

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

C. Victor Pyle, Jr., Circuit Court Judge

Case No.: 2012-CP-23-3501

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APR 19 2016

SC Court of Appeals

McKinley Cooper and Company, LLC,.....Respondent,

vs.

J. Todd Highsmith, Shane Highsmith and Highsmith and Highsmith, LLC,.....Appellants.

FINAL BRIEF OF RESPONDENT MCKINLEY COOPER AND COMPANY, LLC

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STATEMENT OF ISSUES ON APPEAL

- I. APPELLANTS WAIVED THEIR ABILITY TO CHALLENGE THE JURY'S VERDICT.**
- II. APPELLANTS WAIVED THEIR ABILITY TO SEEK A NEW TRIAL.**
- III. PUNITIVE DAMAGES ARE RECOVERABLE WITHOUT ACTUAL DAMAGES.**
- IV. THE JURY'S INTENT MUST BE RESPECTED.**
- V. THE PUNITIVE DAMAGES AWARD COMPORTS WITH DUE PROCESS.**

STATEMENT OF THE CASE

After a five day trial McKinley, Cooper & Company, LLP received a verdict in its favor against appellants J. Todd Highsmith, Shane Highsmith and Highsmith and Highsmith, LLC. For purposes of the issues before this Court, the jury found for respondent on its cause of action for breach of fiduciary duty as well as its cause of action for conversion and further found that the appellants' conduct was a willful violation. After the verdicts were published by the clerk Judge Pyle polled the jury to confirm that the verdicts as published and signed by the foreperson were in fact the verdict of the jury and in response the jury all raised their right hands indicating the verdict was, in fact, their verdict. At this point Judge Pyle specifically asked counsel for appellants if there was anything further from the jury to which counsel replied no. (R. p. 883, lines 9-17) Thereafter the jury was discharged by Judge Pyle. After the jury was discharged, counsel for appellants indicated he would renew his motion (presumably the motion for directed verdict) and then indicated to the court for the first time that he believed there was a problem with the jury's verdict. (R. p. 885, lines 1-6) On February 25, 2015 Judge Pyle issued his final order detailing in great specificity the necessity of a court upholding a jury's verdict to achieve the jury's intent as well as an analysis, under constitutional principles, of the punitive damages returned by the jury. Pursuant to such analysis, Judge Pyle cut the punitive damage award from \$60,000.00 to \$30,000.00 and after denial of appellant's motion to alter or amend, this appeal followed.

ARGUMENT

I. APPELLANTS WAIVED THEIR ABILITY TO CHALLENGE THE JURY'S VERDICT.

South Carolina case law is replete with examples where a party aggrieved by a jury's verdict failed to immediately bring such issue to the attention of the trial judge and request that the jury be instructed relative to perceived problems with their verdict and further deliberate so as to correct the perceived insufficiencies or inconsistencies in their verdict. Likewise, South Carolina case law is also replete with examples where the party seeking to challenge the verdict until after the jury has been discharged, has waived the right to challenge the verdict. For instance, in *Dykema v. Carolina Emergency Physicians*, 348 SC 549, 560 S.E. 2d 894 (2002) the jury returned a verdict of actual and punitive damages against one defendant, the Greenville Hospital System as well as a separate award of punitive damages only against a co-defendant, Companion Health Care. The trial court granted Companion's motion for judgment notwithstanding the verdict on the ground that the jury's failure to award actual damages against it precluded an award of punitive damages. In disagreeing that the failure to award actual damages against Companion mandated the grant of JNOV to Companion relative to punitive damages, the South Carolina Supreme Court specifically held that Companion's failure to object prior to discharge of the jury resulted in a waiver of the right to challenge the verdict. As noted in *Dykema*: "We decline to hold that a party may allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal. Accordingly, we find Companion waited too late to voice its objection to the verdict." *Id.*, at 554.

The courts of our state have repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and

later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence. *See Deese v. Williams*, 237 S.C. 560, 118 S.E.2d 330 (1961). *See also Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1995) (holding that party may not wait until JNOV to object to punitive damage award as this Court does not recognize a "plain error" rule); *Limehouse v. Southern Ry.*, 216 S.C. 424, 58 S.E.2d 685 (1950) (where verdict is objectionable as to form, party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived); *McAlister v. Thomas and Howard Co.*, 116 S.C. 319, 108 S.E. 94 (1921) (defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later); *Bethea v. Western Union Telegraph*, 97 S.C. 385, 81 S.E. 675(1914) (irregularity of jury verdict awarding punitive but no actual damages must be called to the attention of the court at the earliest opportunity; otherwise it will be deemed to have been waived; waiting until jury separates and then urging irregularity as ground for new trial is too late).

These cases are consistent with the Supreme Court's opinion in *Stevens v. Allen*, 342 S.C. 47, 536 S.E.2d 663 (2000), in which the court held a verdict finding the defendant liable but awarding zero damages is inconsistent or incomplete and that, when the issue is raised, the matter should be resubmitted to the jury with instructions to either enter a verdict for the defendant or award some amount of damages. Accordingly, consistent with the wealth of authority in this state, in *Dykema* the Supreme Court found Companion's failure to challenge the verdict upon being given an opportunity to do so results in a waiver. Therefore, the grant of JNOV to Companion was reversed, and the \$500,000 punitive damage award was reinstated.

The Dykema case appears to be virtually indistinguishable from the action presently before this Court relative to waiver of the right to challenge what may be a defective verdict. In this case, as in *Dykema*, counsel was present when the verdict form was published in the exact manner as had been written on the verdict form. Counsel was specifically given an opportunity to raise or request anything further from the jury and counsel for respondents specifically declined such invitation as made by the trial judge. (R. p. 883, lines 14-18) Eleven days after the jury was discharged, appellants filed their motion for judgment notwithstanding the verdict contending that the jury verdict was inconsistent and could not be upheld. Interestingly, appellants also argue before this court that instead of reforming the jury's verdict, the trial court should have either called back in the jury to clarify the jury's intent or granted appellants judgment notwithstanding the verdict. (Appellant's Final Brief, page 9) One wonders how the court could have exercised either of the suggested options given the fact that the JNOV motion was not made until more than a week after the jury had been discharged.

II. APPELLANTS WAIVED THEIR ABILITY TO SEEK A NEW TRIAL.

Among the contentions asserted by appellants as grounds for appeal is that they were denied an option for a new trial. However, as succinctly stated on page 19 and 20 of appellants' initial brief, a party seeking amendment of a verdict must lay a proper foundation by a motion for a new trial. In this case, no request for a new trial was made until the issue was raised for the first time pursuant to appellants' motion to reconsider Judge Pyle's order of February 25, 2015. As such, appellants' objections have been waived. A party cannot for the first time raise an issue by way of a Rule 59 (e) motion which could have been raised at trial. *C.A.H. v. L.H.*, _____ S.C. _____, 434 S.E. 2d 268 (1993); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E. 2d 481 (Ct. App. 1990).

III. PUNITIVE DAMAGES ARE RECOVERABLE WITHOUT ACTUAL DAMAGES

One of the arguments advanced by appellants to try and extricate themselves from the clear and convincing establishment of a punitive damage verdict against them is to argue that the jury found no actual damages and as such, they cannot as a matter of law be liable for punitive damages. Appellants' argument misstates the applicable law and flies in the face of the evidence before the jury which resulted in the challenge verdict. As noted by the trial judge in his analysis of the constitutionality of the punitive damage award, the reprehensibility of defendants' conduct merits an award of punitive damages. Most reprehensible was the fact that the plaintiff's owner was often times absent and undergoing chemotherapy treatment during the times when appellants were conducting their nefarious activities and as noted often reprehensibility is perhaps the most relevant consideration when assessing punitive damages. *Mitchell, Jr., v. Fortis, Ins. Co.*, 385 S.C. 570, 686 S.E. 2d 176 (2009).

With regard to the punitive damages verdict, contrary to appellants' argument, it was not necessary for the jury to find a specific amount of actual damages against appellants in order to support the award of punitive damages. By way of example, in *L.O. Hinson v. A.T. Sistare Construction Co., Inc.*, 236 S.C. 125, 113 S.E. 2d 341 (1960), the South Carolina supreme court addressed the issue and specifically held that "where there has been willful invasion of a legal right but no substantial damage has been shown to have resulted therefrom, a verdict for punitive damages alone will stand. Since it will be presumed that nominal damages, incapable of admeasurement, have been merged into the punitive damages." 236 S.C. at 134

The foregoing principal has been recently reaffirmed. In *Liberty Mutual Fire Insurance Company v. JT Walker Industries, Inc.*¹ 554 F. App. 176 (4th Cir. 2014) the Fourth Circuit Court of Appeals was called upon to address a decision by the South Carolina district court setting aside an award of punitive damages due to the failure to prove attendant actual damages. In vacating the district court's ruling on the punitive damage award, the court discussed the background of actual damages as a pre-requisite to punitive damages which is premised on the fact that liability must be established before a plaintiff can seek punitive damages. "Thus, a plaintiff is entitled to a jury determination on punitive damages liability even in the absence of ascertainable loss and where a jury finds a willful or reckless invasion of a legal right, a court presumes that nominal actual damages are merged into a punitive damage award. *Id.*

Appellants contend before this court that absent express jury findings to the contrary, South Carolina law presumes damages in trespass and certain defamation actions and, apparently, no others. Appellants go on to argue that respondent has presented no authority that damages are ever presumed in conversion actions and even if this were true, the express finding of zero actual damages (in the original verdict form) would rebut the presumption as a matter of law. (Appellant's Final Brief, page 13) Appellants' statements above misapprehend the applicable South Carolina law. In this matter, respondent does not contend that damages are presumed in conversion actions, nor any particular action. Rather, respondent contends in accordance with applicable law, that it was entitled to a jury determination on punitive damages liability even in the absence of ascertainable loss and having been awarded punitive damages pursuant to the jury's determination, such should be upheld by this court. South Carolina jurisprudence does not provide the analysis of punitive damages and actual damages within the frame work of the type of action

¹ While unpublished, the Liberty Mutual case is cited not for its specific holding, but rather, for its confirmation of applicable South Carolina law on the issue.

asserted. Rather, as noted previously, where the pleadings allege and the evidence proves a willful invasion or infringement of a right, punitive damages are available even if the exact measurement of actual damages is not possible. In its verdict form, the jury specifically found appellants conduct was a “willful violation” of a legal right of respondent thus supporting an award of punitive damages even absent a specific finding of actual damages.

IV. THE JURY’S INTENT MUST BE RESPECTED

Perhaps one thing that cannot be debated, at least with a straight face, amongst the litigants to this action, is the fact that the jury in this case, after a week-long trial, found that Shane Highsmith, Todd Highsmith and their entity, Highsmith and Highsmith, had willfully infringed upon the rights of plaintiff and the jury intended to punish this conduct to the tune of \$60,000.00. Respondent herein did not appeal the trial judge’s reduction of the punitive award from \$60,000.00 to \$30,000.00 but nonetheless submits to this court that the “intent” of the jury to punish appellants for their reprehensible conduct has already been mitigated by 50%. Any additional attack on or reduction of the remaining punitive damages award of \$30,000.00 would so eviscerate the jury’s intent that it would be tantamount to rewarding appellants for their conduct.

Assuming without conceding that the original verdict form as filled out by the jury was ambiguous, and analyzing Judge Pyle’s order of through the lens of his interpretation of the jury’s intent, it is well settled that the trial court should consider the entire proceedings, focusing on the events and circumstances that reasonably indicate what the jury intended. As an initial matter, when the original jury verdict was published, to include the jury’s verdict of \$60,000.00 in punitive damages, Judge Pyle specifically questioned the panel to determine that the verdict, as signed by the foreman, was the verdict of all the jurors. (R. p. 883, lines 9-12) “The construction of a verdict should, and can, depend upon, not only the language used by the jury, but other things occurring

in the trial may be, and should be, properly regarded in determining what a jury intended to find. *Keeter v. Alpine Towers International, Inc.* 399 S.C. 179, 730 S.E. 2d 890 (Ct. App. 2012).

To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings, focusing on the events and circumstances that reasonably indicate what the jury intended. *See Durst v. S. Ry. Co.*, 161 S.C. 498, 506, 159 S.E. 844, 848 (1931) (stating "the construction of a verdict should, and can, depend upon, not only the language used by the jury, but other things occurring in the trial may be, and should be, properly regarded in determining what a jury intended to find"); *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928) (stating it is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial"); *see also* 75B Am.Jur.2d *Trial* § 1545 (2007) ("In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and, for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted.")

"It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). In fulfilling this duty, the Court may not substitute its judgment for that of the jury. *See Lorick*, 153 S.C. at 319, 150 S.E. at 792 (stating the court has a right to give "effect to what the jury unmistakably found" but cannot "invade the province of the jury").

In *Bethea v. Western Union Telegraph Co.*, 97 S.C. 385, 81 S.E. 675, 676, which was an action to recover actual and punitive damages for delay in the delivery of a telegram informing plaintiff of the serious illness of his brother, the jury returned a verdict for punitive damages only

in the sum of \$250.00. Defendant made a motion for a new trial on the ground that the verdict showed that no actual damages had been sustained. The motion was overruled by the trial Judge. On appeal to this Court, the judgment was sustained upon two grounds: (1) That the verdict contained an implied finding of actual damages nominal in amount and not so substantial as to require expression in the verdict. It was stated, however, that if there had been no testimony tending to prove some actual damages, even though nominal, the verdict for punitive damages alone would not have been proper.

To correctly interpret the verdict in this case, the trial court was required to consider several indications of the jury's intention as to damages. First, the court considered the fact that the jury found in favor of the plaintiff on the causes of action submitted to them, to include an award of both actual damages and punitive damages. The court also considered, as noted in its order, the reprehensibility of the Highsmiths' conduct. Presumably the court also considered, in assessing the jury's intent, the charges the court provided to the jury to include the charge that if the acts were the result of recklessness, willfulness or wantonness, the jury could consider the element of punitive damages. (R. p. 857, lines 6-9); that punitive damages have relation to an injured party for the vindication of his, her or its rights which have been recklessly, willfully and wantonly invaded. (R. p. 857, lines 14-18); and that one of the chief purposes in awarding punitive damages is to punish the wrongdoer, not only to prevent him, her or it from a recurrence of the wrongful act, but to deter others in conduct of the same or similar kind. (R. p. 857, lines 18-22) In furtherance of the charge, the trial judge advised the jury that when punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence which is evidence of a higher degree of proof than proof by greater weight or preponderance of the evidence

and that clear and convincing evidence means evidence which is not ambiguous, doubtful or contradictory. (R. p. 858, line 24 through R. p. 859, line 5)

V. THE PUNITIVE DAMAGES AWARD COMPORTS WITH DUE PROCESS

To the best of respondent's knowledge, there exists no case within the State of South Carolina nor anywhere else that states the litigants' due process rights are violated solely and exclusively by virtue of a ratio of punitive damages to actual damages.

South Carolina appellant decisions have essentially recognized three stages for a trial court's review of punitive damages. As an initial matter, the court must determine whether defendants' conduct rises to a sufficient level of culpability to submit the issue to the jury. Clearly Judge Pyle during the trial believed sufficient evidence had been presented to submit the issue of punitive damages to the jury. Second, the trial court must conduct a post-trial review pursuant to *Gambrell v. Stevenson* 305 S.C. 104, 406 S.E. 2d 350 (1991) to evaluate whether the award deprives the defendant of due process. In this case, pursuant to the post trial review, Judge Pyle decided to reduce the punitive damages verdict by ½. The third arm or stage of the analysis sprang forth from the case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) wherein the United States Supreme Court considered a due process challenge to a punitive damages award which was greatly in excess of the actual damages found by the jury. In *Gore* the court announced three "guideposts" for a determining whether a punitive damage award meets the constitutional requirement of providing fair notice of the magnitude of the sanction. As noted previously, the degree of reprehensibility of the defendants' conduct was one if not perhaps the most important indicium of the reasonableness of a punitive award. As noted by Judge Pyle, there were several aggravating factors associated with the Highsmiths conduct present in this case. The second guidepost concerned the ratio and the fact that punitive damages must bear a reasonable

relationship to compensatory damages. However, as noted there is no bright line test for a ratio of actual to punitives and indeed with regard to punitive damages awards, the Supreme Court acknowledged “indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards.” *BMW of North America, Inc. v. Gore* 517 U.S. at 582, 116 S. Ct. at 1589. The third guidepost concerns a comparison of the punitive damages award to the civil or criminal penalties that could be imposed for similar misconduct. As noted by Judge Pyle in his order, the appropriate state authority is the South Carolina Board of Accountancy pursuant to S.C. Code Ann. 40-2-10 (2014). In addition to revoking a CPA license, the Board is also authorized to impose a fine not exceeding \$10,000.00 per violation on a licensee. The court considered that the Board of Accountancy could, if it so chose, impose a fine of at least \$30,000.00 upon the appellants.

With regard to the challenge to the punitive damages award, respondent respectfully suggests this court should reaffirm its statement made in *Hundley ex rel. Hundley v. Rite Aid*, 339 S.C. 285, 529 S.E. 2d 45 (Ct. App. 2000) that “[w]e end our analysis where we began it, with the recognition that the amount of damages, actual and punitive, remains largely within the discretion of the jury, as reviewed by the trial court.” 339 S.C. at 319.

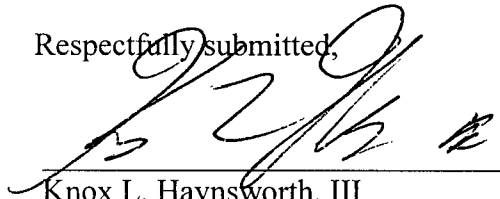
It is worth noting, that one of the arguments advanced by appellants in their final brief, at pages 18 and 19, are that they are a two person accounting firm who testified at trial that they had no knowledge of stolen documents on their computers, that their hired expert offered testimony that such documents were never accessed by appellants and that appellants believe respondent initiated this lawsuit out of malice towards them in an attempt to drive them out of business. Appellants go on to state that they have struggled to stay in business and are still paying for all of the expenses incurred in defending themselves from this lawsuit and, perhaps most outrageous,

that an affirmation of the punitive damages award in this case will not deter future similar action from appellants because they did not commit any fraudulent actions and as a result of defending against this lawsuit, they do not currently possess the required resources to perform their businesses. While not necessarily a direct analogy, appellants' argument is somewhat like the convicted rapist arguing that he should not be sentenced to life without parole because he did not commit the rape and even if he did, the resources expended in fighting the rape charges have so thoroughly exhausted him, the court can be confident he lacks the energy to commit any rapes in the future.

CONCLUSION

Respondent respectfully submit that this court need not expend time and effort in addressing the minutia of the applicable law relative to actual damages, punitive damages, the ratio between punitives and actuals, verdict forms, inconsistent verdict forms or any of the issues upon which great mental effort and analysis could be focused. Rather, this court should, as was done by Judge Pyle, respect the intention of the jury and summarily deny the relief sought by appellants in this matter.

Respectfully submitted,



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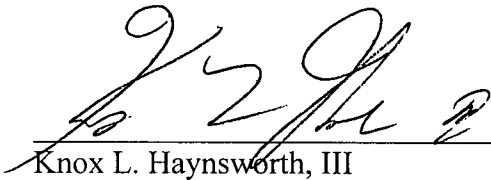
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with South Carolina Rule of Appellate Procedure 211(b).

April 15, 2016

A handwritten signature in black ink, appearing to read "Knox L. Haynsworth, III", is written over a horizontal line.

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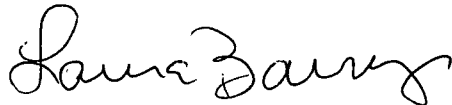
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PROOF OF SERVICE

I certify that I have served the Final Brief by causing the same to be hand-delivered on
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