

CLOSING ARGUMENT: Unlawful Videotaping of Woman (Mrs. "B." v. "John Doe" Maryland Circuit Court, Worcester County, No. 23-C-02-000089, January 29, 2005)¹

BY MR. FIERBERG:²

“Good morning again.

I had a chance to talk to you yesterday directly, and I said that I would have a chance to come back after the close of the evidence and talk to you a little bit about the law, more specifically about the law applies to the evidence in this case; how it all fits in together. And this is my chance to do that. Of course, when I'm done the defense will have an opportunity to talk to you again as well.

I want to start off by thanking you for taking the time off, and I know it's been snowing and that you've had other jobs to do, and I thank you for coming in and listening to the evidence. It has taken over four years for Mrs. B. [last name redacted] and her family to finally to court - a long time - and they very much appreciate that you've taken the time from your jobs to come in.

I started off by talking to you about why we we're here. We're here to help Mrs. B., to compensate Ms. B. and to punish this Defendant for the outrageous things he did.

Now, it strikes me that nowadays in society that there is always something for sale. Someone is always trying to sell you a bill of goods. It's hard to believe certain things. People are always trying to sell you a story. I want to just talk to you about what the law is, what you know the law to be, and then what the facts introduced into evidence were at this trial. And, obviously, you have to decide whether or not those facts were true. You saw the witnesses, and you heard from Mrs. B. You weighed that evidence, and at some point you heard what the Defendant had to say, the chance to say it wasn't true, and you are the judge of those facts.

But let's talk about what I believe you know. We all know certain things about what the law is and what matters to us most. You walk into this courthouse, and I don't know how familiar you are with it, but you walk right past all these monuments from different wars that people have fought in, honoring people from Worcester County that died serving this country. One of the bedrock principles of our country, bedrock, the very beginning of time of this country, that we fought for, is the right of privacy. It's the right to be left alone. It's the right to be safe in your own home, safe from unreasonable search, unreasonable seizure, safe from monitored or watched. You close your bedroom door, you close your home door, and it is your private space. We value this. We've valued this since the beginning of this country. That's what freedom is to us. And we know that to be true.

We also know this to be true, from a sense of morality, a sense of religion, or from just common sense -- because you heard the Judge say when you come through the courthouse door that one of the things we don't check when we put our coats on the rack is our common sense. We know from these ideals that certain things are right and others are wrong. The idea of privacy, to be left alone, we know that to be right.

We also know that thou shall not covet thy neighbor's wife. But we also know that Mrs. B. and another married couple went to a condominium, that the defendant controls, and she was videotaped. We know that to be wrong.

The videotape was put into evidence, and you saw a portion of it, and you heard Detective Case describe that invasion. He described it as outrageous, humiliating. We know that it's wrong. No one needs to tell you it's wrong. I don't need to tell you it's wrong. We've learned it's wrong.

We also know that marriage is something else which is critically important to all of us, again, regardless of your faith or anything else. You know, you read in the papers today, there is a big debate, Democrats, Republicans, whoever it is, and they say marriage is under attack, marriage is under attack. And the fact is that it is under attack. But you ought to know an attack when you see it: It's what was done here to this married woman. Here, a married woman struggled with her husband for three years after this took place, because of what somebody decided to do, evilly, with no right to do it, no excuse to do it.

¹ The Client's name has been redacted, despite the fact that this case and verdict was covered (and her name identified) in national media, including a feature story on Dateline.

² The following text is taken from the Court Reporter's transcription.

Well, the defendant came up with an excuse that you heard for the first time in court, and, well, you can be the judge as to whether or not that testimony was truthful or credible.

We also know from our values that one of the most important things to us is our human dignity. It's what separates us from animals. We see a lot of things on TV. We know the war is terrible. We know people being hurt and killed is terrible. We see people getting killed, and sometimes it just sort of seems like it's become ordinary. But, what still shocks us, all of us, even from the images that we saw in Iraq, was where bodies were burned or people were beheaded. Whatever those images were, what it meant to us was what it said about the value of human dignity. That's the bedrock of what we believe to be important, is having a sense of self-worth and dignity.

It's not right - ever - to be humiliated, completely humiliated by somebody, torn down to your core by somebody. We knew it was wrong in elementary school. We know it's wrong in high school with what people can do to each other that is evil, and we ought to know how wrong it is if you're a married, faithful woman and someone does this to you. There is nothing I should have to tell you that says it's wrong. I think we know it's wrong.

And we also know from our own values that when there is a wrong, you have to confront it. You know, you can listen to the President's speech recently, or you can listen to other things that we've heard about how there is evil. Well, who should just sit back and watch or allow it to happen. You're supposed to do something about it.

And Heather has done something about it. Her family has done something about it. Four years to get to this courthouse to do something about it, if only so that no one else should be victimized.

This woman was terribly humiliated. It shouldn't happen to anyone else. You heard Detective Case on the stand say, "well, all I can think about was my wife, my daughter, someone else."

I've got two girls. I've got an eight and ten-year-old. Is this what's waiting for them? Is this the initiation into a grown-up world, this freakish thing? Heather stood up and did something about it, and she got all the way to this courthouse where she is asking that you help, too, because you have a job to do as well. She has undertaken her job.

We also know, because we heard some of this in the trial, when the taping happened Heather and Kevin went across the Bay Bridge and talked to some policeman. Those police didn't think it was a crime, I guess believing that you can do this to women. You heard how shocked they were when they learned that the police did not care. Well, they come back to this county, there is a better sense of value, where Detective Case recognizes that this is wrong, where the Court recognizes that this is a case that goes to trial, and where the Court, as you will see, has already found that the Defendant engaged in an unlawful video surveillance of Mrs. B. for a prurient interest; a sexually wrong, sexually vile interest. Because you heard from the defendant in cross-examination, that he sat with that videotape and watched it, I don't know how many times, but watched it while Heather and her husband slept in the room just next door.

Is that conduct right in Snow Hill? Is that right in Pocomoke? Is that right in Berlin? Is that right in this county? Absolutely not. That's why Detective Case is in here, making sure that this is seen through to the end, because it's not right. I don't know where it could be right, but it's certainly not right here.

And we know, too, that if you are a victim of a crime, sometimes people say, "well, he paid his debt to society, so what else do we have to do?" Well, we're all smarter than that. You can go back three hundred years, four hundred years, if you were a farmer and someone came on to your farm and they stole your horses, stole your chickens, stole your livestock, well, the criminal is going to be prosecuted for it because they should be prosecuted for it. Right?

But does that leave the victim with no other remedy. Of course not. The criminal owes you for what they took from you. They pay their debt to society, but then they have to answer to you because they've stolen something from you.

And if someone steals your sense of dignity, your sense of worth, your sense of safety, your sense of a good marriage, a happy home, you have the right to be compensated for that. If someone sexually assaults another, the criminal gets prosecuted. The criminal also has to answer to the victim. If you're a drunk driver and you cross the center line and smash into a car and kill somebody, a wife and a daughter, you will be criminally prosecuted for drinking, being under the influence, and for crossing the yellow line. Yet, you still have to reconcile with and compensate the victim.

Mrs. B. is a victim who has rights under the law to be protected and compensated.

And now let's talk specifically about Maryland and the judge's instructions. You may remember that one of the things the Judge said is something you can find at the very top of the United States Supreme Court. It's what our country and

courts stands for: "Equal justice under the law." That actually means something that we live by every day and we fight for. It means that you could be rich, you could be poor, you could be a farmer, you could be black, could be Hispanic, you could be divorced, you could be retired, but when you walk through the doors of this courthouse, you are all equal under the law.

Now, we know stuff happens to people outside. People might kill you for the coat off your back. People might kill you because you don't have the right skin color. Or you might be treated badly because you're retired and you're not considered part of society any longer. You might be discriminated against for other reasons. People have terrible biases in society. Well, we know that. But we also know and demand that when you walk through the courthouse doors you are equal under the law. That's the way it works. That's the way everybody is protected.

That means that certain biases that we may have are not allowed into the courtroom. Now, I want to talk more about bias, consistent with what you heard the Judge instruct you about in this case, particularly about mental injury and mental illness. This is important because people have certain biases about mental injury. Let me talk about at least two of them.

One bias is illustrated by phrases you hear on TV, such as "suck it up," like when you watch the football games, or "be tough," "be a man," "just handle it." This bias implies what you're supposed to do, like don't be a "cry baby." The bias suggests that you're not supposed to be harmed emotionally. Everybody is supposed to just move on down the road, perfectly healthy and undeterred by troubling events. Well, people can get hurt. People do get hurt. You know, one of the big secrets is just how many people have emotional difficulties. Every family. It happens. It happens. And it's recoverable under the law when it happens, when somebody causes it, when somebody has no right to cause it, when somebody does something evil that causes it. As here, it's recoverable under law.

The other bias that we have about mental injury is illustrated by a movie starring Tom Cruise, where he or another actor yells "show me the money". This expression of "show me the money" became very popular. Well, people look at mental illness and think, "show me the injury." This is because mental illness is sometimes hard to see, even though it's real. If this defendant had done something dangerous and broken Heather's leg, I would have demonstrated this injury right in front of you by putting up an x-ray to show you the broken leg. You would absolutely see the break. And everybody would have said, "Well, I see a broken leg. That's a broken leg, I know what compensatory damages are all about, so that's recoverable and we should compensate Heather." Mental illness is different. It's an injury to and inside your head. There is no X-ray by which you can see it. It's provable, though.

You know the evidence in this case. You heard from Doctor McDaniel. Heather did not suffer from emotional trauma or injury, was not on medication, had never sought counseling until after this incident. That was the testimony. Well, was she prescribed, and is she taking, anti-depressants for fun? Is she medicating herself because of some other incident? No one does that. She didn't do that. As yourselves: Was she hiding in her closet dressing in the dark for years after this incident because she was well?

This is objective evidence of her injury. Objective evidence to see it right in front of your eyes, like an x-ray. And we asked you at the outset of the trial to listen to the evidence. What evidence did you hear about her emotional injury to suggest that it wasn't real? You know, think about it, because you don't leave your common sense at the door as the Judge instructed you. It's been over four and a half years since this incident. Was there anyone from the defense that came in on the witness stand and testified that that this wasn't true or that this didn't happen to this woman? Of course you know that no one would come in and do that, because taking a videotape -- well, you haven't seen all of the videotape, you can see it in the jury room if you want, if you feel you need to do that -- taking a videotape of a woman in her most private moments is devastating. And you heard what some of the testimony was about what was seen on that videotape. Would that harm somebody? You be the judge of that.

Let's now go back to what the Judge instructed you about the law of this State, and I want to talk about a few of those instructions in particular because they are consistent with our sense of morality. Maryland law, for all of Maryland residents, regardless of whether you live in Berlin, Pocomoke, Snow Hill, east side of the state, the west side of the state. This is what comes from the Maryland Legislature and from what Maryland Courts say are rights that protect Marylanders.

And as the Judge told you, privacy is an invasion or an intrusion into someone else's private affairs that's shocking. As Dr. McDaniel said on the witness stand, of course, they don't have it in the DSM Standards, unlawful surveillance, because, God willing, it doesn't happen that much. So it is really shocking to us when it happens. Does it shock you that someone would do this? That's the first kind of invasion of privacy, that's the law.

The second is infliction of emotional distress. Well, the defendant had no excuse for doing it. He intentionally did it. He intentionally inflicted extreme emotional distress on Heather. It's fairly straight forward. That's what Maryland law is.

The third claim is negligence. This means doing something a reasonable person would not do under the circumstances. I ask you to think about your own lives. Do you know a reasonable person that would do this to someone? Not just once, not just to one married woman, but twice, to two women, and then come back for more after watching it? I don't know any reasonable people that would do that.

The fourth claim is failure to warn. If you own and you control property, and you invite people in to your big place in Ocean City and make some money on that, you must warn your invitees. If you invite people to that property, and if you concoct a lie and scheme, it is required under law that you take reasonable action to protect your invitees. Here it would be reasonable and required to warn the women that if you take a shower you're going to be videotaped. Wouldn't you or anyone else like to know that? If you did, you wouldn't shower. Maybe you'd leave. Maybe you would get as far away from that location as possible, which is what Mrs. B. did, and the other married couple did when they found out it happened. Well, of course, the defendant stayed at the condominium on vacation.

Next is the the harm to Heather. Detective Case saw the videotapes, and his words, as they are written down, "total humiliation." He saw her then when she came in, he saw her a year and a half later, "total humiliation," described by an officer of the court. He can only think of his wife and daughter in that same situation. Mrs. Deshenko, Heather's boss, isn't owed anything to come in here and testify. She helped Heather get to counseling. Lawyers didn't generate this thing up. Heather's lawyers had a qualified doctor come in to do an evaluation to see if there was a psychiatric illness. But, Heather initially got to counseling because she broke down at work. That counselor was a woman who Heather's boss knew someone from church, who had a Christian background. That's how she got into counseling.

Now, the defense will say to you, "well, she didn't get into counseling for a year and a half." Like that's faking something? That's what real people try to do, they try to be well, they try to be healthy. They don't run out and demand help and treatment right away and jimmy something up. Heather tried to get well and to do it on her own. Should she be faulted for that? The defense would fault her if the day after this happened she went into counseling. They'd say, "ah-ha, know, the first thing she did was run to a psychologist so she could have damages." She didn't do that. She tried to be well. She relied on her husband. She relied on her family. And she went to work because it was a safe place to be. She stayed in school because it was a safe place to be. She didn't come to you and say, "I was totally crippled by this, I couldn't do anything." That's a whiner. That's a malingerer. That's someone who is faking something.

Heather tried to hang onto her life and to do it for herself, and her boss recognized when she collapsed at work that she absolutely needed help. And she went to counseling with Cathy Wingate who came in here and told you how Heather was, and she went to Cathy Wingate for eleven sessions and she thought she was okay enough to go on her own. And then had to come back in 2003, more than two years after this took place.

Now, while the Defendant was talking about Kathy Wingate, they had her read from her notes. And we had Kathy Wingate testify, and they read from Kathy Wingate's notes. But the defense did not read all of her notes to you. The portion they left out was from May 29, 2003, a year and a half after this incident. And here is what the psychologist's notes say: "Heather returns with some sense of depression." Quote, "I should have come earlier." Remember she stopped before, because she wanted to do it on her own, she wanted to be well. The physician prescribed Wellbutrin, three hundred milligrams a couple of months ago. The notes further say: "She's on antidepressants now." "Reports difficulties within her marriage." You heard why. "Hyper vigilance." "Continues when in unfamiliar places anxiously searching for hidden cameras." Again, this is going on a year and a half after she was videotaped. The notes say: "Trying to rebuild a sense of self-worth." "Increased alcohol use to assist in depressed mood."

The defense never read this to you. Instead, they made a point at some time in that cross-examination of saying, well, Mrs. B., you've never had a good self-image about your body. What's that all about? What is that all about? Should a person who gets intentionally harmed by another have to come in court seeking compensation and some lawyer says, "you never felt good about yourself or your body." Imagine, you're not a movie star, you're just a normal person, maybe a little overweight or something but some lawyer will put you up on the stand and ask you about that, as if it matters. However Heather felt about her body, it was her body. Her body alone. Not to be seen by anybody else. Not to be violated by some man with no excuse.

Dr. McDaniel came in here, as a professor at the University of Maryland, and, yes, retained by lawyers, because this woman was hurt and the lawyers wanted to know, "what is this? How did it affect her? Let us know, too." There is no one else that came in and said it wasn't true. And Dr. McDaniel went through these factors by referring to the American Psychiatric Association, which identifies recognized mental diseases. Dr. McDaniel went through what Heather was experiencing: Hyper vigilance; exaggerated startle response; disturbances. She called it chronic because it was lasting more than three months. Chronic. All of these were present, except for the one factor which was whether or not there was a threat of death to her. Dr. McDaniel said in her clinical judgment, having been videotaped like this is such an event it creates post-traumatic stress disorder, and God willing that it doesn't happen that much in this society. But it happened here.

The Defendant read from part of Dr. McDaniel's notes. One sentence is all they read, and then we read what was going on with Heather in the rest of the note that the Defendant didn't read. Quote, "Mrs. B. cried as she conveyed this. I feel like Alan raped me without touching me. I've never been comfortable with my body." That's the quote that they read. Here's the rest of that note, "She conveyed she was having her menstrual period at the time and in the video one can see a tampon string. He took something from me without being asked." You just imagine yourself on that videotape. You just imagine somebody doing that to you. That's what is seen by someone else, and that is what someone else pleasures himself with, and that's what you have to live with in your mind for the rest of your life.

Heather and Kevin, you know, to get to the courthouse they have to actually come here and then bear their souls about their marriage and the way it affected them. Heather has to talk to you about vomiting when she sees this videotape, and vomiting when she talks to her husband about how it made her feel. She then has to say some of the problems with when her husband had trouble understanding: "Men react to things differently." Do men react to this differently? I hope not. I absolutely hope not. Because I don't think -- this isn't something you just can't get. You cannot conclude that this could happen to somebody and it just doesn't matter.

The Judge says don't leave your common sense at the courthouse door. And, really, in your common sense, if you were planning on how to tear down a woman to her core, tear her down to her core, I'll tell you how. You find a married woman, you set her up, and you lie to her, you videotape her, you do everything that you've heard from the evidence in this case. That's how you tear somebody down to the core. And that's recoverable, as it should be. That's punishable under Maryland law, as it should be. Now, we are asking because this is, again, Maryland law. Heather can't get relief from this Court, from you, that says, "poof, it doesn't happen, it didn't happen." That's relief that can't be granted. You can't "unhappen" this event. But you can compensate her for what happened, for the number of years that this affected her.

There were 17 counseling sessions at seventy-five dollars an hour, which is \$1,275. That's not what this case is about. That is recoverable as actual damage. That is what you call, it's what's on the verdict form, you will see economic damages. There is \$1,275 in bills. That's not what it's about, but that's recoverable. It's about the pain, suffering, humiliation, and embarrassment, that happened to Mrs. B.. That is her loss, as I hope you can imagine and understand.

And it's about why we value ourselves and our lives. It's more important than property. We know that. And you have to determine what the just compensation is for doing that to somebody and for the problems that she had. You see all of those commercials, like what's that worth? I cannot tell you with a calculator. I cannot stand up here with a board and say destroying someone's sense of self-worth, \$55,000. Destroying someone's sense of body, destroying someone's sense of security, with someone's marriage, interfering with someone's life for a number of years, \$62,500. That is not our burden of proof. Your job is to determine what is fair, just compensation for Mrs. B. for what happened to her and for those elements. That's your job.

Now, the Judge in some of his instructions also said that you do that by a preponderance of the evidence. Another one of those legal words. It's just what is more likely than not. You see the scales of justice, the blind scales of justice, what a preponderance of the evidence means, when you review all of this evidence, was it more likely than not. It's not a criminal trial where, you know, the burden of proof is beyond a reasonable doubt. Was it more likely than not that it's true? And as you go through the verdict sheet, which the Court is going to give you, you will have all of those questions asked on each one of these claims.

The Court has already determined that Heather was visually surveilled with a prurient interest, but was it more likely than not that he invaded her privacy? Yes or no. Was it more likely than not that he intentionally inflicted extreme emotional distress on her? You decide. And the same for all of the rest of the questions. And we would submit to you that it meets that standard.

I want to thank you again for your taking your time, and I thank you in advance for doing what you have to do, and I ask that you fairly and fully compensate Mrs. B. for what this Defendant did."

THE COURT: "Thank you, Mr. Fierberg."

COMPENSATORY DAMAGE VERDICT: \$102,500

Punitive Damage Argument Following Compensatory Damages Verdict of \$102,500:

BY MR. FIERBERG:

“On behalf of my client, thank you very much for considering the evidence and having done what you've done already today.

Having found the conduct that was engaged in was outrageous and wrongful, the law provides that a Defendant can be punished for wrongdoing in the form of punitive damages. These damages let others know, the amount of your award, that this type of conduct doesn't work; it's not right; it's not going to happen again; it's not going to happen, not necessarily to Mrs. B., but to someone else. Because that's the point of it. We award damages against the Defendant. These aren't compensatory damages, but a dollar damage that says, no, no, to you, no to anyone else that would come into this county, or anywhere, and do this to a woman. And that is the purpose of punitive damages.

And I don't want to insult you by going through how outrageous his conduct was. I think you understand that. And I think you also understand how there needs to be a message that is sent out from this jury, from this Court, that says, no no, this is absolutely intolerable and here is how we're going to show it. And that's punitive damages.

Now, of course, you're not to bankrupt the Defendant. The Defendant is not a wealthy person and neither is my client. This took place for over three years of my client's life. Should it be that the Defendant's life for three years is to financially deal with this issue? You know, he has to live with it for a number of years. The testimony was, and the question of punitive damages is, to punish, to show that it's wrongful, to deter someone else. Importantly, did the Defendant really even appear to understand what he did was wrongful? Because, again, we talk about things that people sell, and he went up and he perfectly said, “I realize this is wrong, I wish I hadn't done it.” He also said, though, “I have no way of telling if I harmed her.” And then he also said, although it took time to get him to admit the truth, that afterwards he “vacationed for a couple of days.” After all of this, after all of the women whipped out of that house -- terrified and upset -- he stayed in Ocean City.

That's why you need to send a message, in part, that's why there has to be an award against him that lets him know, and lets others know, “no way, we don't do this to women, we don't even do this to a man, we don't do it to an animal, we just don't do it.”

Thank you.

PUNITIVE DAMAGE VERDICT: \$200,000