damages to Ms. West. Seven of the eight jurors also found appellant liable for punitive damages.

¶{98} Prior to the second stage, the court decided that only the seven jurors who awarded punitive damages would be asked to participate in the assessment of the amount of punitive damages and the determination of whether attorney fees should be awarded (leaving for the court the amount of attorney fees). (Tr. 796-797, 802). The court overruled appellant's objection to this manner of proceeding. (Tr. 802-803). A brief trial on the amount of punitive damages then proceeded. After closing arguments, the excluded juror was advised that she would not be participating in deliberations. (Tr. 822). The seven remaining jurors then deliberated and awarded $200,000 in punitive damages plus attorney fees.

¶{99} On appeal, appellant contests the exclusion of the eighth juror from the deliberations on attorney fess and the amount of punitive damages. Specifically, he argues that the juror who finds no liability for punitive damages may still participate in determining the amount of punitive damages and in determining whether attorney fees should be assessed. The arguments of both parties rely on the case *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226.

¶{100} In *O'Connell*, six out of eight jurors voted that the defendant was negligent and that this negligence proximately caused the plaintiff's injury. Seven jurors found that the plaintiff was also negligent and that her negligence proximately caused her injury. In apportioning fault, six jurors found that the plaintiff was 70% negligent and the defendant was 30% negligent. However, two of these six were the jurors who voted that the defendant was not negligent at all (and one of these two was the juror who found that the plaintiff was not negligent at all).

¶{101} Because the plaintiff's negligence was found to be greater than fifty percent, the trial court entered judgment for the defendant. Upon later examination of the interrogatories, counsel for the plaintiff noticed the inconsistencies in the juror's participation and unsuccessfully sought a new trial. The court of appeals found waiver of the issue and alternatively found no problem with a juror finding no negligence but then participating in the apportionment of fault.

¶{102} As to the waiver issue, the Supreme Court held that there was no waiver because the court read the answers to the interrogatories and there was little chance of discovering the inconsistencies without a protracted examination and comparison of the interrogatory forms themselves. Id. at 229. In any event, the Court held that the issue amounts to plain error that had to be recognized to preserve confidence in the judicial system. Id. at 229-230.

¶{103} Succinctly, the Court held that the votes of two of the six jurors who apportioned fault could not be counted in the apportionment of fault since they found no negligence by the defendant (and one found no negligence by the plaintiff). Thus, the verdict rendered by the trial court was held to be constitutionally infirm as the jury did not concur by a three-fourths majority as to the apportionment of negligence. Id. at 232, citing Ohio Constitution, Section 5, Article I ("The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.") and Civ.R. 48

("In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number.").

¶{104} In formulating this holding, the Court noted two competing views in other states: the “any majority” rule and the “same juror” rule. The courts adopting the “any majority” rule reason that once three-fourths of the jurors have found a party negligent, there is no reason why dissenting jurors cannot accept the majority's finding of such negligence and then participate in the apportionment of liability. Id. at 234, citing *Juarez v. Super. Ct. of Los Angeles* (1982), 31 Cal.3d 759, 183 Cal.Rptr. 852, 647 P.2d 128. These courts further explain: "To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 [8 in Ohio] persons deliberating on all issues.” Id.

¶{105} Rather than adopting this doctrine, the *O’Connell* Court adopted the “same juror” rule for use in comparative negligence cases, holding that the same jurors who found negligence and proximate cause must constitute the three-quarters needed for apportioning fault, and the jurors who found no negligence or proximate cause cannot be part of the three-quarters needed for the apportionment. Id. at 235-236. In discussing other courts’ use of the “same juror” rule, the *O’Connell* Court quoted a Minnesota court’s explanation of the “same juror” rule as follows:

¶{106} "The questions regarding the causal negligence of the parties and the apportionment of that causal negligence are not independent of one another, but are **integrally related** in determining ultimate liability. To illustrate, the question of apportionment is never reached, in the ordinary case, until one plaintiff and one defendant are found to be causally negligent. And when reached, its function is to give further definition to causal negligence for purposes of imposing liability. **It is unlike the damages question, which can be, and is, answered independently of liability**." Id. at 233, quoting *Ferguson v. Northern States Power Co.* (1976), 307 Minn. 26, 37, 239 N.W.2d 190. (Emphasis added).

¶{107} The following statements of the Supreme Court are also enlightening for purposes of determining the breadth of the *O’Connell* holding:

¶{108} “Thus, the major principle behind the ‘same juror’ rule is that the determination as to whether a party is causally negligent is not independent from, but

is indeed inseparable from, the apportionment of negligence. Stated otherwise, a juror's finding as to whether liability exists is so conceptually and logically connected with apportioning fault that inconsistent answers to the two questions render that juror's vote unreliable and thus invalid." Id. at 233.

¶{109} "[W]e believe that the determination of causal negligence on the part of one party to be a precondition to apportioning comparative fault to that party. It is illogical to require, or even allow, a juror to initially find a defendant has not acted causally negligently, and then subsequently permit this juror to assign some degree of fault to that same defendant. Likewise, where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party's recovery." Id. at 235.

¶{110} "[I]t does not seem * * * realistic to assume that a juror who concludes that a party is not culpable would be able conscientiously to apportion financial responsibility to that party. His perception of a legal compulsion upon him to affix some responsibility upon a party [who] he concludes is not responsible at all is more likely to cause that juror to assign to such a party an arbitrary proportion of the total liability. The introduction of such arbitrary or speculative element into the deliberative process can only tend to render the ultimate apportionment unreliable." Id., quoting *Juarez*, 31 Cal.3d at 772 (Clifford, J., dissenting).

¶{111} "Similarly, we are not persuaded by the argument that the same juror rule would deny all parties the right to have a full jury deliberate on all issues. In a comparative negligence case, the initial, and somewhat talismanic question, is whether the defendant is causally negligent for the injury to the plaintiff." Id.

¶{112} Finally, the *O'Connell* Court stated in a footnote:

¶{113} "Some courts have employed the 'same juror' rule under circumstances other than those presented by the instant case. See *Clark v. Strain* (1958), 212 Or. 357, 319 P.2d 940; *Shultz v. Monterey* (1962), 232 Or. 421, 375 P.2d 829; *Klanseck v. Anderson Sales & Service, Inc.* (1984), 136 Mich.App. 75, 356 N.W.2d 275. **In these cases, the courts applied the same juror rule in the context of the jury's determinations as to liability and damages. While we do not extend our holding to reach that type of situation, these cases do exemplify the courts' adherence to the same juror rule**." Id. at fn. 3 (emphasis added).

¶{114} Few Ohio appellate courts have addressed whether the “same juror” rule or the “any majority” rule applies to damages; in other words, whether jurors finding no liability can vote on damages. In one case, a trial court had applied the “same juror” rule to the interrogatory answers concerning liability and damages, found there was no three-fourths majority and granted a new trial partly on this basis. The Third District pointed out that a comment in Ohio Jury Instructions states:

¶{115} “since the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence." *Hudson v. Corsaut* (Aug. 22, 1995), 3d Dist. No.4-94-16, quoting 1 Ohio Jury Instructions (1994), Section 9.10, at 149.

¶{116} Based upon this and the dicta in *O’Connell*, the Third District disagreed with the trial court’s decision on this issue and found that damages could be determined by all jurors regardless of their vote on liability. Id. (but affirming new trial due to *O’Connell*-like interrogatory issues concerning negligence and apportionment), discretionary appeal denied (1996), 74 Ohio St.3d 1512. See, also, *Blake v. Faulkner* (Nov. 6, 1996), 3d Dist. Nos. 17-95-12, 17-95-13.

¶{117} In another case, the appellant argued that the trial court erred when it granted a new trial on the basis that the "same juror" rule was violated. *Sheidler v. Norfolk & W. Ry.* (1999), 132 Ohio App.3d 462, 467 (6th Dist.). The appellant urged that the jurors who decide liability do not have to be the same jurors who decide the amount of damages to be awarded in a case. The Sixth District agreed with the *Hudson* case and held that the reasons cited by the Supreme Court of Ohio in *O’Connell* for applying the "same juror" rule to cases involving the determination of liability and the apportionment of liability do not exist in a case involving the determination of liability and the separate determination of damages. Id. at 468, discretionary appeal denied (1999), 86 Ohio St.3d 1438. See, also, *Williams v. Mike Kaeser Towing*, 1st Dist. No. C-050841, 2006-Ohio-6976, ¶14 (finding that no juror who voted “no” on liability was used to reach the three-quarters needed for damages but also stating that “same juror” rule is limited to comparative negligence cases).

¶{118} In conclusion, the committee comments to Ohio Jury Instructions and three Ohio appellate districts believe that the “same juror” rule adopted in *O’Connell* for comparative negligence apportionment does not apply to preclude a juror who

voted against liability from voting on damages. The Supreme Court declined appeal in two of the cases.

¶{119} The Supreme Court did not merely state that they were not extending the "same juror" rule to damages in their apportionment case, they also quoted the Minnesota court's statement: "[Apportionment of fault] is unlike the damages question, which can be, and is, answered independently of liability." *O'Connell*, 58 Ohio St.3d at 233, quoting *Ferguson*, 307 Minn. at 37. This is more than dicta; it is the rationale for their apportionment holding. For all of the foregoing reasons, we conclude that the "same juror" rule does not bar a juror who voted against liability from voting on damages.

¶{120} There is no reason for distinguishing between general damages and punitive damages when applying this rule.[1] This brings us to the next question: Since a juror's vote counts on the amount of punitive damages even where that juror who voted no on liability for punitive damages, does a court commit reversible error where it prohibits a juror who dissents on liability for punitive damages from participating in the deliberations on the amount of punitive damages and on liability for attorney fees?

¶{121} We recognize that there is no three-quarter rule problem here since seven jurors signed the forms finding liability for punitive damages, liability for attorney fees and the amount of punitive damages. However, as appellant urges if that dissenting juror's vote would be counted had he been permitted to participate, then appellant was denied his right to a full jury trial on the amount of punitive damages. See Civ.R. 38(B) (right to eight jurors). See, also, Ohio Const. Art. I, Sec. 5; Art. VII, Sec. 8.

¶{122} As appellant points out, since that excluded juror's vote was permissible, then appellant was prejudiced by the lack of this juror during deliberations as that juror could have presented arguments to her fellow jurors against the $200,000 punitive damage award or the award of attorney fees. Regardless of the number of signatures on the forms, it is not harmless error to deny a party the right to a full jury on every issue. Notably, this situation of exclusion would not have occurred in the absence of bifurcation, and there is no reason why bifurcation should result in a lower

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[1]Thus, a verdict can be upheld, for instance, where six jurors vote on liability for punitive damages and one of those six do not later sign the form for the amount of punitive damages and instead one of the original dissenters to liability for punitive damages is counted as the sixth signature for the amount of punitive damages.

amount of jurors being involved in the deliberative process. Considering the amount of the punitive damage award in comparison to the amount of compensatory damages, that dissenting juror's voice would have been important to the deliberative process.

¶{123} Due to the violation of appellant's right to a full jury, we reverse the amount of punitive damages and the award of attorney fees and remand for retrial of these issues.

ASSIGNMENT OF ERROR NUMBER FIVE

¶{124} Appellant's fifth assignment of error urges:

¶{125} "PREJUDGMENT INTEREST RULING SHOULD BE REVERSED."

¶{126} Upon motion in a civil action based on tortious conduct, prejudgment interest shall be awarded if the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case. R.C. 1343.03(C)(1).

¶{127} The party seeking prejudgment interest must show an effort to settle that is reasonable considering factors such as the type of case, the injuries involved, applicable law, defenses available, the nature, scope and frequency of efforts to settle, a demand substantiated by facts and figures, and responses received or the lack thereof. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 659. This party must also show that the other party failed to make a good faith effort to settle. Id. However, this does not require a showing of bad faith as a lack of good faith is not equated with bad faith. Id.

¶{128} The Supreme Court has held that a party has not "failed to make a good faith effort to settle" if he has:

¶{129} "(1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Kalain v. Smith* (1986), 25 Ohio St.3d 157, syllabus.

¶{130} The Court later added a caveat that the last sentence of this holding should be strictly construed so as to carry out the purposes of R.C. 1343.03(C).

Moskovitz, 69 Ohio St.3d at 659. The purposes of the statute are to promote settlement efforts, to prevent tortfeasors from frivolously delaying the resolution of cases and to encourage good faith efforts to settle controversies outside a trial setting. Id. at 658, citing *Kalain*, 25 Ohio St.3d at 159. A trial court's decision on good faith is reviewed for an abuse of discretion. Id.

¶{131} Here, the following facts were presented at the prejudgment interest hearing. Plaintiff's counsel sent a letter to appellant in October 2002, just weeks after the termination, advising appellant to consider obtaining an attorney and calling to discuss settlement. (Tr. 50-51). Appellant retained an attorney, and in December 2002, plaintiff offered to settle for $150,000. (Tr. 51). Appellant quickly responded by offering an additional four weeks severance pay as she had obtained a new job in that time; she had already received two weeks severance pay. (Tr. 52, 66, 71). Plaintiff refused this offer.

¶{132} She then waited until August 2004 to file her sexual harassment complaint. Appellant retained another attorney who sent a letter to plaintiff's counsel in April 2005 asking her to voluntarily dismiss her claim in return for appellant forgoing his intent to recover expenses and costs against her. (Tr. 53).

¶{133} Thereafter, appellant filed a summary judgment motion, which argued only against a hostile work environment theory. Plaintiff responded raising genuine issues of material fact concerning both hostile work environment and quid pro quo theories of sexual harassment. The court denied summary judgment finding genuine issues of material fact on both theories and pointing out that setting forth a claim for sexual harassment was sufficient to satisfy Ohio's notice pleading on either theory. Appellant points to this as the first indication that the suit contained a claim of a liability for quid pro quo harassment.

¶{134} In May 2006, plaintiff's counsel presented a written settlement offer of $250,000. Appellant's counsel responded that appellant was not interested in paying any amount to settle and that the case could only be decided at trial unless plaintiff dismissed her case and paid his expenses. (Tr. 53).

¶{135} The jury trial began on December 4, 2007. After the verdict awarding $35,000 in compensatory damages and finding liability for punitive damages, but prior to the verdict setting the amount of punitive damages, plaintiff offered to settle for

$200,000. (Tr. 56). Sometime thereafter, plaintiff made another offer to settle for $250,000, which appellant rejected in a letter after trial. (Tr. 54).

¶{136} Appellant's counsel testified at the prejudgment interest hearing that it was appellant's consistent position that he would recover his fees from plaintiff after prevailing and that he had a good faith belief that he was not liable. (Tr. 57, 60). Counsel noted that appellant had disagreed with any delays or continuances and that he had cooperated in discovery. (Tr. 57).

¶{137} In March 2008, the court found that plaintiff made a good faith effort to settle and that appellant failed to make a good faith monetary settlement offer and failed to rationally evaluate his risks and potential liability. Although plaintiff did not pursue a hostile work environment claim and the jury was not instructed on such theory, the court's entry stated that appellant should have realized that various facts:

¶{138} "put him at some risk, in a lawsuit claiming a 'quid pro quo' sexual discrimination and/or the creation of a 'hostile work environment' discrimination claim."

¶{139} In determining a defendant's rational evaluation of risks and potential liability and whether there was a good faith response to an offer, the trial court can compare the settlement offers to the eventual jury verdict. *Miller v. Van Fleet*, 7th Dist. No. 03MA200, 2004-Ohio-7214, ¶16 (although not dispositive, the amount of a settlement offer compared to the amount of the verdict returned by the jury is a factor to consider). Here, the court specifically stated on the record that it could use the amount of the verdict as a consideration. (Tr. 71).

¶{140} Since we are reversing the award of punitive damages and attorney fees under the prior assignment of error, we must reverse the award of prejudgment interest because this total damage factor is not set until the amount of total liability has been established. For instance, if the remand produces a much lower punitive damage award, then the trial court's evaluation of potential risks and good faith response may change.

¶{141} We have additional concerns with the trial court's decision on prejudgment interest. The trial court made reference to multiple offers that were rejected, and plaintiff made much of appellant's failure to respond to her efforts to settle during trial and after the initial verdict. However, "[t]he focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the *pretrial* settlement efforts made between the plaintiffs and defendants and/or their insurers." *Moskovitz*,

69 Ohio St.3d at 661 (emphasis original). The principles of judicial economy and avoidance of delay are not advanced after a jury is seated, especially after the main verdict is rendered. *Scibelli v. Pannunzio*, 7th Dist. No. 05MA170, 2006-Ohio-5652, ¶172-173.

¶{142} "After enduring an entire trial and evaluating the testimony presented, the rationale for settlement is wholly different. That is, the purpose of encouraging settlement to avoid expending court time and judicial resources is destroyed." Id.

¶{143} Moreover, the trial court found that plaintiff's $150,000 offer (made two months after her termination) should have been responded to with more than an offer to pay four additional weeks of severance. However, in itself, appellant's response was not irrational since plaintiff had secured other employment by then. Most importantly, *suit had not even been filed yet*. Prejudgment interest deals with failure to make a good faith effort to settle "the case." R.C. 1343.03(C)(1). There is no case until suit is filed.

¶{144} Furthermore, regarding appellant's first offer to forgo collection of expenses if plaintiff dismissed her suit, this was not made in response to an offer by the plaintiff, which is the trigger for a defendant's duty to make a reciprocal good faith effort.

¶{145} On remand, the court's real focus should lie on plaintiff's May 2006 offer to settle for $250,000 and appellant's response. In evaluating this offer and response, the court must focus only on the risk of liability for quid pro quo sexual harassment and cannot consider the hostile work environment theory. That is, it is improper to consider the risk of liability for a theory that was abandoned by the plaintiff at trial. Although the claim is sex discrimination in the form of the sexual harassment and the methods of proving the claim are quid pro quo or hostile work place, when the case proceeds only on one method, the court may not rely on the other method for showing why a defendant lacked good faith in settlement discussions. As discussed in assignment of error number one, use of the hostile work environment theory results in different instructions as it requires a showing of severe and pervasive harassment, which is not required under the quid pro quo theory due to the tangible job detriment.

CONCLUSION

¶{146} For all the foregoing reasons, the trial court's judgment finding appellant liable for sexual harassment is affirmed. However, we reverse and remand

the amount of punitive damages and the issue of whether appellant was liable for attorney fees as appellant was denied his right to a full jury on these matters. Due to the fact that the total damage award is a significant factor to consider in awarding prejudgment interest, the matter of prejudgment interest is also reversed and remanded with instructions provided herein for addressing the topic on remand.

Donofrio, J., concurs.
Waite, J., concurs.