[Cite as *Kalbfell v. Marc Glassman, Inc.*, 2003-Ohio-3489.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TAMMY S. KALBFELL, PLAINTIFF-APPELLEE, - VS - MARC GLASSMAN, INC. dba MARC'S, DEFENDANT-APPELLANT.	))))))))))	CASE NO. 02 CO 5 O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from County Court NW, Case No. 97CVF587.

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 26, 2003

VUKOVICH, J.

{¶1} Defendant-appellant Marc Glassman, Inc., d.b.a. Marc's, appeals the judgment entered in favor of plaintiff-appellee Tammy Kalbfell in the Northwest Area County Court of Columbiana County. Appellant raises arguments concerning the trial court's denial of its motion for judgment notwithstanding the verdict or new trial on various claims and on compensatory and punitive damages; appellant also presents a remittitur argument and makes an evidentiary argument. For the reasons stated below, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} This case arose as a result of an incident that occurred in Marc's Salem, Ohio store on September 25, 1997. When Tammy Kalbfell entered the store, some employees began stating amongst themselves that she had been banned from the Alliance store for shoplifting and was to stay away from all other stores. One of these employees called the operations manager and related this story. (Tr. 168). The operations manager later revealed in an affidavit as part of defendant's discovery packet that she believed that Kalbfell has previously been watched at the Lisbon Sparkle for theft; however, the manager of Sparkle rebutted this statement in testimony for Kalbfell.

{¶3} The operations manager relayed the rumors about Kalbfell to the security guard. (Tr. 168). She informed the security guard that she received a call from the customer service girls and "they had stated that there was someone out there that had been barred from the Alliance store and was told to stay away from the Alliance store and all other Marc's stores." (Tr. 168). The security guard was allegedly called over the public address system to the customer service desk where Kalbfell was standing. (Tr. 171). And then, the employees who first made the accusations repeated their story to the security guard. (Tr. 168-169). He described these employees as being "very emphatic that this was the girl." (Tr. 168, 171). When he pressed, these employees "insisted," stating there was "[n]o doubt about it." (Tr. 171).

{¶4} The security guard, dressed in a shirt displaying the word, "Security," approached Kalbfell. According to Kalbfell, the guard said, "Come with me," but the

security guard claims that he asked her if she would come with him. (Tr. 99, 172). He then followed Kalbfell down a store aisle, through employee-only doors, into a corridor, to the last office, and allegedly repeated the accusations in front of the operations manager. Kalbfell heard the security guard make a phone call which she thought was to the police; she believed the police would be coming to arrest her. Kalbfell states that she was in the office for approximately twenty minutes; the guard believes it was less than one minute.

{¶5} The manager advised in his affidavit that the security guard called him and told him that he had a customer in the office who was banned from the Alliance store and that he was in the process of banning her from the Salem store. After being told that he cannot ban patrons from the store, the security guard apologized to Kalbfell. Kalbfell left the office crying and remained in the store to complain to the manager who refused to meet with her until she actively sought him out. The manager stated in his affidavit that Kalbfell approached him twenty-five minutes after he received the call from security. She was unhappy with the results of this conversation so she called the police. The employees related to the police their story that they had thought that Kalbfell had been arrested for shoplifting in Alliance. (Tr. 163). We note that only *after* Kalbfell left the office did the security guard think to ask a trusted employee, who had been a long-time employee of the Alliance store, whether Kalbfell had been banned for shoplifting. This employee responded, "Absolutely not. She's not the one." (Tr. 177).

{¶6} In July 1998, Kalbfell sued Marc's for false imprisonment, defamation, invasion of privacy, negligent employment, and negligent infliction of emotional distress; Kalbfell voluntarily dismissed the latter two claims during trial. The complaint, which she filed in the local county court, asked for $15,000 in compensatory damages, costs, and attorneys' fees. On March 31 and April 1, 1999, the jury heard the case and then, returned a general verdict for Kalbfell. The jury awarded $10,000 in compensatory damages, $5,250 in punitive damages, and attorneys' fees. On April 15, 1999, the court entered judgment on the verdict but entered a $250 remittitur with Marc's consent since the verdict exceeded the county court's $15,000 jurisdictional limit.

{¶7} Marc's filed timely motions for JNOV, new trial, and remittitur. From the trial court's May 6, 1999 denial of these motions, Marc's filed timely notice of appeal. However, such was not transmitted to this court and was not assigned an appellate case number at that time. A hearing on attorneys' fees was held, and on August 9, 1999, the trial court ordered Marc's to pay $4,940 in fees. Marc's filed an appeal on September 9, 1999. Once again, the appeal was not transmitted to this court or assigned a case number. The trial court stayed execution of judgment pending a ruling on Kalbfell's motion for prejudgment interest. The court did not deny this motion for prejudgment interest until February 12, 2002. At this time, Marc's refiled its two pre-stamped notices of appeal and received case number 2002-CO-05. We filed an entry noting this strange procedure but conceding that the original appeal was timely filed, and thus, we allowed an extremely untimely submission of briefs.

{¶8} As an aside, the clerk's failure to transmit the appeal does not allow an appellant to wait indefinitely to file a brief. App.R. 4 (B)(5) allows appellant to file the appeal after the original judgment or after the remainder of the claims are disposed. By filing notices of appeal after three different judgments, appellant chose the former choice and thus was required to transmit the record and file a brief with this court in a timely fashion or seek a stay with this court. App.R. 14(C) speaks of dismissal for failure to cause timely transmission of the record. But it mentions doing so upon appellee's motion, which we do not have in this case.

TWO-ISSUE RULE

{¶9} Marc's first, second, and third assignments of error argue that there is no support for Kalbfell's claims of false imprisonment, defamation, and invasion of privacy, respectively. Kalbfell argues that if we uphold any of these three assignments of error, then a failure of evidence on either of the other two is irrelevant. Kalbfell notes that the jury's verdict form was general whereby it merely held in favor of plaintiff. Kalbfell points out that Marc's failed to submit specific verdict forms for each claim and failed to seek jury interrogatories on the issue. These arguments rely on the two-issue rule which provides:

{¶10} "[W]here there are two causes of action, or two defenses, thereby raising separate and distinct issues, and a general verdict has been returned, and the mental

processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, it will be presumed that all issues were so determined; and that, where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded." *Hampel v. Food Ingred. Specialties, Inc.* (2000), 89 Ohio St.3d 169, 185.

{¶11} The Supreme Court is closely divided on whether the two-issue rule applies to uphold liability and damages where an instruction on a claim should not have even been given. Previously, the Court held that the two-issue rule does not apply when the court charged the jury on an issue that should never have been charged. *Ricks v. Jackson* (1959), 169 Ohio St. 254. Although the majority still cites this case and this holding, the Court now holds that instructing on a claim for which no instruction should have been given is not always prejudicial error. *Hampel,* 89 Ohio St.3d at 185-86; *Wagner v. Roche Labs.* (1999), 85 Ohio St.3d 457, 461-62 (noting a degree of prejudice evaluation). Hence, in *Hampel,* the court refused to reverse for a new trial where there was insufficient evidence to instruct on sexual harassment but sufficient evidence to instruct on intentional infliction of emotional distress. Thus, we keep this doctrine in mind as we review the first three assignments.

ASSIGNMENT OF ERROR NUMBER ONE

{¶12} Marc's sets forth seven assignments of error, the first of which alleges:

{¶13} "THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT/NEW TRIAL ON PLAINTIFF'S FALSE IMPRISONMENT CLAIM."

{¶14} Contrary to Marc's argument, they never sought JNOV based on the alleged legal insufficiency of evidence for the false imprisonment claim. The reference to false imprisonment in their post-trial motions was specifically placed under the heading related to a motion for a new trial pursuant to Civ.R. 59(A)(6), which deals with weight of the evidence. Any mention of false imprisonment in the JNOV motion was only to complain that the court and the plaintiff used the phrase "false arrest" at one point instead of "false imprisonment;" however, this complaint is not raised on appeal.

{¶15} We also note that we cannot construe any general sufficiency arguments as meaning that directed verdict should have been granted on this claim because they never renewed their motion for directed verdict at the close of their case and thus waived that argument. *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 74. See, also, *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204 (noting that *Helmick* reaffirmed a long-standing rule).

{¶16} As aforementioned, Marc's did seek a new trial on the false imprisonment claim under Civ.R. 59(A)(6), on the grounds that the verdict was against the weight of the evidence. A trial court's decision to deny a motion for a new trial is entitled to deference where the court exercised discretion in reaching its decision and is reviewed de novo where the decision was based on a question of law. *Wagner v. Roche Labs.* (1999), 85 Ohio St.3d 457, 460. Marc's concedes that the court's decision in this scenario was an exercise of discretion, but they argue that the court abused its discretion in failing to find that the verdict in favor of Kalbfell on her false imprisonment claim was against the weight of the evidence. Marc's motion for new trial on this claim mentions some conflicting testimony such as that Kalbfell estimated she was in the office for twenty minutes, whereas the security guard estimated the time to be only one minute. The motion also disputes Kalbfell's claim that she did not voluntarily enter the office. Although sufficiency arguments have been waived, we shall continue our review to determine whether there was competent and credible evidence to support the verdict for the plaintiff.

{¶17} False imprisonment entails intentionally confining a person without lawful privilege and against her consent within a limited area for any appreciable time, however short. *Bennett v. Ohio Dept. of Rehab. & Corrections* (1991), 60 Ohio St.3d 107, 109; *Feliciano v. Kreiger* (1977), 50 Ohio St.2d 69, 71. The legislature has enacted a statute to protect shopkeepers by providing a defense in certain cases. Pursuant to R.C. 2935.041(A), a merchant, who has probable cause to believe that items have been unlawfully acquired, may detain the person in a reasonable manner for a reasonable length of time. However, the merchant shall not use undue restraint or search the person or search or seize the person's property without that person's consent. R.C. 2935.041(D).

{¶18} Here, the shopkeeper's privilege statute is not asserted as a defense by Marc's on appeal because they admit that they did not question Kalbfell with probable cause that she unlawfully took items from the Salem store. Rather, Marc's takes issue with the confinement element of false imprisonment. Marc's argues that confinement requires force or threat of force and that no testimony established force or threat of force. Marc's cites a recent case from our district which interpreted confinement as meaning a total detention or restraint on the plaintiff's freedom by way of force or threat of force. *Ferraro v. Phar-Mor, Inc.* (Apr. 7, 2000), 7th Dist. No. 98CA48. We held that "mere submission to verbal direction, unaccompanied by force or threat cannot constitute confinement or detention." Id., citing *Condo v. B. & R. Tire Co.* (May 29, 1996), 7th Dist. No. 95CA166. Marc's concludes that there is no confinement unless the customer is physically restrained or expressly threatened to be physically restrained.

{¶19} Such a holding would negate the requirements of the shopkeeper's privilege defense because as long as the threat was implicit, the shopkeeper would be able to avoid the requirements of probable cause, reasonable method, and reasonable time. Support for Kalbfell's position can be found in the Ohio Jury Instructions dealing with false arrest and false imprisonment. Pursuant to O.J.I. 309.01, number 1, both false arrest and false imprisonment are defined as the unlawful restraint or control by one person over the physical liberty of another. Then, O.J.I. 309.01, number 3 states that the *restraint can be actual or implied*. This section lists "threat of force" *or* "display of authority" as methods of implied restraint. Then, it pronounces that restraint occurs if the words, conduct, or display of authority are such as to cause or give rise to a fear or apprehension of force and to overcome the plaintiff's will.

{¶20} The addition of "display of authority" to the test means that ordering plaintiff to follow, in such a manner and under such circumstances that plaintiff reasonably believes she must so follow, is sufficient to establish confinement. Similarly, the Ninth Appellate District has held that there is sufficient evidence of an employer's false imprisonment where a police officer, after being informed by the store that the plaintiff was suspected of theft, asked the plaintiff, "Will you come with me?"

Mitles v. Young (1978), 59 Ohio St.2d 287, 291. The court mentioned that the plaintiff "would hardly be brave enough to resist such a display of authority." Id.

{¶21} The present case is distinguishable from *Ferraro* as *Ferraro* did not involve a security guard but merely an employee, whereas here, we have a public announcement for security to come to the front desk followed by a man wearing a "Security" shirt approaching a woman and ordering her to come with him. Thus, the threat of force or restraint is stronger. Additionally, the defendant in *Ferraro* would have been protected by the shopkeeper's privilege, even though we did not apply it. Moreover, *Ferraro* was believed to be shoplifting, but Kalbfell was not. Finally, our use of the word "threat" in *Ferraro* did not necessarily include only an express or explicit threat and preclude an implied or implicit threat which could be projected through the existing circumstances including a display of authority.

{¶22} In conclusion, we find that a reasonable person could believe that confinement occurred. This conclusion is based upon Kalbfell's testimony that a security guard who had just been called over the public address system ordered her to come with him, walking behind her the entire way to the back office. Further, even if the initial encounter did not initiate a confinement, a reasonable person could find that the time spent in the back office became a confinement when the security guard started accusing her of shoplifting and being banned from Alliance and when he made a phone call which appeared to have been placed to the police.

{¶23} Regardless, the court instructed the jury using the pattern jury instruction declaring that a display of authority is sufficient for confinement, and Marc's did not object to this instruction. Hence, any argument is waived. As for weight of the evidence in general on whether Kalbfell's will was sufficiently overcome due to the display of authority, the jury obviously found Kalbfell to be a credible witness as opposed to the various inconsistent statements of the store employees. We refuse to second-guess the jury's credibility and weight determinations. For all of the above reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶24} Appellant's second assignment of error contends:

{¶25} "THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT/NEW TRIAL ON PLAINTIFF'S DEFAMATION CLAIM."

{¶26} Defamation is a false publication which injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assoc.* (1991) 57 Ohio St.3d 112, 117. The publication element is raised as the main issue herein. Publication is a communication that is made intentionally or negligently to a third person, i.e. a person other than the person defamed. *Hecht v. Levin* (1993), 66 Ohio St.3d 458, 460.

{¶27} If the defendant is entitled to the affirmative defense of qualified (or conditional) privilege, then the plaintiff must show the additional element of actual malice. Actual malice involves a publication that is knowingly false or made with reckless disregard for its falsity. *Dale,* 57 Ohio St.3d at 117. See, also, *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706.

{¶28} A qualified privilege relevant to the present case was set forth in the landmark case of *Hahn v. Kotten* (1975), 43 Ohio St.2d 237. In that case, the Court recognized a qualified privilege based on public policy where the publisher and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further this interest. Id. at 244. More specifically, the elements are: good faith, interest to be upheld, statement limited in its scope to this purpose, proper occasion, and publication in proper manner and to proper parties only. Id. The Court thus held that there existed a qualified privilege for an insurance company and its managers to publish statements about a former insurance agent to his insureds. Because the element of actual malice was added to the case, the privilege was only qualified as opposed to absolute.

{¶29} Here, neither Marc's appellate brief nor its motion for JNOV mentions qualified privilege or contests actual malice with regards to defamation. In fact, they specifically stated that they had no objection to the court's instructions and later clarification on the elements of defamation. (Tr. 293). Rather, they argue now (and argued in their motion for JNOV), only that there was insufficient evidence of defamation because there was no evidence of publication to a third party. Specifically,

Marc's alleges the lack of a third party because the employer was sued and all involved in the discussions were employees whose actions are attributed to the employer.

{¶30} However, in applying the qualified privilege to certain communications made in the workplace, the Sixth District moved straight to actual malice without worrying about the fact that the employer was sued and that the publisher and recipient both worked for the employer. *Ball v. British Petroleum Oil* (1995), 108 Ohio App.3d 129, 135. More importantly, the Supreme Court has decided a case where the defamatory statements about the plaintiff were made by the store manager to the personnel director of the employer; the plaintiff sued both the employer and the manager. *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245. The Supreme Court set forth its *Hahn* actual malice test for qualified privilege without concerning itself with the fact that both the publisher and the recipient worked for the company. Id. at 255.

{¶31} Hence, it is safe to say that an employer can be held liable for a false communication about a person made with actual malice and in the scope of employment by one employee to another employee. As such, Marc's claim that the publication element was not satisfied is without merit. Finally, as aforementioned, Marc's failed to renew its directed verdict motion, and its new trial motion merely argued that the court should have granted a directed verdict. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

{¶32} The third assignment of error set forth by Marc's provides:

{¶33} "THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT/NEW TRIAL ON PLAINTIFF'S INVASION OF PRIVACY CLAIM."

{¶34} Invasion of the right to privacy represents an individual tort cause of action. The case where the Supreme Court first applied invasion of privacy involved a debt collector who constantly called plaintiff at home and at work. *Housh v. Peth* (1956), 165 Ohio St. 35. The court outlined three types of invasion of privacy torts. Id. at syllabus. One, appropriation of a name or likeness. Id. Two, publicizing private

affairs with which the public has no legitimate interest, sometimes called the publicity tort. Id. Three, wrongful intrusion into private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation, sometimes called the intrusion into seclusion tort. Id. A fourth type of invasion of privacy listed in the Restatement of Torts, the false light theory of recovery, has not been adopted by Ohio. *M.J. DiCorpo, Inc. v. Sweeney* (1994), 69 Ohio St.3d 497, 507; *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372.

{¶35} Kalbfell's complaint set forth the third type of invasion of privacy claim by alleging Marc's intentionally intruded into her private affairs in a highly offensive manner that cause mental suffering, shame, and humiliation. The trial court instructed the jury on all three types, and Marc's did not object to this instruction. Although it was instructed on without objection, Marc's appellate brief does not seem to address the second type of invasion of privacy claim; that is, the publicity tort. Rather, it argues that there was insufficient evidence to support the third type of invasion of privacy.

{¶36} Marc's alleges that there was no intrusion into any private matter. They contend that they handled the situation in a manner that would not outrage or cause mental suffering, shame, or humiliation. Intrusion into seclusion cases often involve wiretapping or photographing in private places. As aforementioned, it can involve repeated calling of an individual in a harassing manner as in *Housh.* Another example of intrusion into seclusion was noted in a case where a police officer who pulled a driver over for speeding peered down the front and back of the passenger's pants and underwear with a flashlight and made her take her breast out of her bra to prove that nothing was in her bra. *Hidey v. Ohio State Hwy. Patrol* (1996), 116 Ohio App.3d 744, 749. Marc's cites *Hidey* and urges that nothing like this occurred in the case at bar and that nothing private was invaded. But before these arguments can be considered, there exist preliminary hurdles to overcome.

{¶37} Marc's motion for directed verdict made at the close of plaintiff's case simply and vaguely alleged that no juror could find the elements of invasion of privacy. Marc's did not explain its reasoning. More importantly, Marc's did not renew its motion for directed verdict at the close of its own case as is required to preserve a sufficiency

argument on this claim. *Helmick*, 39 Ohio St.3d at 74. See, also, *Chemical Bank*, 52 Ohio St.3d 204. Thus, Marc's waived these sufficiency arguments.

{¶38} In any event and alternatively, the two-issue rule would save the jury verdict even if invasion of privacy should not have been submitted because Marc's could have asked for special interrogatories to determine which of the causes of action was decided in its favor. Instead, it accepted a general verdict form. Here, there was sufficient evidence to instruct on false imprisonment and defamation. So even if invasion of privacy should not have been submitted to the jury, Marc's was not prejudiced in a manner requiring reversal. See *Hampel*, 89 Ohio St.3d at 185-186; *Wagner*, 85 Ohio St.3d at 461-462. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶39} Marc's fourth assignment of error contends:

{¶40} "THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT NOTWITHSTANDING THE VERDICT/NEW TRIAL ON PLAINTIFF'S PUNITIVE DAMAGES CLAIM."

{¶41} Marc's makes two arguments concerning punitive damages: that punitive damages cannot be awarded where they were never expressly mentioned in the complaint and that there was insufficient evidence of actual malice. As to the first argument, we note that the complaint sought attorneys' fees. Under the American rule, the prevailing party is not automatically entitled to attorneys' fees. To receive attorneys' fees, there must be statutory authorization, contractual agreement, or some type of bad faith or wanton conduct that exists in cases of torts involving malice where punitive damages are found to be warranted. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 32, citing *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 558; *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156; *Charles R. Combs Trucking, Inc. v. International Harvesters Co.* (1984), 12 Ohio St.3d 241, 245. Appellant's brief at page 18 concedes, "attorneys' fees are only warranted where punitive damages are awarded * * *." Hence, it was reasonable for Marc's to notice that punitive damages were a possibility due to the request for attorneys' fees in the complaint.

{¶42} In any case, the failure to specifically request punitive damages in the complaint does not preclude instructions on and a subsequent award of punitive

damages. The Tenth District has upheld a punitive damage award where malice was not specifically pleaded but where the element of actual malice could be inferred from certain allegations in the complaint. *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 273-74 (holding that punitive damages need not be specially pleaded). The Supreme Court has briefly addressed the issue in a case where appellant argued that appellee failed to specifically plead malice or insult and pled no facts to warrant punitive damages. *Apel v. Katz* (1998), 83 Ohio St.3d 11, 20. The Court determined that the pleading adequately put appellant on notice of the substance of the claim and of the fact that punitive damages were possible. Id.

{¶43} Here, actual malice need not be merely inferred from various allegations in the complaint because under the defamation cause of action, the complaint alleged that the "statements were made with malice or with utter, wanton, and reckless indifference for the truth." See *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 696 (noting that the pleading should allege malice, fraud, or insult). As such, Marc's was sufficiently on notice of the substance of the claim for damages. Thus, the pleading amendment rules set forth in Civ.R. 15, which are liberal at any rate, were not required to be utilized or evaluated to explicitly add punitive damages to the complaint.

{¶44} We urge appellants to compare the current and former versions of Civ.R. 54(C). The former version provided that "a demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless he amends his demand not later than seven days before commencement of trial." Even under this former version, *the Supreme Court held that punitive damages may be awarded even if they were not sought in the complaint, as long as the total award does not exceed the compensatory request*. *Bishop v. Grdina* (1995), 20 Ohio St.3d 26, 28-29. See, also, *Brookridge Party Ctr., Inc. v. Fisher Foods, Inc.* (1983), 12 Ohio App.3d 130, 131 (upholding a punitive damage award where the total damage award did not exceed the general amount asked for in the demand for judgment even where the plaintiff did not specifically ask for punitive damages in the complaint). In the present case, the compensatory request was $15,000 and the total award, after an agreed remittitur, was $15,000 ($10,000 in compensatory and $5,250 reduced to $5,000 in punitives).

{¶45} The current and more liberal version of Civ.R. 54(C) created in July 1994 states that besides a default judgment, every judgment shall grant the relief to which the party is entitled, "*even if the party has not demanded the relief in the pleadings*." (Emphasis added). We applied this rule in *Skripac v. Kephart* (Mar. 19, 2002), 7th Dist. No. 01CA30, where we upheld a damage award greater than originally disclosed to the defendant due to the new version of Civ.R. 54(C).

{¶46} Punitive damages are not a separate claim but merely an issue in the overall claim for damages. *Hitchings v. Weese* (1997), 77 Ohio St.3d 390, 391. So punitive damages can be awarded even if they are not specifically mentioned in the complaint as long as the complaint contains allegations that could warrant punitive damages. For all of the foregoing reasons, this argument is overruled.

{¶47} As aforementioned, Marc's also argues that there was insufficient evidence of actual malice upon which punitive damages could be submitted to the jury. Marc's notes how the security guard apologized to Kalbfell after the incident and how he claims that he only brought her into the office so that she would not be embarrassed. (Tr. 179). Marc's states that, at best, Kalbfell's allegations support only a finding of indifference. Thus, Marc's professes that the award of punitive damages is a manifest miscarriage of justice. To their own detriment, Marc's does not mention that the burden of proof on punitive damages was by clear and convincing evidence. See R.C. 2315.21(C).

{¶48} Actual malice to support a punitive damages award entails: (1) a state of mind under which one's conduct is characterized by hatred, ill-will, or spirit of revenge or (2) a conscious disregard for the rights and safety of others that has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus. In arguing that the evidence did not support an award of punitive damages, the issue is whether reasonable minds can differ as to whether the actors were aware that their acts had a great probability of causing substantial harm and as to whether they consciously disregarded Kalbfell's rights. See Id. at 336. Actual malice can be inferred by conduct and surrounding circumstances showing such conscious disregard. *Villela v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 37.

{¶49} Here, we have what one could view as an attempt by individual employees to cover-up the details of the occurrences. See *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651-652 (holding that altering documents after an act of negligence is indicative of actual malice and reversing the court of appeals decision that found no malice). We also have conflicting testimony, the resolution of which shall be left to the province of the jury. See *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614.

{¶50} For instance, the security guard's testimony that they spent less than one minute in the back office is highly contested and not very credible considering not just Kalbfell's testimony but the testimony of others. Further, Kalbfell states that the security guard followed her to the room, and the security guard states that she followed him. Additionally, the operations manager's affidavit denies being in the office during the questioning, but the testimony of both Kalbfell and the security guard place her there. This same operations manager stated in her affidavit that Kalbfell was also under suspicion for shoplifting at the Lisbon Sparkle; however, the manager of that store had no knowledge of this allegation and testified that Kalbfell was a good customer. She also called for security over the public address system.

{¶51} This same security guard, with "Security" emblazoned on his shirt, then approached Kalbfell in a crowded store and told her to come with him, pointed her to the back rooms, and followed her into a restricted area. The security guard admits to violating company policy by bringing Kalbfell to the back room. (Tr. 149). Before accusing Kalbfell, all relevant employees and managers failed to check with Alliance or knowledgeable and available other employees to determine the name of the person who was allegedly banned from the Alliance store for shoplifting. Instead, the security guard waited until after the incident to seek input from a current Salem employee who was a former experienced Alliance employee and who, upon being asked, immediately stated that Kalbfell had never been banned.

{¶52} This behavior can be described as more than reckless and could be considered a conscious disregard for Kalbfell's rights which had a great probability of causing substantial harm to her reputation, privacy, emotional state, and right to be free from false imprisonment. We conclude that sufficient facts were pleaded and then

alleged at trial by which reasonable minds could find actual malice to support an award of punitive damages. See *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 279. We support our conclusion by pointing out the Supreme Court's rule that even if a case does not present a "classic punitive damages situation," the level of wrongfulness of a defendant's act can still be open to question based upon, for instance, differing interpretation the parties place on their respective representations of the facts. *Apel v. Katz* (1998), 83 Ohio St.3d 11, 22 (where the parties were arguing over the interpretation of an easement).

{¶53} Finally, we note that after objecting to various other instructions, defense counsel made only a very general objection to punitive damages. Where a defendant made a general objection to a punitive damage instruction, the Supreme Court found waiver of a specific punitive damage issue on appeal. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 32. "At no time prior to jury deliberations did Cicchini object to the content of the trial court's charge on punitive damages, let alone specify the grounds of the objection that he now raises on appeal." Id. (refusing to address an appellate argument that the jury should not have been instructed on punitive damages in the absence of egregious wrongdoing). See, also, Civ.R. 51(A) (stating that a party cannot assign a jury instruction as error on appeal unless the party objected stating specifically the matter objected to and the grounds for the objection). Here, defense counsel basically wants to raise on appeal that the trial court should not have instructed the jury on punitive damages. But prior to deliberation, defense counsel merely stated, "at some point I would like to put on the record my objection to -- I'm not sure if I did earlier, my objection to the instruction on punitive damages." (Tr. 233). This gives no indication of whether he disliked the content or a certain part of the punitive damages instruction or whether he believed no punitive damages instruction should be given. For all of the foregoing reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

{¶54} Marc's fifth assignment of error contends:

{¶55} "THE TRIAL COURT ERRED BY FAILING TO GRANT A NEW TRIAL ON THE ISSUE OF DAMAGES AWARDED BY THE JURY."

{¶56} Marc's moved for new trial on the issue of damages under Civ.R. 59(A)(4), (7), and (9). Both Civ.R. 59(A)(7) and (9) deal with errors of law and are not before us in this assignment; the claimed error of law under division (A)(7) regarding punitive damages was discussed in the preceding assignment of error and the other error of law under division (A)(9) dealt with attorneys' fees but is not raised on appeal. This leaves us with an analysis regarding division (A)(4).

{¶57} Pursuant to Civ.R. 59(A)(4), a new trial may be granted on the ground that excessive damages were awarded under the influence of passion or prejudice. In evaluating whether the verdict is so excessive that it appears to have been influenced by passion or prejudice, courts determine if the award is so disproportionate to the harm that it shocks reasonable sensibilities. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 317. Some items that may cause passion or prejudice include admission of incompetent evidence or improper conduct by counsel or a party. Id. Where the trial court has authority to grant a new trial for a reason which requires an exercise of discretion, we may only reverse the court's order upon a showing of an abuse of discretion. See *Mannion v. Sandel* (2001), 91 Ohio St.3d 318.

{¶58} Marc's takes issue with the $15,000 total damage award, representing both $10,000 in compensatory damages and $5,000 in punitive damages, specifically contending that the $10,000 compensatory damages award is excessive and "shocks the conscience." Marc's contends that this award is excessive because although plaintiff may have experienced some humiliation, she suffered no substantial injuries and sought no counseling. Marc's does not allege (at least not under this assignment or error) what occurrences at trial could have caused passion or prejudice.

{¶59} Pain and suffering entails a subjective evaluation, rather than the objective determinations made for certain other types of compensatory damages such as medical expenses or lost wages. The jury can consider humiliation, injury to feelings, mental suffering and anguish, and indignity. *Barker v. Netcare Corp.,* 10th Dist. No. 01AP-230, 2001-Ohio-3975 (where the court upheld a $50,000 compensatory damage award for pain and suffering based on false imprisonment by a mental health professional). Here, Kalbfell's emotional state was testified to by Kalbfell, her mother, and her mother-in-law. It was revealed that she is still

embarrassed and that rather than enter stores herself, she often inconveniences herself and others by asking others to shop for her.

{¶60} It does not appear to this court that the trial court abused its discretion in failing to grant a new trial on the grounds that the verdict was a result of passion or prejudice. There is no allegation as to what exactly caused the passion or prejudice besides the contention that there was insufficient evidence for all three causes of action. It is the jury's function to fashion damages based upon their assessment of the testimony and evidence. Thereafter, the trial court is in a better position than a reviewing court to determine whether an award is influenced by passion or prejudice. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 655. As such, we find that the trial court did not act unreasonably by finding that the $10,000 compensatory damage award was not influenced by passion or prejudice. See *Kluss v. Alcan Alum. Corp.* (1995), 106 Ohio App.3d 528, 539-540 (upholding a $400,000 compensatory damages award for defamation, noting a failure to demonstrate any improper influence that induced passion or prejudice, and explaining how juries can award substantial sums in defamation actions based upon personal humiliation and injury to reputation). This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

{¶61} Marc's sixth assignment of error provides:

{¶62} "THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR REMITTITUR."

{¶63} As aforementioned, if the court finds that an excessive award appears to have been swayed by passion or prejudice, then the court grants a new trial. If a trial court determines that a damage award is excessive, but not influenced by passion or prejudice, then the court can present the plaintiff with the option of accepting a reduced amount of damages (a remittitur) or choosing a new trial on the issue of damages. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 444.

{¶64} Under this assignment, Marc's refers us to the reasons set forth under the previous assignment of error and asks that the entire damage award be decreased from $15,000 to a mere $500. Under the prior assignment, we held that the trial court did not abuse its discretion in determining that the verdict was not influenced by

passion or prejudice. Now, the issue is (even if there was no discernible passion or prejudice that influenced the verdict) whether the court abused its discretion in failing to find that $10,000 in compensatory damages was excessive and in failing to require a remittitur. Admittedly, $10,000 may seem excessive to some. But others could find the amount to be appropriate. We do not lightly substitute our judgment for that of the jury or the trial judge. Here, we find that the trial court did not abuse its discretion in failing to label the amount chosen by the jury to be excessive and in failing to grant the remittitur/new trial option. Thus, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SEVEN

{¶65} Marc's seventh and final assignment of error provides:

{¶66} "THE COURT ERRED BY ADMITTING INTO EVIDENCE THE AFFIDAVITS OF BRENDA MITCHELL AND BARBARA SMITH."

{¶67} Kalbfell served interrogatories on Marc's. Interrogatory number seven asked Marc's to identify the substance of any statements received by Marc's. Interrogatory number fourteen asked Marc's to identify the individuals who said that Kalbfell was previously banished from Marc's stores. Kalbfell also requested production of documents. The first request sought all written correspondence or communication involving Kalbfell. Request number seven sought statements or other written material received by Marc's from any person having knowledge of any relevant allegations.

{¶68} Marc's responded to these questions and requests by attaching three affidavits. These affidavits were signed on December 3, 1997, which is about two months after the incident and over seven months before the lawsuit was filed. The first affidavit was that of the Marc's manager, Robert Bindus. The second affidavit was provided by Marc's operations manager, Barbara Smith. The third affidavit was signed by Marc's customer service supervisor, Brenda Mitchell. Each told their story of what they knew relative to the events occurring on the day of the incident.

{¶69} The last two affidavits were presented at trial by Kalbfell in lieu of live testimony. Marc's objected, but the trial court determined that the affidavits did not constitute hearsay based upon Evid.R. 801(D)(2)(d). Under this rule, an admission by a party-opponent is not hearsay. Evid.R. 801(D)(2). An admission by a party-

opponent is characterized by a statement offered against a party that is: (a) his own statement, in his individual or representative capacity; (b) a statement of which he has manifested his adoption or belief in its truth; (c) a statement by a person authorized by him to make a statement concerning the subject; (d*) a statement by an agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship;* or (e) a co-conspirator's statement during and in furtherance of the conspiracy with independent proof of the conspiracy.

{¶70} Marc's contends that neither of the affidavits disclosed the declarant's job responsibilities and thus plaintiff did not prove that the statements concerned matters within the scope of the declarant's duties. We find this argument to be without merit. Ms. Mitchell's affidavit disclosed that she is a customer service supervisor. The manager's affidavit, which is not a subject of this assignment of error, established that Ms. Smith is the operations manager. Testimony also established the job titles of these two employees. (Tr. 147). Moreover, the affidavits and testimony establish that the affiants were working at the time of the incident and gained their knowledge as they were working.

{¶71} Moreover, the affidavits were made approximately one month after the incident during the course of a store investigation; they were notarized on the same day by the same person. Thus, the affidavits were made prior to the filing of the lawsuit and were only later provided by the defendants in response to interrogatories. There is no contention that the affidavits were not made during the existence of the employment relationship.

{¶72} It is easily deduced that the affidavits were made concerning a matter within the scope of employment. For instance, Ms. Smith's affidavit stated that she was working at her desk in the back office when an employee called her to report a problem with Kalbfell. Ms. Smith then paged the security guard to take care of the matter. Her affidavit also reveals that she was later paged to the customer service desk where Kalbfell was crying after the incident. This sufficiently establishes that the related matters were within the scope of her employment. Ms. Mitchell's affidavit states that Kalbfell was crying in front of the customer service desk while Ms. Mitchell

was working behind the counter. Ms. Mitchell gave Kalbfell a tissue, and Kalbfell told her the store accused her of theft.

{¶73} Issues concerning the admissibility of evidence are reviewed under the abuse of discretion standard of review. We find no abuse of discretion in admitting these affidavits as statements by a party-opponent. In fact, we find it difficult to even fathom how the above observations and related actions could concern matters that fall outside the scope of employment. As such, this assignment of error is overruled.

{¶74} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Judgment affirmed.

Waite, P.J., and DeGenaro, J., concur.