MARIA VALENTINA SPAGNUOLO vs. EDWARD P. HOLZBERG; GERARDO C. SPAGNUOLO, third-party defendant.

No. 19-P-778.

Essex. June 11, 2020. - October 21, 2020.

Present: Rubin, Milkey, & Massing, JJ.

Employment, Sexual harassment. Emotional Distress. Workers' Compensation Act, Exclusivity provision, Emotional distress. Damages, Punitive. Proximate Cause. Negligence, Proximate cause. Evidence, Relevancy and materiality.

Civil action commenced in the Superior Court Department on March 21, 2016.

The case was tried before James F. Lang, J., and motions for a new trial and for additional findings and rulings of law, to amend the judgment, or in the alternative for a new trial were considered by him.

Mary-Ellen Manning for the defendant.
Nicholas A. Halks for the plaintiff.

RUBIN, J. The defendant, Edward P. Holzberg, was found liable to the plaintiff, Maria Valentina Spagnuolo, his former employee and direct supervisee, for intentional infliction of

emotional distress, sexual harassment by hostile work environment, and constructive discharge. On her intentional infliction of emotional distress claim, the plaintiff was awarded $20,000 in compensatory damages. The plaintiff was awarded $20,000 in compensatory damages on her sexual harassment claim, as well as punitive damages in the amount of $150,000. No issue concerning her constructive discharge claim is before us. The defendant brought counterclaims and third-party claims against the plaintiff's husband, Gerardo Spagnuolo (Gerardo Spagnuolo or husband), related to this matter. Gerardo Spagnuolo was found liable for assault, but the jury awarded only $1,000 in damages. He was also found liable on claims for violation of the Massachusetts wiretapping statute, G. L. c. 272, § 99 O, and the Federal wiretapping statute, 18 U.S.C. § 2520, though neither count is at issue here. The defendant has now appealed; the third-party defendant Gerardo Spagnuolo has not, although the defendant raises issues with respect not only to the judgments against him, but also with respect to his third-party assault claim against Gerardo Spagnuolo.[1]

[1] Although his notice of appeal also states that he is appealing from the liability and damages awarded with respect to his third-party State and Federal wiretap claims against Gerardo Spagnuolo, the defendant fails to make any argument regarding these issues in his brief.

Background. Viewing the evidence with respect to the counts of the plaintiff's complaint for which the defendant was found liable, in the light most favorable to the plaintiff, the jury could have found as follows. The plaintiff was employed as a legal assistant at the law office of defendant, an attorney with a solo practice in Essex County. When she began working there in 2012, the plaintiff was the defendant's sole employee, but the defendant expanded his staff after hiring her.

The plaintiff's duties evolved over her years of working in the office, from answering the office telephones, handling the mail, and scheduling meetings, to working on interrogatories, doing legal research, and discussing client settlements. The plaintiff's desk was in the reception area of the office, across from the defendant's office. When the defendant was in the office, he worked directly with the plaintiff as her direct supervisor.

The plaintiff's complaint alleged, and the jury could have found, that over the course of several years the defendant made numerous comments and engaged in repeated behaviors that constituted tortious misconduct. This conduct occurred at the defendant's office, in the course of the plaintiff's employment. The defendant verbally attacked the plaintiff, calling her stupid and a moron. The plaintiff's coworkers testified that the defendant often belittled the plaintiff in the office,

shouting uncontrollably at her and screaming in her face. When she tried to defend herself, he would yell at her to shut up and continue to scream at her. The defendant's screams could be heard even in offices on the floor above the defendant's office. When she was not present, and the defendant was angry with her, he would describe the plaintiff as a bitch, a slut, or a whore. He would also say she was crazy. There was a jar kept in the office into which the defendant would place money each time he called the plaintiff stupid.

Much of this misconduct related to the plaintiff's gender and race. The defendant told the plaintiff that men were intelligent while women were stupid; men were "superior" to women. He instructed the plaintiff to clean up after him in the office, including the mess left behind after his meals, because "that was women's work." The defendant also made comments about the plaintiff's and other female employees' appearances at work. He referred to one female employee as "Miss Dominican Republic." The defendant, at times without prior permission, photographed the plaintiff and her female coworker for the purpose of showing his friends "that I have nice girls here at the office." The plaintiff and another employee testified that the defendant would stand close behind the plaintiff while she was at her desk and look at her cleavage. When she asked him to stop staring at her breasts, he responded that he could not help it and that she

should wear other clothes to work. The plaintiff was also instructed to pick up condoms and lubricant for the defendant when she ran errands for him. The defendant would have the plaintiff go through his e-mails in the office, including pornographic advertisements; he once sent a pornographic e-mail to the plaintiff's daughter.

In explicit detail, the defendant would describe his sexual encounters to the plaintiff at the office. The defendant described himself to the plaintiff as "always horny," asked her to comment on his girlfriend's breasts, and repeatedly described sex with his girlfriend to the plaintiff. He recounted a trip to the Dominican Republic in which he said his hotel room "came with [a] girl" and that "for $20 he got full service. Blow job and everything." He described women in the Dominican Republic as "a bargain." He frequently bragged to the plaintiff of a trip to the Philippines in which he claimed he had sex with "cheap" young girls. When she asked him to stop, he ignored her or told her that she had to listen to this commentary because he paid her.

In speaking to the plaintiff, a Hispanic woman, the defendant made numerous racist remarks to her about African-American and Hispanic people. He would refer to his Hispanic clients as "drug dealers" and say that African-Americans were "stupid" and white people were superior. She testified that he

used a number of racial slurs, referring to his Hispanic clients as "F-ing Spic[s]" and "calling [black] people niggers." When she asked him to stop making such comments, he disregarded her or told her to shut up and listen to him because he was her boss. The plaintiff testified that the defendant also made her sit with him and read his e-mails consisting of racist comments and "jokes" about black and Hispanic people. He often made fun of her accent and told her that her brown eyes were "dirty" compared to his "superior" blue eyes, which were "beautiful."

The plaintiff ultimately left the defendant's employ on October 22, 2015, after an incident with the defendant in the office. The defendant had been yelling at the plaintiff for failing to follow his instructions, and when she tried to explain what she had done, he repeatedly screamed at her to shut up. She informed the defendant that she was not feeling well and needed to go home, and the defendant told her, "Get the hell out of my office. Don't ever come back if you don't say sorry to me." The plaintiff left without the intention of returning, and her employment with the defendant ended.

The defendant successfully brought claims against Gerardo Spagnuolo, the plaintiff's husband, based on events that occurred after the plaintiff left the defendant's office on October 22. With respect to the assault claim and the claims for violations of State and Federal wiretapping statues, on

which the husband was found liable, viewing the evidence in the light most favorable to the defendant, the jury could have found the following.

After the plaintiff left the defendant's office, her husband went to the office himself to confront the defendant about his treatment of the plaintiff. After turning on his cell phone camera to record this encounter and placing the cell phone in his shirt pocket, the husband entered the office and moved toward the defendant, who was sitting at the front conference table talking on his cell phone. The husband sat down at the conference table near the defendant and told the defendant repeatedly to put his cell phone away. The defendant and the plaintiff's husband began to argue at increasing volume about whether the defendant would put the cell phone away, and the husband told the defendant to listen to him. The defendant, feeling threatened, retreated to his office and closed the door, repeatedly telling the husband to leave. The husband opened the defendant's office door, and the defendant slammed it shut and called the police.

Discussion. 1. Exclusivity provision of the Workers' Compensation Act. The defendant argues that the counts for intentional infliction of emotional distress and sexual harassment are barred by the exclusivity provision of the Massachusetts Workers' Compensation Act (act), G. L. c. 152,

§ 24.[2] Under that exclusivity provision, the act supplants common-law causes of action for injuries to an employee suffered in the course of employment unless he or she waives any compensation payments under the act at the time of hire. See Estate of Moulton v. Puopolo, 467 Mass. 478, 482-484 (2014). Thus, in general, "actions for negligence, recklessness, gross negligence, and willful and wanton misconduct by an employer are precluded by the exclusive remedy provision." Id. at 484.

Nonetheless, over thirty years ago in O'Connell v. Chasbi, 400 Mass. 686, 690 (1987), the Supreme Judicial Court recognized an exception to the exclusivity provision, holding that it is not applicable when an employee brings "an action against a fellow employee who commits an intentional tort which was in no way within the scope of employment furthering the interests of the employer." In that case, the court held that claims against a coemployee alleging assault and battery and intentional infliction of emotional distress were not precluded by the exclusivity provision of the act. The court said, "We do not think that the right to commit such acts with impunity was part of the general compromise of rights involved in the act. Moreover, liability for such intentional torts is not part of

[2] General Laws c. 152, § 24, states, in relevant part: "An employee shall be held to have waived his right of action at common law . . . in respect to an injury that is compensable under this chapter, to recover damages for personal injuries."

the circumstances of employment, unlike liability for negligently injuring others in the course of employment. Such intentional torts are not an accepted risk of doing business." Id. at 690-691. Cf. Timpson v. Transamerica Ins. Co., 41 Mass. App. Ct. 344, 348 (1996), quoting Pinshaw v. Metropolitan Dist. Comm'n, 402 Mass. 687, 694 (1988) (construing insurance policy and holding that, "[i]f . . . an employee 'acts from purely personal motives . . . in no way connected with the employer's interests,' he is not acting within the scope of his employment") Thus, for example, in a case applying O'Connell, the United States District Court for the District of Massachusetts (U.S. District Court) said, "Because sexual harassment is 'not remotely related to the employer's interests,' [O'Connell, supra at 690 n.5], an employee who is subjected to intentional infliction of emotional distress stemming from sexual harassment by a co-employee is not barred by the [a]ct from suing that individual." Morehouse v. Berkshire Gas Co., 989 F. Supp. 54, 65 (D. Mass. 1997).

The defendant argues that he is not a coemployee of the plaintiff and that, therefore, O'Connell does not apply. He argues that he is, instead, the employer, and that the exclusivity provision bars suits against the employer, even for intentional tortious conduct arising out of sexual harassment.

The principle underlying O'Connell, however, does not turn on the status of the particular individual in the workplace who has engaged in harassing conduct. In O'Connell itself, although the employer was a nonprofit institution, the defendant was the director of that institution, that is, the head of the organization, and the supervisor of the plaintiff. 400 Mass. at 687. Similarly, in Bergeson v. Franchi, 783 F. Supp. 713, 714 (D. Mass. 1992), the U.S. District Court, applying O'Connell, allowed a lawsuit against an individual, Dominic Franchi, a director of Franchi Group Associates, which was described as a "real estate management enterprise." There, the court wrote, "This case is . . . analogous to O'Connell, where a director of the corporation was individually sued for similar transgressions. The court in O'Connell characterized their relationship as co-employees, not as insurer and employee. This [c]ourt follows the court in O'Connell, and treats defendant Franchi as a co-employee, not as the insured entity that is immune from suit." Bergeson, supra at 716-717.

The point of O'Connell, as the judge in Bergeson recognized, is that conduct such as that alleged here, including sexual and racial harassment, does not further the business interest of the employer. Even when such conduct is undertaken by an individual like the defendant, who works with the plaintiff and is her direct supervisor, but is himself the sole

proprietor of the business, it does not further his business interests as an employer. Consequently, the common-law cause of action here, intentional infliction of emotional distress, is not barred by the exclusivity provisions of the act.[3]

As to the sexual harassment claim under G. L. c. 214, § 1C, because the exclusivity provisions of the act apply only to common-law causes of action, no exception to the provision is required. In § 1C, "the Legislature has already created a statutory one." Doe v. Purity Supreme, Inc., 422 Mass. 563, 566 (1996) (referring specifically to G. L. c. 214, § 1C).

2. Exclusivity of G. L. c. 214, § 1C. The defendant also argues that the plaintiff's intentional infliction of emotional distress claim is barred because G. L. c. 214, § 1C, is her exclusive remedy for injuries related to sexual harassment. He argues that, if the jury found the plaintiff to be an employee covered by the statute, she could recover only thereunder, and that she could not also recover under a claim for intentional infliction of emotional distress "that is merely a recast of her claim under [G. L.] c. 214, §[ ]1C[,] for sexual harassment."

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[3] Estate of Moulton, on which the defendant would rely, is not to the contrary. In holding the exclusivity provision barred suit against the directors of a charitable corporation there, the court, citing O'Connell, made clear that it was not addressing "those situations . . . where a director of a charitable corporation is said to act both as a director and also as a coemployee of an injured employee." Estate of Moulton, 467 Mass. at 490 n.16.

Cf. Guzman v. Lowinger, 422 Mass. 570, 572 (1996) (holding that where employees are given remedy for sexual harassment under G. L. c. 214, § 1C, no "independent and duplicative right exist[s] to pursue such claims under the civil rights act").

The defendant sought summary judgment on the intentional infliction of emotional distress claim on this basis. The judge concluded, correctly, as the facts described above make clear, that the intentional infliction of emotional distress count was not simply a recast version of the plaintiff's statutory sexual harassment claim. Thus even assuming, without deciding, that a sexual harassment claim recast as an intentional infliction of emotional distress claim may not be brought by one covered by the statute, the defendant's argument has no merit. To the extent, if any, the defendant argues that the verdicts resulted in duplicative recovery, there is no merit to his claim. The verdict slip specifically asked the jury to state in both words and figures what amount of money, if any, awarded on the sexual harassment claim was for the same harms or injuries for which money was awarded on the intentional infliction of emotional distress claim. They wrote "Zero" and "$0.00."[4]

[4] The defendant also argues that the plaintiff could not recover under the statute if she were an independent contractor, and that the judge both erroneously failed to rule on the legal question whether she was an employee or an independent contractor, something the defendant says the judge reserved to

3. The punitive damages award. The defendant argues that the punitive damages award was against the weight of the evidence. In particular, he argues that there was no evidence adduced as to his wealth. As permitted, the judge instructed

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himself, and erroneously sent the case to the jury without instructions on the question.

The judge, however, did not reserve the question to himself as one of law, and the defendant did not preserve any objection to the jury instructions with respect to this issue.

As the judge described in his memorandum and order on the defendant's motion for additional findings, the defendant's proposed instructions submitted before trial included language stating that the plaintiff had to be an employee in order to recover under the statute. Before trial, the judge did tentatively conclude that it was immaterial under the statute whether the plaintiff was an employee or an independent contractor (a question we need not and do not decide). But the judge was clear at that time that that ruling was tentative and that he could "be educated" on the matter; most importantly, the judge stated, "I don't know that the recovery on any claim would turn on that determination [whether she was an employee or an independent contractor] by the jury. But to the extent that it does or might, I would deny this motion and allow that to be a litigated disputed fact for the jury to determine." Indeed, he repeated, "I've stated that I don't know the extent to which her status as one or the other would have a bearing on her ability to recover on any of the claims that she's brought, but to the extent that it might, I was not precluding you from making such an assertion before the jury."

Both parties were thus explicitly made free to present evidence on the plaintiff's employment status and to argue it to the jury. Despite these invitations, the defendant did not argue the issue before the jury. Nor did he make any objection to the judge's final instructions regarding the elements of claims pursuant to G. L. c. 214, § 1C. The defendant therefore may not now claim error in those instructions. See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974); Flood v. Southland Corp., 416 Mass. 62, 66 (1993).

the jury that one of the factors that should be considered in determining the amount of a punitive damage award was "the defendant's wealth in order to determine what amount of money is needed to punish the defendant's conduct and to deter any future acts of discrimination."

Neither the argument that there was insufficient evidence of the defendant's wealth to support a punitive damages award, nor the argument that, because of the absence of such evidence, the judgment was against the weight of the evidence, was made below. Indeed, during jury deliberations, the jury asked the following question: "[I]f we were to determine punitive damages, how are we to determine [the defendant's] wealth using the evidence that we see regarding bank statements or something else?" Counsel for both parties agreed that the jury were to be instructed as follows:

> "[I]n considering the eight factors that I instructed you to consider in making a determination as to the amount of a punitive damages award, including the defendant[']s wealth, you are limited to whatever evidence that has been introduced that bears on those factors. I remind you, however, that the plaintiff bears the burden by a preponderance of the evidence at proving the propriety and amount of a punitive damages award."

Because the claim put forward here was not raised at that time, at the close of the plaintiff's case, at the close of all the evidence, before the jury were initially instructed, or after the verdict, it is waived.

4. Exclusion of evidence. The defendant argues that he was improperly denied the opportunity to introduce evidence of his own economic damages as a result of the assault to which the jury found he was subjected. At trial, he testified that as a result of the events that gave rise to his claims against Gerardo Spagnuolo, he "avoid[s] Lynn [District] [C]ourt." The judge sustained an objection by the plaintiff to the defendant's testifying that he lost business as a result of avoiding the Lynn Division of the District Court Department (Lynn District Court). Specifically, the judge said that the defendant could not "testify that he lost business, cases that were to be taken in the district court, because he didn't want to go to Lynn District Court because something had happened with Mr. Spagnuolo," because any such damages were "much too far attenuated."

This is a conclusion that this evidence could not be admitted because of a lack of proximate causation. Proximate cause is ordinarily a jury question unless, as a matter of law, proximate causation cannot be proved. Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 44-46 (2009).

In this case, the proffer of evidence made by the defendant concerning his avoidance of Lynn District Court was inadequate to allow us properly to conclude that the judge erred in excluding evidence of damages of lost business in that court.

In particular, the defendant did not proffer anything indicating why concern about the plaintiff's husband would have rendered the defendant fearful of going to Lynn District Court. Nor is there anything in the evidence that supports an inference that avoiding that court might have been a reasonable response to the actions of the plaintiff's husband. Gerardo Spagnuolo does not live in Lynn. The evidence was that he lived in Georgetown and worked for the Massachusetts Bay Transportation Authority in Everett, and there is no indication that he worked in Lynn or that there was any reason to think that he would be present in the Lynn District Court.

5. Proof of damages and causation. The defendant argues next that there was insufficient proof of damages or causation with respect to the intentional infliction of emotional distress claim. As there was no request for a directed verdict on the claim, this argument is waived. See Reckis v. Johnson & Johnson, 471 Mass. 272, 300 (2015). In any event, among the almost eight hundred pages of medical records and the plaintiff's own testimony there is ample evidence of both causation and damage.

6. Unexpected testimony. Finally, the defendant argues, without citation or specifying the particular evidence to which he objects, that that the judge should have excluded what he describes as "outlandish claims" in the testimony of both the

plaintiff and her witnesses, presumably including coworker Angelica Sanchez, that detailed incidents at the workplace that were not described in response to interrogatories propounded to the plaintiff. Without identifying it, he describes the testimony to which he objects as "despicable, unprovable, undisclosed sexual, perverse and racially volatile remarks."[5]

To the extent his objection is based on the failure to disclose statements in answers to interrogatories, the defendant has cited to no case that would support a contention that the trial judge was required, as a matter of law, to exclude this evidence. Cf. Wilson v. Honeywell, Inc., 409 Mass. 803, 809 (1991) ("although the plaintiff's attorney failed seasonably to notify defense counsel of the existence of the witness, in violation of Mass. R. Civ. P. 26 [e] [1] [A], 365 Mass. 776 [1974], such violation did not mandate exclusion of the testimony"). The trial judge had "broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial[,] . . . [and w]ithin this discretion lies the power to exclude or deny expert testimony and to

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[5] Based on his motion in limine and the discussions on the record at trial, he may be referring to "statements attributed to Mr. Holzberg regarding the use of the N-word, the length of African-American males' penises and this trip to the Philippines involving sex with a prostitute who may or may not have been underage." The judge decided not to strike or exclude testimony on these topics despite the plaintiff's failure to disclose them in her interrogatory responses.

exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party" (citations omitted). Nally v. Volkswagen of Am., Inc., 405 Mass. 191, 197 (1989).

The judge declined to exclude the evidence, stating that "the failure to disclose such things in interrogatories is for cross-examination[,] . . . not to preclude the testimony from coming in." Indeed, in light of a pretrial Superior Court order for the plaintiff to supplement her responses to the defendant's interrogatories, and the plaintiff's failure to include in her responses specific details of the defendant's conduct to which the plaintiffs' witnesses testified at trial, the judge ruled that the defendant would be permitted to cross-examine the plaintiffs' witnesses about the fact that the interrogatories do not make such disclosure and, by stipulation if necessary, inform the jury that the plaintiff did not disclose this information despite a court order requiring the plaintiff to supplement her responses in discovery.[6] We think in taking this course, the judge acted within his sound discretion.

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[6] On January 30, 2017, the defendant brought a motion to compel more complete responses to certain interrogatories. At a hearing on that motion, among others, the motion judge ordered the plaintiff to furnish the defendant with supplemental responses to certain interrogatories, specifically that the plaintiff must "[s]tate all facts and identify all communications and documents upon which [the plaintiff] relies to support her the allegations contained in the [c]omplaint."

To the extent the defendant's claim is that this testimony should have been excluded because it was more prejudicial than probative, review is prevented by the defendant's failure to identify the testimony to which he objects. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019). To the extent that the defendant is appealing from the judge's decision not to exclude as unfairly prejudicial testimony about racially derogatory statements made by the defendant, we review for abuse of discretion.

The judge ruled on Sanchez's testimony that the defendant mentioned a prostitute in the Philippines who was supposedly eighteen, but looked fourteen. The context of the defendant's comments suggested she was in fact a child prostitute. The judge correctly found that this testimony was relevant to the plaintiff's claims of discrimination, harassment, and intentional infliction of emotional distress, and the judge allowed its admission. He also ruled on the plaintiff's testimony about the defendant's racist statements about African Americans, and his use of the "N-word" in the office. The judge again correctly found it was relevant to the plaintiff's intentional infliction of emotional distress claim, and was

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The plaintiff provided a supplementary response that did not detail the defendant's statements to which she and Sanchez testified at trial.

corroborative of her testimony about his use of racist slurs against Hispanic people, and he allowed its admission. We see no abuse of discretion in his decisions that the probative value of the testimony outweighed the risk of unfair prejudice.

Conclusion. The judgments are affirmed. The orders denying the motion for a new trial and the motion for additional findings and rulings of law, to amend the judgment, or in the alternative for a new trial are affirmed.

So ordered.