

STATE OF MINNESOTA

IN COURT OF APPEALS

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Patrick Longbehn,

Appellant,

v.

A06-1021

Robin Schoenrock,

Respondent.

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APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

I.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO DEFAMATION PER SE.

II.

WHETHER THE TRIAL COURT USURPED THE JURY'S FUNCTION BY WEIGHING THE EVIDENCE, ASSESSING THE CREDIBILITY OF THE WITNESSES, AND DRAWING ITS OWN INFERENCES TO REACH ITS DECISION OF JNOV.

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT:  
-THERE WAS NO CLEAR AND CONVINCING EVIDENCE OF DELIBERATE DISREGARD ALLOWING PUNITIVE DAMAGES;  
-THAT THERE WAS NO LEGALLY SUFFICIENT BASIS FOR AN AWARD OF PUNITIVE DAMAGES IN THE SUM AWARDED BY THE JURY; AND,  
-THAT THERE WAS NO LEGALLY SUFFICIENT BASIS FOR THE JURY TO HAVE FOUND THE CONCEPT OF PUNITIVE DAMAGES APPLICABLE IN THIS CASE.

## STATEMENT OF THE CASE

This matter was tried before a Jury in Carlton, Minnesota on October 31, and November 1, 2005. The Jury reached a decision in favor of the Plaintiff/Appellant. See Special Verdict Form at A-52. Defendant/Respondent brought a Motion that was heard by the District Court on January 3, 2006. In its Findings of Fact, Conclusions of Law and Order for Judgment, of April 3, 2006, the Trial Court granted JNOV to the Defendant/Respondent. This is an appeal of that decision.

### STATEMENT OF FACTS

This case was an action for defamation. The Appellant was a police officer with the City of Moose Lake. On January 1, 2001, Respondent Schoenrock published to a third person the name “Pat the Pedophile” in describing Appellant. As a result of that name, Appellant lost his job, his relationship, and suffered severe emotional distress.

This matter was originally tried and appealed with a decision on May 17, 2005. See unpublished opinion Patrick Longbehn v. City of Moose Lake, et.al. and Robin Schoerock (A04-1214, May 17, 2005) at A-13. The matter was reversed in part, and the trial involving the remaining Defendant, Schoenrock, has resulted in this appeal.

## ARGUMENT

### I STANDARD OF REVIEW

A decision of JNOV presents a “purely legal question.” Lamb v. Jordan, 333 N.W. 2d 852, 855 (Minn. 1983). Therefore, this Court’s review of the trial court’s grant of JNOV in favor of Defendant/Respondent requires a de novo review. Frost-Benko Elec. Ass’n. v. Minnesota Public Utilities Commission, 358 N.W.2d 639, 642 (Minn. 1984). In reviewing a trial court’s finding of JNOV, a review of the entire record of the evidence is required. Sikes v. Garrett, 262 N.W.2d 681, 683 (Minn. 1977). That evidence must be viewed “in the light most favorable to the verdict.” Lamb, 333 N.W.2d at 855. A jury verdict should be upheld unless the evidence is “practically conclusive against the verdict and reasonable minds can reach only one conclusion.” Nadeau v. County of Ramsey, 277 N.W.2d 520, 522 (Minn. 1979). The jury’s verdict will only be disturbed if it is manifestly and palpably contrary to the evidence. Stuempges v. Parke, Davis & Co., 297 N.W. 2d 252, 256 (Minn. 1980).

In deciding a motion for JNOV courts may not weigh the evidence or judge the credibility of the witnesses. Lamb, 333 N.W.2d at 855. That is the function of the jury. A motion for JNOV “should be denied unless the evidence in support of the verdict, and all reasonable inferences to be drawn therefrom, be so wholly incredible and unworthy of belief or so conclusively overcome by other uncontradicted evidence ... as to leave no room for an honest difference of opinion among reasonable [people].” Johnson v. Evanski, 221 Minn. 323, 327, 22 N.W.2d 213, 215 (1946). If the jury has any reasonable

evidentiary support for its verdict, both the district court and this Court must accept the verdict as final. Brubaker v. Hi-Banks Resort Corp., 415 N.W.2d 680, 683 (Minn.App. 1987).

“Where circumstantial evidence reasonably permits different inferences, the choice of inference to be drawn rests with the factfinder.” McKay’s Family Dodge v. Hardrives, Inc., 480 N.W.2d 141, 146 (Minn.App. 1992)(citation omitted). “It is inappropriate for a district court to determine that evidence is inadmissible during a motion for JNOV” Knuth v. Emergency Care Consultants, P.A., 644 N.W.2d 106, 112 (Minn.App. 2002)(citation omitted). To do so “usurps the role of the jury.” Id. (citation omitted). “JNOV will never be granted for errors in either law or procedure committed at the trial.” Id.

A review of an award of punitive damages is conducted on an abuse of discretion standard. Ray v. Miller Meester Advertising, Inc., 664 N.W.2d 355, 371 (Minn.App. 2003), affirmed 684 N.W.2d 404 (Minn. 2004). “A decision on the amount of a punitive damage award lies almost exclusively within the province of the fact finder.” Id.

When the standards of review are applied in this case, and the evidence is viewed in a light most favorable to the verdict, we must begin with the fact that Respondent Schoenrock called Appellant Longbehn - “Pat the Pedophile.” See Special Verdict Form question #2.

The term “pedophile” imputes the practice of a criminal act of serious sexual misconduct, an act to which the legislature and courts have given special attention. A statement that imputes the commission of serious deviant sexual misconduct constitutes slander per se and is actionable without proof of actual damages. See

Baufield v. Safelite Glass Corp., 831 F.Supp. 713, 717 (D.Minn. 1993); Richie v. Paramount Pictures, 544 N.W.2d 21, 25, n.3 (Minn. 1996). In a case of slander per se, damage to a person's reputation may be presumed. Becker v. Alloy Hardfacing and Engineering, 401 N.W.2d 665, 661 (Minn. 1987); see also Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). When applying the standard of review in this matter, it must start with and be accepted that Respondent called Appellant "Pat the Pedophile." Therefore, it must also be presumed that the Appellant's reputation was damaged.

The final presumption that must be accepted for purposes of this appeal is that the Appellant suffered damages. See Becker v. Alloy Hardfacing & Engineering, 401 N.W.2d 655, 661 (Minn. 1987). Because of the imputation of serious sexual misconduct through use of the term "Pat the Pedophile," the Appellant's damages are presumed.

## II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO DEFAMATION PER SE.

In its Findings of Fact, Conclusions of Law, and Order for Judgment, dated and filed April 3, 2006, the District Court, at paragraph 15 of its Findings, stated:

In answering question one of the special interrogatories the jury found that the Defendant did not accuse the Plaintiff of being a pedophile.

The District Court then found, in its Conclusions of Law, at paragraph 2, the following:

Because of finding of fact number 14 (sic) above, there was no defamation *per se* and the Plaintiff must establish actual damages caused by the Defendant's telephone call to Mr. Wilson.

At no point in its Findings, Conclusions or Judgment does the District Court address the Jury's answer to question number 2 of the Special Verdict Form where the Jury found that the Defendant had called the Plaintiff the name – "Pat the Pedophile."

This is error. The Jury was asked two questions. The first was whether Defendant/Respondent Schoenrock accused the Plaintiff/Appellant of being a pedophile. The second question was whether Respondent called Appellant the name – “Pat the Pedophile.” While the Jury answered “no” to the first question, it did answer “yes” to the second question. The Jury found that the Respondent called the Appellant “Pat the Pedophile.” The District Court, in its analysis of the JNOV Motion totally ignored this finding by the Jury.

The Jury’s response to question number 2 entitles Appellant to a finding of defamation per se. Respondent used a term that imputes a criminal deviant sexual act. The fact that the jury was required to determine if the Appellant was “accused” of being a pedophile, or just called a pedophile as part of a name is of no consequence. There is no claim that Respondent reported Appellant in to the police for committing acts of pedophilia. The claim is, and always has been, that Respondent called the Appellant the name – “Pat the Pedophile.” The term “pedophile” imputes a criminal sexual act and it is of no consequence whether Appellant was accused of that act by Respondent, or whether it was a name used by Respondent just to make fun of Appellant. The finding of the Jury that Respondent used this statement to describe Appellant raises it to the level of defamation per se. Baufield v. Safelite Glass Corp., 831 F.Supp. 713, 717 (D.Minn. 1993); Ritchie v. Paramount Pictures, 544 N.W.2d 21, 25, n.3 (Minn. 1996).

The District Court erred in finding that there was no defamation per se.

III WHETHER THE TRIAL COURT USURPED THE JURY’S FUNCTION BY WEIGHING THE EVIDENCE, ASSESSING THE CREDIBILITY OF THE WITNESSES, AND DRAWING ITS OWN INFERENCES IN REACHING ITS DECISION OF JNOV.

It is clear through the Trial Court’s Findings of Fact, Conclusions of Law, and

Order for Judgment, including the attached Memorandum, that the Trial Court substituted its judgment for that of the Jury. Specifically, looking at Findings 5, 7, 9, 11, 13, 15, Conclusions 2, 3, 4, 5, 6, 7, and 8. Further, the Memorandum attached to the Order for Judgment makes it clear that the Trial Court erred in its decision of JNOV. In that Memorandum the Trial Court stated – “it does not appear that the Defendant coined the phrase or that he directed the term at the Plaintiff;” and went on to substitute its judgment for that of the Jury by stating that “the record does not show that Defendant made any accusation at all against Plaintiff. He did not say this officer is a pedophile nor did he use the term ‘Pat the Pedophile’ to vilify Mr. Longbehn;” and further stated that “it appears from the evidence that the real problem Plaintiff had with maintaining his job as a Moose Lake police officer was his general reputation that had spread within the community ... .” The Trial Court said – “the evidence is devoid of any showing that he could not have obtained a job paying the same or more in law enforcement after he was terminated by Moose Lake;” and on the issue of the Appellant’s medical/psychological condition, the Trial Court determined that “[i]t was a hospitalization for suicidal ideation triggered by an OFP brought by his ex-girlfriend following his alleged assault at the DOC facility and a full year after he left Moose Lake’s employment;”... “this Court feels that at some point it would have been mentioned (even in passing) during the days of his hospitalization;”... “there is no showing that any of his problems in any community have not been self-inflicted.” The Trial Court then erroneously states that the statement of the Respondent was made in a “private telephone call that no one else knew about.”

These statements by the Trial Court clearly demonstrate that it substituted its

judgment for that of the Jury by weighing the evidence, assessing the witnesses, and drawing its own inferences separate from that of the Jury.

A. Finding Number 5

Finding number 5 states that:

“The Chief further testified that although the term ‘Pat the Pedophile’ and Plaintiff’s general reputation played a part in the City’s decision to not extend his probationary status, he did not testify that it was ‘the reason’ his employment was terminated.”

First, the Trial Court’s statement is based upon error. Chief Heaton testified that the name given to Appellant was one of the main issues for his termination. Transcript 1, Page 30, Line 8 – Page 34, Line 2 & Transcript 1, Page 40, Line 2 – 17. It appears that the Trial Court is saying that unless the Appellant can prove that the name calling of Respondent was the sole reason for the loss of Appellant’s job, the Jury cannot consider this as a reason for the loss of his job. Notwithstanding that, the Chief did indicate that it was a main issue in Appellant losing his job. The Chief’s testimony is supported by Exhibit 4, Appellant’s December, 2000 Performance Evaluation, which was a very good evaluation that did not mention an erosion of credibility or the use of the pedophile moniker. The Appellant further testified that the pedophile name was not discussed between the Chief and him until January 24, 2002, at which time it became the main reason for his termination. Transcript 2, Page 92, Line 17 – Page 95, Line 6. It is clear that the Jury had sufficient evidence on which to base its decision that the Appellant lost his job due to the name.

B. Finding Number 7

Finding number 7 states that:

“There was no evidence offered to establish that outside of his single telephone call with Mr. Wilson, Defendant, Mr. Wilson, or anyone associated with either Mr. Wilson or Defendant used that telephone call to promote the nickname of “Pat the Pedophile” to anyone else.”

First, the Trial Court erred because the name was published to a third party – Mr. Wilson. Next, the name imputes a deviant criminal sexual act, and, therefore, the statement was defamation per se. This created a presumption where no proof of actual damages is required.

Even with that presumption in place, and contrary to the Trial Court’s stated belief, Appellant did provide circumstantial evidence of the Respondent’s coining of that name. See Transcript 2, Page 169, Line 6 – Page 170, Line 10 & Transcript 2, Page 175, Line 2 – 8. With regard to coining the name, the door was opened by Respondent’s attorney who elicited testimony on it, which was followed-up by Appellant’s counsel, and which provided sufficient evidence for the Jury to find that it was Respondent who coined and circulated the name. In its discussion of this issue in its Memorandum, the Trial Court left out the following testimony:

- Q: But you don’t have any evidence beyond your gut feeling that he did this, do you?  
A: I had one person tell me that he did.  
Q: But besides somebody telling you that, you don’t have anything?  
A: No, but it’s an awful close person.

See Transcript 2, Page 169, Line 22 – Page 170 Line 2. Further, at Transcript 2, Page 175, Line 2 – 8, Appellant identified that “close person” to be Respondent’s stepdaughter. This information was elicited without objection.

The Trial Court’s error is clear, both on the issue of the presumption of damages (as a consequence of defamation per se), and on the evidentiary issue of “coining” the name. Even if the Respondent had not “coined” the name, why would

anyone say such a thing about another person without knowing its truth or falsity, and knowing the serious consequences that attach to such a label.

C. Finding Number 9

Finding number 9 states:

“But Plaintiff did not make any applications for law enforcement jobs and there was no evidence that he was ever denied any such jobs due to the telephone call by the Defendant or due to his loss of employment from the City of Moose Lake.”

This, once again, is error. Appellant testified to his at job seeking attempts. Transcript 2, Page 108, Line 1 – 17 & Transcript 2, Page 114, Line 17 – 23. Once again, there was testimonial evidence upon which the Jury, while assessing the credibility of the witness, could rely in reaching its decision. Additionally, with the presumption of damages as applied in a case of defamation per se, there is no obligation to mitigate.

D. Finding Number 11

Finding number 11 states:

“From the record it appears that Plaintiff’s real employment and emotional problems arose later in the year after he left his job with Moose Lake. Plaintiff testified that he had left the job at the Maplewood hospital because he received a job offer from the Minnesota Department of Corrections. Thereafter he was hired by the DOC in November. He did not indicate what is (sic) wages were nor what they would have been had he completed his training at that new job.”

The Trial Court’s purpose in this statement is not clear. It does, however, state that his “employment and emotional problems arose later in the year after he left his job in Moose Lake.” He did not leave his job, he was terminated – the main reason for this action was the name he had been saddled with by the Respondent. Next, the Trial Court completely disregards the testimony of Dr. Richard Hoffman, licensed psychologist, who testified that the Appellant “became symptomatic following his

discharge from his customary duties in January 2001 when his employment was terminated as a police officer.” Hoffman 2/26/03 Deposition, Page 16, Line 9 – 12. The inference drawn by the Trial Court is erroneous and is not supported by the testimony of the psychological expert – the only expert who testified in this matter, and whose testimony is uncontroverted. There was an adequate basis for the Jury to rely upon this testimony to find that Appellant’s real problems started with his termination from his position as a police officer with the City of Moose Lake, a termination that had as its main reason (according to Chief Heaton) the name Appellant was being called – “Pat the Pedophile.”

E. Finding Number 13

Finding number 13 states:

“It is also crucial to note that the jury awarded Plaintiff “none” in regards to any past health care. The Court assumes they also examined the medical exhibit in detail as did the Court and found that his hospitalization a year after leaving the Moose Lake Police Department was not related to any action by the Defendant or the City.”

Appellant is upset by this finding of the Trial Court. During deliberations the Trial Court contacted counsel and informed them that the Jury had a question on how to handle insurance payments for hospitalizations. It was not until receipt of the transcript in this matter when it was first noticed and realized that the Trial Court neglected to place that discussion with the Jury on the record. The Trial Court’s assumptions are based upon an incomplete rendition of events in this trial. See Affidavit of Thomas M. Skare, at A-50

The trial exhibit that contained the medical records and bills, which are in evidence and available to this Court, indicate the past charges incurred and clearly show

that insurance payments were made on Appellant's behalf by the insurance company for Appellant's hospitalization – facts most likely noted by the Jury, hence their questions to the Court on insurance payments. The information regarding these insurance payments were before the Jury, without objection, for its consideration in the deliberations regarding this case. Since the jury clearly had this information before it, there was a reasonable and common-sense basis for the jury to reach the inference it did with regard to the past medical expenses, and its decision is consistent with the other findings made by the Jury and contrary to the Trial Court's assumption on this issue. Buttrressing the fact that the Jury considered this information is its question about insurance to the Court (which went unrecorded) regarding how to deal with the insurance payments. No other bills were in evidence that showed or mentioned insurance payments.

Once again the Trial Court's finding is based upon clear error, and engaging in its own "assumptions" of what the facts should be and what it believes the jury did, or should have, considered.

F. Finding Number 15

Finding number 15 states:

“In answering question one of the special interrogatories the jury found that the Defendant did not accuse the Plaintiff of being a pedophile.”

The Trial Court, completely neglected to address the Jury's answer to question number 2 in its Order for Judgment. In that question, the Jury found that Respondent Schoenrock called Appellant Longbehn – “Pat the Pedophile.” There was no place on the special verdict form for the Jury to check “defamation per se.” The Jury was only given the questions asking if Respondent accused Appellant of being a pedophile, or whether he called Appellant “Pat the Pedophile.” The way it was answered supports Appellant's

position that Respondent's act amounted to defamation per se. Respondent had no basis whatsoever for concluding that Appellant was a pedophile. He made the statement without having any knowledge or facts that led him to believe Appellant was a pedophile. Transcript 1, Page 70, Line 5 – 7. This demonstrates a deliberate disregard for the rights and safety of Appellant. There is no law relied upon by the Trial Court that makes a distinction between being "accused" of being a pedophile, or being called a name that imputes pedophilia. Once labeled a pedophile, society does not differentiate how the label came into existence. In either manner, the imputation is that of a criminal deviant sexual act. This is the basis for defamation per se. The Trial Court's entire rationale appears to be based upon an implicit misunderstanding that calling someone "Pat the Pedophile" does not rise to the level of defamation per se. This assumption of the Trial Court is erroneous.

G. Conclusion Number 2

Conclusion number 2 states:

"Because of finding of fact number 14 (sic) above, there was no defamation per se and the Plaintiff must establish actual damages caused by Defendant's telephone call to Mr. Wilson."

This conclusion demonstrates the Trial Court's fundamental error of law in this case. Once again the Trial Court does not mention of Special Verdict Form question number 2, wherein the Jury found that the Respondent had called Appellant "Pat the Pedophile." In fact, in its Memorandum attached to its Order, under the "Past and Future Damages" heading, the Trial Court states, "there was no act of defamation." That is clearly wrong. (just look to question 2 of the Special Verdict Form). Whether Respondent had the intent to accuse the Appellant of being a pedophile or whether he just wanted to use the name as

some form of twisted joke is of no consequence – its net effect is to impute deviant criminal sexual acts. Defamation per se is applicable to this case.

H. Conclusion Number 3

Conclusion number 3 states:

“When the Defendant used the moniker of ‘Pat the Pedophile’ in his phone conversation with Charles Wilson, it was merely a warning to Mr. Wilson that the Defendant was going to report his concerns about his teenage step-daughter to law enforcement officials on all levels, including the local Moose Lake officer. He never accused the officer of any wrongdoing.”

This conclusion is a pure interpretation of facts on the part of the Trial Court – a clear invasion of the province of the Jury by the Court and one with which the Jury did not agree. Further, it is nonsensical. To say that it was a report to law enforcement officials on all levels implies that by saying he called Pat the Pedophile, there is a pedophile on duty to which this matter was reported by Respondent. Calling all law enforcement agencies, and using the term “Pat the Pedophile” to describe one of the officers does not justify or immunize Respondent’s statement from being slander per se. It is not a “warning” as the Trial Court deems it to be - it is a defamatory statement that acts to impute a deviant criminal sexual activity to the officer described in that inappropriate manner.

I. Conclusion Number 4

Conclusion number 4 states:

“Given the context of the telephone call there was no ‘clear and convincing’ evidence presented at trial for a reasonable jury to use as a basis to find that the Defendant acted with deliberate disregard for the rights and safety of the Plaintiff, nor anyone else, when he made that call to Mr. Wilson on that New Year’s Eve.”

Despite instructing the Jury on the clear and convincing standard, the Trial Court

substituted itself as the factfinder and interpreted the evidence presented in this case – that is, the “context” of the telephone call. The Trial Court finds that there was no clear and convincing evidence to be used to find a deliberate disregard. The Jury only needed to recall Respondent’s testimony that he was not aware of any evidence that the Appellant was a pedophile and conclude – “To call someone a ‘pedophile’ with all its societal consequences without having any evidence, is the height of recklessness or worse”. See Transcript 1, Page 70, Line 5 – 7. The Trial Court overlooks the exercising of choice when Respondent labeled Appellant with the name “Pat the Pedophile” – a name which connotes a person who practices a deviant criminal sexual act. This in itself was clear and convincing evidence of Respondent’s deliberate disregard for the rights and safety of Appellant. The “context” of the telephone call is not a factual issue for the Trial Court to decide – that was the duty of the Jury. The factfinder did find by clear and convincing evidence that Respondent deliberately disregarded the rights and safety of Appellant.

J. Conclusion Number 7

Conclusion number 7 states:

“There is no legally sufficient evidentiary basis for a reasonable jury to have awarded past or present damages in the sum they did in this case.”

In the Memorandum attached to the Trial Court’s Order, the Court discusses the Appellant’s failure to mitigate his damages by not seeking reemployment as a police officer. This disturbing analysis comes out of “left field” because no defense of mitigation of damages was raised in this case, and the Trial Court limits the mitigation issue to that of a police officer’s wages only, overlooking that Appellant actually mitigated wage damages following his termination as a police officer with non police

officer work. The Trial Court states that there was no evidence offered of an attempt to find police work. That statement is incorrect. See Transcript 2, Page 108, Line 1 – 17 & Transcript 2, Page 114, Line 17 – 23. Further, a failure to mitigate does not affect the right to recover damages, only the amount of damages recovered. Casper v. Frederick, 146 Minn. 112, 177 N.W. 936 (1920). The failure to mitigate may constitute fault that may be apportioned under the comparative fault statute - a request that was not made by Respondent at the time of trial. See Mike's Fixtures, Inc. v. Bombard's Access Floor Systems, 354 N.W.2d 837 (Minn.App. 1984).

Appellant testified to his personal and emotional losses incurred as a result of the use of the moniker by the Respondent. See Transcript 2, Page 96 – 98; Page 102, Line 15 – 19; Page 108, Line 1 – Page 112, Line 12; Page 136, Line 20 – Page 137, Line 19; Page 174, Line 13 – Page 175, Line 1.

Both Appellant and Dr. Richard Hoffman discussed the psychological problems experienced by the Appellant. See Dr. Richard Hoffman 2/26/03 Deposition. Dr. Hoffman reached an opinion regarding future psychological care that would be needed by the Appellant. See Dr. Richard Hoffman 2/23/03 Deposition, Page 8, Line 1 – Page 9, Line 18. The Jury's award was consistent with that opinion. The medical records documented Appellant's condition and treatment, which were also explained by Dr. Hoffman. The decision of the Jury on Appellant's emotional losses and needed treatment appear to have been reasonably based upon the testimony of Appellant and Dr. Hoffman.

Appellant also testified to the work he performed since his termination. Transcript 2, Page 99, Line 9 – Page 108, Line 10. Contrary to the Trial Court's

contention, the Appellant had sought out police work and actually obtained two part time police jobs in an attempt to get back into the profession, however, the moniker placed on him by the Respondent has hindered those efforts in finding work in his chosen profession. Transcript 2, Page 108, Line 11 – 17.

The Jury, while assessing the credibility of the Appellant, and having available to it these damage facts, had a legally sufficient basis to award past and future damages. Evidence was presented of wage loss/earning capacity loss; medical/psychological injury; and the emotional affect of this moniker on the Appellant for both past losses and future losses.

K. Conclusion Number 8

Conclusion number 8 states:

“There is no legally sufficient evidentiary basis for a reasonable jury to have found a logical, causal connection between the single call by the Defendant, which is the basis of this action, and any past or future damages claimed by the Plaintiff under the facts of this case.”

Under the principle of defamation per se, damages are presumed. There was circumstantial evidence of Respondent coining the phrase, making it available to the Moose Lake area through his daughters who were going to school in Moose Lake in January of 2001. See III, B. Finding Number 7, supra; Transcript 2, Page 184, Line 8 – 12. This provides the basis for the Jury making the logical connection regarding past and future damages.

IV WHETHER THE TRIAL COURT ERRED IN FINDING THAT:  
-THERE WAS NO CLEAR AND CONVINCING EVIDENCE OF  
DELIBERATE DISREGARD ALLOWING PUNITIVE DAMAGES;  
-THAT THERE WAS NO LEGALLY SUFFICIENT BASIS FOR AN AWARD  
OF PUNITIVE DAMAGES IN THE SUM AWARDED BY THE JURY; AND, -

-THAT THERE WAS NO LEGALLY SUFFICIENT BASIS FOR THE JURY TO HAVE FOUND THE CONCEPT OF PUNITIVE DAMAGES APPLICABLE IN THIS CASE.

Conclusions 4, 5, and 6 of the Trial Court's Order and parts of its Memorandum deal with the punitive damages issue. It should be noted that the Jury was given instructions on both the clear and convincing standard and on deliberate disregard. The Jury was able to assess the evidence, weigh the credibility of the witnesses, and reach its own inferences with regard to what happened in this case. Conclusion number 4 has already been addressed at III, I, supra. Conclusions numbered 5 and 6 erroneously find that the Jury did not have a legally sufficient basis for the sum it awarded, or that the concept of punitive damages was applicable. This is a question of law.

On the issue of the applicability of punitive damages the Trial Court is basing its decision upon a fundamental error of law that defamation per se did not occur in this case. In its analysis, the Trial Court found that there was no public hazard – substituting its judgment for that of the Jury, which very easily could have found that calling a person who is supposed to enforce the laws (including those regarding pedophilia) a pedophile, was a hazard. The Trial Court found that there was no issue as to the length of time of the misconduct or whether the Defendant hid the misconduct – despite the Jury's finding that Defendant/Respondent used the term "Pat the Pedophile;" that there is evidence that he coined the term; that up and through the time of the trial he denied his action – a clear showing of the length of time of the misconduct and his attempt to hide it.

The Trial Court next makes a factual decision that the nickname was already in use in the community (a fact the Jury was able to consider) indicating that the Respondent was unaware of any hazard or danger in calling someone a pedophile. Here

the Trial Court directly usurped the province of the Jury by making a factual determination. It also assumes that – even though Respondent was not aware of any evidence that Appellant was a pedophile, he still chose to use that term – and that he is somehow immune from the consequences of his act, all of which is based upon the Trial Court’s independent factfinding that the name was already in use – a finding that has no evidentiary basis. Clearly, whether Respondent was aware of prior use of the name, or whether he coined the name, he remains responsible for his own actions and the consequences of using that name to describe Appellant. The Jury was able to consider the same information considered by the Trial Court and found that Defendant/Respondent, by clear and convincing evidence, acted with deliberate disregard for the rights and safety of Appellant. The Trial Court goes on to indicate that the attitude and conduct of the Defendant was not addressed at trial. It was. At trial, Respondent continued to deny using that term even through the day of his testimony. In light of its answer to question number 2 of the Special Verdict Form (that the Respondent did call the Appellant “Pat the Pedophile.”), the lack of Respondent’s remorse was a fact that could have been, and probably was, considered by the Jury. With regard to the financial state of Respondent, he testified that he had a full time position with the Minnesota Department of Correction, in the IT, or computer department. The Respondent is barred from attacking the award based upon an alleged inability to pay the punitive damages. Nugent v. Kerr, 543 N.W.2d 688 (Minn.App. 1996). The Respondent’s financial condition is not an essential element of proof. Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980).

These were all issues that were available to the Jury for consideration in reaching

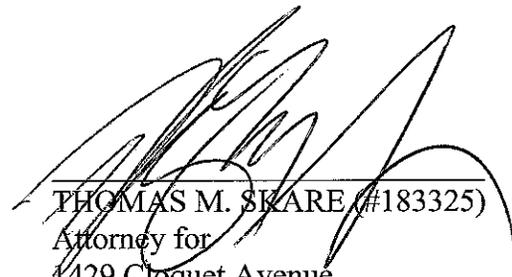
its decision on punitive damages. Despite having made a well-reasoned decision, based upon the evidence and testimony, the Trial Court has inserted itself into this case, making its own factual inferences and overruling those made by the Jury. This is clear error.

CONCLUSION

Based upon the above arguments, and the files and records available to this Court, Appellant Longbehn respectfully requests an Order of this Court finding that the Trial Court erred in granting JNOV to the Respondent in this matter. Appellant requests that the Trial Court's Order for Judgment be reversed and that the Jury Verdict be reinstated.

Date: 8/2/06

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).