IN THE SUPREME COURT OF IOWA

JERRY HOFFMANNN and HOFFMANN INNOVATIONS, INC., d/b/a DIY AUTOTUNE Plaintiffs-Appellees, v. SCOTT CLARK and REALTUNERS, LLC, Defendants-Appellants,	SUPREME COURT NO. 19-2086 POTTAWATTAMIE COUNTY NO. LACV116501

APPEAL FROM THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY
HONORABLE MARGARET REYES, JUDGE (PRETRIAL PROCEEDINGS AFTER SEPTEMBER 1, 2018; TRIAL; POSTTRIAL PROCEEDINGS)
HONORABLE SUSAN L. CHRISTENSEN, JUDGE (PRETRIAL PROCEEDINGS BEFORE SEPTEMBER 1, 2018)

APPELLANTS' FINAL BRIEF AND ARGUMENT

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ROUTING STATEMENT

This appeal requires application of existing legal principles and should be transferred to the court of appeals. *See* Iowa Rs. App. P. 6.903(2)(*d*), 6.1101(3)(*a*).

STATEMENT OF THE CASE

Nature of the Case

Scott Clark ("Clark") and RealTuners, LLC ("RealTuners") appeal from an $11,000,000 jury verdict in favor of Jerry Hoffmannn ("Hoffmannn") and Hoffmannn Innovations, Inc. d/b/a DIYAutoTune ("DIY") for tort, contract, and punitive damages claims and from the district court's award of attorney fees to Hoffmannn and DIY.

Course of Proceedings

On July 28, 2017, Hoffmannn and DIY filed suit against Scott Clark and RealTuners. (APP VOL I - 5, Petition). Against Clark, the petition raised claims of defamation and defamation per se, civil extortion, breach of fiduciary duty, breach of contract, and unjust enrichment. (*Id.*) It requested punitive damages and attorney fees

based on Clark's actions and injunctive relief against both Clark and RealTuners. (*Id.*) Clark and RealTuners answered, raising truth as a defense to the defamation claims; counterclaimed for defamation and defamation per se, intentional interference with prospective business advantage, and false light invasion of privacy; and requested temporary and permanent injunctive relief, punitive damages, and a jury trial. (APP VOL I - 24, Answer & Counterclaims and Request for Injunctive Relief).

In January 2018, the parties filed a joint motion for entry of a consent order, which the district court entered on January 23. (APP VOL I - 34, Joint Motion for Entry of Consent Order; APP VOL I - 44, Consent Order). Under the consent order, the parties would refrain from making disparaging statements about an adverse party or its products, alert opposing counsel upon discovering anyone using the party's forum to publish disparaging statements about an adverse party, and remove negative statements about an adverse party made in the party's forum within three days of the order. (APP VOL I - 44, Consent Order

¶¶ 5, 8, 9). The parties would not make or file any charge or complaint against an adverse party or provide a forum for anyone else to make disparaging statements about an adverse party. (*Id.* ¶ 6). If asked about an adverse party, the parties were to respond, "I cannot comment. The Parties are involved in litigation." (*Id.* ¶ 10). The order provided that violation "may result in the imposition of sanctions and any offending Party may be forced to pay the reasonable attorneys' fees of any Party forced to bring a violation of this Order to the Court's attention." (*Id.* ¶ 13).

Throughout this case, both parties filed multiple motions for sanctions for violations of the consent order. Pertinent to this appeal are Hoffmannn's and DIY's first four motions. On March 14, the court held an unrecorded hearing regarding the first motion for sanctions, granted the Hoffmann's and DIY's motion, and ordered Clark to reimburse Hoffmannn and DIY $4,892.34 in attorney fees and travel expenses. (APP VOL I - 127, 03/14/18 Order). On March 16, 2018, Hoffmann and DIY filed their second sanctions motion based on comments Clark made during a podcast on March 14,

2018. (APP VOL I - 130, Plaintiffs' Second Sanctions Motion). Clark resisted pro se. (APP VOL I - 141, Defendants' Resistance to Plaintiffs' Second Sanctions Motion). Following a recorded hearing on April 26, 2018 the court granted the motion and ordered Clark to deposit $10,000 into the court's registry and to reimburse Hoffmannn and DIY $5383.27 in attorney fees and travel expenses. (04/26/18 Transcript 32:5 – 36:2; APP VOL I - 162, 04/26/18 Order).

On May 16, 2018 Hoffmann and Clark filed their third sanctions motion regarding comments Clark made on Facebook on May 8, 2018. (APP VOL I - 166, Plaintiffs' Third Sanctions Motion). Clark filed a pro se resistance. (APP VOL I - 202, Defendant's Resistance to Plaintiffs' Third Sanctions Motion). Another motion was filed on July 12, 2018, which was also resisted by Clark. (APP VOL I - 207, Plaintiffs' Fourth Sanctions Motion; APP VOL I - 239, Defendants' Resistance to Plaintiffs' Fourth Sanctions Motion).

The sanctions motions were addressed at the August 13, 2018 pretrial conference hearing. (08/13/18 Transcript 4:12 – 5:6). The

court granted Hoffmann's and DIY's third and fourth sanctions motions, requested the parties brief whether striking Clark's and RealTuners' pleadings was a possible sanction, and noted that if it could not strike the pleading, it would allow the jury to know how many times Clark had been held in contempt. (*Id.* 85:6 – 86:19). Thereafter, the court struck the answer and counterclaims and ordered the case to "proceed to trial as to the amount of Plaintiffs' damages and the equitable relief sought." (APP VOL I - 265, 08/24/18 Order; APP VOL I – 279-280, 08/31/18 Order p.12–13, 20; *see* APP VOL I - 245, Plaintiffs' Brief in Support of Striking; APP VOL I - 258, Defendants' Resistance to Striking).

A three-day trial began on August 20, 2019. (*See* APP VOL III – 125, 08/22/19 Judgment Order). Ultimately, the jury returned an $11,000,000 verdict in favor of Hoffmann and DIY. (APP VOL III - 116, Verdict). Clark and RealTuners filed motions for JNOV, new trial and remittitur and resistance to Hoffmann and DIY's request for attorney's fees. (APP VOL III - 127, Motion JNOV; APP VOL III - 129, Motion for New Trial and Request for Remittitur, APP

VOL III - 74, Motion to Deny to Attorney Fees). On December 12, 2019, the court denied Clark's and RealTuners' motions and awarded common law attorney fees. (APP VOL III - 235, 12/11/19 Order (Post-Trial Matters). Clark and RealTuners filed a timely notice of appeal on December 17. (APP VOL III - 263, Notice of Appeal).

Statement of the Facts

Clark is a former employee of DIY (APP VOL III - 105, Jury Instructions p.19). DIY is a Georgia Corporation specializing in assisting customers with do-it-yourself racing automotive needs and tuning. (*Id.* at 20). Clark's duties as its employee included creating curriculum for and teaching training classes for Hoffmannn Innovations customers, marketing and selling those classes, providing trackside support, and providing installation and tuning services. (*Id.* at 21–22).

During his employment with DIY, Clark conducted training classes using Hoffmannn Innovations materials for his personal benefit. (*Id.* at 21, 23). He used the materials from DIY to design

the curriculum for those classes. (*Id.*) These classes competed with classes offered by DIY. (*Id.*)

Clark's employment was terminated by a phone call on August 4, 2016. (*Id.* at 22). When told he would not be paid a severance, Clark responded that there would be a public fight that would be bad for Hoffmannn and DIY and threatened to cause trouble for Hoffmannn and DIY on social media. (*Id.*) Clark then began to post, publish, and make disparaging and negative comments about Hoffmannn and DIY. (*Id.*) These comments included incorrect failure rates for Hoffmannn and DIY's products, that they were dishonest in their business dealings and knowingly sold defective products, that they were his "scumbag former employer," that there was "a six figure wrongful termination settlement" and "seven figure claim on damages" against them regarding Clark's loss of employment, and that they accused Clark of intentionally destroying engines. (*Id.* at 23–24).

During his employment with DIY, Clark signed a non-compete agreement wherein he agreed that he would not compete

with DIY during and for two years after his employment. (*Id.* at 21–22). Within two years of his termination, Clark started RealTuners, which, like DIY, provides engine and powertrain tuning and support assistance to customers. (*Id.* at 20, 22).

In the non-compete, Clark also agreed that he would be given access to DIY's trade secrets and other confidential data but would not use that for his own benefit or disclose that to others. (*Id.* at 22–23). After his termination, he used materials he was given as an employee of DIY to teach classes on tuning and related topics. (*Id.*)

Additional facts and proceedings are discussed in the Argument section below.

ARGUMENT

I. CLARK AND REALTUNERS ARE ENTITLED TO A NEW TRIAL BECAUSE THE DISTRICT COURT IMPROPERLY STRUCK THEIR ANSWER AND COUNTERCLAIMS.

A. Error Preservation.

Each time Hoffmannn and DIY requested the court strike Clark's and RealTuner's answer and counterclaims as a sanction, Clark and RealTuners resisted. (APP VOL I – 50, 130, 166, 207, Plaintiffs' First to Fourth Sanctions Motions; APP VOL I - 245, Plaintiffs' Brief in Support of Striking; APP VOL I – 123, 141, 202, 239, Defendants' Resistances to Plaintiffs First to Fourth Sanctions Motions; APP VOL I - 258, Defendants' Resistance to Plaintiffs' Brief in Support of Striking). Nevertheless, the district court struck Clark's and RealTuners' pleading as a sanction for Clark's conduct. (APP VOL I - 265, 08/24/18 Order; APP VOL I – 279-280, 08/31/18 Order p.12–13). Clark and RealTuners reiterated their claim that striking their pleading was improper at trial and in their motion for new trial. (08/22/19 Transcript 6:5–8; APP VOL III - 129, Motion for New Trial and Request for Remittitur ¶ 13). The court rejected

Clark's and RealTuners' challenges. (08/22/19 Transcript 8:21 – 9:8; APP VOL III – 246-247, 12/11/19 Order p.12–13 (Post-Trial Matters)). Error was preserved. *See, e.g.*, *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

B. Standard of Review.

Review of the imposition of sanctions is for abuse of discretion. *See Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 684 (Iowa 2020). The reviewing court will correct erroneous applications of law but is bound by the district court's findings of fact if supported by substantial evidence. *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009). A ruling resting on clearly untenable or unreasonable grounds constitutes an abuse of discretion. *In re Marr. of Williams*, 595 N.W.2d 126, 129 (Iowa Ct. App. 1999). Although district courts have discretion in imposing sanctions, "it is incumbent upon a reviewing court to scrutinize the exercise of that discretion and to confine the exercise to reasonable limits." *Fox v. Stanley J. How & Assocs., Inc.*, 309 N.W.2d 520, 522 (Iowa Ct. App. 1981).

Errors in jury instructions are reviewed for legal error. *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 891 (Iowa 2015). "Jury instructions 'must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide.' " *Id.* (quoting *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)). "Prejudice occurs and reversal is required if jury instructions have misled the jury, or if the district court materially misstates the law." *Id.*

C. Discussion.

The district court abused its discretion by striking Clark's and RealTuners' answer and counterclaims as a sanction for Clark's conduct. Further, the district court erred in providing an instruction containing one hundred (100) paragraphs of "admitted" facts. (APP VOL III – 105-115, Jury Instructions p.19–29). Accordingly, this Court should reverse the district court and grant Clark and RealTuners a new trial.

1. The district court improperly struck Clark's and RealTuners' Answer and Counterclaim

In granting Hoffmannn and DIY's request to strike Clark and RealTuners' answer and counterclaim, the district court relied upon Iowa R. Civ. P. 1.602 and Iowa R. Civ. P. 1.517. Assuming Rules 1.602(2) and (5) and 1.517(2)(*b*)(3)[1] authorize district courts to enter the consent orders and sanction violations thereof by striking the violating party's pleading, striking Clark's and RealTuners' pleading, here, was unreasonable under the circumstances of this case.

After striking the pleading, the court deemed the allegations in Hoffmannn and DIY's petition admitted, included them in the jury instructions, and prohibited Clark's and RealTuners' from presenting evidence—even in mitigation of damages—that Clark's and/or others' perceptions or opinions of Hoffmannn and DIY's

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[1] Iowa R. Civ. P. 1.602 does not actually provide for the entry of a consent order and instead only provides a district court with authority to govern trial scheduling, discovery and deadlines. *See* Iowa R. Civ. P. 1.602. Instead, the district court was likely using its inherent authority "to do what is reasonably necessary for the administration of justice in a case before the court." *State v. Iowa Dist. Court for Johnson County*, 750 N.W.2d 531, 534 (Iowa 2008).

products justified Clark's defamatory conduct, or that Hoffmannn and DIY engaged in any wrongdoing. (*E.g.*, APP VOL III - 69, 08/16/19 Pre-Trial Order; APP VOL III – 105-115, Jury Instructions p.19–29; 08/20/19 Transcript 3:1 – 22:7; 08/21/19 Transcript 149:7 – 150:12, 154:6–20, 171:8 – 172:4). In this way, the court effectively entered a default judgment against Clark's and RealTuners' on liability, found that punitive damages were warranted, and awarded a significant amount of damages. *See In re Det. of Huss*, 688 N.W.2d 58, 64 (Iowa 2004) (finding sanctions ruling had the effect of a default judgment as it determined that all the matters the other party had to establish would be deemed to have been established).

"Because the sanctions of dismissal and default judgment preclude a trial on the merits, the range of the trial court's discretion to impose such sanctions is narrow." *Troendle v. Hanson*, 570 N.W.2d 753, 755 (Iowa 1997). This is an extreme sanction and "should be the rare judicial act." *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 241, 242 (Iowa 1988) (quoting *Edgar v. Slaughter*,

548 F.2d 770, 773 (8th Cir. 1977)); *accord* Sterry R. Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pre-Trial Orders*, 29 F.R.D. 420, 424 (1961) (noting such sanctions are severe and "appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts").

To justify a dismissal or default judgment under rule 1.517, the noncompliance with the discovery order must be willful or deliberate or with fault or in bad faith. *Troendle*, 570 N.W.2d at 755–56. But it is important to be mindful that the effect of rule 1.517 is to create " 'the "proper balance between the conflicting policies" ' of avoiding delays and deciding cases on their merits." *Id.* at 755 (quoting *Kendall/Hunt*, 424 N.W.2d at 240). The reviewing court should also evaluate the record as it existed at the time of the dismissal sanction. *See Kendall/Hunt*, 424 N.W.2d at 242 (considering the record as it existed on the date the default was

entered when evaluating whether entry of the default was an appropriate sanction).

Iowa appellate courts have not expressly identified the factors to consider when imposing a rule 1.517(2)(*b*)(3) sanction. However, the courts have routinely looked to federal cases evaluating sanctions imposed under the corresponding Federal Rule of Civil Procedure 37(b)(2)(A). *See, e.g.*, *R.E. Morris Invs., Inc. v. Lind*, 304 N.W.2d 189, 191 (Iowa 1981) (noting Rule 1.517 is closely patterned after Fed. R. Civ. P. 37 and federal courts' decisions interpreting Fed. R. Civ. P. 37 "are of persuasive authority"). Like Iowa courts, federal courts acknowledge that a rule 37 sanction that precludes trial on the merits "should be used as a 'weapon of last, rather than first, resort.' " *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (quoting *Meade v. Grubbs*, 841 F.2d 1512, 1520 n.6 (10th Cir. 1988)).

Before imposing Fed. R. Civ. P 37 sanctions, federal courts consider

> (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . .

> (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Id. (alteration in original) (quoting *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)); *accord, e.g.*, *United States v. $284,950.00 in U.S. Currency*, 933 F.3d 971, 974 (8th Cir. 2019) (noting striking a claim as a sanction should occur only when, *inter alia*, there is prejudice to the other party from the discovery violation); *Hillesheim v. Holiday Stationstores, Inc.*, 903 F.3d 786, 790 (8th Cir. 2018) (considering whether the discovery violation was harmless); *see* Waterman, 29 F.R.D. at 425 ("Where an alternative, less drastic, sanction would be just as effective it should be utilized.").

Iowa appellate cases have generally considered similar factors. *See, e.g.*, *Det. of Huss*, 688 N.W.2d at 65 (considering the most effective sanction to keep the party's continued conduct from inhibiting the other party's ability to prove its case); *Troendle*, 570 N.W.2d at 756 (noting discovery noncompliance left opposing party with choice of either proceeding to trial unprepared or continuing

trial and further delaying resolution); *State ex rel. Parcel v. St. John*, 308 N.W.2d 8, 10–11 (Iowa 1981) (en banc) (indicating that "the harsh sanction of a default judgment should not be imposed" when noncompliance is based on the inability to comply and that the sanction of default must be proportionate to the noncompliance); *Fenton v. Webb*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005) (affirming striking of defendant's answer after she failed to respond to discovery requests despite being given three additional chances to comply after her initial failure and a warning that continued noncompliance would result in "further sanctions, including entry of default judgment"); *Marr. of Williams*, 595 N.W.2d at 129–30 (finding information sought in discovery requests was critical to the outcome of case and the noncompliance was prejudicial to the other party because time was of the essence).

Federal courts also consider whether the noncompliant litigant is pro se and a layperson and, if so, whether the litigant violated "simple requirements of discovery" and had any other experience as a pro se litigant. *See, e.g.*, *Lindstedt v. City of Granby*,

238 F.3d 933, 936, 937 & n.4 (8th Cir. 2000). The reasonableness of the sanction imposed should also be considered in light of the underlying purposes of rule 1.517 sanctions: "ensuring effective discovery procedure and deterring future noncompliance." *R.E. Morris Invs.*, 304 N.W.2d at 192 (citations omitted).

Applying those factors to this case reveals it was unreasonable for the court to have struck Clark's and RealTuners' pleading as a sanction when it did.

First, Hoffmann and DIY did not suffer any actual prejudice by the purported sanctionable behavior. None of Hoffmann and DIY's first three motions for sanctions had to do with any claimed discovery violations or impeding Hoffmann's or DIY's ability to prosecute their case in any way. (APP VOL I - 50, First Motion for Sanctions; APP VOL I - 130, Second Motion for Sanctions; APP VOL I - 166, Third Motion for Sanctions). Instead, each and every complaint was in regard to Clark's purported violation of the January 23, 2018 consent decree. This distinction is important because only those instances that affect the case as plead, warrant

the striking of a pleading. As recognized by the Iowa Court of Appeals "the severity of a sanction should bear a relationship not only to the action it is meant to penalize, but also the impact of that action on the ***underlying action***." *Raye v. Central Iowa Hosp. Corp.*, 2002 WL 3157262 at *4 (Iowa Ct. App. 2002).

Second, there were many less drastic, alternative options available to the court than striking the pleadings. Indeed, the district court implemented many of them as other sanctions against Clark throughout the course of these proceedings, including ordering fines, ordering attorney fees, finding Clark in contempt, and ordering him to jail for his willful violations of the consent decree—any of which would be appropriate for violating a district court order. Yet, the district court selected the most severe sanction available and prevented the parties from adjudicating the case on the merits. Consequently, the trial devolved into two days of unrebutted testimony by Hoffmann and DIY and an attack of Clark

for failing to comply with the district court's prior order.[2] Indeed, very little damages evidence was actually presented, despite the district court's direction that this was to be the whole purpose of the trial. (APP VOL I - 268, 08/31/18 Order).

Alternatively, the district court could have also remedied the continuing violations by allowing Hoffmann and DIY to amend their petition to include each new violation as another basis for their defamation claim and allow Hoffmann and DIY to argue that the jury should award them damages for these new defamatory statements. In that situation, Clark would be proportionately punished for his new violations but not disproportionately punished because he lacked a fundamental understanding, as a pro se litigant, of what the consent order's language actually meant. *See*

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[2] The consent decree was not limited to preventing the parties from publishing defamatory statement, but instead prohibited the parties from discussing matters "regardless of the truth or the falsity of such statements." (APP VOL I - 44, Consent Order). Thus, Clark was punished for statements that might well have been true, but yet, the district court's order allowed Hoffmann and DIY to present the statements as irrebuttable truth.

Parcel, 308 N.W.2d at 10–11 (requiring the sanction of default be proportionate to the party's failure to comply).

Next, many of Clark's violations of the consent order leading up to the striking of Clark and RealTuners' pleadings can be characterized as comments that were ambiguously negative, subsequently removed or edited by Clark when asked, or the result of Clark's misunderstanding of the consent order. Accordingly, his level of culpability weighs against the harsh sanction imposed. *See Mobley*, 40 F.3d at 340 (identifying litigant's culpability as a factor); *see also Lindstedt*, 238 F.3d at 937 (noting litigant sought to complicate a simple case, delay an otherwise speedy resolution, and refused to comply as a litigation tactic for responding to difficulties he had had with opposing counsel's law firm in other cases); *Parcel*, 308 N.W.2d at 10–11.

For example, in their first sanctions motion, Hoffmannn and DIY claim Clark posted a disparaging comment on Facebook on January 24. (APP VOL I - 52, Plaintiffs' First Sanctions Motion ¶ 16). However, viewing the whole comment as provided in

Exhibit 1 to the motion reveals the comment is ambiguously negative—Clark says he would not use the current version of a product (which belongs to DIY) but would use a prior version. (APP VOL I - 58, Exhibit 1 to Plaintiffs' First Sanctions Motion). Additionally, the comment was removed upon Hoffmannn's and DIY's request. (APP VOL I - 123, Defendants' Resistance to Plaintiffs' First Sanctions Motion ¶ 4).

Similarly, Hoffmannn and DIY point to Clark's comment on the January 24 podcast, that he only had thirty-six more hours before he could no longer talk about Hoffmannn and DIY due to a court order. (APP VOL I - 52, Plaintiffs' First Sanctions Motion ¶ 20). However, that comment was removed from the podcast within thirty-six hours of broadcast, which would have been within the three-day deadline the consent order imposed for the parties to remove any disparaging statements they had posted. (APP VOL I – 123-124, Defendants' Resistance to Plaintiffs' First Sanctions Motion ¶¶ 8–9; *see* APP VOL I - 47, Consent Order ¶ 9). Further, this comment exemplifies Clark's misunderstandings of the consent

order's parameters—here, a misunderstanding of deadline in paragraph 9 of the consent order—something that is not unreasonable for a layperson. *See Lindstedt*, 238 F.3d at 937 (recognizing laypeople do not have the same inherent legal understandings as a lawyer).

Finally, the district court never warned Clark that additional violations could result in having the Answer and Counterclaim stricken. *See, e.g., Mobley*, 40 F.3d at 340 (noting a factor includes whether the court warned the party in advance that dismissal would be a likely sanction for future violations); *Fenton v. Webb*, 705 N.W2d 323, 327 (Iowa Ct. App. 2005) (affirming striking of defendant's answer after, *inter alia*, the court warned that continued noncompliance would result in default judgment sanctions). Such a warning here would not only be reasonable, but almost necessary considering Clark's pro se status, the fact the consent order says nothing about a pleading being struck as a possible sanction for violations but lists other possible sanctions. (*See e.g.*, APP VOL I - 34, Joint Stipulated Consent Order; APP VOL

I - 44, Consent Order; APP VOL I - 127, 03/14/18 Order; APP VOL I - 162, 04/26/18 Order).

Clark's violations of the consent order were not egregious, were usually inadvertent, and were often a reasonably foreseeable result of a frustrated pro se litigant trying to make heads or tails of the civil justice system while also trying to maintain a business and make ends meet. Several alternative remedies for the violations were available to the court instead of striking Clark's and RealTuners' pleading, and these alternatives were more likely to deter future noncompliance by helping Clark understand why his conduct was not allowed, what he could do instead, and the harshness of sanctions for future noncompliance. Further, these alternatives were a better balance of the equities such that Clark's noncompliance was proportionately sanctioned. Considering all of the relevant factors, the district court abused its discretion by unreasonably striking Clark's and RealTuners' pleading on August 31, 2018, prohibiting Clark and DIY from contesting the facts, and instructing the jury on all deemed admitted facts.

2. The District Court improperly instructed the jury regarding "admitted facts".

The striking of their pleading substantially prejudiced Clark and RealTuners because the district court thereafter considered the allegations in Hoffmannn's and DIY's petition to be admitted, read those "admitted" allegations to the jury, and included them in the jury instructions; as well as cited the struck pleading as the basis for prohibiting Clark and RealTuners from presenting evidence—even in mitigation of damages—that Clark's and/or others' perceptions or opinions of Hoffmannn's and DIY's products justified Clark's defamatory conduct, or that Hoffmannn's and DIY engaged in any wrongdoing. (APP VOL III - 69, 08/16/19 Pre-Trial Order; APP VOL III – 105-115, Jury Instructions p.19–29; 08/20/19 Transcript 3:1 – 22:7; 08/21/19 Transcript 149:7 – 150:12, 154:6–20, 171:8 – 172:4). Most egregious of these acts was the inclusions of the "FACTS DEEMED ADMITTED" jury instruction.

At the close of the evidence, the district court entered a directed verdict in favor of Hoffmann and DIY on all of their claims.

(08/22/19 Transcript 179:15 – 187:20). As such, there was no need to instruct the jury on any of the elements of Hoffmann's and DIY's claims. However, despite the district court previously finding in favor of Hoffmann and DIY, the district court not only included each of the marshalling instructions, the district court presented the jury with one hundred (100) paragraphs of admitted facts that were essentially a reassertion of Hoffmann's prior testimony. The "FACTS DEEMED ADMITTED" section also included several facts that were completely irrelevant to the jury's damages determination. The most problematic of these include:

> 11. Hoffmann is entitled to injunctive relief ordering Clark to cease operation of his competing business, return to Plaintiffs all of their property and to stop defaming Plaintiffs and interfering with their business.
>
> 87. Equity should not permit Clark to retain these benefits.
>
> 88. Clark's actions have shown showed [sic] willful misconduct, malice, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

89. Punitive damages should be awarded to Plaintiffs and against Clark in order to penalize, punish, or deter Clark.

90. By continuing to publish untrue and derogatory things about Plaintiffs, Clark is causing Plaintiffs damage–to their reputation and to their business.

91. This damage is difficult if not impossible to quantify because, in many cases, Clark's publications are being made via social media postings to the public at large or to groups with various members or to individuals via private messages.

94. Equity dictates that Clark should be enjoined from continuing his activities as described herein.

96. Plaintiffs will continue to suffer damages if Clark's conduct as described herein is not enjoined.

97. By engaging in the misconduct conduct [sic] described above and by acting intentionally and willfully in causing or attempting to cause Plaintiffs harm, Clark acted in bad faith.

98. By ignoring Plaintiffs' demand(s) to cease such misconduct, Clark has acted in bad faith and has been stubbornly litigious.

99. By threatening Plaintiffs with the course of conduct upon which Clark has proceeded because Plaintiffs did not pay Clark a severance, Clark has acted in the utmost bad faith.

> 100. Plaintiffs are entitled to recover their attorneys' fees from Clark and costs of litigation.

(APP VOL III - 87, Jury Instructions). Instructing the jury of these and many of the other facts was in error.

It is one thing to strike an answer and counterclaim and effectively enter a default judgment, but it is quite another to instruct a jury in the manner the district court did in this case. There is simply no justification to instruct the jury on equitable principles such as whether a party has acted so egregiously that they must be enjoined, or that attorneys' fees must be awarded. As acknowledged by Hoffmann and DIY, these items were solely within the purview of the district court.

The purpose of jury instructions is to accurately state the law to the jury. *See* Iowa R. Civ. P. 1.924. Pursuant to the district court's order striking Clark's and RealTuners' answer and counterclaim, this matter was supposed to proceed to a trial on damages. Instead, the jury was instructed on how bad an actor Clark purportedly was, that punitive damages must be awarded,

that an injunction must be entered, attorney's fees must be awarded and the very job the jury was tasked to do, i.e. determine damages, "is difficult if not impossible" to do. (APP VOL III - 87, Jury Instructions). These instructions, given the posture of this case were improper and as explained in section III, *infra*, resulted in a grossly excessive verdict. Accordingly, this Court should find it was in error to provide the "FACTS DEEMED ADMITTED INSTRUCTION" and award Clark and RealTuners a new trial in this matter.

II. THE DISTRICT COURT ERRONEOUSLY PRECLUDED CLARK AND REALTUNERS FROM PRESENTING CERTAIN EVIDENCE.

A. Error Preservation.

In response to Hoffmannn and DIY's motion in limine, Clark and RealTuners claimed they must be allowed to present evidence that would challenge the amount of damages sought by Hoffmannn and DIY. (APP VOL III - 67, Defendants' Response to Plaintiffs' Motion in Limine). As will be discussed in detail below, Clark and RealTuners sought to elicit certain testimony at trial, however, the

district court sustained the objections by Hoffmann and DIY and precluded the testimony at trial. (08/21/19 Transcript 149:7 – 150:12, 154:6–20, 171:8 – 172:4). Further, Clark and RealTuners raised their inability to present evidence in their motion for new trial. (APP VOL III - 129, Motion for New Trial). The district court ruled on the issue. (APP VOL III - 235, 12/11/19 Order (Post-Trial Matters)). Accordingly, error was preserved. *See Meier*, 641 N.W.2d at 537.

B. Standard of Review.

"We review the district court's determination of relevancy and admission of relevant evidence for an abuse of discretion." *Mohammed v. Otoadese*, 738 N.W.2d 628, 631 (Iowa 2007). "An abuse of discretion exists when 'the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.' " *Id.* at 631-32 (alteration in original) (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)).

C. Discussion.

Based upon the district court's prior order striking Clark's and RealTuners' answer and counterclaims, Hoffmannn and DIY filed a motion in limine seeking to prohibit the "Defendants' Defenses" and "Plaintiffs' Alleged Conduct." (APP VOL III - 63, Plaintiff Motion in Limine). Over the resistance of Clark and RealTuners, the district court granted the motions in limine by holding that: "1….The Defendant, or any other witness, is prohibited therefore from testifying that he was justified in his actions based upon what he perceives as the truth, or based upon his or others' opinion concerning the quality of Plaintiffs' products" and "2…The Defendant, or any other witness, is prohibited therefore from testifying concerning Defendants' allegations of or claims of wrongdoing by the Plaintiffs." (APP VOL III - 69, 08/16/19 Pre-Trial Order). The result of this ruling created an unworkable situation for Clark and RealTuners to defend any claim brought by Hoffmannn or DIY and greatly expanded the district court's

original order striking Clark's and RealTuners' answer and counterclaims.

The following exchanges occurred during the examinations of Hoffmannn:

> Q. Did you ever write an e-mail to the public or on your Facebook saying – regarding your MS3Pro that we had an issue, we acknowledged it and we are making it right?
>
> A. I think - -
>
> [Plaintiffs' Trial Counsel]. Your Honor, I object. This was covered in a motion and the ruling filed prior to trial on - -
>
> The Court. I agree. I'm going to sustain the objection and ask that you move on from that question,
>
> [Plaintiffs' Trial Counsel]. Your Honor, I would also respectfully ask for an instruction that the instructions set forth in the Court's order prior to trial be followed because this is prejudicially asking the questions that are improper. We've been instructed on what to do.
>
> The Court. Understood. Understood.
>
> Q. Well, did your MS3 product ever fail?
>
> [Plaintiffs' Trial Counsel]. Same objection, Your Honor.

> [Defendants' Trial Counsel]. Your, Honor, the crux of this case is whether or not my client lied about his product, and I'm not even allowed to ask about it.
>
> [Plaintiffs' Trial Counsel]. Not anymore it's not, Your Honor. That ship has sailed.
>
> The Court. Gentlemen, I understand what you're saying, and we addressed this in our pretrial motions, and so you're aware of the ruling in that matter, and so we need to move on from that line of questioning.

(08/21/19 Transcript 149:7 – 150:12).

> Q. Have you ever acknowledged anywhere at any time that your MS3Pro or your MS3Pro Ultimate had problems?
>
> [Plaintiffs' Trial Counsel]. Same objection, Your Honor, and I've asked for an instruction to stop going down this road because it's prejudicing the jury. The Court ruled on this issue already.
>
> The Court. Go ahead.
>
> [Defendants' Trial Counsel]. It's prejudicial to my client not to be able to defend himself.
>
> The Court. Well, your client could choose to come and be present and defend himself, [Defendants' Trial Counsel], so we've had a prior court ruling on this issue, and you need to move on from this topic. The objection is sustained.

(08/21/19 Transcript 154:6-20).

> Q. Did you ever start a Facebook attack or strike back in any way at Mr. Clark?
>
> [Plaintiffs' Trial Counsel]. Objection, Your Honor. That question is directly implicated by the Court's instructions prior to trial.
>
> [Defendants' Trial Counsel]. I'm not sure about that.
>
> …
>
> The Court: Yeah. Thank you very much. The objection is sustained, and, [Defendant's Trial Counsel] you need to move on to a different line of questioning for Mr. Hoffmannn.
>
> Q. My client tells me that you've been convicted of a felony; is that true?
>
> [Plaintiffs' Counsel]. Same objection, Your Honor.
>
> The Court. I'll sustain the objection.

(08/21/19 Transcript 171:8 – 172:4). Each of these sustained objections had a great and significant impact on Clark's and RealTuners' ability to defend this action and to challenge the only

issue remaining in the case, namely the extent of damages caused by the alleged defamatory conduct.[3]

While the propriety of the district court's decision to strike Clark's and RealTuners' answer and counterclaims is contested, it is important to recognize the extent of that holding and more importantly, what it did not hold. In striking Clark's and RealTuners' answer and counterclaims, the district court determined that the only matter to proceed to trial was the issue of Hoffmannn and DIY's request for damages and claims for equitable relief. (APP VOL I - 268, 8/31/18 order). What this holding did not do is prohibit Clark or RealTuners from presenting any evidence. (APP VOL I - 268, 8/31/18 order). Specifically, the order did not prohibit Clark or RealTuners from contesting the extent of the damages or what the reputation of Hoffmannn or DIY were before, during, or after the defamatory statements.

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[3] It is of important note that the burden always remained on Hoffmann and DIY to prove its damages even though the answer and counterclaim were struck and the libel per se damages were presumed.

For example, the district court prohibited testimony regarding DIY potentially admitting that there were problems with its products in a public forum. (08/21/19 Transcript 149:7 – 150:12). By not allowing Hoffmannn to answer this question, the district court prohibited relevant testimony that would show that Hoffmannn and DIY's reputation was damaged by factors other than Clark's purported defamatory conduct. It further goes to why there may have been other issues related to loss of customers and/or revenue. Yet, by denying Clark's and RealTuners' ability to contest DIY and Hoffmannn's claims of reputational damages, the jury essentially heard undisputed testimony.

The same is true regarding the reputation of Hoffmannn personally. Whether Hoffmannn had ever been convicted of a felony is unquestionably a relevant consideration when discussing his reputation. Clearly, the question of whether Hoffmannn had a criminal conviction would be relevant to the extent to which his reputation had been damaged. Yet, the district court denied Clark

and RealTuners the ability to contest Hoffmannn's reputation. This was in error and an abuse of discretion.

"Nevertheless, the erroneous admission of evidence does not require reversal 'unless a substantial right of the party is affected.' " *Mohammed*, 738 N.W.2d at 633 (quoting Iowa R. Evid. 5.103(a)). "In other words, the admission of evidence must be prejudicial to the interest of the complaining party. This requires a finding that it is probable a different result would have been reached but for the admission of the evidence or testimony." *Id.* (citations and quotations omitted). In this case, Clark and RealTuners' rights were substantially affected, and the result would have been different had the purported testimony been admitted.

In essence, the district court prohibited Clark and RealTuners from presenting any probative evidence challenging the extent of damages sought by Hoffmannn and DIY. To the point that Clark and RealTuners were forced to abandon entire areas of examination and no evidence was then presented in their case in chief. Indeed, in an obvious fit of frustration, Clark's and RealTuners' counsel

exasperatedly stated in front of the jury, "It's prejudicial to my client not to be able to defend himself." (08/21/19 Transcript 154:14-15). What occurred in this case was the equivalent of telling a basketball team that they are not allowed to play any defense in the game and then every time they shot the ball on offense, they were called for a foul, preventing them from scoring any points. Would the score be different if they were actually allowed to shoot the ball? The answer is of course. But every time Clark and RealTuners attempted to take a shot, their shot was called back by the district court. These types of prejudicial rulings mandate a reversal of the district court and mandate a new trial in this matter.

III. THE DAMAGES AWARD IS IMPROPER AND EXCESSIVE.

A. Error Preservation.

Clark and RealTuners raised the issue of unsupported and excessive damages in their motion for new trial, which was denied by the district court. (APP VOL III - 129, Motion for New Trial and Request for Remittitur; APP VOL III - 127, Judgment Not

Withstanding the Verdict; APP ,VOL III - 235 Order (Post-Trial Matters)). Error was preserved. *See Meier*, 641 N.W.2d at 537.

B. Standard of Review.

The review for a judgment notwithstanding the verdict is for correction of errors at law. *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 460 (Iowa 2017). "The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001).

In challenges to an award of damages, appellate courts "view the evidence in the light most favorable to the verdict and need only consider the evidence favorable to [Hoffmannn and DIY] whether it is contradicted or not." *Olsen v. Drahos*, 229 N.W.2d 741, 742-43 (Iowa 1975); *see also Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). "We must also give weight to the fact the trial court, with the benefit of seeing the witnesses, observing the jury and having before it all incidents of the trial, did not see fit to interfere." *Olsen*, 229 N.W.2d at 743.

C. Discussion.

A new trial may be granted on damages when the verdict is flagrantly excessive, so out of reason as to shock the conscience or sense of justice, raises a presumption it was the result of passion, prejudice, or other ulterior motive, or lacks evidentiary support. *Rees*, 461 N.W.2d at 839. Clark and RealTuners are entitled to a new trial, or at least a remittitur, because the jury's damages verdict was flagrantly excessive and influenced by passion or prejudice. *See* Iowa R. Civ. P. 1.1004(4), (5) (providing for a new trial when there are "[e]xcessive . . . damages appearing to have been influenced by passion or prejudice" or "[e]rror in fixing the amount of recovery, whether too large or too small, in an action upon contract").

In this case, the jury awarded the following damages:

- Libel per se damages against Scott Clark for Jerry Hoffmannn - $500,000.
- Libel per se damages against RealTuners for Jerry Hoffmannn - $500,000.
- Breach of Fiduciary Duty damages against Scott Clark for DIY - $27,000.

- Breach of contract damages against Scott Clark for DIY - $102,500.
- Civil Extortion damages against Scott Clark for DIY - $250,000.
- Libel per se damages against Scott Clark for DIY - $2,060,250.
- Libel per se damages against RealTuners for DIY - $2,060,250.
- Punitive damages against Scott Clark - $2,000,000.
- Punitive damages against RealTuners - $3,500,000.

(APP VOL III - 116, Jury Verdict). For the purposes of their contention that the jury awards were improper, Clark and RealTuners do not contest the awards for Breach of Contract or Breach of fiduciary duty.[4] However, Clark and RealTuners contest each and every other award made by the jury.

1. *Civil Extortion damages were not supported by any evidence.*

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[4] Clark and RealTuners maintain, for the reasons stated in sections I and II that a new trial should be awarded on ***all claims***, however, for the purposes of these argument only, these damages are not contested.

Hoffmannn and DIY presented no evidence to support an award of any damages for the claim of civil extortion. Despite the lack of evidentiary support, the jury awarded $250,000 for this claim. Instead, the jury appeared to simply award DIY damages in the civil extortion category to reach Hoffmannn's request of $4.5 million in compensatory damages for DIY. Hoffmannn did not present any evidence to justify an award of separate damages for civil extortion, instead, as will be discussed at length, Hoffmannn's only testimony regarding the $4.5 million in damages was based upon his claim of reputational loss for DIY. (08/21/19 Transcript 128:2 – 129:10). Additionally, not only is there a lack of proof to justify this award, it further shows that the verdict was not based upon actual evidence, but instead "raises a presumption it is a result of passion, prejudice or other ulterior motive." *See Rees*, 461 N.W.2d at 839. Accordingly, this damages award must be reversed.

2. *DIY Libel per se damages were not supported by evidence and are flagrantly excessive.*

"The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without

evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). "A statement that is slanderous *per se* is actionable without proof of damage." *Rees*, 461 N.W.2d at 839 (citing *Vinson v. Linn-Mar Comm. Sch. Dist.*, 360 N.W.2d 108, 115-16 (Iowa 1984)). "However, recovery is limited to 'those damages which were a natural and probable consequence of the original [slander] or its repetition or republication.'" *Id.* (alteration in original) (quoting *Brown v. First Nat'l Bank*, 193 N.W.2d 547, 555 (Iowa 1972)). As recognized by one legal commentator, "This is not to say, however, a plaintiff should not offer proof of actual damage. . . Unless, the plaintiff wants to run the risk of having only nominal damages awarded, evidence should be offered which demonstrates the plaintiff's entitlement to and extent of damages." Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 Drake L. Rev. 639, 653 (1996). "Although we do not require proof of damages, our court of appeals has stated that damages may not be awarded based upon the defamatory material alone and no other evidence. That court stated that 'the jury must

be presented with evidence upon which the consequences of the [slander] can be judged, evidence such as the plaintiff's reputation before the libel was published and the extent of the publication.' " *Rees*, 461 N.W.2d at 839 (alteration in original) (quoting *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 300 (Iowa Ct. App. 1985)). "Requiring evidence of reputation and extent of publication is necessary so that a jury can determine the extent of injury, but it is not imposing a burden on the plaintiff of proving damages." *Id.*

a. DIY's libel per se damages were based upon overly speculative damages.

> "There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages." *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998). If the evidence is speculative and uncertain whether damages have been sustained, damages are denied. *Id.* However, if the uncertainty merely lies in the amount of damages sustained, "'recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.'" *Id.* (quoting *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968)). Thus, some speculation on the amount of damages sustained is acceptable; ***however, overly speculative damages cannot be recovered.***

Pavone v. Kirke, 801 N.W.2d 477, 495 (Iowa 2011) (emphasis added). Unfortunately, that is exactly what occurred in this case.

Before any further discussion, it is important to understand a key distinction in libel per se damages. First, the type of damages which are "presumed" are reputational damages, "which were a natural and probable consequence of the original [libel] or its repetition or republication." *Rees*, 461 N.W.2d at 839. Damages which are not "presumed" are, instead, actual damages which may include things such as "loss of income, emotional distress, physical pain and suffering, medical and hospital services attendant to mental anguish, and for personal humiliation and embarrassment. As with all tort damages, these damages must be a natural and probable consequence of the publication of the defamatory statement." McNulty, 44 Drake L. Rev. at 653-54.

This case was tried almost exclusively on "the defamatory material alone." *Rees*, 461 N.W.2d at 839. There was no evidence presented regarding DIY's reputation either before the purported defamatory statements or after. While it is acknowledged that

some testimony was submitted regarding the loss of customers, this evidence is not "reputational" damages, but instead would qualify as "actual" damages. Other than the testimony of one loss customer and the return of certain items, no evidence was presented regarding the reputational harm caused by any defamatory statements. In fact, when testifying about purported defamatory statements that were made to DIY's top business partner, Hoffmannn acknowledged that they still do business together. (08/21/19 Transcript 89:19 – 91:4)

Instead, in what appears to be an attempt to blend "reputational damages" and actual damages, Hoffmannn only provided testimony regarding purported "actual" damages. Indeed, the testimony provided by Hoffmannn that served as justification for requesting $4.5 million dollars was as follows:

> Q….I'd like you to describe to the jury what you're seeking for damage to your company's reputation and your reputation and the reasons why.
>
> A. Company reputation, $4.5 million. For my personal reputation, $1 million.

> Q. Can you help the jury understand what those figures represent?
>
> A. Those figures represent - - first off, easier to quantify is company reputation, because I can easily track the progression that our business was on, the growth rate that we were operating at, and I looked at - - I extrapolated that – that's a big word that means I took what happened in one year and I applied those changes conservatively to future years – so we were growing at 23 percent. I took a 20 percent number instead of 23 percent trying to err a little bit on the conservative side, and I said, okay, well, if we had still grown at that same rate in 2017, and there's no other reason we wouldn't have that I can see at all, and in 2018 and in the first eight months of 2019, what would that have added up to, and it was over $4.5 million.

(08/21/18 Transcript 129:13 – 129:10). This was the extent of Hoffmannn's testimony which provided the basis in which he calculated $4.5 million in damages. First, this is problematic because the jury was only instructed to award "reputation" damages and not any actual damages. (APP VOL III - 98, Jury Instruction No. 11). Further, during cross examination, Hoffmannn admitted that he did not provide any business records, nor did he provide any tax returns. (08/21/18 Transcript 150:14 – 152:19). Hoffmannn provided no testimony on what the revenues or profits

of the company actually were, which year was selected as to provide the basis for the 20 percent growth or anything similar. Simply put, this testimony lacked all indicia of reliability and instead relied entirely upon the over speculation of the business' owner. This type of speculation cannot serve as the basis to award damages. *See Pavone*, 801 N.W.2d at 495.

Most problematic with this analysis is that Hoffmannn did not even alert the jury until cross examination that his $4.5 million in requested damages was not even lost profits, but instead lost revenue. (08/13/18 Transcript 152:12-22). His analysis did not provide any deductions for the costs of goods, costs of operation, costs of overhead, etc. Accordingly, Hoffmann could not have actually lost $4.5 million dollars because he was only factoring revenue, not profits. At no time did Hoffmannn introduce any evidence as to what DIY's lost profits were or would be based upon the purported defamatory statements. In the most telling exchange regarding the complete and utter speculation of the purported "actual" damages, Hoffmannn testified as follows:

> Q. How did you calculate 4.5 million? Where did that number come from?
>
> A. Well, I essentially pondered what kind of value is there in a reputation? What would you charge for yours, [Clark's trial counsel]?
> …
> I considered how many years of blood, sweat and tears, sacrifice have been poured into this business. I considered how my customers have responded to the way that we've taken care of them for almost 15 years now, and I looked at how they're talking about me now, and I looked at the loss of revenue that's occurred since Mr. Clark began this campaign of terror, and I came up with the best number that I could.

(08/21/18 Transcript 156:3-21). While Hoffmannn's sentiment is appreciated, this does not serve the basis for "actual" damages or a lost profits analysis. It further does not establish a concrete reputational damage. Instead, it is the very type of speculation that makes the jury award in this case improper, and as such, this verdict must be overturned with an order for a new trial.

b. DIY's libel per se damages and punitive damages were excessive and the result of passion and/or prejudice.

In addition to being overly speculative and not supported by evidence, DIY's libel per se damages are excessive and the result of

passion and/or prejudice. "When 'a verdict is so flagrantly excessive that it goes beyond the limits of fair compensation…and fails to do substantial justice between the parties, it is our duty to correct the error by granting a new trial or requiring a remittitur on pain of the grant of a new trial.' " *Rees*, 461 N.W.2d at 839-40 (quoting *Sallis v. Lamansky*, 420 N.W.2d 795, 800-01 (1988)).

Hoffmannn presented little to no evidence regarding his actual loss from any of the defamatory statements. Instead, he presented testimony regarding purported lost revenue only and not lost profits. Indeed, during cross examination he refused to provide an answer regarding what lost profits he actually may have suffered. (08/21/19 Transcript 152:16-19) ("Q. In profit? A. I was speaking regarding my impact to my reputation, and I told you how I worked towards calculating that. Q. All right. So, then I guess you're telling us that you didn't really lose profit, you lost reputation?" (objection omitted)). Further, Hoffmannn only referenced one customer DIY lost but did not provide a single other customer or client that was lost by the purported defamatory

comments. (08/21/19 Transcript 136:12-139:6). Even assuming Hoffmannn's unsubstantiated claims regarding the one customer were true, that merely established a forty percent (40%) lost profit margin on approximately $120,000. This is a far cry from the purported $4.5 million.

As such, this Court should follow the logic of *Rees* and find that the jury awards of libel per se were excessive and order a new trial on the claims of libel per se. *See Rees*, 461 N.W.2d at 840 (finding that $250,000 award of reputational damages was flagrantly excessive and ordering a new trial).

Similarly, the verdict in this case was the result of passion and/or prejudice. When a verdict is flagrantly excessive it "raises a presumption that it is the product of passion or prejudice." *WSH Properties, LLC v. Daniels*, 761 N.W.2d 45, 50 (Iowa 2008). "In considering the contention the verdict is so excessive as to … show it is the result of passion and prejudice we must take the evidence in the aspect most favorable to the plaintiff which it will reasonably bear." *Id.* (quoting *Townsend v. Mid-Am. Pipeline Co.*, 168 N.W.2d

30, 33 (Iowa 1969) (other citations and quotations omitted)). In this case, the jury awarded a total $8 million in compensatory and punitive damages for DIY. There can be little doubt that this verdict creates a presumption of that it was the product of passion or prejudice.

However, even if passion and prejudice are not presumed, it is evident from the record in this case. As outlined in sections I and II, *supra*, the district court limited the testimony that could be presented by Clark and RealTuners in this matter. Additionally, rather than presenting testimony regarding damages, Hoffmannn and DIY focused almost ***exclusively*** upon the defamatory comments and Clark's actions that resulted in several sanctions by the district court. Further, the district court prohibited any meaningful examination of Hoffmannn or DIY. Indeed, the district court even stated the following in front of the jury: "Well, your client could choose to come and be present and defend himself, Mr. Winter, so we've had a prior court ruling on this issue, and you need to move on from this topic." (08/21/19 Transcript 154:16-19). Given

these statements, the rulings and the testimony presented at trial it is of little wonder the jury returned such a substantial verdict.

Instead of actually considering the reputational and actual harm sustained by DIY, the jury made both its compensatory and punitive damages award not based upon the harms caused by the defamatory statements, but instead the defamatory statements themselves. In addition to the size of the verdict, this is also apparent from the damages awarded from each category. Hoffmannn testified that he believed the damages should be $4.5 million and the jury reached that amount by splitting it amongst the verdict form with little logical distinction. For example, throughout the verdict form, the jury awarded damages against both Clark, individually, and RealTuners; however, during the trial, there was no distinction between the actions of Clark individually and RealTuners. This again establishes that the jury's verdict is not supported by any actual evidence or testimony but instead was done for the purpose of giving two times the amount

Hoffmannn and DIY were requesting This is improper and requires the grant of a new trial.

3. *Hoffmannn's libel per se damages were not supported by evidence and are flagrantly excessive.*

For many of the same reasons and rationales, the damages awards for Hoffmannn individually were improper. During the two days of testimony, virtually no evidence was presented regarding the reputation of Hoffmannn before, during or after the statements were made. Indeed, Hoffmannn did not present any evidence regarding how his reputation was defamed in his personal capacity. It is acknowledged that during his testimony, Hoffmannn provided evidence that he was required to work long hours and had to take certain actions to prove his products were not defective, but at no point was any evidence presented regarding his personal reputation. There was no evidence that anyone in Hoffmannn's community treated him differently than before the defamatory statements were made. There was no evidence that Hoffmannn's reputation was damaged. Instead, when asked for why he believed he should be compensated $1 million he testified as follows:

Q. You told the jury that you're asking for $4.5 million for damages to DIY and the reasons why. What are you requesting for damages to your reputation as a result of these admittedly false comments that impugned your character and your trade?

A. $1 million is what I'm asking for, Seth.

Q. The same question. If it's the same answer, that's okay. Explain to the jury why? What's $1 million?

A. That's a hard number to come up with in some sense; right? I mean, how much do you value your reputation?
[Defense trial counsel], how much do you value your reputation?

Q. Okay.

A. If somebody were to spend their whole life's effort at destroying it, what would it be – maybe it should be more than the company reputation. Maybe it should be more than 4.5. I picked one million.

Q. So it sounds like the answer is what's your name worth?

A. What's your name worth, and how do you put a number on that? I don't know. I had a – I had a good name.

(08/21/19 Transcript 135:11-136:11). There was no testimony that Hoffmannn was an upstanding citizen in his community or that he is no longer considered an upstanding citizen in his community.

There is no evidence that he was so well known that this caused great reputational harm. Instead, there was no evidence regarding his reputation. Simply put, this is insufficient evidence to award any damages more than nominal damages in a claim for libel per se. *See* Restatement (Second) Torts § 620 (1977) (2020 Update).

Similarly, there was little evidence to establish an award of actual damages to Hoffmannn in the amount of $1 million. In addition to Hoffmannn testifying about the time and effort (which he did not quantify) he put into responding to the purported defamatory comments, Hoffmannn's wife testified regarding her observations, which were that the actions "put a lot of stress and mentally just kind of took over, you know, his mind, how he was going to deal with this, and he was having trouble sleeping." (08/21/19 Transcript 165:24-9). It is certainly true that emotional and physical harm can be recovered in libel cases. *See generally* Restatement (Second) Torts § 623 (1977) (2020 Update). However, there is nothing in this record that justifies an award of $1 million

of compensatory damages and $2 million in punitive damages to Hoffmannn.

Additionally, for the same reasons asserted regarding the damages for DIY, the verdict for Hoffmannn, in its entirety, is excessive and the result of passion and/or prejudice. As further proof of the excessiveness of this verdict, a review of excessive emotional distress damages cases proves telling. In *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771-73 (Iowa 2009), the Iowa Supreme Court affirmed a district court's grant of a new trial that found an award of $100,000 in emotional distress damages as an excessive verdict. In affirming the district court's grant of a new trial, the supreme court sampled several cases where a verdict of less than $100,000 was deemed appropriate if the alleged harms were "anger, confusion, loss of esteem, financial worry," "loss of sleep," "loss of dignity," or "the plaintiff [was left] devastated, withdrawn, and plagued by back pain, muscle stress, and stomach problem." *Id.* at772 (collecting cases). None of these verdicts support an award anywhere near $1 million in compensatory

damages and $2 million in punitive damages for Hoffmannn. There is no evidence in this case that justifies the flagrantly excessive awards of compensatory or punitive damages for either Hoffmannn or DIY. Accordingly, this Court should reverse the district court and award a new trial in this matter.

IV. THE DISTRICT COURT ERRED IN AWARDING PLAINTIFFS ATTORNEY FEES.

A. Error Preservation.

Before trial, Clark and RealTuners motioned the court to deny Hoffmannn's and DIY's request for attorney fees and renewed their request after trial. (APP VOL III - 74, Motion to Deny Attorney Fees; 10/11/19 Transcript 21:14 – 22:9). The court awarded Hoffmannn's and DIY's attorney fees in its posttrial ruling. (APP VOL III - 235, 12/11/19 Order (Post-Trial Matters)). Error was preserved. *See, e.g.*, *Meier*, 641 N.W.2d at 537.

B. Standard of Review.

"The determination of a common law attorney fee award rests in the court's equitable powers. Therefore, [the appellate court's] review of this issue is de novo." *Hockenberg Equip. Co. v.*

Hockenberg's Equip. & Supply Co. of Des Moines, Inc., 510 N.W.2d 153, 158 (Iowa 1993) (citation omitted).

C. Discussion.

Ordinarily, an award of attorney fees is allowed only if permitted by statute or contract. *Homeland Energy Sols.*, 938 N.W.2d at 707. Here, there is no dispute that any statute or contract provides Hoffmannn and DIY with a basis for their attorney fee claim.

Accordingly, Hoffmannn and DIY must rely on the common law for their claim. "[A] plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of oppression or connivance to harass or injure another." *Hockenberg Equip.*, 510 N.W.2d at 159–60. This is an incredibly high standard—higher than the punitive damage standard. *See id.* Moreover, merely because a party engages in willful and wanton conduct does not automatically mean the party's conduct was oppressive or conniving. *Id.* at 160. Rather, the party

seeking common law attorney fees must prove the other party's conduct was harsh, cruel, or tyrannical. *Id.* Hoffmannn and DIY failed to meet that burden here.

Hoffmannn and DIY failed to meet their burden because they relied on Clark's conduct that was not the subject of their petition in order support of their claim for attorney fees. Specifically, the district court, Hoffmannn and DIY rely on Clark's conduct of violating the consent and sanctions orders as the basis for their claim that his pre-litigation conduct was "harsh, cruel, or tyrannical." (APP VOL III – 83-84, Resistance to Motion to Deny Attorney Fee p.3–4). In reviewing Hoffmann and DIY's application for attorney's fees and the district court's award, it is apparent that the award of attorneys' fees was not premised on pre-litigation conduct, but instead was based upon Clark's actions post-filing. (APP VOL III - 235, 12/11/19 Order). What this order disregards is that with nearly each sanction, Clark was punished with paying fines and attorney's fees. So, in essence, the district court punished Clark again for items he had already been sanctioned.

Moreover, just as the willful and wanton disregard required to impose punitive damages is not enough for the imposition of common law attorney fees, the mere bad faith or other improper conduct required to impose liability for the underlying tort is not enough for the imposition of common law attorney fees. *See, e.g.*, *Hockenberg Equip.*, 510 N.W.2d at 159 (envisioning conduct giving rise to common law attorney fees as "intentional and likely to be aggravated by cruel and tyrannical motives" and noting "[s]uch conduct lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another'"); *cf. id.* at 156 (noting a breach of contract alone, even if intentional, is not enough to be the basis for punitive damages). Accordingly, the mere fact that liability was imposed for the tort of civil extortion or that Clark and RealTuners chose to litigate the case instead of acquiescing to Hoffmannn's and DIY's demand letter, (*see* APP VOL I - 20, Petition (Count Eight, alleging Clark and RealTuners engaged in bad faith and stubborn litigation)), is not enough to support Hoffmannn's and DIY's claim for attorney fees.

Clark's conduct before the litigation did not rise to the level necessary to award common law attorney fees. *See, e.g.*, *Hockenberg Equip.*, 510 N.W.2d at 154–56, 160 (finding plaintiff was not entitled to common law attorney fees even where defendant intentionally and repeatedly violated an agreement not to compete and a temporary injunctive order up to the time of trial and the defendant knew violation of the non-compete agreement would result in "great and irreparable harm" to the plaintiff). The award of attorney fees should be reversed.

CONCLUSION

Clark and RealTuners respectfully request this Court reverse the district court. Specifically, they request this Court determine the district court prejudicially erred in striking their answer and counterclaims and preventing Clark and RealTuners from presenting damages-mitigation evidence. Additionally, they request this Court find the jury's damages verdict was improper, excessive, and unsupported by the evidence. Lastly, they request this Court find the district court erred in awarding Hoffmannn's

and DIY's attorney fees. Accordingly, this Court should reverse the judgment and posttrial fee award against Clark and RealTuners.

REQUEST FOR ORAL ARGUMENT

Clark and RealTuners respectfully request oral argument in this matter.

Respectfully Submitted,

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ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Final Brief and Argument was $0.00 as it was electronically filed.

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I certify on September 29, 2020, I will serve this brief on the Appellee's Attorney, Seth Katz and Robert Livingston, by electronically filing it.

I further certify that on September 29, 2020, I will electronically file this document with the Clerk of the Iowa Supreme Court.

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