STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1828

Diversified Water Diversion, Inc.,
Respondent,

vs.

Standard Water Control Systems, Inc.,
Appellant.

Filed September 23, 2008
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-03-7231

Todd Wind, Patrick D.J. Mahlberg, Fredrikson & Byron, P.A., 200 South 6th Street, Suite 4000, Minneapolis, MN 55402 (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the propriety of the district court's award of punitive damages and attorney fees to respondent. Concerning the punitive-damages award, appellant claims that the award does not satisfy the statutory criteria contained in Minn. Stat. § 549.20 (2006) and that the award violates its Fourteenth Amendment due-process rights. Appellant asserts that the district court erred in awarding attorney fees based on the language of a prior settlement agreement between the parties. We affirm.

FACTS

Appellant Standard Water Control Systems, Inc. (Standard), and respondent Diversified Water Diversion, Inc. (Diversified), are business competitors. Both companies provide contracting services, with a focus on drain-tile and window installation in residential properties.

Mike Hogenson (Hogenson) is the president and owner of Standard. Hogenson's brother, Arthur Hogenson, and John Gieseke are associated with Diversified. Arthur Hogenson is not involved in Diversified's day-to-day operations; instead he provides financial backing for the company. Gieseke is Diversified's main principal. Arthur Hogenson and Gieseke were previously employed by, or had an ownership interest in, Standard before they severed ties with the company and became associated with Diversified. As a result, there is a great deal of ill will between Hogenson and Arthur Hogenson and Gieseke.

In 2002, Standard sued Diversified, alleging misappropriation of trade secrets and unfair competition. A settlement agreement between the parties was reached in October 2003. The terms of the settlement were orally placed on the record in district court but never incorporated in a formal written agreement. As part of the settlement, each party agreed not to disparage the business of the other.[1] In addition, the parties stipulated that the "prevailing party" in any litigation relating to subsequent enforcement of the settlement would be entitled to attorney fees. Finally, if either party violated the settlement, a cease-and-desist letter was required before an action to enforce the agreement could be brought in district court.

In October 2005, Julie Korus solicited bids from both Standard and Diversified for a drain-tile-installation project. When Korus later called Hogenson to tell him that Standard's price was higher than other bids she received, Hogenson inquired about these bids, and Korus told him that Diversified was her preferred contractor. Upon learning this, Korus stated that Hogenson began "[b]ashing Diversified Water." Hogenson told her that Diversified was not a good company, did "terrible work," and was "not reliable." Korus disregarded Hogenson's statements, hired Diversified, and was satisfied with its performance.

Also in October 2005, Stephen Anderson, M.D., solicited bids from both Standard and Diversified for drain-tile work. Hogenson later made a follow-up call to Dr. Anderson about Standard's bid. Dr. Anderson informed Hogenson that he had

[1] The district court's oral summary of this point of the agreement was that the parties could not "say anything bad to other customers when [they] are hyping [their own] product."

decided to hire Diversified to do the drain-tile work. Hogenson became upset, recommended that Dr. Anderson choose a different company, and stated that Diversified would not honor the warranty for its work. Despite these statements, Dr. Anderson hired Diversified.

Diversified eventually learned of Hogenson's comments and sent Standard a cease-and-desist letter on February 9, 2006, stating that it believed that Hogenson was violating the terms of the 2003 settlement by disparaging Diversified. In a February 13, 2006 reply letter, Standard disputed the allegations of disparagement but acknowledged that Diversified's letter fulfilled the cease-and-desist requirement contained in the parties' 2003 settlement.

One week later, on February 20, Kelly Zimmerschied solicited bids for a drain-tile project from several businesses, including Diversified and Standard. During a subsequent phone conversation with Hogenson, Zimmerschied mentioned that she had solicited a bid from Diversified. Upon learning this, Hogenson became "very venomous and very angry." He told her that Diversified used substandard products, would not stand behind its warranty, was unreliable, acted in bad faith, and was generally a "sleazy" company. Nevertheless, Zimmerschied chose Diversified to perform the drain-tile project. Zimmerschied was so troubled by Hogenson's accusations that she later told Gieseke about them. Diversified subsequently sued Standard for breach of the settlement agreement and defamation.

Following a court trial, the district court found for Diversified. It ruled that Hogenson's conduct amounted to defamation per se because Hogenson's comments

impugned Diversified's business practices and reputation.[2] Although Diversified acknowledged that it did not suffer any actual injury as a result of Hogenson's actions, the district court noted that general damages are presumed in a defamation-per-se case and therefore failure to demonstrate actual harm was not fatal to Diversified's claim.[3] The district court awarded Diversified $0 in compensatory damages and $30,000 in punitive damages. It also issued an injunction barring Standard from making any further disparaging comments in violation of the 2003 settlement. Finally, the district court awarded Diversified $16,072.50 in attorney fees pursuant to the 2003 settlement because it was the "prevailing party." This appeal follows.

D E C I S I O N

Standard makes three arguments to this court. Standard argues that (1) Diversified failed to establish facts satisfying the statutory requirements that must be met to award punitive damages; (2) the punitive-damages award violates the Due Process Clause of the Fourteenth Amendment because it is an arbitrary deprivation of Standard's property; and (3) Diversified is not a "prevailing party" entitled to attorney fees under the 2003 settlement agreement.

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[2] *See Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 9–10 (Minn. 1984) (affirming that a business "may maintain an action for defamation on a showing that defendant's words tended to prejudice it in the conduct of its business or to deter third persons from dealing with it").

[3] *See Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977) (holding that statements derogating the honesty of a party in the operation of his business are slanderous per se, requiring no proof of actual damages).

I.

Standard challenges the district court's conclusion that the facts established at trial meet the statutory requisites for awarding punitive damages. Minn. Stat. § 549.20 governs punitive damages in civil cases. The section states that before punitive damages can be awarded, clear and convincing evidence must establish that the acts of the defendant evince a "deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a). This "deliberate disregard" standard is met by demonstrating that a defendant had knowledge of facts creating "a high probability of injury to the rights or safety of others" and that the defendant consciously, deliberately, or indifferently acted in a manner that disregarded this high probability of injury. *Id.*, subd. 1(b); *see also Longbehn v. Schoenrock*, 727 N.W.2d 153, 162 (Minn. App. 2007) ("To support an award of punitive damages [in the context of a defamation action], there must be clear and convincing evidence establishing . . . intentional disregard for the high probability that [the] statement would cause . . . harm.").

A. Deliberate disregard

Standard first contends that the district court erred in concluding that Hogenson's comments amounted to "deliberate disregard" of probable harm to Diversified's rights, arguing that Hogenson believed that his comments amounted only to "company comparisons" between Standard and Diversified. In support of its argument, Standard asserts that none of the three customers who testified at trial could point out specific, deliberately disparaging remarks that Hogenson made about Diversified. We disagree.

While a district court's findings of fact will not be reversed unless clearly erroneous, Minn. R. Civ. P. 52.01, the application of a statute to the facts found by the district court is a question of law, which we review de novo. *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (stating that the application of a statute to undisputed facts is a question of law); *In re Welfare of S.H.H.*, 741 N.W.2d 917, 919 (Minn. App. 2007) ("[T]he issue in this case concerns the application of a statute to the facts as found by the district court. Such a review is a question of law, which we review de novo.").

Given the nature and content of Hogenson's statements, the district court properly concluded that they constituted a deliberate disregard of the probable harm to Diversified's good will and business reputation with its potential customers. For example, Zimmerschied testified that Hogenson told her that Diversified was a "sleazy" business, operated in bad faith, was unreliable, and would not stand behind its warranty. These statements were not merely a comparison of the different services offered or the products used by each company, but intentionally disparaged Diversified and its business practices. In making the comments, Hogenson intentionally disregarded Diversified's rights under the 2003 settlement and its right not to be defamed.

B. High probability of harm

Standard next argues that, even assuming Hogenson deliberately disregarded Diversified's rights, this conduct did not create a "high probability" of harm to Diversified. Standard points out that all three customers to whom the remarks were made

chose Diversified as their contractor anyway. Standard asserts that "[w]ithout any [actual] harm, there cannot be a high probability of harm."

But if accepted, this argument would effectively rewrite section 549.20 by requiring a showing of actual harm or injury to satisfy the statute. Under Standard's construction of Minn. Stat. § 549.20, there could be no finding that the conduct at issue, no matter how injurious or dangerous, created a "high probability" of harm if no harm actually resulted. But the statute's plain language requires courts to focus on the defendant's underlying conduct and whether it tends to create a high probability of harm, not whether harm actually occurred as a result of the conduct in the particular instance. *See Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (stating that when a statute's language is plain and unambiguous, "courts apply the statute's plain meaning"). Standard's argument contravenes this plain language.

That no actual harm resulted from Hogenson's disparagement of Diversified does not take away from the fact that the remarks created a high probability of harm. The significant probability that such remarks will injure a business's good will is presumably why slanderous statements regarding a business and its operation are deemed to be defamatory per se. *See Kammeier*, 262 N.W.2d at 372 (holding that statements derogating the honesty of a party in the operation of his business are slanderous per se, requiring no proof of actual damages). Hogenson's statements that Diversified is sleazy, operates in bad faith, and will not stand behind its products and services go to the very heart of Diversified's business reputation. Therefore, the district court properly determined that this element of Minn. Stat. § 549.20, subd. 1, was met.

C. Supportive findings

Standard contends that the district court's findings are not sufficient to support its award of punitive damages. Minn. Stat. § 549.20, subd. 3, states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public . . . , the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct . . . , and the severity of any criminal penalty to which the defendant may be subject.

While conceding at oral argument that a district court need not specifically list the impact of every finding contained in Minn. Stat. § 549.20, subd. 3, Standard contends that the district court failed to make sufficient findings to support its punitive damages award.

While the district court could have been more explicit in discussing how Hogenson's conduct related to the factors in Minn. Stat. § 549.20, subd. 3, its posttrial order nevertheless sufficiently addressed the factors in subdivision 3 to justify the award. The district court considered the duration of Hogenson's misconduct, finding that it went on for several months. The district court also found that Hogenson denied that he disparaged Diversified, despite the evidence to the contrary. Hogenson characterized his statements as "company comparisons." This

goes to "the attitude and conduct of the defendant upon discovery of the misconduct" and supports the award. *See id*. The district court noted that Hogenson was the manager and owner of Standard; in other words, Hogenson was a high-level employee "involved in causing" the harm. *See id*. And Hogenson was expressly made aware of the inappropriate nature of his actions by Diversified's cease-and-desist letter. Thus, "the degree of the defendant's awareness of the hazard" also supports the award. *See id*. We conclude that the district court's order evinces sufficient consideration of "those factors which justly bear upon the purpose of punitive damages" as required by the statute. *See id*.

II.

The second issue Standard raises is whether the Due Process Clause of the Fourteenth Amendment bars an award of punitive damages in the amount of $30,000 when no compensatory damages are awarded.

A. The *Gore* and *Campbell* precedents

The amount of a punitive-damages award is almost exclusively for the fact-finder to determine; appellate courts "will not disturb [a punitive damages] award on appeal unless it is so excessive as to be unreasonable." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 259 (Minn. 1980). If no constitutional issue is raised, an appellate court reviews whether the award is unreasonably excessive under an abuse-of-discretion standard. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 1684 (2001). But a claim that the amount of punitive damages awarded violates

due process presents a constitutional issue, which we review de novo. *Id*. at 436, 121 S. Ct. at 1285–86.

The primary United States Supreme Court cases on the constitutionality of punitive damages are *BMW of N. Am., Inc., v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).[4] In *Gore*, the plaintiff sued BMW for fraud relating to the undisclosed repainting of a vehicle. *Gore*, 517 U.S. at 563, 116 S. Ct. at 1593. Gore prevailed in state district court and, after the appeal process, was left with an award of $4,000 in compensatory damages and $2 million in punitive damages. *Id*. at 565–67, 116 S. Ct. at 1593–95. The Supreme Court held that the amount of the punitive-damages award violated the Due Process Clause of the Fourteenth Amendment because it was so unreasonably excessive when compared to compensatory damages that it was an arbitrary deprivation of property in contravention of the clause. *Id*. at 568, 585–86, 116 S. Ct. at 1595, 1604. In reaching this holding, the Court identified three guideposts for evaluating whether a punitive-damages award is so unreasonably excessive that it violates due process, and we discuss them below. *Id*. at 574–75, 116 S. Ct. at 1598–99.

[4] We note that the Supreme Court has recently considered the propriety of a large punitive-damages award in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). But the Court's decision in *Exxon* to limit a punitive-damages award to the amount of the compensatory-damages award was based on its interpretation of the limit imposed on punitive damages by maritime law, not the limit that due process places on such an award. *Exxon*, 128 S. Ct. at 2626–27 (stating that the current inquiry "differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process" and that the Court's "review of punitive damages today . . . [does not] consider[] their intersection with the Constitution"). Maritime law is not at issue here.

In *Campbell*, the plaintiff sued State Farm, alleging a bad-faith failure to settle a tort claim against him. *Campbell*, 538 U.S. at 413–14, 123 S. Ct. at 1518. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. *Id*. at 415, 123 S. Ct. at 1519. The Supreme Court held this award to be grossly excessive and violative of the Fourteenth Amendment's Due Process Clause. *Id*. at 417, 429, 123 S. Ct. at 1519–20, 1526. The Court stated that, while due process does not place a rigid mathematical limit on punitive-damage awards, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 425, 123 S. Ct. at 1524.

Campbell's single-digit-ratio rule forms the linchpin of Standard's argument. But difficulties arise in applying this precedent to circumstances when no, or only nominal, compensatory damages were awarded and $30,000 in punitive damages was awarded. Because the amount and nature of the damages award in such a circumstance is so different from the circumstances in *Gore* and *Campbell*, there has been "some confusion" in many jurisdictions regarding application of these precedents. *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 871 (N.D. Iowa 2004).

B. Application of *Gore* and *Campbell*

Gore instructs courts to review the reasonableness of a punitive-damages award using the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm or potential harm and the punitive-damages award; and (3) the difference between the punitive-damages award and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 574–75, 116

S. Ct. at 1598–99. *Gore* also made clear that a proper inquiry does not look solely at just the harm that occurred, but "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* . . . as well as the harm that actually has occurred." *Id*. at 581, 116 S. Ct. at 1602 (quotation omitted).

1. Comparable misconduct

Our research revealed no cases awarding statutory civil penalties upon the successful pursuit of a defamation claim in Minnesota.[5] A civil defamation action is based in common law, not statute. *See Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471, 473 (Minn. App. 1991) (stating that "private plaintiff/private issue defamation actions must be analyzed under state common law principles"). Accordingly, this *Gore* guidepost is not particularly helpful in the present context.

2. Reprehensibility

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. In evaluating the reprehensibility of a defendant's conduct, courts should consider 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

[5] Minn. Stat. § 609.765 (2006) does make a narrow class of defamation a criminal offense, designating the offense as a gross misdemeanor and prescribing up to a $3,000 fine. "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action," although a criminal penalty has "less utility" in helping gauge the reasonableness of a punitive-damages award than a civil penalty. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526.

> repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419, 123 S. Ct. at 1521.

Here, the harm was potentially economic. Hogenson's conduct was not an isolated incident; he repeatedly and deliberately disparaged Diversified to customers who solicited bids from both companies. And he continued to do so even after being expressly warned by the cease-and-desist letter that his actions violated the 2003 settlement agreement. In addition, the record supports the determination that Hogenson's conduct was the result of intentional malice. There was ill will between Hogenson and his brother and Gieseke. Hogenson's comments were specifically intended to injure Diversified's business reputation and deprive it of customers. As a result, these repeated, malicious acts support the conclusion that the reprehensiveness of Hogenson's conduct warrants an award of reasonable punitive damages.

3. Proportionality

Application of *Gore* and *Campbell* becomes more complicated when considering the proportionality or ratio analysis. In evaluating this guidepost, the Supreme Court has consistently declined to set a concrete mathematical limit regarding a punitive-damages ratio. *See Exxon*, 128 S. Ct. at 2626; *Campbell*, 538 U.S. at 424–25, 123 S. Ct. at 1524; *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043 (1991). The Court also acknowledged in *Gore* that a "higher ratio [between punitive damages and compensatory damages] may . . . be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm

might have been difficult to determine." *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602. Ultimately, general concerns of reasonableness must guide a constitutional calculus regarding the amount of punitive damages that can be properly awarded in light of the compensatory-damages award. *Id*. at 582–83, 116 S. Ct. at 1602–03.

The nature of the relationship between a punitive- and compensatory-damages award when only nominal compensatory damages are found differs from the circumstances presented in *Gore* and *Campbell*. Taking their cue from this fact and the flexibility allowed by the Supreme Court in *Gore* and *Campbell*, numerous courts from other jurisdictions have upheld comparatively significant punitive-damage awards even when only nominal compensatory damages were awarded. These courts have generally justified this result by significantly deemphasizing, if not disregarding, the importance of the proportionality guidepost when nominal compensatory damages are found. *See Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) (stating that "any punitive damages-to-*compensatory* damages 'ratio analysis' cannot be applied effectively in cases where only *nominal* damages have been awarded"); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 88 (2d Cir. 2003) ("[T]he ratios referred to in *Campbell* may not apply with equal force when punitive damages are compared to nominal damages."); *DiSorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (holding that when nominal compensatory damages were awarded, "the use of a multiplier to assess punitive damages is not the best tool"); *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) (holding that when compensatory damages are nominal, "a much higher ratio [of punitive damages] can be contemplated"); *Kasotakis*, 314 F. Supp. 2d at

871 (stating that the prudent path when an award of compensatory damages is nominal "is to apply the *Gore* guideposts, but place less emphasis on the proportionality requirement").

In the nominal-compensatory-damages context, these courts have upheld punitive-damage ratios approximately equivalent to, and even in excess of, the 30,000-to-1 ratio that resulted from the district court's punitive-damages award to Diversified. *See Kaufman County*, 352 F.3d at 1014, 1016 (upholding a per-plaintiff ratio of $15,000 in punitive damages to $100 in nominal damages); *Provost v. City of Newburgh*, 262 F.3d 146, 164 (2d Cir. 2001) (noting that a $10,000 punitive-damages award based on a $1 nominal-damages award approaches constitutional limits); *Lee*, 101 F.3d at 807, 813 (finding constitutionally acceptable a punitive-damages award of $75,000 in comparison to $1 in nominal damages); *Kasotakis*, 314 F. Supp. at 848, 876 (upholding a per-plaintiff ratio of $12,500-to-$1).

Ultimately, a ratio analysis "only embodies 'a general concern of reasonableness.'" *Kaufman County*, 352 F.3d at 1016 (quoting *Gore*, 538 U.S. at 582–83, 116 S. Ct. at 1602). And courts have consistently found that it is constitutionally permissible to award reasonable punitive damages even if a plaintiff suffers only a nominal injury. We agree with the reasoning of the above-cited cases and conclude that a reasonable award of punitive damages is constitutionally acceptable even when only nominal (or no) compensatory damages are awarded. We also conclude that Hogenson's conduct, for the reasons discussed under the "reprehensibility"

guidepost, was sufficiently culpable to render constitutionally reasonable the $30,000 punitive damages award by the district court.

III.

Standard's final claim is that if the award of punitive damages is reversed, Diversified is not a "prevailing party" under the 2003 settlement agreement. But this entire argument is premised on the punitive-damages award not withstanding appellate scrutiny. As we have concluded that the punitive-damages award was proper, this argument fails. Accordingly, we do not address whether Diversified would be a "prevailing party" under the 2003 agreement based merely on the district court's issuance of an injunction enforcing the settlement.

Affirmed.