STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: WEST BATH
DOCKET NO. BCD-WB-CV-09-07

PETER REDMAN AND NORTHERN MATTRESS COMPANY, INC.,

Plaintiffs

v.

ORDER ON DEFENDANTS' RULE 50 AND RULE 59 MOTIONS

NELSON TONER, JOHN CARPENTER, BERNSTEIN SHUR, SAWYER & NELSON, P.A.,

Defendants

Before the court are the post-trial motions of Defendants Bernstein, Shur, Sawyer & Nelson, P.A. (BSSN) and Nelson Toner following a jury verdict in favor of Peter Redman on the remaining counts of his complaint for professional negligence and breach of fiduciary duty. Defendants renew their motion for judgment as a matter of law, pursuant to M.R. Civ. P. 50(b), and also move for a new trial pursuant to M.R. Civ. P. 59.[1]

FACTUAL BACKGROUND

Viewing the evidence in the light most favorable to the jury's verdict, the jury reasonably could have found the following facts. *See Reardon v. Larkin*, 2010 ME 86, ¶ 4, 3 A.3d 376, 377. Peter Redman engaged BSSN in 2004 to represent him in a contentious shareholder dispute with his brother, Mark Redman, over control of the family business, Northern Mattress Co., Inc. Attorney Adam Taylor represented Mark Redman in the shareholder dispute. Redman informed

[1] In addition, Defendants have also filed a motion to strike exhibits C and D of Plaintiff's Memorandum in Opposition to Defendants' Motion for a New Trial. The court agrees that those exhibits are nineteen pages of legal argument in excess of the thirty pages the court allowed and Plaintiff submitted in opposition to the motion. Exhibits C and D are stricken.

Toner that his brother would try to remove him from the company in unsavory ways, including conspiring with other Northern Mattress employees.

On May 12, 2004, Tammy Simpson, a long-time employee at Northern Mattress, lodged a sexual harassment complaint against Redman with Deborah Gallant, a business consultant hired by Northern Mattress. Simpson complained that on May 11, 2004, Redman grabbed her hand at work on two separate occasions and "freaked [her] out". The first time allegedly occurred in a hallway outside Redman's office at Northern Mattress. While "overly" praising Simpson, Redman "casually grabbed her hand" as if to shake it. The second time allegedly occurred later that same day when Redman went into Simpson's office and again grabbed her hand, holding it for an "uncomfortably long time" (15 to 20 seconds) "like a boyfriend holding a girlfriend's hand", then began pounding his chest saying, "You are in here."

Defendants learned of Simpson's complaint against Redman the following day. Northern Mattress directed Gallant to conduct an investigation of the complaint, but she never contacted Redman regarding the incident. Gallant presented a report of her investigation to Redman at a meeting on May 19, 2004. Also present at the meeting was Mark Bell, the general manager of Northern Mattress. Although Redman requested that his attorney, NelsonToner, be present with him at the meeting, Toner was unable to attend because he was tied up with other responsibilities. Instead, Toner advised Redman to go to the meeting and take notes.

Redman gave a copy of the Gallant report to Toner and BSSN and specifically told Toner that he had done nothing wrong. Neither Toner nor BSSN investigated the veracity of Simpson's accusations or the accuracy of Gallant's findings and conclusions. Rather, Toner advised Redman that there were two possible solutions to the situation: 1) fight the accusations, or 2)

resolve the dispute quickly and quietly. Redman told Toner that he wanted to fight the accusations.

Toner and BSSN did not follow Redman's instructions. Instead, Toner decided to resolve the situation without Redman's knowledge or authority. Toner discussed ways to resolve and settle the Simpson incident with Adam Taylor, Mark Redman's attorney. Toner had Kate Debevoise, an employment attorney at BSSN, review the Gallant report and draft a memorandum. Although the memo purported to be from Mark Bell and Northern Mattress, in fact it was drafted by Debevoise with input from Adam Taylor.. Toner then sent the memorandum to Mark Bell, with instructions for Bell to sign it and give it to Simpson. Simpson received the "Bell memo" on June 11, 2004.

The Bell memo was signed by Simpson, Bell, and Mark Redman. The substance of the memo drafted by Debevoise, and its clear inference, was that Simpson's allegations against Redman and the findings and conclusions of the Gallant report were accurate. The memo provided that Redman would not be allowed to go to his office, but would work from a remote location, and that all Northern Mattress employees would be required to undergo sexual harassment training. Redman did not know that Toner was resolving the dispute in this way against his instructions, did not know Toner was consulting with his brother's attorney, and did not receive a copy of the Bell memo until after it was presented to Simpson.

Consistent with the prescription of the Bell memo, Redman was forced to work at a remote location at a time when he was in a dispute with his brother over control of the company. Redman felt betrayed by his attorneys and humiliated by their contributions to the false acknowledgement of his liability. As a result, Redman endured a loss of reputation at his company, among his friends, and in the community, and suffered from clinical depression,

significant anxiety bordering on panic, loss of dignity, sleep disturbance, muscle tension, palpitations, sweating, trembling, dizziness, shortness of breath, and was diagnosed with post-traumatic stress disorder. These symptoms began in 2004 and continued into 2010 at the time of trial.

PROCEDURAL BACKGROUND

Redman and Northern Mattress Co., Inc. filed a three-count complaint against BSSN, Nelson A. Toner, and John L. Carpenter, alleging professional negligence, breach of fiduciary duty, and negligent infliction of emotional distress. BSSN, Toner, and Carpenter asserted the affirmative defense of comparative negligence, among others, and counter-claimed for breach of contract, unjust enrichment, and account annexed. On cross motions for summary judgment, the court granted Defendants' motion for summary judgment as to the claims brought by Northern Mattress, and as to Redman's claim of negligent infliction of emotional distress count and the legal malpractice and fiduciary duty claims relating to the failure of Northern Mattress. The court also eliminated any claim for punitive damages for lack of evidence of malice.

After a nearly three-week trial in June of 2010, the court granted Defendants' motion for judgment as to the claims against Carpenter, and dismissed Defendants' counterclaims. The only claims presented to the jury were Redman's claims of professional negligence and breach of fiduciary duty against Toner and BSSN related to their handling of the Simpson complaint, and Defendants' defense of comparative negligence. The jury returned a verdict in favor of Redman on both counts, determined that Redman was not comparatively negligent, and awarded Redman $7,300,000 in damages for severe emotional distress. Toner and BSSN timely filed the pending motions, and the court held oral argument on these motions on January 25, 2011.

DISCUSSION

I. Defendants' Renewed Motion for Judgment as a Matter of Law

Pursuant to M.R. Civ. P. 50, the court may grant a party's motion for judgment as a matter of law when "viewing the evidence and all reasonable inferences therefrom most favorably to the party opposing the motion, a jury could not reasonably find for that party on an issue that under the substantive law is an essential element of the claim." M.R. Civ. P. 50(a); *see also Garland v. Roy*, 2009 ME 86, ¶ 17, 976 A.2d 940, 945. The burden is on the moving party to show that the jury's verdict is clearly and manifestly wrong. *See Townsend v. Chute Chem. Co.*, 1997 ME 46, ¶ 8, 691 A.2d 199, 202. In their Rule 50 motion, Defendants: 1) allege that error in the jury instructions mandates a new trial; 2) challenge the sufficiency of the evidence to support the jury's verdict on the legal malpractice claim; and 3) challenge the sufficiency of the evidence to support the jury's verdict on the breach of fiduciary duty claim; and 4) challenge the sufficiency of the evidence to support the jury's award of damages for severe emotional distress. In addition, Defendants argue that the breach of fiduciary duty claim was duplicative of the legal malpractice claim and should not have been presented to the jury.

A. Error in Jury Instructions

First, Defendants assert that the court's jury instructions were erroneous and mandate a new trial. Specifically, Defendants argue that the court incorrectly instructed the jury on legal professional negligence and that the verdict is inconsistent, indicating that the jury misunderstood the law. (Def.'s M. JMOL 6-7, 18-20.)

1. The "Lost Opportunity" Issue

Defendants contend that the court improperly instructed the jury on legal professional negligence by not giving the so-called "lost opportunity" standard as articulated *Niehoff v.*

Shankman & Assocs. Legal Ctr., P.A., 2000 ME 214, 763 A.2d 121. (Defs.' M. JMOL 19-20.)

The court gave the following professional negligence instruction to the jury:

> In this action for legal malpractice, the plaintiff must prove, by a preponderance of the evidence, that:
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> 1. The defendant committed professional negligence in his representation of the plaintiff;
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> 2. The defendant's professional negligence was a substantial factor in causing an unfavorable result for the plaintiff;[2] and
>
> 3. The defendant's professional negligence was a cause of the loss or damages claimed by the plaintiff.
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> Professional negligence, in the context of a legal malpractice action, is the failure to use such skill, judgment, prudence, diligence, and preparation as is reasonable according to the standards of ordinarily competent lawyers performing similar services under like conditions.
>
> More than dissatisfaction with a result or disagreement with tactics, or preparation or presentation must be shown. The plaintiff must prove, by a preponderance of the evidence, that the defendant's performance was below the level of skill, judgment, prudence, diligence, or preparation that was reasonable according to the standards of ordinarily competent lawyers performing similar services under like conditions.
>
> A lawyer may reasonably rely on statements made to the lawyer by the client, and may assume that such statements are truthful.

See Alexander, Maine Jury Instruction Manual § 7-77 at 7-80 (4th ed. 2010). Defendants assert that the court should have instructed the jury that in order for them to find in favor of Plaintiff, they must conclude that Defendants were negligent in their representation and that "the attorney's negligence caused the plaintiff *to lose an opportunity* to achieve a result, favorable to the plaintiff," which is allowed by law and the facts support. *See Niehoff*, 2000 ME 214, ¶ 10, 763 A.2d at 125 (emphasis added). Defendants contend that Plaintiff was required to meet the

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[2] Because Defendants asserted comparative negligence as a defense to the malpractice claim, the court utilized the substantial factor formulation in causation. *See* Alexander, Maine Jury Instruction Manual § 7-77 at 7-81 (4th ed. 2010) (citing *Wheeler v. White*, 1998 ME 137 ¶ 6-10, 714 A.2d 125, 127-28).

"lost opportunity standard," Plaintiff did not do so, and the court's failure to instruct on the "lost opportunity standard" prejudiced Defendants and mandates a new trial. The court disagrees.

Whether framed in terms of a lost opportunity to achieve a favorable result or simply a less favorable result, the burden is on the plaintiff to show that the attorney's negligence caused or was a substantial factor in causing a negative outcome to the plaintiff. *See Schneider v. Richardson*, 411 A.2d 656, 658 (Me. 1979). If the plaintiff's outcome would have been the same absent the attorney's negligence, then a plaintiff has not shown the negligence was a proximate cause of his injuries and has only proved "negligence in a vacuum." *See id.*; *accord Johnson v. Carleton*, 2001 ME 12, ¶ 12, 765 A.2d 571, 575 (defining proximate causation). To the extent there is any distinction between the given and requested instructions, the court views it as a distinction without a difference and does not agree that the professional negligence instruction was erroneous.

2. The "Wanton" Issue

Next, Defendants contend that the jury verdict is inconsistent and reflects that the jury misunderstood the law they were to apply when awarding Redman damages for severe emotional distress. (Defs.' M. JMOL 6-7, 18-19.) The specific issue identified by Defendants is with questions 1 and 2 of the jury verdict form. Question 1 asked the jury: "Were the defendants professionally negligent and was that negligence a cause of serious emotional distress damages to the plaintiff?" Question 2 then asked the jury: "Did the defendants act wantonly toward the plaintiff?" To question 1, the jury answered "yes"; to question 2, the jury answered "no." Defendants contend that this is a fundamental contradiction and means that the jury could not have understood the law on severe emotional distress damages.

In its damage instruction, the court instructed the jury as follows regarding severe emotional distress:

> The plaintiff has alleged that he suffered serious emotional distress as a result of the defendant's conduct.
>
> The term "serious emotional distress" means something more than minor psychic and emotional shocks, something more than the usual and insignificant emotional traumas of daily life in modern society. Serious emotional distress means mental stress, created by the circumstances of the event, that a reasonable person, normally constituted, would be unable to adequately endure.
>
> In order for the plaintiff to recover for serious emotional distress damages in this case, you must find by a preponderance of the evidence (a) that the plaintiff suffered serious emotional distress legally caused by the defendant's professional negligence or breach of fiduciary duty, (b) *find that the defendant has acted egregiously or has wantonly or willfully disregarded the consequences of his or its actions*, and (c) find that it was reasonably foreseeable that a person of normal sensitivities would suffer serious emotional distress under the circumstances, then you should award damages that will fairly and justly compensate the plaintiff for the full extent of the plaintiff's emotional distress, even if the plaintiff's emotional distress was greater than the distress which would have been suffered by a person of normal sensitivities.
>
> "Egregious Conduct" means conduct that is extremely or remarkably bad.[3]

(Emphasis added.) *See Garland v. Roy*, 2009 ME 86, ¶¶ 24-26, 976 A.2d 940, 947-48 (discussing the factual predicate for an award of severe emotional distress damages in a legal malpractice case); *Schelling v. Lindell*, 2008 ME 59, ¶¶ 24-26, 942 A.2d 1226, 1233 (explaining the types of injury that will constitute serious or severe emotional distress); Alexander, Maine Jury Instruction Manual § 7-70 at 7-69; § 7-71 at 7-72. Defendants do not argue that this instruction is an inaccurate statement of the legal standard for recovering damages for serious emotional distress in a legal malpractice case. Rather, Defendants argue that the jury's conclusion that the Defendants did not act wantonly is inconsistent with an award of damages for serious emotional distress. At oral argument, Defendants argued for the first time that

[3] *See* Black's Law Dictionary 555 (8th ed. 2004).

"egregious," "wanton," and "willful" are essentially synonymous, and the jury's conclusion that Defendants were not wanton precludes them from also concluding that their actions were egregious or willful. The court disagrees.

First, egregious, wanton, and willful are not synonymous, nor is that assertion born out by case law. Willful and wanton describe a state of mind, whereas egregious describes the act itself. *Compare Blanchard v. Bass*, 153 Me. 354, 357-62, 139 A.2d 359, 361-63 (1958) (explaining the difference between negligent, wanton, and willful conduct in terms of the tortfeasor's state of mind), *with Garland*, 2009 ME 58, ¶¶ 24, 26, 976 A.2d at 947-48 (noting egregious conduct by an attorney giving rise to damages for severe emotional distress), *and Soley v. Karll*, 2004 ME 89, ¶ 15, 853 A.2d 755, 760 (describing egregious conduct that warranted an award of attorney fees as conduct of an extraordinary nature). Second, question 2 of the verdict form arose because of Defendants' asserted defense of comparative negligence to the professional negligence claim. Consideration of a plaintiff's comparative negligence is only available if the jury determines that the defendant's conduct exceeded mere carelessness and constituted wanton misconduct. *See Blanchard*, 153 Me. at 362, 139 A.2d at 363 ("It is well settled that contributory negligence, that is, lack of due care, does not bar recovery for wanton misconduct.") (cited in *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990); Alexander, Maine Jury Instruction Manual § 7-85 at 7-88. Thus, the jury had to indicate whether they found Defendants' conduct to be "wanton" before they could consider whether plaintiff's alleged negligence contributed to his injuries. The court instructed the jury that "[t]o act 'wantonly' means to act recklessly, heedlessly or maliciously."[4]

[4] *See also Blanchard v. Bass*, 153 Me. 354, 358, 139 A.2d 359, 361 (1958) ("Wantonly means without reasonable excuse and implies turpitude . . . . It is a reckless disregard of the lawful rights of others, such

The jury determined that Defendants were not "wanton," but also found that Plaintiff was not negligent. Contrary to Defendants' contention, the jury did not need to find Defendants acted wantonly to award damages for severe emotional distress. The jury could conclude that Defendants actions were egregious, but not done with a wanton disregard for the consequences of those actions. *See Garland*, 2009 ME 58, ¶¶ 24, 26, 976 A.2d at 947-48. The verdict is fully consistent with the jury concluding that Defendants' actions were egregious, but not wanton, and, as discussed further in this order, the record supports such a finding. *See Ma v. Bryan*, 2010 ME 55, ¶ 8, 997 A.2d 755, 758-59; *Burton v. Merrill*, 612 A.2d, 862, 865 (Me 1992).

B. Sufficiency of the Evidence: Professional Negligence

To prove professional negligence, "a plaintiff must prove by a preponderance of the evidence, that the defendant breached a duty owed to the plaintiff to conform to a certain standard of conduct, and that the breach of that duty proximately caused an injury or loss to the plaintiff." *Garland*, 2009 ME 86, ¶ 19, 976 A.2d at 946 (quotation marks omitted); *accord Niehoff v. Shankman & Assocs. Legal Ctr., P.A.*, 2000 ME 214, ¶ 7, 763 A.2d 121, 124. The standard of conduct to which a defendant must conform in a case of legal professional negligence is the exercise of that degree of skill, care, and diligence exercised by other members of the legal profession. *See Fisherman's Wharf Assocs. II v. Verrill & Dana*, 645 A.2d 1133, 1136 (Me. 1994). "A jury's verdict finding an attorney liable for professional negligence must be upheld if any credible evidence, and all justifiable inferences drawn from that evidence, viewed in the light most favorable to the plaintiff, supports the verdict." *Burton*, 612 A.2d at 865 (quoted in *Garland*, 2009 ME 86, ¶ 18, 976 A.2d at 945-46).

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a degree of rashness as denotes a total want of care, or a willingness to destroy, although destruction itself may have been unintentional.")

Of the four elements required to make out a claim of professional negligence, Defendants only challenge causation. Defendants contend that the evidence fails to support the jury's verdict on legal malpractice because Plaintiff did not provide any expert testimony on proximate causation and, in any event, failed to prove an unfavorable result to him that was caused by Defendant's negligence.[5] (Defs.' M. JMOL 4-5, 10-12.) Although not fully developed in their brief, Defendants also contend that the harm to Redman was an unforeseeable consequence of how they handled the Simpson complaint. (Defs.' M. JMOL 9-10.) "The question of whether a defendant's acts or omissions were the proximate cause of a plaintiff's injuries is generally a question of fact, reserved for the jury's determination." *Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 42, 948 A.2d 1223, 1236.

> Proximate cause requires a showing that the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence.

Johnson v. Carleton, 2001 ME 12, ¶ 12, 765 A.2d 571, 575 (quotation marks omitted).

To show that an attorney's negligence is the proximate cause of the plaintiff's injury, the plaintiff must prove that the negligent representation caused a negative outcome for the plaintiff that would have not occurred absent the attorney's negligence. *See id*; *accord Schneider v. Richardson*, 411 A.2d 656, 658 (Me. 1979). Often, in order to meet this burden, the legal malpractice plaintiff must provide expert testimony because a jury does not have the specialized knowledge of whether or not an alleged instance of negligence would have produced a different

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[5] Defendants also assert that Plaintiff failed to prove that their breach caused him to lose an opportunity for a more favorable result. *See Niehoff v. Shankman & Assocs. Legal Ctr., P.A.*, 2000 ME 214, ¶ 10, 763 A.2d 121, 124-25. As discussed in section I, A, *supra*, the court concludes that such a requirement is a distinction without a difference and examines the sufficiency of the evidence based on the given instruction.

outcome after trial. *See, e.g.*, *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶¶ 13-14, 742 A.2d 933, 940 (requiring expert testimony to show that the failure to procure an independent appraisal of a marital asset in a divorce proceeding resulted in a less monetarily favorable divorce judgment for the plaintiff). "[E]xpert testimony," however, "may not be necessary where the negligence and harmful results are sufficiently obvious as to lie within [the] common knowledge" of the jury. *Searles v. Trs. of St. Joseph's College*, 1997 ME 128, ¶ 10, 695 A.2d 1206, 1210 (quoting *Cyr v. Glesen*, 150 Me. 248, 252, 108 A.2d 316, 318 (1954)).

The legal malpractice cases cited by Defendants, *Johnson v. Carleton*, 2001 ME 12, 765 A.2d 571, and *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, 742 A.2d 933, are not inapposite. In both cases, the plaintiff alleged that but for the attorney's negligence, the plaintiff would have achieved a more favorable outcome in an initial suit, requiring her to prove the so-called "case within a case." *See Johnson*, 2001 ME 12, ¶¶ 13-14, 765 A.2d at 575-76; *Corey*, 1999 ME 196, ¶ 12, 742 A.2d at 939-40; *accord Schneider v. Richardson*, 411 A.2d 656, 658 (Me. 1979) (discussing how a plaintiff proves the suit within a suit in professional negligence cases). In such cases, expert testimony on proximate causation is necessary because a jury does not have the specialized knowledge of whether or not the alleged instances of malpractice would have produced a different outcome after trial. *See* M.R. Evid. 702; *Searles v. Trs. of St. Joseph's College*, 1997 ME 128, ¶ 10, 695 A.2d 1206, 1210. The present case, however, does not involve malpractice in underlying litigation, nor does it stand in the same procedural posture as *Johnson* and *Corey*. Both *Johnson* and *Corey* resulted in a summary judgment in favor of the attorney defendant because the plaintiff had failed to provide any evidence through expert affidavit of a less favorable outcome, i.e. proximate cause, in her statement of material facts, and therefore the

defendants were entitled to judgment as a matter of law.[6] *See* M.R. Civ. P. 56(c); *Estate of Cilley v. Lane*, 2009 ME 133, ¶ 10, ("To withstand a motion for summary judgment, the plaintiff must establish a prima facie case of each element of her cause of action." (quotation marks omitted)); *Addy v. Jenkins*, 2009 ME 46, ¶¶ 10-12 (explaining that to survive a motion for summary judgment in a negligence action, a plaintiff must present evidence of proximate cause within her statement of material facts); *Johnson*, 2001 ME 12, ¶ 14, 765 A.2d at 576; *Corey*, 1999 ME 196, ¶ 14, 742 A.2d at 940.

Redman was required to provide expert testimony on the appropriate standard of care and whether Defendants breached that duty. *See Mitchell v. Jackson*, 627 A.2d 1014, 1017 (Me. 1993). His legal expert, Attorney Joseph Goodman, testified about his legal training, his professional experiences, and his familiarity with the profession's code of ethics. He described his understanding of the salient alleged acts and omissions by Defendants relating to Redman's claims, and his analysis of Defendants' representation of Redman. He also described the standard of care for attorneys in such situations, and opined that Defendants' conduct and their representation of Redman, particularly regarding the Bell memo, fell below that standard and was negligent. Both Redman and his treating psychologists testified that after Defendants sent the Bell memo, which admitted Redman's culpability to a sexual harassment claim, a claim that Defendants did not investigate, Redman felt extremely humiliated and betrayed, resulting in clinical depression, anxiety disorders, and post-traumatic stress disorder. Further, as a result of the Bell memo, Redman was excluded from the building in which his office was located and forced to work at a remote location during a period when he was in a shareholder dispute with

[6] The lack of expert testimony within Plaintiffs' statement of material facts at the summary judgment stage was also the basis for the court granting summary judgment in favor of Defendants on Northern Mattress's claim of legal malpractice resulting in the failure of the company.

his brother over control over the company. Contrary to Defendants' contention and more narrow view of the law, the jury reasonably could have found that this was a negative outcome to Redman that would not have occurred if Defendants had investigated the Simpson incident and not drafted and sent the Bell memo — in other words, that Defendants' negligence proximately caused Redman serious emotional distress. *See Johnson*, 2001 ME 12, ¶ 12, 765 A.2d at 575; *Schneider*, 411 A.2d at 658.

Nevertheless, Defendants contend this is insufficient to establish proximate causation, essentially arguing that Plaintiff was required to present expert testimony to the jury that linked the type of injury suffered to the negligent conduct because it is not a reasonably foreseeable consequence of their actions. The court does not agree that such testimony is necessary. The jury may draw "reasonable inferences based on their own experience as to whether a particular act or omission is a proximate cause of an injury." *Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 2, 948 A.2d 1223, 1236. Here, the jury could reasonably infer from their own experience that humiliation and depression were reasonably foreseeable consequences of Defendants admitting Redman's liability to an unfounded, uninvestigated sexual harassment charge, and they could have reasonably concluded this without the assistance of expert testimony. *See Searles*, 1997 ME 128, ¶ 10, 695 A.2d at 1210.

C. Breach of Fiduciary Duty

It is well established that "[a]n attorney and client necessarily share a fiduciary relationship of the highest confidence." *Sargent v. Buckley*, 1997 ME 159, ¶ 9, 697 A.2d 1272, 1275. This is because there is a disparity of knowledge of legal affairs between the attorney and client, and the client places trust and confidence in his attorney to handle his affairs. *See Ruebsamen v. Maddocks*, 340 A.2d 31, 34-35 (Me. 1975), *superseded on other grounds by*

Theriault v. Burnham, 2010 ME 82, 2 A.2d 324; *see also Stewart v. Machias Savings Bank*, 2000 ME 207, ¶ 10, 762 A.2d 44, 46. "The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality . . . . These common law duties predate and exist despite independent, codified ethical standards." *Sargent*, 1997 ME 159, ¶ 9, 697 A.2d at 1275 (quotation marks omitted). In Maine, "[a] fiduciary relationship is the same as a confidential relationship, which gives rise to the same duties." *Stewart*, 2000 ME 207, ¶ 11 n.1, 762 A.2d at 46; *but see Bryan R. v. Watchtower Bible & Tracy Soc'y, Inc.*, 1999 ME 144, ¶ 20 n.10, 738 A.2d 839, 846 (suggesting that establishing the fact of a confidential relationship might require more proof than establishing a fiduciary relationship). A breach of the fiduciary relationship occurs when the trust and confidence placed in the fiduciary is abused or the influence inherent in such relationships "is exerted to obtain an advantage at the expense of the confiding party."[7] *See Stewart*, 2000 ME 207, ¶ 11 n.1, 762 A.2d at 46 (quotation marks omitted).

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[7] The court instructed the jury with regards to breach of fiduciary duty:

> To prove a claim of breach of fiduciary duty, the plaintiff must prove, by a preponderance of the evidence, the following facts:
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> First, that the plaintiff placed trust and confidence in the defendant;
>
> Second, that there was a great disparity of position and influence between the parties and favoring the defendant;
>
> Third, that the defendant engaged in or allowed transactions favorable to a third party and adverse to the plaintiff in the course of their relationship; and
>
> Fourth, that the plaintiff has damages proximately caused by the defendant's breach of fiduciary duty to the plaintiff.
>
> A fiduciary relationship exists between all lawyers and their clients and the lawyer's fiduciary obligation requires undivided loyalty and confidentiality.

Alexander, Maine Jury Instruction Manual § 7-35 at 7-42.

1. Sufficiency of the Evidence: Proximate Causation

As they did with professional negligence, Defendants allege that Plaintiff was required to provide expert testimony on proximate causation—that the breach of one or more of the fiduciary duties proximately caused serious emotional distress to the plaintiff—and that the failure to do so requires entry of judgment in their favor. (Defs.' M. JMOL 15-16.) Defendants correctly point out that "[t]he same rules of causation generally apply whether the cause of action sounds in contract, negligence, or breach of fiduciary duty." *Niehoff*, 2000 ME 214, ¶ 8, 763 A.2d at 124. Therefore, to show that the Defendants' breach of fiduciary duty proximately caused his injuries, the Plaintiff was required to show

> that the evidence and inferences that may reasonably be drawn from the evidence indicate that the [breach of fiduciary duty] played a substantial part in bringing about or actually causing injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the [breach of fiduciary duty].

Johnson v. Carleton, 2001 ME 12, ¶ 12, 765 A.2d 571, 575 (quotation marks omitted); *accord Niehoff*, 2000 ME 214, ¶ 8, 763 A.2d at 124.

The court finds its analysis on proximate cause from professional negligence equally applicable here; expert testimony linking the Defendants' breaches to the injuries suffered was not necessary in this case. The jury is permitted to draw "reasonable inferences based on their own experience as to whether a particular act or omission is a proximate cause of an injury." *Tolliver v. Dep't of Transp.*, 2008 ME 83, ¶ 2, 948 A.2d 1223, 1236. Here, the jury could reasonably infer from their own experience that humiliation and depression were reasonably foreseeable consequences of Defendants' breach of their duty of loyalty—drafting and sending a memorandum that was favorable to Mark Redman and Northern Mattress and adverse to

Plaintiff—and they could have reasonably concluded this without the assistance of expert testimony. *See Searles*, 1997 ME 128, ¶ 10, 695 A.2d at 1210.

2. Duplicative as a Matter of Law

Defendants next contend that a separate claim for breach of fiduciary duty does not arise when the alleged breach is identical to that underlying a claim of legal malpractice, and the court should have granted judgment as a matter of law to Defendants on this claim because it is duplicative. (Defs.' M. JMOL 16-18.) They claim that when the court's summary judgment eliminated the counts brought by Northern Mattress, there was no longer any basis for a breach of fiduciary duty claim because there was no conflict of interest present. (Defs.' M. JMOL 17.)

First, the court does not agree, nor has the Law Court held, that the breach of one of an attorney's fiduciary duties is subsumed within professional negligence.[8] While the two causes of action are similar, the standard of conduct distinguishes them. The standard of professional conduct owed by an attorney to his client is "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Sohn v. Bernstein*, 279 A.2d 529, 532 (Me. 1971). The standard is the ubiquitous reasonable person standard imported into the attorney-client relationship. An attorney's failure to conform to this standard of conduct constitutes professional negligence. *See id.*

An attorney's fiduciary duties are not framed in terms of the reasonableness of the conduct. They are simple to proclaim: undivided loyalty and confidentiality. *See Sargent*, 1997

[8] At least one Maine Superior Court decision appears to have taken the approach urged by Defendants. S*ee Smith v. Loyd*, 2002 Me. Super. LEXIS 155, No. RE-01-15, at *8-*9 (Me. Super. Ct., Sept. 24, 2002) (equating an attorney's fiduciary duty with the standard of care owed by an attorney to his client, then dismissing a breach of fiduciary duty claim, but allowing the malpractice claim to move forward). The Law Court, however, has not spoken on this issue.

ME 159, ¶ 9, 697 A.2d at 1275. "The fiduciary obligations are the foundation of the attorney-client relationship and enable a client to fully reveal confidences and to repose unhesitating trust in the attorney's ability to represent the client's interests diligently and competently. . . . [U]nflinching fidelity is the duty of every attorney." 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 15.1 at 661-62 (2009 ed. 2009); *accord Burnham v. Heselton*, 82 Me. 495, 499 (1890) ("Especially does the law require the highest degree of honor and good faith from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counselor, shall be fully deserved."). The attorney breaches his fiduciary duties by revealing client confidences or engaging in transactions to benefit himself or others, to the detriment of the client. A breach of the reasonable standard of care, however, does not necessarily constitute a breach of fiduciary duty. An attorney may act faithfully, but also negligently. The court, thus, does not accept the proposition that breach of fiduciary duty is subsumed into professional negligence. *See Camden Nat'l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶¶ 10-16, 952 A.2d 213, 216-18 (analyzing negligence and breach of a fiduciary relationship arising from the same facts as two separate causes of action); *cf. Steeves v. Bernstein, Shur, Sawyer & Nelson P.C.*, 1998 ME 210, ¶ 10, 718 A.2d 186, 189 (suggesting an attorney may be liable for legal malpractice from his professional negligence or a breach of his fiduciary duty).

Defendants presume that the factual predicate supporting the jury's verdicts on professional negligence and breach of fiduciary duty are identical. The court sees no reason to make such a presumption, especially viewing the evidence and all the reasonable inferences therefrom in the light most favorable to the Plaintiff. *See* M.R. Civ. P. 50(a); *Ma*, 2010 ME 55, ¶ 8, 997 A.2d at 758-59. The jury could have concluded, and the evidence supports, that

Defendants engaged in professional negligence by: 1) failing to attend the meeting with Plaintiff in which he received the Gallant report, or failing to advise Redman not to attend until an attorney could go with him; 2) failing to investigate any of the allegations within the report, despite Plaintiff expressly reporting his innocence; 3) failing to follow the course of action that Plaintiff chose, i.e. fighting the allegations of sexual harassment; and 4) admitting Plaintiff's culpability to the sexual harassment claim in an unauthorized memo. Such conduct falls well beyond the standard of "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Sohn*, 279 A.2d at 532.

The jury also could have concluded, and the evidence supports, that Defendants breached their fiduciary duty of undivided loyalty by: 1) working with Mark Redman and Adam Taylor to draft the Bell memo and remove Plaintiff from his office and his duties at Northern Mattress; 2) drafting the Bell memo as if it were in fact from Northern Mattress, to Plaintiff's detriment and Mark Redman's benefit; and 3) admitting Plaintiff's culpability to a sexual harassment claim and agreeing to consequences that were harmful to Plaintiff, all to Plaintiff's detriment and Mark Redman's benefit. Such conduct is a complete breach of the trust placed by Plaintiff in his attorneys, and a breach of the duty of loyalty. Because Defendants have not raised any other argument regarding the claim of breach of fiduciary duty, the jury's conclusion must stand.

D. Sufficiency of the Evidence: Severe Emotional Distress and Egregious Conduct

Once a plaintiff has proved his case of legal malpractice, he may only recover damages for severe emotional distress if the jury concludes that the defendant's conduct was egregious or the defendant wantonly or willfully disregarded the consequences of his or its actions. *See Garland*, 2009 ME 86, ¶¶ 24-26, 976 A.2d at 947-48. Because the jury concluded that

Defendants were not "wanton," *see supra* I, A, 1, their verdict in favor of Redman on legal malpractice must have been based on their determination that Defendants' conduct was egregious.[9] Defendants contend, however, that the evidence, when viewed in the light most favorable to Plaintiff, does not support the jury's conclusion that their conduct was egregious. (Defs.' M. JMOL 5-9.) Again, the court disagrees.

The jury's conclusion that Defendants' conduct was egregious is both supported by the record and consistent with Maine case law. For example, in *McAlister v. Slosberg*, 658 A.2d 658 (Me. 1995), a malpractice action in which an attorney intentionally misrepresented the status of his client's appeal which was eventually dismissed for failure to file a brief, the Law Court upheld the emotional distress damages resulting from the attorney's egregious conduct. Similarly, in *Burton v. Merrill*, 612 A.2d 862 (Me. 1992), an attorney falsely and repeatedly informed his clients that he had filed a counterclaim in the suit against them; the attorney later signed a stipulation of dismissal of the suit without their consent or consultation. The Law Court upheld the award of severe emotional distress damages based on this egregious conduct. *See id.* at 866; *cf. Garland*, 2009 ME 86, ¶ 24, 976 A.2d at 947-48 (describing the attorney's conduct in *Burton* as egregious).

As previously noted, based on the evidence at trial, the jury could have concluded that Plaintiff hired Defendants to represent him in his dispute with his brother over control of the family company, Northern Mattress. The jury also could have concluded that Plaintiff's dispute with his brother was particularly contentious, and that Plaintiff informed Defendants that his brother would try to remove him from the company in unsavory ways. The jury could have

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[9] Defendants also assert that the jury's verdict is contradictory with regards to the damage award, indicating that the jury did not understand the instruction. The court addressed this argument in section I, A, *supra*, and does not discuss it any further.

concluded that despite this warning, upon learning of the sexual harassment allegations by Ms. Simpson, and in complete disregard of Plaintiff's instructions, Defendants colluded with Mark Redman and/or his attorney to draft a memorandum, ostensibly from Northern Mattress to Ms. Simpson, in which Defendants' admitted Plaintiff's wrongdoing and, as a result, Plaintiff was ousted from the company and the entire staff of Northern Mattress was required to undergo sexual harassment training. The jury could have concluded that Defendants did this without Plaintiff's knowledge, consultation, or consent, or any investigation into the veracity of Simpson's allegations. The court cannot say that such conclusions are clearly and manifestly wrong, or that the record does not amply support a jury finding egregious conduct. *See* M.R. Civ. P. 50(a); *Townsend*, 1997 ME 46, ¶ 8, 691 A.2d at 202.

II. Defendants' Motion for a New Trial and Remittitur

Defendants allege that jury confusion, attorney misconduct, and excessive damages as grounds for a new trial. (Defs.' M. New Trial 2-16.) Defendants also contend that the excessive damages mandate remittitur and request the court "remit such portion thereof as the court judges to be excessive." M.R. Civ. P. 59(a). (Def.'s M. New Trial 16-18.) Defendants suggest that the court remit the damages from $7,300,000 to $100,000. (Defs.' M. New Trial 18.) Finally, Defendants argue that the jury verdict violates due process of law as guaranteed by the Maine and United States Constitutions because it is arbitrary, unpredictable, and unforeseeable. (Defs.' M. New Trial 18-20.)

A. Standard of Review

Pursuant to M.R. Civ. P. 59(a), the court may

> grant a new trial 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 or in suits in equity in the courts of this state. A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has

> first been given an opportunity to remit such portion thereof as the court judges to be excessive.

Accord Estate of Fournier, 2009 ME 17, ¶ 12, 966 A.2d 885, 889. An error in a ruling or an omission by the court is not grounds for granting a new trial "unless refusal to take such action appears to be inconsistent with substantial justice. The court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." M.R. Civ. P. 61. The court will first examine whether the Defendants' other grounds mandate a new trial before examining whether the amount of damages warrants remittitur or a new trial. M.R. Civ. P. 59(a).

B. Juror Confusion on Severe Emotional Distress

Defendants contend that during closing argument, Plaintiffs' counsel misstated the proper standard to award damages for severe emotional distress. During closing argument, counsel stated:

> You will be instructed by the Court that a person who comes in with a preexisting condition, if he's in a state of emotional problems when he goes to the lawyer for help, and the lawyer causes this to get worse, the lawyer's responsible for all of that, it's called eggshell. If you crack an eggshell and it cracks open, you are responsible for the whole thing, even if he had some minor problem at the outset, you take your victim as you find him. That's the law.

(Closing Argument Tr. 41:13-23.) Defendants strenuously argue that Plaintiff's counsel improperly suggested to the jury that they could award emotional distress damages without finding that the harm suffered by Plaintiff was severe, and this material misstatement mandates a new trial on damages. While Plaintiff counsel's statement does conflate the concept of a fragile condition and an eggshell psyche, the court is confident that any impropriety was cured by its own instruction, quoted earlier in this decision. The court also instructed the jury that

> [i]f at the time of the incident the plaintiff had a pre-existing condition which made plaintiff more susceptible to injury than a person in good health, the

> defendant is responsible for all injuries or losses suffered by plaintiff as a result of defendant's fault, even if those injuries are greater than would have been suffered by a person in good health under the same circumstances.

See Alexander, Maine Jury Instruction Manual § 7-103 at 7-111. The court's instructions to the jury made clear that they could only award damages for emotional distress if they found Defendants' conduct was egregious. Further, the instruction on fragile condition cured any inaccuracy in Plaintiff counsel's closing argument. The court can see no evidence of juror confusion in this regard.

C. Attorney Misconduct: Improper Closing Argument

Defendants identify nineteen instances of improper argument by Redman's counsel that they contend are improper for one or more of the following six reasons: 1) prejudicial and inflammatory, 2) comment on financial circumstances of the parties, 3) misstatement of the law, 4) misstatement of facts or misrepresentation of the evidence, 5) personal opinion, and 6) barred by the court's previous ruling. (Defs.' M. New Trial 2-7.) Defendants did not object at trial to any of these alleged instances of improper argument or request a curative instruction. Defendants nonetheless contend that the frequency, severity, and overall nature of these prejudicial arguments affect their substantial rights and the court should grant a new trial on this basis. (Def.'s M. New Trial 7.)

The standard for summation in Maine is well established:

> As is permitted to the debater in parliamentary contests the legal advocate may employ wit, satire, invective, and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence. . . . Violation of the rule may be the ground for a new trial on motion of the party whose rights are prejudiced . . .

State v. Martel, 103 Me. 63, 66, 68 A. 454, 455 (1907). The court may order a new trial only if the closing argument of Plaintiff's counsel deprived Defendants of a fair trial. M.R. Civ. P. 61;

accord Gilmore v. Cent. Me. Power Co., 665 A.2d 666, 669 (Me. 1995); *cf. State v. Schmidt*, 2008 ME 151, ¶ 15, 957 A.2d 80, 85 ("Obvious error is that error so highly prejudicial it virtually deprives the defendant of a fundamentally fair trial." (quotation marks omitted)); *Coyne v. Peace*, 2004 ME 150, ¶ 14, 863 A.2d 885, 890 ("Obvious error is error that constitutes such a serious injustice that reversal is necessary because [the court] could not in good conscience let the judgment stand."). Any improper comments during closing argument must be viewed in the context of the entire trial to determine whether they prejudiced the jury. *See Gilmore*, 665 A.2d at 669.

1. The Alleged Instances of Improper Argument

Defendants have labeled the nineteen challenged statements alphabetically in their motion. For convenience, the court will follow suit in its discussion, beginning with a chart identifying the location in the closing argument transcript and full text of each alleged instance of improper argument.

A	2:17-3:4	It seems that these days there's a lot of shirking of responsibility in the world. We have the BP oil disaster, and people aren't held accountable. We have Wall Street people, not held accountable, and it seems that the little guy is always picking up the pieces and . . . get[ting] his life together, whereas the big guy who may have caused the problem often walks off scot-free and is never held accountable.
B1	3:10-14	[A]ttorneys . . . are supposed to live up to a very high standard of care . . . and they are supposed to correspondingly care for their clients and perform for their clients.
B2[10]	3:11-12	[Attorneys] get paid a lot of money

[10] The court has divided this statement into two subparts because Defendants make two separate objections: misstatement of the law and improper comment on financial circumstances. Put back into context, Plaintiff's counsel stated during closing argument that: "[A]ttorneys . . . are supposed to live up

C	9:21-23	[W]e'll talk about it when I get a break from whatever I am doing on tax returns or something like that . . .
D	10:8-10	[U]nless they don't read their e-mails, which is entirely possible.
E	13:25-14:3	And Mr. Webbert gets $25,000 for his opinions here, for his testimony he said. I asked him how much are they paying you for your testimony? He said $350 an hour. $25,000.
		. . . .
	25:22-23	[W]e didn't pay somebody $25,000 to give you an opinion.
F	17:8	Peter is a nice guy.
G	19:24-20:2	What's at stake here is a huge company, the principle owner of which is being, it's being suggested that he be permanently removed out of his office.
H	24:10-14	[F]or some reason they are not showing this very important document to Peter that removes him from his business. I think their reason is because Peter didn't agree to it . . . .
I	25:1-2	So I think it's quite clear what was going on.
J	25:8-9	I have made it crystal clear about how important this business was to Peter.
K	25:8-9	They know it's genuine. These doctors were compelling witnesses.
L	28: 7-12	Peter Redman's thoughts about having been thrown out of his own company, thrown me out of my parent[s'] company, threw me out without talking to me. You destroyed my company, you destroyed my financial wealth, you destroyed my family's legacy, made me feel like a criminal.
M	29:2-3	So I would suggest to you that this is a case where a message does have to be sent . . . .
N	29:8-10	"A lot of damage can be done in a short time as the BP crisis makes it very clear to us."
O	29:14-18	And so I suggest you look at Dr. Ratner's notes. And you heard him, he's the one that directed me to these notes during his testimony, nothing was planned about his testimony in this regard.

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to a very high standard of care and they get paid a lot of money and they are supposed to correspondingly care for their clients and perform for their clients." (Closing Argument Tr. 3:9-14.)

P	30:18-19	[I]t was too late to save my company.
Q	33:7-12	And so I think a big problem here is that these lawyers who wrote this memo saying, saying that he has got to get his stuff together or we are not going to represent him, I think they got a problem not believing their client. If you don't believe your client, you can't represent your clients. Lawyers, you all know lawyers are the mouthpieces for their client, they have to believe or—in what he's saying.
R	38:2-8	[Toner] apparently thinks lawyers can just play God and assume the role of the client, do whatever they want, they have a lot of power to manipulate their clients, and that's the problem here and that's why you have to hold them accountable . . . .
S	41:1-4	And then you will proceed on and you will address damages, and I hope you would consider the number that Dr. Ratner put forward.

Because the court finds that some of these statements are less problematic than others, the court will first address the categories of statements or individual statements that the court determines are not improper or do not rise to the level of affecting the Defendants' substantial rights.

2. Statements F, G H, I, J, K, L, O, Q, R, and S

Defendants contend that Plaintiff's counsel interjected his personal opinion into closing argument in contravention of M. R. Prof. Conduct 3.4(e) in statements F, H, I, J, K, O, Q, and R. Rule 3.4(e) states that a "lawyer shall not . . . in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." A lawyer may, however, "argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated therein." *Schmidt*, 2008 ME 151, ¶ 17, 957 A.2d at 85 (quoting former M. Bar R. 3.7(3)(2)(v) (abrogated Aug. 1, 2009)). The court agrees that Statements F and K are clearly improper personal opinion because they are comments on the credibility of witnesses. The remaining instances, although inartful, do not rise to the level of improper argument based on personal opinion because they do not touch on the justness of a cause, the credibility of a witness, or the culpability of the Defendants.

In the context of the entire trial, the two isolated, improper statements did not affect the Defendants' substantial rights and do not mandate a new trial. *See* M.R. Civ. P. 61; *Gilmore*, 665 A.2d at 669.

In addition, Defendants contend that statements G, J, O, and S are misstatements of the facts or evidence. The court, however, finds these statements to be fair comments on the evidence and do not represent improper argument on the part of Plaintiff's counsel. *See Schmidt*, 2008 ME 151, ¶ 17, 957 A.2d at 85. Finally, Defendants assert that Plaintiff's counsel impermissibly referred to the eventual liquidation of Northern Mattress in statements G and L in violation of the court's previous rulings. Although Defendants contend these statements ere not relevant to the proceedings, the court finds them to be fair comments on the evidence and the extent of the Plaintiff's emotional distress. Neither affected Defendants' substantial rights. *See* M.R. Civ. P. 61.

3. Statements B1, D, M, P, and Q

Defendants contend that Plaintiff's counsel misstated the law in his closing argument regarding the appropriate standard of care an attorney owes his client (Statement B1) and an attorney's ethical obligations (Statement Q). (Def.'s M. New Trial 2, 7.) Pursuant to M. R. Prof. Conduct 3.3(a)(1), a lawyer "shall not knowingly make a false statement of fact or law to a tribunal." *See also State v. Bahre*, 456 A.2d 860, 864-65 (Me. 1983) (explaining that a misstatement or incomplete statement of the law during closing arguments that is not corrected by proper jury instructions can deprive a party of a fair trial and compel reversal). The court, however, does not find either statement to be a misstatement of the law. Statement B1 is phrased generally, and does not purport to instruct the jury on the law they will be applying to the case or the duty of care owed by an attorney to a client. Statement Q, rather than an improper statement

on an attorney's ethical obligations as Defendants contend, is a general comment on the attorney-client relationship. Further, this portion of the closing argument essentially rephrases one of the primary canons of an attorney's obligations: candor and truth. *See, e.g.*, M.R. Prof. Conduct 3.3(a); M.R. Prof. Conduct 3.4; M.R. Prof. Conduct 4.1.

Defendants also allege that Statements D, M, and Q are inflammatory and prejudicial. The court disagrees. If improper at all, they are harmless error. Statement D is a fair comment on the evidence admitted at trial, namely, e-mails between Redman and BSSN attorneys regarding Redman's dispute with his brother.[11] As discussed, Statement Q is general comment on the attorney-client relationship. At Statement M, Plaintiff's counsel stated: "So I would suggest to you that this is a case where a message does have to be sent . . . ." (Closing Argument Tr. 29:2-3.) Defendants contend this is a punitive damages style remark, inappropriate for a legal malpractice case and prejudicial. Taken alone, the court would agree. However, immediately after this remark, Plaintiff's counsel continued: ". . . where you can hold these lawyers accountable. It's not about punishment, it about holding people accountable for the repercussions of their actions." (Closing Argument Tr. 29:3-7.) Any impropriety in the initial phrasing was mitigated by the subsequent clarification by counsel. None of these statements rises to the level of affecting substantial justice or mandating a new trial. *See* M.R. Civ. P. 61.

Lastly, Defendants assert that Statement P is a misstatement of the evidence. This argument misses the mark. During this portion of the closing argument, Plaintiff's counsel was reading a portion of an exhibit admitted at trial to the jury. Defendants' objection to this statement as being barred by a previous ruling similarly fails because Defendants did not request that any portion of the exhibit be redacted.

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[11] Likewise, the court does not find this statement to be a mischaracterization of the evidence as Defendants contend.

4. Statements A, B2, C, E, N, and R

The remaining statements identified by Defendants are troubling. Twice, Plaintiff's counsel referenced the BP oil spill, which was ongoing at the time of the trial; he also referenced the recent financial crisis. (Closing Argument Tr. 2:17-3:4, 29:8-10.) Three times, Plaintiff's counsel commented on the financial disparity of the parties: in reference to the BP oil spill; the amount of money paid to attorneys; and the amount paid by BSSN to their expert Mr. Webbert. (Closing Argument Tr. 2:17-3:4; 3:11-12; 25:22-23.) Plaintiff's counsel also made the wild and unsubstantiated claims that Toner "thinks lawyers can play God and assume the role of the client, do whatever they want," and that Toner dismissed the Plaintiff in favor of tax returns. (Closing Argument Tr. 38:2-8, 9:21-23.)

It is beyond doubt that a party may not "appeal to a jury's sympathy with emotionally charged and inflammatory remarks." *State v. Stanton*, 1998 ME 85, ¶ 12, 710 A.2d 240, 244 (Me. 1985) (quotation marks omitted); *see also* 58 Am. Jur. 2d New Trial §§ 131-32. Further, "in cases where the wealth or poverty of a party is not a proper issue in the case, references by counsel to these matters constitute improper argument." *St. Pierre v. Houde*, 269 A.2d 538, 539 (Me. 1970). The Law Court has said that the repetition of "improper comments about the wealth and power of a corporation" can constitute incurable and reversible error. *See Gilmore*, 665 A.2d at 669.

The comments regarding the BP oil crisis, which was pending at the time of the trial, are irrelevant and inflammatory. The court also finds that to the extent Plaintiff's counsel referred to the wealth of Defendants, those comments are also are improper. *See St. Pierre*, 269 A.2d at 539. On balance, however, the court does not find these comments to be so pervasive as to deprive Defendants of a fair trial or compromise substantial justice. *See* M.R. Civ. P. 61;

Gilmore, 665 A.2d at 669. With regards to the BP spill, the court is confident that the jury could distinguish between legal malpractice and an environmental disaster unrelated to the instant proceedings. *See Falk v. Paluch*, 163 F.R.D. 8, 9 (N.D. Ill. 1995) (finding only harmless error of defense counsel's characterization of the plaintiff in a personal injury matter as "extreme" or "crazy" in the wake of the Oklahoma City bombings). Further, the context of Plaintiff counsel's remarks on the BP oil spill was the accountability of the Defendants, a topic that is appropriate for closing argument and to which Defendants do not object. Viewed in context of the entire trial and closing arguments, the court does not find that statements A, B2, C, E, N, and R were so improper as to affect Defendants' substantial rights. *See* M.R. Civ. P. 61.

D. Damages

1. Excessiveness and Remittitur

"As a general rule, the parties are entitled to the judgment of the jury and not of the court upon [the] question [of damages]." *Cayford v. Wilbur*, 86 Me. 414, 416, 29 A. 1117, 1118 (1894). This general rule has led to the oft-stated principle: the assessment of damages is within the sole province of the jury. *See, e.g.*, *Wood v. Bell*, 2006 ME 98 ¶ 24, 902 A.2d 843, 851; *Tang of the Sea, Inc. v. Bayley's Quality Seafoods*, 1998 ME 264, ¶ 8, 650; *VanVoorhees v. Dodge*, 679 A.2d 1079, 1081 (Me. 1996); *Michaud v. Steckino*, 390 A.2d 524, 536 (Me. 1978). Nowhere is this rule more relevant than in the realm of non-economic damages. Such damages are inherently subjective and fact-specific, varying from case to case and plaintiff to plaintiff. *See Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987) ("Translating legal damage into money damages—especially in cases which involve few significant items of measurable economic loss—is a matter peculiarly within a jury's ken."); *accord Withers v. Hackett*, 1999 ME 117, ¶ 8, 734 A.2d 189, 191 ("Where damages cannot be specifically calculated from the record

and are based on the subjective judgment of the fact finder, the issue is properly one for a Jury."). Further, the Law Court has emphasized the deference afforded to jury verdicts in several recent cases, specifically highlighting the jury's primacy in evaluating the credibility and demeanor of witnesses. *See Reardon v. Larkin*, 2010 ME 86, 3 A.3d 376; *Ma v. Bryan*, 2010 ME 55, 997 A.2d 755; *Provencher v. Faucher*, 2006 ME 59, 898 A.2d 404.

Nevertheless, the court has the power to disturb an award of damages "on the ground that the damages are excessive or inadequate when it is apparent that the jury acted under some bias, prejudice, or improper influence, or has made some mistake of law or fact." *Provencher*, 2006 ME 59, ¶ 6, 898 A.2d at 406-07; *accord Chennell v. Westbrook College*, 324 A.2d 735, 737 (Me. 1974); *Fotter v. Butler*, 145 Me. 266, 273, 75 A.2d 160, 164 (1950); *Leavitt v. Dow*, 105 Me. 50, 53, 72 A. 735, 736 (1908). The court, however, cannot substitute its judgment for that of the jury as to the proper amount of damages. *See Nyzio v. Valliancourt*, 382 A.2d 856, 861 (Me. 1978).

In the instant case, Defendants argue that the award of $7,300,000 in emotional distress damages is excessive and not supported by any rational basis or competent record evidence and the court must grant a new trial. *See Rutland v. Mullen*, 2002 ME 98, ¶ 20, 798 A.2d 1104, 1112. (Def.'s M. New Trial 12-16.) In support of their claim of excessive damages, Defendants contend that the verdict is so excessive and out of line with statutory caps on non-economic damages and other Maine jury verdicts for similar emotional injuries, that the jury must have improperly compensated the Plaintiff for economic losses to Northern Mattress, and not his emotional distress. In support, Defendants point to Redman's alleged repeated references to the Northern Mattress as a $20 million company, despite the court's summary judgment order dismissing all claims of economic loss to Northern Mattress from the suit. In the alternative,

Defendants contend that remittitur is necessary to remove the unlawful excess in the verdict that is beyond the bounds of rationality. (Def.'s M. New Trial 16-18.) *See Withers*, 1999 ME 117, ¶ 5, 734 A.2d at 190.

In response, Plaintiff points to the sanctity of the jury system and verdicts throughout American history and argues that any tampering with the verdict would be an affront to the time, effort, and considered deliberation of the jury. (*See generally* Pls.' Collective Post-Trial Opp'ns.) Plaintiff further agues that the size of Northern Mattress was relevant to the extent of Peter Redman's emotional devastation and that, procedurally, Defendants have waived this argument because they did not object to the testimony, move to strike such testimony, request a curative instruction, or provide the court with a transcript of the offending testimony. (Pl.'s Opp'n M. New Trial 19-23.) Plaintiff also alleges that Defendants put the size of Northern Mattress in issue when Kate Debevoise, the attorney at BSSN who drafted the Bell memo, testified that Defendant Toner told her that Northern Mattress was a $10 million company. (Pl.'s Opp'n M. New Trial 21-22.) Plaintiff, however, also has not provided the court with a transcript of Attorney Debevoise's testimony.

As noted, the court may

> grant a new trial 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 or in suits in equity in the courts of this state. A new trial shall not be granted *solely* on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit such portion thereof as the court judges to be excessive.

M.R. Civ. P. 59(a) (emphasis added); *accord Estate of Fournier*, 2009 ME 17, ¶ 12, 966 A.2d 885, 889. Remittitur is only "proper to remove the unlawful excess in the jury's award, that is, the amount which, in light of all the evidence, is in excess of the bounds of rationality and is, therefore, erroneous *as a matter of law*." *Withers*, 1999 ME 117, ¶ 5, 734 A.2d at 190 (quotation

marks omitted). Remittitur is not available, however, if the verdict is "so high as to reflect passion and prejudice in the rendition of the entire verdict and not merely error in assessing damages"; in such cases, a new trial on all issues is necessary. *See* 2 Field, McKusick & Wroth, *Maine Civil Practice* § 59.2 at 61 (2d ed. 1970) (cited in *Nyzio v. Vaillancourt*, 382 A.2d 856, 861 (Me. 1978)).

Thus, the court must first determine whether the jury's award of emotional distress damages is excessive, i.e. exceeds all bounds of rationality.[12] *See Withers*, 1999 ME 17 ¶ 5, 734 A.2d at 190. In making this determination, the court is mindful that damages for severe emotional distress are compensatory damages, and not punitive damages. *See* Simmons, Zillman & Gregory, *Maine Tort Law* § 19.02 at 668-72 (1999 ed. 1999). If the damages are excessive, the court must next determine whether the excessive, unlawful amount is the result of juror bias or prejudice, or a mistake of law or fact. An excessive verdict that is the result of bias or prejudice results in a new trial; an excessive verdict that is the result of a mistake of law or fact is a candidate for remittitur. *Compare Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22 (1931), *cited in* 2 Field, McKusick & Wroth, *Maine Civil Practice* § 59.2 at 62 n.12 (precluding remittitur when a verdict is obtained by appeals to passion and prejudice

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12 The First Circuit's standard for reviewing allegations of excessive compensatory damages is similar:

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount any reasonable man could feel the claimant entitled to."

Nydam v. Lennerton, 948 F.2d 808, 811 (1st Cir. 1991) (quoting *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983). Although Defendants seem to suggest that the court should use the standard of "shocking the judicial conscience" to determine if the damages are excessive, this standard has not been utilized in Maine. As the court sees no meaningful distinction between the federal standard and the standard articulated by the Law Court, the court will follow Maine precedent.

in a federal action), *and Chennell*, 324 A.2d at 737 (approving the trial court's grant of a new trial when damages were inadequate and reflected a compromise on liability), *with Phillips v. E. Me. Med. Ctr.*, 565 A.2d 306, 309 (Me. 1989) (remitting a damage award for pain and suffering in half on an error of law in the jury instructions that misled the jury).

To show that the damages are excessive Defendants point to the statutory limits on non-economic damages and the lack of Maine jury verdicts in a similar range in support of their contention that the damages in the instant case are excessive. They contend that statutory caps encompass a policy in favor of limiting unchecked jury verdicts. *See, e.g.*, 5 M.R.S. § 4613(2)(B)(8)(e) (2009) (limiting the amount of compensatory and punitive damages that can be awarded per claimant for intentional employment discrimination under the Maine Human Rights Act). The court does not find this argument persuasive, as the evidence equally points to the opposite conclusion: limits on non-economic damages for certain claims, but not this one, could equally mean the Legislature is only concerned with unchecked non-economic damages for the causes of action currently regulated. Similarly, the dearth of jury verdicts in Maine awarding millions of dollars for emotional distress damages does not mean the current award is not supportable.[13] *See Bielunas v. F/V Misty Dawn, Inc.*, 621 F.3d 72, 82 (1st Cir. 2010) (stating that "simply showing that the damage award is generous in comparison to other (hand-picked) cases is insufficient to warrant relief" on a charge of excessive damages (quotation marks omitted)). These arguments avoid the heart of the matter: whether competent evidence *in this case* supports

[13] Both the court and Defendants can only find three reported Maine cases in the last 20 years where emotional distress damages have been awarded and upheld for legal malpractice. *See McAlister v. Slosberg*, 658 A.2d 658 (Me. 1995); *Burton v. Merrill*, 612 A.2d 862 (Me. 1992); *Salley v. Childs*, 541 A.2d 1297 (Me. 1988). None of these cases reveal the amount of each award attributable to the plaintiff's severe emotional distress. *Cf. Garland v. Roy*, 2009 ME 86, ¶ 27, 976 A.2d 940, 948 (vacating an award of $250,000 in emotional distress damages when the losses were purely economic and the attorney's actions were not egregious).

the jury verdict, or whether *in this case* the verdict exceeds all bounds of rationality and is erroneous as a matter of law.

Based on the evidence at trial, the jury could find that Plaintiff was deeply and emotionally attached to the family business and distressed that his brother was attempting to take over the company. When Plaintiff informed Defendants that the Gallant report was false and part of an attempt by his brother to take over the company and asked Defendants to investigate, his attorneys paternalistically disregarded his warning and pursued their own course of action. Instead of representing Plaintiff's interests in the dispute with his brother, Defendants worked *with* Mark Redman and his attorney to force Plaintiff out of the company. Instead of protecting Plaintiff from an unfounded claim of sexual harassment, Defendants admitted his culpability. As a result, Plaintiff suffered from clinical depression, significant anxiety bordering on panic, loss of dignity, sleep disturbance, muscle tension, palpitations, sweating, trembling, dizziness, shortness of breath. Plaintiff was diagnosed with post-traumatic stress disorder. These symptoms began in 2004 and continued into 2010 at the time of trial. Plaintiff testified to his humiliation and loss of reputation at his company, among friends, and in the community.

Measuring non-economic damages is inescapably fact bound and thus a matter within the discretion of the jury. The jury was instructed to

> compensate the plaintiff for any pain, suffering, mental anguish and loss of enjoyment of life already suffered by the plaintiff and caused by the defendant's negligence and for any pain, suffering, mental anguish and loss of enjoyment of life which you find that the plaintiff is reasonably certain to suffer in the future because of the defendant's negligence.

Serious emotional distress damages are based on the subjective judgment of the jury and their evaluation of the evidence and the credibility and demeanor of witnesses. *See Reardon*, 2010 ME 86, ¶ 16, 3 A.3d at 379. The jury was free to accept most or all of Plaintiff's evidence and

reject most or all of Defendants' evidence, as they clearly must have done in this case. The court is cognizant of the significant amount of damages awarded by the jury. The court's role, however, is not to re-examine the evidence and make an independent determination of the proper amount of damages. The court's role at this stage of the proceeding is to determine whether the award is beyond all bounds of rationality. Based on the evidence at trial of the Defendants' egregious, paternalistic conduct and the extent and length of Plaintiff's suffering, the court cannot conclude that the damage award is beyond all bounds of rationality. To do so would merely be the court substituting its own judgment for that of the jury. *See Nyzio*, 382 A.2d at 861. Because the court does not conclude the damages are excessive, the court does not remit any portion to the award.

2. Excessiveness and Due Process

Finally, Defendants argue that the excessiveness of the jury award is violative of due process because it was arbitrary and a completely unforeseeable consequence of the litigation. (Defs.' M. New Trial 18-20.) To this end, Defendants ask the court to adopt the test utilized in challenging punitive damage awards as excessive. *See generally BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Because the court cannot conclude that the jury's award of damages in this case is excessive, the award is likewise not arbitrary or unforeseeable and, therefore, the jury's verdict may not be disturbed. *Cf. Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 19, 769 A.2d 857, 864 (noting that constitutional issues should only be reached in cases where it is absolutely necessary to the case).

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by annotation incorporating it by reference, and the entry is

Defendants' Motion to Strike Exhibits C and D of Plaintiff's Memorandum in Opposition to Defendants' Motion for a New Trial is GRANTED.

Defendants' Motion for Judgment as a Matter of Law and Defendants' Motion for a New Trial and Remittitur are DENIED.

Dated: February 4, 2011

s/Thomas E. Humphrey
Chief Justice, Superior Court