



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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August 9, 2022

JUDGES

RETIRED JUDGES

Alan B. Croft, Esq.
Lawrence J. McClafferty, Esq.
McCandlish Lillard
11350 Random Hills Road, Suite 500
Fairfax, VA 22030
Counsel for the Plaintiff / Counterclaim Defendant

Brian V. Ebert, Esq.
Law Office of Brian V. Ebert, PC
10640 Page Avenue, Suite 300
Fairfax, VA 22030
Counsel for the Defendants / Counterclaim Plaintiffs

Re: *Richard B. Grundy v. Charles H. Brown, III, D.D.S. PC, et al.*
Case No. CL-2018-18098

Dear Counsel:

On May 2, 2022, the jury returned its verdicts in this case. On Dr. Grundy's claims, Count I (Defamation Per Se) the jury found in favor of Dr. Grundy and awarded compensatory damages of \$1,500,000 and punitive damages of \$500,000; on Count II (Tortious Interference with Business Expectancy) the jury found in favor of Brown; on Count III (Conversion) the jury found in favor of Dr. Grundy and awarded compensatory damages of \$1,800 and no punitive damages; on Count V (Breach of Contract) the jury found in favor of Dr. Grundy and awarded nominal / compensatory damages of \$500 and declined to award attorney's fees. On the Counterclaim brought by Dr. Brown and the Brown PC, Count IV (Breach of Contract), the jury found in favor of the Brown PC and awarded nominal / compensatory damages of \$500 and declined to award

OPINION LETTER

attorney's fees; on Count V (Defamation Per Se) the jury found in favor of Dr. Brown and awarded \$1.00 in compensatory damages and \$200,000 in punitive damages.

Dr. Grundy has moved for judgment notwithstanding the verdicts seeking judgment be entered in his favor on the Brown PC's claim for breach of contract, and that he be granted additur on his claim for attorney's fees on his Count V claim for breach of contract. The Brown PC has moved that judgment in its favor be entered on Dr. Grundy's Count IV breach of contract claim and for other relief as deemed proper. Additionally, Dr. Grundy has moved for remittitur of the punitive damages award against him on Dr. Brown's Count V claim for defamation per se.

The Court received the written submissions of the Parties and heard oral argument on the post-trial motions. At the conclusion of the hearing, the Court took the matter under advisement. Since that time, the Court has had ample time to consider the arguments of counsel and is now prepared to rule on the post-trial motions.

Analysis

Cross motions to set aside the jury verdicts on the contract claims

Dr. Grundy seeks judgment in his favor on the Brown PC's claim for breach of contract on the ground that the "contract breaches by the Brown Practice took place before any alleged breaches by Dr. Grundy. The Brown Practice was therefore the first to breach as a matter of law and the judgment in favor of Dr. Brown on his contract claim should be set aside" Plaintiff / Counterclaim Defendant's Memorandum in Support at 6. The Brown PC refutes that argument by stating, "Dr. Grundy was in breach of his contractual obligations on time management from the time he started his employment with Brown PC." Brown PC's Memorandum In Support of Motion for Judgment Notwithstanding the Verdict at 2. Accordingly, the Brown PC moves the Court for judgment in its favor on Dr. Grundy's breach of contract claim.

The circuit court's authority to set aside a jury verdict is explicit and narrowly defined. *Carter v. Lambert*, 246 Va. 309, 314, 435 S.E.2d 403, 405 (1993); *Rogers v. Marrow*, 243 Va. 162, 166, 413 S.E.2d 344, 346 (1992). Such authority may be exercised only if a jury verdict is plainly wrong or without credible evidence to support it. *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 366, 585 S.E.2d 578, 581 (2003); *Shalimar Dev., Inc. v. FDIC*, 257 Va. 565, 569–70, 515 S.E.2d 120, 123 (1999); *Henderson v. Gay*, 245 Va. 478, 480, 429 S.E.2d 14, 16 (1993); *Lane v. Scott*, 220 Va. 578, 581, 260 S.E.2d 238, 240 (1979); see Code § 8.01–430. Thus, if the evidence is conflicting on a material point, if

reasonable persons may draw different conclusions from the evidence, or if a conclusion is dependent on the weight the fact finder gives to the testimony, a judge is not permitted to substitute his or her conclusion for that of the jury merely because he or she would have reached a different result. *Cohn*, 266 Va. at 366, 585 S.E.2d at 581; *Shalimar Dev.*, 257 Va. at 570, 515 S.E.2d at 123; *Henderson*, 245 Va. at 480–81, 429 S.E.2d at 16; *Lane*, 220 Va. at 581, 260 S.E.2d at 240.

Because the jury's function is to determine the credibility of the witnesses and the weight of the evidence, and to resolve all conflicts in the evidence, [an appellate court] will reinstate the verdict on appeal if credible evidence supports the verdict. *Hoar v. Great E. Resort Mgmt., Inc.*, 256 Va. 374, 378, 506 S.E.2d 777, 780 (1998); *Carter*, 246 Va. at 314, 435 S.E.2d at 405–06; *Rogers*, 243 Va. at 166, 413 S.E.2d at 346. In making this determination, [an appellate court] will give the recipient of the jury verdict the benefit of all substantial conflicts in the evidence, as well as the reasonable inferences that may be drawn from the evidence. *Cohn*, 266 Va. at 366, 585 S.E.2d at 581; *Shalimar Dev.*, 257 Va. at 570, 515 S.E.2d at 123; *Henderson*, 245 Va. at 481, 429 S.E.2d at 16.

Jenkins v. Pyles, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005).

Both Dr. Grundy and Dr. Brown alleged that the other breached the contract between them in several ways. The verdict form completed by the Jury did not require the Jury to identify the specific breaches upon which the verdicts were based, complicating the determination of who breached first. One possibility is that the Jury found that the Parties breached at the same time and, therefore, neither was the first to breach. Another – and perhaps more likely – justification for the Jury's verdicts is that they found both Parties had breached the contract in some way, but that none of the breaches were material.¹ This may account for the Jury award of only nominal damages and their rejection of any defense based on a first *material* breach. This result would be consistent with the instructions given to the Jury.

The instructions on the breach of contract claims² did not require the proponent of the claim to prove that a breach was material in order to prevail on that claim.

¹ Dr. Grundy began employment with the Brown PC in September 2013. The Brown PC terminated Dr. Grundy in December 2018. Whatever breaches may have occurred prior to December 2018, none caused the Brown PC to discontinue Dr. Grundy's employment or caused Dr. Grundy to stop performing services for patients of the Brown PC until December 2018.

² Instruction C-12 and Instruction C-25, which were granted without objection by any Party, are attached to this opinion.

However, the Jury was instructed that the defense of first breach required proof of a *material* breach by proponent of that defense. As there exists evidence in the record which supports the Jury finding that both Dr. Grundy and the Brown PC committed breaches of contract which were not material,³ the Court denies the motions to set aside the verdicts on the claims of breach of contract. Additionally, the Court denies any request for additur with respect to recovery of attorney's fees which were not awarded by the jury.

Remittitur of the punitive damages award against Dr. Grundy

Dr. Grundy seeks an order for remittitur of the punitive damages award against him on Dr. Brown's claim for defamation *per se*, pursuant to Code § 8.01-383.1(A). Dr. Grundy claims that the award of \$200,000 in punitive damages is so excessive, particularly when compared to the award of \$1.00 in compensatory damages, so as to suggest that the award did not result from a fair and impartial decision by the Jury. Dr. Grundy also claims that the excessive punitive damages award violates his 14th Amendment right of due process and impinges upon his First Amendment right of freedom of speech.

The proper role of punitive damages is well-settled in American law generally and particularly in Virginia jurisprudence.

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). "They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). "The purpose of punitive damages is to punish the wrongdoer and warn others." *Flippo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 58, 547 S.E.2d 216, 222 (2001); *Coalson v. Canchola*, 287 Va. 242, 249 (2014) ("The purpose of punitive damages is to provide protection of the public, punishment to the defendant, and a warning and example to deter him and others from committing like offenses."); *Doe v. Isaacs*, 265 Va. 531, 536, 579 S.E.2d 174, 177 (2003).

When considering remittitur of a punitive damages award, the Court must view the evidence in the light most favorable to the party who received the jury verdict. *Caldwell v. Seaboard System R.R., Inc.*, 238 Va. 148, 155, 380 S.E.2d 910, 914 (1989).

³ The Court granted Instruction C-13 without objection, which instructed the jury regarding the definition of a material breach. This instruction is attached.

The Court must consider a variety of factors, including 1) the reasonableness between the damages sustained and the amount of the punitive damages award and the measurement of punishment required; 2) whether the award will amount to a double recovery; 3) the proportionality between the compensatory and punitive damages; and 4) the ability of the defendant to pay. *Baldwin v. McConnell*, 273 Va. 650, 657, 643 S.E.2d 703, 706 (2007), citing *Poulston v. Rock*, 251 Va. 254, 263, 467 S.E.2d 479, 484 (1996).

The Court considers similar factors in resolving a claim that an award of punitive damages is so excessive as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁴ Those factors include 1) whether the award bears a reasonable relationship to the award of compensatory damages; 2) the relationship between the punitive damages award and the actual or potential damage that might have been caused by the acts; 3) the grievousness or degree of reprehensibility of the acts; 4) the degree of malicious intent; 5) the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; 6) the wealth of the wrongdoer. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

When punitive damages are awarded for defamation, the Court also must consider the effect of the award on the freedom of expression protected by the First Amendment to the United States Constitution. *Gazette, Inc. v. Harris*, 229 Va. 1, 50, 325 S.E.2d 713, 746 (1985). This does not require consideration of factors beyond those relevant to the Due Process analysis. The First Amendment requires that “[w]here a punitive award is substantially in excess of what ordinarily might be expected as punishment for the particular conduct, the reviewing court has a duty to annul the award unless the circumstances are so egregious as to constitute a sufficient punishment for the wrongful activity.” *Id.*

“[T]he relevant constitutional line [for punitive damages] is inherently imprecise rather than one marked by a simple mathematical formula.” *Cooper Industries*, 532 U.S. at 434–35, citing *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) and *Gore*, 517 U.S. at 582 (internal quotations omitted). “Only when an award can be fairly categorized as ‘grossly excessive’ in relation to [the State’s legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.” *Gore*, 517 U.S. at 568. “[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm Mut. Auto. Ins. Co. v.*

⁴ “That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.” *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34, (2001), citing *Furman v. Georgia*, 408 U.S. 238 (1972).

Campbell, 538 U.S. 408, 425 (2003). Larger ratios “may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages[] or where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.” *Id.* (internal quotations and citations omitted).

Dr. Brown’s and the Brown PC’s defamation claim was predicated upon statements made by Dr. Grundy in a complaint to the Board of Dentistry. In that complaint, Dr. Grundy stated that

Patients are paying higher copays due to changing of procedure codes, paying extra fees for material(s) in addition to contracted insurance fees, having their non-destroyed PHI thrown into the dumpster daily, not being contacted when breach of all patient records were ransomed, having physical injuries occur due to untrained staff, theft of paid implant components, voiding implant warranties by placing cheaper non-brand components.

Defendants’ Exhibit 64. The Jury found that one or more of these statements were false and defamatory,⁵ that Dr. Grundy had abused any privilege he had to make these statements,⁶ and that Dr. Grundy made the statements knowing they were false or made them so recklessly as to amount to a willful disregard for the truth.⁷

The Court now turns to the factors that must be considered when determining whether an award of punitive damages is excessive. Dr. Brown did not present evidence to quantify the amount of damages he sustained as a result of Dr. Grundy’s complaint to the Board of Dentistry. Consequently, the Jury awarded nominal damages of \$1.00.⁸ The Jury imposed punitive damages of \$200,000. While “there are no rigid benchmarks that a punitive damages award may not surpass,”⁹ and greater ratios are permissible when the amount of economic damages is small, hard to detect or difficult to determine,¹⁰ an award that is 200,000 times the amount of compensatory damages must be based upon conduct that is “particularly egregious.” See *State Farm*, U.S. at 425; *Gazette, Inc. v. Harris*, 229 Va. at 50, 325 S.E.2d at 746. Acts that are particularly egregious are deserving of greater punishment.

⁵ Instruction C-27 instructed the Jury on the elements of Dr. Brown’s and the Brown PC’s defamation claim.

⁶ Instruction C-29 instructed the Jury on the law regarding abuse of privilege to make these statements.

⁷ Instruction C-32 instructed the Jury on the elements necessary to award punitive damages.

⁸ This modest award rules out the prospect of the punitive damages award amounting to a double recovery.

⁹ *State Farm*, 538 U.S. at 425.

¹⁰ *Id.*

The grievousness or degree of reprehensibility of Dr. Grundy's conduct is determined by the nature of the harm his conduct caused or threatened to cause. The evidence at trial, when viewed in the light most favorable to Dr. Brown, supports the Jury's finding that Dr. Grundy made a confidential complaint to the licensing authority about Dr. Brown knowing that the complaint was false or with reckless disregard for the truth of the allegations, and that he did so out of spite, ill-will or with the intent to injure Dr. Brown. Dr. Grundy did not publish the false statements to Dr. Brown's patients, the public or anyone outside of a regulatory agency.

Any knowingly-false complaint of wrongdoing to a regulator or law enforcement agency is deserving of condemnation and punishment. However, the Court did not receive any evidence to suggest that these allegations did – or could – threaten revocation of Dr. Brown's license to practice dentistry or cause interruption in Dr. Brown's or the Brown PC's ability to treat patients and earn income, even if the allegations had been believed. The Court did not receive evidence that Dr. Brown or his practice expended any significant amount of time or money in refuting the false claims.¹¹ The false complaint did not threaten physical harm. Dr. Grundy, who is licensed by the same authority as Dr. Brown, likely understood that the effect of a false complaint would be more of annoyance, outrage, inconvenience, and embarrassment rather than professional or economic ruin.

The Court also considers that the maximum fine for making a false statement to law enforcement is \$2500, and the same maximum fine applies to a felony conviction for perjury.¹² Lastly, Dr. Grundy testified at trial that he has substantial debts and that his dental practice does not produce a net positive cash flow. The Court notes that Dr. Grundy won a sizeable award on his claims against Dr. Brown.

Upon evaluation of the factors identified by *Baldwin, Poulson, Gore and Cooper Industries*, the Court determines that the degree of reprehensibility of filing this false complaint is low and that Dr. Grundy's act in doing so, while wrongful, was not "particularly egregious." The award of \$200,000 in punitive damages is excessive, unreasonable, shocks the Court's conscience, and violates the Due Process Clause of

¹¹ In a letter to the Court after the argument on the Motion for Remittitur, Counsel for Dr. Brown withdrew any assertion that the Brown Practice expended significant man-hours refuting these claims.

¹² Code §§18.2-461; 18.2-434 and 19.2-10. Making a false statement to a law enforcement officer is a Class 1 misdemeanor punishable by a fine of up to \$2500 and / or a jail sentence of not more than 12 months; perjury is a Class 5 felony for which a fine of not more than \$2500 may be imposed independently or together with a period of incarceration.

the Fourteenth Amendment and is impermissible under the First Amendment. Such an award cannot stand.¹³

Code § 8.01-383.1(A) provides that:

In any action at law in which the trial court requires a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, may appeal the judgment of the court in requiring him to remit to the Court of Appeals.

Accordingly, Dr. Grundy's Motion for Remittitur is granted. The Court orders Dr. Brown to remit all but \$25,000 of the defamation punitive damages award. The Court requests that the Parties work cooperatively to draft a final order incorporating the Jury verdicts¹⁴ and this opinion. In the final order, Dr. Brown shall state whether a) he accepts the reduced punitive damages award; b) he rejects the reduced award and seeks a new trial on his defamation claim; or c) he accepts the reduced award under protest and indicates his intent to appeal the judgment of the Court. The Court will set this matter for entry of a final order on September 9, 2022 at 10 a.m.

Sincerely yours,



Michael F. Devine

¹³ Compare *Canchola*, 287 Va. at 250, 754 S.E.2d at 529 in which the Supreme Court reversed the trial court's remittitur of punitive damages ("Canchola was driving while intoxicated and without a license, which had been revoked because of previous instances of driving while intoxicated. Despite having at least seven convictions for driving while intoxicated on his record, Canchola drove on several occasions on the day of the accident while drinking alcohol throughout the day. He ignored a police officer's warning not to drive and engaged in deception so that the officer would not discover he was driving, after which he drank even more and then attempted to drive again. After causing an accident that could have resulted in serious injuries, Canchola fled the scene and asked his girlfriend to lie about his involvement.") and *Gazette, Inc. v. Harris*, 229 Va. 1, 48, 325 S.E.2d 713, 745 (1985) (Remittitur of punitive damage award for libel mandated where publication resulted in no physical manifestation of any emotional distress, no need for medical attention and there was no evidence that Plaintiff's standing with his peers was diminished as the result of the libel.).

¹⁴ The punitive damages award to Dr. Grundy on Count I (Defamation *Per Se*) must be reduced to \$350,000 in accordance with Code § 8.01-38.1.

Instruction C-12

Grundy – Count V – Breach of Contract

You shall find your verdict for Dr. Grundy if he has proved by the greater weight of the evidence:

- (1) That there was a valid contract between Dr. Grundy and Charles H. Brown, III, DDS, PC; and
- (2) That Charles H. Brown, III, DDS, PC breached the contract;

If you find your verdict for Dr. Grundy, you shall award him damages and attorneys' fees incurred in prosecuting the claim for Breach of Contract in accordance with the other instructions of the Court.

You shall find your verdict for Charles H. Brown, III, DDS, PC if

- (1) Dr. Grundy has failed to prove by the greater weight of the evidence either or both of the elements above;

-- OR--

- (2) Charles H. Brown, III, DDS, PC has proved by the greater weight of the evidence that Dr. Grundy was the first party to materially breach the contract.

If you find your verdict for Charles H. Brown, III, DDS, PC you shall award it attorneys' fees it incurred in defense of the claim for breach of contract.

Grundy



Instruction C-25

Brown – Count IV – Breach of Contract

You shall find your verdict for Charles H. Brown, III, DDS, PC if it has proved by the greater weight of the evidence that:

- (1) A valid contract existed between Charles H. Brown, III, DDS, PC and Dr. Grundy and
- (2) Dr. Grundy breached the contract.

If you find your verdict for Charles H. Brown, III, DDS, PC, you shall award it damages and attorneys' fees incurred in prosecuting the claim for Breach of Contract in accordance with the other instructions of the Court.

You shall find your verdict for Dr. Grundy if

- (1) Charles H. Brown, III, DDS, PC has failed to prove by the greater weight of the evidence any one or more of the elements above

– OR –

- (2) Dr. Grundy has proved by the greater weight of the evidence that Charles H. Brown, III, DDS, PC was the first party to materially breach the contract.

If you find your verdict for Dr. Grundy you shall award him attorneys' fees he incurred in defense of the claim for breach of contract.

Wounded



Instruction C-13

Grundy – Count V – Breach of Contract

Brown – Count IV – Breach of Contract

A material breach of contract occurs if a party fails to do something which that party is bound to do according to the contract which is so important and central to the contract that the failure defeats the very purpose of the contract.

Grundy
[Redacted]