STATE OF MICHIGAN

COURT OF APPEALS

LINDA M. GILBERT,

Plaintiff-Appellee,

v

DAIMLERCHRYSLER CORP,

Defendant-Appellant.

UNPUBLISHED
July 30, 2002

No. 227392
Wayne Circuit Court
LC No. 94-409216-NH

Before: Whitbeck, C.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury awarded plaintiff Linda M. Gilbert $21 million for her claim that defendant DaimlerChrysler, Inc.,[1] violated the Michigan Civil Rights Act (CRA), MCL 37.2102 *et seq.*, when its agents, some of Gilbert's coworkers and supervisors, sexually harassed her for more than seven years. Chrysler now appeals as of right from the trial court's order denying its motion for an evidentiary hearing, judgment notwithstanding the verdict (JNOV), a new trial, and remittitur. We affirm.

I. Basic Facts And Procedural History

Following her graduation from high school in 1977, Gilbert held jobs at McDonald's and Comerica Bank before attempting to obtain a better job with Blue Cross and Blue Shield of Michigan. When the job with Blue Cross did not materialize, Gilbert decided to become a millwright. Millwrights are skilled tradespeople who work mainly with metals, installing, maintaining, and repairing machinery. This is heavy, dirty, and sometimes dangerous work, which interested Gilbert because of the combination of technical knowledge and athletic skills it requires. In the automobile industry, millwrights are considered among the elite skilled trades because they are responsible for keeping the assembly line moving. In 1986, Gilbert applied to the Millwrights Institute of Technology, where she was accepted and began her four-year millwright apprenticeship. In 1990, Gilbert became a journeyman millwright, having finished the apprenticeship and the many hours of work it required. She spent her first two years as a journeyman working as an independent contractor through her union.

[1] In order to be consistent with the majority of testimony and documentary evidence presented in this case, we refer to defendant as Chrysler.

Because of layoffs common to the trade, Gilbert worked very little during fall 1991 and winter 1992. At the same time, Gilbert, who had been abused as a child and had a history of alcoholism and cocaine use, began having personal problems. While details of this period in her life are not particularly clear, she was arrested for drunk driving and was involved in an altercation at a bar around this time. In early 1992, Gilbert sought treatment for her substance abuse problems from Steven Hnat, a psychiatric social worker who specializes in treating people with substance abuse problems. According to Hnat's evaluation, Gilbert had a substance abuse problem and the depression she was experiencing was a symptom of that substance abuse, not a separate condition. Despite Gilbert's history of abuse as a child and poor family support, Hnat thought that Gilbert was a resilient and motivated person with a good prognosis for recovery, in part because she had initiated treatment voluntarily. By the end of February or the beginning of March 1992, Hnat believed that Gilbert was clean and sober.

In March 1992, Chrysler hired Gilbert to work at its new Jefferson North Assembly Plant. Gilbert was the first female millwright in the plant; in fact, she was the only female skilled tradesperson for the first 1½ years she worked at the plant, and the only female millwright for her first two years there. According to Gilbert, her male coworkers immediately started harassing her because she was a woman. Gilbert spent her very first day working for Chrysler in training with other millwrights. One millwright remarked that they had finally been assigned a "bitch," and another made a comment suggesting that she should wear a dress to work and he would hold a ladder for her to climb so that he could look up her skirt.

These comments continued in the plant itself, where Gilbert was first assigned to work in the core assembly area on the second shift. In comments made directly to her, and made in reference to her among the men, the male millwrights, and some of her supervisors, called Gilbert "bitch," "whore," "cunt," "asshole," often adding "fucking" to these epithets.[2] Gilbert hoped that the male millwrights would accept her, or at least leave her alone, once they saw how competent she was; it is undisputed that Gilbert is skilled in her profession. Though she was friendly with a few other people in different trades, the millwrights did not change their response to her. The journeymen millwrights refused to be partnered with Gilbert, which left her to be partnered with apprentices. Gilbert did not mind working with apprentices generally, but she asked to be assigned to a journeyman millwright to benefit from his experience at Chrysler, noting that apprentices would also benefit from working with other experienced journeymen. Despite never formally declining to work with apprentices, Gilbert felt that always being assigned to work with apprentices forced her to assume a greater portion of the work because apprentices were not always able to help when dealing with a problem. On occasion, she had to fix urgent problems by herself, and then explain to the apprentice what she had done.

Though millwrights must work in teams or small groups to perform certain types of work, some of the male millwrights refused to acknowledge Gilbert. On one occasion, a male millwright would not accept the tool that she tried to hand him until a supervisor made a comment. Despite the danger of trying to perform some repairs without assistance, some male millwrights would go to sleep or leave the area when they were supposed to help her. Two

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[2] Throughout this opinion, we use very explicit language without resort to euphemisms or deletions. We do so advisedly.

millwrights in particular, Jack Nigoshian and Gerry Ernat, disliked Gilbert, and on at least one occasion tried to get her in trouble by reporting to her supervisor that she was absent from her work area when she was actually there. Nigoshian and Gilbert also engaged in a very loud and public fight with each other at work once. For a two or three week period in her first year at Chrysler, unidentified individuals left pallets or other items in front of her large tool locker to block her from getting her tools, which she reported to her direct supervisor. The male apprentices working with her also received verbal harassment, with some millwrights suggesting that Gilbert was performing sexual favors for them.

During this first year of work, Gilbert said, she felt the stress of her working conditions even though she had made very good progress with Hnat. Her depression abated, but Gilbert had what Hnat deemed a "slip" in July 1992, when Gilbert was again arrested for drunk driving. Gilbert said that she felt the need to numb her emotions regarding her work environment and the constant harassment she experienced there. Hnat saw it as a good sign that Gilbert reported this slip to him and sought inpatient treatment at Sacred Heart Hospital in October 1992. Hnat thought that working remained an important component of Gilbert's recovery because it minimized her exposure to drinking and gave her something on which to focus, though working twelve hours a day, seven days a week was taxing on Gilbert. Additionally, he observed, Gilbert's success at work was tied to her recovery because of her strong identity as a millwright, her work ethic, and determination not to be forced to leave.

By 1993, one or more unidentified individuals at Chrysler had begun to leave lewd cartoons for Gilbert, sometimes posting them around the plant before leaving them for her to see. On May 22, 1993, Gilbert went to her tool box to retrieve a grinder, but found that someone had taken it. In searching through her toolbox drawers for the grinder, Gilbert discovered a cartoon entitled "Pecker Wrestling." In the cartoon, three men are watching a fourth man, who is sitting on a table with his pants around his ankles. A woman in the cartoon is grasping the seated man's penis and, from the expression on her face, appears to be exerting some effort to "wrestle" with his penis. A second woman is observing the action. Though difficult to discern from the photocopies in the record, the name "Linda" is written on the cartoon with an arrow to the woman who is "wrestling," the name "Bill Barr" – the name of a welder or millwright who worked with Gilbert – is written across the chest of the man seated on the table. Names of three other millwrights who worked with Gilbert and arrows pointing to the three other men in the cartoon are also visible. There is a question mark over the second woman in the cartoon.

Gilbert reported this incident to her supervisor, Harry Pilon, and in writing to Chrysler management, providing management with a copy of the cartoon.[3] She noted that she thought the cartoon was "obscene," citing the names written on the cartoon as names of people with whom she worked. As she saw it, the woman named "Linda" in the cartoon was "bare-breasted and about to perform fellatio." Gilbert stated that she was "extremely insulted and degraded. The insinuation that this happen[ed] between" her and a man with whom she worked "everyday" was

[3] The record suggests that one of Gilbert's acquaintances may have seen her crying about the cartoon, and that acquaintance may have taken the cartoon to Pilon. In any event, Pilon directly knew of the cartoon.

"humiliating." Gilbert did not mention any earlier incidents of sexual harassment in her written report.

Two days later, Frank Battaglia, Sr., an employee in Chrysler's human resources department, discussed the situation with Pilon, Jerry Heikkila, who was Gilbert's union steward, Joe Christman, who was the area coordinator, and Dave Standen, who was the shift operations manager essentially in charge of the workforce in the entire plant. They agreed to talk to all thirty-six millwrights in the core area to explain that the matter was serious and to inform them of Chrysler's sexual harassment policy. Christman and Pilon apologized to Gilbert about the incident and reassured her that Chrysler did not condone this conduct. Though a memorandum indicates that Battaglia and others carried out their intentions to speak with the other millwrights, Gilbert said that no such thing happened. In fact, she said, she found a copy of Chrysler's sexual harassment policy and gave it to some of the other workers.

After Gilbert reported the wrestling cartoon to management, the other millwrights started making hushing noises in her presence and calling her a "snitch." About a week and a half after finding the wrestling cartoon, on June 5, 1993, Gilbert went to her toolbox, only to find that someone had taped a Polaroid photograph of male genitalia to the top of it. She reported this incident to Pilon and Battaglia. Battaglia spoke with Gilbert and Pilon about the Polaroid, but did not separately investigate it, partly because that was not his responsibility and partly because, he later claimed, the investigation into the wrestling cartoon was still underway. Chrysler never determined who had left this cartoon or photograph.

Battaglia and Pilon decided that the best remedy to the problem would be to transfer Gilbert. When Gilbert consented, Chrysler assigned her to the third shift in the paint shop. Though a more favorable shift, this was not a favorable assignment because the paint shop had noxious fumes, which was of particular concern to Gilbert, an asthmatic. No one alerted Gilbert's supervisors in the paint shop that she was being transferred because of the sexual harassment that had occurred in the core area.

Gilbert apparently remained clean and sober until July or August 1993. Hnat, who continued to treat her, thought this was extraordinary given the pressure Gilbert had been under in June 1993, when Gilbert reported that her union representative was pressuring her to drop her complaint and the sexual harassment had continued. Gilbert, however, had developed a major depressive disorder, which was different from the depression symptomatic of alcoholism that Hnat had seen in Gilbert at the beginning of her treatment. This major depressive disorder was permanent, had affected Gilbert's mood, ability to move, articulate, think, and function. But Gilbert was still determined to prove that she could persevere at work, refusing to take time away from work even when she injured her back, fearing that she would be seen as weak.

Gilbert relapsed into alcoholism at the end of summer 1993, and her psychiatric situation had worsened by September 1993. As of November 1993, Gilbert was bingeing on alcohol after work. Throughout this time, though he was aware of Gilbert's other personal problems, Hnat remained convinced that the sexual harassment she was experiencing at work was the primary reason why she turned to alcohol. With her alcoholism spiraling out of control, Gilbert admitted herself to Sacred Heart Hospital in November 1993. This hospitalization may have coincided with her attempt to commit suicide by cutting her arm. Her Sacred Heart Hospital records noted that sexual harassment at work remained her greatest risk factor for future relapses.

Sacred Heart discharged Gilbert in December 1993. She remained sober for a few months. Hnat last saw her in January 1994. In March 1994, close to her second-year anniversary with Chrysler, Gilbert sued Chrysler for discrimination in the form of sexual harassment, as well as under a number of other theories. Though the chronology of events during this time is unclear, Gilbert claimed to continue to experience almost daily harassment even after filing suit. She had also lost a significant amount of weight, approximately fifty pounds. At about this time, more nonverbal incidents began occurring even though she moved from the paint shop back to the core assembly area. For instance, someone left a Penthouse magazine on her toolbox. Another day, Gilbert left her can of diet Pepsi on the table in a break area to respond to a repair call. When she returned, someone had placed a magazine next to her drink to make it look as if she had been reading an article entitled "Why Men Have So Many Sperm." That summer, in a separate incident, Gilbert returned to an area that she had blocked from public view to use as a changing area to find that someone had urinated on a chair on which she ordinarily sat to change her boots.[4] She did not report these incidents immediately, and Hnat thought Gilbert was doing "pretty well."

Some time in fall 1994, Gilbert found an article entitled "10 Times A Day Is Too Many" by Dr. Ruth Westheimer in her locker. Drafted in a question and answer format, the person requesting advice asked:

> Q: My girlfriend and I are very much in love and as we are both very highly sexed people, we make love often – up to 10 times in a day or night. However, we both find it very frustrating when my penis won't perform! Sometimes it gets too sore, or at other times after lots of sex it just won't rise no matter how much I want more. What can I do?

The response was straightforward:

> A: The first thing I [Dr. Westheimer] would suggest: Don't make love 10 times in a day or night. Make love only once a night and prolong it with foreplay, but don't put all that pressure on your penis to perform or you are going to get into trouble. Lovemaking can be holding hands, cuddling or having and intimate conversations, but it's not trying to get into the Guinness Book of World Records.

Chrysler was aware of this article no later than October 10, 1994.

Again, though not clear on when this happened, Gilbert said that someone taped another lewd or derogatory cartoon to her toolbox or locker with the word "bitch" written on the tape. When she reported this incident, a supervisor, Richard Castleman, advised her to act like it did not bother her. Consequently, she left the cartoon taped to her toolbox or locker for two weeks, until someone else removed it.

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[4] Apparently, the male workers changed into their clothes in the aisles and did not walk the distance to their designated locker rooms, so Gilbert had adopted a similar practice, fashioning a changing area that allowed only her feet to be visible to people in the vicinity.

On October 10, 1994, Gilbert returned to her locker only to find that it had been pried open and someone had left a cartoon entitled "Highway Signs You Should Know" in the locker. The cartoon had fourteen "signs" that used drawings of naked bodies or body parts engaged in sexual activity to illustrate the meaning of each "sign." For instance, for "men at work," the cartoon showed a man and woman having intercourse. Gilbert reported the cartoon to Pilon and to management. Maya Baker, a human resources employee, spoke with Gilbert. Baker suggested that Gilbert use a designated locker room, which was a relatively long distance from her work area, instead of her makeshift changing room, so she would draw less attention to herself. Baker also spoke to the union stewards on the three shifts and stopped by Gilbert's work area several times before and after she reported to work to see if she could find anyone leaving the cartoons. Baker wanted to make it known to the workers that Chrysler was investigating Gilbert's allegations and that the person caught harassing Gilbert would be punished. Baker never caught the person who left the cartoon and lost touch with Gilbert because of Chrysler's policy of rotating human resources personnel through different shifts every few months.

In November 1994, Chrysler deposed Gilbert for the first time. In this deposition she detailed the comments and harassment, including some incidents she had not previously reported. Following this deposition, Gilbert indicated, no one from Chrysler approached her or attempted to investigate any of her complaints, though she continued working at the Jefferson North Assembly Plant as a millwright.

On March 12, 1995, Gilbert discovered an illustrated "poem" entitled "The Creation of a Pussy" that had evidently been posted in the carpenters' shop, about twenty yards from the millwrights' shop:

> Seven wise men with knowledge so fine,
>
> created a pussy to their design.
>
> First was a butcher, smart with wit,
>
> using a knive [sic], he gave it a slit.
>
> Second was a carpenter, strong and bold,
>
> with a hammer and chisel, he gave it a hole.
>
> Third was a tailor, tall and thin,
>
> by using red velvet, he lined it within.
>
> Fourth was a hunter, short and stout,
>
> with a piece of fox fur, he lined it without.
>
> Fifth was a fisherman, nasty as hell,
>
> threw in a fish and gave it a smell.

Sixth was a preacher whose name was McGee,

touched it and blessed it and said it could pee.

Last came a sailor, dirty little runt,

he sucked it and fucked it and called it a cunt.

Running around the border of the "poem" were caricatures of each of the seven "wise" men posed or brandishing an item that reflected each man's "skill;" the sailor, for example, was shown having intercourse with a woman. Gilbert reported this to Pilon and management. Tim Holland, a facilitator in the human resources department and member of Chrysler's new Civil Rights Committee, handled this complaint. Though he had not had any previous involvement with Gilbert's complaints, he was aware that she had been experiencing harassment. Holland took a photograph of the bulletin board with the "poem" and spoke with Gilbert, who said that she did not want anyone fired over the incident, she just wanted the harassment to stop. Chrysler then removed the bulletin board.

Almost immediately after seeing the "poem," Gilbert relapsed to a severe degree, expressing fear that men who were originally involved in the harassment, who had been off of work for some time for other reasons, were returning. Though the details, including the exact time, are sketchy, Gilbert evidently turned on the gas in her oven and tried to go to "sleep." She went through detoxification at Sacred Heart Hospital from April 11, 1995, through April 25, 1995. She was either rehospitalized or participated in an intensive outpatient therapy program from April 27, 1995, through May 4, 1995, at the Eastwood Clinic. She did not remain sober, and was admitted to Harper Hospital for detoxification on July 8, 1995. Her records indicated that she was no longer suicidal by July 18, 1995.

Gilbert returned to work again after this hospitalization. In March 1997, Gilbert encountered a male coworker who kept insisting over and over again to her that he had a "big meat." She reportedly responded "whip it out," and told her supervisor about this incident. This coworker was reprimanded. At another time, Gilbert asked her supervisor, Gordon Potempa, about the allowable variation or tolerance in an adjustment she had to make in a repair, to which he barked that she had to make the repair to within a "cunt's hair." She reported this incident, and Potempa – who had a history of being disciplined for inappropriate language – was reprimanded. On another occasion, Gilbert asked Herbert Hicks, her supervisor at the time, a question about work and he told her to "clean out" her "fucking ears." She did not report this comment at the time.

Even before Gilbert began drinking again, her new therapist, social worker Carol Katz, noticed that she was using food to replace her addiction to alcoholism, which was a warning sign of what was to come. In September or October 1997, Gilbert tried to commit suicide for a third time by cutting her wrists. She was admitted to St. John's Hospital. When she returned to work, she claimed, the harassment continued. She was readmitted to St. John's Hospital in 1998 and admitted to Bon Secours Hospital in 1999.

Gilbert's lawsuit went to trial in June 1999 while she continued to work for Chrysler. From the outset, Gilbert's attorney, Geoffrey Feiger, informed the jury that Gilbert had a

longstanding substance abuse problem. However, his theory of the case was that Gilbert was in recovery by the time she started working for Chrysler, her prognosis was very good, her relatively lengthy sobriety demonstrated her motivation for and commitment to staying sober, and only the relentless sexual harassment pushed her back into alcoholism. Indeed, this alcoholism was more severe than what she had ever experienced in the past, and was accompanied by major depressive disorder, a new, permanent, and serious psychiatric condition that could lead to her death through suicide or the physical effects of continued alcoholism. Under this theory, Chrysler was legally responsible for Gilbert's damages, including future medical expenses, because she had reported the harassment as early as May 1993, and Chrysler never investigated the harassment nor stopped it.

Feiger laid the factual foundation for this theory that Gilbert worked in a hostile environment by having several of Gilbert's coworkers testify. Dennis Whitenight and Fred Lemmerz were both friendly with Gilbert. Though neither man was a millwright, they were able to observe her working, and considered her to be very good at her work. Both men corroborated Gilbert's claims of individual acts of sexual harassment. For instance, Whitenight saw that the other millwrights would not help Gilbert, but just watched her work. In his view, it was no secret that they did not like having a woman work with them. Whitenight saw cartoons left for Gilbert, and even removed some before she could see them because he knew how upset Gilbert was about the harassment. Lemmerz was with Gilbert when she discovered that someone had urinated on her chair, noting that the odor was unmistakable. Both Lemmerz and Whitenight commented that the male millwrights did not treat each other the way they treated Gilbert, the harassment was open and obvious, and the supervisors should have been aware of what was happening. In fact, in his thirty-one years working for Chrysler, Lemmerz had never seen *anyone* treated as badly as Gilbert had been treated. Lemmerz confirmed that, until he retired in 1999, he heard people make harassing comments toward Gilbert. Both men also observed the radical changes in Gilbert's weight, her crying at work, and depression. Robert Gupton, a tool and die maker, echoed Whitenight's and Lemmerz's testimony about Gilbert. Gupton was impressed at Gilbert's skills, but he had seen that the male millwrights did not like her. Further, though Pilon thought that some of the incidents that Gilbert detailed were more akin to rough "shop talk," even Pilon conceded that some of the incidents, like the Polaroid photograph of a penis, were unusual and "improper." Similarly, even though Standen viewed shop talk as a fact of life in the plant, he thought it was inappropriate.

Feiger asked each Chrysler employee about what, if any, investigation or remedial action the company had taken in response to Gilbert's situation. Battaglia claimed to be responsible for investigating only the penis wrestling cartoon incident, and maintained that talking with the other supervisors and union representatives was an adequate response to Gilbert's complaint. He believed that these supervisors had talked with the people working with Gilbert and gave them a copy of the sexual harassment policy, though he had no documentation that they did so. Pilon suggested that someone had tracked who received the policies. However, unlike the circumstances when Chrysler handed out other policies to the workers, it did not have the individuals sign a form to confirm that they had received a copy of the policy. Chrysler did not attempt to compare the handwriting on the wrestling cartoon with any of the employee records, it did not set up cameras for surveillance, as it had done when there was a theft/sabotage problem in the plant, nor did it assign someone on the floor to report harassment directly to management. Neither Battaglia nor Pilon confronted any of the men named in the penis wrestling cartoon. On

occasion, Pilon asked some of the men about the cartoons, but he never learned who was leaving them. However, Christman said that he had met with at least some of the men named in the penis wrestling cartoon, including Bill Barr, who had denied playing any role in leaving the cartoon for Gilbert.

Feiger attempted to underscore the inadequacy of Chrysler's response in general by asking Pilon, "If somebody peed on [former Chrysler Chairman] Lee Iacocca's chair, [do] you think he could find out who did it?" Pilon responded, "I believe so." Feiger then asked Pilon, who was seated with the defense as Chrysler's representative during the trial, whether Jurgen Schrempf was Chrysler's new chairman following its merger with Daimler. When Pilon responded affirmatively, Feiger asked, "If somebody peed on Mr. Schrempf's chair, do you think they would find out who did it?" Pilon again responded, "Yes, I believe if someone peed on his chair. If someone peed on my chair, I could find out who did it, sir." This prompted Feiger to ask, "Except nobody would find out who peed on Linda Gilbert's chair?" Pilon replied, "If I suspected someone, I would point them out." This last comment pointed to an overarching theme in the testimony of Battaglia, Pilon, and Baker. Namely, they claimed numerous times that it was Gilbert's responsibility to inform her supervisors or management of who was harassing her, and until she could identify her harasser or harassers, Chrysler could do nothing to stop the harassment – if it was actually harassment.

Hnat, who testified for four days as an expert, provided the most cohesive testimony at trial in terms of providing a timeline of Gilbert's improvement, relapses, short-term recoveries, and prognosis. Looking at Gilbert's sobriety between March 1992 and July or August 1993, including her "slip," Hnat concluded that she could be considered among a small group of people with the best prospect for lasting recovery. Studies he had read and his own experience as a therapist indicated that the majority of alcoholics – about seventy-two percent – relapsed within the first six months of recovery, which Gilbert did not do despite the stress of work. An even greater percentage of people relapsed within the first year of recovery, which Gilbert did not do. In his estimation, her likelihood for success was in the top ten percent of alcoholics who sought treatment from a professional. Hnat was aware of Gilbert's drunk driving arrests, but believed that, regardless of any court orders to seek treatment, she had actually sought treatment out of a personal desire to recover. He pointed out that the length of her treatment was unusual, especially because her insurance had stopped paying for treatment and she had to pay for it herself. Hnat was also fully aware of Gilbert's troubled past, including: physical and verbal abuse by family members when she was a child; sexual abuse by someone outside her family when she was a child; being forced to have an abortion as a teenager; involvement with a manipulative boyfriend who sold drugs; poor or nonexistent family support; and minimal opportunities for relaxation. Nevertheless, in his opinion: Gilbert had always complied with his treatment plan; she was dying from a combination of alcoholism and major depressive disorder, which had permanently changed the way her brain worked and would cause her physical pain from pancreatitis or other physical ailments she would likely suffer; the records by other individuals who treated Gilbert confirmed this grim prognosis; and Gilbert's poor prognosis was primarily because of the sexual harassment at work. He believed that for her to make any significant changes she would need at least six months of inpatient therapy, an additional six months in a half-way house, and ongoing treatment. Hnat added that inpatient treatment cost $2,000 per week, and therapists charged about $85 an hour for individual therapy and $45 for group therapy.

Katz agreed with Hnat that Gilbert suffered from major depressive disorder, and that this was a serious, long-term problem. Katz had observed that Gilbert was also suffering from post-traumatic stress disorder in the form of dreams and flashbacks to her childhood abuse because of the harassment at work. Like Hnat, Katz saw the relatively direct relationship between incidents of harassment aimed at Gilbert and her relapses and suicide attempts. Katz also agreed that Gilbert had a strong work ethic, she wanted to persevere, and that she would have had a good prognosis without the harassment at work. Further, when cross-examined on the matter, Katz said that had Gilbert's only motivation for attending therapy been a court order related to a drunk driving arrest, Gilbert would not have attended therapy for so long. As Katz put it, there were far easier ways to satisfy the typical treatment required in court orders than the intensive and lengthy therapy in which Gilbert had engaged.

Katz also had a long history of treating individuals who worked in the automobile industry, where substance abuse problems, even drinking on the job, was common in the assembly plants. Her experiences with these individuals led her to believe that Gilbert's coworkers would not ostracize her and treat her as badly as they had done and were doing just because she had a drinking problem. Moreover, Katz believed that harassment was a well-known phenomenon for women who tried to break into a male-dominated workplace or career, irrespective of the individual's background.

Though denying that Gilbert had been sexually harassed, Chrysler posited numerous explanations for what had happened to Gilbert: the male millwrights did not like her because she had attended a formal apprenticeship program rather than rising through the ranks and being trained in the plant like the men; the men did not like to work with Gilbert because she drank on the job and had attendance problems; the comments and cartoons were commonplace shop talk not intended to be offensive, and which even Gilbert used; Gilbert was moody, difficult to work with, and provoked the men; if there had been harassment, Chrysler was blameless because Gilbert did not report the harassment or name her harassers to management under the open door policy used in the plant; Gilbert's relapses were attributable solely to the problems in her personal life and individual failings, including her failure to attend Alcoholics Anonymous (AA) consistently or follow a twelve-step program; and depression was commonly understood to be an ailment from which people recovered, not the fatal disease Hnat said it was. Chrysler also claimed that only the incidents Gilbert directly reported to management could be considered alleged harassment. From Chrysler's perspective, because there were long periods between Gilbert's formal reports to management, the harassment consisted of a few, isolated events and Chrysler effectively prevented harassment from happening in the time between the reports. Chrysler claimed that, having only reported six unrelated acts of alleged harassment, Gilbert could not prove that she had been subjected to a hostile work environment.

Chrysler had mixed success in providing evidentiary support for these theories. For instance, Gilbert's attendance problem was documented and she had once been disciplined for drinking on the job and being away from her work area. Her supervisors, including Pilon, indicated that they had given her the benefit of the doubt a number of times because they knew she was dealing with personal problems. Additionally, all new hires went through a probationary period, when it would have been fairly easy to get Gilbert fired had the men really desired that result. Some of the witnesses, like Danielson, also testified that Nigoshian and Ernat, two journeymen millwrights with whom Gilbert had had significant problems, had been at Chrysler

for a long time and did not get along with most people. Nigoshian had also left Chrysler around 1995, eliminating the possibility that he had committed harassment later in Gilbert's employment with Chrysler.

On the other hand, though Potempa said that some men had asked not to work with Gilbert because they thought it was dangerous, he did not specifically say that any of the men had complained about her drinking. Though defense counsel, Johanna Armstrong, asked virtually all the Chrysler workers who testified whether they had seen Gilbert being moody, no one ever definitively replied that they had seen that behavior in Gilbert. Rather, some of the men had seen her try to act calmly in the face of offensive comments. At most, they had seen Gilbert cry after being harassed or reply when provoked. While some of the Chrysler workers recalled occasional incidents when Gilbert used a vulgar term, there was no evidence that she used shop talk regularly.

Armstrong pressed both Hnat and Katz about Gilbert's failure to attend AA consistently and whether Gilbert had been telling the truth in her therapy sessions. Hnat indicated that he believed that AA was generally beneficial to alcoholics, but to a lesser degree for women because of the dynamics of meetings and the difficulty in finding female sponsors. He also stressed that he did not think that AA or a similar program was an appropriate therapeutic approach for Gilbert – even if a court had ordered her to attend. In Hnat's opinion, AA helps people to deal with their emotions, but it was vital for Gilbert to minimize, not examine, the very strong emotions she was experiencing as a first step to her recovery. Only after she was sober and had some control over what she was experiencing could Gilbert begin to examine what was happening to her and attempt to develop coping strategies that did not involve alcohol or drugs. Additionally, Katz explained, Gilbert had tried to attend AA during their work with each other, but Gilbert's sponsor had not offered her the support she needed. Katz added that Gilbert had no reason to lie in therapy.

As for Chrysler's open door policy, which developed out of a new management plan negotiated with the union that was supposed to give workers more input into matters at the plant, Armstrong had a difficult time supporting the idea that Gilbert's failure to make formal reports more frequently prevented more action by Chrysler. For example, Michael Jessamy, a human resources manager who did not have specific knowledge of Gilbert's experiences, explained the complaint procedure available. Aside from recourse to the union, Chrysler encouraged employees to report harassment to their immediate supervisors, and if their supervisors were the harassers, to go to management. Jessamy did *not* indicate that Chrysler always required a written report to human resources, labor relations, or plant security. Holland also made this point, noting that the supervisors on the floor were often responsible for complaints and would remain involved in the matter even if the complaint was forwarded to management. There is no question from the record that Gilbert reported some incidents as they happened to Pilon and Potempa, even if she did not make a written report. The testimony of Lemmerz, Whitenight, and Gupton also suggested that the harassment was so open and obvious that it would have been impossible for Gilbert's supervisors not to know what was happening to her, even if they did not spend every minute of the shift with her. Even Holland, who did not know Gilbert and was only involved in investigating her complaint about the "poem," had heard about the harassment Gilbert was experiencing by March 1995. However, perhaps in Chrysler's favor, Gilbert did concede that she developed a suspicion about who had left the penis wrestling cartoon in her

toolbox, but did not want to tell Chrysler because of a combination of her fear of reprisal and the lack of foundation for her suspicion.

The area in which the defense had the most success was discrediting or minimizing the effect some of the witnesses might have had on the jury. For instance, Feiger elicited testimony from Lemmerz, Whitenight, and others that they did not receive a copy of Chrysler's sexual harassment policy following the penis wrestling cartoon until Gilbert made the copies herself. However, Pilon, Battaglia, and Standen's testimony suggested that Chrysler had taken some steps to inform the millwrights about the sexual harassment policy, and none of these men testifying on behalf of Gilbert were millwrights. Armstrong also provided ample testimony that these individuals did not work directly with Gilbert, and they had only minimal opportunities to observe the quality of her work and the alleged harassment she experienced. Armstrong, who emphasized through her cross-examination of Hnat that he was not a medical doctor, also cast doubt on how well he understood what was happening to Gilbert, pointing out that he may not have understood that she was under court order to attend therapy, Gilbert may have been drinking without reporting that to him, and he never took any steps to verify that Gilbert was experiencing any alleged harassment at work. With respect to Gilbert's credibility and vulnerability, Armstrong questioned Gilbert, Hnat, Katz, and others about the many personal problems Gilbert had. Armstrong elicited information about Gilbert's troubled past, her history of treatment and hospitalization before 1992, her alcohol consumption and subsequent discipline at work, drunk driving arrests, home confinement coupled with drug testing, and loss of her driver's license, and the fact that she had been fired from her job at McDonald's. Armstrong also read part of Gilbert's deposition testimony to the jury in which she mentioned finding a liquid, not urine, on her chair in 1994.

At the close of proofs the trial court, with the explicit consent from Armstrong and Feiger, instructed the jury on the law *before* the attorneys made their closing arguments. After the attorneys gave lengthy closing arguments, the trial court submitted the case to the jury with a special verdict slip. In returning their verdict in favor of Gilbert, the jury indicated that it found that Gilbert had been "subjected to sexual harassment in violation of the Michigan Civil Rights Act," and Chrysler had notice of the harassment, but did not "adequately investigate and take prompt and appropriate remedial action." The jury awarded Gilbert $20 million for her emotional damages and $1 million for future medical expenses.

II. Sexual Harassment

A. Overview

Following the jury's verdict, Chrysler brought a motion for JNOV, arguing in part that the evidence presented to the jury was insufficient to prove that Gilbert was subject to a hostile work environment, it had actual or constructive notice of the hostile environment, and it failed to take prompt remedial action. The trial court denied this aspect of the motion, holding that Gilbert had provided sufficient evidence of severe and pervasive harassment at her workplace that, when considered as a whole, constituted a hostile environment. With respect to the notice issue, the trial court held that Chrysler had actual notice that a hostile environment existed as early as 1993, when Gilbert verbally reported the penis wrestling cartoon to Pilon and in writing to management, followed by her report regarding the Polaroid photograph, four other reports, and her deposition, which Chrysler's agents acting in their official capacity first took in 1994.

The trial court also found that there was ample evidence that the harassment was constant and open for all to see, giving Chrysler constructive notice of the hostile environment. Finally, the trial court found that whether Chrysler's remedial actions, such as informing the employees of the sexual harassment policy, were adequate was a question of fact for the jury to decide. On appeal, Chrysler challenges the trial court's ruling on each of these components of the motion for JNOV.

B. Standard Of Review And Legal Standard

The discretionary language in the court rule concerning JNOV and case law suggest that appellate courts review a trial court's decision to deny a motion for JNOV to determine whether the trial court abused its discretion.[5] In the end, whether the trial court erred in denying Chrysler's motion for JNOV depends on whether there was a question of fact concerning which "reasonable jurors could have honestly reached different conclusions," making the jury the proper arbiter of the facts.[6] When reviewing the evidence to determine whether there was a factual dispute for the jury to settle, "this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party."[7]

C. Prima Facie Case

Recently, in *Chambers v Trettco, Inc*,[8] the Michigan Supreme Court reviewed in-depth the law governing sexual harassment in the workplace. The Court began its analysis by noting:

> Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102. Employers are prohibited from violating this right, MCL 37.2202, and discrimination because of sex includes sexual harassment, MCL 37.2103(i). In turn, "sexual harassment" is specifically defined to include
>
> "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment. . . .
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment. . . .

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[5] See MCR 2.610(B); *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 682; 607 NW2d 123 (2000).

[6] *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000).

[7] *Id*. at 260.

[8] *Chambers v Trettco, Inc*, 463 Mich 297; 614 NW2d 910 (2000).

> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . ." [MCL 37.2103(i).]
>
> The statute expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining "employer" to include both the employer and the employer's agents. MCL 37.2201(a).
>
> Sexual harassment that falls into one of the first two of these subsections is commonly labeled quid pro quo harassment. Sexual harassment that falls into the third subsection is commonly labeled hostile environment harassment. We have previously identified the elements that a party must establish in order to make out a claim for sexual harassment with respect to each of these categories.[9]

After explaining quid pro quo sexual harassment, the Supreme Court turned its attention to the hostile work environment theory:

> In order to establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:
>
> "(1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior."[10]

Further, the Court noted that

> it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent. Because the Civil Rights Act expressly defines "employer" to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees.[11]

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[9] *Id*. at 309-310 (footnotes, case law, and parallel statutory citations omitted).

[10] *Id*. at 311, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

[11] *Chambers, supra* at 311.

Nevertheless:

> [S]trict imposition of vicarious liability on an employer "is illogical in a pure hostile environment setting" because, generally, in such a case, "the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'"[12] Hence, we have explained:
>
> > "Under the Michigan Civil Rights Act, an employer may avoid liability [in a hostile environment case] 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.' Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker, or a supervisor of sexual harassment. An employer, of course, must have notice of alleged harassment before being held liable for not implementing action."
>
> The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some fault on the part of the employer. . . .[13]

D. Hostile Work Environment

In order to submit her claims to the jury, Gilbert had to prove that the nature of the sexual harassment to which she was subjected was

> "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances."[14]

Further, rather than seeing the severity of the harassment from Gilbert's perspective, the proper analysis examines whether "a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment."[15]

Chrysler claims that Gilbert's background, emotional problems, and alcoholism made her a particularly sensitive person. Chrysler also maintains that shop talk and similarly vulgar activities are the norm in the plant setting, not harassment. Consequently, Chrysler contends, a reasonable person encountering the same six, discrete, reported acts committed over the course of seven years would not have considered them so severe that they created a hostile work environment. Each of these arguments is flawed.

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[12] *Radtke*, *supra* at 396, n 46 (citations omitted in *Chambers*).

[13] *Chambers*, *supra* at 311-312.

[14] *Langlois v McDonald's Restaurant of Michigan, Inc*, 149 Mich App 309, 313; 385 NW2d 778 (1986), quoting *Henson v City of Dundee*, 682 F2d 897, 904 (CA 11, 1982).

[15] *Radtke*, *supra* at 372.

First, Chrysler provides no authority for its proposition that the only acts relevant to the hostile environment element of Gilbert's claim were the six acts she formally reported. Instead, in an argument that dominates its brief, Chrysler asserts its lack of notice defense.[16] Case law, however, instructs that whether conduct is sufficiently severe must be viewed under the totality of the circumstances.[17] The totality of the circumstances in this case encompasses acts that Gilbert reported, such as the penis wrestling cartoon, and acts that she did not report, such as the daily comments and derogatory remarks. Thus, we conclude that in determining whether Gilbert submitted sufficient evidence of hostile environment, the trial court was entitled to look at more than the six incidents she formally reported to management.

Second, there are competing considerations with respect to Chrysler's contention that Gilbert is more sensitive than an average, reasonable person. On the one hand, it appears that when Gilbert suffered the stress of harassment the *damages* she sustained were relatively more severe than those others sustain in that she relapsed into substance abuse and attempted suicide.[18] On the other hand, she appears to have been able to withstand the harassment better than others, maintaining sobriety for much of the first seventeen or eighteen months she worked at Chrysler and continuing to work more than eighty hours a week despite the harassment.

More importantly, the Supreme Court has concluded that the reasonable person standard is distinctly objective and does not adopt the view of any particular group or individual.[19] There is no evidence that Gilbert was especially sensitive to what she considered to be harassment; for example, she did not insist that the men abstain from all profanity. In fact, Pilon, Battaglia, Potempa, Standen, and other Chrysler workers indicated at trial that the conduct directed at Gilbert was minimally "improper," and was likely sexual harassment. It is also interesting to note that, at trial, the attorneys and some of the witnesses were apologetic for words they had to use to detail the verbal harassment Gilbert experienced, even spelling certain words to avoid saying them aloud.

Critically, the reasonable person standard also greatly undermines Chrysler's argument that the language at issue in this case is not actionable because it is "just shop talk" commonly used among the individuals working in automobile manufacturing plants.[20] Though the context of acts and language allegedly constituting harassment is certainly relevant as one of many factors comprising the totality of the circumstances,[21] there is no "reasonable millwright,"

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[16] In fact, Chrysler concedes that if it had adequate notice of the harassment, "a jury question was presented on the existence of a hostile work environment."

[17] See *Langlois*, *supra* at 313; see also *Radtke*, *supra* at 372, 387.

[18] To the extent that Gilbert's susceptibility to damages from what a reasonable person would interpret as harassment might be germane to this inquiry, and it does not appear at all relevant, the law is clear: defendants take their victims as they find them, increased sensitivity and all. See *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000).

[19] *Radtke*, *supra* at 388-394.

[20] See *id*. at 372.

[21] See *id*. at 389-391; see also *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 81; 118 S Ct 998; 140 L Ed 2d 201 (1998).

"reasonable skilled tradesperson," or "reasonable automobile plant worker" standard that can be used to define what constitutes harassment in place of the reasonable person. Even if most millwrights, skilled tradespeople, or automobile plant workers might have found the language to be commonplace, the prevalence of harassing conduct or language does not, alone, make it more acceptable under the Civil Rights Act.[22] Accordingly, keeping in mind the objective perspective the reasonable person standards requires and the favorable manner in which the Court must view the evidence,[23] we conclude that the record leaves no reason to believe that any particular sensitivity Gilbert had made her perceive the conduct aimed at her as harassing when a reasonable person would not find it offensive or hostile.

Third, returning to the totality of the circumstances viewed in the light most favorable to Gilbert,[24] a reasonable person would have no trouble concluding that the harassment she suffered was sufficiently severe and pervasive to constitute a hostile environment. A reasonable person, for example, would consider someone urinating on that person's chair to be a hostile act.[25] Certainly, there was no evidence that this was an accident, nor an innocuous tradition practiced among the male millwrights. Similarly, a reasonable person would consider a photograph of male genitalia left on a woman's toolbox soon after that woman had reported a previous harassing incident as a reprisal. One or more people had had evidently delivered this message previously by assembling pieces of hose to look like a penis, which was left for Gilbert on her toolbox. Seven years of daily references to Gilbert as a "asshole," "bitch," "whore," and "cunt" connected these incidents. There was no evidence that this was simply a form of affectionate familiarity the men used with each other, which they naturally extended to Gilbert. Instead, the record suggests that these names were used in a derogatory manner, and the dictionary confirms that the commonplace slang meaning for each of these terms is derogatory.[26]

Furthermore, this case involved more than name-calling or the occasional bawdy joke that would have no effect on Gilbert's working conditions. The evidence presented at trial indicated that coworkers interfered with Gilbert's work, refused to help her even when assigned to do so, and broke into her locker to deliver cartoons and other material. As a whole, these acts

[22] See *Radtke*, *supra* at 390, quoting Prosser & Keeton, Torts (5th ed), § 32, at 175 ("'The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical [reasonable] person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard . . . . [H]e is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.'").

[23] Interestingly, though Chrysler correctly insists that this Court apply the objective reasonable person standard, its sexual harassment policy provides a subjective standard, saying, "It is important to note that harassment, in any form, is in the eye of the recipient."

[24] See *Morinelli*, *supra* at 260.

[25] Cf. *Mancuso v Atlantic City*, 193 F Supp 2d 789, 803 (D NJ, 2002).

[26] See *Random House Webster's College* Dictionary (2d ed), p 80 ("asshole" is a "[v]ulgar" term referring to a "stupid, mean or contemptible person" or "the worst part of a place or thing"), p 135 (a "bitch" is "a malicious, unpleasant, selfish woman"), p 322 (a "cunt" is an "[o]ffensive" term used for a woman" and means a "contemptible or unpleasant person"), p 1467 (a "whore" is "a prostitute, esp[ecially] a woman who engages in promiscuous sexual intercourse for money").

sent a clear message to Gilbert that she did not belong at the plant because she was a woman and, therefore, she should quit. Thus, this case stands in contrast to *Linebaugh v Sheraton Michigan Corp*.[27] In *Linebaugh*, this Court held that a cartoon posted in the female plaintiff's workplace depicting her and one of her male coworkers in sexual activity was equally offensive to both individuals, and therefore not "gender-oriented" discrimination actionable under the CRA.[28] Needless to say, the sexual activity portrayed in the cartoons in this case was not gender neutral.

Though this case involves precisely the type of conduct the CRA prohibits,[29] Chrysler emphasizes the absence of physical assaults against Gilbert. While that may place the conduct in this case somewhat lower on the continuum of harassment than the worst abuse ever perpetrated in an employment setting, it does nothing to redeem the conduct at issue. Nor is there authority for Chrysler's suggestion that the law limits recovery to hostile environment cases involving physical assault. In sum, viewed in the light most favorable to Gilbert, a reasonable person could conclude that a question of fact existed concerning the degree and pervasiveness of hostility at this workplace, giving the jury a proper role in deciding this issue.

E. Actual And Constructive Notice

The key point Chrysler makes in its brief on appeal, which the case law amply supports, is that "an employer must have actual or constructive notice of the alleged harassment before liability will attach to the employer."[30] In 1982, the United States Courts of Appeals for the Eleventh Circuit explained the concepts of actual and constructive notice.[31] Courts of this state have since adopted this formulation, which states that

> [t]he employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.[32]

Recently, this Court defined the "higher management" language from this federal precedent to mean that, for an employer to have actual notice of harassment, the employee must report the harassing conduct to "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee."[33] This Court has not, however, altered or further defined the

[27] *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335; 497 NW2d 585 (1993).

[28] *Id*. at 341.

[29] See *Radtke*, *supra* at 383 (the harassing conduct need not be sexual in nature, but directed at the plaintiff because of the plaintiff's sex).

[30] *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001); see also *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 235; 477 NW2d 146 (1991).

[31] See *Henson*, *supra*.

[32] *Id*. at 904 (citations omitted); see also *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988), adopting *Henson*.

[33] *Sheridan*, *supra* at 622.

circumstances pertinent to constructive notice.[34] Chrysler contends that it lacked both actual and constructive notice of the reported and unreported harassment Gilbert experienced and, therefore, it could not be held liable despite the jury's verdict.

Chrysler claims that, even though Gilbert reported six incidents to management, it lacked actual notice of these incidents because she withheld the name or initials of her harasser or harassers. There is no merit to this argument. As the Supreme Court reaffirmed in *Chambers*, in order to hold an employer responsible for its employees' harassing conduct under the theory of respondeat superior, the employer must have notice "'"of the alleged hostile work *environment*."'"[35] The key word here is "environment." In order to have actual notice that a hostile *environment* exists, an employer need not necessarily have notice of every harassing incident.[36] The amount of information known to the employer, and when it became known, is relevant to whether the investigation it undertakes and whether the remedy it puts in place is reasonably adequate. The nature of Gilbert's complaints, many of which she or which another Chrysler documented in writing, directly notified Chrysler that she was experiencing harassment and considered her environment to be hostile to her because of her sex. It cannot be said that Chrysler was actually unaware of these reported incidents.

Whether Chrysler had actual notice of the incidents Gilbert did not formally report to human resources, labor relations, or security is a more difficult question in light of the requirement that an employee report harassment to "higher management." In a recent case, this Court held that it was insufficient for the plaintiff, a custodian, to report the harassment to her supervisor, a head custodian who was not part of management, especially because the sexual harassment policy in effect informed her to report harassment to an "appropriate supervisor."[37] Pilon, Potempa, and Gilbert's other immediate supervisors to whom Gilbert claimed to have reported the harassment most frequently were not part of management. However, Chrysler's sexual harassment policy,[38] which Jessamy confirmed at trial, instructs employees to report suspected harassment to an "immediate supervisor or manager. If the complaint is regarding conduct of his/her immediate supervisor or manager, the employee should contact" a listed person in the personnel department. If an employee does report the incident to an immediate supervisor or manager, the sexual harassment policy provides that the immediate supervisor or manager "should inform the employee that a thorough investigation will be conducted and then contact the Personnel Manager immediately." Apparently, though immediate supervisors and managers may not be considered sufficiently "high" in management to provide actual notice in other corporations, Chrysler has chosen to designate them as appropriate individuals to receive

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[34] See *id*. at 627.

[35] *Chambers*, *supra* at 312, quoting *Radtke*, *supra* at 396, quoting *Downer*, *supra* at 234 (emphasis added).

[36] See *Chambers*, *supra* at 319 ("[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been *aware of a substantial probability that sexual harassment was occurring*.") (emphasis added).

[37] *Sheridan*, *supra* at 623-625.

[38] Chrysler stated this policy in a bulletin, dated May 27, 1993, immediately after Gilbert reported the wrestling cartoon.

reports for the purpose of notice for coworker harassment. As Holland suggested, supervisors can handle some complaints by themselves, and often remain involved in cases once higher management becomes involved. Accordingly, it is at least arguable Gilbert provided actual notice of coworker harassment when she informed Pilon, Potempa, and other supervisors about what she was experiencing, although it was an inadequate method of complaining about harassment from her supervisors.

Even if reporting these incidents to Gilbert's immediate supervisors was insufficient to provide Chrysler with actual notice of the harassment for which she did not contemporaneously lodge a more formal complaint with someone higher in management, she did report the vast majority of these events when Chrysler deposed her. Chrysler, however, contends that notice given to its attorneys after Gilbert filed suit was insufficient as a matter of law. Chrysler does not provide any authority for this proposition. This case is unusual in that Gilbert continued to work for Chrysler even after filing suit and had new incidents to report. Of course, to the extent that she was reporting older incidents in an untimely manner, a jury could certainly consider whether Chrysler could do anything in response to those older events. However, Gilbert's deposition testimony effectively alerted "higher management" of the ongoing harassment because Chrysler's attorneys were acting as agents for the corporation in gathering this information. Chrysler is "'deemed bound by the acts of [its] lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."'"[39] In simpler terms, "[n]otice to an attorney relevant to a given matter is notice to the client employing him in relation to such matter."[40]

Chrysler also claims that any harassment Gilbert suffered was insufficiently obvious and severe to attribute knowledge of the harassment to the corporation. According to Whitenight, Lemmerz, and Gilbert, the harassment was harsh and obvious to anyone who worked on the plant floor, including Gilbert's supervisors. Even Holland had heard about the harassment Gilbert was experiencing before he became involved in investigating the "poem" in March 1995. To the contrary, Baker claimed not to see anything suspicious the times she walked around the floor and Gilbert's supervisors characterized much of the conduct at issue as merely inappropriate, not harassment. Determining what to believe when the evidence conflicts, as with this issue, is just the sort of question that should be left to the jury.[41]

F. Investigation And Remedial Action

Chrysler acknowledges that it has an obligation to "take prompt and adequate remedial action upon notice of the creation of a hostile work environment."[42] Nevertheless, Chrysler

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[39] See *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), quoting New York v Hill, 528 US 110; 120 S Ct 659, 663; 145 L Ed 2d 560 (2000), quoting *Link v Wabash R Co*, 370 US 626, 634; 82 S Ct 1386; 8 L Ed 2d 734 (1962), quoting *Smith v Ayer*, 101 US 320, 326; 25 L Ed 955 (1880).

[40] *Kastle v Clemons*, 330 Mich 28, 32; 46 NW2d 450 (1951).

[41] See *Anton, supra* at 689.

[42] *Chambers, supra* at 312, interpreting *Radtke, supra*.

claims that it conducted the appropriate investigations and took immediate action after each of the six formal complaints. Chrysler adds that the length of time between complaints indicated that the remedies were adequate, and that it cannot be held responsible for investigating and taking action for all the other acts of alleged harassment, primarily because Gilbert had not cooperated in reporting them.

According to Gilbert's proofs, Chrysler did little, if anything, each time she made a formal report of an incident to management, and certainly nothing that was designed to prevent future harassment. For instance, none of the witnesses at trial could point to any investigation of any pre-November 1994 incident Chrysler undertook after it deposed Gilbert, even though a number of incidents had occurred close in time to the deposition and after it. Chrysler never found any of the individuals who left the cartoons for Gilbert, broke into her locker, or blocked her toolbox, though it provided evidence that other people may have experienced similar acts. Though Chrysler reprimanded Potempa, as well as Gilbert's coworker who made the "big meat" comments, there is no evidence that it ever disciplined anyone else for harassing Gilbert, much less stopped the harassment from occurring. Pilon conceded that if some of what had happened to Gilbert had happened to either of Chrysler's recent chairmen, Chrysler could have determined who committed the harassment. There was also testimony that when there was either theft or sabotage at the plant, Chrysler had used cameras to catch the perpetrator. Some of Chrysler's remedies were also focused on Gilbert, such as transferring her to another shift, rather than attempting an investigation. Still, Chrysler elicited testimony from Gilbert that she suspected who had left the cartoon but would not reveal who it was. Her memory of exact dates was also hazy, making investigation without a contemporaneous complaint difficult or impossible. Some of the Chrysler employees who testified also suggested that collective bargaining agreements and other regulations prevented surveillance and other investigation techniques. This is another issue best left to the jury because the evidence presented by both parties conflicted.[43]

G. Conclusion

Returning to the standards applicable to the motion for JNOV, it is clear that Chrysler's arguments either lacked legal merit or that a factual debate existed with respect to each of the issues it raises concerning the evidence of Gilbert's prima facie case. Viewing the evidence in the light most favorable to Gilbert, we conclude that the trial court did not abuse its discretion in denying the motion for JNOV on these grounds.

III. Feiger

A. Background

The trial in this case took place over the course of a month. During that month, Armstrong objected approximately forty-two times. These objections were largely routine challenges to the evidence, including the relevance of testimony or exhibits and the evidentiary foundation for statements. The trial court overruled about twenty of these objections and

[43] See *Anton, supra* at 689.

sustained about fifteen of the objections. Not once during the trial did Armstrong object to Feiger's demeanor or his language.

In his closing arguments, Feiger outlined the harassment and damages he argued that Gilbert had proved and then described how he thought the jury should have Chrysler compensate her:

> The law of this state requires you to consider all of those things from March of 1992 to the present and into the future.
>
> Now, how you do that, God speed, I don't know that. You must consider the days, the minutes, the hours, and the weeks that she went through for seven years, and for as long as God gives her on this plant [sic], God help her, and allows her to maintain on this plant [sic], despite the disease that she is suffering from, the disease that she will suffer from, and that will kill her, you must consider that, and so that your verdict reflect [sic] the enormity of the wrong, the intolerable nature of the injury, the extent of the humiliation, the torture, the extent of the outrage perpetrated upon, I can suggest, and you can go back in your jury room, and you determine whether this is right. That it should be more, that it should be less.
>
> But I suggest to you that you award as full and complete justice for the seven years of past and for the future, whatever it holds, $140,000,000.00 You can break it any way you want.
>
> No one should ever, "we hold these truths to be self-evident that all people are created equal. That each one of us is entitled and endowed by our creator with certain unalienable rights, including those are the right to life, liberty, and the pursuit of happiness." And with all due respect, the hopes and dreams of all free Americans exist in Linda [Gilbert] the way they do in all of us.
>
> And to destroy those, and to subject anyone to the type of indignity and injustice and intolerable acts that this woman has been subjected to for the past seven years, that figure reflects a symbol, if you will, since you can't adequately compensate her for every –

Armstrong interjected, arguing:

> Your Honor, I object. He is strictly going to punitive damages instructions at this point. He is not talking about compensating for injuries. He is talking about sending a message.
>
> Certainly, that number is also talking about sending a message. That is not permitted in this case, your Honor.
>
> Strictly compensation for damages to the extent any liability has been found.

Feiger quickly responded, "Let me make it clear. This figure will not adequately compensate her. This figure is too low. She will never recover her health, but she may recover some sense of dignity." The trial court, ruling on the motion, agreed with Armstrong and admonished Feiger before issuing a curative instruction:

> Members of the jury, with regards to the argument of counsel, that is not to be considered by you as the law that you are to apply in the case. We have already given you the instructions of law as to the proper elements of damage and how you are to compute damage. So, if you heard anything that is in conflict with what the Court told you with regard to that, then disregard what the lawyers say and rely on your memory of the Court's instructions.

Feiger then continued with his closing argument. He compared Gilbert's bravery and fortitude to the sabras who settled Israel after World War II, to Rosa Parks' decision to assert her rights, and to Arthur Ashe's decision to announce publicly that he had AIDS. He compared Gilbert's suffering to the mythological Prometheus enduring a bird pecking at him daily, calling Gilbert's experience "abuse," "torture," and other terms. Feiger also urged the jury to "ring the bell of justice" and make a "loud," "clear," and "high" award several times. Armstrong did not object to any of these statements.

After trial, Chrysler moved for a new trial or remittitur because, it claimed, Feiger had committed misconduct in asking the jury to award punitive damages in this section of his argument and by asking the jury to ring the bell of justice, as well as by using hyperbole. The trial court noted that it had properly instructed the jury concerning allowable damages, and the special verdict slip only provided a space for the jury to award compensatory damages, not punitive damages. Consequently, the trial court denied the motion because there was "no evidence here to believe that the jury did anything but award compensatory damages." With respect to Feiger's hyperbole, the trial court indicated that it was "difficult to conclude" that the comments

> diverted the jury from the issues at hand since the comments to which Defendant objects go to the core of the case. To take just one example, Defendant objects to his [Feiger] saying that Plaintiff had been exposed to a "living hell" by harassment. Obviously, the quality of the harassment and its impact on Plaintiff were directly relevant. . . .

The trial court found it particularly relevant that, if inflammatory, these remarks did not draw a single objection. In a lengthy footnote, the trial court added that

> to paraphrase a writer's words about a particularly acerbic critic, this might be a case in which venom serves as its own toxin, so to speak. If a lawyer peppers her statements to the jury with incendiary and exaggerated references and comparisons, she risks alienating the jury. Unfounded comparisons and the like will lead jurors to discount not only the comparisons themselves but everything else the lawyer says. . . .
>
> [T]he self-correcting nature of the problem becomes especially strong for allusions to important historical events; at oral argument, counsel for defense

> alleged that Plaintiff's counsel had gone to the extent of equating what Linda Gilbert suffered to what the Jews suffered at the hands of the Nazis during Word War II, the implication being, according to defense counsel, that Chrysler was equated to the Nazis. The public in general, not only people who lost relatives during the Holocaust, might be deeply offended by such comparisons . . . .

On appeal, without specifying the precise legal ground on which the trial court should have granted a new trial, Chrysler contends that Feiger used inappropriate hyperbole at trial that mischaracterized the evidence and that he appealed to the jury to award punitive damages, partly on the basis of the Chrysler's new German ownership.

B. Standard Of Review

This Court reviews a trial court's decision to grant or deny a motion for remittitur to determine whether the trial court abused its discretion.[44] The abuse of discretion standard of review also applies to a trial court's decision to grant or deny a motion for a new trial.[45]

C. Attorney Conduct

MCR 2.611 permits a trial court to grant a motion for a new trial if a party's "substantial rights are materially affected"[46] by "[m]isconduct of the . . . prevailing party."[47]

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.[48]

Attorney misconduct can take the form of comments in examination or arguments made directly to the jury.[49] However, given an attorney's obligation to be a zealous advocate for his client's

[44] See *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000).

[45] See *Morinelli, supra* at 261.

[46] MCR 2.611(A)(1).

[47] MCR 2.611(A)(1)(b).

[48] *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).

[49] See, generally, *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 464-466; 624 NW2d 427 (2000); *Badalamenti v Beaumont Hosp – Troy*, 237 Mich App 278, 290-291; 602 NW2d 854 (1999).

interests, not every comment or question that vividly draws attention to the lack of merit in the opposing party's evidence and arguments is misconduct.[50] Rather, to be misconduct, the comment or question must be designed to inflame the jurors' passions so they will disregard the evidence in rendering a verdict, thereby causing *unfair* prejudice to the opposing party.[51]

According to Chrysler,

> plaintiff's counsel used declamatory questions, before-the-jury-colloquies, and closing argument to convey totally distorted, hyperbolic, and inflammatory descriptions – "daily and brutal sexual harassment, "never ending repeated incessant activities," "daily torture, "harassment is far too gentle a word," "brutal, brutal sexual abuse," and the like. He even made the preposterous claim that plaintiff had suffered "15,000 incidents" of sexual harassment, and asserted falsely that "some of the supervisors even joined in the abuse."[52]

We find little support for Chrysler's claims with regard to Feiger's comments on most of the pages it cited. For instance, on one of the pages Chrysler claims Feiger used hyperbole, he merely asked Hnat why Gilbert "was hospitalized" and what effect "years of sexual harassment," which consisted of "never ending repeated incessant activities," would have on her. Hyperbole is "obvious and intentional exaggeration."[53] Notably, not one of Feiger's comments during trial drew an objection from Armstrong.

As for Feiger's comments during closing arguments, which is when the majority of the passages Chrysler now cites occurred, we conclude that they did not amount to misconduct. Feiger indisputably used vibrant terms to describe the harassment's severity. However, words like "torture," which means "extreme anguish of body or mind,"[54] and "abuse," which means "to speak insultingly or harshly to or about," were shocking only because the jury had an evidentiary basis to conclude that they were accurate characterizations of what had occurred.[55] Though Chrysler contends that Feiger suggested to the jury that Gilbert had suffered physical assaults when there was no proof of any physical assaults, the context in which Feiger made those comments does not permit that inference. Rather, as with the other comments, Feiger was emphasizing the unremitting and severe nature of the harassment, not insisting that anyone had physically assaulted Gilbert.

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[50] See, generally, *Schunk v Zeff & Zeff, PC*, 109 Mich App 163, ; 311 NW2d 322 (1981) ("[A]n attorney has a duty to be a zealous advocate. The lawyer's obligation to his client thus permits the lawyer to assert that view of the law most favorable to the client.").

[51] See *Esparaza v Manning*, 148 Mich App 371, 377; 384 NW2d 168 (1986); *May v Parke, Davis & Co*, 142 Mich App 404l 422-423; 370 NW2d 371 (1985).

[52] Citations to the record omitted.

[53] See *Random House Webster*, *supra* at 641.

[54] *Id*. at 1358.

[55] *Id*. at 6.

More importantly, while Chrysler contends that Feiger misrepresented the record in arguing that Gilbert's supervisors engaged in the harassment, Gilbert did provide evidence that Potempa and Hicks used inappropriate language with her, which the jury might interpret as harassment. Similarly, though Chrysler maintains that there was no support for Feiger's argument that it failed to undertake any investigation, the evidence related to this issue was in conflict. Chrysler could not document what steps it had taken. This left a credibility contest between Gilbert, who said that Chrysler did not look into what had happened to her, or if it did, took no action on her behalf, and Pilon and others who claimed that they had done all that was possible because she was withholding information.

Further, Chrysler claims that Feiger was drawing parallels between Nazi atrocities against Jews during the Holocaust with Chrysler as a way to inflame the jury against its new German ownership. In fact, though Feiger suggested that the jury send a message to the Chrysler board room in Stuttgart, he never drew any explicit connection between the Nazis and the German corporation. Rather he referred to the Holocaust survivors who immigrated to Israel as symbolic of Gilbert's strength. We conclude that Chrysler's new corporate identity was never an issue at trial.

Chrysler clearly mounted a vigorous defense. However, Gilbert and the witnesses testifying on her behalf provided an ample evidentiary basis for jurors to conclude, consistent with Feiger's theories and remarks, that Gilbert truly suffered because of the harassment she experienced at Chrysler and that Chrysler's response was either nonexistent or inadequate. The jury just found Gilbert's evidence more convincing than Chrysler's evidence, as was its right.[56]

The trial court's behavior stands out against this backdrop of conflicting evidence. Though Chrysler asserts that the trial court itself acted improperly, the trial court took all appropriate actions to ensure that the jury understood the limited role of the attorneys' arguments and that it applied the proper law when determining liability and calculating damages.[57] We agree with the trial court that the jury's large award stemmed from the evidence, not from any allegedly improper argument. As the trial court noted, Feiger's comments were evidently minor enough to avoid Armstrong's attention. She objected only once during Feiger's closing arguments to his punitive damages argument, and not once to the other comments or questions Chrysler now claims were misconduct. Nor did Armstrong comment on Feiger's dramatics at any time during her own argument, which spanned more than one hundred pages of transcript and what appears to be about two hours.

It is safe to say that the circumstances of this case make it unusual and, perhaps, more severe than most other harassment claims. This is so because, despite the extremely long hours Gilbert worked, during which she was exposed to continuing harassment, Gilbert did not quit. If the jurors believed the testimony Gilbert, Lemmerz, Gupton, Whitenight, Hnat, and Katz provided, they could easily agree that Gilbert's experience at Chrysler was terrible, and certainly

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[56] See *Hutton v Roberts*, 182 Mich App 153, 162, 451 NW2d 536 (1989).

[57] See *Esparaza*, *supra* at 377-379 (plaintiff's attorney's argument asking for punitive damages was harmless because the trial court instructed the jury on the proper measure of damages and the verdict slip did not provide the jury an opportunity to award punitive damages).

enough to cause her to start drinking again and attempt suicide. With her history of relapses and attempted suicides, added to Katz and Hnat's testimony, it is no stretch of the imagination that Gilbert might die prematurely, whether from the physical effects of alcoholism, another suicide attempt from her major depressive disorder, or in an alcohol-related car crash. Further, in a move that might be described as provident, the trial court decided to instruct the jury on the law *before* the jury heard closing arguments. In this way, the trial court ensured that the jury knew the limited value of the lawyers' arguments before hearing them, minimizing the potential that any inflammatory statements would actually inflame the jurors. Even the jurors themselves indicated that they were exercising their independent abilities to reason, rejecting the figure Feiger requested in damages, awarding a far smaller – though still large – amount.

We conclude that there is insufficient evidence that Feiger's arguments were misconduct that "materially affected" affected Chrysler's substantial rights, especially given the possibility that Armstrong did not object at trial. Consequently, the trial court did not abuse its discretion in denying the motion for new trial and remittitur on these grounds.

IV. Hnat

A. Standard of Review

Chrysler argues that several, disparate portions of Hnat's testimony proved that he and Feiger colluded to perpetrate a fraud in this case. In light of this fraud, Chrysler argues, the trial court should have granted its motions for a new trial, an evidentiary hearing, or relief from judgment. This Court reviews a trial court's decision to deny a motion for a new trial to determine whether it abused its discretion,[58] applying the same standard of review to decisions regarding motions for an evidentiary hearing and relief from judgment.[59]

B. Hnat's Relationship With Feiger

In his opening statement to the jury, Feiger revealed to the jury that he knew Hnat, Hnat had worked on Feiger's 1998 gubernatorial campaign, and that Hnat had worked for his law firm on other cases in 1998 and 1999, after he treated Gilbert. Feiger claimed that Hnat did not have any contact with him or his law firm while he was treating Gilbert. Consequently, he indicated to the jury, the fact that Hnat was testifying in this case was a coincidence. After the summer 1999 trial, Chrysler found newspaper articles regarding Feiger's gubernatorial campaign and a television interview from April 1999, which discussed Hnat's friendship with Feiger. Chrysler also allegedly found proof that Hnat had worked with Feiger on many cases. According to Chrysler, Feiger and Hnat had purposefully withheld this information, critical to Hnat's credibility, from the jury at trial, which is why it claimed that it was entitled to a new trial or other relief.

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[58] See *Morinelli, supra* at 261.

[59] See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 645; 607 NW2d 100 (1999); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 300; 517 NW2d 319 (1994).

Feiger and Hnat responded to Chrysler's motion for a new trial with affidavits in which each claimed to have become acquainted with each other while attending the University of Michigan in the 1970s. Both men said that theirs was a casual relationship marked by occasional contact with each other over the years, with Hnat assisting Feiger only lately. They may have seen each other at social events, but did not spend time with each other. Hnat had *retained* another attorney in Feiger's firm to help him with a contract dispute and an employment dispute in 1990. However, Feiger said he had "little to no involvement" in either case. In the early 1990s, when Hnat was seeking a divorce from his wife, an attorney outside the Feiger firm had referred Hnat to Feiger to handle his divorce, but neither Feiger nor his firm handled the case. Feiger said that the first time he worked with Hnat was in 1996, when Feiger was defending Dr. Jack Kevorkian. Feiger said that "[a]fter that, and not beginning until late in the following year, 1997, Stephen Hnat has worked on many of my trial as a consultant."

The trial court denied Chrysler's motions concerning the depth of this relationship for three reasons. First, it concluded that "[h]ow to describe a relationship between two people inevitably calls for a subjective judgment: [sic] 'closeness' is in the eye of the beholder." Evidently, the trial court did not agree with Chrysler that the materials it produced varied greatly from how Feiger had described his relationship with Hnat to the jury. Second, the trial court reasoned that all the material Chrysler produced in support of its motions had existed before trial, but had not been discovered because of Chrysler's lack of diligence. In the trial court's view, this lack of diligence was inconsistent with the requirements for a motion for a new trial and relief from judgment. Finally, the trial court noted that federal precedent held that witness perjury was not grounds for a new trial because it could have been challenged at trial.

MCR 2.611 allows a new trial for "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." That the material Chrysler discovered had been released publicly no less than two months before trial suggests that it could have discovered in time to be presented to the jury. MCR 2.612(C)(1)(b) is a similar court rule, permitting relief from judgment if a party comes across "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." This court rule does not apply because Chrysler did file a timely motion for a new trial. MCR 2.612(C)(1)(c), the court rule allowing relief from judgment, does also permit relief if there was "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Despite Chrysler's attempts to characterize Feiger's and Hnat' representation of their relationship as springing from some improper motivation, there was no evidence that Feiger referred Hnat to Gilbert or vice versa, much less evidence of fraud. In fact, regardless of the relationship Feiger had with Hnat, he did treat Gilbert for about two years and, therefore, had pertinent factual details to relate to the jury.

Feiger revealed his relationship with Hnat in his opening statement. Feiger did not describe this relationship in detail. Armstrong also asked Hnat about the relationship during her cross-examination, but did not ask him any specific questions that would have elicited the information Chrysler subsequently discovered. As the trial court observed, the strength of a bond between people is a largely subjective question, and there is no evidence that Hnat actually provided any testimony about the relationship that he knew was false. In her closing arguments, Armstrong also argued that Gilbert's case rested on Hnat's testimony and that he was not believable because of his connection to Feiger. The jury certainly had enough information about

this connection to conclude, if it chose to do so, that Hnat might not be objective or credible. If there was any error in not revealing more of the relationship, the error was harmless and, therefore, does not merit reversal and a new trial for Chrysler.

C. Hnat's Credentials

When Feiger first called Hnat to the stand to testify, he had Hnat review his accomplishments and credentials for the jury. According to Hnat, he received a Pillsbury Award in 1980 for a thesis on psychology he had written while a graduate student. Feiger also asked Hnat, "What program specifically were you admitted to at the University of Michigan?" Hnat replied, "It was combined, doctoral studies in social work and through the Department of social work and doctoral studies in psychology through the Department of Psycho-Biology." Feiger inquired when he completed his studies, and Hnat revealed that he "did not complete the Ph.D." Instead, Hnat explained, "I stopped when I got my Masters degree in Psycho-Biology" in 1985. Feiger followed up this explanation by stating, "Your curriculum also indicates between that time between 1980 and 1985 when you received your degree in Psychology and Psycho-biology you were awarded master of social work in interpersonal practice. What was that?" Hnat then explained the foundation for psychiatric social work. Later, after the trial court accepted Hnat as an expert in "substance abuse care and treatment," Feiger asked Hnat to review one of Gilbert's hospital records, asking:

> In terms of her [Gilbert's] treatment at Sacred Heart, BiCounty Hospital, Eastwood Hospital, which is part of St. John's Hospital, was she treated at those facilities by people such as yourself, counselors, MSWs [people holding masters degrees in social work], psychologists and psychiatrists with this type of expertise that you have described to us this morning?

Hnat replied, "Yes. As a matter of fact, I trained Ms. Walsh" and other individuals who treated Gilbert at Sacred Heart Hospital.

Though Armstrong did not object to any of this testimony, following trial, Chrysler moved for a new trial or relief from judgment. Chrysler claimed that Hnat did not earn the Pillsbury award, he had not received a master's degree in psycho-biology, and that he had misrepresented that he had credentials equivalent to a psychiatrist or psychologist. Hnat conceded that he had not received the Pillsbury award, claiming the statement was inadvertent, and clarified that he had completed the coursework necessary for a master's degree, and had not misrepresented his qualifications.

The trial court rejected Chrysler's arguments, denying the motion on these grounds. As the trial court indicated in its written order and opinion, the inaccuracies in Hnat's testimony were not "large." Though Hnat had not earned the master's degree in psycho-biology, he had completed the coursework, giving him a legitimate background in the subject. Additionally, Hnat had never claimed at trial that he was a psychiatrist or psychologist. Overall, the trial court did not think that the flaws in Hnat's testimony were substantial, much less that they amounted to fraud.

The trial court, which heard Hnat's testimony and could see its effect on the jury, was in the best position to determine whether Hnat had simply misspoken.[60] Further, Hnat freely admitted several times in his testimony that he was not a psychologist or psychiatrist, noting when he lacked information to answer questions regarding medicine or other areas outside his expertise. Feiger explicitly corrected himself the one or two times he accidentally called Hnat "Dr. Hnat," and Armstrong emphasized in her cross-examination of Hnat and closing argument that he was not a psychiatrist, psychologist, or any sort of doctor. Further, the reference to the Pillsbury award was fleeting, not a significant factor in Gilbert's case. Overall, Hnat's testimony was consistent with his actual credentials, including his experience treating substance abusers, which Hnat documented with letters from several individuals and organizations in response to the motion. The record suggests that there was little possibility that the jury misunderstood the scope of Hnat's expertise. The trial court did not err in concluding that these flaws in his testimony did not taint the trial and resulting verdict to the extent that a new trial was necessary. More importantly, there is no evidence that Feiger and Hnat colluded to make these misrepresentations, as Chrysler claimed. Consequently, the trial court did not err in denying the motions on these grounds.

D. Gilbert's Medical Records

According to Chrysler, Feiger and Hnat engaged in a scheme to deprive it of access to parts of Gilbert's medical records. This allegedly denied Chrysler an opportunity to reveal to the jury matters relating to Gilbert's willingness to seek treatment and the harassment she was experiencing. When the trial court denied Chrysler's motion for a new trial or relief from judgment on this ground, it placed the blame for Chrysler's lack of access to the information to its own attorneys. In the trial court's view,

> The parties here appear to have disagreed with the wording of the authorization designed to produce at least some of the records at issue. Unfortunately, Defendant never brought a motion to compel to resolve this dispute. Similarly, with respect to the other sets of records, Defendant seems to have made only half-hearted efforts to obtain them. Indeed, the record shows that some of the records allegedly hidden by Plaintiff do not exist.
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> * * *
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> Defendant here appears to have piggybacked on Plaintiff's own efforts to obtain records. Thus Defendant complains that it relied on a representation that Mr. Feiger had made at a pre-trial conference concerning the completeness of the records. . . . Defendant ignores the fact that it had an independent responsibility to secure for itself the complete records.

On appeal, Chrysler claims that Feiger had issued subpoenas for the medical records, directing that they be delivered to his office, which was a scheme to deprive Chrysler of the records. This was the start of what Chrysler calls Feiger's attempt to "hijack" the records,

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[60] See, generally, MCR 2.613(C).

worsened at trial because Hnat kept up a "charade" concerning the date he began treating Gilbert and her good prognosis for recovery when she began working at the Jefferson North Assembly Plant. There can be no merit to Chrysler's arguments with respect to Feiger's duty to share records that never existed. Chrysler provides no authority for its proposition that it was somehow improper for Feiger to request Gilbert's medical records in order to prepare the case. Further, at trial, Chrysler fully explored the possibility that Gilbert was not firmly in recovery and did not have a good prognosis at the time she started her job in March 1992. In short, regardless of Feiger's strategy in obtaining the records, Chrysler has not provided evidence of fraud, much less that the records it did not see had evidence that would have affected the jury's verdict. At most, any error in the trial court's ruling that Chrysler had not articulated sufficient grounds for a new trial or relief of judgment was harmless.

E. Hnat's Representations Concerning Gilbert's Drunk Driving Record

At trial, Feiger and Armstrong both questioned Hnat extensively regarding why Gilbert started treatment with him. In Hnat's opinion, Gilbert started treatment voluntarily, because she had been going through a difficult time, and she wanted to feel better and stop abusing substances. Armstrong brought out the possibility that a court had ordered Gilbert to seek treatment, asking Hnat, "At the time that she saw Dr. Yousef,[61] was it your understanding that she was seeing Dr. Yousef relating in any way to her driving legal problems with regards to her driving?" Hnat answered, "No, my understanding the precipitant was she was upset about the breakup of a relationship."

Following trial, Chrysler contended that Gilbert's drunk driving record would have proven that she sought treatment because a court ordered her to do so, not because she was motivated to recover and sought treatment voluntarily. Chrysler claimed that Hnat had purposefully concealed this information. The trial court did not comment on this issue specifically.

Hnat's response in this passage and at other times during his testimony was not intended to verify or conclusively rule out the possibility Gilbert had been arrested for drunk driving before he began treating her or was under a court order to seek therapy. Rather, his testimony suggested that he personally observed Gilbert's motivation to recover and that this motivation could not be attributed merely to a court order compelling her to attend therapy. For instance, he explained, Gilbert sought treatment for much longer than a court order would require, even after her insurance stopped paying for the treatment. Further, Hnat's testimony suggested that whether Gilbert was under court order to seek therapy was irrelevant to how he treated her in therapy, giving him no reason to focus on this information. Even if this record had been available, Armstrong would have been unable to impeach Hnat on this issue any further. While the record may have clarified any court order in place when Gilbert sought treatment from Hnat, it would reveal nothing about Hnat's knowledge or memory of the order, or his alleged intent to conceal this information from the jury. As with the other issues raised, there simply is no

[61] Dr. Yousef was the psychiatrist in Hnat's clinic who evaluated Gilbert before referring her to Hnat.

evidence that Hnat intentionally misrepresented anything related to Gilbert's drunk driving record, making the trial court's ultimate ruling to deny the related motions proper.

V. Evidentiary Issues

A. Standard Of Review

In its postjudgment motions for a new trial or remittitur, Chrysler challenged a number of the trial court's evidentiary rulings. On appeal, Chrysler maintains that the trial court's original evidentiary rulings, as well as its subsequent decision to deny the motions for a new trial or remittitur on this basis were erroneous. This Court reviews a trial court's decision to deny a motion for a new trial to determine whether it abused its discretion,[62] applying the same standard of review to decisions regarding motions for remittitur,[63] the admissibility of evidence,[64] and whether to qualify a witness as an expert.[65]

B. Deposition Testimony

At trial, Armstrong objected to Feiger's attempt to introduce transcripts of the depositions Chrysler took from Gilbert and Lemmerz. Feiger argued that the transcripts were admissible, not to prove that Gilbert's allegations were true, but to show that Chrysler had notice of her complaints no later than November 1994. The trial court agreed, allowing the jury to consider the depositions relative to the Chrysler's notice defense. On appeal, Chrysler neither explains the legal reasoning behind its continuing objection to the admissibility of this evidence, nor provides any authority to support this point. Even though Chrysler refers to an earlier section of its appellate brief in which it claimed that deposition testimony was inadequate to prove notice, it provided no support for that proposition. Hence, it has abandoned this issue.[66] Further, Chrysler failed to present this issue for appeal by listing it in the questions presented.[67] Regardless, notice to an attorney is notice to the client,[68] making the depositions admissible as relevant,[69] and used for a purpose outside the scope of the definition of hearsay.[70]

C. Hnat's Qualifications As An Expert

When Feiger asked the trial court to certify Hnat as an expert so he could render opinions about Gilbert, Armstrong objected, essentially contending that a social worker could not testify

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[62] See *Morinelli, supra* at 261.

[63] See *Leavitt, supra* at 305.

[64] See *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998).

[65] See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 454; 633 NW2d 418 (2001).

[66] *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 156, n 7; 565 NW2d 868 (1997).

[67] See MCR 7.212(C)(5).

[68] See *Kastle, supra* at 32.

[69] See MRE 402.

[70] See MRE 801(c).

as an expert on substance abuse. Feiger, who had Hnat lay a foundation concerning his experience and credentials, argued that Hnat had always been listed in the pleadings as an expert in his field. The trial court agreed with Feiger, allowing him to testify as an expert in "substance abuse care and treatment."

Following trial, Chrysler contended that it was entitled to a new trial or remittitur because Hnat should not have been allowed to testify as an expert on matters such as the physical effects of alcohol abuse, including the effect of alcohol on brain chemistry and whether Gilbert was "dying" from alcoholism. The trial court rejected this argument, reasoning that Hnat had sufficient experience and training in the area to testify as an expert, the fact that he was a social worker was not dispositive of his expertise, and the effects of alcohol were sufficiently well-known to be considered scientific.[71]

MRE 702 primarily governs how Michigan courts treat scientific evidence and witnesses who testify as experts, providing:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"MRE 702 requires a trial court to determine the evidentiary reliability of trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted."[72]

The trial court reached the correct conclusion in allowing Hnat to testify as an expert. Hnat has a master's degree in social work and has a limited license from the state to provide psychological therapy. His practice for many years has specifically focused on substance abusers, giving him opportunities to develop a substantial knowledge about their treatment. Hnat was also able to cite published studies to support his opinions a number of times during his testimony, demonstrating that he had a foundation for his opinions. Chrysler's argument at trial, and again on appeal, amounts to an assertion that only psychiatrists, other medical doctors, and psychologists can render expert opinions. However, to borrow the wording from this Court's opinion in *Grow v WA Thomas Co*,[73] the "mere fact" that Hnat "is not a medical practitioner does

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[71] The trial court erroneously cited *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) when concluding that the evidence of the effects of alcohol were well-known. This state follows the standards set out in *People v Davis*, 343 Mich 348, 372; 72 NW2d 269 (1955) and *Frye v United States*, 54 US App DC 46, 47; 293 F 1013 (1923). See *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485; 566 NW2d 672 (1997); *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995). Chrysler does not challenge the trial court's ruling on this ground, and even cites *Daubert*.

[72] *Nelson*, *supra* at 491.

[73] *Grow v WA Thomas Co*, 236 Mich App 696, 713-714; 601 NW2d 426 (1999).

not render him unqualified as an expert witness. . . . Any limitations in" Hnat's "qualifications are relevant to the weight, not the admissibility, of his testimony."[74]

At times, Hnat's testimony appeared to have a medical dimension. However, his testimony suggested that his practice as a social worker had allowed him to observe and learn about these specific effects of substance abuse.[75] At no time did Hnat try to suggest to the jury that he was a medical doctor. He openly admitted sending Gilbert to other practitioners. When Armstrong asked Hnat if he was "able to physically examine Ms. Gilbert to determine if she is dying," he admitted that he could not. In a separate exchange, when Armstrong asked Hnat whether he thought that one of Gilbert's asthma medications was causing her to gain weight, he candidly responded, "It could, [but] I can't speculate. I don't know the exact pharmacology. It's not a centrally acting medication, so I am not as familiar with those." Armstrong also emphasized in her closing argument that Hnat was not a medical doctor. The jury certainly could not be confused about the limits of Hnat's expertise.

As for Chrysler's contention that Hnat's testimony that the effects of alcoholism can lead to death was not scientific, it points to no evidence contradicting the trial court's conclusion that this has become common knowledge. This would make Hnat' testimony admissible.[76] In fact, this Court has held that evidence of physical disease or effect of alcoholism is admissible without questioning its scientific validity.[77] Accordingly, Chrysler has failed to demonstrate that the trial court erred in allowing Hnat to testify as an expert and to provide his opinion in areas that related to substance abuse, but also had a more traditional medical component that overlapped with his expertise.

Chrysler also argues that the trial court should have barred Katz's testimony for the same reasons that it should have barred Hnat's testimony as an expert. It has failed to develop its argument to differentiate between Hnat as an expert and Katz as a fact witness. Accordingly, having failed to present an argument or cite any authority that the trial court erred in allowing Katz to testify to the facts surrounding her treatment of Gilbert, Chrysler has abandoned this portion of its argument.[78] Furthermore, to the extent that Katz may have rendered opinions as if she were an expert, Armstrong did not object to any part of her testimony on that basis and actually asked Katz questions that required Katz to render an opinion. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute."[79]

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[74] See also *Thames v Thames*, 191 Mich App 299, 303; 477 NW2d 496 (1991).

[75] See *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995), citing MRE 702.

[76] See MRE 702.

[77] See, e.g., *Chmielewski*, *supra* at 613-614.

[78] See *Palazzola*, *supra* at 156, n 7.

[79] *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

D. Excluding A Defense Expert

In the middle of the month-long trial in this case, Armstrong asked the trial court to allow her to call a physician as a medical expert to rebut Hnat's expert testimony, which she did not anticipate. Feiger responded that Hnat was endorsed on the plaintiff's witness list well before trial, allowing Chrysler to prepare its case, but that he would have no opportunity to prepare to examine an expert identified at such a late date. The trial court denied Armstrong's request, first noting that she had yet to put on Chrysler's case-in-chief, which would make the witness a traditional defense witness, not a rebuttal witness. Additionally, the trial court agreed that allowing a new expert to testify at that late date would prejudice Gilbert.

When Chrysler raised this issue again in its post-verdict motions, the trial court reaffirmed its initial decision, explaining that cross-examination was the best way to challenge Hnat's testimony. The trial court, in a footnote, stated:

> Defendant argues that it was late in notifying the Court it would present these witnesses because it had no reason to anticipate that Mr. Hnat's testimony would range over issues of Plaintiff's health and prognosis. But it seems unlikely that a reasonable defendant here would not have anticipated that Plaintiff would try to argue that the current state of her alcoholism was linked to the harassment she had endured; moreover, Defendant knew Plaintiff had a severe alcohol problem, and it is no mystery that heavy drinking can cause death. . . .

The trial court did not comment on its conclusion at trial that allowing this late endorsement would cause prejudice to Feiger's ability to present Gilbert's case.

MCR 2.401(I) governs witness lists, providing that a trial court "may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." Case law recommends that trial courts allow unendorsed witnesses to testify at trial as long as the adverse party's rights are protected.[80] Nevertheless, the record suggests that the trial court was concerned about the prejudice allowing Chrysler's proposed witness to testify would cause to Gilbert, including delay in the proceedings. The trial court had mentioned its concern about unendorsed witnesses at the outset of trial, asking that "if, in fact, there is going to be a request to call a witness that is not listed on the pretrial order, I want to know about it a couple of days in advance." Further, the trial court seemed disinclined to consider Chrysler's lack of preparation for trial as good cause to grant the motion. Indeed, as Gilbert notes in her brief on appeal, that Hnat would render expert testimony was no surprise to Chrysler; Hnat had been listed as an expert as early as November 16, 1995, more than 3 ½ years before trial. Chrysler was also aware that Gilbert was claiming damages related to "mental anguish," as she had pleaded in her complaint. Why Chrysler failed to secure an expert before trial is not clear. The trial court did allow Katz to testify as a fact witness even though she had

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[80] See *Pastrick v General Telephone Co of Michigan*, 162 Mich App 243, 245; 412 NW2d 279 (1987) ("[t]rial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses").

not been listed as a witness before trial.[81] Whether Chrysler only discovered the need to find an expert during trial, justifying a late endorsement, is a close question. As a matter entrusted to the trial court's discretion, it is impossible to say that the trial court's ruling was baseless and, therefore, error requiring reversal.

E. Gilbert's Drunk Driving Records

Chrysler contends that the trial court erred in excluding Gilbert's drunk driving record from evidence, "which allowed plaintiff to misrepresent the extent of her recovery from alcoholism before the alleged harassment – a key fact in her theory of damages[.]" The trial court explained its ruling at the time as a reaction to Chrysler's failure to list the document as a proposed exhibit before trial. When Chrysler raised this issue again after the jury rendered its verdict, the trial court emphasized that Chrysler had freely explored Gilbert's driving record at trial even without admitting the exhibit, and its own "laxity" had been responsible for its failure to list the exhibit. Additionally, any error was harmless because the reason a patient enters treatment

> is not a dispositive indicator of success, and the more important point remains: that after entering treatment in 1992 – whether voluntarily or not – Plaintiff was able to achieve a certain level of sobriety, and that her alcohol worsened after she had been subjected to the harassment. It is the fact that the harassment led Plaintiff to drink that is important in linking it to Plaintiff's current medical state.

Clearly, Chrysler made the correct strategic choice to argue to the jury that it could not be certain that Gilbert was on the road to recovery when she started her job in light of the possibility that she had been forced to attend treatment. This court-ordered treatment also called into question Hnat's testimony that Gilbert had a particularly strong will to succeed at recovery. Nevertheless, the trial court articulated a compelling reason for denying the motion for new trial or remittitur in light of its evidentiary ruling: the record leaves no doubt that Chrysler made this argument directly to the jury, informing the jury of the existence of the order and what it perceived to be the flaw in Hnat's estimation of Gilbert's prospect for success when he started treating her in 1992. Having the documentary evidence of the order would not have proved the point to any greater degree of certainty. Moreover, given that Gilbert admitted to her drunk driving arrests, it is unlikely that this drunk driving record would have shed any additional light on Gilbert's alleged misrepresentation of her degree of recovery. If there was any error in the initial evidentiary ruling, it was harmless, making the trial court's ruling on the postjudgment motion properly within its discretion.

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[81] The record suggests that the trial court may have allowed Katz to testify, albeit only as a fact witness, because at least some of the preliminary witness lists revealed that Gilbert intended to call anyone who had treated her, including social workers, and Katz fit in this category.

VI. Jury Award

A. Standard Of Review

Chrysler contends that the trial court erred in denying its motion for a new trial or remittitur because the jury's award was excessive and out of line with other cases. This Court reviews a trial court's decision to deny a motion for a new trial[82] or remittitur[83] to determine whether it abused its discretion.

B. $21,000,000

When Chrysler raised this issue in its postjudgment motions, the trial court rejected Chrysler's argument that the jury verdict was excessive in comparison to other jury verdicts in sexual harassment cases, instead focusing on a number of issues related to damages that Chrysler does not raise in this appeal. Strictly speaking, the test for remittitur examines whether the evidence submitted to the jury that decided the case will support the award.[84] While some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar.[85] Jury awards in different cases involving wholly unrelated facts are not particularly germane to whether the trial court erred in denying remittitur, especially when the awards cited were given many years ago.

It certainly is possible that a different jury would have reacted differently to the evidence in this case and might have given Gilbert a smaller award. However, the jury in this case could have found compelling Gilbert's evidence that she would die an untimely death because of the effects of the harassment that Chrysler knew existed and did nothing to stop. Alternatively, the jury could have found persuasive Gilbert's evidence that her life was and would be completely joyless because the harassment had caused her to develop major depressive and post-traumatic stress disorders, changing the fundamental chemistry in her brain. Hnat also provided testimony explaining the high costs of treatment Gilbert is likely to incur in the future. All these factors, as well as the length of the harassment, might have contributed to the high award. The precise amount of appropriate damages is often an elusive figure that cannot be calculated with simple mathematical equations, which is why the law requires only a reasonable approximation by the jury.[86] That the jury exercised its independence by awarding Gilbert only about fifteen percent of the $140,000,000 Feiger said was appropriate suggests that it decided the amount of the award on how it perceived the evidence the parties presented, not because of passion, bias, or misunderstanding. Like the jury, the trial court heard all the evidence and decided that it

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[82] See *Morinelli, supra* at 261.

[83] See *Leavitt, supra* at 305.

[84] See *Anton, supra* at 683, citing MCR 2.611(E)(1).

[85] See *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 131-132; 492 NW2d 761 (1992).

[86] See *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995); *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

supported the jury's award. Giving the trial court the deference it is surely due,[87] it is impossible to say that the trial court abused its discretion in reaching this conclusion.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[87] See MCR 2.613(C).