

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Perrin and Debbie Babb, Wayne and Sarah)
Elstrom, Alan and Kathy Jackson,)
)
Plaintiffs,)
)
v.)
)
Lee County Landfill SC, LLC,)
)
Defendant.)
_____)

C.A. No. 3:10-cv-01724-JFA

**DEFENDANT'S MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR FOR A NEW TRIAL OR
REMITTITUR**

The defendant Lee County Landfill SC, LLC respectfully moves the Court, pursuant to Rule 50(b) and Rule 59(e) of the Federal Rules of Civil Procedure, for a motion for judgment as a matter of law or, in the alternative, for a new trial or remittitur.

The bases for this motion are set forth in the following:

1. The memorandum of law filed in support of this motion;
2. Excerpts of the trial transcript in this matter; and
3. All other evidence and authorities cited in the memorandum of law filed with this motion.

Respectfully submitted this 27th day of April, 2012.

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Lee County Landfill SC, LLC,	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT
AS A MATTER OF LAW OR FOR A NEW TRIAL OR REMITTITUR**

The defendant Lee County Landfill SC, LLC respectfully submits this memorandum in support of its motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure or, in the alternative, for a new trial or remittitur under Rule 59(e) of the Federal Rules. In support of the motion, the defendant respectfully asserts the following:

INTRODUCTION

There are times in our jury system that a jury attempts to do the right thing, but unfortunately stumbles. This Court has the authority to correct those missteps. If there ever was a case in which jury errors need correcting, this is it. The jury awarded punitive damages despite the fact that the plaintiffs' own expert and the South Carolina Department of Health and Environmental Control ("DHEC") both testified unequivocally after reviewing the defendant's operations, environmental compliance history and recent performance in terms of controlling odor issues that the defendant engaged in no reckless conduct of such a reprehensible nature that punitive damages would be warranted.

More specifically, during trial the plaintiffs' only expert witness testified that, in his review of the defendant's operations at the Lee County Landfill (the "Landfill"), he saw no reckless, egregious, malicious or extraordinary misconduct by the defendant. Similarly, DHEC (the independent third-party regulatory agency that administers and enforces the South Carolina solid waste regulations that apply to the Landfill) testified that the agency knew of no intentional, reckless or malicious conduct by the defendant. The defendant's experts and representatives similarly testified that the defendant's conduct was not reckless, egregious or malicious.

Despite this overwhelming and unequivocal evidence that the defendant engaged in no reckless, reprehensible or extraordinary misconduct that would warrant a punitive award, the jury nonetheless returned a punitive verdict of \$1.8 million which is 11.4% of the defendant's net worth and over three times the compensatory verdict, which itself bears no relation to the evidence and accordingly is unsustainably excessive. For the reasons set forth herein, the punitive and compensatory verdicts should be set aside as a matter of law. In the alternative, the Court should set aside the verdicts in favor of a new trial or order remittitur of the verdicts.

ARGUMENT

I. THE PUNITIVE DAMAGES VERDICT SHOULD BE SET ASIDE UNDER RULE 50(b) OR, IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE GRANTED UNDER RULE 59(e).

The defendant asked this Court to dismiss the plaintiffs' punitive damages claim at every stage – on summary judgment, at the close of the plaintiffs' case-in-chief at trial, at the close of the defendant's case, prior to the verdicts and after the verdicts. This Court understandably has had "grave concerns" and "misgivings" regarding the viability of the punitive claim, indicating that the claim was "hanging by a very slender thread." *See* Trial Tr. 26:14, 26:23, March 30, 2012; Trial Tr.

116:14-23, March 23, 2012; Trial Tr. 133:12-15, March 29, 2012.¹ For good reason. There simply is no legally sufficient evidentiary basis for a reasonable jury to have come to any other conclusion than to reject the plaintiffs' request for punitive damages. *See Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005) (reversing trial court's denial of a Rule 50(b) motion and vacating jury's punitive damages verdict). As such, this Court should set aside the punitive verdict as a matter of law or, in the alternative, order a new trial or remittitur.

A. Under South Carolina law, an award of punitive damages requires "clear and convincing" proof of reckless behavior (with wanton and willful being synonymous with "reckless" in this context).

As this Court knows, a punitive award is appropriate only when a plaintiff proves that the defendant's actions were reckless, willful or wanton. *Fairchild v. S.C. Dep't of Transp.*, 2012 WL 1194438, *3 (S.C. Apr. 11, 2012).² In an action such as the case at bar where negligence is alleged, the term "reckless" is synonymous with the terms "wanton" or "willful." *Id.* Recklessness is the doing of a negligent act knowingly and "import[s] a greater degree of culpability than mere negligence." *Id.* The plaintiffs were required to prove that the defendant was reckless by "clear and convincing" evidence, which is the highest burden of proof in a civil case. *See Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008) ("[o]n the issue of punitive damages, the highest burden of proof known to the civil law is applicable. . . . [T]he plaintiff has the burden of proving such damages by clear and convincing evidence.") (emphasis added). "Assessment of punitive damages for recklessness is proper only if the wrongful act is committed in such a manner that a person of ordinary prudence would say that it was [in] reckless disregard of another's rights." *Jimenez v. Daimlerchrysler Corp.*, 269 F.3d 439, 450 (4th Cir. 2001). (The term "clear and

¹ The final trial transcript is not available, so all cites are to the "rough" transcript obtained from the court reporter during trial. Because the transcript is a rough transcript, the quoted language from the transcript is the testimony as understood by the undersigned and is subject to correction if it differs from the final transcript.

² Per Local Rule 7.05(4) DSC, unpublished cases are attached as Exhibit A.

convincing evidence” has been defined as “evidence . . . of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established” and “proves the facts at issue to be highly probable.” *Jimenez*, 269 F.3d at 450 (internal quotes and citations omitted; ellipses in original).

Punitive damages are appropriate only when “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.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)) (emphasis added). Here, there was no sufficient evidence of recklessness or any other extraordinary misconduct that is so reprehensible as to warrant a punitive award, let alone clear and convincing evidence of such conduct.

B. The lack of evidence of reckless conduct.

This is a rare case indeed because all of the experts (both the plaintiffs’ and the defendant’s) and the independent third-party regulatory agency (DHEC) all testified that the defendant did not engage in the sort of recklessness or extraordinary misconduct that would warrant punitive damages. Despite this unequivocal and overwhelming evidence to the contrary, the jury awarded punitive damages nonetheless. This is precisely the type of case in which the punitive award should be set aside. Before turning to the Rule 50(b) and 59(e) arguments, it is important to recap the evidence adduced at trial regarding the issue of recklessness.

1. The plaintiffs’ own (and only) expert testified unequivocally that in his review of the defendant’s operations, he saw no reckless conduct that would warrant a punitive verdict.

The plaintiffs engaged a single expert witness to testify on their behalf, Dr. Timothy Townsend, a professor from the University of Florida. His area of expertise is environmental engineering with specialties in solid waste and landfill engineering. Trial Tr. 39:1-3, March 21,

2012. Dr. Townsend was engaged to examine and opine on the defendant's operations. He examined tens of thousands of pages of documents, studied the defendant's environmental regulatory compliance history, flew over the Landfill and took hundreds of pictures, visited the neighborhoods surrounding the Landfill on three occasions and toured the Landfill itself. Trial Tr. 39:6-40:8, March 21, 2012. After this thorough and extensive review of the defendant's environmental compliance history, operations and conduct, Dr. Townsend admitted unequivocally that punitive damages are not appropriate in this case:

Q: And then finally, in your review of operations at the landfill you didn't see any activity on the part of the landfill that was **egregious** or **reckless**, did you?

A: No. Not based on how I was interpreting **egregious** or **reckless**. It seemed to me it's subjective.

Q: In your review of operations at the landfill, you didn't see any activity on the part of the landfill that was **egregious** or **reckless**. Your answer was no, correct?

A: That's correct.

(Trial Tr. 163:5-13, March 21, 2012) (emphasis added) Dr. Townsend further testified:

Q: You didn't see anything **malicious** in this case, correct?

A: Yes, sir. That's correct.

Q: You didn't see any **extraordinary misconduct** to cause you to believe the landfill was **egregious** or **reckless**, did you?

A: There's nothing that I saw.

(Trial Tr. 176:12-18, March 21, 2012) (emphasis added) Dr. Townsend further testified:

Q: You certainly didn't get the opinion that things were being **grossly mismanaged**?

A: From everything that I could see that day on our tour, there was nothing that indicated it was **grossly mismanaged**.

(Trial Tr. 134:6-11, March 21, 2012) (emphasis added) Dr. Townsend also testified that in his view, the actions taken by the Landfill to control odors were reasonable:

Q: And I asked the question, were the landfill team's actions in taking these odor control measures **reasonable**? And you said yes, correct?

A: I did say yes.

(Trial Tr. 156:20-23, March 21, 2012) (emphasis added)

The plaintiffs' own expert could not have been more clear. After examining the defendant's conduct in significant detail, the plaintiffs' expert admitted that he saw no activity on the part of the defendant that was reckless or would warrant a punitive verdict. After the plaintiffs' expert admitted this on cross-examination, the plaintiffs had ample opportunity to rehabilitate these admissions on redirect, but no such rehabilitation occurred. In fact, on recross, the plaintiffs' expert confirmed unequivocally that no punitive award was warranted when he admitted that he saw nothing malicious and no extraordinary misconduct on the part of the defendant. *See* Trial Tr. 176:12-18, March 21, 2012.

2. The independent regulatory agency charged with enforcing the environmental regulations to which the Landfill is subject testified that there was no activity on the part of the defendant that warranted a punitive award.

DHEC is the South Carolina environmental protection agency charged with administering the State Solid Waste program and enforcing the environmental laws and regulations in South Carolina. *See* S.C. Code § 44-96-260 (2012); *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 456-57, 716 S.E.2d 280, 282-83 (2011). DHEC has conducted solid waste inspections of the Landfill over 370 times since 2001. *See* Def. Trial Ex. 1-3. These inspections occurred every week or more for a number of years and now occur approximately twice a month. *Id.* DHEC, after having inspected the Landfill and its operations over 370 times (including two occasions during which DHEC discovered daily cover³ violations), testified as follows:

³ There were two isolated instances when (1) on December 5, 2008 the Landfill did not cover the waste with soil (called "daily cover") overnight; and (2) on May 23, 2009 the Landfill did not adequately

Q: In your time period with DHEC and inspecting the landfill have you seen anything that was done **intentionally** by the Lee County Landfill?

A: Never.

Q: What about any sort of **reckless** behavior?

A: None.

Q: What about any sort of **egregious** or **malicious** type of behavior?

A: None.

(Trial Tr. 163:10-18, March 28, 2012) (emphasis added) DHEC could not have been more clear regarding the defendant's conduct in this case. The agency charged with enforcing solid waste regulations to which the Landfill is subject testified unequivocally that the defendant did not engage in any reckless activity that warranted a punitive verdict.

3. The defendant's expert witnesses confirmed the testimony of the plaintiffs' expert and DHEC that the defendant engaged in no activity that would warrant a punitive verdict.

The defendant's two expert witnesses, Mort Barlaz and Ken Skipka, both confirmed that the actions of the defendant were reasonable and did not constitute reckless behavior. Dr. Mort Barlaz, a well-regarded Department Head and Solid Waste professor at North Carolina State University and licensed professional engineer in the solid waste industry,⁴ testified:

Q: Did you read in [the plaintiffs' expert] Dr. Townsend's deposition and also his testimony at trial that he didn't see anything, any activity on the part of the landfill that was **egregious** or **reckless**?

A: I did read that, yeah.

Q: Do you remember his answer?

A: Yeah. I remember that he said he did not see anything that was **egregious** or **reckless**.

cover the waste overnight. *See* Def. Trial Ex. 225 & 246. The employee responsible for both incidents was terminated after the second incident. Trial Tr. 67:5-15, March 29, 2012.

⁴ The plaintiffs' own expert testified that Dr. Mort Barlaz is a well-regarded solid waste professor and engineer in the solid waste industry. *See* Trial Tr. 157:11-15, March 26, 2012.

Q: Do you have that same conclusion, do you have the same conclusion that you see no evidence of **egregious** or **reckless** behavior here?

A: Yes.

Q: What about malicious or **extraordinary misconduct**? Did you see what Dr. Townsend said about that?

A: Yeah. He saw no evidence of **malicious** conduct.

Q: What about **extraordinary misconduct**?

A: He saw no evidence of **extraordinary misconduct** and I have not seen any evidence of **malicious** or **extraordinary misconduct** either.

(Trial Tr. 205:13-206:5, March 27, 2012) (emphasis added)

Q: Do you have an opinion as to whether Mr. Lamb and the landfill's team's efforts to manage and control the landfill gas collection system before off-site odors were noticed in December of 2008 was **reasonable**?

A: I do have an opinion. I think that the owners' efforts were quite **reasonable**.

(Trial Tr. 190:10-15, March 27, 2012) (emphasis added)

Q: Do you have an opinion as to whether the landfill team's actions were **reasonable** in maintaining and upgrading and such its landfill gas collection system from December of 2008 to the present?

A: Yeah. My sense is that the landfill owner's team was quite **reasonable** in managing the gas and controlling odors in the period from December 2008 onward.

(Trial Tr. 195:-196:1, March 27, 2012) (emphasis added)

Q: Do you agree that odor control measures that were taken, do you agree with Plaintiffs' own expert, Dr. Townsend, that those odor control measures were **reasonable**?

A: Yeah. I do believe they were **reasonable** and I agree with Dr. Townsend.

(Trial Tr. 199:25-200:4, March 27, 2012) (emphasis added)

The defendant's odor expert, Ken Skipka, also confirmed that the defendant's actions were not reckless.

Q: And tell me what if any opinion do you have as to whether in your review of operations at the landfill if you saw any activity on the part of the landfill that you felt was **egregious** or **reckless**?

A: I did not see any **egregious** or **reckless** activity at the landfill.

Q: And tell me if you have an opinion as to whether you saw anything that was **malicious** in this case?

A: From the landfill's perspective, no, no **malicious** activity.

Q: And tell me if you saw anything that you felt was **extraordinary misconduct** on the part of the landfill?

A: I did not see any **extraordinary misconduct** by the landfill.

(Trial Tr. 77:13-78:1, March 27, 2012) (emphasis added)

C. The defendant's representatives testified that the defendant acted reasonably at all times when operating the Landfill.

The defendant's representatives also confirmed that the defendant engaged in no reckless behavior. The defendant's Area Environmental Engineer, Hank Ludwig, testified:

Q: And what if anything do you believe as to whether the company was at any time **reckless** in dealing with these odor control or gas well collection systems?

A: I have never seen any indication of anything **reckless** or anything along those lines. All I have seen is strong support for if it needs to be fixed, here is the money, get it done.

(Trial Tr. 186:17-23, March 20, 2012) (emphasis added)

Q: What if anything do you believe as to whether the gas collection system met industry standards the latter part of 2008?

A: The latter part of 2008 I believe it met industry standards defined as complying with you know the air permit in Title 5 regulations.

Q: What do you believe, if anything, about whether the gas collection system complies with industry standards today?

A: Today I believe it far exceeds industry standards.

(Trial Tr. 186:8-16, March 20, 2012)

The defendant's nationally reputed gas collection system consultant, Steve Lamb,⁵ also testified that the defendant did not engage in any reckless behavior and the defendant's actions were reasonable.

Q: Did you hear testimony from Dr. Townsend that he believed in his review of operations of the landfill he did not see anything on the part of the landfill as **reckless or egregious**. Did you hear that?

A: Yes, I did.

Q: Do you recall his answer?

A: It was no.

Q: Do you have an opinion about that?

A: I have the same answer as Dr. Townsend on that.

Q: All right. Do you recall Dr. Townsend testifying that he didn't see anything **malicious** in this case?

A: Yes.

Q: Do you agree with him in that?

A: I do.

Q: Do you recall Dr. Townsend testifying that he didn't see any **extraordinary misconduct** in this case?

A: Yes, I do. I did.

Q: Do you agree with his statement?

A: Yes, I do.

(Trial Tr. 92:15-93:8, March 26, 2012) (emphasis added)

Given this overwhelming and unequivocal evidence by (1) the plaintiffs through their own expert; (2) the independent regulatory agency charged with enforcing the solid waste regulations;

⁵ The plaintiffs' own expert testified that Steve Lamb's company, SCS Engineers, is a well-established, reputable landfill gas system company in the solid waste industry. See Trial Tr. 157:2-10, March 26, 2012.

(3) the defendant's two experts; and (4) defendant's representatives that the defendant's conduct was not reckless, egregious or malicious, a judgment as a matter of law is appropriate because there simply is no other conclusion a reasonable jury could reach than to refuse to return a punitive award in this case. In the alternative, a new trial should be granted or remittitur, given that the finding of liability for punitive damages is against the overwhelming weight of the evidence, and a miscarriage of justice would occur if the verdict were to stand.

D. The Court should grant the defendant's motion for judgment as a matter of law because the evidence supports only one conclusion – that the defendant's conduct did not warrant punitive damages.

1. Legal standard under Rule 50(b).

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, this Court may grant a motion for judgment as a matter of law “if a reasonable jury could only reach one conclusion based on the evidence or if the verdict in favor of the non-moving party would necessarily be based on speculation and conjecture.” *Myrick*, 395 F.3d at 489; *Int'l Safety Access Corp. v. Integrity Worldwide, Inc.*, 2011 WL 6826855, *2 (D.S.C. Dec. 28, 2011). “[T]he evidence and all reasonable inferences from it are assessed in the light most favorable to the [non-moving] party, and the credibility of all evidence favoring the non-moving party is assumed.” *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160 (4th Cir. 1988) (citations omitted). The Court should grant judgment as a matter of law “if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof.” *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996). In weighing the sufficiency of the evidence, the Court must take into account the plaintiffs' heightened burden of proof for punitive damages, that of clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986).

2. The defendant is entitled to judgment as a matter of law as to the punitive award because there is no clear and convincing evidence that the defendant acted recklessly.

Judgment as a matter of law is proper here because the plaintiff failed to introduce clear and convincing evidence that would lead a reasonable juror to conclude that the defendant acted recklessly. *Myrick*, 395 F.3d at 489. The plaintiffs' own expert evaluated all the evidence in the case, including the defendant's operations, environmental compliance history, landfill gas generation and collection, interaction with the plaintiffs and regulatory violations, and concluded that the defendant did not engage in reckless, malicious or extraordinary misconduct.

In situations such as these where the evidence (or lack thereof) points to a single conclusion, the Fourth Circuit has not hesitated to affirm the trial courts' decisions to set aside punitive awards as a matter of law or reverse lower courts that do not enter judgment as a matter of law when a punitive award is not appropriate. *See, e.g., Myrick*, 395 F.3d at 494 (reversing denial of Rule 50 motion and vacating punitive award because defendant's conduct was not willful or reckless); *Jimenez*, 269 F.3d at 451 (concluding that the plaintiff failed to demonstrate clearly and convincingly a consciousness of wrongdoing and reversing jury verdict awarding punitive damages); *Mosser v. Fruehauf Corp.*, 940 F.2d 77, 83-84 (4th Cir. 1991) (affirming the district court's *sua sponte* decision to set aside the punitive award as a matter of law because "[t]here simply was not enough evidence to justify a finding warranting punitive damages"); *Tadlock Painting Co. v. Maryland Cas. Co.*, 97 F.3d 1449, *3-4 (4th Cir. 1996) (unpublished) (finding no evidence in the record that could lead a reasonable juror to conclude that punitive damages were warranted and reversing trial court's denial of motion to set aside verdict); *Gaumer v. First Nat'l Bank of North East*, 23 F.3d 400, *5 (4th Cir. 1994) (unpublished) (affirming district court's j.n.o.v. of punitive verdict). This is the very type of case in which the punitive verdict should be set aside as a matter of law because the testimony of the plaintiffs' own expert that the defendant engaged in no reckless conduct is utterly irreconcilable with the jury's finding that there was clear and convincing evidence that the defendant acted recklessly. *See Jimenez*, 269 F.3d at 450. Punitive

damages involve a “quantum leap” up in the condemnation of corporate conduct that simply is not apparent here. *Mosser*, 940 F.2d at 87-88. As such, the defendant’s motion for judgment as a matter of law with respect to the punitive verdict should be granted.

3. Two isolated regulatory violations do not preclude the Court from granting judgment as a matter of law on punitive damages under South Carolina law.

The plaintiffs make a broad-brush argument that any regulatory violation is evidence of recklessness and, therefore, because there were two regulatory violations in this case, this Court was required to submit the punitive damages question to the jury. This argument, however, misstates existing precedent. The correct statement of the law is that regulatory violations can be evidence of recklessness for the jury, but only if (1) there is “a causal link between the violation and the injury to warrant submitting the issue of punitive damages to the jury” (*Fairchild*, 2012 WL 1194438, at *4); and (2) “the facts are susceptible of more than one reasonable inference” (*Tant v. Dan River, Inc.*, 289 S.C. 325, 326-27, 345 S.E.2d 495, 496 (1986)) (citing *Cartee v. Lesley*, 290 S.C. 333, 337-38, 350 S.E.2d 388, 390 (1986)); *Ravan v. Greenville County*, 315 S.C. 447, 458-59, 434 S.E.2d 296, 303 (Ct. App. 1993). If there is no causal link between the violation and the alleged harm or if the only reasonable inference is that the violations do not amount to recklessness, the violations are not evidence of recklessness and need not be submitted to the jury. Neither prerequisite for treating the regulatory violations as evidence of recklessness is satisfied here. Thus, the issue of punitive damages was not a jury question, and judgment as a matter of law is warranted.

a. There is no evidence of a causal connection between the two cover violations and the plaintiffs’ alleged injuries.

In *Fairchild* (decided less than a month ago), the South Carolina Supreme Court clarified that regulatory violations do not mandate that the punitive question be submitted to a jury. Instead the Supreme Court held that there must be evidence of a causal connection between the alleged violation and the harm allegedly suffered by the plaintiff before regulatory violations require

punitive damages to become a jury question. *Id.*, 2012 WL 1194438, at *4. Here, the plaintiffs introduced no evidence of a causal connection between the two regulatory violations at issue in this lawsuit (one on December 5, 2008 and one on May 23, 2009) and the plaintiffs' specific alleged injuries. The two regulatory violations were for: (1) the defendant's failure to cover landfill materials overnight on December 5, 2008; and (2) failure to cover landfill materials adequately overnight on May 23, 2009. There is no testimony in the record that any odors from the Landfill traveled to the plaintiffs' properties on those two evenings. In fact, the two regulatory violations were for on-site landfill daily cover concerns, not off-site odor concerns. *See* Def. Trial Ex. 225 & 246. On those two days, DHEC inspected the Landfill and did not find there to be any off-site odor violations or serious off-site odors. *Id.* Thus, there is no evidence to infer a causal connection between the regulatory violations and the alleged harm to the plaintiffs on those two evenings. *See Ravan*, 315 S.C. at 470, 434 S.E.2d at 310 (taking waste to a landfill on a couple of occasions with no hint of the content of the waste did not provide causal connection to warrant liability).

b. The facts are clear that the defendant did not act recklessly.

In addition, as explained in detail above, the facts are not susceptible of more than one reasonable inference, even when viewing the evidence in the light most favorable to the plaintiffs. In a negligence action such as this, the term "recklessness" is synonymous with "willful" and "wanton." *Fairchild*, 2012 WL 1194438, at *3. Absent clear and convincing evidence of reckless behavior, a punitive damages claim fails. *Id.*

The plaintiffs through their own expert (Dr. Tim Townsend) testified that the defendant's conduct was not reckless. When the plaintiffs, through their expert, testify that there was no reckless behavior by the defendant, there can be only one reasonable inference – that the defendant

did not act recklessly. It is critically important to note that the plaintiffs' own expert examined the defendants' entire environmental compliance history, including the two daily cover regulatory violations, and still concluded that the defendants' conduct was not reckless. The plaintiffs' own expert clearly had the expertise to evaluate the impact of the two regulatory violations and he slammed the door on the punitive damages claim. There simply is no legally viable punitive claim. Therefore, under existing South Carolina precedent, the punitive award was improper and should be set aside.

4. The plaintiffs failed to establish the standard of care or a breach thereof in this case, thus precluding any finding of recklessness.

The plaintiffs indicated during jury selection that even though they had abandoned their health-related claims, this case was, nonetheless, akin to a personal injury action. Jury Selection Tr. 5:8-12, March 1, 2012 (“[it] is akin to a personal injury action because the damages are primarily loss of use and enjoyment of property and quality of life.”) Like a personal injury action, this case requires expert testimony to establish the standard of care and any alleged breach thereof. Under existing precedent in South Carolina, if the subject matter that forms the relevant standard of care for a negligence claim is not understandable to a jury, expert testimony is required to establish the standard of care and a breach thereof. *See, e.g.,* 18 S.C. Jur. Negligence §15 (2012); *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986) (expert testimony is required in a personal injury action to establish the appropriate standard of care). *See also City of York v. Turner-Murphy Co., Inc.*, 317 S.C. 194, 197, 452 S.E. 2d 615, 617 (Ct. App. 1994) (dismissing negligence claim against engineer where no expert testimony was presented as to the alleged breach of the standard of care); *Gilliland v. Elmwood Prop.*, 301 S.C. 295, 301-02, 391 S.E. 2d 577, 580 (1990) (affirming dismissal of a negligence claim where plaintiff presented no expert testimony to establish standard of care or breach thereof). *See also Briggs v. Washington Metro. Area Transit Auth.*, 481 F.3d 839, 845 (D.C. Cir. 2007) (“[a] plaintiff must put on expert testimony to establish what the standard of

care is if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson”).

As is evident from the two-week trial of this matter with hundreds of exhibits concerning landfill gas collection operation and analysis, the subject area of landfill gas collection system operation/odor control is an involved and complex area that is beyond the general knowledge of a jury and requires expertise to establish the standard of care and a breach thereof. A lay jury cannot be expected to digest and understand the standard of care for a reasonable landfill gas collection system operator established by such things as the Federal and State New Source Performance Standard (“NSPS”) regulations, Federal and State Solid Waste regulations and gas collection system standard operating procedures. The defendant’s witnesses who are responsible for the landfill gas collection system, Hank Ludwig and Steve Lamb, are licensed professional engineers. In fact, because landfill gas collection is so specialized, the defendant engaged a professional consulting firm to manage that aspect of landfill operations. The plaintiffs’ landfill gas collection system expert witness, Dr. Tim Townsend, is a licensed professional engineer. The defendant’s landfill gas collection system expert witness, Dr. Mort Barlaz, is a licensed professional engineer. The defendant’s odor control expert witness, Ken Skipka, is a certified meteorologist (in fact, the plaintiffs objected to the fact that this expert is not a licensed engineer). Trial Tr. 36:13-17, March 27, 2012. Unquestionably, landfill gas collection/odor control is a complex and specialized area managed by certified and licensed professionals that is not easily understandable by jurors, and therefore requires expert testimony to establish the standard of care and any alleged breach thereof.

The plaintiffs did call a landfill gas collection system expert who is a licensed professional engineer but they simply failed to elicit any testimony from the expert regarding the appropriate standard of care or establishing a breach thereof. Because the plaintiffs failed to establish the standard of care or a breach thereof in this case by expert testimony, the plaintiffs failed to prove

two essential elements of their negligence claim and that claim fails as a matter of law. *See Pederson*, 288 S.C. at 143, 341 S.E.2d at 635; *City of York*, 317 S.C. at 197, 452 S.E.2d at 617. It follows then that because the plaintiffs' claim that the defendant breached the industry standard of care fails as a matter of law, the plaintiffs' claim that the defendant acted recklessly also fails as a matter of law because recklessness necessarily involves a greater degree of culpability than mere negligence. *Fairchild*, 2012 WL 1194438, *3. *See Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316 (5th Cir. 1995) (vacating award of punitive damages on Rule 50(b) motion in part because the defendant's conduct was consistent with industry standards).

In the end, there simply is not sufficient evidence for a reasonable juror to conclude that the defendant engaged in reckless behavior that would warrant a punitive verdict and thus, the punitive claim should be dismissed as a matter of law.

E. The Court should grant the defendant's motion for new trial as to the punitive damages award.

If, notwithstanding the arguments above, the Court concludes that the punitive award should not be set aside as a matter of law under Rule 50(b), the Court should, nonetheless, order a new trial regarding the plaintiffs' punitive damages claim under Rule 59(e). *See Fairchild*, 2012 WL 1194438, *6 (if the punitive question goes to the jury and a verdict is returned, the Court still has the authority to correct the error by granting a new trial).

1. Legal standard.

The Court has a duty to grant a new trial under Rule 59(e) if, among other things, "(1) the verdict is against the clear weight of the evidence, or (2) is based on evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99

F.3d 587, 594 (4th Cir. 1996). In considering a Rule 59(e) motion, the Court has the discretion to weigh the evidence and consider the credibility of the witnesses. *Knussman v. Maryland*, 272 F.3d 625, 647 (4th Cir. 2001).

2. The verdict is against the clear weight of the evidence.

For the reasons set forth in detail above, the evidence unequivocally indicates that the defendant did not act recklessly, willfully or wantonly. Considering the plaintiffs' expert testimony in conjunction with the testimony of DHEC and the defendant's experts and representatives, compels that the jury's finding of recklessness is against the overwhelming weight of the evidence and that a new trial is therefore warranted.

3. The punitive award is unconstitutionally excessive such that letting it stand would amount to a miscarriage of justice.

Given that all the evidence leads to the unavoidable conclusion that the defendant's conduct was not reckless, wanton or willful, any punitive award is excessive and amounts to a miscarriage of justice, particularly a punitive award of \$1.8 million that is over three times the (manifestly inflated) compensatory award and 11.4% of the defendant's net worth. In fact, the punitive award is so excessive that it violates the Fourteenth Amendment's Due Process Clause. *See BMW*, 517 U.S. at 559 (holding a \$2 million punitive award to be unconstitutionally excessive). In *BMW*, the Supreme Court characterized a \$2 million award as "tantamount to a severe criminal penalty." *Id.* at 585. The punitive award of \$1.8 million in this case is similarly excessive.

In *BMW*, the Supreme Court identified three "guideposts" for determining whether a punitive award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the disparity between the punitive damages and legislatively established penalties for comparable conduct. *Id.* at 574-75. In *State Farm*, the Court refined and amplified the "guidepost" analysis. *See State Farm*, 538 U.S. at

418. Application of these three guideposts in this case leads to the inevitable conclusion that a \$1.8 million punishment is unconstitutionally excessive and that a new trial is necessary.

a. Reprehensibility Guidepost.

In *State Farm*, the Supreme Court identified five non-exclusive factors that bear on the degree of reprehensibility of a defendant's conduct: (i) whether the conduct resulted in physical as opposed to economic harm; (ii) whether the defendant acted with indifference to or reckless disregard of the health or safety of others; (iii) whether the target of the conduct had financial vulnerability; (iv) whether the conduct involved repeated violations as opposed to an isolated incident; and (v) whether the harm resulted from intentional malice, trickery, deceit or mere accident. *State Farm*, 538 U.S. at 419. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* Here, none of the five reprehensibility factors is present.

i. It is undisputed that the first two factors are not present in this case because the plaintiffs abandoned any economic and physical or health-related claims.

The plaintiffs specifically limited their claims in this case to loss of enjoyment of their property and abandoned all physical health, safety and economic diminution of property value claims. *See* Def. Trial Ex. 854 & 857. Therefore, it is undisputed that the first two *State Farm* reprehensibility factors are not present in this case.

ii. The defendant did not specifically target any of the plaintiffs.

The Supreme Court in *BMW* concluded that the appropriate inquiry for purposes of this factor is whether the defendant specifically targeted the plaintiffs, and did so because they were financially vulnerable. *BMW*, 517 U.S. at 576; *see also In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir. 2007) (third reprehensibility factor was not satisfied because "there must be some kind of intentional aiming or targeting of the vulnerable that did not occur here"), *rev'd on other grounds*

sub nom. Exxon Shipping Co. v. Baker, 544 U.S. 471 (2008). There are no allegations or evidence that the defendant specifically targeted any of the plaintiffs or did so because they were financially vulnerable. Quite to the contrary. When the defendant learned from some of the plaintiffs that the Landfill had off-site odor concerns (and even before), the Landfill immediately began addressing those odor issues and did so to the satisfaction of DHEC and the plaintiffs' expert. *See* Trial Tr. 162:11-16, March 28, 2012; 156:20-157:1, March 21, 2012. Thus, this factor not present.

iii. The conduct did not involve a pattern of repeated violations because two isolated incidents out of thousands of operating days is not a pattern.

As discussed above, only two violations occurred during the relevant timeframe. Those two violations were isolated incidents out of the thousands of operating days at the Landfill. From the time the Landfill began accepting waste in 1994 to the present, there have been approximately 4,800 operating days at the Landfill. Trial Tr. 190:7-191:5, March 28, 2012. In these approximately 4,800 operating days, the Landfill has had only two daily cover regulatory violations, one on December 5, 2008 and the other six months later on May 23, 2009. Since the May 2009 incident, the Landfill has not had any daily cover violations (or any other type of violations). *Id.* Furthermore, DHEC has been satisfied with the defendant's response to the violations. *Id.* Finally, DHEC and the plaintiffs' own expert both agree that even accounting for the two cover violations, the defendant did not act recklessly, maliciously or engage in extraordinary misconduct.

iv. The plaintiffs' own expert and DHEC agree that the defendant's conduct did not amount to intentional malice, trickery or deceit.

The final reprehensibility factor is not present because it is undisputed that there was no intentional malice, trickery or deceit by the defendant. As discussed in detail above, the plaintiffs (through their expert), DHEC and the defendant's representatives all agree that there was no intentional malice, trickery or deceit.

Because none of the reprehensibility factors is present in this case, the punitive award is improper and must be set aside. *See, e.g., United States v. Bailey*, 288 F. Supp. 2d 1261, 1279-1281 (M.D. Fla. 2003) (concluding that the absence of all five aggravating factors identified in *State Farm* indicated a lack of reprehensibility that warranted setting aside the punitive award in its entirety), *aff'd*, 419 F.3d 1208 (11th Cir. 2005); *See also Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1001 (6th Cir. 2007) (reversing award of punitive damages upon finding only one of the five reprehensibility factors); *Herbal Care Sys., Inc. v. Plaza*, 2009 WL 692338, *5 (D. Ariz. 2009) (because the record supported only one of the reprehensibility factors, the defendant's conduct was not sufficiently reprehensible for an award of punitive damages).

b. Ratio Guidepost.

The 3.4:1 ratio of punitive to compensatory damages in this case exceeds the outermost limit of the Due Process guarantee. In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost. Most important for present purposes, the Court stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*, 538 U.S. at 425. Applying this additional guidance to the facts of the case before it, the Court observed that, even though *State Farm*'s conduct was “reprehensible” and “merit[ed] no praise,” *id.* at 419-20, “a punitive damages award at or near the amount of compensatory damages” (*i.e.*, a 1:1 ratio) was likely the constitutional maximum. *Id.* at 429. In this case, the jury returned a punitive verdict at a ratio of 3.4:1 to the compensatory verdict (\$1.8 million ÷ \$532,500) despite the fact that none of the reprehensibility factors is present. This 3.4:1 ratio exceeds the outermost bounds of the constitutional maximum established by *State Farm*.

Furthermore, because the compensatory award was so large (greater than the full value of two of the properties at issue), it fully satisfies the deterrent aspect of punitive damages. As the

Supreme Court stated in *State Farm*, “[i]t should be presumed [that] a plaintiff has been made whole for her injuries by compensatory damages . . . 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.” *Id.*, 538 U.S. at 419. Because there is no reprehensible conduct here, punitive damages are not warranted and a new trial should be granted.

c. The third *BMW* guidepost assessing the disparity between regulatory penalties and the punitive award confirms the excessiveness of the award.

The third *BMW* guidepost requires a comparison between “the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.” *BMW*, 517 U.S. at 583. The Supreme Court deemed this factor significant because of the expertise and perspective that legislatures and administrative agencies have in setting punishments. *See id.* at 583-84. A large disparity between punitive damages and applicable civil penalties constitutes strong evidence that the punitive award is unconstitutionally excessive. *See State Farm*, 538 U.S. at 428. Here, only two incidents resulted in regulatory violations during the relevant time period. The maximum daily penalty for any such violation is \$10,000. *See* S.C. Code Ann. §44-96-450(A). Because the two incidents could have resulted in a maximum of six violations (statutory, regulatory and permit-based) according to DHEC (*see* Pl. Trial Exs. 41 & 43 (excluded by the Court)), the maximum civil penalty that could have been imposed for the two incidents was \$60,000. The jury returned a verdict of \$1.8 million, which is 30 times the statutory maximum.

The defendant entered into consent orders to resolve both violations and actually paid civil penalties to DHEC of \$9,000 and \$19,200, totaling \$28,200. *Id.* The punitive award is almost 64 times the actual civil penalty paid by the defendant. When compared to the maximum civil penalty and the actual civil penalty imposed by DHEC, it is clear that the \$1.8 million punitive verdict is

“tantamount to a severe criminal penalty” that should not stand given the absence of highly reprehensible conduct. *See BMW*, 517 U.S. at 585.

In the end, the three guideposts point squarely to the conclusion that the \$1.8 million punitive verdict extends well beyond the limits of due process guarantees. Despite the fact that there is no evidence of truly reprehensible conduct that warrants any punitive award, the jury returned a verdict in an amount that is reserved for the worst offenders engaging in extraordinary misconduct. To remedy this miscarriage of justice, the Court should order a new trial.

F. Even if the punitive award is not unconstitutionally excessive, it nonetheless is excessive under South Carolina law.

When the Court considers a motion for new trial based on non-constitutional excessiveness of a jury award, the Court must apply state-law standards. *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275, 280 (4th Cir. 1999); *Atlas*, 99 F.3d at 593. Under South Carolina law, a “new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive.” *Knoke v. S.C. Dep’t of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996); *See Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991).

In addition to the reasons set forth in the above section addressing the constitutionality of the punitive award, the award shocks the conscience because it is 11.4% of the defendant’s entire net worth. The parties stipulated that the defendant’s net worth is \$15.78 million, and that amount was provided to the jury for its punitive deliberations. Trial Tr. 48:3-9, March 30, 2012. The punitive award was \$1.8 million, which is 11.4% of the defendant’s net worth. This greatly exceeds the percentage of net worth that the courts have indicated may be appropriate for punitive damages. It is well-settled that if any punitive verdict is rendered, the appropriate percentage of the defendant’s net worth typically is around one percent. *See Cash v. Beltmann N. Am. Co., Inc.*, 900 F.2d 109,

111 n.3 (7th Cir. 1990) (citing court research on percentage of net worth to punitive awards and concluding that, “[o]ur research reveals that a typical ratio for a punitive damages award to a defendant's net worth may be around one percent.”). See also *E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998) (holding that “a penalty of five percent of the corporate parent's net worth is excessive.”).

It is clear under existing precedent that a punitive award equaling over ten percent of a company's net worth is excessive under any circumstance and a new trial should be granted (or, at a minimum, the verdict should be reduced to one percent of the defendant's net worth).

G. In the alternative to a new trial absolute, the Court should order the plaintiffs to accept either remittitur of the punitive award to one percent of the defendant's net worth or a new trial.

Remittitur, used in connection with FRCP 59(e), is the established method by which a trial judge can review a jury award for excessiveness. Remittitur is a process “by which the trial court orders a new trial unless the plaintiff accepts a reduction in an excessive jury award.” *Atlas*, 99 F.3d at 593. “Indeed, if a court finds that a jury award is excessive, it is the court's duty to require a remittitur or order a new trial.” *Id.*; *Cline*, 144 F.3d at 305. If the Court does not set aside the punitive verdict as a matter of law and does not grant a new trial on the punitive claim, the Court should order remittitur of the punitive award to no greater than one percent of the defendant's net worth, or \$157,800. See *Cash*, 900 F.2d at 109 (concluding that the appropriate ratio for a punitive award as relates to net worth is no greater than 1%). This amount also is in line nearly to the dollar with the defendant's request for remittitur of the compensatory award to \$158,630 as discussed more fully below.

II. THE COURT SHOULD GRANT THE DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO THE COMPENSATORY DAMAGES AWARD.

The jury found the defendant liable for negligence, trespass and nuisance and returned six compensatory awards (one for each plaintiff) totaling \$532,500. For the reasons set forth below, the

defendant respectfully submits that the Court should set aside the compensatory damages award in total as a matter of law.

A. Judgment as a matter of law should be granted on the plaintiffs' negligence claim.

1. The plaintiffs failed to establish the standard of care or a breach thereof in this case through expert testimony.

As discussed in detail above, the plaintiffs failed to establish the standard of care for the operation of landfill gas collection system/odor control or any breach thereof. Therefore, the plaintiffs' negligence claim fails as a matter of law. *See Briggs*, 481 F.3d at 845.

2. The plaintiffs did not prove damages to a reasonable degree of certainty.

It is black-letter law that a plaintiff must prove damages to a reasonable degree of certainty. *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, 2010 WL 1345287, *8 (D.S.C. March 30, 2010) (citing *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794, 796 (1981)). In a series of pleadings, the plaintiffs abandoned their loss-of-use and health-related causes of action, leaving as their sole remaining claim the loss of enjoyment resulting from alleged landfill odors. *See* Def. Trial Ex. 854 & 857. What this means is that the plaintiffs were required to prove by a preponderance of the evidence damages resulting from their alleged loss of enjoyment to a reasonable degree of certainty. The plaintiffs did not. To the contrary, they offered no basis on which a jury could calculate an appropriate measure of damages. They did not offer an appraiser (and, in fact, objected to the defendant's appraisal expert). Nor did they provide any monetary yardstick for the jury to evaluate damages. In fact, not a single one of the plaintiffs ever asked for a specific dollar amount.⁶ Furthermore, none of the plaintiffs has any out-of-pocket expenses associated with alleged odors from the Landfill. *See, e.g.*, Trial Tr. 225:18-226:1, March 21, 2012.

⁶ The Plaintiffs' first and only monetary request for compensatory damages was made at the end of trial (in spite of numerous requests for the plaintiffs' alleged amount of damages during discovery) and did not occur until the plaintiffs' closing argument, which is not evidence in this case.

In essence, the plaintiffs' only evidence of damages is: "odors from the Landfill have caused me annoyance." This "evidence" falls far short of the legal requirement to prove monetary damages by a preponderance of the evidence to a reasonable degree of certainty.

3. The jury disregarded the only evidence of damages in the case, fair rental value, which led to an improper verdict as a matter of law.

The defendant introduced evidence of the rental value of the plaintiffs' properties as a fair measure of damages. *See* Trial Tr. 228:19-229:8, March 28, 2012. *See also* *Hylar v. Wheeler*, 240 S.C. 386, 392, 126 S.E.2d 173, 175 (1962) (rental value is an appropriate measure of damages in a nuisance action). The amount of the rental value was not contested by the plaintiffs. Specifically, the defendant's expert testified that the plaintiffs' monthly rental values were: (1) \$1,300 per month for the Babb property; (2) \$900 per month for the Jackson Property; and (3) \$535 per month for the Elstrom property. Trial Tr. 228:19-229:8, March 28, 2012.

This was the only evidentiary yardstick for damages in the case, and it is manifest from the verdict that the jury disregarded it. For example, in light of the statute of limitations, the maximum number of months at issue in the case is 58 months (June 2007 to March 2012). Fifty-eight months multiplied by, for example, the Jacksons' rental value of \$900 per month equals \$52,200. Despite this, the plaintiffs awarded each of the two Jackson plaintiffs \$100,000 for a total of \$200,000, nearly four times the rental value.

The impropriety of this result also is highlighted by the fact that the compensatory award was greater than the full value of two of the three plaintiffs' properties. The defendant's real property appraisal expert valued the Jacksons' property at \$116,000 and the Elstroms' property at \$55,000. Def. Trial Ex. 679 (excluded from evidence at motion *in limine* hearing). The verdict in favor of the Jacksons was \$200,000, which exceeds their full property value by \$74,000. Similarly, the verdict in favor of the Elstroms was \$155,000, which exceeds their full property value by \$100,000 (nearly double what the property is worth). The defendant respectfully submits that the

jury's disregard for the rental value and exclusion of the full property value led to the inflated and improper verdict as a matter of law.

4. "Invisible" trespass of landfill odors has not been specifically recognized in South Carolina and should not be extended to landfill odors.

Trespass is an intentional and physical invasion onto the land of another. *See Snow v. City of Columbia*, 305 S.C. 544, 552, 409 S.E.2d 797, 801-02 (Ct. App. 1991). In South Carolina, these physical invasions have been limited to physical materials such as water, animals, etc. *Id. See, e.g., See Darney v. Dragon Prod. Co.*, 640 F. Supp. 2d 117, 124-25 (D. Me. 2009) (providing discussion of invisible trespass and certifying novel question of invisible trespass to state supreme court).

The South Carolina Supreme Court has not, however, expanded trespass to intangible landfill odors. To extend the tort of trespass to invisible agents such as landfill odors goes beyond existing South Carolina precedent and invites a flood of litigation by neighboring landowners near this Landfill and any other landfill in South Carolina. In fact, there is a second action pending against the defendant in State Court and an indication that there may be hundreds of additional plaintiffs on the horizon. Allowing landfill odors to be physical invasions that satisfy the elements of a trespass claim invites a slippery slope that the South Carolina Supreme Court has not yet attempted to navigate. *See id.*

5. Judgment as a matter of law should be granted as to the plaintiffs' nuisance claim.

For the reasons described above regarding the plaintiffs' failure to prove damages and failure to prove lack of reasonableness, their nuisance claim also fails.

III. IN THE ALTERNATIVE, THE COURT SHOULD SET ASIDE THE COMPENSATORY AWARD AND GRANT A NEW TRIAL.

A. A new trial should be granted because the verdict was against the clear weight of the evidence.

In connection with a Rule 59(e) motion, this Court can weigh the evidence and evaluate whether the compensatory verdict was against the clear weight of the evidence. *Int'l Safety*, 2011 WL 6826855 at *3. For the reasons set forth above, if this Court chooses not to set aside the compensatory verdict as a matter of law or vacates only some of the claims, the Court should set aside the compensatory verdict and order a new trial based on the weight of the evidence. Rather than rehashing the failures of proof noted above, the defendant simply urges the Court to order a new trial after weighing the plaintiffs' lack of damages evidence, lack of standard-of-care evidence on the negligence claim, lack of physical invasion on the trespass claim, and lack of damages evidence and proof of unreasonableness on the nuisance claim.

B. A new trial should be granted because the verdict will result in a miscarriage of justice.

1. A new trial should be granted because the verdict is excessive.

As discussed above, the compensatory damage award is grossly excessive because (1) it greatly exceeds the fair rental value of the plaintiffs' properties for the relevant time period; and (2) the damages awarded to two of the three sets of plaintiffs were nearly twice the entire value of those plaintiffs' properties.

2. A new trial should be granted based on the admission and exclusion of certain evidence.

The defendant respectfully renews its motions *in limine* and evidentiary arguments made during trial and asserts that evidence admitted or excluded over the defendant's objections prevented a fair trial and result in this matter. Specifically, for the reasons set forth in the defendant's opposition to the plaintiffs' motions *in limine*, in oral argument and in the defendant's offers of proof, the defendant asserts that the following should not have been excluded from evidence, for example: (1) appraisals of the Jackson property indicating there were no environmental issues that would adversely affect property value; (2) evidence of full property value;

(3) the agreement between the Babbs and the Landfill providing the Babbs the ability to sell their property for a period of years; (4) the agreement between the Bishopville Country Club (for which Perrin Babb served as a Board member) and the Landfill; and (5) the public benefit the Landfill provides in South Carolina and the local community.

Additionally, for the reasons set forth in the defendant's motions *in limine* and in oral argument, the defendant asserts that the following should have been excluded from evidence, for example: (1) alleged promises and other representations made by the former owner to local citizens regarding the life of the Landfill, use of the Landfill property after it closed and other similar promises; and (2) odor complaints from non-testifying declarants.

3. The Court should order remittitur of the compensatory damages award.

Because the compensatory award is so large (greater than the full value of two of the properties at issue), the compensatory award likely contained a punitive element. *See King v. McMillan*, 594 F.3d 301, 314 (4th Cir. 2010) (noting that the compensatory award "appeared to have a punitive element" and concluding that the district court properly remitted the award to the correct the error). Remittitur is appropriate to correct this error. In this case, weighing the evidence in the light most favorable to the plaintiffs indicates that remittitur of the compensatory award to \$158,630 is appropriate. The maximum number of months at issue in this case is 58. Assuming that these off-site odors were substantial and unreasonable and reached the plaintiffs' properties each month during those time frames (again, viewing the evidence in the light most favorable to the plaintiffs only for the purpose of remittitur), the damages calculation would be as follows:

	Number of months	Rental Value	Total Damages
Elstroms	58	\$535/month	\$31,030
Jacksons	58	\$900/month	\$52,200
Babbs	58	\$1,300/month	\$75,400
		TOTAL DAMAGES:	\$158,630

The maximum amount of compensatory damages in the case should be \$158,630, and the Court should order a remittitur of the compensatory verdict to that amount. Coincidentally and importantly, this amount is almost exactly one percent of the defendant's net worth (\$157,800) and would be almost exactly a 1:1 punitive to compensatory ratio if the Court ordered remittitur of the punitive award to \$157,800. This amount is a more appropriate verdict.

IV. THE COURT SHOULD ORDER A NEW TRIAL ON ALL CLAIMS BECAUSE THE COMPENSATORY AND PUNITIVE VERDICTS WERE THE RESULT OF PASSION AND PREJUDICE.

The right to a fair trial "comprehends a fair determination free from passion or prejudice." *United States v. Haupt*, 136 F.2d 661, 671 (7th Cir. 1943). A trial is not fair when the jurors were "inflamed by passion [or] warped by prejudice." *Groppi v. Wisconsin*, 400 U.S. 505, 511 n.12 (1971). Courts have long held that, when a jury verdict reflects passion and prejudice rather than a rational evaluation of the evidence, a new trial is the appropriate remedy. *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 603-04 (5th Cir. 1988). An award of damages can be so inflated that it is sufficient, in and of itself, to indicate passion and prejudice. *See id.* at 603. The compensatory and punitive awards in this case are so inflated that they indicate the jury was fueled by passion and prejudice.

The compensatory award, as noted above, exceeds the full value of two of the plaintiffs' properties. It also is more than four times the full rental value of all the plaintiffs' properties during the relevant time period. Similarly, the punitive verdict is over three times the amount of the (already inflated) compensatory award and 11.4% of the defendant's net worth. That, in and of itself, indicates that the verdicts were fueled by passion and prejudice. *Id.*

Moreover, the sources of the passion and prejudice that resulted in the inexplicable finding of punitive liability and the shocking amounts of compensatory and punitive damages are not difficult to discern. First, the plaintiffs argued to the jury that landfill gas collection well

exceedences that are allowed by the regulations governing landfill gas collection systems were tantamount to regulatory violations. This is entirely untrue. Gas well exceedences are allowed by regulation as long as they are repaired within the time period specified in the regulations. *See* 40 C.F.R. § 60.753(g) (“If corrective actions are taken as specified in § 60.755, the monitored exceedence is not a violation of the operational requirements in this section.”). If the exceedences are not repaired within the specified time period, only then do the exceedences become regulatory violations. *Id.* It is undisputed in this case that while the Landfill has had numerous exceedences, all such exceedences have been timely repaired in accordance with the regulations and have never resulted in any regulatory violation. Trial Tr. 113:7-13, March 21, 2012. The plaintiffs, however, argued to the jury that the exceedences essentially were violations and that there were hundreds of them. Trial Tr. 191:16-192:11, March 29, 2012 (“These exceed what the federal regulations say. And it happens not occasionally, but every month after month, 80, 90, 100 exceedences of the federal regulations.”). This point in closing argument was in direct contradiction of the federal regulations and plaintiffs’ own expert who testified that exceedences were not violations of law and the defendant had never violated these regulations. Trial Tr. 113:7-13, March 21, 2012 (“Q: Isn’t it fair to say that even if you have these exceedences you’re still in compliance with the NSPS rules? . . . TOWNSEND: Correct.”) This argument was prejudicial in that jurors likely were confused about whether there were hundreds of violations, which could be evidence of recklessness (if causally connected to the alleged injury), versus hundreds of exceedences, which is not evidence of recklessness.

Second, the plaintiffs argued that the punitive damages should be the value of a temporary plastic landfill cover in the amount of \$6 million. Trial Tr. 57:8-20, March 30, 2012. There was no credible evidence as to the viability of a temporary cover or the actual cost of a temporary cover other than general speculation. In fact, the plaintiffs’ expert testified that this type of cap was just

out of the experimental stage (Trial Tr. 144:10 – 145:4, March 21, 2012) and the defendant's landfill expert testified that in the hundreds of landfills he has visited, he had never seen any temporary cap at any landfill and the idea was purely experimental (Trial Tr. 199:10-15, 20-24, March 26, 2012). It was improper for the jury to base its punitive award, even in part, on this measure of speculation.

Third, the plaintiffs artificially inflated the alleged wealth of the defendant by arguing gross revenue based on the total tonnage received by the Landfill in 2008 (approximately 1.5 million tons) times a general charge of \$24/per ton. Trial Tr. 57:21-58:7, March 30, 2012. This general calculation of gross revenue equals \$36 million (over twice the defendant's net worth), yet it has no basis in fact for punitive damages purposes because (1) it does not account for the Landfill's expenses which, if subtracted from the gross revenue, would provide a much smaller and more representative net revenue number; (2) the \$24 per ton figure was based on a single e-mail providing a general figure for a specialized type of waste; and (3) the \$24 per ton figure cannot be applied to all 1.5 million tons as the Landfill has many customers and many contracts that provide varying per ton charges.

Fourth, the verdict form allowed the jury to return individual punitive damage awards to each plaintiff. Punitive awards are imposed to punish the alleged wrongdoer rather than to compensate the alleged victim. The verdict form should simply have had a single line for the jury to indicate a single punitive award, which the Court would have divided among the Plaintiffs. Allowing the jury to consider six separate punitive awards resulted in unnecessary prejudice and confusion and an award potentially six times what a single award may have been (assuming that any award was warranted at all). In fact, a single award of \$300,000 rather than six awards of \$300,000 (one for each plaintiff), though still excessive and unwarranted, would have been more in line with the due process guarantees discussed above.

Additionally, the Court ruled *in limine* that the terms “noxious” or “harmful” could not be spoken in this matter. Despite this ruling and warnings from the Court, the plaintiffs on two separate occasions used the term in the presence of the jury. Trial Tr. 12:19-20, March 23, 2012; Trial Tr. 163:2-6, March 26, 2012. In addition, the plaintiffs repeatedly mischaracterized the evidence and asked questions that assumed facts not in evidence in an effort to confuse and prejudice the jury. For example, in their case-in-chief, the plaintiffs asked Steve Lamb a series of questions regarding DHEC with no evidentiary basis that were for no purpose other than to prejudice the jury into thinking that DHEC was not doing its job. *See, e.g.*, Trial Tr. 155:6-24, March 26, 2012. Moreover, the plaintiffs’ counsel called the undersigned’s actions “deceitful” in the presence of the jury on the very first day of trial. Trial Tr. 166:22-23, March 19, 2012. This statement was highly inappropriate, uncalled for, unwarranted and prejudicial. Attempted curative instructions do not, in fact, cure the seriousness of these statements, particularly the latter. This conduct falls far short of the conduct required and expected of lawyers as officers of the Court. Moreover, in conjunction with the other improper references by plaintiffs’ counsel discussed above, it manifestly prejudiced the outcome.

Finally, the plaintiffs repeatedly introduced hearsay and irrelevant evidence of promises allegedly made and allegedly broken by prior owners of the Landfill regarding the life of the Landfill and use of the Landfill after it closes. *See, e.g.*, Trial Tr. 15:7-24:16, March 23, 2012. The plaintiffs’ repeated introduction of this hearsay and irrelevant evidence was a bald-face attempt by the plaintiffs to confuse the jury into thinking that this defendant (as opposed to prior owners with no relation to this defendant) had broken promises to the community and/or that the plaintiffs were harmed by unfulfilled promises. The Court gave repeated curative instructions (*see id.*) that, in themselves, lead to juror confusion given the number of instructions on this point.

Because the jury was exposed to these details that were improperly before it, “[t]he inescapable conclusion is that rational thought was vacated by the jury, and replaced with their own passion and prejudices to fill the vacuum.” *Anderson v. Conwood Co.*, 34 F. Supp. 2d 650, 656 (W.D. Tenn. 1999). “[W]hen a jury verdict results from passion or prejudice, a new trial, not remittitur, is the proper remedy.” *Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683 (5th Cir. 1998). The plaintiffs will argue that this case has broad ramifications on the pending and related State Court matter, on the hundreds of other supposed cases regarding this Landfill that the plaintiffs’ counsel has indicated after the trial are imminent, and on possible similar cases at other Landfills in South Carolina. This case should have been decided on the evidence rather than on passion and prejudice. In light of the clear impact of prejudice on the verdict in this case, the defendant should be granted a new trial on all claims.

CONCLUSION

For the reasons set forth herein, the defendant respectfully requests that the Court set aside the punitive and compensatory verdicts as a matter of law under Rule 50(b). In the alternative, the defendant requests that the Court grant a new trial on all claims under Rule 59(e). In the further alternative, the defendant requests that the Court order remittitur of the compensatory verdict to \$158,630 and the punitive verdict to \$158,630 (an appropriate 1:1 ratio between compensation and punitive damages and approximately one percent of the defendant’s net worth, both amounts of which are in line with existing precedent).

Respectfully submitted this 27th day of April, 2012.

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EXHIBIT A

(Unpublished and Out-of-Region Cases Cited)

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

2012 WL 1194438

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of South Carolina.

Marilee B. FAIRCHILD and Larry J. Fairchild,
Plaintiffs,

Of whom Marilee B. Fairchild is Respondent,
v.

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION, William Leslie Palmer and
Palmer Construction Co., Inc., Defendants,
Of whom William Leslie Palmer and Palmer
Construction Co., Inc., are Petitioners.

No. 27112. | Heard Nov. 15, 2011. | Decided April 11,
2012.

Synopsis

Background: Injured motorist filed suit against Department of Transportation (DOT) and other driver for injuries sustained in automobile accident when other driver collided with her vehicle. DOT was subsequently dismissed. The Circuit Court, Colleton County, Perry M. Buckner, J., denied driver's motion for independent medical evaluation (IME) by his physician, directed verdict in favor of driver on affirmative defense of comparative negligence, and, entered judgment on jury verdict in favor of motorist for \$720,000. Both parties appealed. The Court of Appeals, 385 S.C. 344, 683 S.E.2d 818, affirmed in part, reversed in part, and remanded. Certiorari review was granted.

Holdings: The Supreme Court, Beatty, J., held that:

[1] whether driver's alleged violation of traffic statutes amounted to recklessness, as basis for award of punitive damages, was question for jury;

[2] evidence warranted instructions that intervening negligence by third party would not excuse wrongdoer's conduct if such intervention was foreseeable, and that negligence of treating physician is reasonably foreseeable such that aggravation of motorist's injury would be viewed as immediate and direct damages flowing from original injury; and

[3] denial of driver's motion for independent medical

examination of motorist by psychiatrist of driver's choice was not abuse of discretion.

Affirmed.

West Headnotes (26)

[1] Automobiles

Willful, Wanton, or Reckless Acts

Automobiles

Punitive or Exemplary Damages; Double or Treble Damages

48AAutomobiles

48AVInjuries from Operation, or Use of Highway

48AV(B)Actions

48Ak245Questions for Jury

48Ak245(2)Care Required and Negligence

48Ak245(5)Willful, Wanton, or Reckless Acts

48AAutomobiles

48AVInjuries from Operation, or Use of Highway

48AV(B)Actions

48Ak249Damages

48Ak249.2Punitive or Exemplary Damages; Double or Treble Damages

Whether driver's alleged violation of traffic statutes prohibiting driving at unsafe speed and following too closely amounted to recklessness, as basis for award of punitive damages, was question for jury, in motorist's action against driver. Code 1976, §§ 56-5-1520(A), 56-5-1930(a), 15-33-135.

[2] Appeal and Error

Effect of Evidence and Inferences Therefrom on Direction of Verdict

30Appeal and Error

30XVIReview

30XVI(G)Presumptions

30k927Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict

30k927(7)Effect of Evidence and Inferences Therefrom on Direction of Verdict

In reviewing a ruling on a motion for a directed

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

verdict, the appellate court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion.

[3] Trial

⚡Inferences from Evidence

388Trial
388VITaking Case or Question from Jury
388VI(A)Questions of Law or of Fact in General
388k142Inferences from Evidence

A case should be submitted to the jury when the evidence is susceptible of more than one reasonable inference.

[4] Trial

⚡Hearing and Determination

388Trial
388VITaking Case or Question from Jury
388VI(D)Direction of Verdict
388k178Hearing and Determination

It is not the duty of the trial court to weigh the testimony in ruling on a motion for a directed verdict.

[5] Damages

⚡Grounds for Exemplary Damages

115Damages
115VExemplary Damages
115k91.5Grounds for Exemplary Damages
115k91.5(1)In General

Punitive damages are recoverable where there is evidence the defendant's conduct was reckless, willful, or wanton.

[6] Negligence

⚡Reckless Conduct

Negligence

⚡Willful or Wanton Conduct

272Negligence
272VHeightened Degrees of Negligence
272k274Reckless Conduct
272Negligence
272VHeightened Degrees of Negligence
272k275Willful or Wanton Conduct

"Recklessness" is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence.

[7] Damages

⚡Sufficiency of Pleading and Proof

Negligence

⚡Reckless Conduct

Negligence

⚡Willful or Wanton Conduct

115Damages
115XProceedings for Assessment
115k209Instructions
115k215Exemplary Damages
115k215(2)Sufficiency of Pleading and Proof
272Negligence
272VHeightened Degrees of Negligence
272k274Reckless Conduct
272Negligence
272VHeightened Degrees of Negligence
272k275Willful or Wanton Conduct

The terms "willful" and "wanton" when pled in a negligence action are synonymous with "reckless" and import a greater degree of culpability than mere negligence, and evidence that the defendant's conduct breached this higher standard entitles the plaintiff to a charge on punitive damages. Code 1976, § 15-33-135.

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

[8] Damages**⚡Grounds for Exemplary Damages**

115Damages
 115VExemplary Damages
 115k91.5Grounds for Exemplary Damages
 115k91.5(1)In General

Ordinarily, the test for punitive damages is whether the tort has been committed in such a manner or under circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the plaintiff's rights, or it may be satisfied by evidence of the causative violation of an applicable statute. Code 1976, § 15-33-135.

[9] Damages**⚡Exemplary Damages**

115Damages
 115XProceedings for Assessment
 115k208Questions for Jury
 115k208(8)Exemplary Damages

Before punitive damages arising out of a statutory violation may be submitted to the jury, there must be evidence the violation proximately contributed to the injury. Code 1976, § 15-33-135.

[10] Damages**⚡Exemplary Damages**

115Damages
 115XProceedings for Assessment
 115k208Questions for Jury
 115k208(8)Exemplary Damages

Ordinarily, whether or not a statutory violation contributed as a proximate cause to the injury, for purposes of awarding punitive damages, is a question for the jury.

[11] Damages**⚡Exemplary Damages**

115Damages
 115XProceedings for Assessment
 115k208Questions for Jury
 115k208(8)Exemplary Damages

There must be some inference of a causal link between a statutory violation and the injury to warrant submitting the issue of punitive damages to the jury based on the violation. Code 1976, § 15-33-135.

[12] Damages**⚡Exemplary Damages**

115Damages
 115XProceedings for Assessment
 115k208Questions for Jury
 115k208(8)Exemplary Damages

Even where the trial court has submitted the issue of punitive damages arising out of statutory violations to a jury, the defendant still has an opportunity to challenge the propriety of any resulting punitive damages award. Code 1976, § 15-33-135.

[13] New Trial**⚡Remission or Reduction of Excess of Recovery**

275New Trial
 275IIIProceedings to Procure New Trial
 275k162Remission or Reduction of Excess of Recovery
 275k162(1)In General

The trial court has the authority to review the punitive damages award and if the court finds the award is inappropriate or excessive, it has the discretion to order a new trial or remittitur.

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d ---- (2012)

Code 1976, § 15-33-135.

[14] Damages

☞ Sufficiency of Pleading and Proof

115 Damages
115X Proceedings for Assessment
115k209 Instructions
115k215 Exemplary Damages
115k215(2) Sufficiency of Pleading and Proof

Evidence warranted instructions that intervening negligence by third party would not excuse wrongdoer's conduct if such intervention was foreseeable, and that negligence of treating physician is reasonably foreseeable, such that aggravation of plaintiff's injury would be viewed as immediate and direct damages flowing from original injury, in injured motorist's action against driver, by evidence of side effects of drugs prescribed for motorist during treatment for injuries and testimony by nurses and doctors regarding course of treatment, which driver elicited to imply that overmedication, and not his negligence was cause of motorist's injuries.

[15] Trial

☞ Presentation and Allowance in General

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k263 Presentation and Allowance in General

Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence.

[16] Appeal and Error

☞ Failure or Refusal to Charge

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1067 Failure or Refusal to Charge

Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.

[17] Appeal and Error

☞ Failure or Refusal to Charge

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1067 Failure or Refusal to Charge

When general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

[18] Trial

☞ Matters of Law in General

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k213 Matters of Law in General

It is the court's duty to instruct the jury on the law, and the jury ought not to be left to cut a way through the woods with no compass to guide it.

[19] Appeal and Error

☞ Failure or Refusal to Charge

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

30Appeal and Error
 30XVIReview
 30XVI(J)Harmless Error
 30XVI(J)18Instructions
 30k1067Failure or Refusal to Charge

To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial.

applies the same rules of construction used to interpret statutes: if a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.

[20] Damages
 ⚡Persons Making Examination

115Damages
 115XProceedings for Assessment
 115k206Physical or Mental Examination of Person Injured
 115k206(6)Persons Making Examination

Denial of defendant driver's motion for independent medical examination of injured motorist by psychiatrist of driver's choice was not abuse of discretion, in motorist's action against driver; rule governing such motion did not accord driver right to select examiner, driver had already retained psychiatrist as expert, psychiatrist had already reviewed motorist's medical records and deposition testimony of potential witnesses, and psychiatrist had allegedly already formed adverse opinions regarding motorist's injuries before evaluation was requested. Rule 35 of the South Carolina Rules of Civil Procedure.

[21] Courts
 ⚡Construction and Application of Particular Rules

106Courts
 106IIEstablishment, Organization, and Procedure
 106II(F)Rules of Court and Conduct of Business
 106k85Operation and Effect of Rules
 106k85(3)Construction and Application of Particular Rules

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court

[22] Appeal and Error
 ⚡Depositions, Affidavits, or Discovery

30Appeal and Error
 30XVIReview
 30XVI(H)Discretion of Lower Court
 30k961Depositions, Affidavits, or Discovery

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion.

[23] Appeal and Error
 ⚡Abuse of Discretion

30Appeal and Error
 30XVIReview
 30XVI(H)Discretion of Lower Court
 30k944Power to Review
 30k946Abuse of Discretion

An "abuse of discretion" occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions.

[24] Damages
 ⚡Persons Making Examination

115Damages
 115XProceedings for Assessment
 115k206Physical or Mental Examination of Person Injured
 115k206(6)Persons Making Examination

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

A "reasonable objection" to the appointment of an examiner, in the context of a motion for an independent medical examination, simply means the reason for the objection must not be frivolous; what is reasonable will depend on the individual facts and circumstances of the case, which is precisely why the determination of this matter, as in other discovery and evidentiary disputes, is best left to the sound discretion of the trial court. Rule 35(a), SCRPC.

[25] Damages

☞Physical or Mental Examination of Person Injured

115Damages
115XProceedings for Assessment
115k206Physical or Mental Examination of Person Injured
115k206(.5)In General

The purpose of the rule governing a motion for an independent medical examination is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. Rule 35 of the South Carolina Rules of Civil Procedure.

[26] Damages

☞Persons Making Examination

115Damages
115XProceedings for Assessment
115k206Physical or Mental Examination of Person Injured
115k206(6)Persons Making Examination

The better rule is that the evaluating physician should not be affiliated with either party, in order to serve the purposes of the rule governing a motion for an independent medical evaluation. Rule 35 of the South Carolina Rules of Civil Procedure.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS.

Appeal from Colleton County; Perry M. Buckner, Circuit Court Judge.

Attorneys and Law Firms

Kirby D. Shealy, III and Bradley L. Lanford, both of Baker, Ravenel & Bender, of Columbia, for Petitioners.

Bert G. Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Walterboro; and George D. Jebaily and Suzanne H. Jebaily, both of Jebaily Law Firm, of Florence, for Respondent.

Opinion

Justice BEATTY.

*1 This Court granted a petition for a writ of certiorari to review the decision in *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct.App.2009). The Court of Appeals affirmed in part, reversed in part, and remanded for a new trial a negligence action arising from a motor vehicle accident. In relevant part, the Court of Appeals determined (1) Marilee Fairchild's claim for punitive damages should have been submitted to the jury, (2) the trial court should have charged the jury on the intervening negligence of a treating physician, and (3) the trial court did not abuse its discretion in denying William Leslie Palmer's motion under Rule 35, SCRPC for an independent medical examination (IME) to be performed by Dr. James Ballenger. We affirm.

I. FACTS

This action arises out of a motor vehicle accident that occurred on March 1, 2001 while several vehicles were traveling south on Interstate 95 in South Carolina.

Just before the accident, James Rabb, an employee with the South Carolina Department of Transportation (SCDOT), was driving a dump truck with an attached trailer transporting a backhoe. Rabb was traveling in the left lane of the southbound traffic (closest to the median)

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

when he pulled in to a paved "cross-over" in the median so he could turn around and enter the northbound lanes of I-95. While Rabb was stopped waiting for the northbound traffic to clear, the back of his trailer allegedly protruded into the left traffic lane on the southbound side.

Several cars traveling south in the left lane directly behind Rabb saw Rabb's trailer and simultaneously switched to the right lane. When those cars moved over, Marilee Fairchild, who was behind them driving a minivan, saw Rabb's trailer partially blocking the left lane where she was traveling. Fairchild "flashed" her brakes and then continued to brake while staying ahead of the vehicle behind her. Fairchild managed to avoid Rabb's trailer, but she was struck by a truck traveling behind her that was driven by William Leslie Palmer.

Palmer, whose truck also had an attached trailer (which contained a motorcycle), hit his brakes and swerved to the right when he came upon Fairchild. However, Palmer struck Fairchild's minivan, and the force of the impact with Palmer's large vehicle caused Fairchild's minivan to flip over and roll before landing in the median. Rabb's truck was not hit in the accident.

On February 26, 2003, Fairchild¹ brought this negligence action against SCDOT, Palmer, and Palmer Construction Co., alleging she sustained physical injuries and property damage in the accident. She sought both actual and punitive damages. Fairchild thereafter entered into a covenant not to sue with SCDOT, and SCDOT was dismissed as a party.

At trial, the jury returned a verdict in favor of Fairchild for \$720,000. Both parties appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. We thereafter granted Palmer's² petition for a writ of certiorari.

II. LAW/ANALYSIS

A. Punitive Damages

*2 Palmer first argues the Court of Appeals erred in holding the trial court should have submitted Fairchild's claim of punitive damages to the jury based on its determination that the evidence and its reasonable inferences created a factual question as to whether he had acted recklessly.

The trial court granted Palmer's motion for a directed verdict on Fairchild's claim for punitive damages on the basis there was *no* evidence of reckless conduct by

Palmer. However, the trial court did conclude that two statutes governing traffic safety were implicated in this case and charged the jury on the same. The first, section 56-5-1520(A), provides general rules as to maximum and safe speeds and states when lower speeds may be required:

A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Speed must be so controlled to avoid colliding with a person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of a person to use care.

S.C.Code Ann. § 56-5-1520(A) (2006).

In addition, the trial court charged the jury on section 56-5-1930(a), which prohibits following too closely:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

Id. § 56-5-1930(a).

The Court of Appeals found the grant of a directed verdict on the claim for punitive damages was error as the evidence and its reasonable inferences created a factual question as to whether Palmer had acted recklessly. *Fairchild*, 385 S.C. at 353, 683 S.E.2d at 823. The court agreed with Fairchild that, based on Palmer's conduct, which included driving a large commercial truck³ into heavy traffic just before the accident without any reduction in his rate of speed, and his alleged statutory violations, the jury should have been permitted to consider whether Palmer acted recklessly. *Id.*

Citing long-standing South Carolina precedent, the Court of Appeals held the violation of a statute constitutes negligence per se, and negligence per se is some evidence of recklessness and willfulness that requires submission of the issue of punitive damages to the jury. *Id.* at 354, 683 S.E.2d at 823. The Court of Appeals cited this Court's decision in *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993) as well as additional authorities to this effect:

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

Wise v. Broadway, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (“The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury.”); *Rhodes v. Lawrence*, 279 S.C. 96, 97–98, 302 S.E.2d 343, 344 (1983) (“In these circumstances, a jury question as to punitive damages was clearly presented given the well settled rule that a showing of statutory violation can be evidence of recklessness and willfulness.”); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct.App.2004) (“A factual question as to punitive damages is presented when there is evidence of a statutory violation.”).

*3 *Id.* The Court of Appeals noted “[t]hese cases limit their holdings to creating a jury question only and not recklessness per se.” *Id.* The court referenced the express limitation pronounced by this Court in *Wise*:

Violation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly. It is always for the jury to determine whether a party has been reckless, willful, and wanton. However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation.

Id. at 354, 433 S.E.2d 857, 683 S.E.2d at 823–24 (quoting *Wise*, 315 S.C. at 276–77, 433 S.E.2d at 859 (internal citations omitted)).

The Court of Appeals concluded that there was evidence Palmer was negligent per se in causing the accident, which consisted of following another vehicle too closely and speeding; consequently, a jury could have found Palmer violated sections 56–5–1930(a) and 56–5–1520(A), and the finding of a statutory violation may be considered by the jury as evidence of recklessness. *Id.* at 357, 683 S.E.2d 818, 683 S.E.2d at 825. As a result, the court reversed the grant of a directed verdict on punitive damages and remanded for a new trial. *Id.*

[1] On appeal to this Court, Palmer asserts this was error, and that “evidence of a statutory violation alone, without more, is generally insufficient to send the issue of punitive damages to the jury.” He contends the two statutes at issue codify the common law standards for safe speeds and following distances, and they do not establish bright-line standards; therefore, they should not form the

basis for an award of punitive damages without other supporting evidence.

[2] [3] [4] In reviewing a ruling on a motion for a directed verdict, this Court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion. *Weir v. Citicorp Nat’l Servs., Inc.*, 312 S.C. 511, 435 S.E.2d 864 (1993). A case should be submitted to the jury when the evidence is susceptible of more than one reasonable inference. *Unlimited Servs., Inc. v. Macklen Enters., Inc.*, 303 S.C. 384, 401 S.E.2d 153 (1991). It is not the duty of the trial court to weigh the testimony in ruling on a motion for a directed verdict. *Young v. Bost.* 241 S.C. 289, 128 S.E.2d 118 (1962).

[5] [6] [7] Punitive damages are recoverable where there is evidence the defendant’s conduct was reckless, willful, or wanton. *Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388 (1986). Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The terms “willful” and “wanton” when pled in a negligence action are synonymous with “reckless” and import a greater degree of culpability than mere negligence. *Id.* at 288, 709 S.E.2d at 612. “Evidence that the defendant’s conduct breached this higher standard entitles the plaintiff to a charge on punitive damages.” *Id.* (quoting *Marcum v. Bowden*, 372 S.C. 452, 458 n. 5, 643 S.E.2d 85, 88 n. 5 (2007)); *see also* S.C.Code Ann. § 15–33–135 (2005) (“In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.”).

*4 [8] [9] [10] “Ordinarily, the test is whether the tort has been committed in such a manner or under circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the plaintiff’s rights.” *Cartee*, 290 S.C. at 337, 350 S.E.2d at 390. “The test may also be satisfied by evidence of the causative violation of an applicable statute.” *Id.* “However, before punitive damages may be submitted to the jury, there must be evidence the statutory violation proximately contributed to the injury.” *Id.* “Ordinarily, whether or not the statutory violation contributed as a proximate cause to the injury is a question for the jury.” *Id.*

[11] “There must be some inference of a causal link between the statutory violation and the injury to warrant submitting the issue of punitive damages to the jury.” *Id.* at 337–38, 350 S.E.2d at 390. For example, in *Cartee* the Court noted that if, in a case by beneficiaries against trustees for mismanaging assets, the trustees had been

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

guilty of driving without their driver's licenses, they would have been guilty of violating a statute; however, that violation could have nothing to do with the injuries claimed by beneficiaries and would not justify a charge on punitive damages because "[s]ome inference of causation must be shown." *Id.* at 338 n. 3, 350 S.E.2d at 390 n. 3; see also *Austin v. Specialty Trans. Servs., Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004) (stating the causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring submission of the issue of punitive damages to the jury).

In *Copeland v. Nabors*, 285 S.C. 340, 329 S.E.2d 457 (Ct.App.1985), the Court of Appeals found the record contained evidence from which the jury could have inferred that Nabors violated one or more statutes relating to maximum speed limits and to overtaking and passing vehicles proceeding in the same direction and that Nabors thereby engaged in conduct warranting an award of punitive damages. Likewise, in *Field v. Gregory*, 230 S.C. 39, 94 S.E.2d 15 (1956), this Court found evidence of the violation of at least three applicable traffic statutes, which resulted in a traffic collision, warranted the submission of punitive damages to the jury. We stated, "The violation of an applicable statute is negligence per se, and whether or not such breach contributed as a proximate cause to [the] plaintiff's injury is ordinarily a question for the jury." *Id.* at 44, 94 S.E.2d at 18 (citation omitted). We observed that "[c]ausative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness." *Id.* at 46, 94 S.E.2d at 19 (citing *Morrow v. Evans*, 223 S.C. 288, 295, 75 S.E.2d 598, 601 (1953)); accord *Padgett v. Colonial Wholesale Dist. Co.*, 232 S.C. 593, 103 S.E.2d 265 (1958); *Vernon v. Atlantic Coast Line R. Co.*, 221 S.C. 376, 70 S.E.2d 862 (1952); *Ralls v. Saleeby*, 178 S.C. 431, 182 S.E. 750 (1935); *Lumpkin v. Mankin*, 136 S.C. 506, 134 S.E. 503 (1926).

*5 In *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978), this Court held that testimony that a witness saw two vehicles traveling north on Highway 52, that Bernard's vehicle was trailing the vehicle driven by Daniels and gaining on Daniels's vehicle, and that the Bernard automobile rammed into the rear of Daniels's vehicle was evidence from which the jury could have reasonably inferred that Bernard was following too closely and was failing to maintain a proper lookout. *Id.* at 55, 240 S.E.2d at 519-20. The Court noted following too closely was a violation of section 56-5-1930 and "the violation of a statute is negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Id.* at 55, 240 S.E.2d at 520 (citing *Jarvis v. Green*, 257 S.C. 558,

186 S.E.2d 765 (1972) and *Still v. Blake*, 255 S.C. 95, 177 S.E.2d 469 (1970)). The *Daniels* Court concluded the trial court erred in holding there was no evidence of recklessness to sustain an award for punitive damages. *Id.* at 56, 240 S.E.2d at 520.

Similarly, in the current appeal, we find the trial court erred in granting a directed verdict on the issue of punitive damages. It is not the duty of a trial court to weigh the evidence. Viewing the evidence and its reasonable inferences in the light most favorable to Fairchild, as both the trial court and this Court are required to do, we hold there is evidence to create a jury question as to whether or not Palmer acted with recklessness, thus requiring submission of the issue of punitive damages to the jury.

Palmer was driving a commercial-sized truck, towing a 28-foot trailer, and hauling a motorcycle, and his combined weight exceeded eight and one-half tons. Palmer knew he was approaching an area of merging traffic and possible congestion on I-95 near several rest areas, and he acknowledged that it was an area "where a lot of accidents happen." Palmer further described the traffic around his truck prior to the collision as "typical crazy interstate 95 traffic, you know, everybody running together." He also was aware of the potential that traffic could slow down to a crawl due to a wreck or other conditions, and he knew of the need to maintain a safe stopping distance for such a large vehicle.

Palmer acknowledged that he maintained a "pretty steady speed" of 65 to 70 miles per hour to avoid "giving distance" that would let other vehicles cross into his lane ahead of him. He also stated he was "maybe a hundred feet or more" behind Fairchild when she first applied her brakes. Palmer maintained he did not even notice Fairchild until right before the impact.

We further agree with the Court of Appeals that there is evidence that Palmer might have violated section 56-5-1520(A) (circumstances requiring a reduction in speed) and section 56-5-1930(a) (following too closely), and there is an inference that the violations of these statutes were the proximate cause of the accident. Therefore, Fairchild's claim for punitive damages should have been submitted to the jury.

*6 [12] [13] Moreover, even where the trial court has submitted the issue of punitive damages to a jury, the defendant still has an opportunity to challenge the propriety of any resulting punitive damages award. The trial court has the authority to review the punitive damages award and if the court finds the award is inappropriate or excessive, it has the discretion to order a

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

new trial or remittitur. *See generally Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (stating a reviewing court should consider the following set of factors in conducting a post-judgment review of an award of punitive damages: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases).

B. Intervening Negligence of Third Party

[14] Palmer next contends the Court of Appeals erred in determining the trial court should have charged the jury on the intervening negligence of a third party.

Fairchild submitted three proposed instructions (Plaintiff's Requests to Charge # 11, # 12, & # 13) regarding intervening negligence, which included several variations on the following principles:

The intervening negligence of a third party will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care.

It is the law in South Carolina that the negligence of a treating doctor is reasonably foreseeable. It is the general rule that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the doctor as part of the immediate and direct damages which naturally flow from the original injury.

The trial court declined to give the requested instructions on the basis there was no evidence of negligent treatment by an attending physician.

The Court of Appeals held this was error, noting that during the trial Palmer had stressed the side effects of the drugs prescribed for Fairchild during treatment for her injuries and had suggested that she was overmedicated. *Fairchild*, 385 S.C. at 352, 683 S.E.2d at 822. Palmer had implied that the overmedication, rather than his own negligence, was the source of many of Fairchild's ailments. *Id.* The Court of Appeals additionally noted that, to support this theory, "Palmer called and questioned several doctors and nurses to discuss Fairchild's course of treatment." *Id.* The Court of Appeals found that "[t]he following statement by [Palmer's] counsel made during closing arguments, in particular, was convincing that the charges were relevant: 'So ask yourself, is it the chronic

post-traumatic headache that is the disabling headache, or is it the medication over-use that is the disabling headache?" " *Id.* at 352, 683 S.E.2d at 822-23. The court concluded it was error to refuse to give the requested instruction and further found that, "given the jury's verdict and the amount of damages at issue," the ruling could have impacted the jury's verdict, resulting in prejudice. *Id.* at 352, 683 S.E.2d at 823.

*7 Palmer acknowledges that the proposed charges correctly state the current law in South Carolina,⁴ but maintains there were no references made at trial to a negligent act or omission by a treating physician. Palmer also states that he did not seek a charge on whether the intervening negligence of a third party severed the causal connection between Palmer's negligence and Fairchild's injury, and this is an affirmative defense, citing *Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct.App.1994) (holding the defense of a third-party's intervening acts of negligence does not break the causal chain if the acts are foreseeable).

[15] [16] [17] "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct.App.2000). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." *Id.* "Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Id.*

[18] It is the court's duty to instruct the jury on the law, and "[t]he jury ought not to be left to cut a way through the woods with no compass to guide it." *Collins-Plass Thayer Co. v. Hewlett*, 109 S.C. 245, 253-54, 95 S.E. 510, 513 (1918), cited in *Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 259, 136 S.E.2d 297, 298 (1964).

[19] To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial.⁵ *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008); *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005); *Jones v. Ridgely Commc'ns, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991); *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (Ct.App.2003); *Merritt v. Grant*, 285 S.C. 150, 328 S.E.2d 346 (Ct.App.1985).

We find the charge requested by Fairchild was necessary to allow the jury to properly evaluate proximate cause and resulting damages, and its omission resulted in prejudice to Fairchild. There was an abundance of testimony elicited by Palmer on the allegation that overmedication

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

by Fairchild's physicians was a possible cause of many of Fairchild's ailments. Palmer's message throughout the trial was that he should not be held responsible for any resulting symptoms in Fairchild that might have been caused by or exacerbated by overmedication or the treatment of Fairchild's physicians.

For example, Palmer called Dr. James Ballenger, a psychiatrist, as an expert witness for the defense. Dr. Ballenger testified "that the most likely reason [Fairchild's] headaches got so much worse from '02 to at least '05 or maybe into '06, was that ... *a decision was made* to go into big-time medications. Oxycontin was the first one." (Emphasis added.) He opined that Fairchild's difficulties were likely linked to "rebound headache syndrome ... meaning you have the headache; you take very strong medicines; it goes away, it comes out of your system, and you get a headache ultimately caused by taking the medicine." Although Palmer also states there was testimony that the overmedication could also be based on Fairchild's own conduct, the implication here clearly was that a treating physician made the decision "to go into big-time medications" and that this was not the best course of treatment. Palmer also called Dr. Robert Richey, an internist who had treated Fairchild. Dr. Richey asserted Fairchild "was on a cornucopia of medicine," and he expressed reservations about several drugs, including Sulfasalazine and Indocin, prescribed by Fairchild's other physicians and he detailed the potential side effects from these drugs.

*8 Further, in cross-examining Fairchild's witnesses, Palmer repeatedly questioned the type of medical treatment she had received and whether she had suffered adverse effects, such as increased pain and medical "intoxication," from the prescribed treatment. The clear purpose of Palmer's repeated line of questioning in this regard was to reduce the assessment of damages by distinguishing any harm he believed was caused by Fairchild's medical treatment and alleged overmedication from any harm he allegedly caused in the motor vehicle collision.

Under these particular circumstances, where Fairchild's treatment and medical condition were the focus of so much of the testimony, the charge should have been given to avoid confusion for the jury and to aid it in properly evaluating proximate cause and damages. We agree with the Court of Appeals that the failure to give the requested charge was error warranting reversal. *See, e.g., Eaddy*, 244 S.C. at 259, 136 S.E.2d at 298 (concluding where the request to charge was of a controlling principle of law and was timely made, the refusal of the charge was error requiring reversal and a new trial).

C. Palmer's Motion for an IME by Dr. James Ballenger

[20] Palmer next contends the Court of Appeals erred in holding the trial court did not abuse its discretion in denying his motion for an IME to be performed by Dr. James C. Ballenger.

Palmer filed a pretrial motion, pursuant to Rule 35 of the South Carolina Rules of Civil Procedure, for an IME to be performed on Fairchild by Dr. Ballenger. Dr. Ballenger is a psychiatrist who had been retained by Palmer as an expert witness regarding Fairchild's alleged injuries.

Fairchild did not oppose an IME, but objected to Dr. Ballenger being designated the examining physician because he had a pre-existing relationship with Palmer. Specifically, Fairchild asserted the following: (1) some four months earlier, Palmer had named Dr. Ballenger as an expert witness for the defense and had paid him a retainer; (2) Dr. Ballenger had already examined some of Fairchild's medical records that were sent to him by Palmer; (3) Dr. Ballenger had already formed opinions about her condition prior to an IME; (4) Dr. Ballenger was expected to testify as a defense witness at trial; and (5) Dr. Ballenger had been referred to Palmer by another expert who had also been retained by Palmer to question the extent of Fairchild's injuries.

The trial court denied Palmer's motion to have Dr. Ballenger perform an IME. The trial court found Dr. Ballenger's prior work on Fairchild's case as a retained expert for the defense and the fact that Palmer had sent Dr. Ballenger not only Fairchild's medical records, but also the transcripts of depositions of some of Fairchild's treating physicians in advance of his request for an IME, formed the basis for a reasonable objection to the appointment of Dr. Ballenger. The trial court further stated that, upon being instructed to submit a list of alternative physicians for the court to consider for the IME, Palmer had informed the court that he was unwilling to pay for an examination to be made by any physician other than Dr. Ballenger. The trial court concluded that, "given this election by [Palmer], [it was] left with no alternative other than to deny the motion."

*9 The Court of Appeals determined the trial court did not abuse its discretion in denying Palmer's motion to have Dr. Ballenger perform an IME on Fairchild. *Fairchild*, 385 S.C. at 360, 683 S.E.2d at 827. Palmer argues this was error, as Fairchild did not assert a "reasonable objection" under Rule 35(a), SCRCP to the appointment of Dr. Ballenger. Palmer contends a physician's prior relationship with the defendant and his or her familiarity with the case should not preclude the physician from

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

being selected by the defendant to perform the examination.⁶ Both parties have observed that there are no South Carolina decisions specifically addressing the provision for a “reasonable objection” under Rule 35(a), SCRCP.

[21] “In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.” *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). “If a rule’s language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.” *Id.*; see also *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct.App.2004) (stating where the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning without resort to forced construction to limit or expand the rule); cf. *Muci v. State Farm Mut. Auto. Ins. Co.*, 478 Mich. 178, 732 N.W.2d 88, 93 (Mich.2007) (“The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.”).

[22] [23] A trial court’s rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 512 S.E.2d 510 (Ct.App.1998). An abuse of discretion occurs when the trial court’s order is controlled by an error of law or when there is no evidentiary support for the trial court’s factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

Rule 35 of the South Carolina Rules of Civil Procedure governs requests for physical and mental examinations and provides in relevant part as follows:

In any case in which the amount in controversy exceeds \$100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown....

The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides.... Upon *reasonable objection* to the physician designated to

make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician; but the fact that a physician was so designated shall not be admissible upon the trial.

*10 Rule 35(a), SCRCP (emphasis added). The official Notes to Rule 35(a), SCRCP observe that the first paragraph of Rule 35(a) is based on the Federal Rule on this subject, but the second paragraph is not included in the Federal Rule. The second paragraph was specifically added by this Court to establish limits on the use of this procedure.⁷

Under the plain language of Rule 35(a), the defendant clearly does not have the right to unilaterally select the examining physician; rather, the court alone has the right to make the appointment. The rule contemplates that the parties will confer on this point to make suggestions, but where a “reasonable objection” has been interposed and the parties cannot agree, the court will make the selection. See Rule 35(a), SCRCP (providing upon reasonable objection and “if the parties shall fail to agree as to who shall make the examination, the court may designate a physician”); see also Rule 11(a), SCRCP (stating motions should generally contain an affirmation that the movant’s counsel communicated with opposing counsel prior to filing the motion to make a good faith effort to resolve the matter).

[24] A “reasonable objection” in this context simply means the reason for the objection must not be frivolous. What is reasonable will depend on the individual facts and circumstances of the case, which is precisely why the determination of this matter, as in other discovery and evidentiary disputes, is best left to the sound discretion of the trial court. See generally *LeBlanc v. Cambo*, 26 Conn.Supp. 338, 223 A.2d 311 (Conn.C.P.1966) (observing what is a reasonable objection to a particular physician named to perform a physical examination is a matter that must of necessity be left to the trial court’s inherent discretion).

[25] [26] The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. This purpose was recognized long before South Carolina law permitted such examinations. See *Best v. Columbia Elec. St. Ry., Light & Power Co.*, 85 S.C. 422, 428, 67 S.E. 1, 3 (1910) (Woods, J., dissenting) (stating nothing can be more helpful to the jury in reaching a just estimate of the damages in a personal injury suit than knowledge of the true nature of the injury, and whenever it appears to the circuit court that an examination by impartial experts would materially aid the jury, the circuit court should order such examination to be

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

made by disinterested experts). Thus, the better rule is that the physician should not be affiliated with either party in order to serve the purposes of Rule 35.

In *Richardson v. Johnson*, 60 Tenn.App. 129, 444 S.W.2d 708, 710 (Tenn.Ct.App.1969), the Tennessee court, echoing these sentiments, listed a series of guidelines regarding court-ordered physical examinations, including, "The physician must be selected by the court, not the defendant, and must be competent and disinterested." The court stated "it is clear that the power so vested in the court is a discretionary power, and not an absolute right in the applicant, and that the physician or physicians so appointed act as officers of the court, and not as agents of either party." *Id.* at 712. The court further observed that where claims concern injuries or disabilities that are based upon the subjective complaints of the plaintiff, "an impartial physician may have objective means of testing the subjective claims of the plaintiff[.]" *Id.* As is further explained in a case from a Missouri court:

*11 The law invests the trial court with authority to appoint physicians to make [a] physical examination of the plaintiff in a physical injury suit. The defendant cannot demand it as a matter of right, but the court in its discretion may do it in the furtherance of justice. When the court makes such an appointment, [it] does so because [it] determines in [its] discretion that the case calls for the opinion of *disinterested and unbiased physicians, not friends of either parties*, whose testimony is likely to be biased.

Atkinson v. United Rys. Co., 286 Mo. 634, 228 S.W. 483, 485 (Mo.1921) (emphasis added) (internal citations omitted). The Missouri court also recognized that a "court could not compel [a] plaintiff to submit to [a physical] examination by the witnesses for the other side," and "[t]he physicians appointed in such cases are the officers of the court." *Id.*

In the current appeal, the finding of the trial court that Fairchild had interposed a reasonable objection to Dr. Ballard's designation as the examining physician was a proper exercise of the trial court's inherent discretion to rule on discovery matters and is amply supported by the record. Dr. Ballenger was retained as a defense witness and had reviewed not only Fairchild's medical records, but also the deposition testimony of other potential witnesses, and it was alleged that he had already formed adverse opinions regarding Fairchild's injuries before the IME was requested. Under the circumstances present here, we agree with the Court of Appeals that Palmer has

shown no abuse of discretion in this regard.

IV. CONCLUSION

We affirm the decision of the Court of Appeals, which found reversible error in the trial court's failure to submit the issue of punitive damages to the jury and to charge the jury on the intervening negligence of a treating physician, and found the trial court did not abuse its discretion in denying Palmer's motion for an IME to be performed by Dr. Ballenger.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice JAMES E. MOORE, concur.

1 Fairchild's husband was also a plaintiff, but he is not a party to this appeal.

2 "Palmer" shall also include his construction company, where applicable.

3 Palmer's truck weighed 13,740 pounds, the trailer weighed 2,760 pounds, and the motorcycle he was transporting was 655.6 pounds.

4 See, e.g., *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978).

5 The Court of Appeals correctly cited this standard in its opinion. However, Palmer takes issue with one case the court cited, *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct.App.2000), which states: "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Palmer contends the "beyond a reasonable doubt" reference is a criminal standard that is not applicable in this civil case. We agree, but find the citation to *Wells* did not affect the propriety of the conclusion reached by the Court of Appeals in *Fairchild*.

6 Palmer cites, e.g., *Timpte v. District Court*, 161 Colo.

Fairchild v. South Carolina Dept. of Transp., --- S.E.2d --- (2012)

309, 421 P.2d 728, 729 (Colo.1966) ("So long as a plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right, in the absence of an agreement by the parties as to who the examining physician will be."). The *Timpte* case applying Colorado state court rules, as well as other authority cited by Palmer applying Rule 35 of the Federal Rules of Civil Procedure, are inapposite because those rules do not contain the same provision present in Rule 35(a), SCRPC. Further, we do not agree that a plaintiff chooses his or her own physician. See John E. Parker & Jack L. Nettles, *Automobile and Truck Accidents*, in 1 *The South Carolina Practice Manual* 199 (William Howard, Sr. & E. Warren Moise eds., 2000) (noting the plaintiff usually did not choose his or her physician; instead, treatment was provided by the physician on call at the hospital or the person was referred to the physician by another physician).

- 7 A somewhat similar procedure exists under workers' compensation law, which allows the appointment of "a disinterested and duly qualified physician or surgeon" to examine the injured claimant. S.C.Code Ann. § 42-17-30 (Supp.2011).

- 8 Fairchild notes that, immediately after the denial of the motion for an IME, Palmer supplemented his discovery responses with a listing of adverse opinions regarding Fairchild's injuries that Dr. Ballenger planned to testify to at trial. Thus, Dr. Ballenger must have already formed these adverse opinions prior to the time an IME could have been scheduled. Further, Dr. Ballenger did testify at trial as a defense witness for Palmer in accordance with these adverse opinions.

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International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

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United States District Court,
D. South Carolina,
Rock Hill Division.

INTERNATIONAL SAFETY ACCESS
CORPORATION, Plaintiff,

v.

INTEGRITY WORLDWIDE, INC. and John Melic,
Defendants.

Civil Action No. 0:09-00315-MBS. | Dec. 28, 2011.

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Opinion

ORDER

MARGARET B. SEYMOUR, District Judge.

*1 Plaintiff International Safety Access Corporation ("Plaintiff") filed this action for declaratory judgment against Defendants, Integrity Worldwide, Inc. ("IWI") and John Melic ("Melic") (collectively called "Defendants"), to determine Plaintiff's contractual obligations to IWI under the terms of a distributorship agreement. Defendants filed counterclaims against Plaintiff for breach of contract and breach of fiduciary duty. (ECF No. 46.) A jury trial was held on June 1-3 and June 6-8, 2011, at the conclusion of which the jury returned a verdict for Defendants in the amount of \$287,000. (ECF No. 168.) This matter is before the court on Plaintiff's July 6, 2011 post-trial motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or motion for a new trial pursuant to Fed.R.Civ.P. 59(a), or in the alternative, motion for remittitur of the jury's verdict. (ECF No. 177.) Defendants filed opposition to Plaintiff's motion on July 25, 2011. (ECF No. 179.) For the reasons set forth below, the court **DENIES** Plaintiff's motion in its entirety.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff distributes steel fencing and perimeter edge protection for concrete, steel, and timber construction projects. (ECF 88-2, ¶ 5.) Melic invented and developed an edge protection safety system designed to prevent injuries and deaths from falls at high-rise construction job sites. Melic's edge protection system utilized vertical posts to which various types of safety fence are secured. Melic marketed and sold his edge protection system as President of IWI.

In early 2006, Plaintiff and IWI began negotiating an agreement whereby Plaintiff would become the exclusive distributor of the edge protection system in the United States. On or about April 2006, Plaintiff and IWI entered into a written distributorship agreement (the "Agreement"). (ECF No. 37, ¶ 5.) The Agreement specifically provided that (1) IWI was the holder of certain patents as defined in the Agreement; (2) Plaintiff was to operate as the exclusive distributor of IWI's products in the United States; (3) Plaintiff would place all orders for IWI's products with a third party manufacturer, Tata Incorporated; (4) Plaintiff would purchase a specified minimum quantity of IWI's products from Tata Incorporated on an annual basis; (5) the Agreement was valid until December 31, 2012 and renewable for additional five-year terms; and (6) IWI would receive compensation as described in a separate "profit-sharing" agreement with Tata Incorporated. (See ECF No. 85-2, ¶¶ 1, 6, 18, 20.) Plaintiff admittedly never satisfied its minimum purchase obligations. (ECF No. 37, ¶ 10.) Moreover, in the fall of 2008, Plaintiff ceased performing altogether under the Agreement and sought an immediate release from its terms. (ECF No. 46, ¶ 43.)

On January 7, 2009, Plaintiff filed an action for declaratory judgment against Defendants in the Court of Common Pleas for York County, South Carolina in order to determine the contractual rights of the parties under the Agreement. (ECF No. 1-1.) Plaintiff alleged that it had been fraudulently induced into entering the Agreement by Defendants and the Agreement was unenforceable as a result. (*Id.*) On February 6, 2009, Defendants removed the state court action to the United States District Court for the District of South Carolina, based on the diverse citizenship of the parties pursuant to 28 U.S.C. § 1332. (ECF No. 1.) Defendants answered the Complaint on February 13, 2009, denying Plaintiff's allegations. (ECF

International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

No. 7.) On May 6, 2009, Plaintiff amended the Complaint to add allegations that the Agreement was not executed in compliance with the Statute of Frauds.¹ (ECF No. 37, ¶¶ 12–16.) On June 9, 2009, Defendants answered the Amended Complaint denying Plaintiff's allegations and asserted counterclaims against Plaintiff for breach of contract and breach of fiduciary duty. (ECF No. 46.)

- 1 This claim was dropped after Defendants located and provided to Plaintiff a copy of the Agreement signed by Plaintiff's agents. (See ECF No. 85–2.)

*2 Upon the completion of discovery and the expiration of the dispositive motion deadline, the Honorable Matthew J. Perry, Jr. presided over the parties' jury trial on June 1–3 and June 6–8, 2011. (See ECF Nos. 151, 152, 155, 159, 162 & 163.) At the close of Defendants' case, Judge Perry denied a Rule 50(a) motion in which Plaintiff asserted that Defendants had failed to present sufficient evidence of damages to establish all elements of a breach of contract claim. On June 8, 2011, the jury returned a verdict for Defendants on the claims in the Complaint and on their counterclaim for breach of contract in the amount of \$287,000. (ECF No. 168.) On July 6, 2011, Plaintiff filed the present motion contending that the jury's verdict is improper and is not supported by competent evidence and that the court should enter judgment as a matter of law for Plaintiff or, set aside the verdict and order a new trial or, in the alternative, amend the verdict by way of remittitur. (See ECF No. 177.) Defendants filed opposition to Plaintiff's motion on July 25, 2011. (ECF No. 179.) In addition, on June 24, 2011, Defendants filed a bill of costs, ECF No. 176, to which on October 17, 2011, Plaintiff filed a motion for extension of time to object to Defendants' bill of costs until such time after the court has ruled on Plaintiff's pending motions. (ECF No. 184.)

On August 29, 2011, the case was reassigned to the Honorable Margaret B. Seymour, following the death of Judge Perry. (ECF No. 181.)

II. LEGAL STANDARD AND ANALYSIS

A. Standards for Motions Pursuant to Fed.R.Civ.P. 50 and 59

Rule 50(b) provides that “[i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a) [before the case is submitted to the jury], the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions

raised by the motion.” Fed.R.Civ.P. 50(b). A trial court should award judgment as a matter of law to a movant pursuant to Fed.R.Civ.P. 50(b) “if a reasonable jury could only reach one conclusion based on the evidence or if the verdict in favor of the non-moving party would necessarily be based upon speculation and conjecture.” *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir.2005); see also *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1189 (4th Cir.1990) (The court should grant judgment as a matter of law only if “the evidence is so clear that reasonable men could reach no other conclusion than the one suggested by the moving party.”). A movant is entitled to judgment as a matter of law “if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof.” *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir.1996); *Wheatley v. Wicomico Cnty., Md.*, 390 F.3d 328, 332 (4th Cir.2004) (motion for judgment as a matter of law following a jury's verdict granted “if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof”). Judgment as a matter of law is appropriate when the evidence can support only one reasonable conclusion. See *Chaudhry v. Gallerizzo*, 174 F.3d 394, 405 (4th Cir.1999). “[T]he evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party, and the credibility of all evidence favoring the non-moving party is assumed.” *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 160 (4th Cir.1988); see also *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275, 279 (4th Cir.1999) (A Rule 50 motion should be granted “if a district court determines, without weighing the evidence or considering the credibility of the witnesses, that substantial evidence does not support the jury's findings.”). If there is any evidence on which a reasonable jury could return a verdict in favor of the nonmoving party, judgment as a matter of law should not be granted. *Price*, 93 F.3d at 1249. “If reasonable minds could differ, [the court] must affirm the jury's verdict.” *Pitrolo v. Cnty. of Buncombe*, 407 F. App'x 657, 659 (4th Cir.2011) (citing *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639, 645 (4th Cir.2002)).

*3 Alternatively, a motion for a new trial under Fed.R.Civ.P. 59(a) may be granted “on all or some of the issues ... to any party ... for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed.R.Civ.P. 59(a). This rule allows a trial court to set aside the verdict and order a new trial only if “(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice even though there may be substantial evidence which would prevent the direction of a verdict.” *Atlas Food Sys. & Servs. Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.1996). This

International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

“federal” standard applies to a motion for new trial as to a verdict on a state law claim if the motion does not rest on the alleged excessiveness of the jury’s verdict. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426–31, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275, 280–81 (4th Cir.1999). However, the court “must apply state law standards when it considers a Rule 59(a) motion for a new trial [in a diversity action in federal district court] based upon the alleged excessiveness of the jury’s compensatory damage award.” *Konkel*, 165 F.3d at 280. Under South Carolina law, a “new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive.” *Knoke v. South Carolina Dep’t of Parks, Recreation and Tourism*, 324 S.C. 136, 478 S.E.2d 256, 258 (S.C.1996). In evaluating a motion for a new trial, the district court has the discretion to “weigh the evidence and consider the credibility of witnesses.” *Knussman v. Maryland*, 272 F.3d 625, 647 (4th Cir.2001); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir.1987).

As an alternative to ordering a new trial, a court may order remittitur, which is a method used in connection with Fed.R.Civ.P. 59 by which a trial judge can review a jury award for excessiveness. *Atlas Food*, 99 F.3d at 593. Remittitur is “a process, dating back to 1822, by which the trial court orders a new trial unless the [prevailing party] accepts a reduction in an excessive jury award.” *Id.* If a court concludes that a verdict is excessive, “it is the court’s duty to require a remittitur or order a new trial.” *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir.1998). A district court sitting in diversity must apply state law standards to determine whether a verdict is excessive. *Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 197 (4th Cir.1997). Under South Carolina law, a motion for new trial nisi remittitur is founded upon a contention that the verdict is not inherently unlawful, but rather, under the facts of the case, is unduly liberal. *Elliott v. Black River Elec. Co-op.*, 233 S.C. 233, 104 S.E.2d 357, 372 (S.C.1958); *Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290, 295–96 (S.C.Ct.App.1996). In evaluating a motion for remittitur, the evidence and reasonable inferences to be drawn therefrom are considered in the light most favorable to the non-moving party. *Krepps*, 479 S.E.2d at 296.

B. Plaintiff’s Motion for Judgment as a Matter of Law

*4 Plaintiff asserts that the court should set aside the jury’s verdict of \$287,000 for Defendants and enter judgment for Plaintiff as a matter of law because

Defendants failed to present sufficient evidence at trial to establish damages with any reasonable certainty or accuracy. Plaintiff further asserts that the jury’s verdict ignored “the substantive weight of evidence presented at trial, is based upon contentions which were not admitted as evidence at trial, and would result in a miscarriage of justice if allowed to stand.” (ECF No. 177, pp. 3–4.)

In support of its contentions, Plaintiff states that there was not trial testimony by any witness that would allow a reasonable jury to award actual damages to Defendants. (*Id.* at p. 5, 479 S.E.2d 290.) Plaintiff observes that Michele Melic, wife of Defendant John Melic and secretary/treasurer of IWI, was the only witness in the Defendants’ case in chief who even attempted to testify regarding the alleged damages sustained by Defendants. (*Id.* at p. 4, 479 S.E.2d 290.) Plaintiff asserts that Judge Perry, however, sustained objections to all of Michele Melic’s testimony regarding lost revenue and lost profits on the grounds of speculation, lack of foundation, and because Defendants did not disclose these amounts of alleged damages in discovery. (*Id.* (citing ECF No. 177–3, pp. 16–20.))

Plaintiff asserts that the speculative nature of the verdict is further proven by information received from two jurors, who allegedly opined to Plaintiff’s counsel after the trial that the verdict amount for Defendants consisted of \$75,000 for lost profits. (*See* ECF Nos. 177–1 & 177–2.) Plaintiff argues that competent evidence does not support an award of \$75,000 in lost profits, which makes such award purely speculative. (ECF No. 177, p. 5.) Therefore, Plaintiff concludes that there is no competent evidence in the record to support the jury’s award of damages and, as a result, it is entitled to judgment as a matter of law. (*Id.*)

In response to Plaintiff’s arguments, Defendants assert that there was sufficient evidence presented at trial to allow the jury to arrive at the amount of damages awarded in the verdict. Defendants argue that competent evidence to support the jury’s award of damages could be found in the following: (1) the Agreement (Joint Trial Ex. 1), which identified the amount of product Plaintiff was required to purchase during the time the Agreement was in effect (\$45 million); (2) the contract between IWI and Tata Incorporated (Joint Trial Ex. 2), which provided that the companies would share equally the profits resulting from sales of the edge protection system to Plaintiff; and (3) Michele Melic’s testimony that IWI’s profit margin on sales to Plaintiff was 20%, *see* ECF No. 177–3, p. 20:12–18, and that, between April 18, 2006 and August 2008, Plaintiff purchased \$6.8 million in product and IWI received \$1.31 million in profit. (ECF No. 179, pp. 14–17.) Based on this evidence, Defendants argue that competent evidence existed to support the verdict

International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

returned by the jury on Defendants' counterclaim for breach of contract.

*5 To recover damages for a breach of contract action in South Carolina, the claiming party has to establish three elements: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the claiming party as a direct and proximate result of the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (S.C.1962). The purpose of an award of damages in a breach of contract action is to place the non-breaching party in as good a position as it would have been in if the contract had been performed. *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67, 70 (S.C.Ct.App.1996) ("The proper measure of compensation [for breach of contract] is the loss actually suffered by the plaintiff as a result of the breach."). "While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 546 (S.C.1991) (citing *Piggy Park Enter., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (S.C.1968)). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Id.*

The jury found in favor of Defendants on their counterclaim for breach of contract and awarded damages in an amount that the jurors found was supported by that evidence. Generally, a jury's verdict should be accorded the "utmost respect." *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir.1996). To grant the relief sought by Plaintiff in its motion for judgment as a matter of law, the court would have to find upon reviewing the evidence and all reasonable inferences in Defendants' favor that the amount of damages awarded was not supported by the evidence. *Myrick*, 395 F.3d at 489; *Crinkley*, 844 F.2d at 160. Upon consideration of the evidence in the context of the appropriate standard of review, the court is unable to conclude that the jury's verdict in favor of Defendants was "based upon speculation and conjecture" resulting in the failure by Defendants to establish the damages element of their breach of contract claim. Therefore, the court must deny Plaintiff's motion for judgment as a matter of law.

C. Plaintiff's Motion for a New Trial

Plaintiff contends that it is entitled to a new trial because the jury's verdict improperly compensated Defendants for attorney's fees. The South Carolina state law standard for

granting a new trial is applicable to Plaintiff's motion for a new trial because implicit in Plaintiff's claim that any award of attorney's fees was improper is that the damages were excessive. *See Konkel*, 165 F.3d at 280. Under the "state law standard," the court would grant Plaintiff's motion for a new trial if Plaintiff established that "the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Knoke v. South Carolina Dep't of Parks, Recreation and Tourism*, 324 S.C. 136, 478 S.E.2d 256, 258 (S.C.1996).

*6 In support of its motion for a new trial, Plaintiff submitted affidavits from its trial counsel containing post-trial, out-of-court statements from two jurors. The jurors allegedly told Plaintiff's trial counsel that \$212,000 of the jury's verdict was meant to compensate Defendants for attorney's fees. (See ECF Nos. 177, p. 6; 177-2, ¶¶ 2-3; and 177-1, ¶¶ 6-8.) Based on these juror statements, Plaintiff argues that the award of attorney's fees was "wholly improvident and guided by improper motive" because attorney's fees were not authorized by the contract at issue in the litigation or by statute as a matter of law. (ECF No. 177, p. 6.)

In response to Plaintiff's contentions, Defendants assert that Plaintiff's motion for new trial relies on inadmissible information received from jurors in violation of Rule 606(b) of the Federal Rules of Evidence. Defendants argue that Plaintiff's use of information from jurors in its motion violates Rule 606(b) because there is no evidence that the jury's deliberations were affected by extraneous prejudicial information, outside influence, or mistake in entering the verdict. (ECF No. 179, pp. 8-12 (citing *Tanner v. United States*, 483 U.S. 107, 121, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *McDonald v. Pless*, 238 U.S. 264, 267-68, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); *Wilsmann v. Upjohn Co.*, 572 F.Supp. 242, 245 (W.D.Mich.1983)).

The admissibility of post-trial juror information, such as that sought to be used by Plaintiff, is governed by Fed.R.Evid. 606(b), which provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may

International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Fed.R.Evid. 606(b). Under Fed.R.Evid. 606(b), there are only three limited circumstances where a court may make inquiries into whether to impeach a verdict based on juror testimony: "(1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." *Id.*

Upon consideration of the merits of Plaintiff's motion for a new trial, the court finds that it is barred from considering Plaintiff's alleged evidence of impropriety contained in the affidavits of Plaintiff's counsel because the out-of-court statements by the two jurors are hearsay. The court further finds that these out-of-court statements are inadmissible because the statements do not demonstrate that the jury's deliberations were affected by extraneous prejudicial information, outside influence, or mistake in entering the verdict. *See* Fed.R.Evid. 606(b). Because Plaintiff's motion for a new trial relies entirely on inadmissible juror statements, Plaintiff cannot show that "the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." Plaintiff further cannot show that the jury's verdict for Defendants on their counterclaim for breach of contract is so excessive that it shocks the court's conscience. Therefore, the court must deny Plaintiff's motion for a new trial.²

- 2 Even if the federal standard applied, the court finds that Plaintiff would not be entitled to a new trial.

D. Plaintiff's Motion for New Trial Nisi Remittitur

*7 In the alternative to a new trial, Plaintiff moves the court for a new trial nisi remittitur, "by which the trial court orders a new trial unless the [prevailing party] accepts a reduction in an excessive jury award." *Atlas Food*, 99 F.3d at 593. Plaintiff contends that the jury's

verdict of \$287,000 for Defendants on their counterclaim for breach of contract should be remitted by \$212,000, the amount that Plaintiff alleges was improperly awarded to Defendants for attorney's fees. (*See* ECF Nos. 177-1 & 177-2.) As with the motion for new trial, Plaintiff argues that the award of attorney's fees was improper under the law. (ECF No. 177, p. 6.)

A trial judge should grant a new trial nisi remittitur when the amount of the verdict is found to be excessive.³ *Cline*, 144 F.3d at 305. Because the counterclaim at issue is a state law claim for breach of contract, the court would have to find that the jury's verdict was "unduly liberal" in order to grant Plaintiff's request for remittitur. *See Elliott v. Black River Elec. Co-op.*, 233 S.C. 233, 104 S.E.2d 357, 372 (S.C.1958); *Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290, 295-96 (S.C.Ct.App.1996).⁴

- 3 Although Plaintiff never uses the term "excessive" to describe the verdict in this matter, implicit in Plaintiff's argument that damages awarded to Defendants were improper is that the damages were excessive.

- 4 Damages are deemed excessive under federal law when they are "against the clear weight of the evidence, or based upon evidence which is false, or will result in a miscarriage of justice." *Cline*, 144 F.3d at 305.

The court has already found that the juror statements offered by Plaintiff are inadmissible. In addition, when the evidence and all reasonable inferences are viewed in the light most favorable to Defendants, *Krepps*, 479 S.E.2d at 296, the court finds that the jury's verdict for Defendants is substantially less than the maximum amount the jury could have arrived at as a result of Plaintiff's breach of the Agreement. Based on the foregoing, the court finds that the jury's verdict for Defendants is not unduly liberal or excessive. Therefore, the court declines to subject the jury's verdict to remittitur and denies Plaintiff's motion for new trial nisi remittitur.

III. CONCLUSION

Upon careful consideration of the entire record, the court hereby **DENIES** the motion of Plaintiff International Safety Access Corporation for judgment as a matter of law, for new trial, or in the alternative, for a new trial nisi remittitur. (ECF No. 177.) The court **GRANTS** Plaintiff's motion for an extension of time to submit objections to Defendants' bill of costs. (ECF Nos. 176 & 184 .) Plaintiff shall submit any and all objections to

International Safety Access Corp. v. Integrity Worldwide, Inc., Slip Copy (2011)

Defendants' bill of costs within fourteen days from date
of entry of this order.

IT IS SO ORDERED.

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Tadlock Painting Co. v. Maryland Cas. Co., 97 F.3d 1449 (1996)

Unpublished Disposition

97 F.3d 1449

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.

TADLOCK PAINTING COMPANY,

Plaintiff-Appellee,

v.

THE MARYLAND CASUALTY COMPANY,

Defendant-Appellant.

No. 93-2021. | Argued: June 8, 1994. | Decided:
September 20, 1996.

Appeal from the United States District Court for the District of South Carolina, at Florence. C. Weston Houck, Chief District Judge. (CA-91-3352)

Attorneys and Law Firms

ARGUED: E. Charles Dann, Jr., GOODELL, DEVRIES, LEECH & GRAY, Baltimore, MD, for Appellant. John Leon Schurlock, Florence, SC, for Appellee. **ON BRIEF:** Stefan A. Hagerup, GOODELL, DEVRIES, LEECH & GRAY, Baltimore, MD, for Appellant.

D.S.C.

AFFIRMED IN PART, REVERSED IN PART.

Before WIDENER, MURNAGHAN, and WILKINS,*
Circuit Judges.

* Judge Wilkins heard oral argument in this case but recused himself after certification to the Supreme Court of South Carolina and did not participate in the consideration of this appeal. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

Opinion

OPINION

PER CURIAM:

I.

*1 In April 1990, Tadlock Painting Company, based in Darlington, South Carolina, began a painting project at an industrial job site owned by Cargill, Inc. Later that year, Tadlock was notified that "overspray" paint had accumulated on nearby cars. Tadlock was able to clean the cars at its own expense, without involving its insurer, Maryland Casualty Company. In October 1990, Tadlock again experienced overspray paint problems, damaging numerous cars. Tadlock decided to let its insurance company resolve the claims, so notified its local Maryland Casualty agent in Darlington, who, in turn, contacted Cargill and asked for information regarding the claims. On November 9, 1990, Tadlock's local agent received the information from Cargill and filed a claim form on Tadlock's behalf with Maryland Casualty's office in Greenville, South Carolina.

Maryland Casualty interviewed Dewey Tadlock, the president of Tadlock Painting, on November 29, 1990. During this same time period, beginning in early October 1990, a number of internal memoranda, telephone calls, and notes were made among different employees of Maryland Casualty. Apparently, an overspray paint claim was unusual enough to prompt considerable discussion about how best to handle it. On January 18, 1991, a Maryland Casualty employee who was working on Tadlock's claim wrote to Maryland Casualty's home office and asked for information about the status of the claim. The memorandum noted that Maryland Casualty had been receiving a number of telephone calls from representatives of Cargill and Tadlock. On January 21, 1991, Maryland Casualty sent Tadlock a reservation-of-rights letter, listing the failure timely to notify Maryland Casualty of the claims, the possibility that the claim involved the discharge of pollutants, and the \$500 per-claim deductible as possible bases on which Maryland Casualty might deny the claim.

After sending the January 21 letter to Tadlock, Maryland Casualty employees again engaged in a series of discussions regarding Tadlock's claim. On February 14, 1991, Maryland Casualty interviewed Mr. Tadlock a second time. No vehicle inspections were performed during that meeting. Maryland Casualty apparently had decided to delay inspection of the damaged vehicles until it could decide whether there was coverage under the policy.

On March 7, 1991, Mr. Tadlock called Maryland Casualty

Tadlock Painting Co. v. Maryland Cas. Co., 97 F.3d 1449 (1996)

and told it that Cargill had threatened legal action against Tadlock, Maryland Casualty, and Tadlock's local Maryland Casualty agent. Maryland Casualty wrote to Tadlock the next day, informing it that certain requested information had not been received from Cargill, and no coverage decision could be made without it. Internal correspondence reveals that Maryland Casualty may have been contemplating a contributory negligence defense.

On March 25, 1991, Maryland Casualty sent a letter to Tadlock stating that it was exercising its discretionary right under the policy to negotiate and settle the claims, although it would do so under a reservation of rights because it had not been timely notified of the claim. The letter further stated that the applicable deductible was \$500 per claim and that it would forward a request for reimbursement after the negotiations had been completed. On April 25, 1991, Mr. Tadlock had a conversation with an employee at Maryland Casualty in which Mr. Tadlock disputed the application of the deductible. Rather than applying the deductible on a per-claim basis, as the contract explicitly provides, he apparently believed that the policy contained a one-time deductible of \$500.* The next day, Maryland Casualty sent Tadlock a copy of the endorsement containing a \$500 per-claim deductible. On May 16, 1991, Maryland Casualty sent a letter to Tadlock requesting acknowledgment of the deductible and stating that it must have written confirmation from Tadlock that it would pay the deductible before Maryland Casualty would arrange for inspection and cleaning of the damaged cars. Tadlock never sent the requested confirmation, so Maryland Casualty did not proceed further with the claim. Mr.

* The District Court granted Maryland Casualty's motion for partial summary judgment on the deductible issue. Tadlock has not appealed that ruling.

*2 Tadlock later personally settled each of the claims under \$500: he would later testify that he so settled at least 70 claims, and that there were four or five claims above \$500 that he did not settle.

Thereafter, because of the delay involved in cleaning up the Cargill employees' cars, Cargill apparently refused to consider Tadlock for any of its painting jobs. According to Mr. Tadlock, Tadlock had been Cargill's main painting contractor since 1984 but was not hired for certain other painting jobs after the overspray incident.

Tadlock filed a complaint against Maryland Casualty in the South Carolina Court of Common Pleas on October 8, 1991, seeking lost profits, punitive damages, costs, and attorneys' fees, together exceeding \$2 million. Maryland

Casualty then removed the action to the United States District Court for the District of South Carolina. After Tadlock had presented its case at trial, after both parties had rested, and again following entry of the verdict, the District Court denied Maryland Casualty's motions for judgment as a matter of law with respect to liability for both compensatory and punitive damages. The District Court rested its decision in large part upon its belief that Tadlock could proceed on the theory that Maryland Casualty had breached an implied covenant of good faith and fair dealing in its handling of Tadlock's claim, even in the absence of an express contractual duty to investigate the claim. The jury returned a verdict for Tadlock in the amount of \$15,552, which represented a twenty percent profit on the jobs Tadlock would have performed for Cargill had the insurance claim been handled in a more timely fashion, plus an amount to compensate Tadlock for the expense of appraisals incurred when Mr. Tadlock personally settled the claims. In a separate verdict, the jury also awarded Tadlock \$200,000 in punitive damages.

After various unsuccessful post-trial motions-including motions for a new trial and for a reduction of the punitive damages award-Maryland Casualty appealed. The company contended that South Carolina law does not require an insurance carrier to investigate and settle third-party claims when no suit has been filed against its insured and in the absence of contractual language to the contrary. Maryland Casualty also argued that, even if an implied covenant of good faith and fair dealing did apply, the District Court had erred when it denied the company's motions for judgment because Tadlock had not presented sufficient evidence to persuade a reasonable juror that the company had violated such a covenant or that \$15,552 in compensatory damages or punitive damages in any amount were warranted. Maryland Casualty also contended that, in the absence of any proof of a conflict of interest, the District Court had erred when it told the jury that, when there is a conflict of interest between an insurer and an insured, the insured's interest must take precedence.

Tadlock argued that, under South Carolina law, an insurer's badfaith failure to investigate a claim constitutes a breach of an implied covenant of good faith and fair dealing. Tadlock disputed Maryland Casualty's other allegations of error as well.

*3 Finding no controlling South Carolina precedent on the implied covenant issue, we certified the question to the Supreme Court of South Carolina. On July 15, 1996, that court issued its response. After reviewing authorities in South Carolina and other jurisdictions, the court stated:

Tadlock Painting Co. v. Maryland Cas. Co., 97 F.3d 1449 (1996)

We recognize the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of third party claims. Furthermore, we decline to make breach of an express contractual provision a prerequisite to bringing the action.

Tadlock Painting Co. v. Maryland Casualty Co., No. 24465, at 18 (S.C. July 15, 1996).

II.

When an appellant objects to the jury instructions given at trial, we must determine "whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Spell v. McDaniel*, 824 F.2d 1380, 1395 (4th Cir.1987), *cert. denied*, 484 U.S. 1027 (1988). Under that standard, we find the District Court's instructions concerning conflicts of interest unobjectionable.

III.

We will not overturn the District Court's denial of Maryland Casualty's motions for judgment as a matter of law unless, reviewing the matter *de novo*, and "without weighing the evidence or assessing witness credibility, we conclude that reasonable people could have returned a verdict only for" Maryland Casualty. *Cooper v. Dyke*, 814 F.2d 941, 944 (4th Cir.1987). We must view the evidence in the light most favorable to Tadlock and give Tadlock the benefit of all reasonable inferences from the evidence presented at trial. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660 (4th Cir.), *cert. denied*, 510 U.S. 965 (1993). "The grant or denial of a new trial is reviewed for abuse of discretion." *Benesh v. Amphenol Corp. (In re Wildewood Litig.)*, 52 F.3d 499, 502 (4th Cir.1995).

In light of the South Carolina Supreme Court's ruling, and

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having carefully reviewed the parties' arguments and the record, we have concluded that the District Court did not err when it denied Maryland Casualty's motions for judgment as a matter of law as to liability for compensatory damages. We find that a reasonable juror could conclude, based on the evidence presented, that Maryland Casualty did not handle Tadlock's claim fairly and in good faith and that Tadlock was therefore entitled to compensatory damages totaling \$15,552. Because we find that there was sufficient evidence from which a reasonable juror could conclude that Maryland Casualty breached an implied covenant of good faith and fair dealing, we also hold that the District Court did not abuse its discretion when it denied Maryland Casualty's motion for a new trial.

With respect to the matter of punitive damages, though, we find that the District Court erred. Tadlock was entitled to receive punitive damages only if it demonstrated that Maryland Casualty had willfully, wantonly, or recklessly breached the implied covenant of good faith and fair dealing. *Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 263, (S.C.1958). "The test by which a tort is to be characterized as reckless, wilful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* We find no evidence in the record that could lead a reasonable juror to conclude that, in its handling of Tadlock's claim, Maryland Casualty so acted.

IV.

*4 We therefore affirm the jury's award of \$15,552 in compensatory damages, but remand the case to the District Court with instructions to vacate the award of \$200,000 in punitive damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Parallel Citations

1996 WL 532745 (C.A.4 (S.C.))

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Gaumer v. First Nat. Bank of North East, 23 F.3d 400 (1994)

Unpublished Disposition

23 F.3d 400

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.

Carolyn M. GAUMER, Plaintiff-Appellant,
and

Carol Jeanne GAUMER, Executrix of the Estate of
Alice U. McDaniel, Plaintiff,

v.

THE FIRST NATIONAL BANK OF NORTH EAST,
A National Bank chartered under the authority of
the United States of America, Treasury
Department, Office of the comptroller of Currency,
Charter No 7064, Defendant-Appellee,

and

Richard D. McDANIEL; J. David McDaniel; John
E. Hughes, Defendants.

No. 93-1126. | Argued: March 7, 1994. | Decided:
May 11, 1994.

Appeal from the United States District Court for the
District of Maryland, at Baltimore. M. J. Garbis, District
Judge. (CA-88-3434-MJG)

Attorneys and Law Firms

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D.Md.

AFFIRMED.

Before WIDENER and WILKINSON, Circuit Judges, and
BRINKEMA, United States District Judge for the Eastern
District of Virginia, sitting by designation.

Opinion

OPINION

PER CURIAM:

*1 Alice U. McDaniel, the mother of defendant Richard D. McDaniel and Carolyn Gaumer, filed the original complaint against Richard D. McDaniel and his son and son-in-law, J. David McDaniel and John E. Hughes, respectively, as well as the First National Bank of North East (the Bank) alleging violations of various federal banking laws and also seeking damages under state common law in connection with the Bank's refusal to re-register certain stocks jointly to Alice McDaniel and Carolyn Gaumer. Mrs. McDaniel died while this action was pending and her estate was substituted as the plaintiff. Carolyn Gaumer and Carol Jeanne Gaumer filed an amended complaint, Carol Jeanne Gaumer in her capacity as executrix of the estate of Alice McDaniel and Carolyn Gaumer as an individual, alleging that she had an interest in the stock.

The case was tried to a jury, which found, essentially, that Richard McDaniel had no legal right to the stock in question and that the Bank had conspired with Richard McDaniel to prevent Alice McDaniel from transferring her shares to Carolyn Gaumer. The jury also awarded punitive damages to Carolyn Gaumer against the Bank. The court then granted judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b), for the Bank but entered the judgment for Carol Jeanne Gaumer as Executrix of the estate against Richard McDaniel. Plaintiff Carolyn Gaumer appealed from the Court's grant of judgment n.o.v. on her claim for punitive damages against the Bank. Because we agree with the district court's conclusion that the plaintiff did not produce sufficient evidence to support a verdict against the Bank, we affirm.

I.

The evidence presented to the jury, in the light most favorable to appellant Carolyn Gaumer,* was essentially as follows. The Bank is a McDaniel family business. Family members control the Bank to this day. (JA 128, 156-157). The McDaniel family used joint tenancies with rights of survivorship as a testamentary substitute, that is, to transfer Bank stock at death without incurring inheritance tax. (JA 158, 161, 162).

Gaumer v. First Nat. Bank of North East, 23 F.3d 400 (1994)

In 1963, Alexander McDaniel, Alice McDaniel's husband, died. Alice McDaniel inherited ten shares of Bank stock from him and also became the sole owner of another forty-five shares which she and her husband had held as joint tenants. (JA 114-116). She already held another fifty-five shares, acquired sometime before 1963, which was registered to herself and Carolyn Gaumer. (JA 114-118).

On September 26, 1963, Alice McDaniel endorsed in blank the certificates for the forty-five shares and fifty-five shares and gave them to Richard McDaniel, who took them to the Bank. (JA 114-118, 150.) Without requiring Carolyn Gaumer's consent, the Bank issued a new certificate, # 180, for 100 shares in the names of Alice and/or Richard McDaniel as joint tenants with right of survivorship and not as tenants in common. (JA 116, 150). At the time of the 1963 transfer, Richard McDaniel was a major stockholder and president of the Bank. (JA 149). In September, 1963, Alice McDaniel endorsed the certificate for her ten inherited shares and gave that certificate to Richard McDaniel.

*2 He took it to the Bank and had new certificate # 181 issued, again in the names Alice and Richard McDaniel as joint tenants with rights of survivorship. (JA 90, 114-117). Richard McDaniel gave the new certificates to his mother. (JA 162). Despite the transfers, Alice McDaniel continued to treat all 110 shares of stock as her own, retaining sole control, voting the shares and receiving the dividends. (JA 58). This is consistent with Alice McDaniel's understanding that registering the stocks in both her own name and Richard McDaniel's was only for the purpose of indicating that she wanted him to become the owner at her death. (JA 57-58, 63).

Initially, the Bank also treated the stock as if it were Alice McDaniel's sole property, notwithstanding the way it appeared on its ledger. In 1974 and 1980, the Bank, over the signature of Richard McDaniel as President, wrote to Alice McDaniel stating that she held the shares in question. (JA 81). Similarly, the Bank filled out a questionnaire for Alice McDaniel in 1987, (in the context of plans to exchange shares in the Bank for shares in a bank holding company), stating that she held 21,565 shares of stock (multiplied since 1963 by several splits and reinvestments of dividends). (JA 80, 118-120, 397, 482, 485). At trial, Gaumer offered this evidence to prove that the Bank knew that Richard had no claim to these shares.

Meanwhile, the Office of the Comptroller of the Currency (O.C.C.) had taken action against Richard McDaniel, resulting in his agreeing to remove himself from the Bank's operations, as of April 30, 1987, as part of a

settlement. (JA 65). Richard McDaniel's shares in the Bank, a controlling interest just under fifty percent, went into a revocable trust, the Shady Beach Trust, paying him income, with his children as beneficiaries. (JA 110-111). Other McDaniel family members including Richard's son, J. David McDaniel, and his son-in-law, John E. Hughes, remained in control of the Bank. (JA 157).

At about this time, Alice McDaniel, still treating the stock as entirely her own, decided to place her daughter Carolyn Gaumer's name, rather than Richard McDaniel's, on the stock, in order to have it pass to Carolyn at Alice's death. (JA 68). She requested that the Bank change the stock certificates so as to name herself and Carolyn Gaumer as joint owners with rights of survivorship, rather than herself and Richard. (JA 67). This time the Bank refused to do so without signatures of both Alice and Richard McDaniel, as the joint owners. (JA 61, 88-89, 137-141, 424, 430). This was a change from the Bank's previous policy, which apparently was to treat jointly-owned stock as if it belonged solely to Alice McDaniel. (JA 89-90).

In December, 1987, the Bank, now aware of the dispute between Richard McDaniel and his mother, advised Alice McDaniel that it intended to deposit all dividends of the stock in question into an escrow account until the dispute was resolved. (JA 96). This took place eight months after Richard McDaniel had withdrawn from any involvement with the Bank. The Bank also began requiring that Richard McDaniel co-sign dividend checks. (JA 67). For the previous twenty-five years, the Bank had never required Richard McDaniel's signature on these checks in order for Alice McDaniel to cash them. (JA 60, 68, 135).

*3 The jury also heard evidence that, during the same time period, McDaniel Enterprises, which Richard controlled, ceased paying for Alice McDaniel's auto insurance, did not renew her Conoco credit card and stopped paying for accountants to complete her tax returns. (JA 61-62, 106-108). Richard McDaniel also had an employee remove Alice McDaniel's license tag, "240", a prestigious low number, from her 67 Ford Galaxy, replacing it with a high-numbered plate from his wife's car. (JA 105). There was some evidence that Alice McDaniel's health insurance had been cancelled. (JA 62, 178-181). One witness, Alice McDaniel's accountant, also a Bank Director, speculated that Blue Cross had probably cancelled the policy because Alice McDaniel was not a Bank employee. (JA 178-181). Alice McDaniel complained bitterly about these events, and enlisted the help of her attorney, Stanley Lowicki. (JA 73ff).

Unable to convince the Bank to reissue the stock certificates to Alice and Carolyn without Richard's signature, Lowicki went to the Bank on January 27, 1988.

Gaumer v. First Nat. Bank of North East, 23 F.3d 400 (1994)

(JA 89). Meanwhile, because of the dispute, a Bank auditor had been investigating the records pertaining to the shares in question and discovered that the "joint tenants" language that appears on the original certificates had been omitted from the stock ledger caption and some later certificates, and so notified Alice McDaniel. (JA 249-54, 440-43). The Bank then reworked the ledger, replacing an original "sheet 2" with a corrected "sheet 2." (JA 452, 453). Thus, when Lowicki went to the Bank to review the records, he found a new-looking "sheet 2" which referred to "joint tenants" and eventually an older-looking "sheet 1" which did not mention "joint tenants" but was headed "Alice U. McDaniel or Richard D. McDaniel WROS-and not as tenants in common." (JA 91-92, 437-39, 489-490). Lowicki questioned David McDaniel, then the Bank President, about these differences between "sheet 1" and "sheet 2", and was told that "sheet 2" was a corrected sheet and that the original, wrong "sheet 2" had been destroyed. (JA 95, 253, 450, 451). Later, during the discovery phase of this lawsuit, the Bank produced the original "sheet 2", which, like "sheet 1" did not use the term "joint tenants." Finally, the jury heard evidence concerning the valuation of the shares in question.

At the close of plaintiff's case, all defendants moved for judgment. The court granted motions for judgment in favor of J. David McDaniel and John E. Hughes. (JA 124). At the close of defendants' case, the court granted the remaining defendants' motions as to some counts. (JA 269). The court sent to the jury, using special verdicts, the conspiracy count and the question of the effect of the 1963 conveyances.

On the first special verdict, concerning the September and December 1963 transactions, the jury found that ownership of the original 110 bank shares was "transferred to go to Richard D. McDaniel on Alice U. McDaniel's death subject to revocation by Alice U. McDaniel at any time." (JA 294). On the second and fourth special verdicts, respectively, the jury found that Richard and the Bank had conspired in 1987 to prevent Alice McDaniel from transferring her stock to Gaumer and that the Bank was liable to Carolyn Gaumer for punitive damages of \$240,000.00. (JA 295, 297).

*4 The Court entered judgment for plaintiff Carol Jeanne Gaumer, as executrix of the estate, against Richard D. McDaniel, in the amount of \$237,215.00, plus interest, and declared that the shares of stock in question be awarded to Richard as his sole property. (JA 340). The Bank then filed a motion for judgment n.o.v. as to the jury's award of punitive damages. The motion was granted. (Memorandum Opinion at JA 343-347).

II.

The standard for granting judgment n.o.v. is the same as that for summary judgment: it is appropriate where there is no evidence upon which a jury can properly find a verdict. *Whalen v. Roanoke County Bd. of Sup'r.s.*, 769 F.2d 221 (4th Cir.1985), citing *Ralston Purina Co. v. Edmunds*, 241 F.2d 164 (4th Cir.1987). We essentially review *de novo* the district court's decision, taking all evidence favoring the non-moving party as credible and asking whether a reasonable and impartial jury could reasonably return a verdict for the non-moving party. *Crinkley v. Holiday Inns*, 844 F.2d 156, 160 (4th Cir.1988); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 243 n. 14 (4th Cir.1982); *Tights, Inc. v. Acme-McCrory Corp.*, 541 F.2d 1047, 1055 (4th Cir.1976); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir.1980).

At issue here is whether appellant Carolyn Gaumer produced evidence that would convince a reasonable jury by a preponderance of the evidence that the Bank conspired with Richard McDaniel in 1987 to help him convert the stock by preventing Alice McDaniel's proposed transfer of the stock to Carolyn Gaumer. The appellant asks this court to impute Richard McDaniel's knowledge and intent to the Bank, based on her argument that Richard McDaniel effectively controlled the bank in 1987, even after the OCC removed him from the position of Bank president. There is no evidence in the record to show that he maintained such control. Moreover, appellant produced no evidence to establish that the Bank was on notice in 1987 that Richard McDaniel's claim to the stock was unjust. On the contrary, the evidence shows that the Bank was only following prudent policies and advice of counsel in requiring both registered owners to consent to Alice's proposed transfer of stock.

To be sure, evidence of a conspiracy is likely to be circumstantial. Here, however, the evidence of the Bank's actions is consistent with a Bank which has recently had difficulties with the bank regulators and is attempting to operate under proper banking procedures. The above-recited evidence shows that before 1987, the Bank treated McDaniel family stock rather informally, ignoring normal corporate formalities, and that after the OCC's action, the Bank attempted to proceed conservatively, seeking both registered stock owners' permission to transfer the shares. The Bank also acted prudently and fairly to both parties by putting the dividends in escrow pending resolution of the dispute and in consulting outside counsel. While Richard McDaniel may have temporarily benefitted from the Bank's improved policies, this does not prove bad intent on the Bank's part.

Gaumer v. First Nat. Bank of North East, 23 F.3d 400 (1994)

*5 The evidence of the "altered" or "corrected" stock ledger is a red herring. The Bank's investigation of its records was an appropriate response to the dispute over the shares' ownership. As described above, the reason for the new page was to bring the Bank's ledger caption into conformity with the original certificates. In other words, the new sheet was meant to reflect, not hide, the way the shares were titled. We cannot infer a sinister motive from the Bank's attempt to correct old errors, especially when the Bank immediately notified Alice McDaniel of the correction it had made.

Similarly, the fact that Richard McDaniel took all kinds of adverse action toward his mother when she attempted to transfer the stock is not probative of misconduct by the Bank. There was no evidence that the Bank participated at all in these actions. As the trial court found, the Bank acted properly in refusing to take either party's side. In

short, we conclude that the evidence at trial was not sufficient to convince a reasonable jury by a preponderance of the evidence that the Bank conspired with Richard McDaniel to block Alice McDaniel's transfer of stock to Carolyn Gaumer. The court's order granting judgment n.o.v. as to the Bank is therefore affirmed.

AFFIRMED

* See *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 243 n. 14 (4th Cir.1982).

Parallel Citations

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Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

2009 WL 692338

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United States District Court,
D. Arizona.

HERBAL CARE SYSTEMS, INC., et al., Plaintiffs,
v.
James PLAZA, et al., Defendants.

No. cv-06-2698-PHX-ROS. | March 17, 2009.

West KeySummary

1 Corporations and Business Organizations

✶Fiduciary duty to creditors in general

101Corporations and Business Organizations
101VIIIDirectors, Officers, and Agents
101VII(E)Liability for Corporate Debts and Acts
101k1991Insolvency, Dissolution or Forfeiture of
Charter of Corporation
101k1993Fiduciary duty to creditors in general
(Formerly 101k349)

A company owed no fiduciary duty to its creditors as its corporate officers could not be held liable under a breach of fiduciary duty theory for acts performed prior to the company's insolvency. Thus, summary judgment was granted in favor of the company's corporate officers. There was no dispute that during the time in question, the company was not insolvent and had continued to make payments according to the stock redemption agreements for two more years before becoming insolvent.

6 Cases that cite this headnote

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Opinion

ORDER

ROSLYN O. SILVER, District Judge.

*1 Pending before the Court are Defendant James Plaza's Motion for Summary Judgment (Doc. 87) and Plaintiffs' Partial Motion for Summary Judgment (Doc. 89). For the reasons stated herein, Defendant's Motion will be granted in part and denied in part, and Plaintiffs' Motion will be denied.

BACKGROUND

Herbal Care Systems, Inc. ("HCS") sold Paraben-Glycol Free ("PG Free"), a product used in personal hygiene products such as deodorants. Body Blue, Inc. was a Canadian company that originally developed the formula for PG Free at the request of HCS. The two companies had an arrangement by which HCS would forward purchase orders to Body Blue, which would then ship the orders to HCS's customers.¹ HCS would be paid directly by the customers, and then, in turn, pay Body Blue.

¹ Plaza states that this happened only sometimes; sometimes purchase orders were routed directly through Body Blue.

In July of 2004, Plaintiffs William Grundemann and the Oak Leaf Family Trust entered into a Stock Redemption Agreement with HCS and Body Blue. The agreement was executed by Defendant James Plaza on behalf of HCS and by David Elliott as president of Body Blue. In that agreement, HCS and Body Blue agreed that, in exchange for purchasing the stock of the Plaintiffs in question, Body Blue would:

continue to license its PG Free technology to [HCS] and to manufacture all products it currently manufactures and use best efforts to offer to manufacture all new products for [HCS] and its customers for a period of at least 64 months after the Closing Date and on

Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

substantially the same terms as Body Blue, Inc. currently provides to [HCS].

The parties also agreed that HCS and its principals would not participate in any business that competes with the business of HCS.

After execution of the Stock Redemption Agreement, Plaza, Plaintiffs allege, coordinated with Body Blue to transfer HCS's purchase orders to a new company owned by Plaza (though none of these negotiations came to fruition). In 2005, Plaza instructed HCS's customers to pay money directly to Body Blue instead of HCS; Plaza states that those companies had come under new management and preferred to deal with HCS directly. Either way, HCS was owed royalties from Body Blue pursuant to a Royalty Agreement between the two companies. Body Blue continued to pay royalties in 2005 but ceased in 2006, strangling HCS's cash flow. Plaza received a salary from Body Blue throughout this period.

Shortly thereafter, Body Blue entered receivership in Canada. HCS was not termed a creditor able to recover any money from Body Blue.

Plaintiffs allege that Plaza's actions constituted self-dealing and brought a variety of claims. On May 21, 2008, the parties stipulated to dismiss with prejudice all counts against Plaza except Count 2 (Breach of Contract) and Count 3 (Breach of Fiduciary Duty). Plaza asks for summary judgment on both claims; Plaintiffs ask for summary judgment on the question of Plaza's liability.

STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Substantive law determines which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In addition, the dispute must be genuine; that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

*2 "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (internal quotations and citations omitted). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party; "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. Therefore, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" at the summary judgment stage. *Id.*

CHOICE OF LAW

A federal court sitting in diversity applies the forum state's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Orr v. Bank of Am.*, 285 F.3d 764, 772 n. 4 (9th Cir.2002). Arizona courts apply the rules set forth in the Restatement (Second) of Conflicts (1972) ("Restatement"). *Bryant v. Silverman*, 146 Ariz. 41, 703 P.2d 1190, 1191 (Ariz.1985).

Here, Plaintiffs allege Breach of Fiduciary Duty and Breach of Contract. Section 145(a) of the Restatement states:

The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties

Plaintiffs are Arizona citizens, HCS was located there, and the actions of HCS officers that led to the present dispute took place there. Neither party argues that another forum's law is more appropriate. Accordingly, Arizona

Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

law shall be applied to Plaintiffs' tort claim.

Section 187 states that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied" subject to certain exceptions. The Stock Redemption Agreement, which is the basis for Plaintiffs' contract claim, specifies that Arizona law governs the agreement. There has been no suggestion that Arizona law is inappropriate as per one of the exceptions listed in the Restatement. Arizona law shall be applied to Plaintiffs' contract claim.

ANALYSIS

A. Breach of Contract

Defendant Plaza argues that he is not a party to the Stock Redemption Agreements that Plaintiffs allege a breach of. Accordingly, he argues, Plaintiffs' breach of contract claim must be dismissed. In that agreement, HCS and Body Blue, Inc. agreed that HCS and its principals would not participate in any business that competes with the business of HCS. It is axiomatic that non-parties cannot be held liable for breach of contract barring a special showing by Plaintiff that, for instance, the corporate veil has been pierced. See, e.g., *Ixe Banco, S.A. v. MBNA America Bank, N.A.*, No. CV-07-0432, 2008 U.S. Dist. Lexis 19806 at * 36, 2008 WL 650403 (S.D.N.Y. Mar. 7, 2008) ("[N]on-parties cannot be liable for a breach of contract under New York law" as "New York law respects corporate separateness unless a plaintiff bears the heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.") (internal citations and quotations omitted); *Synopsis, L.L.C. v. Evergreen Data Systems, Inc.*, No. C-05-01524, 2005 U.S. Dist. Lexis 42339 at * 9-10, 2005 WL 1656901 (N.D.Cal. Jul. 13, 2005); *Meeker v. Gray*, 142 Ill.App.3d 717, 97 Ill.Dec. 72, 492 N.E.2d 508, 515 (Ill. 5th Dist.1986).

*3 Plaintiffs have made no such showing, instead arguing merely that Plaza interfered with HCS's contractual obligations. Accordingly, Plaintiffs' breach of contract claim fails.

B. Breach of Fiduciary Duty

Plaza argues that because Plaintiffs Grundemann and Wilhardt (and the associated family trust) were not shareholders of HC S as of July 31, 2004—after which the actions taken by Plaza that would give rise to liability allegedly occurred—they are owed no fiduciary duty. As such, he argues, they are merely creditors who are owed no duty of this sort unless the corporation was insolvent. Plaintiffs respond first that no precedent provides that "once a shareholder agrees to sell his or her stock back to the company, the fiduciary duty of the officers and directors cease ..., especially where that company has not even paid the agreed upon purchase price for that stock." Second, Plaintiffs argue that even if Plaintiffs are deemed creditors rather than shareholders, Arizona law provides they are owed a fiduciary duty nonetheless.

The law is fairly clear that former shareholders may not maintain a derivative action against a corporation. See, A.R.S. § 10-741; *Blasband v. Rales*, 971 F.2d 1034, 1041 (3d Cir.1992). However, Plaintiffs here appear to be bringing a direct action; the law on such actions is less settled.

The general trend, however, appears to be towards refusing to recognize actions for breach of fiduciary duty by non-shareholders and the implication of that precedent is that former shareholders are likewise prohibited. The Supreme Court of Delaware has held that no fiduciary duty is owed to debenture holders as "[b]efore a fiduciary duty arises, an existing property right or equitable interest supporting such a duty must exist." *Simons v. Cogan*, 549 A.2d 300, 304 (Del.1988). Similarly, a California appellate court, in finding bondholders were owed no fiduciary duty, distinguished between bondholders and shareholders in that "bondholders have prior but fixed claims on a firm's assets, while shareholders have limited liability for the firm's debts and unlimited claims on a firm's assets." *Pittelman v. Pearce*, 6 Cal.App.4th 1436, 8 Cal.Rptr.2d 359, 364 (2d Ct.App.1992). Nor do stock options give rise to a fiduciary duty; "[t]he instrument stands alone, claiming no equity in the corporation, entitled to no vote, and with no fiduciary obligation of the management to the option holder's interest." *Starkman v. Warner Comm., Inc.*, 671 F.Supp. 297, 304 (S.D.N.Y.1987); see also, *Glinert v. Wickes Co.*, No. 10407, 1990 Del. Ch. Lexis 42 at * 9, 1990 WL 34703; *McLaughlin v. Cendent Corp.*, 76 F.Supp.2d 539, 549-50 (D.N.J.1999).2

2 Conversely, pledgees of stock generally are found to be owed a fiduciary duty. One court compared pledges to shareholders as follows:

Beneficial and legal holders would seem to be similarly situated. A pledgee holding a security interest in corporate shares is a potential shareholder. He has the same interest and concern as a shareholder that the corporate affairs be

Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

managed properly. If the officers default, the pledgee suffers harm generically not unlike that experienced by the shareholder.

Gibson v. Manuel, 534 So.2d 199, 202 (Miss.1988).

Former shareholders—even ones who have not yet been paid for the stock in question—are not easily distinguishable from the classes of interest holders discussed above. Their fortunes no longer rise and fall with those of the corporation, and they are not relying on the sound management of corporate officers to steady the value of their interest. Instead, they have a ‘prior but fixed claim’ on the firm’s assets. The fact of their recovery may be affected by a corporate manager’s actions, but a corporate officer is not managing property for the former shareholder in the shareholder’s stead.

*4 Similar principles prevent creditors from recovering on a claim for breach of fiduciary duty. There is, however, an exception to this rule. “[W]hen a firm is insolvent, creditors are included in the class of persons to whom a board of directors owes a fiduciary duty.” *Dawson v. Withycombe*, 216 Ariz. 84, 163 P.3d 1034, 1058 (Ariz.Ct.App.2007) (emphasis added). This duty “is derived from the corporate form, which exists for the benefit of the creditors as a class when the firm is insolvent.” *Id.* (citing *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 792 (Del.Ch.2004); *A.R. Teeters & Assoc., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 836 P.2d 1034, 1041 (Ariz.Ct.App.1992)).

Here, there is no suggestion that HCS was insolvent at the time in question. Plaza notes that it is undisputed that HCS reported a gross profit in 2004 and continued to make payments under the stock redemption agreements through the early part of 2006. Because the fiduciary duty of insolvent firms to creditors arises with insolvency itself—i.e., at the point at which the entity exists for the purpose of discharging, to the fullest extent possible, its debts to creditors—corporate officers cannot be held liable under a breach of fiduciary duty theory for acts performed prior to the firm’s insolvency. Accordingly, summary judgment must be granted to Plaza as to Wilhardt, Coghlin, Grundemann, and Oak Leaf Trust’s Count Three.

C. Limitation of Liability

Plaza argues that Plaintiffs’ claims are barred by the limitation of liability provision in HCS’s Articles of

Incorporation. That provision states:

To the fullest extent permitted by the Arizona Revised Statutes, as the same exists or may hereafter be amended, a director of the Corporation shall not be liable to the Corporation or its stockholders for monetary damages for any action taken or failure to take any action as a director. No repeal, amendment or modification of this article whether direct or indirect, shall eliminate or reduce its effect with respect to any act or omission of a director of the Corporation occurring prior to such repeal, amendment or modification.

Arizona law allows for such provisions to be present in the articles incorporation, but includes exceptions for, among other things, financial benefit received by a director to which the director is not entitled and intentional infliction of harm on the corporation or the shareholders. A.R.S. § 10–202(B)(1). Plaintiffs argue that those exceptions exclude Plaza’s acts from inclusion under the statute; Plaza replies that he did not receive a financial benefit to which he was not entitled or intentionally inflict harm on the corporation or its shareholders.

This provision has never been interpreted by Arizona courts or federal courts sitting under Arizona law. However, this Court believes it is clear that the exceptions apply to the actions alleged against Plaza. As to the first, Plaintiffs allege that Plaza allowed HCS’ cash flow to be diverted to Body Blue, Inc., “a company which would grant Plaza stock and pay Plaza a six-figure salary.” As to the second, as Plaintiffs’ Breach of Contract claim fails, Plaintiffs allege Breach of Fiduciary Duty through breach of the duty of loyalty. This constitutes an intentional tort. Accordingly, Plaintiffs’ remaining claim is not barred by the release of liability provision.

D. Prior Decision of the Ontario Superior Court of Justice

*5 Plaza argues that a decision of the Ontario Superior Court of Justice issued a decision on this matter in which it “made no finding or reference to Mr. Plaza or any action taken by Mr. Plaza” and decided that “HCS lost whatever rights it had to PG Free technology because of Body Blue’s bankruptcy.” This Court, he argues, should

Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

grant comity to those findings of fact and conclude that Plaintiff did not suffer any damages as a result of Plaza entering into a royalty agreement or moving purchase orders to Body Blue.

While this Court does indeed respect the comity due the Ontario Superior Court of Justice, that opinion focuses on the rights and liabilities of HCS and Body Blue relating to PG Free. It was not attempting to determine the rights and liabilities of Plaza vis-à-vis the shareholder plaintiffs here, nor did the Ontario court make factual findings concerning those issues.

E. Punitive Damages

Plaza argues that Plaintiffs have not provided the requisite "clear and convincing" evidence support a claim for punitive damages.

Punitive damages require a demonstration that the defendant had an "evil mind" and demonstrated "aggravated and outrageous conduct." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 680 (Ariz.1986). Plaintiff may meet this burden through "indirect and circumstantial evidence;" courts recognize that direct evidence (i.e., a statement from the defendant) of an "evil mind" is rare. *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 832 P.2d 203, 210 (Ariz.1992). In a commercial tort context, punitive damages are harder to obtain. The Supreme Court has found that punitive damages are more likely to be appropriate where:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1995).

Here, Plaintiffs have provided some evidence tending to support the theory that Plaza deliberately drew money away from HCS and directed it to Body Blue for his own material benefit. However, of the factors elucidated in *Gore*, Plaintiffs have only begun to make a showing that the harm was the result of intentional malice, trickery, or deceit.³ At least one court considering the issue has found that the fact that the defendant acted maliciously was not alone enough to find the defendant's "behavior was sufficiently reprehensible for an award of punitive damages." *Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1000 (6th Cir.2007). Accordingly, summary judgment must be granted to Plaza on this point.

3 Plaintiffs do make a conclusory statement that they are financially vulnerable but fail to make any further showing on this point.

F. Plaza's Liability

*6 Plaintiffs ask for a finding that Plaza violated his duties as a corporate fiduciary as a matter of law when he executed a Royalty Agreement that "allowed HCS's only source of cash flow from its customers to be diverted to Body Blue, Inc.." Plaintiffs have failed to show that there is no genuine issue of material fact regarding Plaza's liability, and their motion for summary judgment cannot be granted.

The business judgment rule "precludes judicial inquiry into actions taken by a director in good faith and in the exercise of honest judgment in the legitimate and lawful furtherance of a corporate purpose." *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 31 P.3d 821, 828 (Ariz.Ct.App.2001). Where "there is a prima facie showing that a director is personally interested in a corporate transaction, the business judgment rule does not apply, and the burden shifts to the director to show that the decision with respect to a particular transaction is fair and serves the best interest of the corporation." *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787, 794 (Ariz.Ct.App.1990). Where "officers and directors engage in transactions outside the ordinary scope of the corporate business they are responsible for losses occurring as a result of their unauthorized use." *Kadish v. Phx.-Scotts. Sports Co.*, 11 Ariz.App. 575, 466 P.2d 794, 797 (Ariz.Ct.App.1970). "This is especially true where the acts of an officer or director smack of self-dealing." *Id.*

Here, it is undisputed that Plaza served on the board of directors of both companies and was an employee and

Herbal Care Systems, Inc. v. Plaza, Not Reported in F.Supp.2d (2009)

shareholder of both companies. As he made inquiries to starting a new company altogether and as he continued to receive a salary from Body Blue at the point at which it entered insolvency, cutting off HCS's revenues, there is some evidence of self-dealing. This, the Court believes, is sufficient to allow judicial inquiry into Plaza's business actions. However, Plaintiffs have certainly not overcome any genuine issues of material fact as to whether Plaza's actions violated his duty of loyalty to HCS and its shareholders. Plaza has provided evidence that HCS made *more* under the Royalty Agreement than it did under its original arrangement, as well as that the customers themselves prompted the switch, something that might demonstrate Plaza's actions were sound business ones. He has also presented evidence that he did not benefit financially from the arrangements put in place. Whether Plaza breached his fiduciary duty is a question for the trier of fact.

Accordingly,

IT IS ORDERED Plaza's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED Plaintiffs' Count 2 (Breach of Contract) is **DISMISSED** with prejudice as to James and Joyce Plaza.

IT IS FURTHER ORDERED Plaintiffs Wilhardt, Coghlin, Grundemann, and Oak Leaf Trust's Count 3 (Breach of Fiduciary Duty) is **DISMISSED** with prejudice as to James and Joyce Plaza.

***7 IT IS FURTHER ORDERED** all Motions in Limine are due 30 days from the date of this Order. Responses are due ten days afterward.

IT IS FURTHER ORDERED the parties shall submit a Joint Statement of the Case, of no more than two short paragraphs for the Court's review no later than **May 15, 2009**.

IT IS FURTHER ORDERED the parties shall submit proposed Jury Instructions in compliance with the

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procedures available on the Court's website, including but not limited to: a *joint* set of proposed jury instructions where the parties' instructions agree, a separate set of instructions (one for each party) where the parties do not agree, and legal authority supporting all proposed instructions whether the parties agree or not no later than **May 15, 2009**.

IT IS FURTHER ORDERED the Joint Proposed Pretrial Order is due **May 15, 2009**.

IT IS FURTHER ORDERED the parties are to file the proposed trial schedule no later than **May 15, 2009**.

IT IS FURTHER ORDERED the parties provide the Court with excerpts of the deposition testimony they propose to present at trial, in compliance with the procedures available on the Court's website, including but not limited to: Plaintiffs highlighting in yellow the portions they wish to offer and Defendants highlighting in blue those portions they wish to offer. If either party objects to the proposed testimony, an explanation of the objections is to be set forth independently and appended to the depositions no later than **May 15, 2009**.

IT IS FURTHER ORDERED the parties shall review the Court's standard Juror Questionnaire (available on the Court's website) and submit **NO MORE THAN 5 PROPOSED QUESTIONS EACH** (or 10 jointly) to be added to the standard Juror Questionnaire with the Court's approval no later than **July 6, 2009**.

IT IS FURTHER ORDERED the parties shall submit a second Joint Statement of the Case, of no more than a few short sentences for the Juror Questionnaire no later than **July 6, 2009**.

IT IS FURTHER ORDERED a final pretrial conference is set for **August 7, 2009 at 1:30 P.M.**

IT IS FURTHER ORDERED a status conference is set to review Juror Questionnaires on **August 10, 2009 at 1:30 P.M.**

IT IS FURTHER ORDERED Trial is set for **August 11, 2009 at 8:30 A.M.**

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Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

 KeyCite Yellow Flag - Negative Treatment
Order Modified by Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., D.S.C., September 22, 2011

2010 WL 1345287

Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina,
Charleston Division.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY and Employers Insurance of Wausau,
a Mutual Company, Plaintiffs,

v.

J.T. WALKER INDUSTRIES, INC., f/k/a Metal
Industries, Inc.; and MI Windows & Doors, Inc.,
f/k/a MI Home Products, Inc. and Metal
Industries, Inc. of California, Defendants.

Civil Action No. 2:08-2043-MBS. | March 30, 2010.

Attorneys and Law Firms

Morgan S. Templeton, Charleston, SC, J. Mark Langdon,
Emore and Wall, Raleigh, NC, for Plaintiffs.

Phyllis W. Ewing, William Howell Morrison, Moore and
Van Allen, Charleston, SC, for Defendants.

Opinion**ORDER AND OPINION**

MARGARET B. SEYMOUR, District Judge.

*1 Plaintiffs Liberty Mutual Fire Insurance Company and Employer's Insurance of Wausau (collectively "Liberty Mutual") filed this action on May 29, 2008 against Defendants J.T. Walker Industries, Inc. ("J.T. Walker") and MI Windows & Doors, Inc. ("MI Windows") (collectively "Defendants") seeking a declaratory judgment of the rights and obligations of the parties under certain insurance policies issued to Defendants with respect to the defense and settlement of five underlying state court suits. On August 4, 2008, Defendants answered the complaint and MI Windows asserted a counterclaim for breach of contract against Liberty Mutual. On February 19, 2009, MI Windows amended its counterclaim against Liberty Mutual.

This case is before the court on a motion for summary judgment filed by Liberty Mutual on March 12, 2009.¹ On April 30, 2009, Defendants responded to this motion. On May 11, 2009, Liberty Mutual replied. On June 30, 2009, Defendants filed a supplemental response and on July 13, 2009, Liberty Mutual replied. On August 28, 2009, Defendants filed a second supplemental response to which Liberty Mutual replied on September 1, 2009.

1 This was Liberty Mutual's second motion for summary judgment. Liberty Mutual's first motion for summary judgment dealt with choice of law. Entry 17. The parties have stipulated that South Carolina law applies to all issues in this case. Entry 19.

Also before the court is a motion to compel filed by Liberty Mutual on October 20, 2009. On November 25, 2009, MI Windows responded to Liberty Mutual's motion to compel, agreeing to produce all of the requested documents with the exception of documents from the Gary Law Group that "contain opinion work product or attorneys' mental impressions that were not communicated to MI Windows or anyone outside of the Gary Law Group."² On December 11, 2009, Liberty Mutual replied to MI Windows' response to its motion to compel.

2 This is the law group of Paul Gary, MI Windows' independent counsel in the underlying actions.

Also before the court is a motion for partial summary judgment filed by Defendants and another motion for summary judgment filed by Liberty Mutual, both of which were filed on October 23, 2009. On November 25, 2009, the parties responded to the motions for summary judgment. On December 16, 2009, the parties filed their replies to the motions for summary judgment. On January 11, 2009, Defendants filed a third supplemental response to Liberty Mutual's March 12, 2009 motion for summary judgment. On February 3, 2010, the court held a hearing on all of the above motions. On February 17, 2010, Defendants filed a fourth supplemental submittal in response to an evidentiary inquiry made by the court at the hearing, to which Liberty Mutual replied on February 18, 2010. On February 26, 2010, the parties filed a joint supplement containing documents relevant to Liberty Mutual's Third Motion for Summary Judgment.

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)**BACKGROUND**

This case is predicated on five underlying state court suits filed against MI Windows in South Carolina alleging that products manufactured by MI Windows were defective.³ Liberty Mutual issued six commercial general liability insurance policies to MI Windows' parent company J.T. Walker that provided coverage from May 1, 1997 to July 1, 2003 (hereinafter "the Policies").⁴ From July 1, 2003 to March 31, 2008, MI Windows obtained insurance coverage from Zurich North America.

- 3
- Riverwalk at Arrowhead Country Club Property Owners' Association, Inc. v. MI Home Products, et al., CA No. 03-CP-26-7169, Horry County, South Carolina ("Riverwalk");
 - Avian Forest Homeowners' Association v. MI Windows & Doors, Inc. et al., CA No. 02-CP-22-0687, Horry County, South Carolina ("Avian Forest");
 - Marais Property Owners' Association v. MI Windows, et al. CA No. 05-CP-10-1140, Charleston County, South Carolina ("Marais");
 - Magnolia North Homeowners Association v. MI Windows, et al., CA No. 05-CP-26-0044, Horry County, South Carolina ("Magnolia North"); and
 - Tilghman Shores Homeowners' Association v. MI Windows, et al. CA No 03-CP-26-4021, Horry County, South Carolina ("Tilghman Shores").

- 4
- Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, issued to Metal Industries, Inc.
 - Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1998 to May 1, 1999, issued to J.T. Walker Industries, Inc.
 - Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period July 1, 1999 to July 1, 2000, issued to J.T. Walker Industries, Inc.
 - Liberty Mutual Insurance Policy No. RG2-651-004245-030, Policy Period July 1, 2000 to July 1, 2001, issued to J.T. Walker Industries, Inc.
 - Liberty Mutual Insurance Policy No. RG2-651-004246-031, Policy Period July 1, 2001 to July 1, 2002, issued to J.T. Walker Industries, Inc.
 - Liberty Mutual Insurance Policy No. RG2-651-004246-032, Policy Period July 1, 2002 to July 1, 2003, issued to J.T. Walker Industries, Inc.

*2 Liberty Mutual has settled each of the underlying state lawsuits subject to MI Windows' objection that Liberty

Mutual should have taken the cases to trial. MI Windows contends that additional lawsuits are pending against it and more are expected to be filed because of the prevalence of construction defect lawsuits.

DISCUSSION**A. Summary Judgment Standard**

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir.1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denials of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed.R.Civ.P. 56(e); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir.1991). All that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249.

B. Liberty Mutual's Motion for Summary Judgment**1. Whether Liberty Mutual has the Right to Settle Claims Against MI Windows in its Sole Discretion Under the Policies**

Liberty Mutual argues that once MI Windows tendered the underlying state court actions to it in 2003, the Policies gave Liberty Mutual a duty and right to control the defense and settlement of these actions. The court agrees.

The interpretation of an insurance policy is a legal issue

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

under South Carolina law. *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574, 578 (S.C.2009) (citing *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 522 S.E.2d 345, 348-49 (S.C.Ct.App.1999)). When a contract is clear and unambiguous, the contract language alone determines how the contract is enforced and the contract terms must be construed by the court to give effect to their “plain, ordinary, and popular meaning.” *Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co. of Ill.*, 338 S.C. 43, 524 S.E.2d 847, 850 (S.C.Ct.App.1999) (citing *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 504 S.E.2d 127, 129 (S.C.Ct.App.1998)). Courts cannot use construction to change a contract or agreement. *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445, 447 (S.C.1984). Rather, courts can only interpret contracts as they are written. *Id.* “Extrinsic evidence giving [a] contract a different meaning from that indicated by its plain terms is inadmissible.” *C.A.N. Enter., Inc. v. S.C. Health & Human Servs. Fin. Comm’n*, 296 S.C. 373, 373 S.E.2d 584, 586 (S.C.1988) (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719, 722 (S.C.1973)). Only when a contract is ambiguous may extrinsic evidence be admitted to aid interpretation. *Rhame v. Nat’l Grange Mut. Ins. Co.*, 238 S.C. 539, 121 S.E.2d 94, 97 (S.C.1961); see also *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618, 626 (S.C.Ct.App.2008).

***3** Whether a contract’s language is ambiguous is a question of law. *S.C. Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299, 302-03 (S.C.2001). A contract is ambiguous “only when it may fairly and reasonably be understood in more ways than one.” *Hansen v. United Servs. Auto. Assoc.*, 350 S.C. 62, 565 S.E.2d 114, 117 (S.C.Ct.App.2002). Ambiguity cannot be created by pointing to a single sentence or clause. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E.2d 344, 349 (S.C.1976). In construing an insurance contract, a court must consider all of its provisions. *Id.*; see also *Edward Pinckney Assoc., Ltd. v. Carver*, 294 S.C. 351, 364 S.E.2d 473, 475 (S.C.Ct.App.1987) (courts should consider the whole transaction comprising the contract between parties even when agreements have not been executed simultaneously provided that they relate to the same subject matter).

In *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, the Supreme Court of South Carolina addressed the issue of exclusive control of settlements by an insurer and found that an insurance contract unambiguously granted an insurance company the authority to settle all claims arising under the policy when the contract stated that the insurance company “shall have the right and duty to defend in his name and behalf any suit against the Insured alleging damages, even

if such suit is groundless, false or fraudulent, but [the insurance company] shall have the right to make such investigation and settlement of any claim or suit as may be deemed expedient by [the insurance company].” 347 S.C. 642, 557 S.E.2d 670, 674-75 (S.C.2001).

Each of the Policies states:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, *at our discretion*, investigate any ‘occurrence’ and settle any claim or ‘suit’ that may result.

See, e.g., Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, Section I. Coverages, Coverage A Bodily Injury and Property Damage liability, Insuring Agreement (emphasis added).

The wording in each of the Policies indicates that Liberty Mutual has the authority to control settlement decisions at its discretion. Other provisions in the Policies lend support to this authority. Under the “Supplementary Payments” section, the Policies state, “[W]e will pay, with respect to any claim *we* investigate or *settle* or any ‘suit’ against an insured we defend” See, e.g., Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, Commercial General Liability Coverage Form at 8 (emphasis added); Liberty Mutual Insurance Policy No. RG2-651-004246-032, Policy Period July 1, 2002 to July 1, 2003, Commercial General Liability Coverage Form at 8 (emphasis added). In addition, the “Commercial General Liability Conditions” section of each policy states that in the event of an occurrence or claim, the insured must “cooperate with [Liberty Mutual] in the investigation or settlement of the claim or defense against the ‘suit.’” See, e.g., Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, Commercial General Liability Coverage Form at 12-13; Liberty Mutual Insurance Policy No. RG2-651-004246-032, Policy Period July 1, 2002 to July 1, 2003, Commercial General Liability Coverage Form at 12.

***4** Liberty Mutual conceded at the hearing that the Special Servicing Instructions (“SSIs”), which are issued to streamline the claims adjusting process, should be

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

considered part of the Policies for the purposes of summary judgment. Liberty Mutual argues that the SSIs only require that Liberty Mutual *discuss* any settlement of \$5000 or more with MI Windows and that the SSIs do not create ambiguity as to who controls settlements under the Policies. MI Windows argues that the requirement in the SSIs that Liberty Mutual discuss settlements with MI Windows makes the Policies ambiguous with regard to whether Liberty Mutual has sole discretion to settle tendered cases.

The SSIs do not contradict Liberty Mutual's settlement authority. The SSIs from October 11, 2001 and January 13, 2003⁵ state that "[c]laim settlements of \$5000 and above ... must be discussed with local contact then with Darlene Moffatt [John Roche in 2001] prior to making any offer." Entry 66, Ex. A; Entry 82, Ex. C. The American Heritage College Dictionary 397 (3d ed., Houghton Mifflin Co.2000) (1993) defines "discuss" as: "1. to speak with others about; 2. to consider in speech or writing." A discussion does not require MI Windows' approval of settlements. Therefore, based on the plain language of the contract, MI Windows does not have the right to approve settlement decisions.

5 These are the only SSIs that have been produced through discovery.

MI Windows, relying on California case law,⁶ seeks to admit extrinsic evidence of the course of performance of the insurance contracts to demonstrate that it has the right to approve settlements under the Policies. South Carolina case law does not permit the court to consider extrinsic evidence unless a contract is ambiguous or silent on an issue. See *C.A.N. Enter., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584, 586 (S.C.1988) (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719, 722 (S.C.1973)); *Rhame v. Nat'l Grange Mut. Ins. Co.*, 238 S.C. 539, 121 S.E.2d 94, 97 (S.C.1961); *City of Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 32 S.E.2d 777, 782 (S.C.1945). Moreover, to the extent that Defendants seek to admit extrinsic evidence to prove the terms of the SSIs prior to 2001, the court finds that the most recent SSIs govern the relationship between the parties because the claims were not submitted to Liberty Mutual before 2003. Based upon the foregoing, the court concludes that Liberty Mutual has the right to control settlement decisions under the Policies. Liberty Mutual's motion for summary judgment is granted as to this issue.

6 *Employers Reinsurance Co. v. Superior Court*, 64 Cal.Rptr.3d 733 (Cal.Ct.App.2008) (finding that course of performance evidence is relevant to the

interpretation of insurance contracts and can be used to expose a latent ambiguity).

2. Whether a Single Insurance Policy Must Cover Property Damage that Spans Multiple Policy Periods

Liberty Mutual argues that all of the policies triggered by a progressive damages claim provide coverage for that claim and that MI Windows cannot force Liberty Mutual to defend such a claim under a single policy.⁷ The court agrees.

7 MI Windows originally alleged that Liberty Mutual was attempting to force MI Windows to pay multiple \$500,000 deductibles per claim prior to contributing to any settlement on the underlying progressive damages claims, but has retracted this argument because Liberty Mutual conceded that MI Windows must pay only one \$500,000 deductible per claim or occurrence to Liberty Mutual. Entry 64 at 16; Entry 81 at 13.

In *Joe Harden Builders Inc. v. Aetna Casualty & Surety Co.*, the South Carolina Supreme Court adopted a "modified continuous trigger" approach in progressive damages cases when an insurance policy contemplates coverage of progressive damages. 326 S.C. 231, 486 S.E.2d 89, 91 (S.C.1997). Under this approach, "coverage is triggered at the time of an injury-in-fact and continuously thereafter" *Id.* In adopting this approach, the South Carolina Supreme Court stated that "the policy in effect at the time of the injury-in-fact covers all of the ensuing damages," but that other policies in effect during the progressive damages period were also triggered. *Id.* The South Carolina Supreme Court found that this approach would allocate risk among insurers when more than one policy is in effect during the progressive damage period. *Id.* (citing *Sentinel Ins. Co. v. First Ins. Co. of Hawai'i, Ltd.*, 76 Hawai'i 277, 875 P.2d 894 (H.I.1994)). In *Spartan Petroleum Co., Inc. v. Federated Mutual Insurance Co.*, the Fourth Circuit relied on *Joe Harden* in allocating liability among multiple insurance policies in a progressive damages case. 162 F.3d 805, 807, 810-12 (4th Cir.1998). Further, in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, the South Carolina Supreme Court reaffirmed the *Joe Harden* rule in ruling on a question certified from the Fourth Circuit. The South Carolina Supreme Court held that: "coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages. Coverage is also triggered under

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

every policy applicable thereafter.” 348 S.C. 559, 561 S.E.2d 355, 357 (S.C.2002) (internal citations omitted).

*5 In this case, the Policies state that Liberty Mutual “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” *See, e.g.,* Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, Commercial General Liability Coverage Form, Section I Coverages, Coverage A Bodily Injury and Property Damage Liability, Insuring Agreement. The Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *See, e.g.,* Wausau Insurance Companies, Policy Number 4828-00-000217, Policy Period May 1, 1997 to May 1, 1998, Commercial General Liability Coverage Form, Section V Definitions. The Policies define “property damage” to include “physical injury to tangible property, including all resulting loss of use of that property,” and state that “[a]ll such loss of use shall be deemed to occur at the time of the physical injury that caused it.” *Id.*

This language contemplates the coverage of progressive damages resulting from an injury-in-fact that occurred during the policy period. Under South Carolina law, the Liberty Mutual policy in effect at the time of the injury-in-fact covers the full settlement of each claim, as do all other policies covering the risk during the progressive damages period. The court grants Liberty Mutual summary judgment on this issue.

3. Whether Liberty Mutual Has the Right to Request Allocation of Payments Made to Defend and Settle Each Claim Against MI Windows From MI Windows’ Other Insurers

Liberty Mutual argues that it can compel contribution from other insurers that allegedly provide coverage triggered by the allegations of the claims in the underlying state court actions. As was discussed in the previous section, in *Joe Harden*, the South Carolina Supreme Court stated that the “modified continuous trigger” approach would allow for the allocation of risk among insurers when more than one insurance policy is in effect during the progressive damage. 486 S.E.2d at 91. This case law establishes that Liberty Mutual has the right to seek allocation of payments made to settle each of the underlying claims to MI Windows’ other insurance carriers that also covered the risk. The affidavit of Darlene Moffatt indicates that the Zurich policies provided MI Windows with insurance from July 1, 2003 to March 31, 2008. Entry 99-3, Moffatt Aff. ¶ 3, October

23, 2009. Therefore, if the allegations in the underlying state court cases indicate that progressive damages occurred during this period, Liberty Mutual has a right to seek allocation of payments from Zurich pro rata based upon the length of time the risk was covered. The court grants Liberty Mutual summary judgment on this issue.

C. Defendants’ Motion for Partial Summary Judgment

MI Windows seeks to have the court declare that if Liberty Mutual is permitted to allocate a portion of litigation costs to Zurich, MI Windows is only responsible for a proportionate amount of its \$500,000 deductible. In the alternative, MI Windows seeks a declaration that it is not obligated to pay more than its single \$500,000 deductible for each case/occurrence. “[I]t is Liberty Mutual’s position that it has no obligation to fund the entire ... settlement or prorate its deductible to conform to the allocation between Liberty Mutual and Zurich of defense costs and payment of the settlement sum.” Entry 99, Ex B ¶ 1, Letter from Liberty Mutual to MI Windows. At the hearing, both parties agreed that the Policies do not address the effect of allocation on deductibles. Thus, the Policies are not ambiguous as to this issue and the court must look to South Carolina law.

*6 The parties agree that no South Carolina case addresses the affect, if any, of allocation upon an insured’s responsibility to pay deductibles. As a result, the court will certify a question to the South Carolina Supreme Court pursuant to the privilege made available by Rule 244 of the South Carolina Appellate Court Rules. *See Med. Protective Co. of Fort Wayne, Indiana v. South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass’n*, C.A. Nos. 3:08-2184-CMC, 3:08-2222-CMC, 2009 WL 2567774, at *6 (D.S.C. Aug. 17, 2009). The parties are directed to submit questions to the court for certification to the South Carolina Supreme Court within fifteen (15) days of the issuance of this order. The court holds in abeyance a ruling on Defendants’ motion for partial summary judgment until the Supreme Court of South Carolina provides guidance on this issue.

D. Liberty Mutual’s Third Motion for Summary Judgment

1. Whether there is a Genuine Issue of Material Fact

Liberty Mutual argues that unless the court finds that there is a genuine issue of material fact as to whether MI Windows has the authority to approve settlements under the Policies, MI Windows’ bad faith claim must fail. The court disagrees.

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

"[T]here is an implied covenant of good faith and fair dealing in every insurance contract that neither party will do anything to impair the other's rights to receive benefits under the contract." *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52, 53 (1996) (internal citations and quotation marks omitted.). Generally, an insured can recover for a bad faith denial of coverage claim if the insured proves that there was "no reasonable basis to support the insurer's decision to deny benefits" under an insurance contract. *Cock-N-Bull Steak House, Inc. v. Gen. Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727, 730 (1996). However, "the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." *Mixon, Inc. v. Amer. Loyalty Ins. Co.*, 562 S.E.2d at 662 (citing *Tadlock*, 473 S.E.2d at 52). "[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action." *Tadlock*, 473 S.E.2d at 53 (quoting *Nichols*, 306 S.E.2d at 619).

South Carolina has recognized the rule that "[b]ad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim.... [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *Doe*, 557 S.E.2d at 674 (citing *Amer. Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 504 S.E.2d 356, 358 (Ct.App.1998); *Cock-N-Bull*, 321 S.C. 1, 466 S.E.2d 727; see also *Mixon*, 562 S.E.2d at 661-62 ("if there is a reasonable ground for contesting a claim, there is no bad faith in the denial of it.")). In *Doe*, the South Carolina Supreme Court recognized several cases that appeared to hold that an insurer did not act in bad faith in settling claim within the monetary limits of the policy:

*7 courts [other than the district court of Florida] have reached similar conclusions where an insured has challenged an insurer's decision to settle a claim. See generally *Mitchum v. Hudgens*, 533 So.2d 194 (Ala.1988) (insurer's exclusive right to settle claims against its insured imposes a duty raised by law to observe ordinary diligence in exercising that right; this duty does not compel the insurer to seek the insured's permission before settling a claim); *Frankel v. St. Paul Fire & Marine Ins. Co.*, 334 N.J.Super. 353, 759 A.2d 869 (N.J.App.Div.2000) (bad judgment on the part of the insurer does not constitute bad faith given the insurer's broad discretion in disposing of third party

claims); *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C.App. 192, 528 S.E.2d 372 (N.C.2000) (recognizing that an insurer, when settling claims with a third party, acts in its own self-interest); *Marginian v. Allstate Ins. Co.*, 18 Ohio St.3d 345, 481 N.E.2d 600 (Ohio 1985) (where a contract of insurance provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging a breach of the insurer's duty of good faith will not lie where the insurer has settled such claim within the monetary limits of the policy).

557, S.E.2d at 675. However, the South Carolina Supreme Court did not go so far as to reach the same conclusion. *Id.* Instead, the *Doe* court held that an insurer's decision to charge a portion of a malpractice settlement against one doctor's policy is subject to the covenant of good faith and fair dealing and that a party challenging such decisions must show bad faith on the part of the insurer. *Id.*

Liberty Mutual asserts that the following facts, as established in the record, demonstrate the reasonableness of its actions:

- The five underlying claims at issue were all transferred to Dan Langro, one of Liberty Mutual's senior adjusters for handling. Langro had extensive experience in the adjustment of construction defect cases, and was supervised on a recurring basis by Julien Savoie, who was responsible for construction defect claims nationally.
- Liberty Mutual assigned four of the five underlying cases to Finley Clarke ("Clarke") for Defense. The remaining case, Magnolia North, was assigned to Scott Taylor ("Taylor") and John Cutino. Combined, local defense counsel had over 45 years of experience in defending construction defect cases in South Carolina.
- MI Windows' independent defense counsel, Paul Gary ("Gary") was admitted pro hac vice in each case. Gary was extensively involved in defense preparations and his opinions were considered by local counsel in their evaluations of each case.
- Liberty Mutual did not spare any expense or otherwise restrict Clarke, Taylor and Gary in their defenses of MI Windows.

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

• Clarke and Taylor; Gary; Darlene Moffatt; and Don Langro convened for at least two global defense meetings and at least one mediation in each case to discuss the facts and merits of each action as they impacted the trial and settlement posture of each action.

***8** • Liberty Mutual has produced over 1000 pages of claim notes, which document debate between Liberty Mutual, local defense counsel, Gary and other insurance adjusters regarding the merits of each case. Moreover, MI Windows had access to these notes through the "Ristrac" systems for the entire duration of each case.

Entry 97 at 18-19. Liberty Mutual further argues that the settlement contributions authorized by Liberty Mutual in each of the underlying cases were generally less than 5% of the total settlement or verdict reached in each case.

However, in looking at the facts in a light most favorable to Defendants, the court finds that MI Windows has established a genuine issue of material fact as to whether Liberty Mutual acted in bad faith in settling the underlying state court actions. Gary's opinion that these settlements were not reasonable under the circumstances could, by itself, lead a reasonable jury to conclude that Liberty Mutual acted in bad faith in settling these cases. See Gary Dep. 38:16-39:7; 39:10-22; 52:17-53:2; 53:25-54:18; 58:6-25; 59:14-60:6; 62:10-19, May 27, 2009. Gary's opinion appears to be based upon his evaluation of the strength of MI Windows' defenses in each case, MI Windows' likelihood of success, and MI Windows' estimated range of potential exposure as outlined in his audit letters. See Entry 131. In addition, the expert report of Charles Miller ("Miller"), which states that Liberty Mutual "failed to comply with insurance industry standards and practices by placing its own interests above those of its insured" also supports a finding that there is a genuine issue of material fact to be resolved. Miller Report at ¶ 15. Miller's analysis of MI Windows' defenses in each of the underlying claims and conclusion that Liberty Mutual failed to properly evaluate MI Windows' defenses for the purpose of justifying the settlement of these actions further demonstrates that a genuine issue of material fact remains on the bad faith issue. See Miller Report at ¶¶ 24, 26, 27, 30, 31, and 32.

Liberty Mutual also argues that it is entitled to summary judgment with regard to MI Windows' bad faith claim because MI Windows cannot prove any damages caused by its alleged bad faith. A plaintiff must provide enough evidence such that a court or jury can determine the amount of damages with reasonable certainty or accuracy. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d

794, 796 (S.C.1981). Mathematical certainty is not required. *Id.*

In this case, MI Windows has provided sufficient evidence of damages for its bad faith claim to continue. Specifically, MI Windows alleges that its damages with regard to Liberty Mutual's bad faith are equal to its deductible responsibilities for the underlying claims. Liberty Mutual indicated at the hearing that it felt it was owed a full \$500,000 deductible per claim, which MI Windows disputes. This is sufficient to allow the court or jury to determine the amount of damages for MI Windows' bad faith claim with a reasonable degree of certainty.

2. Whether MI Windows' Bad Faith Claim is Barred by S.C.Code Ann. § 15-3-530

***9** Liberty Mutual argues that MI Windows' bad faith claim is barred by South Carolina's three-year statute of limitations because this claim first accrued in the fall of 2003 or early 2004 and MI Windows did not assert its bad faith claim until May 2009. Liberty Mutual contends that Liberty Mutual's denial of approval rights to MI Windows dates back to when MI Windows first became aware of Liberty Mutual's position that it had sole discretion to settle cases. The court disagrees.

South Carolina has a three year statute of limitations for bad faith/breach of contract claims. S.C.Code Ann. § 15-3-530. A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken. *State v. McClinton*, 369 S.C. 167, 631 S.E.2d 895, 898 (S.C.2006). "The 'discovery rule' provides an exception to the general rule and tolls the statute of limitations until a person knows or by the exercise of reasonable diligence should know that he has a cause of action." *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (S.C.1998).

The court concludes that MI Windows' bad faith cause of action accrued when it received notice that Liberty Mutual settled one of the underlying actions without MI Windows' consent. MI Windows' bad faith counterclaim is not barred by the statute of limitations. Based upon all of the foregoing, the court denies Liberty Mutual's motion for summary judgment on MI Windows' counterclaim for bad faith.

E. Liberty Mutual's Motion to Compel

Liberty Mutual contends that the Gary Law Group's internal "opinion work product" must be produced

Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., Slip Copy (2010)

because MI Windows has waived any such privilege by putting the Gary Law Group's analyses at issue in its bad faith claims. The court agrees.

The Fourth Circuit has recognized that "opinion work product 'enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.'" *In re Allen*, 106 F.3d 582, 607 (4th Cir.1997). "Courts have articulated an exception to opinion work product immunity by allowing discovery of counsel's mental impressions when they are at issue and necessary to the litigation." *Leviton Mfg. Co., Inc. v. Shanghai Meihao Elec., Inc.*, 613 F.Supp.2d 670, 726 (D.Md.2009). While the Fourth Circuit has not yet ruled on this specific issue, district courts in both Maryland and North Carolina have concluded that such an exception is not inconsistent with Fourth Circuit precedent. *Id.*; *Charlotte Motor Speedway, Inc. v. Int'l Ins. Co.*, 125 F.R.D. 127, 130-31 (M.D.N.C.1989).

Because MI Windows represented at the hearing that it intended to rely upon Gary's opinions in proving its bad faith claim, putting these opinions at issue, Liberty Mutual is entitled to discovery of the Gary Law Group's internal opinion work product to the extent it is relevant to MI Window's bad faith claim or helped to form the basis for any of Gary's opinions on the reasonableness of the

settlements in the underlying cases. Therefore, the court grants Liberty Mutual's motion to compel.

CONCLUSION

***10** For the reasons set forth above, the court hereby **grants** Liberty Mutual's motion for summary judgment (Entry 49); **holds in abeyance** a ruling on Defendants' motion for partial summary judgment (Entry 99); **denies** Liberty Mutual's third motion for summary judgment (Entry 97); and **grants** Liberty Mutual's motion to compel (Entry 96) to the extent that Defendants' counsel Paul Gary relied on the documents being sought in forming his opinion as to the reasonableness of settlement in the underlying cases. **The parties are ordered to submit questions on the allocation of deductibles issue to the court for certification to the South Carolina Supreme Court within fifteen (15) days of the issuance of this order.**

IT IS SO ORDERED.

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