

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

JESSE ANDRE THOMAS,

Plaintiff,

v.

Civil Docket No. CL17-2351

ELIZABETH M. PSIMAS,

Defendant.

OPINION AND ORDER REGARDING POST TRIAL MOTIONS

The matter comes before the Court on Defendant's Post-Trial motions following a jury verdict returned on November 19, 2018, awarding Plaintiff \$350,000 in compensatory damages and \$425,000 in punitive damages arising out of Defendant's defamatory statements about Plaintiff to a WAVY-TV news reporter. Defendant renews her motion to strike Plaintiff's evidence and asks that the verdict be set aside. Defendant also asks the Court in the alternative to set aside the verdict and order a new trial, or for remittitur. For the reasons stated herein, the Court grants remittitur.

Defendant, a member of the Portsmouth City Council, made the statements at issue about Plaintiff, then the Portsmouth city auditor who reported to the City Council. Defendant discussed on camera with a television reporter her view of the lack of work product that she had received from Plaintiff, including the following statements:

What is the auditor doing? Where are the finished products? Where are the audits?

I don't have anything. You know, if I had to put my hand on a Bible and tell you what he was working on I couldn't, because I don't know.

* * *

Regular updates at least. You know. Monthly, quarterly, bi-monthly, something. I got nothing. I got nothing for two years.

Pl's Am. Compl., ¶¶ 19, 22, 24; Pl.'s Ex P. 68 (Video exhibit). Plaintiff's evidence established that he had made presentations to City Council and occasionally updated them about what he was working on within the previous two years.

1. Motion to set aside

Defendant argues in support of these requests for post-trial relief: 1) The alleged defamatory statement was not false; 2) there was no evidence that Psimas knew that her statement concerning regular updates was false or that she had any degree of awareness that the statement was probably false; 3) there was insufficient evidence to determine knowing falsity or reckless disregard of the truth by clear and convincing evidence. Each of these first three arguments is premised on Defendant's characterization of the defamatory statement "as a whole" to refer to the fact that Plaintiff did not provide regular updates to Defendant about what he was working on, which he admitted he did not do. That statement - that Defendant did not receive regular updates - was not false. She received no regular updates from Plaintiff.

In contrast, the statement that she "got nothing for two years" was false and implied more than that Plaintiff had not provided regular updates. It suggested that he had provided nothing at all. No updates, no nothing. The jury was entitled to interpret this statement, and they did not accept the meaning that Defendant urged. They apparently did not believe that Defendant was telling the television audience only that she got no regular updates. The Court overrules the renewed motion to strike and/or set aside the verdict based on the first three arguments.

Defendant's fourth and fifth arguments were fully addressed at trial and are not revisited here. The Court is not persuaded that Defendant was entitled to restrict Plaintiff

from arguing about whose contractual duty it was to solicit or provide updates, nor does the Court agree that the rejected jury instructions should have been given.

2. Motion for Remittitur

The Court is persuaded by the sixth and final argument that the jury verdict was so excessive as to shock the conscience and require that it be remitted.

On March 8, 2016, when Defendant made her defamatory statement to WAVY-TV, Plaintiff had already been unflatteringly portrayed in many articles criticizing him in The Virginian- Pilot:

- June 19, 2014, **"After 14 months, Portsmouth auditor has yet to audit."** "Fourteen months have passed since Thomas took the job. He has not yet released any audits, large or small, The Virginian-Pilot has learned. Nor has he submitted a key document to the City Council for approval - required in his job description - that lays out what audits he plans to conduct each year." (Def's Trial Ex. 5).
- June 21, 2014, **"Goodbye, grace period: It's time for Portsmouth's city auditor to audit."** "Teachers teach students. Firefighters fight fires. Auditors audit departments and programs - everywhere, apparently, but in Portsmouth. The Pilot's Tim Eberly reported that City Auditor Jesse Andre Thomas, in the newly created job since April 2013, hasn't released a single audit. The lack of production has given his bosses on the City Council heartburn." (Def's Trial Ex. 6).
- June 27, 2014, **"Since starting, Portsmouth auditor has logged in twice."** "The city auditor has logged in to Portsmouth's financial system only twice since he started the job 14 months ago, and both logins occurred within two weeks of his starting date, city records show. Jesse Andre Thomas' work calendar for the past year shows sparse activity, including numerous months without a single meeting or appointment listed." (Def's Trial Ex. 2).
- Editorial, July 2, 2014, **"Council must look at auditor's office."** "The public should have received an audit of some kind, big or small, from Thomas at some point over the past 15 months. It hasn't. City leaders have expressed dismay at the auditor's lack of productivity, but they are responsible for this outcome." (Def's Trial Ex. 7).
- July 16, 2014, **"Portsmouth auditor's plan mimics Chesapeake's."** "It took almost 15 months for City Auditor Jesse Andre Thomas to produce an audit plan for the City Council. And when he did, it looked a lot like documents

he'd received from the Chesapeake auditor's staff just days before - on the same day The Virginian-Pilot published an investigative report into his lack of productivity." (Def's Trial Ex. 3).

- Editorial, July 17, 2014, "**Trouble in Portsmouth auditor's office.**" "Thomas has provided little evidence to counter suggestions - from elected leaders - that he is incapable of providing effective oversight of municipal finances. That dearth of information compounds every new revelation about his performance, and threatens the credibility of an office essential to ensuring good, effective government. Those circumstances also strengthen the case for the city to terminate his employment." (Def's Trial Ex. 8).
- September 15, 2014, "**Portsmouth leaders losing patience with auditor.**" "In June, the City Council gave Auditor Jesse Andre Thomas 90 days to shape up. That probation period ends Tuesday, and Thomas still has not produced his first audit - although he's been saying since at least February that he is on the verge of completing his audit on entertainment venue Willett Hall. Thomas is now more than 17 months into his employment with the city drawing, \$92,700 annually." (Def's Trial Ex. 4).
- September 24, 2014, "**Portsmouth speakers blast City Council over auditor.**" "City Council members decided in private Monday to keep City Auditor Jesse Andre Thomas employed. Tuesday night, a handful of residents gave council members an earful in public about the decision." (Def's Trial Ex. 9).
- September 25, 2014, "**Decision on auditor is about votes, but Portsmouth voters can decide, too.**" "Don't fret, residents of Portsmouth: Perhaps you, too, can cop a sweet deal like the one council members carved out for Jesse Andre Thomas, the city auditor. He's spent more than 17 months in his nearly six-figure post, but Thomas hasn't completed a single audit." (Def's Trial Ex. 10).
- September 28, 2014, "**Portsmouth auditor blames leaks for lack of results.**" "Auditor Jesse Andre Thomas told City Council members that information leaks have prevented him producing his first audit since starting work in April 2013, according to a secret audio recording obtained by the newspaper." (Def's Trial Ex. D5A).
- Editorial, September 30, 2014, "**Governance nightmare in Portsmouth.**" "The City Council hired Jesse Andre Thomas in April 2013 at an annual salary of \$92,700. As The Pilot's Tim Eberly has reported, Thomas logged into the city's financial system twice in his first 15 months. His work calendar showed little activity, and when he finally submitted an audit plan this summer, much of it looked like the plan that Chesapeake's auditor had shared with Thomas." (Def's Trial Ex. 11).

- December 14, 2015, **“Portsmouth auditor still behind schedule, and majority of council is still behind him.”** “In 2 ½ years as city auditor, Jesse Andre Thomas has struggled to complete audits in a timely fashion. Yet a majority on the City Council stand behind him, keeping him employed at a salary of more than \$95,000 a year. Why is a mystery.” (Def’s Trial Ex.13).
- December 15, 2015, **“Auditor’s lack of production likely hurts morale of city workers.”** “So why should it be any different for city Auditor Jesse Andre Thomas, an official pocketing a nearly six-figure salary but who’s done very little work? The fact the City Council continues to employ Thomas is bewildering. It’s damaged the credibility of council members, and it’s sparked resentment among municipal employees making a fraction of Thomas \$95,000 salary.” (Def’s Trial Ex. 14).

The City Council voted to terminate Plaintiff’s employment pursuant to the terms of his contract on April 26, 2016.

When Defendant spoke about Plaintiff on-camera for approximately 10 seconds in March of 2016, Plaintiff had been bludgeoned by the local newspaper in the above dozen or more articles, all discussing his lack of productivity and insufficient job performance. Counsel for Plaintiff argued to the jury, “You are the only people who can restore his reputation,” (Tr. at 1211) suggesting that his damaged reputation was entirely due to the comment Defendant made on television.

Plaintiff presented no evidence of any particular loss that he suffered as a result of Defendant’s statement. He offered no witnesses to tell the jury about the effect that Defendant’s statements had upon him. No one testified that they thought less of him or that his reputation had been harmed by Defendant’s statement. The loss of his employment with the City of Portsmouth was not attributed to the defamation, and no prospective employer testified that Plaintiff had been denied any job opportunity because of the statement. He called no witnesses who even saw the television broadcast.

His testimony about the effect of the defamation on him was unremarkable:

Q. After you watched or saw the television piece in which Ms. Psimas was being interviewed by Joe Fisher on or about March 8th or 9th of 2016, what was your reaction?

A. Frustration. The fact that she wouldn't call me or when I called her, she wouldn't - didn't want to discuss anything. She wouldn't call me. It's just a frustration for them to say on a stack of Bibles, I don't know what you're doing, when I've said over and over and again this is what I'm doing. Frustration.

Q. And besides that emotion, were there any other emotions over the next month, two, three months?

A. You wonder what you could do. You wonder, are you just caught a catch-22 in this situation? What, as an, as an auditor what can you do about this situation?

Q. Well, were you concerned whether anybody you knew had seen the video, the TV broadcast?

A. Was I?

Q. Concerned.

A. Concerned that other people that I knew? Yeah. That's public humiliation. You know, I have a wife who wears her heart on her sleeve, and she's watching this and she's hurting.

Q. How about you in your profession? Did it affect your choices going forward?

A. You know, yes. You wonder if you want to continue to do this.

* * *

Q. How about your emotional status after you watched the video and for the next several months?

A. It's hard to discern the video from my final - my final days there, as far as my emotional state. I fought through it. I mean, it hurts. It stings. It's depressing. It's hurtful. You feel like you don't have a voice. You have to be mindful, at the time, or during this time, my boss is telling me not to say anything, but they're saying stuff.

Q. Do you believe this has damaged you in your professional reputation?

A. I do.

(Tr. at 723-26).

Plaintiff gave the above testimony on direct examination. On cross, he testified:

Q. Now, in your direct examination in response to Mr. Connell's questions, you described the litany of the emotions that you had following the news report, but you also described, as I believe I heard you say, that you have a hard time differentiating between the end of your employment at the City of Portsmouth and the emotions that brought, as well as emotions that you endured following the news report?

A. I think what I said - and I'm glad to have it read back to me - he asked me a question of my emotions at a particular point when the news report happened and a particular point when I - and I was trying to recall four years later, you know, how I was feeling at the news report versus when I lost my job. And he was asking me to try to recall and parse through one versus the other. And that's what I was saying, that it's hard for me to tell when I felt one thing versus the other.

Q. Okay. And that's as you sit here today?

A. That's as I sit here today.

Q. Correct. And how accepting the immediate aftermath, it was certainly hurtful when you were let go from the City of Portsmouth, correct?

A. Well, I think what I'm saying is you've been emotionally damaged throughout this whole thing. To try to say on this day, I felt 92 percent damaged, and this day, I felt 94 percent damaged is difficult to say at the time.

(Tr. at 776-77).

The jury was instructed that their verdict should compensate Plaintiff for "any insult to him including any pain, embarrassment, humiliation, or mental suffering" and "any injury to his reputation caused by any defamatory statement made by Defendant." Jury Instruction No. 8. His testimony about "pain, embarrassment, humiliation or mental suffering" is quoted above where he describes a "public humiliation;" but he also concedes that he cannot distinguish between the hurt caused by Defendant's televised statement

and that caused by his termination from employment. He was not entitled to be compensated for the hurt caused by his termination from employment. He testified that he believed his professional reputation had been damaged, but he did not corroborate that belief in any way; nor did he account for the harm that the dozen or more newspaper articles about him had caused to his reputation.

When a verdict is large and more than the trial judge would have awarded had she been a member of the jury, it ought not to be disturbed, for to do so the judge must then do what she may not legally do, that is, substitute her judgment for that of the jury. *Baldwin v. McConnell*, 273 Va. 650, 656 (2007).

Nonetheless, in light of the above, the jury's verdict for \$350,000 in compensatory damages and \$425,000 in punitive damages did shock the conscience of the Court and compels the conclusion that the verdict was the product of passion or prejudice or some misunderstanding of the facts or the law. Courts have the duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice. *Edmiston v. Kupsnel*, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964); *Smithey v. Sinclair Refining Co.*, 203 Va. 142, 146, 122 S.E.2d 872, 875 (1961). The Virginia Supreme Court held in *Shepard v. Capitol Foundry of Virginia, Inc.*, 262 Va. 715 (2001):

When a verdict is challenged on the basis of alleged excessiveness, a trial court is compelled to set it aside 'if the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision.'

Id at 720-21, (quoting *Edmiston v. Kupsnel*, 205 Va. 198, 202 (1964)).

Mindful that the Court is required to evaluate the evidence relevant to the question of damages and to view such evidence in the light most favorable to the plaintiff, the Court

is nonetheless unable to conclude that the embarrassment and emotional and mental harm to which Plaintiff testified supports a verdict of \$350,000 in compensatory damages. To the contrary, that award was entirely "out of proportion to the injuries suffered." *Id* The Court has a substantial concern that the jury's decision was a result of an attempt by them not merely to compensate but to punish Defendant for her remarks about a personnel matter on the public airwaves. Moreover, it appears that they intended to punish her for all of the negative publicity that Plaintiff had received and not just the effects of one interview in March of 2016. The size of the punitive damages award, larger than the compensatory award, supports this inference.

Defendant refers in her motion to a question from a juror which the Court did not permit to be asked, which read: "Does [the witness] believe the articles written about Mr. Thomas' work were hit pieces aimed to discredit Mr. Thomas' work and tarnish his reputation as an auditor?" (Record, Juror Questions, p.9 of 9; Tr. at 896-97). The "hit pieces" in the newspaper were not part of Plaintiff's claim against Defendant for defamation. Counsel argues that the jurors had in mind to punish Defendant for all of the bad publicity that Plaintiff had received. The Court cannot conclude anything about the mind of that particular juror or whether his view was shared by other jurors; but the size of the verdict supports Defendant's argument.

a) Compensatory Damages

Virginia case authority sets out specific criteria for courts to consider regarding *whether* and *when* to grant remittitur but very little to instruct on *how* and *how much*. No authority provides a method or formula for trial courts to determine the amount by which a verdict should be reduced. However supportable the decision regarding excessiveness may be, the ensuing conclusion about the amount to be remitted can always seem

arbitrary. See, e.g., *Caldwell v. Seaboard System Railroad, Inc.*, 238 Va.148 (1989) (remitting \$1,500,000 to \$1,000,000); *Sheckler v. Virginia Broadcasting Corp.*, 63 Va. Cir. 368 (Charlottesville 2003) (\$10,000,000 to \$1,000,000); *Williams v. Garraghty*, 249 Va. 224 (1995) (\$125,000 to \$25,000). *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277 (1987) (\$1,000,000 to \$100,000); *Hogan v. Carter*, 226 Va. 361 (1983) (\$50,000 to \$25,000); *Hatfield v. Norfolk & Western Ry. Co.*, 46 Va. Cir. 494 (Norfolk 1995)(\$700,000 to \$280,000).

The only guidance that the Court can glean from the controlling authority on remittitur is that the Court should reduce the verdict to an amount that, although higher than it would have awarded, does not shock the conscience of the Court. That amount in this case is \$75,000. The Court orders that \$275,000 of the verdict for compensatory damages be remitted.

b) Punitive Damages

The jury awarded Plaintiff \$425,000 in punitive damages. Virginia Code § 8.01-38.1 provides a limitation on the recovery of punitive damages: "In no event shall the total amount awarded for punitive damages exceed \$350,000. .. [I]f a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section."

The Court would therefore be required to reduce the jury's punitive damages award to \$350,000. Even that reduced sum, however, shocks the conscience of the Court and represents an excessive award that creates the impression that the verdict was the product of passion, corruption or prejudice or some misunderstanding of the facts or the

law. Counsel for plaintiff only requested a punitive damage award of \$300,000. (Tr. at 1212).

The Virginia Supreme Court has provided this guidance to trial courts reviewing awards of punitive damages:

Review of the amount of punitive damages includes consideration of reasonableness between the damages sustained and the amount of the award and the measurement of punishment required, whether the award will amount to a double recovery, the proportionality between the compensatory and punitive damages, and the ability of the defendant to pay.

Condominium Services Inc. v. First Owner's Ass'n, 281 Va. 561, 580, (2011) (quoting *Poulston v. Rock*, 251 Va. 254, 263 (1996)).

The Court first considers "the measurement of punishment required." *Id.* In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court examined the constitutionality of an award of punitive damages and held that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575. Interpreting that "most important indicium" in the later case of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Court explained:

We have instructed courts to determine the reprehensibility of a defendant by considering 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. at 419. The Court cautioned, "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Application of these factors does not yield a conclusion that Defendant's brief remarks on camera about Plaintiff constituted particularly reprehensible behavior. She should not have told the television audience that she "got nothing for two years," which was untrue. It merits no praise, but it does not go all the way to reprehensible. Application of the consideration addressed in *Condominium Services Inc.* regarding the "measure of punishment required" therefore suggests that a more modest punishment would suffice. 281 Va. at 580.

The next *Condominium Services Inc.* factor is the proportionality of the compensatory and punitive damages. Had the jury awarded only nominal damages in light of the difficulty of detecting the injury or its monetary value, a proportionately significant punitive damages award might have been appropriate. *State Farm Mut. Automobile*, 538 U.S. at 425. The Supreme Court has stated that the converse is also true: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The final *Condominium Services Inc.* factor is Defendant's ability to pay. The court received no evidence about Defendant's ability to pay a punitive damages award. She testified that she was the owner and only employee of a single location travel agency called Travel Designers in Portsmouth, Virginia and additionally serves as Vice-Mayor of the City of Portsmouth. Although neither of those occupations is known for being particularly remunerative, the Court does not consider this factor because of the absence of any relevant evidence.

In sum, as the Supreme Court has held, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff

and to the general damages recovered.” *State Farm Mut. Automobile Ins. Co.*, 538 U.S. at 426. Applying all of these criteria to the facts at bar, the Court awards punitive damages in the amount of \$75,000, an amount equal to the compensatory damages awarded herein, and orders remittitur in the amount of \$350,000.

CONCLUSION

The Court requires Plaintiff to accept remittitur and judgment in the amount of \$75,000 in compensatory damages and \$75,000 in punitive damages, for a total judgment of \$150,000, or to submit to a new trial on the issue of damages pursuant to Virginia Code § 8.0-1-383.1.

Plaintiff shall file a pleading communicating his decision within 21 days.

Counsel are directed to furnish any written objections within fourteen days.

Further endorsements by counsel are waived.

The Clerk is DIRECTED to mail a copy of this Opinion and Order to counsel of record. The matter is retained on the Court’s docket pending further order of the Court.

It is so ORDERED.

ENTERED: 17 January 2019



Mary Jane Hall, Judge