UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GINA GRISANTI	:	
	:	
v.	:	**CIVIL NO. 3:99CV490 (JBA)**
	:	
WILLIAM CIOFFI, JR.	:	

RULING ON POST-TRIAL MOTIONS

In the jury trial on plaintiff Gina Grisanti's claims of sexual assault and intentional infliction of emotional distress, defendant was found liable on all counts and plaintiff was awarded $2.5 million in damages. Currently pending are plaintiff's motion to amend judgment [Doc. # 128], defendant's motion for new trial or, in the alternative, remittitur pursuant to FRCP 59(a) [Doc. # 135], defendant's motion to alter or amend the judgment pursuant to FRCP 59(e) [Doc. # 133], plaintiff's motion for attorney's fees and bill of costs [Doc. # 129], plaintiff's motion for bond or surety [Doc. # 132] and plaintiff's motion for supersedeas bond [Doc. # 131].

A. Plaintiff's motion to amend judgment [Doc. # 128]

Plaintiff has moved pursuant to Fed. R. Civ. P. 59(e) and 60 for a hearing to clarify and/or amend the Judgment in the amount of $2,500,000 dated December 19, 2000, on the grounds that the entries on the Verdict Form are confusing. According to plaintiff, the jury's award of $2,500,000 in "total, non-duplicative compensatory damages" is inconsistent with the award

of $1.25 million in compensatory damages for the February 20, 1998 assault, $1.5 million for the February 21, 1998 assault, $1.75 million for the May 5, 1998 assault, $2 million for the May 6, 1998 assault, and $500,000 for intentional infliction of emotional distress. Plaintiff contends that she is entitled to $7 million (the total of these five amounts) or alternatively, $9.5 million (the total of these five amounts plus the non-duplicative total damages amount), and requests a hearing requiring the jury foreperson to clarify this alleged ambiguity. For the reasons discussed below, the Court disagrees that the verdict is inconsistent or confusing, and the motion is denied.

The jury was charged that:

> You must be careful that any damages you award on any claim are imposed solely for the injury caused by that wrong. If you find for plaintiff on more than one count, you will award her what is fair and reasonable for each claim, but will make a final damages award that represents non-duplicated damages because you may not award plaintiff more in compensatory damages than will reasonably compensate her for all injuries or losses that she has proved she has suffered. Therefore, if you find that compensatory damages should be awarded to Ms. Grisanti on any of her claims, you should complete your Jury Verdict Form as to "total non-duplicated damages" to reflect the total amount of any compensatory damage award you all agree would reasonably compensate Ms. Grisanti for any or all losses she has suffered.

During deliberation, the jury requested clarification of the "duplication of damages" charge. See Court Ex. 2. The jury was then instructed that:

> [I]nasmuch as damages may be awarded for past and future emotional injury in this case, you may find some overlap in what you awarded for the separate claims. In that case, you

> would not just add your compensatory awards together, because that could result in awarding more compensatory damages than just one time for the same injury. That is, you would be duplicating the damages to some extent. The plaintiff is entitled only to be compensated one time for an injury. Your objective in considering a non-duplicated damage award is simply to prevent double recovery for any single injury which is a part of the injuries you find proved in more than one claim.
>
> Let me reduce it to a very simplistic model. If on claim one you were to award five dollars for the injuries you found proved and on claim two you were – to award five dollars for that claim proved, but the injuries overlapped for claim one and claim two to some extent, and thus the total non-duplicated damage award which you may find would be full and fair compensation for all injuries, but not more than once, might be seven. So, you have five, five and you might end out awarding seven as a means of separating out the overlap and as a means of giving as your verdict a final non-duplicated fair and full compensation for all injury you find proved to result from the defendant's conduct.

Tr. Dec. 18, 2000 at 15-16.

Neither party objected to either the original or supplemental charge.

Plaintiff argues that because the verdict form requested "an individual non-duplicative damage award for each claim," the amounts awarded for the four assaults must be added together to reach the total amount and that the $2.5 million total amount is inconsistent with the individual awards for each assault. However, this argument ignores the fact that the jury was specifically instructed that "[i]f you find for plaintiff on more than one count, you will award her what is fair and reasonable for each claim, but will make a final damages award that represents non-duplicated damages because you may not award

plaintiff more in compensatory damages than will reasonably compensate her for all injuries or losses that she has proved she has suffered." The supplemental charge further explained that the total non-duplicated damages award is not necessarily the sum of the individual compensatory damages awards, and that the total award is requested to "prevent double recovery for any single injury which is a part of the injuries you find proved in more than one claim." It is well-settled that jurors are presumed to have followed the instructions given to them and to understand a judge's answer to their questions or requests for clarification. See Weeks v. Angelone, 528 U.S. 225, 234 (2000); Jones v. United States, 527 U.S. 373, 394 (1999); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987).

The instructions thus contemplated that it might be difficult for the jury to determine the amount of damages resulting from each separate assault or that the injuries resulting from the various assaults might overlap, and assured that the total non-duplicative damages would be reflected in the final figure. Therefore, the Court concludes that the $2.5 million awarded by the jury as "total, non-duplicated damages" reflects the total amount of compensatory damages necessary to reasonably compensate plaintiff for the losses the jury determined Ms. Grisanti suffered, and there is no inconsistency in the jury's verdict. Accordingly, plaintiff's motion is DENIED.

B. Defendant's motion for new trial or in the alternative remittitur pursuant to FRCP 59(a) [Doc. # 135] and Defendant's motion to alter or amend the judgment pursuant to FRCP 59(e) [Doc. # 133][1]

Defendant William Cioffi has moved for a new trial, remittitur, or to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(a) and 59(e), on the grounds that 1) the damages awarded were excessive; 2) improper hearsay testimony was admitted; 3) the defendant was unfairly surprised during the plaintiff's case-in-chief by the plaintiff's testimony of an additional alleged rape by the defendant; and 4) the Court's refusal to instruct the jury that threats to get custody and legal actions to gain custody of a child do not constitute extreme and outrageous conduct in and of themselves was error. Defendant requests a new trial or remittitur of damages to zero or a nominal amount.

Unlike a motion for judgment as a matter of law, there is no preservation requirement for a motion for a new trial under Fed. R. Civ. P. 59(a). Rule 59(a) provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues ... for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." "A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has

[1]Although defendant has filed two separate motions, both motions are based on the same arguments and the relief sought is identical.

reached a seriously erroneous result or that the verdict is a miscarriage of justice." Atkins v. New York City, 143 F.3d 100, 102 (2d Cir. 1998) (citation and internal quotation marks omitted). "The 'narrow aim' of Rule 59(e) is 'to make clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment." Greene v. Town of Blooming Grove, 935 F.2d 507, 512 (2d Cir. 1991) (quoting White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 450 (1982)). The moving party bears the burden of demonstrating his entitlement to a new trial. Maguire Co., Inc. v. Herbert Constr. Co., Inc., 945 F. Supp. 72, 74 (S.D.N.Y. 1996).

A trial judge hearing a motion for a new trial under Rule 59 is free to weigh the evidence and need not view it in the light most favorable to the verdict winner. Song v. Ives Labs., Inc., 957 F.2d 1041, 1047 (2d Cir. 1992). However, a court should refrain from setting aside the verdict and granting a new trial when "the resolution of the issues depended on assessment of the credibility of witnesses." Metromedia Co. v. Fugazy, 983 F.2d 350, 363 (2d Cir. 1992). The Second Circuit has explained that

> [t]he trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his [or her] duty to set the

verdict aside; otherwise not.

Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978) (citation omitted).

Applying this standard here, as discussed below, the Court concludes that the $2.5 million damages award is excessive in light of the evidence or lack thereof in this trial, but that defendant's remaining arguments are without merit.

1. Excessive damages

According to defendant, a verdict award $2.5 million dollars as compensatory damages is excessive based on the evidence in this case manifesting an intent by the jury to punish the defendant through the compensatory damages award. Defendant seeks a new trial or alternatively to remit the damages award to zero or a nominal amount.

If a damages award is excessive, the award may be reduced by the Court to the maximum amount that would be considered not excessive, conditioned on plaintiff's right to a new trial if she does not accept the remitted amount. See Early v. Bouchard Transp., 917 F.2d 1320, 1330 (2d Cir. 1990); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 49 (2d Cir. 1984). Where a plaintiff is awarded compensatory damages on state law claims, as here, Connecticut's substantive law is used to assess the evidence of physical and emotional injury to determine whether it is adequate to support the verdict. See Gagne v. Town of

Enfield, 734 F.2d 902, 905 (2d Cir. 1984). Under Connecticut law, the Court is "required to view the evidence in a light most favorable to sustaining the jury's verdict." Berry v. Loiseau, 223 Conn. 786, 810 (1992) (citing Oakes v. New England Dairy, 219 Conn. 1, 13-14 (1991)). "The size of the verdict alone does not determine whether it is excessive. The only practical test to apply . . . is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." Gaudio v. Griffin Health Services Corp., 249 Conn. 523, 550-51 (1999) (citations and quotation marks omitted).

Defendant contends that in the absence of any expert or medical testimony regarding the physical or emotional condition of the plaintiff as to the extent of her damages and/or whether such damages were caused by the conduct at issue in this case "and not from the multitude of other disputes between the parties that took place outside the time frame of this case or from other problems of the Plaintiff including the death of her sister," there was insufficient evidence to establish proximate cause between defendant's conduct and plaintiff's alleged injuries. Defendant further claims that the $2.5 million verdict was the product of prejudice against him. Plaintiff, in response, asserts that there is no evidence of any prejudice against the

defendant, and that the verdict, although substantial, "is fully supported and justified by the evidence in this case." Pl. Br. at 16.

Neither party has cited any Connecticut cases involving damages awards in similar cases in support of their positions that this award is -- or is not -- excessive. The Court's research reveals no cases with a similar fact pattern, and the amount of damages awarded has varied widely in Connecticut cases involving sexual assault or abuse. See, e.g., Blair v. LaFrance, No. CV 980149622S, 2000 WL 1508232, at *2-5 (Conn. Super. Sept. 27, 2000) (awarding $75,200 for economic damages and $500,000 for non-economic damages in case where plaintiff was sexually abused on three occasions by her uncle when she was under the age of sixteen; testimony showed plaintiff had received psychiatric counseling, was significantly depressed, anxious and fearful, had attempted suicide, has recurring nightmares, high degrees of rage and distrust and obsessive compulsive behaviors, and plaintiff's expert witness testified that it is rare to recover fully from sexual abuse and that normally a victim of abuse requires between seven and ten years of therapy); Doe v. TVCA, No. X04CV 930115438S, 2000 WL 254608 (Conn. Super. Feb. 23, 2000) (refusing to remit economic damages awarded to parents of children who were sexually assaulted while enrolled in day care program where plaintiff's expert testified at trial that the abuse would likely have a profound, long-term impact on the children and their

relationships, and the children would likely require counseling at critical life junctures such as puberty and adolescence; the jury awarded economic damages ranging from $30,000 to $60,000 per child, and non-economic damages ranging from $35,000 to $75,000 per child); Schneider v. National R.R. Passenger Corp., 987 F.2d 132, 137-38 (2d Cir. 1993) (upholding $1.75 million damage award, which included over $1.25 million in intangible damages for assault and attempted rape, during which plaintiff sustained physical injuries requiring multiple surgeries, where expert testimony at trial showed that plaintiff suffered from PTSD and mild organic brain syndrome, was unable to socialize normally, had recurring flashbacks and her vision and ability to reason and access information was impaired, and plaintiff could no longer hold down full-time job); see also Giordano v. Giordano, 664 A.2d 1136, 1150 (Conn. App. 1995) (upholding prejudgment attachment in amount of $75,000 and $125,000 respectively for the two plaintiffs who alleged that the defendant, their grandfather, had sexually abused them as children, where plaintiffs testified at the attachment hearing "to emotional injuries including anxiety, low self-esteem, and difficulty in their adult relationships").[2]

[2]The Second Circuit recently affirmed an award of $3 million in compensatory damages in a negligence case brought against the housing authority that operated the housing complex in which the plaintiff resided, where the plaintiff was raped in her apartment because of the defendant's negligence in repairing the locks on the doors of the building. Ortiz v. New York City Housing Auth., 198 F.3d 234, 1999 WL 753153 (2d Cir. 1999) (Table). However, because there is no discussion of the particular damages suffered by the plaintiff in that case, this case provides no guidance on this issue of excessiveness.

Taking all facts in plaintiff's favor, plaintiff's testimony described four sexual assaults by defendant in plaintiff's home during court-ordered child visitation that were part of a larger pattern of threats and terrorization carried out by defendant against her since their relationship terminated and she moved from California to Connecticut with their child.

The jury heard the unnerving phone message left by defendant on plaintiff's answering machine in 1996 threatening financial ruin, that he would take the child and make her pay for the rest of her life, and chillingly stating that she would "end up like her sister," who had been abducted in 1984 and was presumed dead, although her body was never found. Plaintiff further testified that defendant repeated the threat that she would end up like her sister in 1998 if she told anyone about the rapes, and also threatened to harm her mother. 12/11/2000 Tr. at 72, 108. Plaintiff stated that she eventually reported the rapes to the police in an attempt to regain control over her life: "If I didn't stop it, it would be like he won and he would keep doing it and that control -- I had just left his control, I finally got away from his control and the fact that he kept doing it made him keep control, and I couldn't let him be in control of my life anymore. I finally got the guts to end it a long time ago and he was just not leaving me alone and it was disgusting and he have got -- every time he got away with something I finally decided that it was enough, I had to do something. I wanted to forget

about it, but I couldn't, I couldn't." Id. at 109-10.

Although plaintiff did not seek counseling for the assaults, she explained that she lacked the money and, not unreasonably, wanted to put the assaults behind her. However, plaintiff testified, she later discovered she could not do so: "I thought it would have ended and I could just forget about it but I can't. I live in that house every day and I can't forget about it. . . . I live every minute of every day worried and fearful of Billy Cioffi and what he's going to do." Id. at 126, 160. Plaintiff's worry that she may have contracted Hepatitis C from defendant only heightens her perception of the power he has over her life and his capacity to injure her.

Plaintiff's testimony at trial vividly portrayed this theme of domination and control and her belief of how powerful defendant is, and how powerless she is to stop him. Plaintiff testified that defendant told her after the assaults "the reason he did everything he did in the house was to get me not to want to live there so I have would remember him all of the time and that I would eventually want to get out of there and move back to California." Id. at 108. Since the assaults, plaintiff has been terrorized to the point of an irrational, consuming preoccupation with the harm that defendant would do to her. She testified that she "live[s] in fear. Literally in fear. I mean, fear of a noise, fear of him, fear of him in town, fear of a phone call, fear of another threat, fear of another court appearance, fear of

another something, you know, lies about me . . . or anything you can possibly think of." Id. at 160. Plaintiff further stated that she is consumed with fear that defendant will blow up her car, take away her daughter, break into her house, and or otherwise carry out his threats to hurt her and get revenge on her. Id. at 154, 124. Plaintiff's fear is only aggravated by her perception that defendant is a powerful man who is very good at getting away with things. Id. at 184-85.

Plaintiff testified credibly that since the assaults, her terror has manifested itself in sleeplessness, nightmares, nausea from stress, loss of appetite, depression and crying. She also stated that she is embarrassed and ashamed. The consequences of the assaults are further exacerbated by the fact her assailant is a person she had formerly trusted and the father of her child, with whom she will likely be required to have continuing contact at least until their daughter reaches the age of majority, in 2014.

Plaintiff also testified that since the assaults, she has no desire for any sexual relationship: "the thought of a man touching me makes me cringe, no matter who it is and no matter how they're touching me. I don't even like hugs. I don't like when somebody brushes up against me accidentally, I hate it, it makes my blood curdle, it makes my stomach turn." Id. at 156.

Finally, plaintiff's affect as a witness, both while testifying and while listening to defendant relay his account of

the events, provides further evidence of the extent of her damages. Although plaintiff's manner while testifying was understated and even acerbic, her personal affect dramatically conveyed the devastation she has suffered. Similarly, plaintiff manifested profound emotional distress while listening to defendant testify; she was unable to look at defendant and was visibly uncomfortable while he recounted his version of the events.

Defendant claims that in the absence of expert testimony about causation, the jury's conclusion that plaintiff's damages resulted from the assaults, rather than from some other event, is unfounded. However, there is no requirement under Connecticut law that a claim for emotional distress be supported by medical evidence. See Berry, 223 Conn. at 811. Further, as plaintiff explained, it was not until she reported the rapes and defendant began retaliating against her that "all heck broke loose" in the custody dispute. Dec. 11, 2000 Tr. at 189. Crediting plaintiff's account, this case is not about four isolated assaults, but rather involved a pattern of threats and intimidation by defendant, which eventually culminated in repeated sexual assaults that plaintiff was unable to prevent, and which left her with the crippling feeling that she lacked any control over her life, and that defendant would stop at nothing to carry out his repeated threats against her to ruin her life and cause her to lose her child, the most important person in her

life, either through taking the child away by legal means or by taking her away from the child. If the jury credited her testimony, which it was entitled to do, it was entitled to believe that defendant had shattered plaintiff's emotional stability, without the assistance of expert testimony.

The more difficult question, however, is whether and to what extent the damages awarded were excessive. In assessing this question, the absence of expert testimony is more problematic. First, the nature of plaintiff's claimed injuries were almost entirely emotional rather than physical, and expert testimony as to a medical diagnosis of her condition, such as Post Traumatic Stress Disorder, was necessary for the jury to determine the nature and degree of disability and emotional impairment reflected by the symptoms to which plaintiff testified. Cf. Schneider, 987 F.2d at 137-38. Absent such testimony, and in light of the subject matter of rape, there is a likelihood that speculation played some role in the jury's damages award. More critically, plaintiff presented no expert testimony as to the permanency of her injuries, and thus provided no basis from which the jury could conclude whether she would continue to suffer the same level of emotional distress throughout her lifetime. Finally, it is clear to the Court that in crediting Ms. Grisanti's testimony, the jury believed that Mr. Cioffi lied to them and had committed repeated despicable acts against her, such that the enormous size of this damages award likely reflects some

degree of impermissible prejudice against Mr. Cioffi. Given the lack of medical substantiation of serious medical condition and permanency of injury, particularly where no medical expenses or economic losses were proved, the Court must conclude that the jury's award of $2.5 million in compensatory damages for the four assaults and for the intentional infliction of emotional distress was excessive.

Notwithstanding the absence of expert testimony and economic loss, plaintiff has proved that she suffered substantial emotional damage as a result of defendant's repeated threats and assaults. Given Ms. Grisanti's credible testimony of her profound daily fear, anxiety, and trauma, her current lost of ability to form romantic relationships, and because her trauma will be magnified by the reality that she cannot heal by putting defendant out of her life completely because she will be forced to have some degree of contact with defendant until their six year old child reaches the age of majority, the Court finds that the maximum damages award that would not "shock the sense of justice" is $1.25 million in compensatory damages, half the amount awarded by the jury. Accordingly, defendant's motion for a new trial on the grounds that the verdict is excessive is denied, conditioned on plaintiff accepting this remitted damages amount.

2. Evidentiary rulings

During a pre-trial conference, plaintiff claimed that testimony of two witnesses, Dawn Santos and Delores Rose, about what Ms. Grisanti had told them about the sexual assaults was admissible under the "constancy of accusation doctrine." 10/15/00 Tr. at 25-28. At the next pre-trial conference, the Court advised counsel that the constancy of accusation doctrine did not apply in federal court. Counsel were further advised by the Court that under the Supreme Court's decision in Tome v. United States, 513 U.S. 150, 151 (1995), prior consistent statements were admissible non-hearsay under F.R.E. 801(d)(1)(B) if "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," and that to qualify as non-hearsay, the statement must have been made before the motive to fabricate arose.

During the multiple pre-trial conferences held in this case, defendant had described his theory of the case as follows: plaintiff fabricated the allegations of rape when negotiations in the Connecticut custody dispute between plaintiff and defendant reached a critical stage in June 1998. According to defendant, plaintiff filed a complaint with the police alleging rape in June 1998 and sought a protective order in order to prevent him from obtaining unsupervised visitation with their child, then an imminent possibility. Given this understanding of defendant's alleged motive, the Court determined that statements made by Ms.

Grisanti about the assaults prior to June 1998 were admissible to rebut the charge of recent fabrication.[3]

Thereafter, at trial, Dawn Santos and Delores Rose testified as to statements made to them by the plaintiff about the assaults immediately following them in February and May 1998. Defendant objected to the testimony from Ms. Santos and Ms. Rose about what plaintiff had told them about the assaults as hearsay. Plaintiff claimed the statements as admissible to rebut the defendant's charge of recent fabrication, and the Court admitted the testimony.[4]

Defendant now claims that the motive to fabricate arose as early as 1996, when Mr. Cioffi refused to leave his wife for plaintiff and when the California custody dispute began during plaintiff's pregnancy with their child. Therefore, according to defendant, the Court committed clear error by admitting the

---

[3]Defendant also makes much of plaintiff's failure to identify a Federal Rule of Evidence Number in support of her argument as to the admissibility of the prior consistent statements during trial. However, as both parties had been advised by the Court that prior consistent statements were admissible in federal court under Rule 801(d)(1)(B), and were governed by Tome v. United States, defendant had ample notice of the grounds under which this testimony would be admitted.

[4]Despite the fact that the Court had instructed plaintiff that the admission of the testimony of Ms. Santos and Ms. Rose was conditional on meeting the requirements of Tome v. United States, at trial, plaintiff's counsel mis-characterized the holding of that case as permitting statements that pre-dated the filing of a complaint or police report, and plaintiff claimed that such statements are admissible for the fact that they were said but not for the truth of the matter asserted. The Court therefore gave a limiting instruction to that effect as to Ms. Santos' testimony. However, under F.R.E. 801(d)(1)(B), prior consistent statements offered to rebut a charge of recent fabrication are admissible for their truth. Thus, to the extent the Court erred at trial, it was in defendant's favor.

hearsay testimony because plaintiff's motive to fabricate already existed. However, defendant did not identify these earlier events as the basis for the alleged motive to fabricate during the trial. Based on his previous representations that plaintiff's motive was her fear that Mr. Cioffi would be granted unsupervised visitation in light of developments in the custody dispute that occurred in June 1998, the Court's ruling admitting the testimony of Ms. Rose and Ms. Santos was not erroneous.

3. Unfair surprise

Defendant also claims that he suffered unfair surprise during trial when plaintiff testified during her case-in-chief that the pregnancy with their child was the result of non-consensual sex. According to defendant, had he known that plaintiff would testify about this allegation, he would have continued discovery, produced evidence at trial to contradict the allegation of rape, and retained an expert witness to testify that the conception did not occur on the date alleged.

During a pre-trial conference on November 15, 2000, the following colloquy occurred:

> The Court: You also identify Ms. Grisanti as testifying on the circumstances of her pregnancy in '96, and I was hopeful that did not include the allegation that the pregnancy was the result of rape.
>
> Ms. Brown: No, that is correct.
>
> Mr. Lerner: Well, I intend to raise that as rebuttal. I intend to raise that as an issue that shows that not only

did she make up allegations of rape now, but she made them up before, and that's a very – as far as cross-examination, that's an important part of my case.

The Court: My only limitation thus far was on liability allegations.

Mr. Lerner: Fine.

The Court: And not introducing new bases for liability than that which was contained in the July '99 complaint, and that's what Ms. Brown is working with.

Ms. Brown: Okay.

The Court: To the extent that you open the door in any of the areas that she has been precluded from expanding this complaint into, obviously she is not precluded from her evidence in rebuttal to that. I mean, that's the way it goes.

Mr. Lerner: No, I understand that.

10/15/00 Tr. at 14-15.

During a subsequent pre-trial conference on December 7, 2000, the Court ruled that testimony regarding the alleged rape in 1996 would not be admissible in this trial, and defendant continued to object, claiming that earlier allegation was relevant to show a pattern of making false rape allegations. In the absence of any proffer that the allegation of rape in 1996 was false, the Court precluded defendant from introducing evidence of the allegation of the 1996 rape. Defendant's counsel also indicated during this December 7 pre-trial conference that he had believed that plaintiff would testify about the circumstances of her pregnancy with April, including the alleged rape, as background although not as damages evidence. The Court

then informed both parties that the circumstances of the plaintiff's daughter's conception would not be part of this case.

During Ms. Grisanti's direct testimony on December 11, 2000, she testified that Mr. Cioffi came to her house on January 20, 1996 after an argument. According to Ms. Grisanti,

> . . . I told him it was over and I had enough and it was the last straw, and he didn't like that, and he got angry and I asked him to leave and he wouldn't leave so it's easier for me just to walk away. So I started walking down the hall way and he came after me and he grabbed me, and I was close to my room at the time and he threw me down.
>
> Q: And did you have sexual intercourse on that occasion?
>
> A: Yes.
>
> Q: Now, what happened after that?
>
> A: Immediately after that?
>
> Q: As a result of that encounter with Mr. Cioffi, what happened?
>
> A: Oh, I found out I was pregnant.

12/11/00 Tr. at 33-34.

Defendant's counsel then requested a side-bar and objected to the introduction of the discussion of the rape that resulted in the impregnation. He claimed that he had not objected earlier because he had not realized that plaintiff claimed to have become impregnated on that date and he had thought plaintiff was

discussing a different assault.[5] Defendant did not move to strike the statement, move for a continuance, request a curative instruction or seek to supplement his witness list. The Court advised defendant that he could cross-examine plaintiff on her allegation now that it had been introduced. 12/11/00 Tr. at 35-36.

During defendant's cross-examination of Ms. Grisanti, the following exchange occurred:

> Q: Now, you testified before that on January 20th, 1996, Mr. Cioffi threw you down and sexually assaulted you; is that correct?
>
> A: That's not what I said.
>
> Q: Could you tell us what you said?
>
> A: What I testified to before I was cut off was he threw me down on the bed. Would you like me to elaborate?
>
> Q: Please do?
>
> A: Yes. He did sexually assault me on January 20th in my home against my will.
>
> Q: And this is January 20, 1996; is that correct?
>
> A: Yes.

Defendant also elicited from Ms. Grisanti the fact that she had never reported the 1996 rape to the police.

Defendant now claims that he was unfairly surprised by the introduction of testimony about this alleged rape because he "was

[5]The Court is perplexed as to how this made any difference, as any potential prejudice to the defendant of the jury learning about an alleged prior rape does not turn on whether the incident resulted in pregnancy.

not prepared to produce evidence to contradict this rape and was specifically ordered by the court not to do so. This would have included eyewitnesses of the events in Las Vegas that weekend as well as certain medical and hotel records. Based upon this court's specific orders the Plaintiff did not complete the Las Vegas depositions." Def. Br. at [11]. Defendant also alleges that based upon this Court's orders he "did not retain his own expert witness as to 'dating of conception' or even produce eyewitnesses of the plaintiff and defendant on the weekend of the alleged assault." Id.

In light of defendant's express representations to the Court during the pre-trial conferences that he would be pursuing the 1996 rape allegation on cross-examination as an important impeachment issue in his case, his continued objection to the Court's exclusion of such evidence, and his understanding from a pre-trial conference held only four days before plaintiff's trial testimony that plaintiff was planning to testify about the incident, the Court is at a loss to see how defendant can claim that he was "unfairly surprised" by plaintiff's brief discussion of the events of January 20, 1996 during her direct examination. Moreover, plaintiff's direct testimony at trial was simply that she was thrown down and that she then had sexual intercourse with the defendant; plaintiff in fact did not testify on her direct examination that she was sexually assaulted by Mr. Cioffi. Indeed, it was defendant's cross-examination that elicited Ms.

Grisanti's claim that she had been sexually assaulted by defendant at that time.

Because defendant believed that Ms. Grisanti would be permitted to testify about the circumstances of the alleged rape up until four days prior to trial, his claims that he would have conducted discovery differently and called expert witnesses ring hollow, because any discovery he would have conducted necessarily would have been concluded long before that date, and any expert witnesses would already have been identified. See Greguski v. Long Island R.R. Co., 163 F.R.D. 221, 224 (S.D.N.Y. 1995) (no prejudice in admitting testimony of undisclosed expert where party had previously believed expert would testify and therefore had opportunity to take discovery). After the plaintiff's testimony, defendant did not request any remedial or curative action by the court such as striking plaintiff's testimony, a curative instruction, a continuance, or permission to amend his witness list to include the eyewitnesses he now claims he would have called had he not been "surprised." Under these circumstances, particularly as defendant himself had sought to introduce the precise testimony he now objects to and he was permitted to pursue his attack on plaintiff's credibility, the Court rejects defendant's claim that he was substantially prejudiced by plaintiff's mention of the allegation of the 1996 assault at trial.

4. Jury Instructions

According to the defendant, the Court erred in refusing to instruct the jury that attempting to seek custody or visitation of a child does not constitute "extreme and outrageous conduct" within the scope of the tort of intentional infliction of emotional distress.

During a pre-trial conference, the Court expressed skepticism that a custody or visitation dispute alone could form the basis for a claim of intentional infliction of emotional distress, and had invited plaintiff to submit authority on this point. However, the Court did not, as defendant now claims, rule that attempts to seek custody could not constitute extreme and outrageous conduct within the scope of that tort. Neither plaintiff nor defendant submitted any authority to the Court on this issue, and defendant did not request such a charge during the charge conference. Before the jury was charged, defendant requested that the Court advise the jury that attempts to gain custody are not extreme and outrageous conduct. Defendant did not submit any written request to charge or propose any language to the Court. Defendant was informed that he could make that argument to the jury during his closing arguments.

Defendant now claims that he was substantially prejudiced by the Court's refusal to charge the jury that efforts to obtain visitation or custody do not constitute extreme and outrageous

conduct because he had prepared for trial based upon the Court's pre-trial "holding." Defendant does not, however, explain what he would have done differently, and has therefore not demonstrated any prejudice resulting from the refusal to give the late-requested charge.

"A jury instruction is erroneous if the instruction misleads the jury as to the proper legal standard, or it does not adequately inform the jury of the law, but such an error will not be grounds for reversal unless taken as a whole, the jury instructions gave a misleading impression or inadequate understanding of the law." Owens v. Thermatool, 155 F.3d 137, 138 (2d Cir. 1998) (citations and internal quotation marks omitted). The charge given here properly instructed the jury on the elements of the tort of intentional infliction of emotional distressed, and emphasized that "the plaintiff must establish more than unpleasant or uncomfortable behavior on the part of the defendant [and that] [m]ere insults, indignities or annoyances that are not extreme and outrageous are not enough." Jury Charge, at 16. The jury was further instructed that "[t]he conduct must exceed all bounds usually tolerated by decent society and be of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." Id. As noted, defendant was free to argue to the jury that pursuing custody or visitation did not meet this standard.

In any event, even if there were any error in the Court's

refusal to charge the jury as requested, such error would be harmless as the jury's finding of liability on the four sexual assaults evidenced their finding that plaintiff was credible and, as well, a finding of liability for intentional infliction of emotional distress was amply supported by the evidence of defendant's continued threats and threatening behavior. Accordingly, defendant's motion for new trial on this ground is denied.

C. Plaintiff's Motion for Attorney's Fees and Bill of Costs [Doc. # 129]

At trial, the jury awarded punitive damages, the amount of which was left for determination by the Court by agreement of both parties. Under Connecticut law, punitive damages are limited to a party's litigation expenses: attorney's fees less taxable costs. See Berry v. Loiseau, 614 A.2d 786, 825 (Conn. 1992); Lieberman v. Dudley, Civ. No. 3:95cv2437 (AHN), 1998 WL 740827, * 4 (D. Conn. July 27, 1998). The purpose of an award of punitive damages is solely to compensate the plaintiff for the costs of litigation. See Berry, 614 A.2d at 827.

Plaintiff has now moved the Court for an order awarding her costs in the amount of $3,956.27 pursuant to Fed. R. Civ. P. 54, and punitive damages in the amount of $1,083,333. Absent objection from defendant, plaintiff's motion for costs is granted. However, plaintiff's calculation of her punitive

damages must be based on what her attorney fee obligation was as reflected in the fee agreement between her and her counsel, which provided for a one third contingency fee. Plaintiff claims that punitive damages should be calculated based on the sum of one third of the $2.5 million damages award ($833,000) -- her attorney fee by agreement, and the $2.5 million original compensatory damages award, or $3.3 million, resulting in a punitive damages award of $1.1 million.[6] This methodology is incorrect as duplicative, as it includes the amount of punitive damages (one third contingent attorney's fees) in the calculation of the ultimate punitive damages award. Although defendant has not opposed this motion, the Court concludes that the amount of punitive damages awarded here must be calculated based on one third of the total compensatory damages amount. Accordingly, the Court grants in part plaintiff's motion for attorneys fees and costs. Based on the remitted compensatory damages award of $1.25 million, the remitted punitive damages award is $416,667.

D. Conclusion

For the foregoing reasons, plaintiff's motion to amend judgment [Doc. # 128] is DENIED. Defendant's motion for new trial or, in the alternative, remittitur pursuant to FRCP 59(a) [Doc. # 135] is GRANTED IN PART AND DENIED IN PART, conditioned

[6]Contrary to plaintiff's calculation in her motion, one third of $2.5 million is $833,333, not $750,000.

on plaintiff's acceptance of $1.25 million as remitted compensatory damages within thirty days of the docketing of this ruling. Defendant's motion to alter or amend the judgment pursuant to FRCP 59(e) [Doc. # 133] is DENIED AS MOOT in light of the ruling on Doc. # 135.

Plaintiff's motion for attorney's fees and costs [Doc. # 129] is GRANTED IN PART. Plaintiff is awarded costs in the amount of $3,956.27. Conditioned on plaintiff's acceptance of the $1.25 million remitted compensatory damages award within thirty days, attorney's fees as punitive damages in the amount of $416,667 are awarded, for a total final judgment of $1,670,623.27 plus post-judgment interest.

Plaintiff's motion for bond or surety [Doc. # 132] and plaintiff's motion for supersedeas bond [Doc. # 131] are DENIED as premature as no appeal has yet been filed.

IT IS SO ORDERED.

_____

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 14th day of June, 2001.