UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

GEORGE SELLS, IV, and HEIDI THIEL,)
)
Plaintiffs,)
)
v.) CAUSE NO. 1:00-CV-30
)
JEFF BERRY,)
)
Defendant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This matter is before the Court[1] following a damages hearing held on October 10, 2000. Present were George Sells ("Sells") and Heidi Thiel ("Thiel")(collectively, "the Plaintiffs"), together with their counsel, Peter Tepley, Rhonda Brownstein and Dennis Geisleman. The *pro se* Defendant, Jeff Berry (hereafter, "Berry" or "Defendant"), appeared for and on behalf of himself.[2] Evidence and argument was submitted.

At the conclusion of that hearing, the Defendant requested ten days to a obtain and submit an affidavit from a Barry Black ("Black"). The Court held the evidentiary record open for ten days to allow the Defendant to file such an affidavit.

Instead of filing an affidavit from Black, on October 24, 2000, the Defendant filed a Motion to Dismiss citing Fed. R. Civ. P. 60(b). In addition, the Defendant submitted an

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[1] Jurisdiction of the undersigned Magistrate Judge is based on 28 U.S.C. § 636(c), all parties consenting. This Court has subject matter jurisdiction based upon diversity of citizenship. 28 U.S.C. § 1332(a)(1).

[2] The Plaintiffs' complaint lists the Defendant as "Jeff Berry," but his pleadings list his full name as "Jeffery L. Berry."

"Explanation of Evidence Submitted to Court" consisting of thirty exhibits, none of which was the affidavit of Black.[3]

On November 1, 2000, the Plaintiffs by counsel filed a Motion to Strike the thirty exhibits or in the alternative, an opportunity to present evidence and make objections to each item. On that same date, counsel for the Plaintiffs filed their post-hearing brief. On November 8, 2000, the Plaintiffs by counsel filed their opposition to the Defendant's Motion to Dismiss.

On November 22, 2000, the Defendant filed his "Post-Hearing Brief" (docket entry #70), and "Answer to Plaintiff's [sic] Opposition to the Motion to Dismiss" (docket entry #71), and an "Answer to Motion to Strike Evidence Submitted by Defendant" (docket entry #72).[4]

On December 5, 2000, the Plaintiffs by counsel filed their reply on the Motion to Strike Submissions and their post-hearing reply brief.

The Court will address the Defendant's Motion to Dismiss and the Plaintiffs' Motion to Strike within the context of the Court's Findings of Fact and Conclusions of Law. In sum, however, for the reasons hereinafter provided, the Defendant's Motion to Dismiss will be DENIED, and the Plaintiffs' Motion to Strike will be GRANTED. Having considered the arguments and evidence submitted, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) based upon a preponderance of the evidence (unless upon "clear and convincing evidence" as hereafter noted), and accordingly, the Clerk will be directed to enter judgment in favor of each Plaintiff and against the Defendant.

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[3] Two of the exhibits attached to the Defendant's "Explanation of Evidence Submitted to Court" are purported affidavits, one from Gregg Boston (Exh. 15) and one from Rhonda Johnson (Exh. 28).

[4] The Defendant attached to his November 22, 2000, "Answer to Motion to Strike Evidence Submitted by Defendant" documents he describes as being equivalent to an affidavit from Black and these comprise exhibit 31.

II. FINDINGS OF FACT[5]

On November 17, 1999, Sells, a television reporter, and Thiel, a camera person for WHAS-TV (a Louisville-Kentucky television station) were interviewing Berry in his home about an upcoming American Knights of the Ku Klux Klan rally. (Complaint ¶¶ 2, 3, 6, 7; Tr. 6-7.) Berry is the Imperial Wizard-Emperor of the American Knights of the Ku Klux Klan.[6] (Complaint ¶ 4.)

Once the interview was completed, Berry asked Sells if he intended to interview Brad Thompson ("Thompson"), a former Grand Dragon of the American Knights of the Ku Klux Klan. (*Id.* ¶ 8). When Sells answered affirmatively, Berry said that he did not want to be part of the news story and demanded that Sells and Thiel give him the interview tapes. (*Id.* ¶ 8; Tr. 9.) Sells and Thiel refused. (*Id.*) At this point, Berry and one or two of his Klan followers locked and blocked the doors, refusing to allow Sells and Thiel to leave, while another accomplice blocked the driveway where Sells and Thiel had parked their car. (Complaint ¶¶ 9, 10; Tr. 12, 19, 21, 53, 63-5, 68.)

While holding Sells and Thiel against their will, Berry spoke with WHAS-TV News Director, Maria Reitan ("Reitan") (Tr. 11.). Reitan promised Berry that the station would not air the interview without his permission. (Complaint ¶ 11; Tr. 11.) Nevertheless, Berry still would

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[5] Any finding of fact deemed to be a conclusion of law is hereby incorporated as such and any conclusion of law deemed to be a finding of fact is hereby incorporated as such. As a result of the default of the Defendant entered on April 20, 2000, the well-pleaded facts in the Plaintiffs' Complaint are taken as true. *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) (*citing United States v. DiMucci*, 879 F.2d 1488, 1497 (7th Cir. 1989); *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983) (Upon default, the well-pleaded allegations of the complaint relating to liability are taken as true.). Those well-pleaded facts will be cited by referencing the complaint (e.g., "Complaint ¶ ___".) References to the transcript of the damages hearing will be noted as "Tr. ___."

[6] Berry is a citizen of Indiana, while Thiel and Sells are citizens of Kentucky. (Complaint ¶ 5).

not allow Sells and Thiel to leave without turning over the interview tapes. (Complaint ¶ 12; Tr. 13.)

It was at this point that a fourth Klan follower entered the house wielding a shotgun. (Complaint ¶ 12; Tr. 13, 24.) Sells and Thiel were again ordered to turn over the interview tapes and when they refused, the armed accomplice pumped the shotgun to further intimidate them. (Complaint ¶ 12; Tr. 13-14.)

Sells was shocked at Berry's anger and became even more so when the gun-wielding individual entered. (*Id.* 26.) Sells' stomach became upset, his heart began to beat rapidly and his palms began to sweat. (*Id.* 27.) When Berry demanded the tapes, Sells was scared that he and Thiel might be beaten and shot if they did not comply, and he felt helpless at his inability to protect Thiel. (*Id.* 26, 28-9, 31-3.) Thiel also felt trapped when Berry and his agent blocked the door, and when the man with the shotgun pumped the weapon, she was scared and believed that she was going to be physically harmed. (Tr. 68-69.)

Fearing that they would be harmed, Sells and Thiel decided to give Berry the interview tapes. (Complaint ¶ 13; Tr. 14.) As Thiel was in the process of giving the tapes to Berry, he grabbed them from her; there was a brief struggle and Thiel was jostled, intimidated and frightened. (Tr. at 72-73) Thiel felt violated by Berry's actions. (Tr. 80.) It was at this point that Sells and Thiel were allowed to leave. (*Id.*) They had been held approximately twenty to thirty minutes. (Tr. 25.)

After Sells and Thiel left Berry's home, Thiel stopped the car after going a short way because she could no longer drive; she cried and shook uncontrollably. (*Id.* 76-7.) Sells felt his stomach churn and he too was shaking. (*Id.* 34)

Sells did not sleep that night and he did not get a full night's sleep for at least a month.

(*Id.* 35, 91.) In addition, he was nervous and paranoid, fearful that further harm would be done to him. (*Id.* 36, 39.) Although his symptoms are now tapering off, Sells still loses sleep on occasion as a result of the incident. (*Id.* 37-38.) Moreover, he feels ashamed that he was forced to break the journalistic code by surrendering his tapes.

As a result of the incident, Thiel was still shaking that night and could not stay home alone for a week. (*Id.* at 78, 96-97.) Thiel found it hard to sleep and she became paranoid, fearful that further harm might be done to her. (*Id.*) In fact, when the American Knights of the Ku Klux Klan held a rally in Louisville, Thiel left town, and asked the police to check on her residence. (*Id.* at 80, 98-9.)

Berry's accomplices were his agents acting within the course and scope of their agency, in concert with him, and under his direction. (Complaint ¶ 4, 20, 23; Tr. 15, 49.) As a result of being confined and assaulted by Berry and his accomplices, Sells and Thiel were terrified and suffered mental distress and trauma. (Complaint ¶¶ 14, 19, 22.)

III. CONCLUSIONS OF LAW[7]

A. The Plaintiffs' Motion to Strike

The Plaintiffs' Motion to Strike observes that at the damages hearing the Court granted Berry ten (10) days for the limited purpose of submitting the affidavit of Black, and that the record was left open solely for that reason. Nonetheless, Berry has now submitted thirty-one (31) exhibits, none of which are the affidavit of Black, and the Plaintiffs argue that all of these exhibits should be stricken from the record.

In response, the Defendant contends that since he is proceeding *pro se* he should be

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[7] *See* footnote 5, *supra*.

granted some latitude to submit additional evidence showing that contrary to Thompson's testimony, he was actually a member of another Klan organization after he left Berry's organization.

The Defendant's argument ignores that *pro se* litigants are not excused from the procedural requirements imposed by either the Federal Rules of Civil Procedure or this Court. *Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998). Moreover, as will be noted *infra*, the Court does not rely upon Thompson's testimony in imposing punitive damages in any event.

At least five times during the October 10, 2000, hearing the Court carefully instructed the Defendant that the evidentiary record would only remain open for ten (10) days for the limited purpose of receiving Black's affidavit. (*See* Tr. 161, 173, 200, 201, 206.) The following exchange was typical:

> The Court: We are going to hold the record open for ten days for the very limited purpose of receiving that very limited affidavit from Mr. Black.
>
> Mr. Berry: Yes, sir.

(*Id.* at 200.) Ignoring this directive the Defendant has now submitted thirty-one (31) exhibits, none of which are the affidavit of Black or an equivalent.[8] Consequently, the Motion to Strike will be granted and the Defendant's thirty-one (31) exhibits are hereby stricken.

B. The Defendant's Motion to Dismiss

The Defendant in his October 24, 2000 Motion to Dismiss apparently relies upon Fed. R.

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[8] While the Defendant deems exhibit 31 to be equivalent to an affidavit, it merely appears to be a purported letter from Black and some minutes of a meeting. These documents do not meet the test of either an affidavit (*see e.g., Home Savings of America, F.A. v. Einhorn*, No. 87C 7390 1990 WL 114643 at *4 (N.D. Ill. July 24, 1990) (affidavit means that declarant has been sworn before an official authorized to administer an oath), or 28 U.S.C. § 1746.

Civ. P. 60(b)(3) for relief.[9] In that motion, as well as in his November 22, 2000 Reply, the Defendant contends that Thompson committed perjury at the damages hearing, counsel for the Plaintiffs' suborned that perjury, and this constitutes fraud. Furthermore, the Defendant contends that there was a conspiracy between the Plaintiffs and Thompson as well as the Southern Poverty Law Center[10] to deprive him of his freedom of religion. The Defendant also contends that the attorneys have committed barratry by seeking out the Plaintiffs to represent them in these proceedings. Finally, the Defendant contends that he was never informed of who would be testifying at the damages hearing.

First, the Defendant does not make clear what "final judgment, order, or proceeding" he desires to be relieved from, particularly since the Court denied his former request to have the default set aside, essentially applying the same standard. (*See* Court's June 8, 2000 Memorandum of Decision and Order.) Otherwise, no final judgment or order has been entered and thus the Defendant's motion would appear, at a minimum, to be premature.

However, even if we ignore the final judgment or order requirement, it is clear the Defendant's motion must be denied. "Relief under Rule 60(b) 'is an extraordinary remedy and is granted only in exceptional circumstances.'" *United States v. 8136 South Dobson St.*, 125 F.3d 1076, 1082 (7th Cir. 1997) (*quoting Dickerson v. Board of Educ.*, 32 F.3d 1114, 1116 (7th Cir. 1994) (citations and internal quotations omitted)).

Rule 60(b)(3) allows a court to grant relief from a judgment in the case of "fraud,

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[9] Fed. R. Civ. P. 60(b)(3) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

[10] Counsel for the Plaintiffs are attorneys with the Southern Poverty Law Center.

misrepresentation or other misconduct of an adverse party . . . ." Fed. R. Civ. P. 60(b)(3). To obtain relief under Fed. R. Civ. P. 60(b)(3), Berry must prove by clear and convincing evidence that: "(1) he maintained a meritorious [defense] at trial; and (2) because of the fraud, misrepresentation or misconduct of the adverse party; (3) he was prevented from fully and fairly presenting [his defense] at trial." *Tobel v. City of Hammond*, 94 F.3d 360, 362 (7th Cir. 1996) (*quoting Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995)).

As for the first prong, if the Defendant was prevented from presenting any defense at the October 10, 2000 hearing it was because he allowed a default to be entered on April 20, 2000. *See* June 8, 2000 Memorandum of Decision and Order; *see also Tobel*, 94 F.3d at 363 (Counsel's negligence in failing to respond to a motion for judgment on the pleadings is what prevented the plaintiffs from presenting their case at trial.) As a result, the only issue tried on October 10, 2000, were the damages sustained by Sells and Thiel and the possible imposition of punitive damages, and the Defendant was present to contest those claims.

To establish fraud or misconduct under the second prong, the Defendant principally focuses upon the alleged perjury of Thompson, and in particular, Thompson's assertion that he was never a member of the International Keystone Knights of the Ku Klux Klan, apparently a rival Klan organization.

However, there is no showing that the Plaintiffs or their counsel suborned Thompson's alleged perjury because there is no showing that they actually knew or even suspected that Thompson was testifying falsely. *United States v. Derrick*, 163 F.3d 799, 828 (4th Cir. 1998) (*citing Hoke v. Netherland*, 92 F.3d 1350, 1360 (4th Cir. 1996)). For that matter, there is no clear and convincing evidence that Thompson actually committed perjury. Offering incorrect testimony about a non-material matter does not constitute perjury. *United States v. Hall*, 212

F.3d 1016, 1025 (7th Cir. 2000) (*citing U. S. v. Dunnigan*, 507 U.S. 87, 94, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993)). A matter is collateral if it "could not have been introduced into evidence for any purposes other than contradiction." *U.S. v. Williamson*, 202 F.3d 974, 979 (*quoting U.S. v. Jarrett*, 705 F.2d 198, 207 (7th Cir. 1983)). Here, Thompson testified on direct, without objection, that when he left the American Knights he did not join another Klan group. (*See* Tr. at 153.) Why this testimony was even elicited by Plaintiffs' counsel is not clear because it seemingly has no relevance to the issues before the Court and is itself collateral. In any event, on cross-examination by the Defendant, Thompson reiterated that the only Ku Klux Klan organization he had belonged to was Berry's, not Black's. (*Id.* at 156-58.) Therefore, this testimony was offered solely, if it had any purpose at all, to contradict Thompson, and thus it is collateral and not the subject for possible perjury.[11] (*Id.*)

Finally, Berry has not shown by clear and convincing evidence that he was in any way prevented from fully and fairly presenting his defense at trial. While he contends that he was not aware who the witnesses would be, this was true as to both sides. When a damages hearing was requested, the Court merely set it for an evidentiary hearing and saw no need to conduct a final pretrial conference. *See* Fed. R. Civ. P. 16(a) ("In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a [pretrial] conference . . . .") (emphasis added); 6 A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE CIV. 2d § 1523 (2000). Indeed, given Berry's failure to appear at his own

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[11] Thompson's testimony is not mentioned elsewhere in this order because the Court has chosen to disregard it. Apparently Thompson was put on the stand to testify that Berry fosters a "tough guy" image in connection with his Klan activities and therefore punitive damages should be assessed. However, as discussed more fully *infra*, what governs the imposition of such damages is Berry's conduct and state of mind, not his motives, and therefore Thompson's testimony can be safely disregarded.

deposition, the Court was not sure he would even appear at any later proceedings.

Berry also conclusorily states that counsel for the Plaintiffs engaged in barratry by contacting the Plaintiffs to bring this action. Of course, there is no evidence to support such an accusation, and in any event, the activities of the legal staff of the Southern Poverty Law Center are modes of expression and association protected by the First and Fourteenth Amendments when undertaken for the purpose of furthering the objectives of the organization. *See In re Primus*, 436 U.S. 412, 423-24, 98 S. Ct. 1893, 1900 (1978) (*citing NAACP v. Button*, 371 U.S. 415, 428-29, 83 S. Ct. 328, 335 (1963)). Moreover, the federal equivalent of a state barratry law, 28 U.S.C. § 1927, has not been implicated here because it has not been shown that counsel for the Plaintiffs engaged in unreasonable or vexatious litigation in prosecuting this case.

As a consequence of the foregoing, Berry's Motion to Dismiss must be denied.

C. Application for Entry of Judgment by Default

Because Berry presumably "appeared" within the meaning of Federal Rule of Civil Procedure 55(b), he was entitled to be "served with written notice of the application for judgment at least 3 days prior to the hearing on such application." Fed. R. Civ. P. 55(b)(2). The Plaintiffs served their "Application for Entry of Judgment by Default" on September 29, 2000, by United States mail.[12] *See* Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing."). In addition, on October 2, 2000, the Court entered a "Notice and Order" setting the Plaintiffs' Application for Entry of Judgment by Default for hearing for October 10, 2000, at 9:00 a.m., and the Court directed the Clerk to send the notice to the Defendant at his last known address. (*See*

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[12] The application specifically referred to the previously set October 10, 2000 hearing and informed Berry that "[t]he amount of the judgment will be determined at the October 10, 2000 damages hearing."

"Notice and Order," docket entry # 52.) Accordingly, the service requirement of Fed. R. Civ. P. 55(b) was met. *See* Fed. R. Civ. P. 55(b)(2); Fed. R. Civ. P. 6(e).

We now turn to consider whether a judgment should be entered on the Plaintiffs' two count complaint alleging false imprisonment and assault. In so doing, we are to apply the substantive law of the state of Indiana. *Jean v Dugan*, 20 F.3d 255, 260 (7th Cir. 1994)(*citing, Erie R.R. Co. v Tompkins*, 304 U.S. 64, 78 (1938)). Applying Indiana's choice of law rules, *Klaxon Co. v Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) leads to the conclusion that Indiana tort law should apply. *Hubbard Mfg. Co. Inc. v Greeson*, 515 N.E. 2d 1071, 1073 (Ind. 1987).

The analysis we must employ at this point has been succinctly stated by at least one commentator:

> If the court determines that defendant is in default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.
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> * * *
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> Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.

10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2688 at 58-9, 63 (2d ed.1998). *See Thomson v. Wooster*, 114 U.S. 104, 113, 5 S. Ct. 788, 792, 29 L. Ed. 105 (1884) (A default judgment "is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, accordingly to what is proper to be decreed upon the statements of the bill, assumed to be true."); *Black*, 22 F.3d at 1399 ("The entry of a default order does not, however, preclude a party from challenging the sufficiency of the complaint."); *Yang v. Hardin*, 37 F.3d 282, 286 (7th Cir. 1994). Therefore, after reviewing the applicable law, we must determine if the factual allegations of the

complaint support a judgment on each count.

1. *False Imprisonment*

"False imprisonment consists of unlawful restraint on one's freedom of movement against his will." *Delk v. Board of Commissioners of Delaware County*, 503 N.E.2d 436, 439 (Ind. Ct. App. 1987). *Roddel v. Town of Flora*, 580 N.E.2d 255, 259 (Ind. Ct. App. 1991), *trans. denied.* "In proving restraint on freedom of movement, incarceration need not be shown. Rather, it is sufficient to show a person's freedom of movement was in some manner restricted against his will." (*Id.*)

The Plaintiffs' unchallenged complaint states that after Sells and Thiel refused to surrender the tapes, Berry and one or two of his followers locked and blocked the doors of the home, refusing to allow the Plaintiffs to leave and restricting their freedom of movement. (Complaint ¶¶ 9, 10, 12). ("Berry told Sells and Thiel that they could not leave unless they gave him the interview tapes. They continued to refuse."). Another follower blocked the Plaintiffs' car in Berry's driveway. (*Id.* ¶ 9). The unlawful and non-consensual restraint on the Plaintiffs' freedom of movement was emphasized when a shotgun-wielding follower of Berry entered the house and pumped it to intimidate the Plaintiffs into turning over their interview tapes. (*Id.* ¶ 12).

Therefore, on these facts both Sells and Thiel are entitled to recover from Berry on their false imprisonment claim. *Delk*, 503 N.E.2d 439; *Roddel*, 580 N.E.2d 259.

2. *Assault*

An assault is effectuated "when one acts intending to cause harmful or offensive contact with the person of the other or an imminent apprehension of such contact." *Rivera v. City of Nappanee*, 704 N.E.2d 131, 133 (Ind. Ct. App. 1998) (*quoting Cullison v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991)). The right to be free from the apprehension of a battery is protected by an

assault tort action. *Cullison*, 570 N.E.2d at 30. "It is an assault to shake a fist under another's nose, to aim or strike at him with a weapon, or to hold it in a threatening position, to rise or to advance to strike another, to surround him with a display of force . . . ." *Id.* (citing W. PROSSER & J. KEATON, PROSSER & KEATON ON TORTS § 10 (5th ed. 1984). The apprehension of a battery must be one which would normally be aroused in the mind of a reasonable person. (*Id.*) The tort is complete with the invasion of the plaintiffs' mental peace. (*Id.*)

The unchallenged facts in the complaint specify that both Sells and Thiel were faced with a show of force that would naturally lead a reasonable person to conclude that they were in some physical peril. This is most graphically illustrated by the assertion that the Plaintiffs were blocked from leaving, were surrounded, out-numbered, and were confronted by one individual who not only was carrying a shotgun, but who would pump it for the very purpose of intimidating them. (Complaint ¶¶ 9, 12, 21). The individuals assisting the Defendant were Berry's agents, acting on his authorization. (*Id.* ¶¶ 4,23). The tort of assault was complete when the mental peace of Sells and Thiel was invaded. (*Id.* ¶¶ 13-14, 21-22).

Therefore, the facts set out in the complaint makes out a competent assault claim under Indiana law. *Cullison,* 570 N.E.2d at 30.

D. Damages

Having established that the Plaintiffs are entitled to recover from the Defendant following the entry of default, we are left to resolve the issue of damages, and the burden remains upon Sells and Thiel to establish the amount of damages they sustained as a result of the acts and conduct of Berry. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158-59 (2nd Cir. 1992). In the Plaintiffs' complaint, they contend that they are entitled to compensatory damages for "mental distress and trauma" (*see* Complaint ¶¶19, 22), as well as

punitive damages. The Court will first address the question of compensatory damages and then will discuss the issue of punitive damages.

1. *Compensatory Damages*

Both false imprisonment and assault are common law torts which provide for emotional distress damages. *See Cullison*, 570 N.E.2d at 30 ("Because it is a touching of the mind, as opposed to the body, the damages which are recoverable for assault are damages for mental trauma and distress.").

In fact, under Indiana law, the torts of false imprisonment and assault were so likely to engender a disagreeable emotional experience that no impact was needed to establish "fright, shock, humiliation, insult, vexation, inconvenience, worry or apprehension." *See Moffett v. Jean B. Glick Co., Inc.*, 621 F. Supp. 244, 284 (N.D. Ind. 1985) (citing *Charlie Stewart Oldsmobile, Inc. v. Smith*, 357 N.E.2d 247, 253 (1976) *modified on other grds.*, 369 N.E.2d 947 (1977)).

Here, each Plaintiff testified in a compelling way that as a result of their confinement in Berry's home, and their reasonable apprehension that they might be harmed, each experienced shock and fear. (Tr. 26-9, 31-3, 68-69, 72-3, 80.) That fear was physically manifested by Thiel's crying, uncontrollable shaking, and an inability to sleep, and similar reactions by Sells. (*Id.* 34, 76-77.)

In fact, for approximately one month following the incident neither Sells nor Thiel could sleep through the night. (*Id.* 35, 78, 91, 96-97.) Both feared retribution and each experienced paranoia. (*Id.* 36, 39, 78, 96-97.) Sells still loses sleep on occasion as a result of the incident. (*Id.* 37, 38.)

Having observed the sometimes emotional testimony of each Plaintiff, the Court is struck by the obvious mental trauma they have experienced and the apparent continuing effect the event

has had on their lives.

Based on the foregoing, the Court finds that each Plaintiff is entitled to compensatory damages from the Defendant in the sum of $20,000.

2. *Punitive Damages*

Punitive damages serve the public interest by deterring future wrongful conduct by the tortfeasor and others similarly situated, *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 983 (Ind.1993), and "may be awarded only if there is clear and convincing evidence that the defendant 'acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.'" *USA Life One Ins. Co. of Indiana v. Nuckolls*, 682 N.E.2d 534, 541 (Ind.1997) (quoting *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind.1993)).

Punitive damages may be awarded upon a showing of willful and wanton misconduct, defined as "a course of action which shows actual or deliberate intention to cause harm or which, under existing conditions, shows either an utter indifference or conscious disregard for the rights of others." *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 563 (Ind. Ct. App. 1999). Thus, conscious indifference, heedless indifference, reckless disregard for the safety of others, reprehensible conduct, and heedless disregard of the consequences are all examples of conduct that warrant punitive damages. *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1221 (Ind. 1988).

Here, the evidence is clear and convincing that Berry's action were not merely negligent or the result of some honest error, but rather were done maliciously and intentionally with the purpose of coercing the Plaintiffs into surrendering their personal property and with utter indifference to the harm that would follow.

This conclusion is confirmed by the evidence which reveals that Berry and his agents

confined Sells and Thiel in Berry's home, blocked the driveway so as to impede their exit, and intimidated the Plaintiffs by surrounding them and displaying a shotgun. (*See* Complaint ¶¶ 9-13.) This is further confirmed by the testimony of Sells, who recalled that Berry summoned an agent to block the driveway and who then entered with a shotgun. (Tr. 11-12.) When the man with a shotgun entered, Berry told Sells and Thiel, "He wants your tapes." (*Id.* 13.) When the Plaintiffs attempted to leave, the man with the shotgun pumped it and Berry repeated, "He wants your tapes. You're not leaving with those tapes." (*Id.*) Certainly, Berry's comments and actions as well as the actions of his agents, lead to the inescapable conclusion that Berry fully intended to generate fear, and thus the Plaintiffs are entitled to punitive damages in an amount that will punish Berry and dissuade him and others from similar misconduct in the future. *Lazarus Dept. Store v. Sutherlin*, 544 N.E.2d 513, 527 (Ind. Ct. App. 1989).

To determine the amount of punitive damages, we must consider the nature of the tort, the extent of each Plaintiffs' actual damages, and the economic wealth of the Defendant. *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 580 (Ind. Ct. App. 1989).

Here, the nature of the tort clearly indicates that punitive damages are warranted. Indeed, the record clearly and convincingly demonstrates that Berry committed at least one felony under Indiana law by confining the Plaintiffs against their will until they surrendered their tapes. *See* IND. CODE § 35-42-3-3. ("A person who knowingly or intentionally: (1) confines another person without the other person's consent; . . . commits criminal confinement . . . .").

Moreover, it has been clearly and convincingly demonstrated that each of the Plaintiffs suffered more than nominal damages; indeed, as discussed *supra*, the Court has determined that each Plaintiff suffered and continues to suffer significant emotional distress and trauma. Thus, Berry's actions must be condemned by the force of punitive damages, particularly where his

illegal conduct has subjected innocent individuals to this type of injury.

Finally, while there is no evidence as to Berry's wealth, the absence of such evidence does not render the amount of the damages so speculative as to be excessive. *Arlington State Bank*, 545 N.E.2d at 580. Of course, if Berry thought that his lack of wealth was a mitigating factor against the imposition of punitive damages, he could have offered such testimony or evidence at the damages hearing. *See Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996) (The defendant who cannot pay a large award of punitive damages can point this out so the court will not award an amount that exceeds his ability to pay.); *Williams v. Patel*, 104 F. Supp. 2nd 984, 998 (C.D. Ill. 2000) (Defendant's tactical decision not to offer evidence of wealth cannot serve as a basis for negating or reducing award of punitive damages.).

Consequently, after examining the evidence as to the nature of the tort, the extent of the Plaintiffs' damages, and the Defendant's economic wealth, the Court determines that awarding each Plaintiff the sum of $40,000 will meet the goal of deterring Berry and others from similar conduct.

The amount of punitive damages assessed here also falls well within the statutory limit imposed by the Indiana legislature. *See* IND. CODE § 34-51-3-4. (Limiting punitive damages to the greater of three times compensatory damages or $50,000.). Moreover, the ratio of punitive damages to compensatory damages awarded here is only two to one. Indiana courts have upheld punitive damage awards of far greater ratios as not being excessive. *Executive Builders, Inc. v. Trisler*, No. 73A 01-0001-CV-30 2000 WL 1782625 at *9 (Ind. Ct. App. Dec. 6, 2000).

From a constitutional point of view, the award of punitive damages does not violate Berry's due process rights. In *BMV of North America, Inc. v. Gore*, 517 U.S.559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the United States Supreme Court set forth three "guideposts" to

determine whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct at issue, (2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 574-75, 116 S. Ct. 1598-99. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. Here, as previously noted, Berry's actions, and those of his agents, were not only reprehensible but also likely criminal. *See, e.g.*, IND. CODE § 35-42-3-3. It is obvious that Berry was determined to secure the Plaintiffs' tapes by threat of force, perhaps even the use of force if necessary, all in heedless disregard of the emotional, and perhaps physical trauma he was inflicting. Clearly, taking hostages over their possession of a videotape is most reprehensible and must be punished by significant punitive damages.

In *Gore*, the United States Supreme Court further noted that there must be a "reasonable relationship" between the injury suffered and the damages received. *Gore*, 517 U.S. at 581, 116 S. St. at 1603. However, unlike the *Gore* case, where only modest economic damages were sustained, here we have significant emotional trauma sustained by each Plaintiff. Moreover, the punitive damages award here is only two times the amount of the compensatory award. As such, this ratio bears a reasonable relationship to the injuries sustained by the Plaintiffs and the award they have received. Indeed, the United States Supreme Court has sustained punitive damage awards where the ratios far exceeded those in this case. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (Upholding a $6,000,000 punitive damages award where compensatory damages totaled $51,146 -- a ratio of

117 to 1 -- on a claim of anti-trust violation and interference with contractual rights.); *TXL Prods. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711 (1993) (Upon holding a $10,000,000 punitive damages award where compensatory damages totaled $19,000 -- a ratio of 526 to 1 -- on a common law slander of title action.).

Finally, comparing the punitive damages awarded here to the criminal penalties that could be imposed further demonstrates that the award is reasonable. Under a single count of criminal confinement Berry would face a $10,000 fine. *See* IND. CODE §§ 35-42-3-3; 35-50-2-7. In this instance, the punitive damages awarded amount to only four times the fine allowed under Indiana law. This too suggests that the award of punitive damages is not excessive. *See Fall v. Indiana Univ. Bd. of Trustees*, 33 F. Supp. 2d 729, 748 (N.D. Ind. 1998) (Punitive damages awarded in an amount 25 times the maximum fine allowed for similar misconduct under Indiana law.)

Based on the foregoing, the Court will enter a judgment for punitive damages in the amount of $40,000 for each Plaintiff.

IV. CONCLUSION

Based on the foregoing, the Clerk is directed to enter judgment in favor of Sells and against Berry in the amount of $60,000 and in favor of Thiel and against Berry in the amount of $60,000.

Enter for December 22nd, 2000.

Roger B. Cosbey,
United States Magistrate Judge

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