

STATE OF SOUTH CAROLINA

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IN THE COURT OF COMMON PLEAS

)

NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

)

CASE NO.: 2019-CP-10-01108

Balfour Beatty Construction, LLC,  
Plaintiff,

)

v.

)

**PUNITIVE DAMAGES ORDER**

Library Associates, LLC; and Metropolitan  
Life, a New York Corporation

)

)

Defendants,

)

**RECEIVED**

**May 13 2024**

**SC Court of Appeals**

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Library Associates, LLC,

)

Third-Party Plaintiff,

)

v.

)

Lithko Contracting, LLC, *et al.*

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Third-Party Defendants.

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This matter came before the Court on April 2, 2024 for a hearing to determine punitive damages. This Court’s Order entered October 6, 2023 found Plaintiff Balfour Beatty Construction, LLC (hereinafter “Balfour Beatty”) liable to Defendant Library Associates on its counterclaims for breach of contract and breach of contract accompanied by a fraudulent act. The Order found Balfour Beatty liable for \$3,320,329.00 in actual damages on each theory. I then bifurcated the hearing for punitive damages, citing S.C. Code Section 15-35-510 et seq., to determine the amount of punitive damages and provide the parties procedural due process in order to prepare for the hearing. This process was discussed further at the Rule 59(e) hearing held on March 13, 2024.

Prior to the hearing, Balfour Beatty filed a Motion in Limine, arguing that the Court should not have a hearing as no further evidence should be admitted following the conclusion of the trial in December 2021. At the hearing, the Court cited the recent case of *Portrait Homes v. Penn Mutual* wherein the Court of Appeals affirmed the actions of the “learned trial court,”

Judge Roger M. Young, in holding a subsequent hearing to determine punitive damages post-trial. *Portrait Homes- South Carolina v. Pennsylvania National Mutual Ins. Co.*, Op. No. 6038 filed Dec. 13, 2023 (SC App 2023). Accordingly, Plaintiff's Motion in Limine was DENIED.<sup>1</sup>

At the hearing, Library Associates presented five exhibits and the testimony of Library's principal, Michael Bennett. Objection was made to the exhibits on the basis that the documents referenced a separate subsidiary entity, Balfour Beatty Communities, LLC (hereinafter "BBC") of the parent company Balfour Beatty Companies, PLC (the British parent company), than Balfour Beatty Construction, LLC, the unsuccessful Plaintiff in this action. Other than filing and arguing for the Motion in Limine, objection to the exhibits offered, and limited cross-examination of Mr. Bennett, Balfour Beatty presented no evidence at the punitive damages hearing.

Due to the similar nature of the facts presented in the exhibits and the proximity in time to the events of this case (both concluded in December 2021), the Court allowed into evidence the Exhibits numbered 1, 3, 4 & 5. The Court allowed the proffer of Exhibit 2, a 2005 finding against Balfour Beatty Construction (not this LLC) for fraud involving claims brought on behalf of Amtrak. The Court has not taken Exhibit 2 into consideration in its decision but finds the actions of the Balfour Beatty entity from the 2021 criminal guilty plea of major fraud against the United States military (18 USC 1031(a)1) to be both highly relevant and factually similar.

Those similarities are:

1. a. The events between the parties in this case took place from 2014 when the parties entered into their contract until 2019 when Balfour Beatty filed suit against Library Associates.
- b. The events alleged in the federal information and plea agreement between BBC and the United States of America occurred between 2013 and 2019.

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<sup>1</sup> See also Rule 42(b), SCRPC.

2. a. The trial of this case took place over five weeks in the fall of 2021 and concluded on December 3, 2021.  
b. The guilty plea, civil restitution, and court ordered penalty entered into between BBC and the United States of America occurred on December 21, 2021.
3. a. In this case, Library complained repeatedly to Balfour Beatty that the job was taking too long and was not being managed properly. Exhibit 5 was a letter introduced through Mr. Bennett wherein he wrote to the CEO of Balfour Beatty asking him to investigate the management of this job in order to finalize and complete the project which was many months behind schedule. No satisfactory response was given to Mr. Bennett from the CEO. Instead, he was advised by email to speak to the regional Supervisor and emphasized that the job was progressing according to plan.  
b. The factual recitation for the guilty plea states that BBC failed and refused to timely and adequately respond to complaints it received when the military housing authorities requested information and proof of compliance with their housing services contract.
4. a. In this case, upon receipt of complaints from Library Associates and commensurate with the filing of the Lis Pendens just prior to the commencement of this action, Balfour Beatty cut off access to the Egnyte computer software system site where all documents pertaining to the construction of the Hotel Bennett were kept for all parties involved to review. This was a major source of litigation during the discovery phase of this trial as the Egnyte site was never re-opened for use by the owner Library Associates.  
b. In the federal action, Balfour Beatty used its property management software system, known as Yardi, to keep its data. The federal government was able to determine that the data in the Yardi software system was manipulated in order to benefit Balfour Beatty and

was used to the detriment of the United States of America. This included the submission of false and fraudulent material data which allowed Balfour Beatty to satisfy its performance objectives to receive quarterly bonus payments from the federal government.

5. a. As cited in item 3 above, Mr. Bennett's attempts to notify executives at Balfour Beatty of problems with the construction project were left unanswered. In addition, Mr. Bennett testified one of the reasons he entered into the contract with Balfour Beatty was that he felt comfortable with one of the Balfour Beatty executives he initially met with in Charlotte, Mike Bombach; however, by the time construction commenced on the Hotel Bennett, Mr. Bombach was no longer employed with Balfour Beatty.
  - b. A finding in the factual attachment to the plea agreement was that Balfour Beatty lacked adequate controls at the corporate regional and executive levels. In addition, the factual attachment stated the former Chief Operating Official of Balfour Beatty pressured his regional leaders for the collection of performance incentive fees.
6. a. While this Court found the actual damages incurred by Library Associates in this case amount to \$3,320,329.00, Mr. Bennett testified that damages are closer to \$50 million, as he has been unable to refinance the hotel because of the Lis Pendens which remains a lien upon the property. Rather than taking out the construction loan with permanent financing when interest rates were in the 3-4% range, today the rates are closer to 10% and will result in much greater carrying costs to the Hotel as an on-going concern.
  - b. In the federal housing case, the loss determined to the government was \$18.7 million dollars. The criminal penalty adjudged was \$33.6 million dollars and restitution was set at \$31.8 million dollars - a total of almost \$65 million dollars. Separately, BBC settled a False Claims Act (qui tam) action and was allowed to credit the civil liability of \$35 million

dollars against the amounts owed under the criminal plea. Unlike in this action, as part of the federal court's probationary sentence, BBC was also ordered to undergo oversight and review by an independent compliance monitor for a period of three years to ensure no further violations of the government housing contracts occurred. This compliance period is still running at this time.

Paragraphs enumerated 1-6 above are this Court's findings on the similarities between these cases. While the federal case arises from a guilty plea to 18 USC 1031(a)1, our state jurisprudence has long allowed for the recovery of punitive damages when a breach of contract is accompanied by both a fraudulent intent and fraudulent conduct. *Welborn v Dixon*, 70 S.C. 108 (1904). See also *Floyd v. Country Squire Mobile Homes*, 287 S.C. 51 (S.C. Ct. App. 1985). In addition, the burden of proof to award punitive damages requires "clear and convincing evidence." *Armstrong v. Collins*, 366 S.C. 204 (2005). The Court finds the evidence here meets that standard and the factual allegations in these two cases are quite similar.

Furthermore, some of the quotes from Exhibit 1, a press release issued by the federal government announcing the entry of the guilty plea and the court-imposed fine, illustrate the level of conduct shown by BBC in its dealings with the federal government. If willing to treat the United States military and its service members in this fashion, what likelihood does a private citizen have to avert a similar fate? This answers some of the questions raised by the Court in its October 6, 2023 Order. See Paragraph 7(B), page 43.

While noting that the BBC action, *USA v. Balfour Beatty Communities, LLC* (Criminal No. 21-CR-742 (EGS)) involved constructing and maintaining military housing, the Court finds the following comments relevant and applicable to the conduct of Balfour Beatty in this case:

"This pervasive fraud was a consequence of BBC's broken corporate culture, which valued profit over the welfare of servicemembers." Deputy Atty Gen. Lisa Monaco.

“In defrauding our country’s military services, BBC took advantage of their unique position as a military housing provider and put greed and personal profit above our service members.” FBI Deputy Director Paul Abbate.

“Balfour Beatty’s scheme to delay service request entries into their electronic tracking system to increase their performance-based award violated their contract and wasted valuable taxpayer money.” Special Agent Thomas Cannizo of NCIS Southeast Filed Office.

“That BBC would not only fail to deliver this service, but also falsify information to line their own pockets is despicable.” David Estes US Attorney for the Southern District of Georgia.

As stated in this Court’s Order, “I find Contractor’s failure to perform its own accounting and repeated obfuscation of the accounting and audit process constituted not only a breach of contract but that it was accompanied by a fraudulent intent.” Order p. 43. This raised the questions cited above in which the Court Order answered: “The only purpose would be to attempt to force an Owner into submission.” Id.

### STANDARD OF REVIEW

Since *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), our jurisprudence has considered due process as a part of the review of an award of punitive damages. The United States Supreme Court expounded upon this in *BMW of North America v. Gore*, 517 U.S. 559 at 575 (1996), where it held “constitutional jurisprudence dictate(s) that a person receive notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose.” “While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.” *State Farm v. Campbell*, 538 U.S. 408 (2003).

In South Carolina, our Supreme Court set forth eight factors to consider in a due process review of a punitive damages award. See *Gamble v. Stevenson*, 305 S.C. 104 at 111-112 (1991).

The factors are:

1. Degree of culpability
2. Duration of the conduct

3. Awareness of concealment
4. Existence of similar conduct
5. The likelihood the award will deter others from like conduct
6. Is the award reasonably related to the harm likely to result from the conduct
7. Ability to pay; and
8. Any other appropriate factors.

In *Mitchell, Jr. v. Fortis*, 385 S.C. 570 (2009), our Supreme Court ruled that trial courts must consider both the *Gamble* and *Gore* factors in the review of a punitive damages award. In *Mitchell*, the court then undertook an analysis of 3 factors:

1. Reprehensibility
2. Ratio (Punitive damages to actual damages) and
3. Comparative Penalty awards.

#### **ANALYSIS**

Similar to *Mitchell*, this case involves economic rather than physical harm. Also, in this instance, Library Associates was and remains financially vulnerable due to the added cost and loss of time from the delay in construction of the hotel as well as the additional carrying costs incurred as a result of the liens placed upon the hotel. Again, as in *Mitchell*, there were repeated acts of deliberate indifference towards Library Associates as it sought to complete construction of the hotel. Mr. Bennett's letter to CEO Blondin (Ex. 5) resulted in no assistance whatsoever.

Balfour Beatty sought to deny and obfuscate information due to Library Associates when it shut down the Egnyte software site so that information could no longer be shared between the owner and contractors working on the hotel. Clearly, this failure to assist with completing the hotel, coupled with Balfour Beatty's decision to file the Mechanics Lien and bring suit, shows it was aware of its wrongdoing. The facts in the criminal case in which BBC defrauded the US Government shows the existence of similar conduct by a separate subsidiary of the same parent corporation and provides an additional basis for the award of punitive damages. See *Magnolia North POA, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348 (S.C. Ct. App. 2012).

“Under the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as vindication of a private right, and when under proper allegations a plaintiff proves a wilful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award damages.”

*Magnolia North* citing to *Sample v. Gulf Ref. Co.*, 183 S.C. 399 at 410 (1937).

“Punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”

*Magnolia North* citing to *Campbell v. State Farm*, 538 U.S. at 419, *supra*.

Accordingly, as the court finds Balfour Beatty’s behavior to be willful and wanton and proven by clear and convincing evidence, reprehensible behavior is established and punitive damages are appropriate.

### **S.C. Code Section 15-32-510 et seq.**

Since *Mitchell* and *Magnolia North* were decided, the SC General Assembly enacted legislation addressing the award of punitive damages. The statutory scheme is set forth in S.C. Code Section 15-32-510 et seq. Also, our Supreme Court issued an excellent discussion of the statutes relevant to an award of punitive damages in *Garrison v. Target Corp.* 435 S.C. 566 (2022).

A. Section 15-32-530 (A) provides for an award of punitive damages not to exceed three times the amount of compensatory damages unless the court finds that Sections B or C apply. In the event the court finds the terms of Section B apply, the court may award punitive damages not to exceed four times the amount of compensatory damages. Under Section C, there is no cap on punitive damages when the court finds that any one of the three factors cited there are present.

B.1. Analyzing 15-32-530 (B) to the facts of this case, subsection 1 requires the court to prove the wrongful conduct was motivated primarily by financial gain and that the unreasonably dangerous nature of the conduct was known or approved by the managing agent responsible for policy decisions at the culpable party. While Mr. Bennet’s letter to CEO Blondin was notice of the problems associated with the contract terms being fulfilled, while the Court finds management

knew or should have known of the problems, it finds there is a lack of evidence that Balfour Beatty's decision makers approved the conduct.

B.2. Section 15-32-530 (B)(2) requires the court find "the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages." While this test is in essence an attempt to determine if Balfour Beatty's actions were criminal, as noted above, a separate BBC entity has been convicted of criminal activity for very similar conduct. This is exactly what Balfour Beatty's motion in limine sought to exclude. While the test does not require a finding of criminal liability, it only requires that it "could subject" Balfour Beatty Construction, LLC to a felony conviction. The Court finds the conduct very similar and so the first part of this test is met.

The second part of the test is that the "act or course of conduct is a proximate cause of the plaintiff's damages." While it would be very difficult to find that Balfour Beatty's course of conduct in shutting down the Egnyte site, in failing to keep the project on time and on task as General Contractor and filing greatly exaggerated mechanic's liens, was THE proximate cause of Library Associates damages, it is not difficult to find that this conduct was certainly A proximate cause of Library Associates' damages which, as testified to by Mr. Bennett, continue to this day.

I conclude that Balfour Beatty's actions satisfy an award of punitive damages under Section 15-32-530 (B)(2). Accordingly, punitive damages must not exceed the greater of four times the amount of compensatory damages in this case.

C. Section 15-32-530 (C) provides for no cap on punitive damages under the three tests there. Only subsection 1 is relevant here as Balfour Beatty has not been convicted of a felony and no allegation of acts under the influence of alcohol or drugs apply. Under the first section, the test requires a showing that "at the time of the injury the defendant had an intent to harm and ... that

the defendant's conduct did in fact harm the claimant." While the court finds that the conduct of Balfour Beatty did harm Library Associates, the court does not find by clear and convincing evidence that it was their intent to harm Library Associates at the time of breach of the contract. As the Court stated a number of times during the course of this trial, it appeared that Balfour Beatty's employees failed to read the contract and follow its terms during the course of administration of the contract during construction. While this has caused the Owner damage, I find it does not rise to the level of "intent to harm" as that term is used in the statute.

### CONCLUSION

As the Court has found an award of up to four times the amount of compensatory damages is applicable in this case, and the amount of actual damages came to \$3,320,329, the maximum amount of punitive damages allowed in this case is \$13,281,316. The Court hereby exercises its discretion and awards the sum of \$10 Million Dollars in punitive damages against Balfour Beatty.

IT IS THEREFORE ORDERED that Library Associates is hereby awarded \$3,320,329 dollars in actual damages and \$10 Million dollars in punitive damages on its cause of action for Breach of Contract accompanied by a fraudulent act for a total sum of \$13,320,329 dollars.

IT IS FURTHER ORDERED that Library Associates has previously been awarded the sum of \$3,320,329 in actual damages on its claim for Breach of Contract.

IT IS FURTHER ORDERED that Library Associates is hereby required to elect its remedy between these causes of action and shall have twenty (20) days in which to elect. At that time, the Court shall enter its Final Form 4 Order setting forth the full amount of the judgment herein.

It is Further Ordered that the Court shall issue its award of Attorney's Fees and Costs by separate order herein.

**IT IS SO ORDERED!**

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Mikell R. Scarborough  
Master in Equity, Charleston County

\_\_\_\_\_, 2024



Charleston Common Pleas

**Case Caption:** Balfour Beatty Construction LLC VS Library Associates LLC ,  
defendant, et al  
**Case Number:** 2019CP1001108  
**Type:** Order/Damages

So Ordered

s/Mikell R. Scarborough 3062