

IN THE COURT OF CLAIMS OF OHIO

JERRI L. MCCOMBS, Admr.

Plaintiff

v.

OHIO DEPARTMENT OF
DEVELOPMENTAL DISABILITIES

Defendant

Case No. 2019-00194JD

Judge Patrick E. Sheeran

DECISION

{¶1} This case is before the Court on remand from the Tenth District Court of Appeals for a redetermination of damages to be awarded to Plaintiff.

{¶2} As the Court of Appeals noted, Plaintiff's son, B.C., is now 29 years old. He was 25 years of age at the time of the occurrences giving rise to this case. B.C. had a traumatic brain injury, causing him to undergo a craniotomy and cranioplasty, and he has been diagnosed as autistic, with seizure disorder, intellectual disability, obsessive compulsive behavior, and aphasia. B.C. functions at the moderate to severe range of intellectual disability and is non-verbal. As a result of his injuries and his diagnoses, B.C. has difficulty communicating and uses "simple signs, facial expressions, gestures, body language, and sometimes aggressive behaviors such as pulling and grabbing to let others know what he wants and needs." *McCombs v. Ohio Dept. of Dev. Disabilities*, 2022-Ohio-1035, 187 N.E.3d 610, ¶ 2 (10th Dist.).

{¶3} B.C. was admitted to the Cambridge Disability Center (CDC) for the purpose of stabilizing some of his behaviors, which included aggressive behaviors such as physical aggression, self-injurious behavior, taking property (mostly food and drink), ritualistic behaviors, and other inappropriate behaviors. *Id.* at ¶ 4. Therapeutic Program Workers (TPWs), employees of Defendant who are trained to use positive supports and principles, attended to him. Conduct such as hitting, choking, or kicking a resident was

strictly forbidden, and physical restraint was only permissible where there was an imminent risk of harm.

{¶4} On June 26, 2018, another resident of CDC reported to a supervisor that TPW Dianna Stein hit B.C. in the face, pulled his hair, and hit him in the mouth. Douglas Bachmann, an investigator with CDC, began an investigation into the suspected abuse. Bachmann viewed videotapes from CDC's internal security cameras from the previous 30 days and found that Dianna Stein had committed not one, but several abusive acts against B.C. Bachmann was limited in his investigation, insofar as the tapes are recycled to record anew every thirty days. Ten instances were found where abuse was either suspected or (from the tapes) obvious. These findings led to the termination not only of Stein, but of three other TPWs. Stein was prosecuted, convicted, and sentenced to four and a half years in prison, solely due to the abuse of B.C.

{¶5} Plaintiff filed a complaint in this Court asserting claims of abuse, neglect, and loss of consortium. The Court found liability on the abuse and neglect counts, and awarded \$16,125 in damages. The loss of consortium claim was denied, and that denial was affirmed by the Court of Appeals. However, the Tenth District found that the award of damages by this Court "cannot be reconciled with the undisputed evidence in this case, failed to include all the items of damages making up McCombs' claim, and was so grossly inadequate as to shock the sense of justice and fairness and the conscience." *Id.* at ¶ 36. The Tenth District also criticized that the standard used in the initial determination of damages "used B.C.'s disability (in particular, being non-verbal) against him to reduce his damages." *Id.* at ¶ 30.

{¶6} None of the above is disputed by any of the parties. The issues in this case, relating to damages, are what the appropriate standard is to award damages, and, after ascertaining that standard, the amount of monetary damages Plaintiff should receive.

{¶7} Plaintiff sought damages for severe emotional distress, embarrassment, anguish and humiliation, both based on the abuse, and the consequences of the abuse that would carry over into the future. Plaintiff also sought damages for physical pain. As the Court of Appeals noted, these types of damages are considered "non-economic, compensatory damages." Other types of damages, such as economic damages and punitive (or exemplary) damages, were not sought by Plaintiff.

1. Standard for Damages

{¶8} Compensatory damages are damages intended to make the injured party whole for the wrong done to him or her by a defendant. *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St. 3d 601, 612-615, 1992-Ohio-138, 597 N.E.2d 474. But non-economic compensatory damages have no given calculus to arrive at a determination. As the Supreme Court noted in *Fantozzi*,

The assessment of such damage is, however, a matter solely for the determination of the trier of fact because there is no standard by which such pain and suffering may be measured. In this regard, this court has recognized that “no substitute for simple human evaluation has been authoritatively suggested.” *Flory v. New York Central R.R. Co.* (1959), 170 Ohio St. 185, 190, 10 O.O.2d 126, 128, 163 N.E.2d 902, 905.

64 Ohio St.3d at 612. Things have not changed since *Fantozzi*. In remanding this case, the Tenth District Court of Appeals noted:

Of all the items of compensatory damages which it may become the duty of a court or jury to assess, that which will compensate for human pain and suffering is perhaps the most difficult to determine. Such determination is susceptible of no mathematical or rule of thumb computation...

McCombs, 2022-Ohio-1035, 187 N.E.3d 610, at ¶ 28. The Tenth District further observed, quoting a previous case, that the

award for noneconomic damages, or pain and suffering...[has] no specific yardstick, or mathematical rule [that] exists... Rather, the finder of fact makes a “human evaluation” of all the *facts and circumstances involved*. ... Indeed, in no other element of damages is there so wide a latitude for awards as in pain and suffering.

(Emphasis sic.) *McCombs* at ¶ 29, quoting *Kelly v. Northeastern Ohio Univ. College*, 10th Dist. Franklin No. 07-AP-945, 2008 Ohio 4893, at ¶ 8.

{¶9} What compounds the difficulty in the instant case is that, to a great degree, B.C. is incapable of fully communicating his ‘emotional distress, embarrassment, anguish, and/or humiliation’ to a trier of fact.

{¶10} Near the close of the movie “The Accountant”, an otherwise terrible movie insofar as autism is concerned, the director of an Autistic Center (whose daughter is a patient) discusses autism with the parents of an autistic child whom the parents are considering placing there. He is speaking about the difficulty of communication: “And maybe... Just maybe... He doesn’t understand how to tell us. Or... we haven’t yet learned how to listen.”

{¶11} And that is the crux of the problem in determining non-economic compensatory damages, where the law admits it has no easy answers no matter who the victim is.

{¶12} What the Tenth District Court of Appeals has said to us in this case is that we must consider B.C. as an “extremely vulnerable person”, whose environment—which was supposed to be “safe”—was one where he ended up being abused by the very persons who were supposed to be treating him with the goal of lessening B.C.’s own aggressive behaviors. How ironic. It would be hard to imagine a less appropriate group of TPWs to bring the needed changes to B.C.’s life than Ms. Stein and her terminated co-workers. And it would be hard to imagine a less appropriate ‘treatment’ than the ones B.C. received.

{¶13} Defendant asserts in its argument that an award of damages in this case is inherently speculative, which has some truth to it. The problem with the argument, however, is that this is ALWAYS the case, whether one is autistic or not, as the above cited cases have shown.¹ And, as the Tenth District Court of Appeals noted in remanding this case, this Court must not hold B.C.’s autism “against him” in assessing damages. In essence, the Court of Appeals is telling us that perhaps society “has not learned to listen” yet to autistic persons suffering from abuse. And until we can “learn to listen,” we must treat B.C. as a “member of the general public.” As the Tenth District Court noted,

[S]ince many individuals are unable to communicate feelings of fear, humiliation, etc., the assumption must be made that any actions that would usually be viewed as psychologically or verbally abusive by *a member of the general public*, is also viewed as abusive by the individual residing in

¹ The Ohio Jury Instructions (OJI) merely indicate to the jury that “You will consider an amount of money” that will compensate Plaintiff.

the facility, *regardless of the individual's perceived ability to comprehend the nature of the incident.*

(Emphasis added.) *McCombs*, at ¶ 35.

{¶14} Based on the foregoing law of the case, this Court believes it has fixed upon the appropriate method upon which to measure damages in this case.

2. Damages

{¶15} The behavior of the terminated TPWs towards B.C. was not only abusive, but counterproductive in terms of meeting therapeutic goals to lessen B.C.'s aggressive (and other) behaviors. In short, the abuse perpetrated on B.C. not only caused pain and suffering, anguish, humiliation, and severe emotional distress, each separate incident made it more difficult to assist B.C. in learning to lessen his own aggression. 'Why should I stop being aggressive (stealing food, taking and twirling car keys, etc.) when I am being treated like this?' It is more than fair to say that a member of the general public would react to such treatment in that manner. There is simply no positive incentive—which is what B.C.'s treatment *required*—to bring about a change in his behavior. Further, it is both degrading and humiliating to be treated to such behavior, especially when the TPWs' aggressive behaviors occurred without consequence until a resident complained and an investigation started, and the *criminal* behavior was uncovered.

{¶16} The regularity of the abusive behavior in the month that was recorded in the investigation by Mr. Bachmann certainly permits an inference that this behavior was not limited to thirty days' duration. The abuse was too regular and therefore too coincidental, to posit that it only lasted for a month. This inference is supported by the casual acceptance of the abuse by the other TPWs on duty during this time, who did nothing to either prevent, stop, or require an intervention to avoid such behaviors in the future. This Court is, of course, not permitted to draw an inference from another inference, but the only inference being drawn here is that the abusive behavior shown in the videos that have been recovered are not outliers, but part of the day-to-day existence for B.C. while he was at CDC, which makes the recorded abuse even more egregious, humiliating, and therefore even more counterproductive towards achieving the goals of his treatment. One cannot help but think of the classic novel "One Flew Over the Cuckoo's Nest" where the

“treatment” accorded the patients in the novel basically preyed on the very illnesses that had them committed to the institution in the first place. How can anyone ‘get better’ in such a situation, where those responsible for providing treatment (here, the TPWs) violate treatment requirements so egregiously? They cannot.

{¶17} Based on the foregoing, this Court declines to place a monetary value on each incident, although of course some incidents were more physical than others, as in the knee to the groin and the incidents involving choking clearly indicate. Those incidents, being more abusive, certainly merit considerably greater damage amounts than incidents that are less physical, but those lesser assaults carry their own amount of degradation and humiliation, and, as noted *supra*, are completely contrary to the manner in which B.C. was to be treated by staff. Each instance of abuse imparted a lesson—the *wrong* lesson—to B.C., and repeated lessons not only are humiliating, but take more time to be unlearned, or undone. The Court, instead, looks at the overall picture, which includes the individual abuses AND the cumulative effect of the abuses, and does so because each degradation, each humiliation, each act of abuse, adds to the anguish, embarrassment, humiliation and degradation inflicted upon B.C. Parsing each incident out and saying it contributes this much, or that much, is clearly an incomplete analysis, as it neglects to look at the overall situation in which B.C. found himself. Just as the poet wrote that “No Man is an Island”, when there is a repetition of abusive incidents, no one incidence of abuse is, either.

{¶18} Based on the foregoing, this Court awards One Hundred and Forty Thousand Dollars (\$140,000) as a total for the individual acts of abuse, and an additional Sixty Thousand Dollars (\$60,000) for the cumulative effect of such abuses. Thus, the total amount of damages in this case amounts to Two Hundred Thousand Dollars (\$200,000) for Plaintiff’s non-economic compensatory damages. A separate Entry based on this Decision will be filed contemporaneously.

PATRICK E. SHEERAN
Judge

[Cite as *McCombs v. Ohio Dept. of Dev. Disabilities*, 2022-Ohio-4834.]

JERRI L. MCCOMBS, Admr.

Plaintiff

v.

OHIO DEPARTMENT OF
DEVELOPMENTAL DISABILITIES

Defendant

Case No. 2019-00194JD

Judge Patrick E. Sheeran

JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶19} On remand from the Tenth District Court of Appeals, the Court held a hearing to determine a new amount of non-economic compensatory damages to be awarded to Plaintiff. For the reasons set forth in the Decision filed concurrently herewith, judgment is rendered in favor of Plaintiff in the amount of \$200,025.00, which includes the filing fee paid by Plaintiff. Court costs are assessed against Defendant. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed December 16, 2022
Sent to S.C. Reporter 1/12/23