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RECEIVED
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SC Court of Appeals

March 4, 2021

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Dear Ms. Kitchings,

RE: Daniel O’Shields and Roger W. Whitley A Partnership d/b/a O&W Cars, Appellants, v. Columbia Automotive Company, LLC d/b/a Midlands Honda, Respondent
Appellate Case No. 2017-000902

Pursuant to Rule 208(b)(7), SCACR, Appellants, Daniel O’Shields and Roger Whitley, respectfully bring the following four supplemental authorities to the attention of the Court:

Artis v. Murphy-Brown, LLC, No. 7:14-CV-00237-BR, at *6 (E.D.N.C. Mar. 8, 2019) (punitive awards of 9 to 12 million dollars each for six plaintiffs, after reduction to the statutory cap from 75 million dollars each).

The case pertains to Issue I of the Brief of Appellant and I.F of the Reply Brief.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (A “party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings”).

The case pertains to page 20 of the Brief of Respondent and Record page 84 (admitting paragraphs 1-4 of the 2d Am. Compl.), Record page 67 (2d Am. Compl. stating there are two Plaintiffs).

Honeywell v. Sterling Furniture Co., 310 Or. 206, 213 (Or. 1990) (explaining that attorney fee awards in an unlawful trade practices case assure that wronged consumers can obtain counsel where such claims “require an expenditure of attorney time the value of which greatly exceeded the value of the goods or services in question.”)

The case pertains to page 37 of the Brief of Appellant and page 10 of the Reply Brief.

Dennis v. Atl. Coast Line R. R., 70 S.C. 254, 259, 49 S.E. 869, 870 (1904) (citing *Sawyer v. Macaulay*, 18 S. C. 543 (1883)) (explaining that it is “well settled” in South Carolina that matters “relating to the remedy” are enforced according to the law of the forum, not according to the law of the state in which the tort was committed).

The case pertains to Issue III of the Brief of Appellant and III.B.1 of the Reply Brief.

Sawyer v. Macaulay, 18 S. C. 543, 549 (1883) (stating, “[T]he *lex fori* shall govern as to the remedy and its enforcement.”)

The case pertains to Issue III of the Brief of Appellant and III.B.1 of the Reply Brief.

Driskell v. Summit Contracting Grp., No. 19-1456, 828 Fed.Appx. 858 at * 871 (2020) (4th Cir. Sep. 24, 2020) (unpublished) (“Driskell also insists that he shouldn't have been required to choose between the punitive-damages verdict (which arose from his wrongful-discharge claim) and the award of attorney's fees (which arose from his REDA claim). We agree.”); *id.*, n.8 (finding it “doubtful” that the North Carolina Supreme Court would bring attorney fees within the ambit of N.C. G.S. § 1D-20).

The case pertains to Issue III of the Brief of Appellant and III.B.2 of the Reply Brief.

Copies of the cases are attached.

Yours very truly,

LAW OFFICE OF BROOKS R. FUDENBERG,
LLC



Brooks R. Fudenberg
Attorney for Appellant

cc: Robert Reibold, Esq. (w/enclosures)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:14-CV-00237-BR

BEN ARTIS, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 MURPHY-BROWN, LLC, d/b/a)
 SMITHFIELD HOG PRODUCTION)
 DIVISION,)
)
 Defendant.)
 _____)

ORDER

This matter is before the court on the parties’ post-trial motions following the entry of final judgment on the jury verdict awarding the six trial plaintiffs in this case compensatory and punitive damages on their nuisance claims. (DE ## 275, 277, 281, 285.)

I. DEFENDANT’S MOTION TO ALTER OR AMEND

Pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, defendant requests that the court vacate the judgment. “A Rule 59(e) motion may only be granted in three situations: ‘(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.’ It is an extraordinary remedy that should be applied sparingly.” Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012) (citations omitted). Because defendant filed its motion within 28 days of entry of the judgment, the court considers it only under this standard, rather than under the Rule 60(b) standard. See Robinson v. Wix Filtration Corp., 599 F.3d 403, 412 (4th Cir. 2010) (“We have squarely held, however, that a motion filed under both Rule 59(e) and Rule 60(b) should be analyzed only under Rule 59(e) if it was filed no

later than [28] days after entry of the adverse judgment and seeks to correct that judgment.” (citations omitted)).

Defendant argues that the judgment should be vacated for the failure to join Greenwood Livestock LLC (“Greenwood Livestock”) and the Pagle Corporation (“Pagle”), owners of the subject farms, as necessary and indispensable parties. Defendant filed a similar motion in the related case of McKiver v. Murphy-Brown, LLC, No. 7:14-CV-180-BR, and for the reasons stated in the court’s 17 December 2018 order in that case, (DE # 346, at 5-7), the motion will be denied.

II. DEFENDANT’S MOTION FOR JUDGMENT AS A MATTER OF LAW

Based on Rule 50(b) of the Federal Rules of Civil Procedure, defendant renews its earlier motions for judgment as a matter of law. In considering a Rule 50(b) motion, “the question is whether a jury, viewing the evidence in the light most favorable to [the non-movant], could have properly reached the conclusion reached by th[e] jury. If reasonable minds could differ about the result in this case, [the court] must affirm the jury’s verdict.” Bryant v. Aiken Reg’l Med. Ctrs. Inc., 333 F.3d 536, 543 (4th Cir. 2003) (citation and internal quotation marks omitted).

Defendant argues that it is entitled to judgment as a matter of law because (1) plaintiffs failed to present sufficient evidence to support punitive damages; (2) plaintiffs presented no evidence to support compensatory damages as limited by an amendment to North Carolina’s Right to Farm Act (“RFA”); (3) plaintiffs’ claims are barred by an amendment to the RFA; and (4) Greenwood Livestock and Pagle are indispensable parties.

As for the first ground, defendant contends it is entitled to judgment as a matter of law because plaintiffs failed to present sufficient evidence to support punitive damages. Considering the evidence developed at trial in the light most favorable to plaintiffs, a reasonable jury could

have found defendant liable for punitive damages. As for the second and third ground, because plaintiffs brought this action prior to the effective dates of the subject amendments to the RFA, see McKiver (DE # 346) at 2-5; McGowan v. Murphy-Brown, LLC, No. 7:14-CV-182-BR (DE # 472) at 2-5, those amendments do not limit the compensatory damages plaintiffs may recover or bar their claims. As for the fourth ground, defendant relies on its motion to alter or amend the judgment. As addressed above, for the reasons stated in McKiver (DE # 346), the court concludes Greenwood Livestock and Pagle are not indispensable parties.

The court will deny defendant's motion for judgment as a matter of law.

III. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant moves for a new trial under Rule 59(a) of the Federal Rules of Civil Procedure. "In considering a motion for a new trial, a trial judge may weigh the evidence and consider the credibility of witnesses, and if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial." King v. McMillan, 594 F.3d 301, 314 (4th Cir. 2010) (citation and internal quotation marks omitted).

Defendant asks the court to revisit a number of its prior rulings, covering pretrial cross-motions for summary judgment through jury instructions. The court declines to disturb these rulings. The only issues defendant raises that merit further discussion are its allegations of misrepresentations by plaintiffs' counsel regarding the measure of damages and its request for remittitur.

A. Alleged Misrepresentations by Plaintiffs' Counsel

Defendant moves for a new trial based on certain statements made by plaintiffs' counsel during his opening statement and closing argument.

In the interests of justice and efficiency, a new trial should not be lightly granted. To begin with, a new trial should be granted only if prejudicial statements are so egregious that they prevent the complaining party from receiving a fair trial. *See DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 519 (4th Cir. 1985). If a party fails to object to an error at trial, a new trial will not be granted unless “exceptional circumstances exist such as when the error is so obvious or so serious that the public reputation and integrity of the judicial proceeding is impaired.” *Hafner v. Brown*, 983 F.2d 570, 578 (4th Cir. 1992) (internal quotation marks omitted). Finally, a curative instruction may render prejudicial remarks harmless. *See City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 983-84 (4th Cir. 1987).

Just Wood Indus., Inc. v. Centex Const. Co., No. 98-1855, 1999 WL 606859, at *7 (4th Cir. Aug. 12, 1999) (unpublished table decision).

First, defendant contends plaintiffs’ counsel misstated the law in his opening statement and closing argument by suggesting that the jury should award compensatory damages based on the costs to prevent the harm, that being the amount to install and run an alternative waste management system known as “Super Soils.” (Def.’s Mem. Supp., DE # 284, at 2-3.) Defendant contends such argument is not in accordance with North Carolina law, which provides that “compensatory damages are measured by the amount of money necessary ‘to restore the plaintiff to his original condition or to make the plaintiff whole.’” (*Id.* at 3 (quoting Watson v. Dixon, 532 S.E.2d 175, 177-78 (N.C. 2000)).) While defendant’s statement of law is accurate, it fails to acknowledge that North Carolina law also recognizes that a purpose of compensatory damages is to deter conduct that causes harm. *See Haarhuis v. Cheek*, 805 S.E.2d 720, 728 (N.C. Ct. App. 2017), writ denied, review denied, appeal dismissed, 814 S.E.2d 103 (N.C. 2018). As such, counsel may make a general deterrence argument in reference to compensatory damages, provided counsel does not refer to those aggravating factors necessary for an award of punitive damages “or urge the trier of fact to punish the defendant.” *Id.* Plaintiffs’ counsel’s argument did not exceed this standard. However, even if it did, the court finds that the statement was not egregious enough to have prevented defendant from receiving a fair trial.

Second, defendant argues plaintiffs' counsel failed to heed the court's instructions not to discuss "salaries, net worth, [or the] financial condition of the defendant" when referencing compensatory damages. (Def.'s Mem. Supp., DE # 284, at 3 (quoting 8/2/18 Tr., DE # 252, at 3).) Before closing arguments, the court instructed plaintiffs' counsel to address punitive damages "last" in his argument, not to discuss defendant's financial numbers before his punitive damages argument, and that he must fully open. (8/2/18 Tr., DE # 252, at 3-4, 9-10.) Defendant contends plaintiffs' counsel violated these instructions in his rebuttal by arguing the jury should award as compensatory damages "what it takes to prevent the harm," which "Smithfield can afford [to fix] and you know that because of the revenue numbers." (*Id.* (quoting 8/2/18 Tr., DE # 252, at 128-29).) Notably, defendant did not contemporaneously object to this portion of argument, but at any rate, the court concludes plaintiffs' counsel did not violate the court's instructions.

Third, defendant argues plaintiffs' counsel made an inappropriate argument regarding punitive damages. Defendant contends that, in his rebuttal argument, plaintiffs' counsel conflated a concept related to compensatory damages with a concept related to punitive damages, when he "told the jury that it must 'consider the interest of the community' in assessing 'the degree of the defendant's awareness of the probable consequences of its conduct.'" (Def.'s Mem. Supp., DE # 284, at 4 (quoting 8/2/18 Tr., DE # 252, at 115).) Defendant did not contemporaneously object to this argument. Reviewing plaintiffs' counsel's rebuttal as a whole, he does not conflate these concepts, rather, he concludes his thoughts about the interest of the community relative to compensatory damages and then moves to argument regarding evidence relevant to punitive damages. (*See* 8/2/18 Tr., DE # 252, at 115-17.) As such, plaintiffs' counsel's argument was not improper.

Alternatively, defendant requests a new trial based on the court's failure to provide defendant's requested limiting instruction to correct plaintiffs' counsels' purported misstatements. Having concluded that the statements and arguments to which defendant refers were not improper, there was no reason for the court to give the jury the requested limiting instruction. Furthermore, the court instructed the jury regarding what it should consider during deliberations:

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in this case.

(8/2/18 Tr., DE # 252, at 133.) The court also instructed the jurors that it was their duty to follow the law. (*Id.* at 131.) The court's instructions cured any potential prejudice resulting from plaintiffs' counsel's statements. A new trial is not warranted.

B. Defendant's Request for Remittitur

Absent a new trial, defendant moves this court to remit the jury verdict on the ground that the damages awarded were excessive. The jury awarded each of the six trial plaintiffs compensatory damages ranging from \$3 million to \$5 million and punitive damages of \$75 million. Pursuant to North Carolina's cap on punitive damages, N.C. Gen. Stat. § 1D-25(b), the court reduced the jury's punitive damages awards, resulting in such awards ranging from \$9 million to \$15 million per plaintiff.

1. Compensatory Damages

The court applies North Carolina law to determine whether the compensatory damages awards should be remitted for excessiveness. See Konkel v. Bob Evans Farms Inc., 165 F.3d 275, 280 (4th Cir. 1999) ("[A] district court sitting in diversity must apply state law standards

when it considers a Rule 59(a) motion for a new trial based upon the alleged excessiveness of the jury's compensatory damage award." (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438-39 (1996))).

While classic remittitur is not permitted in North Carolina, the concept is governed by Rule 59 of the North Carolina Rules of Civil Procedure in which a new trial may be granted to a party for excessive . . . damages appearing to have been awarded under the influence of passion or prejudice.

Rhyne v. K-Mart Corp., 562 S.E.2d 82, 89 (N.C. Ct. App. 2002) (citing N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999)), aff'd, 594 S.E.2d 1 (N.C. 2004).

Defendant contends that the compensatory damages awards are excessive because the plaintiffs' loss of the use and enjoyment of their properties should be measured by the values of their properties, which purportedly range from "\$12,000 to \$71,000." (Def.'s Mem. Supp., DE # 284, at 30 (citing N.C. Gen. Stat. § 106-702(a)(2) (2017) (limiting compensatory damages for a temporary nuisance emanating from an agricultural operation to diminution of fair rental value of the plaintiff's property)).) Plaintiffs' compensatory damages are not so limited. See McGowan (DE # 472) at 5 (holding that the effective date of N.C. Gen. Stat. § 106-702(a)—11 May 2017—controls the statute's application).

Furthermore, the court has considered the consequences of adopting such an approach. It would, in essence, grant a private actor the right to take the property of a private citizen, akin to the power of eminent domain. Cf. N.C. State Hwy Comm'n v. Farm Equip. Co. Inc., 189 S.E.2d 272, 278 (N.C. 1972) ("Private property can be taken by the exercise of the power of eminent domain *only* where the taking is for a public use." (emphasis added) (citation omitted)); Carlos A. Ball, The Curious Intersection of Nuisance and Takings Law, 86 B.U. L. Rev. 819, 857-58 n.220 (2006) ("There are also important remedial differences between a takings claim and a nuisance action. The plaintiff in a takings case is only entitled to compensation for the loss in

the property's fair market value. A plaintiff in a nuisance case, on the other hand, may be entitled to an injunction. If an injunction is not requested, or if one is not deemed appropriate, a plaintiff in a nuisance action may nonetheless be entitled to not only damages that reflect the loss in fair market value, but also to damages that address additional harms such as the effects on the plaintiff's health caused by the defendant's conduct." (citations omitted)). The purpose of eminent domain is to compensate the individual for the economic value of the property right taken, see Richardson, 817 S.E.2d at 887-88, while the purpose of nuisance law, is to compensate the individual for the *lost use and enjoyment* of his or her property, see Hanna v. Brady, 327 S.E.2d 22, 25 (N.C. Ct. App. 1985). These distinct purposes warrant distinct valuation. See Brown v. Legal Found. of Wash., 538 U.S. 216, 236-37 (2003) ("[G]iven 'the liability of all property to condemnation for the common good,' an owner's nonpecuniary losses attributable to 'his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.'" (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949))).

Accordingly, the plaintiffs in this nuisance action properly pled compensatory damages to redress their discomfort and annoyance. In re NC Swine Farm Nuisance Litig., No. 5:15-CV-0013-BR, 2017 WL 5178038, at *10 (E.D.N.C. Nov. 8, 2017). This harm is not capable of precise calculation. See Hanna, 327 S.E.2d at 25 (recognizing in a nuisance action, "[t]he type of injuries suffered by the plaintiff—physical pain, annoyance, stress, deprivation of the use and comforts of one's home—are intrinsically not susceptible of exact pecuniary calculation" (internal quotation marks and citations omitted)). The court instructed the jury as much:

The plaintiff[s] claim that the interference with the use and enjoyment of his or her property has caused him or her anger, embarrassment, annoyance, inconvenience, decreased quality of life, and/or physical and mental discomfort. There is no fixed formula for placing a

value on these alleged harms. You will determine what is fair compensation by applying logic and common sense to the evidence.

(8/2/18 Tr., DE # 252, at 141.) What the jury determines those damages to be is a particular and peculiar function of the jury. Hanna, 327 S.E.2d at 25 (“The determination of such damages is left to the sound judgment and discretion of the trier of fact.”).

Defendant also claims the compensatory damages awards are excessive when compared to the amounts awarded in (1) related cases where plaintiffs’ counsel did not make purportedly improper argument regarding the measure of damages and (2) other North Carolina nuisance cases. The awards here are higher than awards in the trials of McKiver (\$75,000 per trial plaintiff) and McGowan (\$65,000 per trial plaintiff). However, those cases involve different plaintiffs, hog farms, and facts from those at issue here, and as discussed previously, plaintiffs’ counsel’s arguments at this trial were not improper. As for the other North Carolina nuisance cases to which defendant cites, the court has considered them but concludes they alone do not justify remittitur.

Considering the record as a whole, including the difference in the trial plaintiffs’ awards demonstrating that the jury considered the parties individually, there is no indication that the jury’s decision was made under the influence of passion or prejudice. As such, the court will not remit the jury’s compensatory damages awards in this case.

2. Punitive Damages

Defendant contends the court should remit the punitive damages awards because they too are excessive. “The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). The Supreme Court has identified “guideposts” this court must consider in an analysis of such a challenge: “(1) the degree of reprehensibility of the

defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and 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." Id. at 418 (citation omitted). The first guidepost is the most important, id. at 419, and is the only one upon which defendant relies.

"[T]o determine the reprehensibility of a defendant," the court consider[s] whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to 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.

Id. (citation omitted).

Here, plaintiffs testified that defendant's conduct affected their physical and mental well-being. In addition to the type of harm suffered, the jury was required to consider the existence of malice or willful or wanton conduct determining whether to award punitive damages in the first instance. (See 8/2/18 Tr., DE # 252, at 143.) Under North Carolina law, and as the court instructed the jury,

[m]alice means a sense of personal ill will toward the plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the plaintiff.

Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.

(Id.) Consequently, the jury found that defendant's conduct evinced an indifference to and reckless disregard of the safety of others and/or the trial plaintiffs' harm resulted from intentional malice. Furthermore, the nuisance was not an isolated event but occurred with frequency over the seven-year damages period. These factors collectively indicate defendant's misconduct was sufficiently reprehensible to support the punitive damages awarded.

Defendant cites to three reasons as to why its conduct was not reprehensible. First, it relies on the lawfulness of hog operations. It is true that the subject hog farm operates lawfully under its State permit. However, plaintiffs presented evidence that defendant's predecessor company vigorously opposed the efforts of local boards of health, county commissioners, and state legislators to hold the hog industry to any regulatory standard beyond what is required by the State permit. The company was successful in its efforts until 20 years ago when a moratorium went into effect banning new or expanded industrial hog operations from using the open lagoon and spray field waste management systems. That moratorium remains today. The fact that the subject hog farm complies with its permit, even with defendant's assistance, carries little weight.

Second, defendant suggests its conduct is less reprehensible because plaintiffs did not complain prior to filing suit. The majority of the trial plaintiffs acknowledged they had not complained before the lawsuit about the conditions they were experiencing. Even so, prior to the filing of this action, defendant was well aware of reports of offensive odors associated with industrial hog operations in eastern North Carolina and of the effects of those operations on the people in the surrounding communities. Also, it has long been aware that persons in those communities have complained about hog odors and associated truck traffic interfering with their daily activities and quality of life. Furthermore, prior to this action, it became aware that counties in North Carolina were concerned about the impact of industrial hog operations on the health and welfare of their citizenry including impacts due to odor, traffic, and noise. More important, however, is the fact that with the filing of this action—four years prior to trial—defendant learned of these plaintiffs' complaints, yet it did nothing to lessen the effects of the nuisance, making defendant's conduct more reprehensible.

Finally, defendant cites its lack of profit during the relevant time period. Defendant's profit margin does not minimize the reprehensibility of its conduct. Defendant is part of a vertically integrated business. Under this structure, defendant sells its hogs to its parent company. The parent company then processes and sells the resulting products for profit. Because of this business structure, if defendant wanted to purchase lagoon covers (which could reduce odor from the hog operation), it would be funded by its parent or grandparent company. Defendant, however, has chosen not to implement this technology. Instead, it has attempted to shift that responsibility onto the owner of the farm, even though it effectively controls every aspect of the operation, including the supply of hogs, their feed, their transportation, and the operating procedures, and provides frequent technical assistance. In nearly every aspect, defendant dictates the activities at the farm.

Additionally, although not argued by defendant, the court considers the second State Farm guidepost—the disparity between actual and punitive damages. The Supreme Court refuses to adopt a bright-line ratio in this regard, State Farm, 538 U.S. at 425; however, the Court has recognized that “[s]ingle-digit multipliers are more likely to comport with due process,” *id.* The ratio here is 3:1. See N.C. Gen. Stat. § 1D-25(b) (“Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), *whichever is greater.*” (emphasis added)).

For these reasons, the court concludes the punitive damages awards do not offend due process. Accordingly, they will not be remitted.

IV. PLAINTIFFS' MOTION TO AMEND

Plaintiffs move to amend the judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. (See DE # 281, at 2.) Under Rule 60(b)(6), “[o]n motion and just terms, the court

may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief.” To grant relief under this provision of Rule 60, the circumstances must be “extraordinary.” Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011). “The decision to grant or deny a Rule 60(b)(6) motion, as with all Rule 60 motions, is committed to a district court’s sound discretion.” Brunson v. Colvin, No. 5:11-CV-591-FL, 2013 WL 3761305, at *1 (E.D.N.C. July 16, 2013) (citations omitted).

Specifically, plaintiffs request that the court set aside its reduction of the jury’s punitive damages awards on the ground that North Carolina’s statutory punitive damages cap is unconstitutional as applied. The court has previously considered plaintiffs’ arguments and does not find that extraordinary circumstances exist to grant relief under Rule 60(b)(6). Accordingly, the court stands by its earlier decision reducing the punitive damages awards in this case. (DE # 265.)

V. CONCLUSION

For the foregoing reasons, defendant’s motions to alter or amend the judgment (DE # 275), for judgment as a matter of law (DE # 277), and for a new trial (DE # 285) are DENIED. Plaintiffs’ motion to amend the judgment (DE # 281) is DENIED. Additionally, defendant’s 3 August 2018 oral motion to set aside the verdict is DENIED.

This 8 March 2019.



W. Earl Britt
Senior U.S. District Judge

308 S.C. 385
Court of Appeals of South Carolina.

Peter W. POSTAL, Appellant,
v.
Edward C. MANN, III, Respondent,
v.
Bud KINNIE, Third–Party Defendant.

No. 1812.

|
Heard April 6, 1992.

|
Decided May 11, 1992.


Synopsis

In action to recover for breach of real estate sale contract, the Circuit Court, Richland County, [Joseph M. Strickland](#), Master–In–Equity, denied recovery on lost note, holding that there was insufficient evidence of note's existence. Plaintiff appealed. The Court of Appeals, Shaw, J., held that defendant was bound by admission in his answer that note existed.

Reversed and remanded.

West Headnotes (4)

[1] **Pleading**  [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Pleading  [Pleadings abandoned or withdrawn, or to which demurrer has been sustained](#)

Parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.

[10 Cases that cite this headnote](#)

[2] **Pleading**  [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Allegations, statements, or admissions contained in pleading are conclusive as against pleader and party cannot subsequently take position


contradictory of, or inconsistent with, his pleadings.

[9 Cases that cite this headnote](#)

[3] **Pleading**  [Conclusiveness of Allegations or Admissions on Party Pleading](#)

Facts which are admitted by pleadings are taken as true against pleader for purpose of action.

[6 Cases that cite this headnote](#)

[4] **Commercial Paper**  [Traverses or denials and admissions in general](#)

In action to recover on lost note, defendant was bound by his admission in his answer that note existed, as he failed to amend his answer to deny existence of note.

Attorneys and Law Firms

****322 *385** [Robert F. McMahan, Jr.](#), of Glenn, Irvin, Murphy, Gray & Stepp, Columbia, for appellant.

[Louis H. Lang](#), of Callison, Tighe, Robinson & Anastasion, Columbia, for respondent.

[Carlos W. Gibbons, Jr.](#), of Ashley & Gibbons, Columbia, for third-party defendant.

Opinion

SHAW, Judge:

Appellant, Peter W. Postal, instituted this action against respondent, Edward C. Mann, III, alleging breach of contract associated ****323** with the sale of real estate. From the final order of the master-in-equity, Postal appeals only the denial of recovery ***386** on a lost note in the amount of \$8,000. We reverse and remand.

The only issue before us is whether the master erred in finding there was insufficient evidence of the existence of the note in question. We find that he did.

The record before us reveals the following. Postal entered into a contract with Mann for the purchase of certain real

estate. Bud Kinnie, named as a third-party defendant by Mann, was the listing real estate agent.¹ In his complaint, Postal asserted several breaches of contract involved with the sale. He further sought recovery of an \$8,000 note allegedly tendered by Mann to Kinnie which Kinnie subsequently assigned to Postal. At trial, Kinnie testified he received an \$8,000 commission on the sale but, to facilitate Mann's cash flow, he lent the \$8,000 commission to Mann, taking back a note. Both Kinnie and Postal testified he assigned the note to Postal. However, neither Postal nor Kinnie could produce the note at trial. Kinnie stated the last time he saw the note it was in a file he had left at Mann's office and, although he had looked, he was unable to find the note.

Kinnie grounded one of his trial objections to Mann's cross-examination questions on the admitted existence of the note in Mann's answer. Mann's attorney responded he had always assumed the note would reappear, but now felt it did not exist. He added, "If it becomes an issue, I'll ask to amend my answer." Postal continued to assert the existence of the note was admitted by Mann in the pleading and made a directed verdict motion on the \$8,000 note based on the admission in Mann's answer. There is no indication Mann asked to amend his answer.²

Despite the testimony and the admission in the pleading, the master found there was "insufficient evidence to determine that Kinnie actually took a note back for his sales commission." The master, thus, made no findings on the terms of the note. Postal made a motion for an amendment of this

finding *387 based on the admission in Mann's answer. The master summarily denied the motion.

[1] [2] [3] It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action. *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964).

[4] In his complaint, Postal alleged in paragraph 19 that "As a part of the closing on the property, Mann tendered a note to Kinnie in the amount of Eight Thousand (\$8,000.00) Dollars ..." Paragraph 15 of Mann's answer states "Paragraph 19 of the Complaint is admitted." Further, Mann asserted several defenses to the note in his answer, but never denied its existence. Having failed to amend his answer, Mann was bound by that admission. Accordingly, we hold the trial judge erred in finding the evidence insufficient as to the existence of the note and remand for consideration the terms of the note.

REVERSED AND REMANDED.

SANDERS, C.J., and GARDNER, J., concur.

All Citations

308 S.C. 385, 418 S.E.2d 322

Footnotes

- ¹ Kinnie was subsequently granted a non-suit in a separate order. No appeal has been taken from that order.
- ² Mann apparently attempted to amend his answer by way of motion to alter or amend the master's judgment following issuance of his order. Even if we were to consider his motion to amend his answer timely, the master denied the motion to alter or amend judgment and no appeal has been taken from that order.

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Blanks v. Fluor Corp.](#), Mo.App. E.D., September 16, 2014

310 Or. 206
Supreme Court of Oregon.

A.R. (Buck) HONEYWELL and Sally
Honeywell, Petitioners on Review,
v.
STERLING FURNITURE CO.,
dba M. Jacobs Fine Furniture,
Respondent on Review.

TC 16–87–09481; CA A50296; SC S36688.

|
Argued and Submitted March 6, 1990.

|
Decided Aug. 9, 1990.

Synopsis

Plaintiffs brought conversion and Unlawful Trade Practices Act suit against seller from which they had purchased furniture. [The Lane County Circuit Court, Douglas R. Spencer, J., entered judgment in favor of plaintiffs, and the Court of Appeals, 99 Or.App. 94, 781 P.2d 379, reversed.](#) Review was allowed. The Supreme Court, Gillette, J., held that: (1) trial court erred in instructing jury as to how law required any award of punitive damages to be distributed, and the error was reversible, and (2) fact that punitive damages award was large enough to satisfy plaintiffs' attorney fees did not mean that further fees could not be awarded under the attorney fees provision of Oregon's Unlawful Trade Practices Act.

Affirmed in part, reversed in part, and remanded.


Unis, J., concurred in part and dissented in part, and filed opinion.

West Headnotes (6)

[1] **Damages**  [Nature and Theory of Damages Additional to Compensation](#)

Punitive damages are allowed to punish willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in future.

[8 Cases that cite this headnote](#)

[2] **Damages**  [Nature and Theory of Damages Additional to Compensation](#)

Punitive damages are not substitute for compensatory awards nor offset against litigation expense.

[2 Cases that cite this headnote](#)

[3] **Damages**  [Exemplary Damages](#)

Trial court erred by instructing that any punitive damages award would be used to pay plaintiffs' attorney or to pay criminal injuries compensation account.

[8 Cases that cite this headnote](#)

[4] **Appeal and Error**  [Damages and amount of recovery](#)

Error by trial court in instructing that any punitive damages award would be used to pay plaintiffs' attorney or criminal injuries compensation account was reversible, as potential effect was to permit jury to consider that plaintiffs should receive a certain amount and to add additional amounts to insure that they did, and as it encouraged jury to award punitive damages for a purpose, enhancement of criminal injuries compensation account, that is not recognized under Oregon law.

[17 Cases that cite this headnote](#)

[5] **Antitrust and Trade Regulation**  [Attorney fees](#)

That punitive damages award is large enough to pay prevailing party's attorney fees, thereby satisfying statute providing that punitive damages award must first be used to pay his or her attorney fees, does not mean that further fees may not be awarded under attorney fees portion

of Oregon's Unlawful Trade Practices Act. [ORS 18.540](#), [646.638\(3\)](#).

[2 Cases that cite this headnote](#)

[6] Appeal and Error  [Damages or other relief](#)

Where error affected only availability and amount of punitive damages, it was appropriate to remand case for retrial only on those issues.

[6 Cases that cite this headnote](#)

Attorneys and Law Firms

****1019 *207** [Gary E. Norman](#), Albany, argued the cause and filed the petition, on behalf of petitioners on review.

[Bruce C. Moore](#), Eugene, argued the cause, on behalf of the respondent on review.

Before [PETERSON](#), C.J., and [CARSON](#), JONES, *[GILLETTE](#), VAN HOOMISSEN, [FADELEY](#) and UNIS, JJ.

Opinion

****1020 *208** [GILLETTE](#), Justice.

The questions in this case concern how much a jury should be told concerning to whom the distribution of an award of punitive damages will be made¹ and whether a plaintiff's attorney's share of a jury's award of punitive damages may be used to offset a court's award of attorney fees that a plaintiff may receive under the Oregon Unlawful Trade Practices Act (UTPA). We hold that a jury should be told nothing concerning the distribution of an award of punitive damages, and that no part of such an award may be used to offset attorney fees otherwise awardable under the Oregon UTPA.

FACTS

In July, 1979, plaintiffs purchased a new dining room set from defendant on a "layaway" plan. Because of family illnesses and employment problems, plaintiffs made their monthly payments only sporadically, and did not finish paying for the dining room set until August, 1987. Throughout this entire

eight-year period, both parties expected that plaintiffs would eventually finish paying for the furniture and take it home.

Upon completion of payment, however, defendant delivered the wrong furniture. Instead of the furniture ordered by plaintiffs, defendant substituted a used or shopworn table and much cheaper and lower quality chairs. Testimony by former employees of defendant revealed that most of plaintiffs' furniture had been missing for a number of years and this fact was well known to defendant and its employees. The decision to substitute other furniture was made by defendant's owner.

***209** Plaintiffs initiated this action against defendant alleging both conversion and unlawful trade practices and seeking compensatory damages, punitive damages in the amount of \$250,000, and attorney fees.² The trial court instructed the jury pursuant to the uniform civil jury instruction on punitive damages, UCJI No. 35.01A, but added the following paragraph:

"[i]f punitive damages are awarded by you, Oregon law requires that they be distributed as follows: First, the attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party; secondly, one-half of the remainder shall be paid to the prevailing party; third, the other half of the remainder shall be paid to the Criminal Injury [sic] Compensation Account to be used for the purposes set forth in the law."

Defendant timely excepted to this instruction:

"When you look at the remainder of the instructions to the jury on punitive damages, the use of where the money's going to go is never mentioned. It's not one of the factors the jury's to consider. I believe what that statute does is it tells the Court administratively how it's supposed to structure the judgment against the defendant, how he's supposed to pay, who it's going to go to. That's going to be an administrative position, the Court is going to have to look at the statute, decide how much to pay [counsel], and then split up and form the judgment according to that. The jury's not going to be required to make the—the jury's not going to be asked, 'Okay, we want you to decide how much [counsel] ought to be paid,' and then take half of this and ****1021** apply it to there, take half of this and apply it over there. It doesn't seem to me the policy behind the statute has anything to do with the jury's consideration of whether to award it or not.

“ * * * * *

“I’m asking the Court to look at how are punitive damages to be decided by this jury? They’re to be decided by looking at the defendant’s conduct, and as a punitive measure against the defendant. There’s nothing mentioned about for anybody. And I think we’ll open a Pandora’s box on closing argument with an instruction that specifically says, ‘Well, once you get done, let me tell you what the judge is going to do with what *210 you’ve done’. I’m going to give some money to [counsel] and I’m going to turn around and give half to these plaintiffs.’ I don’t see how that helps the jury at all reach a determination as to whether or not punitive damages ought to be awarded in this case.”

A jury awarded plaintiff \$1795 in compensatory damages and \$20,000 in punitive damages. The award did not purport to distinguish between plaintiff’s two theories of recovery; so far as appears from the verdict, both compensatory and punitive damages were awarded under both theories.

On appeal, the Court of Appeals reversed, holding that “[t]o instruct the jury how its award will be distributed injects into its deliberation factors that are not proper considerations in deciding whether to award punitive damages and, if they are awarded, the amount.” *Honeywell v. Sterling Furniture Co.*, 99 Or.App. 94, 97, 781 P.2d 379 (1989). However, the Court of Appeals did not then instruct the trial court as to how to proceed on retrial. It was not made clear whether the trial court should tell the jury that it is not to consider who receives the punitive damage award or simply should not mention the subject to the jury at all. Equally unclear was the question of what issues are to be retried. Does the award of compensatory damages, which was not challenged on appeal, remain intact? Finally, the Court of Appeals declined to consider defendant’s second assignment of error relating to an alleged double award of attorney fees. We allowed review to address these issues, in addition to reviewing the propriety of the trial court’s instruction.

PUNITIVE DAMAGES

[1] [2] “Punitive damages are allowed in Oregon to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future. *Martin v. Cambas*, 134 Or. 257, 293 P. 601 (1930); accord *Noe v. Kaiser Foundation Hospitals*, 248 Or. 420, 435 P.2d 306 (1967).” *State ex rel Young v. Crookham*,

290 Or. 61, 65, 618 P.2d 1268 (1980). Punitive damages “are not a substitute for compensatory awards nor an offset against litigation expense.” *Id.*; see also *Andor v. United Air Lines*, 303 Or. 505, 511–513, 516–517, 739 P.2d 18 (1987). There is nothing that we have found in the language or the legislative history of *211 ORS 18.540 indicating the legislature intended to change the purposes behind punitive damage awards when it enacted a new mandate for distribution of the proceeds of such awards.

[3] We agree with the Court of Appeals that instructing a jury that a portion of any punitive damage award will be used to pay the plaintiff’s attorney or to contribute to a worthy cause, such as help for victims of crime, does nothing to further or even to inform the jury as to the proper goals of punitive damage awards. Instead, the instruction distracts the jury from the appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages:

“[t]he finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, **1022 the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources.”

State ex rel Young v. Crookham, *supra*, 290 Or. at 72, 618 P.2d 1268. The trial court erred in instructing the jury as to how the law required any award of punitive damages to be distributed.³

[4] The fact that it was error to give the instruction does not complete our inquiry, however. There still remains the question whether the error was reversible error. We hold that it was. We agree with the Court of Appeals that the potential effect of the instruction was to “[permit] a jury to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account.” *Honeywell v. Sterling Furniture Co.*, *supra*, 99 Or.App. at 98, 781 P.2d 379. We also think there is another, perhaps even more serious problem with the instruction: It encouraged the jury to award punitive damages

for a purpose, *212 *viz.*, enhancement of the Criminal Injuries Compensation Account, that is not a reason for awarding punitive damages under Oregon law. So construed, the instruction was erroneous.

It is true, as the plaintiffs argue in their petition for review, that the assumption made by the Court of Appeals as to the effect of the instruction is somewhat speculative—there could be other, more benign uses the jury might make of the information provided in the instruction, although we think the result posited by the Court of Appeals is a likely result. Our separate reading of the instruction is not so speculative, however. Offering a jury an additional, inappropriate basis for awarding punitive damages harmed the defendant. The trial judge was specifically warned that giving the instruction would be error. The Court of Appeals was correct in so holding. *See State ex rel Redden v. Discount Fabrics*, 289 Or. 375, 388–89, 615 P.2d 1034 (1980).

THE ATTORNEY FEE AWARD

Because its ruling eliminated a purported double award of attorney fees to plaintiff, the Court of Appeals declined to consider defendant's second assignment of error. We, however, elect to consider this issue because it may recur upon remand.

[5] Plaintiff sought and was awarded attorney fees in the trial court pursuant to [ORS 646.638\(3\)](#), the attorney fees provision of the Oregon UTPA.⁴ Defendant contends that “once an award of punitive damages is rendered, and that award is sufficiently large to cover plaintiff's contractual obligation to pay their attorney, the mandatory distribution satisfies the attorney fees portion of plaintiff's damages, and further fees cannot be awarded at the cost bill stage.” We reject that interpretation of the relationship between [ORS 18.540](#) and [646.638\(3\)](#).

Punitive damages are intended to punish and deter wrongdoers. The attorney fees distribution provision of [ORS 18.540](#) is merely a legislative recognition that attorneys often are contractually entitled to a share of a punitive damage award, should there be such an award. *213 [ORS 18.540](#) clarifies that the attorney gets his share before the money is split between the state and plaintiff. In other words, the state must bear its share of the cost of compensating the attorney who obtained the judgment, if a contractual obligation exists to compensate the attorney.

****1023** On the other hand, attorney fees awarded in an unlawful trade practices case pursuant to [ORS 646.638\(3\)](#) serve an entirely different function: Their availability assures that wronged consumers can obtain counsel to prosecute claims that otherwise might be impractical to pursue because such claims would require an expenditure of attorney time the value of which greatly exceeded the value of the goods or services in question. The availability of punitive damages in a particular case may be problematical. The availability of basic compensation to counsel, however, cannot be problematical if consumers are going to be able to bring UTPA actions against dishonest and unscrupulous merchants.

The different aims of the two statutes show that defendant's “double recovery” argument is chimerical. Allowing the attorney to be compensated under each statute furthers the statutory purpose of that statute; allowing recovery under only one partially thwarts the object of the other. We note particularly that, even within the UTPA itself, there is no requirement of any offset of fee earned under [ORS 646.638\(1\)](#) (punitive damages) against those earned under [646.638\(3\)](#) (reasonable attorney fees for compensatory or punitive damages).

Because we are remanding this case for a partial retrial, we must vacate the award of attorney fees as it relates to the award of punitive damages. (Plaintiffs are entitled to a discretionary award of their attorney fees for the judgment for compensatory damages under the UTPA.) After the retrial, plaintiffs may once again request costs and attorney fees in connection with any award of punitive damages and the trial court may consider an appropriate award at that time.

SCOPE OF RETRIAL

[6] The sole remaining issue is the scope of retrial. As *214 noted, the Court of Appeals did not address this point. As also noted, the jury's finding of liability and its ensuing award of compensatory damages in this case was not challenged on appeal. Because the error that occurred in this case affects only the availability and amount of punitive damages, it is appropriate to remand the case for retrial only on those issues. *See Wolf v. Nordstrom*, 291 Or. 828, 835–836, 637 P.2d 1280 (1981).

CONCLUSION

The decision of the Court of Appeals is affirmed. The judgment of the circuit court awarding compensatory damages is affirmed. The award of punitive damages is reversed and the case is remanded to the circuit court for a new trial on the issue of punitive damages. The award of attorney fees and costs is vacated and remanded for further proceedings consistent with this opinion.

UNIS, Justice, concurring in part and dissenting in part. Today, this court reverses a jury award of punitive damages, because the trial judge in his instructions to the jury correctly stated how Oregon law requires an award of punitive damages, if made, to be distributed.¹ I agree with the majority that the trial judge should not have given the instruction. I believe, however, that the error was harmless when the instructions are considered as a whole in the context of the circumstances of this case. I would, therefore, reverse the decision of the Court of Appeals and affirm the judgment of the circuit court.

The standard that this court ought to apply in evaluating an alleged error in a jury instruction in a civil case should be the same standard that we employ in evaluating ****1024** an evidentiary error. That standard is (1) whether error was committed and, if so, (2) whether that error requires reversal. The ***215** decision whether evidentiary error requires reversal is made without presuming that the error is prejudicial.² Similarly, this court should not presume that an error in an instruction was prejudicial to the party against whom it was committed. Prior expressions by this court to that effect, *see, e.g., State ex rel Redden v. Discount Fabrics*, 289 Or. 375, 388, 615 P.2d 1034 (1980), cited with approval in the majority opinion, should be disapproved.

ORS 19.125(2) establishes that not every error is “reversible” or “prejudicial” error. *See also State v. Moore*, 124 Or. 61, 66, 262 P. 859 (1928) (ORS 19.125(2), formerly Oregon Laws Section 556, prohibits this court from disposing of cases on mere technical errors). In order to be a basis for reversal of the judgment of the trial court in a civil case, then, the error in instruction must substantially affect the rights of the party against whom it was committed.³

***216** In the present case, the trial court erred when it instructed the jury on how punitive damages, if awarded, are to be distributed. The proper inquiry is whether that error requires reversal. In deciding that question, we should consider the instruction in context. The judge told the jury that plaintiff must prove punitive damages by clear and convincing evidence. He then charged the jury:

“Punitive damages *may be awarded* or may be assessed in addition to compensatory damages, *to punish the wrongdoer and to discourage the defendant and others from engaging in wanton misconduct*. In considering punitive damages, you must first determine whether the defendant was guilty of wanton misconduct that caused damage to the plaintiffs. Wanton misconduct is conduct amounting to a particularly aggravated, deliberate disregard of the rights of others. If you decide this issue against the defendant, you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of that discretion, you may consider the importance to society in deterring similar misconduct in the future.” (Emphasis added.)

****1025** That instruction is consistent with numerous statements by this court that the purpose of punitive damages is to punish a defendant and deter others who are similarly situated. *See, e.g., Andor v. United Air Lines, Inc.*, 303 Or. 505, 517, 739 P.2d 18, 35 (1987); *Noe v. Kaiser Found. Hosp.*, 248 Or. 420, 425, 435 P.2d 306, 308 (1967); *Martin v. Cambas*, 134 Or. 257, 261, 293 P. 601, 603 (1930).

The trial judge also instructed the jury:

“If you decide to award punitive damages, you may properly consider the following items in fixing the amount: The character of the defendant's conduct; the defendant's motive; the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and the income and assets of the defendant. The amount of punitive damages may not exceed the sum of \$250,000.”

That instruction is likewise in harmony with the guidelines ***217** that this court has established for determining the appropriate size of a punitive damages award in a non-products liability case.⁴ *State ex rel Young v. Crookham*, 290 Or. 61, 72, 618 P.2d 1268 (1980).

Finally, the court added this language in its charge to the jury:

“If punitive damages are awarded by you, Oregon law requires that they be distributed as follows: First, the

attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party; secondly, one-half of the remainder shall be paid to the prevailing party; third, the other half of the remainder shall be paid to the criminal injury compensation account to be used for purposes set forth in the law.”

It is that passage that is the basis for the majority's conclusion that a retrial in this case is necessary on the availability and amount of punitive damages. Although the majority recognizes that “the effect of the instruction is somewhat speculative” and that “there could be *** benign uses the jury might make of the information provided in the instruction,” Maj. op. at 1022, it nevertheless concludes that the instruction harmed the defendant by “[o]ffering a jury an additional, inappropriate basis for awarding punitive damages * * *.” Maj. op. at 1022. According to the majority, “the potential effect of the instruction was to ‘[permit] a jury to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account.’” Maj. op. at 1022. The instruction, the majority states, “encouraged the jury to award punitive damages for a purpose, viz., enhancement of the Criminal Injuries Compensation Account, that is not a reason for awarding punitive damages under Oregon law.” Maj. op. at 1022.

I disagree. The minds of jurors are not like empty tablets upon which the judges and lawyers record all of the *218 data that the jury may use in deciding the case. The jury is permitted to use its store of accumulated experience and knowledge in deciding issues of fact. Wright and Graham, 21 Federal Practice and Procedure 460, § 5102. As Justice Metcalf wrote in *Commonwealth v. Peckham*, 68 Mass (2 Gray) 514, 515 (1854): “Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters.” See *Rostad v. Portland Railway, Light & Power Co.*, 101 Or. 569, 581, 201 P. 184 (1921) (“[t]riers of fact cannot, in the nature of things, be divested of general knowledge of practical affairs.”); 9 Wigmore on Evidence, § 2569 (Chadbourn rev 1970). The jurors in this case, like other people, know that litigants incur attorney fees. It seems reasonable to assume that they were aware that plaintiff must compensate **1026 her counsel for representing her in this action and may well have taken that knowledge into consideration in determining the appropriate

amount of punitive damages, with or without the challenged instruction.⁵

Recognizing that the jury is under oath to follow the law given them by the trial judge, this court has stated on several occasions that it assumes that the jury followed the instructions. See *Chopp v. Miller*, 264 Or. 138, 144, 504 P.2d 106, 109 (1972); *Despain v. Bohlke*, 259 Or. 320, 328, 486 P.2d 545, 549 (1971); *Sedillo v. City of Portland*, 234 Or. 28, 33–34, 380 P.2d 115 (1963). See also OEC 311(1)(j) and (x).⁶ We should assume, therefore, that the jury's award of punitive damages to plaintiff was properly imposed to punish defendant and deter others who are similarly situated. Absent a reason to assume otherwise, we should not assume, as the majority does, that the jury disregarded the trial judge's instructions as to when it *219 could award punitive damages and instead awarded them on an inappropriate basis. Moreover, we should assume that the jury did apply the criteria given it by the trial judge in fixing the amount of punitive damages awarded plaintiff.

Instructions are to be considered in their entirety, not piecemeal, and it is immaterial that one or more of them considered separately may be subject to criticism, if from the instructions as a whole the jury was correctly charged as to the law in its application to the facts. See *Klebaum v. Mitchell*, 246 Or. 196, 198, 424 P.2d 219 (1967); *Parmentier v. Ransom*, 179 Or. 17, 24, 169 P.2d 883 (1946); *Hornby v. Wiper*, 155 Or. 203, 211, 63 P.2d 204 (1936). See also *Anderson v. White*, 264 Or. 607, 611, 506 P.2d 690, 692 (1973). The instruction concerning the distribution of an award of punitive damages was a correct statement of law. See ORS 18.540. “In 1987, the Oregon Legislature recognized the nature of punitive damages as punishment of wrongdoers for the public good and decided that the public should share in the bounty.” Comment, *Constitutional Challenges to Punitive Damages in Oregon: Let the Punishment Fit (Not Exceed) the Crime*, 26 Willamette L Rev 749, 755 (1990), citing ORS 18.540. See Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L Rev 283, 298 (1988):

“ORS 18.540 is most significant; it ‘distributes’ the award of punitive damages. This section allows the attorney for the plaintiff awarded punitive damages to retain the ‘amount agreed upon’ pursuant to the contract of the attorney and client. [ORS 18.540(1)] The ‘prevailing party’ receives one-half of the remainder, as does the Criminal Injuries Compensation Account, unless the party

awarded punitive damages is a ‘public entity.’ [ORS 18.540(2) and (3).]”

This court has stated on more than one occasion that an unnecessary instruction that is a correct statement of the law is not the basis for reversal unless it did mislead, or may have misled, the jury to the prejudice of the appellant. *See, e.g., State v. Cortman*, 251 Or. 566, 573, 446 P.2d 681 (1968); *State v. Townsend*, 237 Or. 527, 530, 392 P.2d 459 (1964). *See also State v. Morris*, 248 Or. 480, 483, 435 P.2d 1018 (1967) (surplusage language which does not mislead the jury in view of other instructions is not reversible error); *Waterway Terminals Company v. P.S. Lord Mechanical Contractors*, 256 Or. 361, 370, 474 P.2d 309, 313 (1970) (“* * * cases should not be *220 reversed upon instructions, despite technical imperfections, unless the appellate court can fairly say that the instruction probably created an erroneous impression **1027 of the law in the minds of the jurors which affected the outcome of the case”). The challenged instruction did not create an erroneous impression of the law in the minds of the jurors. It was a correct statement of the law. In my judgment, the trial record does not reflect that the instruction affected the outcome of the case.

It is important to note that neither plaintiff's attorney nor defendant's attorney mentioned in argument to the jury how punitive damages would be distributed, if awarded. The only reference to how punitive damages would be distributed, if awarded, was in the challenged instruction. The absence of

argument minimizes the possibility that the jury misused or unduly focused on that one passage.

In sum, the instruction concerning to whom the distribution of an award of punitive damages will be made is unnecessary and should not have been given. It cannot be said from the record in this case, however, that the instruction substantially affected the rights of the defendant. In the light of the instructions on punitive damages, considered as a whole, the trial court's giving the instruction was harmless error and does not warrant reversal of the verdict. The parties to a lawsuit are not entitled to a perfect trial. They are entitled to fair trial. Nothing in the trial record demonstrated that the verdict in this case was the result of prejudice or passion. No good purpose would be served by sending it back for a new trial. I would put an end to this costly litigation by reversing the decision of the Court of Appeals and affirming the verdict of the jury and the judgment of the trial court. That conclusion is consistent with [Article VII \(Amend\), section 3, of the Oregon Constitution](#) which provides, in essence, that no judgment should be reversed for technical error when *substantial* justice had been done by a jury verdict and judgment.⁷

I concur in the majority opinion with respect to attorney fees.

All Citations

310 Or. 206, 797 P.2d 1019

Footnotes

* JONES, J., resigned April 30, 1990.

1 Distribution of an award of punitive damages is required by Or. Laws 1987, Ch. 774, section 3, now codified as [ORS 18.540](#) (effective September 27, 1987), which provides:

“The punitive damage portion of an award shall be distributed as follows:

“(1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

“(2) One-half of the remainder shall be paid to the prevailing party.

“(3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.”

2 Punitive damages may be awarded under the Oregon Unlawful Trade Practices Act. [ORS 646.638](#). Plaintiffs also sought punitive damages under their conversion claim.

3 Our holding suggests that the Oregon State Bar's Civil Jury Instruction Committee take a fresh look at UCJI No. 35.01A and related instructions.

4 [ORS 646.638\(3\)](#) provides:

“In any action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees at trial and on appeal and costs. If the defendant prevails, the court may award reasonable attorney fees at trial and on appeal and costs if it finds the action to be frivolous.”

1 [ORS 18.540](#) provides:

"The punitive damage portion of an award shall be distributed as follows:

"(1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

"(2) One-half of the remainder shall be paid to the prevailing party.

"(3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity."

2 With the adoption of the Oregon Evidence Code, "[e]videntiary error is not presumed to be prejudicial. OEC 103." *Powers v. Officer Cheeley*, 307 Or. 585, 597, 771 P.2d 622 (1989); *State v. Carr*, 302 Or. 20, 27, 725 P.2d 1287 (1986); *State v. Miller*, 300 Or. 203, 220, 709 P.2d 225 (1985), or harmless, *Van Gordon v. PGE Co.*, 295 Or. 811, 813, 670 P.2d 1026 (1983); *Powers v. Officer Cheeley*, *supra*, 307 Or. at 597 n 13, 771 P.2d 622. See also Kirkpatrick, Oregon Evidence 16–17 (2d ed 1989).

3 ORS 19.125(2) provides:

"No judgment shall be reversed or modified except for error substantially affecting the rights of a party."

Compare ORS 19.125(2) with OEC 103(1), codified in ORS 40.025(1). OEC 103(1), which deals with evidentiary error occurring in the trial of a case, reads:

"Evidentiary error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right of the party is affected*." (Emphasis added.)

Before an error can be the basis for appellate reversal or modification of a judgment under ORS 19.125(2), it must substantially affect the rights of the party against whom it was committed. On the other hand, OEC 103(1) provides that evidentiary errors at trial are not grounds for setting aside the verdict or reversing the judgment on appeal "unless a substantial right of the party is affected."

Article VII (Amend), section 3, of the Oregon Constitution provides in pertinent part:

" * * * If the Supreme Court shall be of the opinion, after careful consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court. * * * "

Although limited generally to trial courts by ORCP 1 A, ORCP 12 B provides in pertinent part:

"The court shall, in every stage of an action, disregard any error or defect in the * * * proceedings which does not affect the *substantial rights of the adverse party*." (Emphasis added.)

4 Under ORS 30.925(1), a plaintiff in a products liability action may recover punitive damages when he or she proves the defendant acted with "wanton disregard for the health, safety and welfare of others." ORS 30.925(3) sets forth criteria to be used in determining the amount of punitive damages to be awarded to a prevailing plaintiff in a products liability action.

5 Although in theory jurors are not to award fees for counsel as part of plaintiffs' compensation, several studies suggest jurors apparently often discuss fees in their deliberations and occasionally adjust their damage awards with this factor in mind. Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law and Contemporary Problems 224, 241–42 (1989).

6 OEC 311 provides in pertinent part:

"(1) The following are presumptions:

" * * * * *

"(j) Official duty as been regularly performed.

" * * * * *

"(x) The law has been obeyed."

7 See note 3, *supra*.

70 S.C. 254
Supreme Court of South Carolina.

DENNIS
v.
ATLANTIC COAST LINE R. R.

Nov. 28, 1904.

Synopsis

Appeal from Common Pleas Circuit Court of Florence County; Gage, Judge.

Action by Cornelia A. Dennis, administratrix of Frank McGowan, against the Atlantic Coast Line Railroad. From judgment sustaining demurrer to complaint, plaintiff appeals. Affirmed.

West Headnotes (3)

[1] **Death** → What Law Governs

The provision in Lord Campbell's act of North Carolina, Code N. C. § 1498, that a failure to commence an action of wrongful death in one year should extinguish the right conferred by the statute applies to an action under the act brought in South Carolina.

[18 Cases that cite this headnote](#)

[2] **Death** → Constitutional and Statutory Provisions

The act of North Carolina of 1897, Priv.Laws N.C.1897, p. 83, c. 56, giving a remedy for death by wrongful act to any employee of a railroad company operated in the state is only an enlargement of the Lord Campbell act, Code N.C. §§ 1498-1500, and must be construed with it.

[6 Cases that cite this headnote](#)

[3] **Action** → What Law Governs

An action will lie in the state under a statute of a foreign state where its provisions are not contrary to those of the state, but, as to the extent of the remedy, plaintiff will be governed by the limitations of such foreign state.

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

*869 W. F. Clayton, for appellant. Willcox & Willcox, for respondent.

Opinion

GARY, A. J.

Frank McGowan, a resident of South Carolina, was an engineer in the employment of the defendant, and was killed in North Carolina by the wreck of an engine he was running on the 10th November, 1900, more than one year before this action was commenced by his administratrix. It is alleged that the death of the intestate was caused by defects in the machinery and appliances he was operating, and that the defendant had notice of such defects.

An agreement between counsel is set out in the record, in which appears the following statement: "The issue is as to whether the plaintiff was barred of her right of action in this state, it being admitted that, under the Lord Campbell act of North Carolina, the action must be brought within one year, while in the state of South Carolina the limitation was two years, and that this action was brought after the lapse of one year and within two years; the object being to bring all matters before this court on this one appeal, and to save several appeals." The reason for the agreement was because this question would not otherwise at this time have been properly before the court.

The appellant contends that her action was brought under the statute of North Carolina passed in 1897; that it was

independent of the Lord Campbell act (Code N. C. §§ 1498, 1500); that its provisions were comprehensive enough to afford relief in this action; that the statute of limitations pertains merely to the remedy, and is governed by the *lex fori*. That statute is as follows: "Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Priv. Laws N. C. 1897, p. 83, c. 56. The other section has no application to this case. The respondent contends that this statute is but an enlargement of the provisions of the Lord Campbell act; that they are *in pari materia*, and must be construed together; that the time within which the action must be brought under the Lord Campbell act is in no sense a statute of limitations; and that any facts that would have destroyed the right of recovery if the suit had been instituted in North Carolina will defeat the action in this state.

The Lord Campbell act of North Carolina is as follows: "Whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executors, administrators, or collectors, and this notwithstanding the death, and although the wrongful act or neglect causing death, amount in law to felony." Code N. C. § 1498. The statute of 1897 has been declared by the Supreme Court of North Carolina, in the case of [Hancock v. N. & W. R. R.](#), 124 N. C. 222, 32 S. E. 679, to be constitutional. Our construction of the statute of 1897 is that it was merely intended to enlarge the provisions of the Lord Campbell act, that it was in the nature of an amendment to that act, and that they must be construed together.

This action could not have been maintained in North Carolina after more than one year had elapsed from the death of the person suffering the injury. In [Huntington v. Attrill](#), 146 U. S. 657, 670, 13 Sup. Ct. 224, 228, 36 L. Ed. 1123, the court says: "In order to maintain an action for an injury, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. *** But such is not

*870 the law of this court. By our law a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." See, also, 16 Harv. L. Rev., No. 1, p. 63 (Nov., 1902). As we have a statute which gives an action for wrongfully causing death, it is not against public policy to enforce such a liability here, although it arose in another jurisdiction. [Stewart v. B. & O. R. R.](#), 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. When such a liability is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act, in any degree, is subject to the *lex fori*, with regard either to its quality or its consequences. [Slater v. R. Co.](#), 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, 48 L. Ed. 900. In the case last mentioned the court uses this language: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation—an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. [Stout v. Wood](#), 1 Blackf. 71; [Dennick v. Central R. Co.](#), 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation ([Smith v. Condry](#), 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In [Northern P. R. Co. v. Babcock](#), 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side, as quite inadmissible, the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The two statutes of North Carolina must be construed together in determining the consequences of the wrongful act. The action in this state is incumbered with all the burdens arising out of either of said statutes. In [Taylor v. Cranberry Iron & Coal Co.](#), 94 N. C. 525, 526, the court thus construes the provision of the Lord Campbell act limiting the time within which the action must be brought: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be

lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun. The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons; and, as more than a year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must therefore be affirmed.”

It is well settled in this state that the statute of limitations relates to the remedy, and is enforced according to the *lex fori*. *Sawyer v. Macaulay*, 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations. At common law there was no right of action for death caused by wrongful act. The requirement as to the time of commencing the action is a part of the statute creating this right. It is incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, one of which is that the suit must be instituted within a certain time. In North Carolina the failure to commence the action within one year did not simply extinguish the remedy, but was an extinction of the right conferred by the statute. When such is the case the action cannot be maintained in this state. *Sawyer v. Macaulay*, 18 S. C. 543. The North Carolina decision is in

harmony with the principle announced in *Walker v. Chester County*, 40 S. C. 342, 18 S. E. 936. That case was an action under the statute which gave a right of action for damages caused by a defect in the repair of a highway. The statute contained a proviso limiting the right of action to cases, *inter alia*, where the plaintiff had not brought about his injury by his own act or negligently contributed thereto. There was a demurrer to the complaint on the ground that it failed to allege that the plaintiff did not in any way bring about her injury by her own act, or negligently contribute thereto. A county was not liable at common law in an action for injuries received from defects in the repair of a highway. This court held that the demurrer was properly sustained. Mr. Chief Justice McIver concurred on the ground that the conditions upon which the right is conferred must appear in the complaint, as otherwise no right of action is stated. These authorities are conclusive of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

All Citations

70 S.C. 254, 49 S.E. 869, 106 Am.St.Rep. 746

18 S.C. 543
Supreme Court of South Carolina.

SAWYER, WALLACE & CO.

v.

MACAULAY.

Feb. 16th, 1883.

Synopsis

1. To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the “Case” should show that he was requested so to charge.

2. The “Case” is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.

3. Under the law of North Carolina, which makes an endorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorsers co-sureties with their prior endorser for value.

4. It is too sweeping a proposition that notes are illegal if they “arose directly or indirectly out of transactions in futures,” and the Circuit judge committed no error in refusing so to charge.

5. Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.

6. Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.

7. Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.

West Headnotes (8)

[1] **Contracts** 🔑 What law governs

The interpretation of contracts is governed by the *lex loci contractus*; remedies, by the *lex fori*.

[3 Cases that cite this headnote](#)

[2] **Gaming and Lotteries** 🔑 Investments; futures and options; bets on rise or fall of prices

It is too sweeping a proposition that notes are illegal, if they “arose directly or indirectly out of transactions in futures,” and the Circuit judge committed no error in refusing so to charge.

[3] **Limitation of Actions** 🔑 What Law Governs

Action on a note executed and payable in North Carolina is not barred in this State within the six years here allowed, although the limitation of actions as there prescribed is for a shorter period. The statute of limitations is applied according to the *lex fori*.

[5 Cases that cite this headnote](#)

[4] **Commercial Paper** 🔑 As surety

Under the law of North Carolina, which makes an indorser a surety, unless it be otherwise clearly expressed, an endorsement for collection only, without change of ownership, does not make such endorsers co-sureties with their prior endorser for value.

[5] **Commercial Paper** 🔑 Variance between pleadings and proof

Ownership of a note alleged in the complaint and admitted in the answer, could not at the trial be questioned upon proof of an endorsement by plaintiffs to their attorneys for collection.

[6] **Trial** 🔑 Necessity in General

To permit this court to consider alleged errors of the Circuit judge in omissions to charge, it is absolutely necessary that the “Case” should show that he was requested so to charge.

[1 Cases that cite this headnote](#)

[7] **Appeal and Error** 🔑 **Limitation by Scope of Record in General**

The “Case” is the source of information for this court, and alleged errors which are not there disclosed cannot be considered.

[1 Cases that cite this headnote](#)

[8] **Appeal and Error** 🔑 **Setting out instructions**

Where the brief does not give the judge's charge to the jury, a detached fragment of the charge separated from its context cannot be held by this court to be erroneous.

****1** Before COTHRAN, J., March, 1882.

***543** Action commenced February 5th, 1881. The opinion states the case.

Attorneys and Law Firms

Mr. S. P. Hamilton, for appellant.

Mr. T. C. Gaston, contra.

Opinion

The opinion of the court was delivered by

***544** MR. CHIEF JUSTICE SIMPSON.

This was an action on three notes executed by Stenhouse, Macaulay & Co., merchants doing business in Charlotte, N. C. The first was executed on July 28th, 1876, to the plaintiffs and payable at Merchants and Farmers National Bank, Charlotte, eighteen months after date. The second was dated October 24th, 1877, executed by the same parties and payable at the same bank, and the third bore date October 25th, 1877, executed by same parties and payable at same bank. All three of the notes were endorsed by the defendant by simply placing his name, “D. Macaulay,” on the back of each. Each note also

had the following endorsement by the plaintiffs: “Pay to J. H. McAden, president, or order. Sawyer, Wallace & Co.” This endorsement, at the trial, had on each been canceled by pen marks drawn through them; also on each was found at the trial, “Pay Patterson & Gaston, or order, for collection. Sawyer, Wallace & Co.” Patterson & Gaston were the attorneys who brought the action in the name of the plaintiffs.

At the close of plaintiffs' testimony, the defendant moved for a non-suit on the ground that, it appearing that the notes had been endorsed to Patterson & Gaston, the plaintiffs were not entitled to sue. The judge refused this motion, holding that plaintiffs having alleged ownership in their complaint, and this not being denied in the answer, the ownership must be taken as admitted. The verdict was for the plaintiffs, the amount of the notes, to wit, \$1,720.62.

The defendant is now before this court upon six exceptions, four of which assign error in the refusal of the judge to charge certain propositions; the fifth, because his Honor did not allow J. E. Stenhouse, one of the firm, to testify as to the character and business of buying and selling futures and the custom of trade in connection with such transactions generally, and the sixth, because his Honor erred in not deciding that the note for \$645.10 (the first note mentioned), being barred in North Carolina before the commencement of this action, the plaintiffs could not recover; and, also, in arrest of judgment, because the three notes being endorsed by Sawyer, Wallace & Co., the plaintiffs, ***545** to Patterson & Gaston, for collection, the plaintiffs could not maintain an action in their own names as owners and holders.

As to the first four and sixth exceptions, which involve errors of omission to charge, we do not find anywhere in the “Case” or “Brief” that the questions there raised were brought to the attention of the judge by request to charge. This, under our decisions, was absolutely necessary so as to permit this court to consider them, and especially does it become the duty of the court to deny consideration when the objection is interposed by the respondent claiming his legal rights. In *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C. 29, Mr. Justice Willard said: “The third ground of appeal is insufficient so far as it is based upon the failure of the judge to charge certain propositions therein set forth for want of a request to charge, as was the case in reference to the second ground. If counsel desire to bring any view of the law of a case to the attention of the jury, they must make such view the subject of a request to charge, and, failing in this, they cannot allege error. The maintenance of this rule is essential to a correct and careful administration of justice when the appellate court is limited to a consideration

of exceptions on points of law, and cannot look into the whole case to see that substantial justice has been done between the parties.”

****2** In *Abrahams v. Kelly and Barrett*, 2 S. C. 238, the same justice, speaking for the court, said: “It does not appear that the second proposition was brought to the notice of the Circuit judge at the trial. It was not touched upon in the charge, nor was there any request to charge made in respect to it. The presiding judge is not bound to submit any particular proposition of law unless his attention is called to it and a request made to that effect. However important to the case such a proposition may be, error cannot be alleged unless, after request, he has refused to submit it. Nor is a misstatement of the law error unless his attention is called to it and he neglects or refuses to correct it. It is the office of exceptions to bring before this court only such matters of law as were the subject of contest upon the trial.”

In *Fox v. Railroad Co.*, 4 S. C. 543, it was held that a failure ***546** to charge a particular proposition of law could not be assigned as error unless the judge on request declines so to charge, and the court said, when such an objection is insisted upon on behalf of the respondent, the court must necessarily regard it.

The same principle was held and enforced in the late case of *Sullivan v. Jones*, 14 S. C. 365, where Mr. Justice McIver said: “All of these grounds except the first, second and third complain of omission to charge upon points which, so far as the ‘Case’ discloses, were not brought to the attention of the judge during the trial, either by request to charge or otherwise, and therefore are not properly before us.”

Neither do we find anything in the “Case” to sustain the fifth exception. If the presiding judge limited or curtailed J. E. Stenhouse “in his testimony as to the character and business of buying and selling futures, or the custom of trade in connection with such transactions generally,” the “Case” submitted fails to show it and it is not admitted by respondent. In fact it is denied in respondent's argument. The only statement we have is found in the exception raising the question. This the court cannot regard. The “Case” is the source of our information as to what occurred below; its very object is to inform the court authoritatively of the legal questions contested below, and of the facts pertaining thereto. This court has held that as to these matters it confines itself to the “Case.” *Sheriff v. Welborn*, 14 S. C. 480. And it cannot consider statements in exceptions not found in the “Case.” The defects in an appeal herein are fatal, especially

where the respondent not only fails to admit the statements in exceptions, but denies their existence and demands the legal consequences applicable.

The court, however, could not but regret that an appeal should terminate in this way if there was merit therein which, if otherwise presented and in accordance with the rules in such cases, might have been successful. We have therefore, *ex gratia*, considered the exceptions so far as to be satisfied that no injustice will be done, or the rights of parties lost or defeated by enforcing the principles which the cases cited require.

****3** The first two exceptions complain that the presiding judge failed to charge that under the law of North Carolina, where ***547** the notes were executed, D. Macaulay, the defendant, and Sawyer, Wallace & Co. were joint sureties by virtue of the endorsements made respectively on said notes, and therefore no action could be sustained by the plaintiffs against defendant, except for his aliquot portion of the amount paid by plaintiffs. The statute of North Carolina referred to, provides that “whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it shall be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note, and no demand on the maker shall be necessary previous to an action against the endorser; provided, that nothing herein shall in any respect apply to bills of exchange, inland or foreign.” The character of the endorsements by these parties has already been stated. The endorsement of the defendant was his name on the back without more; that of the plaintiffs was a direction to pay the president of the bank at which the notes were made payable, which was afterwards canceled.

While no doubt the act above referred to made the defendant a surety to the makers, dispensing with notice of demand, we do not think it had this effect upon the plaintiffs. The character of their endorsement excludes this idea, and, in the language of the act, “otherwise plainly expresses” its purpose. The notes were payable at the bank of which McAden was president, and the object of the plaintiffs' endorsement was to enable Mr. McAden to collect them. There was no evidence that they were discounted by the bank, or that the ownership was ever changed. It would have been error therefore for the judge to have charged as suggested.

The third exception assigns error, “because his Honor refused to charge that if the jury believes the cause of the losses which are the consideration of the notes, arose directly or

indirectly from the transactions in futures, such transactions are illegal and the plaintiffs cannot recover, and that he did charge that contracts in futures, so called, may be legitimate.” Even upon the assumption that contracts in what are known in commercial circles as “futures” are illegal, as gambling transactions or against public policy, or violative of the North Carolina act of *548 1788, yet the judge could not have legally charged in the broad terms indicated in this exception, that if the notes arose “directly or indirectly,” &c. This would cover any and all connection, the most immediate as well as the most remote, the guilty as well as the innocent. This would have been too sweeping.

As to the latter part of this exception, “that the judge did charge, that contracts in futures, so called, may be legitimate,” we do not know in what connection this was said. The charge of the judge is not set out in the case, either in whole or in part, and in the absence of explanation or connection, and all information as to its application, it would be unjust to the Circuit judge for this court to attempt to pass upon a detached fragment of his charge like this. Besides, the necessary information is not before us. We do not intend, however, to intimate that contracts based on the sale or purchase of futures, would be legal. But we do not think that this distinct question has been sufficiently raised in this case to authorize us to consider it, and therefore it has not been adjudged.

**4 The fourth exception involves a question of fact, to wit, the force and effect of testimony, which was a matter for the jury and not the judge.

As to the fifth, as has been stated, we are not informed of the precise ruling of the judge upon this subject; nor does the “Case” show what connection a general history “of the character and business of buying and selling futures, and the custom of trade in connection with such transactions,” had with the case at bar. The object of testimony is to evolve facts pertinent to the issue in contest, and within the knowledge of the witness as applicable thereto. How far the general business of buying futures was involved in this case, we can not tell, and, if involved, whether Mr. Stenhouse was a sufficient expert to be authorized to speak generally upon the subject, we are not informed. We must leave this exception, therefore, as we find it. Any special fact bearing on the case and within the knowledge of Mr. Stenhouse, he was competent to prove, but testimony by him on the subject of futures and the usage and custom of trade therein “generally,” it appears to us would have been irrelevant.

*549 Sixth. “Because his Honor erred in not deciding that the note for \$645.10, being barred in the statutes of North Carolina before the commencement of this action, the plaintiffs could not recover on the third cause of action.” Even if the proposition of law contained in this exception was correct, yet the judge before charging it was required to assume that the facts upon which it rested had been proved. This he could not do, as the facts are alone for the jury. But is the proposition a sound one? In *Levy v. Boas*, 2 *Bail.* 217, the court held generally, that the limitation of actions is of the *lex fori*, not of the *lex loci contractus*, and in that case where the debt had not been barred in Pennsylvania, the place of the contract, yet in this State where the period of limitation was shorter, that period having elapsed, it was held barred. We can see no reason, where the facts are reversed, why the same rule should not prevail. The underlying principle is that the *lex fori* shall govern as to the remedy and its enforcement, and if in either case the *lex fori* is invoked, the same principle should control.

If the statute paid or destroyed the debt, then when once barred in any State, it would be gone forever and in all places; but this is not the theory of the statute of limitations. It does not pay the debt; it only suspends the remedy. This may take place in one State, while in another the active energy of the remedy may not be impaired in the least. The case of *Morton & Co. v. Naylor*, 1 *Hill* 439, does not touch the question. There the point was as to the effect of a judgment in another State, whether it could be regarded in this State as a debt of record, and, like judgments here, not subject to the plea of the statute. The court held that it would rank here in that respect as in the State where obtained, and if the statute could not be pleaded there it could not here.

**5 Mr. Angell on Limitations, page 69, section 65, says: “Equally well settled is the doctrine that remedies on contracts are to be regarded and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made.” He states further that upon the question being made before Lord Ellenborough, in *Williams v. Jones*, 13 *East* 439, that learned jurist said: “It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they are contracted, and, generally speaking, that is so—that is, if the rights of the contracting parties be extinguished by the foreign law by the happening of certain events. But here there is only an extinction of the remedy in the foreign court according to the law stated to be received there, but no extinction of the right; and there is no law

or authority that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different.”

Mr. Justice Story, in *Leroy v. Crowninshield*, 2 Mason 151, stated the inclination of his mind to be the other way, on the supposition that where the debt was barred by the *lex loci*, this amounted to a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity; but this learned judge admitted that the current of authority was too strong against him to be resisted. In *Townsend v. Jemison*, 9 How. 407, found cited in a note to Angell, page 76, the question underwent thorough examination, with the inclination of Judge Story's mind above referred to before the court, and pressed upon it, the direct question being, whether the cause of action having accrued in Mississippi and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana. The court said: “The rule in the courts of the United

States in respect to pleas of the statute of limitations has always been that they strictly affect the remedy and not the merits.” See, also, *McElmoyle v. Cohen*, 13 Pet. 312. Under these authorities it would have been error for the Circuit judge to have charged as suggested in this exception.

As to the matter relied on in arrest of judgment, we are satisfied with the reasoning of the Circuit judge when he refused the motion of non-suit made on the same ground at the trial. The ownership of the note was a question of fact; this was alleged in the complaint to be in the plaintiffs and not denied in the *551 answer; this, we think, was sufficient, and could not be over-thrown by the qualified endorsement to the attorneys for collection.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

All Citations

18 S.C. 543, 1883 WL 4841

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828 Fed.Appx. 858

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

Justin DRISKELL, Plaintiff – Appellee,

v.

SUMMIT CONTRACTING GROUP,
INC., Defendant – Appellant.

Justin Driskell, Plaintiff – Appellant,

v.

Summit Contracting Group,
Inc., Defendant – Appellee.

No. 19-1456, No. 19-1497

|
Argued: May 28, 2020

|
Decided: September 24, 2020

Synopsis

Background: Employee, a former assistant superintendent for construction projects, brought action against employer, a general contractor, for retaliatory termination in violation of North Carolina's Retaliatory Employment Discrimination Act (REDA) and wrongful discharge under North Carolina common law. Following jury trial, at which jury found in favor of employee on both claims, the United States District Court for the Western District of North Carolina, [Frank D. Whitney](#), Chief Judge, [325 F.Supp.3d 665](#), denied employer's motions for judgment as a matter of law (JMOL) and new trial, and, subsequently, [2019 WL 1412948](#), entered judgment in favor of employee, awarding him \$195,000 in trebled compensatory damages and \$441,600 in attorney fees under REDA. Employer appealed and employee cross-appealed.

Holdings: The Court of Appeals, [Diaz](#), Circuit Judge, held that:

[1] sufficient evidence supported finding that employer fired employee;

[2] REDA protected employee's internal complaints about workplace safety violations;

[3] employer's belief employee would file workers' compensation claim was prohibited motivation for termination under REDA;

[4] employee sufficiently exhausted administrative remedies for REDA claim;

[5] sufficient evidence supported finding that employer's decision to fire employee was caused by employee's protected conduct;

[6] sufficient evidence supported finding that employer's executives acted with malice or conscious disregard for employee's right to engage in protected activity; and

[7] punitive damages for common-law wrongful discharge were not duplicative of attorney fee award under REDA.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Traxler](#), Senior Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (8)

[1] **Labor and Employment** 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding, in employee's action against employer for retaliatory discharge in violation of North Carolina's Retaliatory Employment Discrimination Act (REDA), that employer terminated employee's employment, where employer deactivated employee's work-issued devices, employer's president and project manager failed to respond to employee's attempts to contact them after project manager asked employee to return his work tools, no one directed employee to continue working for

employer when he returned his work-issued devices, employer's internal emails showed it intended to terminate employee, and employee never communicated present intent to quit. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[2] Labor and Employment 🔑 Protected activities

Employee's internal communications to his employer about workplace safety were protected from retaliation under North Carolina's Retaliatory Employment Discrimination Act (REDA), where employee's statements that coworker assaulted employee and was present at work site while intoxicated constituted allegations of violations of Occupational Safety and Health Act of North Carolina (OSHANC), employee's statements led to internal investigation into coworker's drinking, employee's complaints focused on workplace safety, and employee made complaints to employer's president and chief executive officer (CEO) rather than to mere supervisor or manager. *N.C. Gen. Stat. Ann. §§ 95-129(1), 95-241(a)*.

[3] Labor and Employment 🔑 Motive and intent; pretext

Employer's belief that employee would file workers' compensation claim was prohibited motivation for terminating employee under North Carolina's Retaliatory Employment Discrimination Act (REDA), even if employee did not actually file or threaten to file workers' compensation claim; REDA's language, protecting any employee who "threatens to file" a workers' compensation claim, broadly prohibited employer from firing employee based on its subjective anticipation or belief that employee would file workers' compensation claim. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[4] Labor and Employment 🔑 Exhaustion

Employee's filing of written complaint with Commissioner of Labor alleging that he was discharged in retaliation for reporting violations

of Occupational Safety and Health Act of North Carolina (OSHANC) was sufficient to exhaust his administrative remedies for his subsequent claims that employer terminated him in violation of North Carolina's Retaliatory Employment Discharge Act (REDA) as retaliation for filing workers' compensation claim, as well as in retaliation for reporting OSHANC violations; REDA administrative exhaustion provisions did not require REDA action to be based upon same theory of retaliation supporting administrative complaint. *N.C. Gen. Stat. Ann. §§ 95-241(a), 95-242(a), 95-243*.

1 Cases that cite this headnote

[5] Labor and Employment 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding that employer's decision to terminate employee was caused by employee's workplace safety complaints and employer's belief employee would file workers' compensation claim, as necessary to support employee's retaliation claims under North Carolina's Retaliatory Employment Discrimination Act (REDA), where internal emails showed employer's strategizing about how to fire employee so as to avoid appearance of illegality, employer's officers characterized employee's complaints as a "scam," employer's investigation of workplace safety complaint was lackluster, employer failed to punish coworker for assaulting employee, and chief administrative officer was generally hostile to workplace accident reports and workers' compensation claims. *N.C. Gen. Stat. Ann. § 95-241(a)*.

[6] Labor and Employment 🔑 Particular cases in general

Employer's termination of employee for internally complaining about violations of Occupational Safety and Health Act of North Carolina (OSHANC) constituted wrongful termination under North Carolina common law, where employer's conduct also constituted retaliation for employee's protected activity

under North Carolina's Retaliatory Employment Discrimination Act (REDA). *N.C. Gen. Stat. Ann.* §§ 95-129(1), 95-241(a).

[1 Cases that cite this headnote](#)

[7] Labor and Employment 🔑 Exercise of rights or duties; retaliation

Sufficient evidence supported finding that, in firing employee in retaliation for his workplace safety complaints and possible workers' compensation claim, employer's executives acted with malice toward employee or with conscious disregard for his right to engage in activity protected under North Carolina's Retaliatory Employment Discrimination Act (REDA), as necessary to support punitive discharges for employee's wrongful discharge claim under North Carolina common law, where executives refused to seriously investigate employee's allegations that coworker assaulted him or to punish coworker, executive was hostile toward accident reports and workers' compensation claims, and executives were on email chain in which internal investigator said he had personal motivations to fire employee. *N.C. Gen. Stat. Ann.* §§ 1D-5(5), 1D-5(7), 1D-15(c), 95-241(a).

[8] Election of Remedies 🔑 Causes of action and remedies subject to election

Labor and Employment 🔑 Exemplary or punitive damages

Labor and Employment 🔑 Attorney fees

Award to employee of punitive damages on his wrongful discharge claim under North Carolina common law served wholly different interests and was based on different conduct than award to employee of attorney fees for his retaliation claim under North Carolina's Retaliatory Employment Discrimination Act (REDA), and, thus, doctrine of election of remedies did not preclude employee from recovering both punitive damages and attorney fees; punitive damages were designed to punish willful misconduct and deter others from committing similar acts, whereas REDA's

attorney fee provision served to encourage private enforcement of its ban on discrimination and retaliation rather than to punish employers, and REDA authorized reasonable attorney fees regardless of employer's conduct. *N.C. Gen. Stat. Ann.* §§ 1D-15(a), 95-243(c).

***860** Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. *Frank D. Whitney*, District Judge. (3:16-cv-00819-FDW-DCK)

Attorneys and Law Firms

ARGUED: *Reginald Wayne Belcher*, Columbia, South Carolina, *Richard Taylor Speer*, TURNER, PADGET, GRAHAM & LANEY, PA, Greenville, South Carolina, for Appellant/Cross-Appellee. *Joshua Reed Van Kampen, Nicole Katherine Haynes*, VAN KAMPEN LAW, PC, Charlotte, North Carolina, for Appellee/Cross-Appellant. ON BRIEF: *Laura J. Wetsch*, WINSLOW & WETSCH, PLLC, Raleigh, North Carolina, for Appellee/Cross-Appellant.

Before *DIAZ* and *THACKER*, Circuit Judges, and *TRAXLER*, Senior Circuit Judge.

Opinion

Affirmed in part, reversed in part, vacated in part, and remanded by unpublished opinion. Judge *Diaz* wrote the majority opinion, in which Judge *Thacker* joined. Senior Judge *Traxler* wrote a separate opinion concurring in part and dissenting in part.

Unpublished opinions are not binding precedent in this circuit.

DIAZ, Circuit Judge:

In this case, a jury found that Summit Contracting Group violated North Carolina law by firing Justin Driskell as retaliation, either (1) for his complaints about workplace safety or (2) because Summit believed that he would file a workers' compensation claim. Summit appeals, arguing that it was entitled to judgment as a matter of law or a new trial, and that the ***861** jury's punitive-damages award wasn't supported by the evidence. Driskell cross-appeals, contending that the district court erred by not increasing the jury's compensatory damages award to reflect the full amount

of back pay that he's owed and by requiring him to elect between punitive damages and attorney's fees.

We affirm with respect to Summit's appeal because a reasonable jury could have found for Driskell on the merits and awarded him punitive damages. With respect to Driskell's cross-appeal, we hold that he failed to preserve his back-pay request for appellate review by not raising it before the district court in a timely fashion. However, we reverse the district court's order requiring Driskell to elect between punitive damages and attorney's fees, as the two awards serve different interests and aren't based on the same conduct. We vacate that portion of the judgment, and remand for the district court to enter judgment for Driskell for punitive damages, attorney's fees, and untrebled compensatory damages.

I.

This appeal arises from a motion for judgment as a matter of law, so we recite the facts with all reasonable inferences drawn in favor of the non-movant, Driskell. See *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999).

A.

Summit is a general contractor that manages construction projects. On June 4, 2015, Summit hired Driskell as an Assistant Superintendent and promptly assigned him to a project in Charlotte, North Carolina. He reported to Superintendent Daniel Rhyner, who in turn reported to the Project Manager, Steve Fudge. Driskell's father, Tom Driskell, had been a senior Summit employee for years.

In June and July 2015, Driskell noticed that Rhyner frequently drank alcohol at lunch and returned to work intoxicated, occasionally acting belligerently. One day, Rhyner drunkenly brandished a handgun at the job site. Summit's policies prohibit visiting a job site after drinking or while carrying a gun.

Driskell reported Rhyner's drinking to more senior employees several times. During his first week at the Charlotte project, he complained to Fudge that it was a safety issue. Fudge relayed this complaint to Marc Padgett, Summit's president and chief executive officer. Tom Driskell also relayed his son's complaints to Padgett's wife, Nicole Padgett, who was Summit's chief administrative officer. The Padgetts, however,

suspected that the Driskells were scheming to file a "bogus lawsuit" against Summit. J.A. 1648.

On the night of July 16, 2015, Justin Driskell ran into Rhyner, who was drunk, in the parking lot of a hotel where many employees were staying. They argued about a workplace safety issue, at which point Rhyner angrily told Driskell to pack his things and leave the job site.

Later that night, Driskell spoke with Mr. Padgett on the phone and complained again about Rhyner's drinking on the job. Padgett told Driskell to disregard what Rhyner had said about leaving the job site and that he would send a senior employee, Tom Born, to Charlotte to investigate Driskell's complaints. After the call, Rhyner apologized to Driskell. Mr. Padgett also alerted Rhyner that Born was coming to investigate the Driskells' allegations about his drinking.

On July 18, Born met with Rhyner and told him that the Driskells had complained about him. Born also asked a few employees whether they had seen Rhyner drink at the job site, which none of them had. He *862 didn't test Rhyner for drugs or alcohol, check his company credit card receipts (which reflected purchases of alcohol), or ask anyone if they had seen Rhyner drink at lunch, as Driskell had alleged.

Born then met with Driskell. He asked no questions about Rhyner's drinking. Instead, he told Driskell to stop telling people what was going on at the job site, and that whatever happened at the job site should stay there. Born then took Rhyner and other employees (but not Driskell) out to lunch, buying Rhyner two beers. This wasn't a violation of company rules because Rhyner wasn't going back to work after lunch.

The next day, Born sent a report to Mr. Padgett, concluding that Driskell was "a good kid" but needed to "grow a pair of balls." J.A. 2585. Mr. Padgett agreed.

The day after that (July 20), Driskell saw Rhyner, who appeared drunk, in the hotel parking lot. At Rhyner's insistence, the two had a beer together. Rhyner then said that he was removing some employees from the team that Driskell supervised, and that Driskell's team needed to increase its production (even though it would have fewer members). In response, Driskell said that pushing his team any harder would create safety issues. The two argued about this and cursed each other.

According to Driskell and an eyewitness, Driskell then turned toward his truck to leave. Rhyner followed him and punched him in the face repeatedly. Driskell didn't throw a punch, but wrestled with Rhyner, threw him over his head, and put him in a headlock. Neither party was hurt seriously, although Rhyner had to wear a neck brace for two weeks. During the fight, Rhyner told Driskell, "You're fired." J.A. 1073.

Later that evening, Driskell spoke to Mr. Padgett on the phone. Padgett told Driskell that he wasn't fired and that Rhyner lacked the authority to fire him. Driskell replied that he would quit if Rhyner remained at Summit.¹ Padgett didn't respond to that threat. Driskell also met with Fudge that night, who asked Driskell to return his work tools. Driskell expressed confusion about why he had to do that, as he planned to continue working at Summit, but he ultimately complied.

That same night, Driskell filed a criminal complaint against Rhyner—even though Fudge and Padgett had discouraged him from doing so—which led the police to charge Rhyner with assault.² Driskell also visited the emergency room for medical treatment. The doctor examining him said that he could return to work three days later (July 23).

The next morning, Mrs. Padgett emailed her husband and several other employees, writing: "We need to find out what steps to take next because Tom and Justin [Driskell] are plotting a bogus lawsuit that I sniffed out almost two weeks ago. This whole thing was planned." J.A. 2699. She later followed up to write that Tom Driskell "orchestrated this entire scam" with "the intent to screw Marc [Padgett] out of 5 MIL...." J.A. 2698.

Driskell took the next two days off and drove to Columbia, South Carolina, where his father lived and where Summit had another work site. He planned to return to work on July 23, but wasn't sure which work site he should report to, as he had *863 been receiving "conflicting information" (presumably from his father) on this point. J.A. 1095. Driskell had no paid or unpaid leave time available, so if he was still employed by Summit on July 21 and 22, he was breaking the company's rules by missing work.

Over those two days, Driskell called and texted Fudge repeatedly, seeking clarity on where he should report to work. Fudge didn't answer. On July 22 at 3:37 p.m., Driskell emailed Fudge and Mr. Padgett, saying: "Steve you have refused my calls and text message[s.] [A]fter tomorrow my [doctor] has

cleared me to go back to work[,] please advise what I'm suppose[d] to do." J.A. 2703 (cleaned up). Padgett promptly forwarded this message to his wife, who started a group email thread that included her husband, Born, and Zach Graham (another employee).

At 4:23 p.m. on July 22, Mrs. Padgett explained in the group thread that she told Fudge not to respond to Driskell "before we knew the plan from the attorney." J.A. 2702. The next day, the group debated via email which of them should "give [Driskell] the boot." J.A. 2702. Born wrote, "I think Zach was the designated terminator because Steve and I would have personal motivations to Fire [sic] him ..." J.A. 2701. Fudge also noted that Driskell still had his company phone and iPad, and asked Graham to collect Driskell's devices. But notwithstanding this conversation, no Summit employee (except for Rhyner back on July 20) ever told Driskell that he was fired.

Driskell's company-issued phone and iPad were deactivated on July 22, shortly after he had emailed Fudge and Mr. Padgett. At trial, he testified that he "knew at that point that [he] had been terminated and that it was not going to be reversed." J.A. 1216. Nevertheless, he texted Fudge the following message from his personal phone later that evening: "Still haven't heard any word as to what you need me to do. Please give me a call." J.A. 2706. Fudge never responded.

The next afternoon (July 23), Driskell turned in his company-issued devices at the Columbia job site. He explained at trial that he did so because he "knew ... that [he] had been fired and that if [he] kept company property that [he] could be prosecuted for theft." J.A. 1098.

About a month later, Driskell applied for a new job at another company. On the application, he checked a box indicating that he had never been "fired from a job." J.A. 1204. At trial, Driskell explained that this was a lie to improve his chances of getting the new job.

B.

In January 2016, Driskell filed a complaint with the North Carolina Department of Labor. He alleged that he was fired because of his complaints about Rhyner and his refusal (for safety reasons) to follow Rhyner's instructions to increase his team's production, and because he "became a threat, risk or liability to the Company after Mr. Rhyner attacked [him]."

J.A. 78. After the Labor Department declined to investigate his complaint, Driskell asked for and received a right-to-sue letter.

Driskell then filed this suit, bringing claims for, as relevant here, retaliatory termination in violation of North Carolina's Retaliatory Employment Discrimination Act ("REDA") and wrongful discharge in violation of North Carolina common law. He alleged two theories for why Summit fired him: (1) because of his complaints about Rhyner's drinking and their fight, and (2) because Summit believed that he would file a workers' compensation claim *864 due to his injuries from his fight with Rhyner.

Discovery yielded evidence that Summit has exhibited hostility toward other workplace safety reports and workers' compensation claims. For example, Mrs. Padgett once complained about having to document a workplace accident; she instructed employees to put medical bills on company credit cards rather than open workers' compensation claims; and Summit would screen potential employees for their workers' compensation claim history.

A jury trial ensued. The jury found that Summit had fired Driskell and, in doing so, violated REDA and North Carolina common law. The jury didn't specify which of Driskell's two theories of retaliation it accepted. It also awarded Driskell \$65,000 in compensatory damages (representing his lost wages and benefits) for his two claims (which he could collect only once) and \$681,000 in punitive damages on the wrongful-discharge claim.

The district court denied Summit's motions for judgment as a matter of law and for a new trial, in which Summit argued that the verdict was unsupported by the evidence and criticized the court's jury instructions regarding the types of activity that REDA protects. Further, the court denied Driskell's motion to amend the judgment without addressing Driskell's request that the court increase his compensatory award to reflect additional lost back pay. Driskell hadn't included this request in his motion to amend the judgment (which he had filed in a timely fashion), but rather in a response to one of Summit's motions, which Driskell filed 38 days after the judgment was entered.

Later, the court held that Driskell was required to choose between a \$250,000 punitive-damages award³ for the wrongful-discharge claim and attorney's fees under REDA.⁴ The court reasoned that North Carolina law prevents

duplicative remedies, see *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374, 379 (1993), and that the award of punitive damages and attorney's fees were based on the same conduct (namely, Summit's retaliatory firing). Driskell then chose to forgo punitive damages, collecting \$195,000 in trebled compensatory damages⁵ and \$441,600 in attorney's fees.

Both parties appealed.

II.

We first address Summit's appeal, which raises several issues of North Carolina *865 law. In ruling on these issues, we must predict how the Supreme Court of North Carolina would rule, *Stahle v. CTS Corp.*, 817 F.3d 96, 100 (4th Cir. 2016), and follow any "fully reasoned holding" by the North Carolina Court of Appeals unless we are "convinced that the state's highest court would not follow that holding," *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) (cleaned up).

A.

First, Summit insists that it was entitled to judgment as a matter of law on Driskell's REDA and wrongful-discharge claims because it never fired him; rather, he quit. We must affirm the district court unless no reasonable jury could have ruled for Driskell. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002).

As relevant here, REDA provides that:

No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to ... [f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to [the Occupational Safety and Health Act of North Carolina ("OSHANC") or the North Carolina Workers' Compensation Act].

N.C. Gen. Stat. § 95-241(a). To prevail on a REDA claim, a plaintiff must show that (1) he exercised his right to engage in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between his exercise of the protected activity and the retaliatory action. *Edwards v. PCS Phosphate Co., Inc.*, 812 F. Supp. 2d 689, 693 (E.D.N.C.

2011) (citing *Brackett v. SGL Carbon Corp.*, 158 N.C.App. 252, 580 S.E.2d 757, 762 (2003)). And a wrongful-discharge claim requires a plaintiff to “identify a specified North Carolina public policy”—here, the policy against retaliation codified in REDA—“that was violated by an employer in discharging the employee.” *McDonnell v. Guilford County Tradewind Airlines, Inc.*, 194 N.C.App. 674, 670 S.E.2d 302, 305 (2009) (cleaned up).

As an initial matter, we note that North Carolina law provides no legal standard for determining whether an employee was fired or quit. Relatedly, we have found no authority requiring that an employer expressly tell an employee that he's been fired.

[1] With that in mind, we conclude that the evidence supports a finding that Summit fired Driskell on either July 22 or July 23, 2015. Most significantly, Summit deactivated Driskell's work-issued devices on July 22. Fudge and Padgett also didn't respond to Driskell's attempts to contact them on July 21 or 22, and Fudge had asked Driskell to return his work tools on the night of July 20. And when Driskell returned his work-issued devices on July 23, no one directed him to continue working at Summit or told him that Summit mistakenly deactivated his devices. A reasonable person in Driskell's position would have understood that he had been terminated, and Summit's internal emails on July 22 and 23 prove that it did in fact intend to terminate Driskell, despite Padgett's statement on July 20 that Driskell wasn't fired.

At no point did Driskell quit his job. While he did tell Mr. Padgett on July 20 that he *would* quit if Rhyner remained employed by Summit, threatening to quit and actually doing it are two different things. And while he also broke Summit's rules by missing work on July 21 and 22, he did so only because his doctor told him to, and in any event, breaking an employer's rules doesn't necessarily signify an *866 intent to quit. Indeed, Rhyner violated Summit's rules by taking two weeks off from work after his fight with Driskell, and yet he received no punishment and continues to work for Summit.

Nor does Driskell's statement on a job application that he had never been fired doom his claims. To the contrary, a reasonable jury could credit his explanation that he lied to help his chances of getting a new job. Statements on job applications aren't binding admissions, contrary to what Summit argues. The case Summit points to, *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510 (4th Cir. 2006), doesn't support that proposition. There, in ruling against a plaintiff, we relied

on the plaintiff's “fail[ure] to present any evidence genuinely disputing” the fact that he had admitted in a job application. *Id.* at 519. Here, Driskell did present such evidence.

B.

Next, Summit contends that REDA doesn't protect internal complaints to one's own employer. So, Summit argues that it is entitled to judgment as a matter of law because, even if Summit did fire Driskell for his complaints to Mr. Padgett, that couldn't support a REDA claim.

Whether REDA protects Driskell's complaints is a question of law, see *Pierce v. Atlantic Grp., Inc.*, 219 N.C.App. 19, 724 S.E.2d 568, 573–75 (2012) (treating as a legal question whether REDA protected a plaintiff's communications with his supervisors regarding work safety issues), which we review de novo, see *Equinor USA Onshore Properties Inc. v. Pine Res., LLC*, 917 F.3d 807, 813 (4th Cir. 2019). We agree with the district court that, while REDA doesn't protect *every* internal complaint about workplace safety, it does protect Driskell's complaints to Mr. Padgett.

By its terms, REDA protects employees who “initiate any inquiry [or] investigation ... or provide information to any person with respect to” OSHANC. N.C. Gen. Stat. § 95-241(a). “The Supreme Court of North Carolina has not ruled whether an internal complaint is a protected activity under REDA.” *Hadley v. Duke Energy Progress, LLC*, 677 F. App'x 859, 861 (4th Cir. 2017) (per curiam).

The Court of Appeals of North Carolina, however, has indicated that some internal complaints *are* protected. In *Pierce*, the court found “persuasive” a district court holding that REDA protected a plaintiff's communications to an internal auditor about an ongoing investigation into health and safety practices. 724 S.E.2d at 574–75 (citing *Jurrissen v. Keystone Foods, LLC*, No. 1:08-CV-128, 2008 WL 3925086, at *5–6 (M.D.N.C. Aug. 20, 2008)).

And in a later case, the Court of Appeals found that REDA would protect plaintiffs who were allegedly fired for photographing unsafe working conditions and complaining about those conditions to their boss, who replied that he wasn't interested in such complaints. *Bigelow v. Town of Chapel Hill*, 227 N.C.App. 1, 745 S.E.2d 316, 324 (2013). The court reasoned that REDA's “primary purpose ... is to ensure that

employees are not discouraged from reporting violations of OSHANC.” *Id.* at 325 (cleaned up).

On the flip side, the Court of Appeals has also recognized “that merely talking to an internal supervisor about potential safety concerns is not a ‘protected activity’ under REDA.” *Pierce*, 724 S.E.2d at 574 (quoting *Jurrissen*, 2008 WL 3925086, at *5). For instance, the plaintiff in *Pierce* proposed to his supervisors a process by which the company might comply with new safety regulations, raising it on a weekly basis for about a month without ever getting a response. *Id.* at 571.

*867 The Court of Appeals found that such activity was not protected because the plaintiff “spoke only to his supervisors” and “there was no evidence of an investigation” into the defendant’s practices. *See id.* at 575; *see also Hadley*, 677 F. App’x at 862 (noting *Pierce*’s recognition that “while REDA does not require filing a formal claim, it does require more than simply complaining to a manager”). While the Court of Appeals didn’t explain why it mattered that the plaintiff spoke only to his supervisors, we suspect that it’s because employees do that in the ordinary course. An employee who mentions an OSHANC issue to a supervisor won’t typically be seeking to assist or initiate an “inquiry” or “investigation,” which is what REDA protects, N.C. Gen. Stat. § 95-241(a). In contrast, an employee who goes over a supervisor’s head and complains to the company president or an internal auditor will typically intend to assist or initiate an inquiry or investigation. *See Jurrissen*, 2008 WL 3925086, at *6 (finding that the plaintiff’s communication with an internal auditor was protected by REDA, even though “merely commenting to a supervisor about alleged unsafe conditions” would not be).

The Court of Appeals also cited approvingly a district court’s holding “that a plaintiff’s criticism of his supervisor to a division manager” wasn’t protected. *Pierce*, 724 S.E.2d at 575 (citing *Delon v. McLaurin Parking Co.*, 367 F. Supp. 2d 893, 902 (M.D.N.C. 2005), *aff’d*, 146 F. App’x 655 (4th Cir. 2005)). In that case, the plaintiff’s criticism of his supervisor was largely unrelated to workplace safety. *See Delon*, 367 F. Supp. 2d at 896–98 (noting that the plaintiff kept a notebook of complaints that “cover[ed] a wide range of topics,” most of which didn’t concern safety, and that his criticism was focused on the supervisor’s management and not any “concern over safety issues”).

We deduce from these authorities the following principles. Internal complaints alleging ongoing OSHANC violations,

like the ones in *Bigelow* and *Jurrissen* (and unlike the one in *Pierce*, where the plaintiff proposed a way to comply with new safety rules but didn’t allege any ongoing violations), can be protected. In assessing whether a particular complaint is protected, we should also consider: whether it relates or leads to an investigation, *see Pierce*, 724 S.E.2d at 575; whether it’s made to someone other than the plaintiff’s “supervisors or managers,” *see id.*; and whether workplace safety is a primary focus of the complaint, *see Delon*, 367 F. Supp. 2d at 902 (finding that criticism of a supervisor that was mostly unrelated to workplace safety issues wasn’t protected by REDA).

[2] Driskell’s complaints about Rhyner meet these criteria. Driskell alleged OSHANC violations: namely, Rhyner’s presence at the work site while intoxicated and his assault on Driskell. *See N.C. Gen. Stat. § 95–129(1)* (requiring employees to furnish “a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to [] employees”). These allegations led to Born’s investigation into Rhyner’s drinking. Driskell complained frequently to Mr. Padgett, who is Summit’s president and chief executive officer, not a mere supervisor or manager. And workplace safety was the focus of Driskell’s complaints. Thus, REDA protects Driskell’s complaints to Mr. Padgett.

C.

Summit also makes two arguments that are specific to Driskell’s second theory of retaliation: namely, that Summit expected Driskell to file a workers’ compensation claim. While Driskell’s first theory suffices *868 to support the jury’s verdict on the merits (and its compensatory-damages award), we address the second theory as well because it’s relevant to evaluating Summit’s challenge to the punitive-damages award.

1.

First, Summit assails the district court’s jury instruction that “[i]t is against the law for an employer to terminate an employee because the employer *believes* the employee will file a workers’ compensation claim against the employer.” J.A. 1932 (emphasis added). In Summit’s view, REDA’s text requires an employee to actually file or “threaten[] to” file a workers’ compensation claim, *see N.C. Gen. Stat. §*

95-241(a). Because Driskell never explicitly threatened to file a claim, Summit insists, his second theory of retaliation shouldn't have been submitted to the jury. Whether the jury instruction was correct is another question of law that we review de novo.

[3] We conclude that the jury instruction was correct, as no explicit threat by the plaintiff is required. In *Abels v. Renfro Corp.*, the Supreme Court of North Carolina construed REDA's predecessor statute—whose language was much narrower than REDA's⁶—to prohibit an employer from firing someone because the employer “anticipated her good-faith filing of a workers’ compensation claim.” 335 N.C. 209, 436 S.E.2d 822, 826 (1993).

The plaintiff in *Abels* didn't threaten to file a claim. See *id.*, 335 N.C. 209, 436 S.E.2d at 826. Rather, the employer was aware that she had suffered an injury and that her doctor had requested that she be given a leave of absence. Upon learning that, the employer discharged her “to forestall the anticipated filing of a workers’ compensation claim.” *Id.* That was enough, the Supreme Court held, to support the jury's verdict for the plaintiff. *Id.*

The only difference between the *Abels* standard and the jury instruction in this case is that the district court substituted “believe” for “anticipate.” This difference is immaterial. The two words are analogous in that (1) they relate to the defendant's subjective expectation and (2) neither requires the plaintiff to have explicitly threatened to file a claim. And REDA was meant to expand its predecessor's protections, not narrow them. Cf. *Johnson v. Trs. of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 535 S.E.2d 357, 361 (2000) (explaining that REDA replaced the statute at issue in *Abels* and “expanded the definition of retaliation to include” many types of adverse employment actions, not just discharge and demotion). So, we must interpret REDA to prevent an employer from firing an individual because it anticipates (or believes) that she will file a workers’ compensation claim. The jury instruction was therefore proper.

2.

Additionally, Summit asserts that Driskell failed to exhaust his administrative remedies as to his workers’ compensation theory because he didn't raise that theory in his complaint to the North Carolina Department of Labor, relying instead on his OSHANC theory. We disagree.

[4] Before bringing a REDA claim, a plaintiff must: “file a written complaint *869 with the Commissioner of Labor alleging [a REDA] violation,” N.C. Gen. Stat. § 95-242(a); obtain a right-to-sue letter, *id.* §§ 95-242(a), 95-243(a); and commence a civil action within ninety days of the letter's issuance, *id.* § 95-243(b). Driskell did that, so he exhausted his administrative remedies. Since North Carolina law doesn't require that a REDA suit be based on the same theory of retaliation that supported the plaintiff's administrative complaint, Summit's argument misses the mark. See *id.* § 95-243 (containing no such requirement).⁷

D.

Next, Summit maintains that no reasonable jury could have found causation, i.e., that Summit fired Driskell because of his complaints or because it believed that he would file a worker's compensation claim. Instead, Summit posits, it fired Driskell for a legitimate reason: his violations of company policy, including insubordination, cursing and fighting his supervisor, and taking two days off when he had no leave available.

[5] Summit is wrong. There was ample evidence to support causation with respect to both of Driskell's retaliation theories, including: Summit's internal emails strategizing about how to fire Driskell so as to avoid the appearance of illegality; the Padgetts’ characterization of his complaints as a “scam,” J.A. 2698, and as preparation for a “bogus lawsuit,” J.A. 2699; Born's lackluster investigation of Driskell's complaints and comment that he needed to “grow a pair of balls,” with which Mr. Padgett agreed, J.A. 2585; Summit's failure to punish Rhyner for fighting with Driskell; and Mrs. Padgett's general hostility toward OSHANC accident reports and workers’ compensation claims.

Indeed, the evidence of causation here is stronger than in *Abels*, where the Supreme Court of North Carolina held that the record supported an inference of retaliation. 436 S.E.2d at 826. There, the plaintiff showed only that she was a good employee and that she was discharged shortly after her employer learned of her injury. See *Abels v. Renfro Corp.*, 108 N.C.App. 135, 423 S.E.2d 479, 483–84 (1992) (summarizing the plaintiff's evidence), *aff'd in part and rev'd in part on other grounds*, 335 N.C. 209, 436 S.E.2d 822 (1993). In contrast, Driskell presented direct evidence of retaliatory animus.

There's also no contemporaneous evidence corroborating Summit's explanation for why it fired Driskell. Thus, a reasonable jury "could infer from the late appearance of [Summit's] current justification that it is a post-hoc rationale, not a legitimate explanation for [its adverse employment] decision." *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 853 (4th Cir. 2001).

E.

Next, Summit asserts that it was entitled to judgment on Driskell's wrongful-discharge claim because Driskell never filed or threatened to file an OSHA or workers' compensation claim. Summit is mistaken.

[6] As Summit recognizes, Driskell's "wrongful termination claim rises or falls on the viability of [his] REDA-based claim." *Lockie v. Staples Contract & Com., Inc.*, No. 3:14-CV-521, 2015 WL 93643, at *3 (W.D.N.C. Jan. 7, 2015). This is because "wrongful discharge claims have been recognized in North Carolina where the employee *870 was discharged ... for engaging in a legally protected activity," like complaining about OSHANC violations. *Combs v. City Elec. Supply Co.*, 203 N.C.App. 75, 690 S.E.2d 719, 723 (2010) (cleaned up). Thus, just as we affirm the verdict for Driskell on his REDA claim, so too do we affirm the verdict on his wrongful-discharge claim.

F.

Finally, Summit asserts that the jury's award of punitive damages for Driskell's wrongful-discharge claim wasn't supported by the record. We disagree.

Punitive damages are available in wrongful-discharge claims under North Carolina law. See *Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C.App. 713, 478 S.E.2d 809, 810, 815 (1996) (affirming punitive-damages award). They're only proper, however, where there's "clear and convincing evidence" that the defendant's conduct involved fraud, malice, or willful or wanton conduct. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640, 644 (2009) (citing N.C. Gen. Stat. § 1D-15(a)).

"Malice" in this context means "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in

harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." *Id.* § 1D-5(7). It "means more than gross negligence." *Id.* And, "[w]hen punitive damages are sought against a corporation, the claimant must further show that 'the officers, directors, or managers of the corporation participated in or condoned the conduct [involving fraud, malice, or willful or wanton conduct] giving rise to punitive damages.'" *Id.* (citing N.C. Gen. Stat. § 1D-15(c)).

"The clear and convincing standard requires evidence that should fully convince." *Scarborough*, 693 S.E.2d at 643 (cleaned up). "This burden is more exacting than the 'preponderance of the evidence' standard generally applied in civil cases, but less than the 'beyond a reasonable doubt' standard applied in criminal matters." *Id.* In reviewing a jury's punitive damages award, we must determine whether "a jury could reasonably find" that the claimant met this exacting burden. *Id.*, 363 N.C. 715, 693 S.E.2d at 644.

[7] Here, a reasonable jury could be fully convinced that, in firing Driskell, Summit's executives (namely, the Padgetts) acted with malice toward Driskell or with a conscious disregard for his right to engage in activity protected by REDA. As for malice, Mrs. Padgett's emails about Driskell bespeak ill will toward him. She referred to his injuries as a "joke," J.A. 1631, and repeatedly accused him and his father of orchestrating a "scam," J.A. 2698, and a "bogus lawsuit," J.A. 2699. A jury could also find that the Padgetts' refusal to seriously investigate Driskell's allegations or punish Rhyner for assaulting Driskell reflected animus toward Driskell. Further, both of the Padgetts were on an email chain in which Born acknowledged that he and Fudge "would have personal motivations to [f]ire" Driskell, J.A. 2701, suggesting that the Padgetts may have "condoned [] conduct" involving malice, see N.C. Gen. Stat. § 1D-15(c).

The same evidence supports a finding of willful or wanton conduct. So too does Mr. Padgett's agreement with Born's view that Driskell needed to "grow a pair of balls" and stop complaining about Rhyner's drinking. J.A. 2585. That statement shows a conscious disregard for Driskell's right *871 to allege an OSHANC violation. Similarly, Mrs. Padgett's hostility toward accident reports and workers' compensation claims indicates an indifference to the rights and safety of others.

In sum, while the clear-and-convincing standard is “exacting,” *Scarborough*, 693 S.E.2d at 643, a reasonable jury could find that Driskell met it.

III.

We turn now to Driskell's cross-appeal, which raises two issues.

A.

First, Driskell argues that the district court erred by not amending the jury's award of \$65,000 in compensatory damages. In his view, the award should have been \$134,038 (before trebling), reflecting the full amount of back pay that he was owed.

Driskell failed to preserve this issue in the district court, however. Motions to amend a judgment “must be filed no later than 28 days after the entry of the judgment,” *Fed. R. Civ. P. 59(e)*, and a court may not extend that deadline, *Fed. R. Civ. P. 6(b)(2)*. Driskell filed his back-pay request 38 days after the judgment was entered (in a response to one of Summit's motions) rendering the request untimely and thereby forfeiting appellate review of this issue. *See Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) (dismissing an appeal because the appellant had failed to file a post-trial motion within the requisite time period); *see also Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 160 (4th Cir. 2012) (“Belk's failure to move pursuant to Rule 50(b) forfeits the sufficiency of the evidence challenge on appeal.”).

B.

Driskell also insists that he shouldn't have been required to choose between the punitive-damages verdict (which arose from his wrongful-discharge claim) and the award of attorney's fees (which arose from his REDA claim). We agree.

Under North Carolina's “doctrine of election of remedies,” “a plaintiff may not recover inconsistent remedies” or ones that would provide “double redress for a single wrong.” *United Labs.*, 437 S.E.2d at 379, 335 N.C. 183 (cleaned up). Punitive damages and attorney's fees are not inconsistent remedies. *Id.* Whether they are duplicative turns on whether they “serve

different interests and are not based on the same conduct.” *Id.*, 335 N.C. 183, 437 S.E.2d at 380.⁸

[8] Without question, the two awards serve “wholly different” interests. *Id.*; accord *872 *Lacey v. Kirk*, 238 N.C.App. 376, 767 S.E.2d 632, 650 (2014). “Punitive damages are designed to punish willful conduct and to deter others from committing similar acts,” *United Labs.*, 437 S.E.2d at 380, while “an award of attorneys' fees is intended to address costs that arise in the course of the litigation of a particular case,” *Lacey*, 767 S.E.2d at 650. And although REDA doesn't explain *why* it authorizes fee awards for plaintiffs, we infer that it does so “to encourage private enforcement of” its ban on discriminatory and retaliatory employment practices, not to punish defendants. *See United Labs.*, 437 S.E.2d at 380 (explaining why a statute banning unfair methods of competition authorized awards of attorney's fees for successful plaintiffs) (cleaned up).

Further, (and contrary to the dissent's view) the two awards “are not based on the same conduct.” *Id.* To recover punitive damages, Driskell had to prove that Summit's conduct involved fraud, malice, or willful or wanton conduct. *See N.C. Gen. Stat. § 1D–15(a)*. In contrast, REDA gives the trial court discretion to award fees and costs to a prevailing plaintiff—irrespective of the defendant's conduct—provided the plaintiff can show that such fees and costs are reasonable. *N.C. Gen. Stat. § 95-243(c)*. And while North Carolina courts have had little occasion to apply this standard in the context of REDA claims, we think the familiar test for reasonableness applied elsewhere governs here.⁹ *See United Labs.*, 437 S.E.2d at 381-82 (directing trial court, in considering the reasonableness of a fee award for a plaintiff prevailing on a unfair competition claim, to make findings “as to the time and labor expended, the skill required, the customary fee for like work, the experience or ability of the attorney, the novelty and difficulty of the questions of law, the adequacy of the representation, the difficulty of the problems faced by the attorney, especially any unusual difficulties, and the kind of case for which the fees are sought and the result obtained.”) (cleaned up).

In sum, because recovery of attorney's fees under REDA requires proof different from that which gives rise to punitive damages, and the awards don't arise from the same course of conduct, Driskell can collect both. The district court erred in holding otherwise.

IV.

For the reasons given, we reverse that portion of the district court's order (and vacate the related judgment) requiring Driskell to choose between punitive damages and attorney's fees, and remand for the district court to enter judgment for Driskell for punitive damages, attorney's fees, and untrebled compensatory damages.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

TRAXLER, Senior Circuit Judge, concurring in part and dissenting in part:

*873 I concur in the majority's rejection of the issues raised by Summit in its appeal. As to Driskell's cross-appeal, I agree that Driskell failed to preserve for appeal his challenge to the amount of back-pay awarded by the district court, and I concur in that portion of the majority's opinion as well. In my view, however, the district court did not err in requiring Driskell to choose between the remedies available on his common-law wrongful-discharge cause of action and the remedies available on his statutory retaliatory-discharge claim. I therefore dissent from that aspect of the majority's decision.

I.

The jury awarded Driskell \$65,000 in actual damages on his REDA claim and on his wrongful-discharge claim, and \$681,000 (reduced to the statutory maximum of \$250,000) in punitive damages on the wrongful-discharge claim. On the election-of-remedies question, Driskell contended that under *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) ("*United Labs*"), he was entitled to recover the punitive damages awarded on the wrongful-discharge claim, along with untrebled actual damages and attorney's fees under REDA. The district court rejected that approach and accepted Driskell's second choice of recovering the remedies available under REDA -- \$65,000 actual damages trebled to \$195,000, plus attorney's fees. The district court awarded attorney's fees of just over \$441,000, giving Driskell a total award of \$636,000. If the district court had accepted Driskell's first choice, Driskell would have received \$756,000.

On appeal, Driskell continues to pursue his first choice, arguing that he is entitled to \$756,000 under the approach set out in *United Labs*. The majority, concluding that punitive damages and the fee award were based on different conduct and serve different interests, holds that the district court erred under *United Labs* by requiring Driskell to elect between punitive damages and attorney's fees. I believe the district court correctly resolved the issue.

II.

A.

One of the purposes of the doctrine of election of remedies is to prevent "double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 79 S.E.2d 880, 885 (1954). In cases where a single set of facts supports a common-law claim and a statutory claim, North Carolina courts have applied the doctrine to hold that the plaintiff may recover under one cause of action or the other, but not both. *See Ellis v. N. Star Co.*, 326 N.C. 219, 388 S.E.2d 127, 132 (1990) ("The company contends that it should be entitled to both punitive damages for the libel and the treble damages automatically assessed under N.C.G.S. § 75-16. We disagree. The libel and unfair trade claims both arose from the defendants' letter. Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both."); *Wilder v. Hodges*, 80 N.C.App. 333, 342 S.E.2d 57, 58 (1986) ("When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under Chapter 75, recovery can be had on either claim, but not on both."); *Marshall v. Miller*, 47 N.C.App. 530, 268 S.E.2d 97, 103 (1980) ("Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of *874 G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both."). These cases thus require a plaintiff to choose which cause of action or path to recovery on which he will proceed and permit him to recover only those remedies available on the chosen path.

In *United Labs*, however, the North Carolina Supreme Court departed from the approach outlined above and allowed a plaintiff to pick and choose from the remedies available on his common-law and statutory causes of action. *See*

United Labs, 437 S.E.2d at 382 (“Heretofore, it has been the practice in this state to require the plaintiff to recover either the Chapter 75 statutory group of remedies (trebled compensatory damages and discretionary attorneys’ fees) or the group of remedies available in the common law claim (compensatory and punitive damages).”) (Meyer, J., concurring in part and dissenting in part).

In *United Labs*, the court permitted the plaintiff to recover punitive damages available under his common-law cause of action, as well as additional remedies available under N.C. Gen. Stat § 75–1.1(a), a statutory treble-damages scheme prohibiting unfair or deceptive acts and practices affecting commerce, as long as the remedies were neither inconsistent nor duplicitous. Under that approach, the court held that the plaintiff could recover punitive damages on his tort claim along with actual (untrebled) damages and attorney’s fees under the unfair-practices statute. The court held that the untrebled actual-damage award and punitive-damage award were not duplicitous because they did not redress the same wrong. See *United Labs*, 437 S.E.2d at 381. As to attorney’s fees, the court held they were not duplicitous because the punitive-damage award and fee award were based on different conduct:

[The] conduct which gives rise to an award of attorneys fees is not the same conduct that gives rise to an award of punitive damages. To recover punitive damages at common law a plaintiff must show that the defendant acted in a willful or oppressive manner. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342. To recover attorneys fees for unfair practices, however, the plaintiff must also show that “there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of ... the suit.” N.C.G.S. § 75–16.1(1). Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from “the same course of conduct.” *Marshall*, 47 N.C. App. at 542, 268 S.E.2d at 103.

United Labs, 437 S.E.2d at 379-80.

Driskell relies on *United Labs* when seeking to mix and match the remedies available on his separate causes of action. In my view, however, *United Labs*’ mix-and-match approach was legislatively overruled by N.C. Gen. Stat. § 1D-20, which was enacted a few years after the case was decided.¹

Section 1D-20 is part of an act passed in 1995 that limited the circumstances under which punitive damages could be

awarded and placed a cap on the amount of punitive damages that could be awarded. See 1995 North Carolina Laws Ch. 514 (H.B. 729). The provisions of the 1995 act “appl[y] to *875 every claim for punitive damages, regardless of whether the claim for relief is based on a statutory or a common-law right of action or based in equity,” and “prevail over any other law to the contrary.” N.C. Gen. Stat. § 1D-10. Because Driskell sought punitive damages on his common-law wrongful-discharge claim, that punitive-damage claim is governed by the 1995 act, including § 1D-20.

Section 1D-20 provides that “[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.” N.C. Gen. Stat. § 1D-20. In my view, the import of this language is clear. A plaintiff with a claim that supports an award of punitive damages on one cause of action as well as recovery under a multiple-damages statute must choose his path of recovery – he must “elect ... between” either punitive damages or “any other remedy” available under the multiple-damages statute. *Id.* A plaintiff who chooses to recover any of the remedies available on the statutory multiple-damages claim cannot also recover punitive damages on a different claim based on the same facts. The statute thus returns to the pre-*United Labs* approach applied in *Ellis* and *Marshall*. The plaintiff must choose one path of recovery, either the statutory multiple-damages claim or the claim that includes punitive damages, and the plaintiff’s recovery is limited to the remedies authorized for the chosen cause of action. If he wants to collect the award of punitive damages, he cannot collect any of the remedies available under the multiple-damages statute.

Although § 1D-20 is titled “Election of extracompensatory remedies,” its reach is not strictly limited to the kinds of remedies that might be classified as “extracompensatory.” An award of punitive damages is extracompensatory, as is an award of statutorily multiplied actual damages. However, § 1D-20 does not say that a plaintiff choosing a punitive-damages award may not recover *extracompensatory* remedies under a multiple-damages statute; § 1D-20 says that a plaintiff choosing a punitive-damages award may not recover any of the remedies available under a multiple-damages statute, including the purely compensatory (unmultiplied) actual-damage award.

“In North Carolina, a trial court may award attorney’s fees only as authorized by statute.” *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 843 S.E.2d 207, 210 (2020). Whether an award of attorney’s fees might be characterized

as compensatory or extracompensatory, there is little question that an award of attorney's fees authorized by statute is a remedy pursuant to that statute, as required under § 1D-20. See, e.g., *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 451 S.E.2d 293, 298 (1994) (“Attorney's fees are available as a remedy under N.C.G.S. § 20–351.8(3)...”); *Minneman v. Martin*, 114 N.C.App. 616, 442 S.E.2d 564, 566 (1994) (“The Act goes beyond merely allowing suit, however, and provides various remedies for the injured employee, including injunctive relief, damages, attorney's fees, and, in some cases, treble damages.”) (citing N.C. Gen. Stat. § 126–87). Thus, if a multiple-damage statute authorizes an award of attorney's fees, that is one of the remedies that a plaintiff must forgo if he chooses to recover on his punitive-damage claim.

North Carolina courts have given scant attention to § 1D-20, and neither of the State's appellate courts have considered the operation of the statute.² In my view, *876 however, the language of the statute is clear and unambiguous and prohibits a plaintiff from recovering punitive damages while also recovering any of the remedies available under a multiple-damages statute. Applied to this case, my reading of § 1D-20 leads to same conclusion reached by the district court. Driskell is entitled to proceed under his wrongful-discharge claim, which permits punitive damages but not attorney's fees, or to proceed under his REDA claim, which permits attorney's fees but not punitive damages. He cannot, however, mix and match the remedies available under the separate claims.

B.

In any event, even if § 1D-20 has no effect on *United Labs*, I do not believe *United Labs* controls the disposition of this case.

As discussed above, the court in *United Labs* held that the punitive-damage award and fee award in that case were not duplicious because the “conduct which gives rise to an award of attorneys fees is not the same conduct that gives rise to an award of punitive damages.” *United Labs*, 437 S.E.2d at 379. The punitive-damages claim required the plaintiff to prove that “the defendant acted in a willful or oppressive manner,” while the statutory attorney-fee award required further proof “ ‘that there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of ... the suit.’ ” *Id.*, 335 N.C. 183, 437 S.E.2d at 379-80 (quoting N.C. Gen. Stat. § 75–16.1(1)). As this portion of the opinion makes clear, *United Labs* did not hold that punitive-damage awards

and fee awards are *always* based on different conduct for election-of-remedies purposes. Instead, the court explicitly grounded its different-conduct decision on the additional fact the defendant's unwarranted refusal to fully resolve the claim -- that was statutorily required *in that case* to establish a claim for attorney's fees.

In this case, however, there is no additional statutory factor required to support a fee award. REDA simply provides that “[t]he court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys’ fees, of the plaintiff in bringing an action pursuant to this section.” N.C. Gen. Stat. Ann. § 95-243. Because attorney's fees may be awarded in *any* case where a REDA violation is established, it seems clear to me that, as the district court held, the conduct giving rise to the punitive-damages claim in this case is the very same conduct that gave rise to the fee award.

Although the award of punitive damages required Driskell to prove fraud, malice, or willful or wanton conduct, the evidence proving the wrongful discharge and establishing Summit's liability for punitive damages was the same evidence that proved the REDA violation and authorized the award of attorney's fees. Driskell was also required to show the reasonableness of the fee award sought, which required the court to consider the traditional factors, such as the time expended by counsel and the customary fees for similar cases. Those factors, however, are not relevant to the election-of-remedies question. As the court made clear in *United Labs*, the question is whether the “conduct which gives rise to an award of attorneys fees is ... the same conduct that gives rise to an award of punitive damages.” *United Labs*, 437 S.E.2d at 379 (emphasis added). The court thus considered whether the *conduct of the defendant* that triggered liability for punitive *877 damages was the same conduct that triggered liability for attorney's fees. The factors showing the reasonableness of the requested fees do not focus on the conduct of the defendant and have nothing to with the threshold question of whether the defendant engaged in conduct that gave rise to an award of attorney's fees. Accordingly, the factual predicate for the *United Labs* approach – different conduct supporting the fee award – is absent in this case.

In reaching its conclusion, the *United Labs* court noted that punitive damages and fee awards serve different interests, see 437 S.E.2d at 380, an observation that can likewise be made in this case. That the awards serve different interests, however, is not sufficient; under *United Labs*, the awards

must also involve different conduct. See *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225, 229 (1995) (describing *United Labs* as permitting the recovery of punitive damages under a common-law cause of action and attorney's fees under a statutory unfair-practices claim “where [the] recoveries serve different interests *and* are not based on the same conduct”) (emphasis added); *United Labs*, 437 S.E.2d at 380 (holding that election of remedies was not required because the “recoveries serve different interests *and* are not based on the same conduct”) (emphasis added).

Because the same conduct that gave rise to Summit's liability for punitive damages on Driskell's wrongful-discharge claim also gave rise to the REDA violation and triggered the award of attorney's fees under REDA, I do not believe that *United Labs* governs the disposition of this case. Absent the factual basis justifying application of *United Labs*' approach, this case should be governed by North Carolina's traditional approach to election-of-remedies questions set out in *Ellis*, *Wilder*, and *Marshall*. Under that approach, Driskell was required to pick a single path to recovery, either wrongful discharge or REDA, and was entitled to receive only the remedies available on the chosen path. Punitive damages

are available on Driskell's common-law wrongful-discharge claim, but attorney's fees are not. Conversely, attorney's fees are available under REDA, but punitive damages are not. Under the circumstances of this case, I do not believe the district court erred by requiring Driskell to choose between the total recovery permitted under the wrongful-discharge claim or the total recovery permitted under REDA.

III.

Because I believe the district court properly resolved all of the issues raised in Summit's appeal and Driskell's cross-appeal, I would affirm the district court's judgment in its entirety. Accordingly, while I concur in sections I, II, and III.A of the majority opinion, I respectfully dissent from the majority's conclusion in section III.B that under *United Labs*, Driskell is entitled to recover punitive damages on his wrongful-discharge claim and attorney's fees on his REDA claim.

All Citations

828 Fed.Appx. 858

Footnotes

- 1 Rhyner drove to his home in Tennessee that night and told his superiors that he was taking two weeks of paid time off. He remained employed by Summit when this lawsuit was filed.
- 2 The charges against Rhyner were eventually dismissed at Driskell's request.
- 3 The court reduced the punitive-damages award to \$250,000 because, as Driskell conceded, that was the maximum that he could collect under N.C. Gen. Stat. § 1D-25(b), which provides that “[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater.”
- 4 REDA provides that a “court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorney's fees, of the plaintiff in bringing an action pursuant to this section.” N.C. Gen. Stat. § 95-243(c).
- 5 REDA requires a court to treble a plaintiff's compensatory damages if the defendant's violation was “willful,” i.e., if it involved “knowledge or reckless disregard of whether [the defendant's] action violated the statute.” *Morris v. Scenera Research, LLC*, 368 N.C. 857, 788 S.E.2d 154, 161 (N.C. 2016) (citing N.C. Gen. Stat. § 95-243(c)). The district court, not a jury, must make this determination. See *id.* Driskell conceded that he was required to choose between punitive and trebled damages. He sought to recover \$250,000 in punitive damages, \$65,000 in untrebled compensatory damages, and \$441,600 in attorney's fees. But after the district court held that he couldn't collect both punitive damages and attorney's fees, he elected to recover treble damages and attorney's fees in lieu of punitive damages.
- 6 The predecessor statute read in pertinent part: “(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.” N.C. Gen. Stat. § 97-6.1 (1991). REDA's text is much broader, covering anyone who “threatens to” file a workers' compensation claim. N.C. Gen. Stat. § 95-241(a).
- 7 In any event, Driskell arguably raised his workers' compensation theory in his complaint by stating that he was fired because he “became a threat, risk or liability to the company after Mr. Rhyner attacked [him].” J.A. 78.
- 8 Our dissenting colleague would hold that N.C. Gen. Stat. § 1D-20 effectively overruled *United Labs*' “mix-and-match approach” and thus blocks Driskell from recovering both awards. Dissent at 31. But that provision—which was enacted

in 1995 in an act establishing standards for punitive damages, N.C. Sess. Laws 1995-514, H.B. 729, and has never been construed to apply to attorney's fees—requires claimants to elect “between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.” *N.C. Gen. Stat. § 1D-20*. It's true that Driskell's request for attorney's fees is “pursuant to” REDA, which provides for treble damages. But we think it doubtful that the Supreme Court of North Carolina would hold that REDA's separate allowance for an award of attorney's fees is a “remedy” in the way that § 1D-20 uses that term. After all, § 1D-20's title is “Election of extracompensatory remedies,” and attorney's fees are strictly compensatory in that they reimburse a prevailing plaintiff's costs. The title of a statutory subsection, while “not controlling, [] does shed some light on the legislative intent underlying the enactment of that provision.” *State v. Fletcher*, 370 N.C. 313, 807 S.E.2d 528, 539 (2017). And that light is (we think) sufficient here to reject the dissent's view.

9 The district court mistakenly applied the federal lodestar standard in calculating a fee award. We have held (albeit in an unpublished opinion) that state law, not the federal lodestar test, should control in in this circumstance. See *Peter Farrell Supercars, Inc. v. Monsen*, 82 F. App'x 293, 300 (4th Cir. 2003) (“Because the district court granted fees pursuant to a Virginia statute, we look to Virginia's standards for determining if the fee award is reasonable.”). Other circuits agree that when state law supplies the law of decision in a diversity case, state law also controls both whether to award reasonable attorney's fees and what standard to apply in calculating that award. See 17A Moore's Federal Practice-Civil § 124.07(3) (b) (2020) (citing opinions from the 1st, 2d, 3d, 5th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits standing for this proposition). But because Summit raises no issue on appeal as to the reasonableness of the attorney's fee award, we do not address it further.

1 Although § 1D-20 was not raised by the parties, we may affirm the district court on any reason appearing in the record. See *McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 964 F.2d 1462, 1467 (4th Cir. 1992) (“We of course have the power to affirm a judgment for any reason appearing on the record, notwithstanding that the reason was not addressed below.”).

2 Although North Carolina courts have applied *United Labs* in cases that I believe could have been resolved under § 1D-20, there is no indication the statute was raised in those cases. See, e.g., *Waldon v. Burris*, 2007 WL 91657 at *3 (N.C. Ct. App. 2007) (unpublished); *Brown v. King*, 166 N.C.App. 267, 601 S.E.2d 296, 298-99 (2004).