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 REPLY BRIEF AND ARGUMENT

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ARGUMENT

I. ERROR WAS PRESERVED ON ALL OF CLARK'S AND REALTUNERS' ISSUES.

On nearly every issue raised by Clark and RealTuners, Hoffmann and DIY assert that error was not fully preserved on the issue. This is simply incorrect on each and every claim. As asserted in Clark's and RealTuners' opening brief, each of the issues were raised and, more importantly, each issue was ruled upon by the district court.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)). The key issue in an error preservation analysis is whether the district court ruled upon the issue, as appellate courts "do not consider issues for the first time on appeal and therefore only resolve issues preserved for appeal." *State v. Childs*, 898 N.W.2d 177, 190 (Iowa 2017) (Hecht, J.,

dissenting) (citing *State v. Coleman*, 890 N.W.2d 284, 304 (Iowa 2017)(Waterman, J., dissenting)).

In Clark's and RealTuners' opening brief, each argument properly contains citations to the record where Clark and RealTuners initially objected and further, where it was ruled upon by the district court. For example, regarding whether the damages award was proper, Clark and RealTuners cited to the post-trial motions that were filed. (APP VOL III - 129, Motion for New Trial and Request for Remittitur). The district court provided an analysis regarding each of the issues. (APP VOL III - 235, Order Post-Trial Matters).

Additionally, in Clark's and RealTuners' opening brief, it is argued that the damages awarded by the district court were not based upon evidence and were clearly excessive. The district court clearly addressed all of these issues and arguments in over seven (7) pages of its post-trial motions order. (APP VOL III – 238-245, Order Post-Trial Matters p. 4-11). In an even more clear example of the absurdity of Hoffmann's and DIY's error preservation

arguments is regarding their assertion that error was not preserved regarding Clark's and RealTuners' objection to the award of common law attorney's fees. Not only did Clark and RealTuners file an objection to the award of attorneys' fees, but the district court issue a ruling awarding the attorneys' and spent nearly three (3) pages addressing it. (APP VOL III – 257-259, Order Post-Trial Matters p. 23-25). Further, in critiquing the district court's analysis on appeal, Clark and RealTuners rely almost exclusively upon a case (*Hockenberg Equip. Co. v. Hockenberg's Equip & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153 (Iowa 1993)) relied upon by ***Hoffmann and DIY*** in their resistance to Clark's and RealTuners' objection (APP VOL III - 81, Resistance to Motion to Deny Attorneys' Fees). This case was also specifically relied upon by the district court. (APP VOL III – 257-259, Order Post-Trial Matters p. 23-25). It is simply not true to assert that error was not preserved on this or any of the other arguments presented by Clark and RealTuners. Accordingly, Clark and RealTuners stand by their

original assertions that error was preserved on all issues previously asserted in their opening briefs.

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

In asserting that the district court properly struck Clark's and RealTuners' pleadings, Hoffmann and DIY do not cite any authority in which violating a consent order justifies the entire striking of the affirmative pleadings of the party. This is likely for good reason, there is no authority to support their position. Instead, Hoffmann and DIY attempt to fit a square peg in a round hole by only relying upon authority in which a party's dilatory actions or outright disregard to discovery or attending pretrial/settlement conferences, justified the striking of a party's pleadings. Importantly, the courts must be able to strike "'the "proper balance between the conflicting policies"' of avoiding delays and deciding cases on their merits."' *Troendle v. Hanson*, 570 N.W.2d 753, 755 (Iowa 1997) (quoting

Kendall/Hunt Publ'g Co. v. Rowe, 424 N.W.2d 235, 240 (Iowa 1988)).

In this case, Hoffmann and DIY did not establish that Clark's or RealTuners' actions interfered with their ability to prosecute their case. Indeed, the only issue that Hoffmann and DIY point to occurred several months ***after*** the order which struck the pleadings. (12/19/18 Transcript 15:15 – 25). Hoffmann and DIY do not argue that their ability to prosecute the case was hindered by Clark's and RealTuners' action. Instead, what is apparent, is that Hoffmann and DIY were eager to not have the case decided on the merits and instead have the case ruled upon matters outside of the actual merits.

Similarly, Hoffmann and RealTuners assert that the inclusion of over one hundred (100) "FACTS DEEMED ADMITTED" were "harmless." This is simply not the case. As acknowledged by Hoffmann and RealTuners, the jury was instructed on several items that "deal with equity—nothing the jury opined on." (Appellee Brief P. 59). This included "facts" that

Hoffman was entitled to injunctive relief, that "Plaintiffs will continue to suffer damages if Clark's conduct as described herein is not enjoined" and that "Plaintiffs are entitled to recover their attorneys' fees from Clark and costs of litigation." (APP VOL III - 87, Jury Instructions). By readily admitting that this information was not within the purview of the jury, Hoffmann and Clark have admitted that it was improper to instruct the jury on these items. Further, these items, along with the many other improperly instructed "facts" were not harmless. Instead, they continued to not only instruct the jury on how bad of a purported actor Clark and RealTuners were but provided an unduly and harmful emphasis on it.

Hoffmann and DIY also appear to acknowledge the undisputed inconsistencies in the "facts" regarding punitive damages in the jury instructions. Indeed, as Hoffmann and DIY acknowledge, "both attorneys, the court, the instructions and the verdict form were clear that it was up to the jury whether punitive damages were to be awarded and if so, in what amount." (Appellee

Brief P. 59). However, in the "FACTS DEEMED ADMITTED" the jury was specifically instructed that "Punitive damages should be awarded to Plaintiffs and against Clark in order to penalize punish, or deter Clark." (APP VOL III - 87, Jury Instructions). The jury was also repeatedly instructed that Clark acted in "bad faith," the "utmost bad faith" and that he had been "stubbornly litigious." These "facts" were completely contrary to the jury instructions in this case. For example, on the Special Verdict Form, the jury was specifically instructed that: "Your duty is to determine whether Plaintiffs have proven damages and, if so, the amount." (APP VOL III - 87, Jury Instructions). This is clearly inconsistent with the "fact" that "Punitive damages should be awarded…" (APP VOL III - 87, Jury Instructions).

The Iowa Supreme Court has recognized that reversal is appropriate "when instructions are misleading and confusing." *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 902 (Iowa 2015). "[A]n instruction is misleading or confusing if it is 'very possible' the jury could reasonably have interpreted the instruction

incorrectly…An erroneous jury instruction is not necessarily cured by a later instruction correctly stating the law." *Id.* (quoting *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001)(other citations omitted). Similarly, "repetitive instructions that unduly emphasize a feature of the case" warrant reversal. *Id.* It is without question that the repeated and unnecessarily harsh language of the "FACTS DEEMED ADMITTED" were misleading and confusing regarding all of the damages claims. The jury was instructed that the decision was theirs to determine what damages and the extent of the damages that could be awarded, but then were also instructed that they must award damages. Further, the repetitive nature of the instructions also placed an undue emphasis on the "bad faith" of Clark.

Finally, given the fact that the district court granted Hoffmann's and DIY's directed verdict, there was simply no reason to give any of the "FACTS DEEMED ADMITTED." Instead, the jury should have simply been instructed on the damages standards and the verdict form. Anything more than this was unnecessarily

cumulative, duplicative and likely to cause confusion of the issues. Given the clear effect these instructions had on the jury's verdict, this Court should reverse the district court and award a new trial.

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

Due to the district court striking Clark's and RealTuners' pleadings, the trial in this matter should have been only a damages trial. In libel cases, the Iowa Supreme Court has recognized that even in cases in which damages are presumed the "damages may not be awarded based upon the defamatory material alone and no other evidence." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). Instead, "the jury must be presented with evidence upon which the consequences of the [libel/slander] can be judged, evidence such as the nature of the plaintiff's reputation before the libel was published and the extent of the publication." *Id.* (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.* However, in this case, Clark and RealTuners were almost completely prohibited from challenging Hoffmann's and DIY's reputation during the trial.

Throughout the trial, Clark's and RealTuners' counsel repeatedly attempted to ask questions regarding Hoffmann's character and reputation, but at every juncture, the district court sustained objections prohibiting the questions and answers. Similarly, Clark's and RealTuners' counsel sought to question the reputation of DIY and any complaints that they may have had, but again, the district court repeatedly sustained those objections as well, leaving Clark and RealTuners with virtually no ability to defend themselves.

In response to these arguments Hoffmann and DIY assert that the district court was correct in excluding the evidence because it would have caused "prejudice on Hoffmann and the expansion of trial it would have caused." (Appellee's Brief P. 63). In essence, it appears that Hoffmann and DIY are asserting that this evidence

would have made the case more difficult for Hoffmann and DIY and therefore it was properly excluded. This is not a proper rationale to justify the inability of Clark's and RealTuners' trial counsel to simply ask reputational questions that get to the heart of the purported damages. Clark and RealTuners should have been allowed to question Hoffman regarding his and DIY's reputation and critique his assertions regarding their purported tarnished reputations. Instead they were denied any meaningful opportunity to do so. Accordingly, the exclusion of that evidence was improper, and this Court should reverse the district court an award a new trial.

IV. THE DAMAGES AWARD IS IMPROPER AND EXCESSIVE.

Hoffmann and DIY appear to argue that merely because the district court determined that the statements were libelous per se, any award by the jury would be appropriate. This is simply not the case. First, Hoffmann and DIY ignore the distinction between general reputational damages and actual damages 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." Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 Drake L.Rev. 638, 653-54 (1996). This is a key distinction as actual damages (i.e. emotional distress, loss of customers, physical pain and suffering) should require proof to substantiate the award. In this case, Hoffmann and DIY did not establish this requisite proof.

Instead, rather than presenting evidence that would be easily ascertainable for Hoffman and DIY, Hoffman merely spoke in broad generalities. For example, rather than providing actual documents to justify the request for $4.5 million, Hoffmann merely stated that DIY did not experience the growth that was expected in prior years. (08/21/18 Transcript 129:13-129:10). No context was provided regarding annual sales, revenues, profits, overhead, etc. Instead, it was simply a number that Hoffmann "extrapolated" from his prior years earnings. Indeed, when pressed, he admitted that these figures were based upon gross revenues and not any actual lost profits. (08/21/18 Transcript 156:3-21). Most important, Hoffmann

does not even assert that he has experienced a ***loss*** or ***decline*** in revenue and instead only asserted that he has not ***grown*** as expected. Thus, it is questionable whether DIY actually suffered any loss at all or instead, has simply satisfied the available market.

Similarly, Hoffmann and DIY state that Hoffmann and DIY employees had to expend a significant amount of time dealing with libelous statements. (Appellee Brief P. 71). Yet, Hoffmann never quantified this into actual loss of production. There was no testimony regarding Hoffmann's loss wages, or the wages of the employees that "spent nearly all of their time refuting Clark's false claims which included responding to customers requesting to return products due to fears that the products were dangerous and might catch fire." (Appellee Brief P. 71). This is despite all of this information being readily available to Hoffman and DIY.

Hoffman and DIY also failed to establish that the damages awarded were not excessive. This Court should follow the logic in *Rees v. O'Malley*, 461 N.W.2d 833 (Iowa 1990) and reverse for a new trial. In *Rees*, the plaintiff was sladered by being accused of

committing civil extortion in a city of Des Moines Council meeting that was brodcasted into 68,000 Des Moines area homes. *Id.* at 834. The jury originally awarded the plaintiff $250,000. *Id.* After affirming that the statements were slander per se, the Iowa Supreme Court ultimately held that the defendant was entitled to a new trial because the award of $250,000 were excessive. *Id.* 840. In its holding, the Court recognized that the plaintiff "did not demonstrate that his reputation has been injured or that he has suffered any significant emotional distress. Further, he presented no evidence of any economic damages resulting from [the defendant's] statements. Since [the plaintiff] did not establish any special damages, the damage award must reflect the natural and probable consequences that would result from [the defendant's] statements." *Id.*

Additionally, other than the speculative testimony presented by Hoffmann, there was no evidence to substantiate his claim of $4.5 million damages to DIY. Further, there was no evidence of significant emotional harm experienced by Hoffmann to warrant $1

million in loss of reputation. Hoffmann presented no evidence that he is looked down upon in the community or is feeling a particular amount of hatred against him. Indeed, the Iowa Supreme Court has previously affirmed the grant of a new trial in an employment discrimination case when the jury awarded $100,000 in emotional distress damages. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 772-73 (Iowa 2009). Importantly, the Iowa Supreme Court has recognized that "emotional-distress damages tend to range higher in employment cases…involving egregious, sometimes prolonged, conduct." *Id.* Yet, in this case, with the proof of virtually no emotional distress damages, the jury awarded $1 million in compensatory damages. This verdict is flagrantly excessive and must be reveresed.

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

For the reasons stated in this brief and their opening brief, Clark and RealTuners maintain that an award of common law attorneys' fees is improper.

VI. CLARK AND REALTUNERS HAVE NOT WAIVED CLAIMS OF BREACH OF CONTRACT, FIDUCIARY DUTY AND INJUNCTION

In their final contentions, Hoffmann and DIY argue that "Appellants' Brief provides no meaningful argument on either the breach of contract or breach of fiduciary duty damages or the injunction." (Appellees' Brief P. 78). As such, Hoffmann and DIY contend these issues were not preserved and this Court should therefore affirm the district court's judgment on these sections. This is simply not true. As outlined at length in Clark's and RealTuners' opening brief and this brief, Clark and RealTuners maintain that the district court's rulings regarding striking the pleadings, improper instructions regarding "FACTS DEEMED ADMITTED" and the sustaining of several objections warrants a reversal of the entire judgment. Each of these rulings by themselves, and certainly collectively, call into question the validity of the trial in this matter. Indeed, Clark and RealTuners specifically indicated this position in their opening brief at footnote 4. Accordingly, should this court reverse the district court and

order a new trial due to any of the defects in these proceedings, this Court should order a remand on all counts and claims. However, if the Court orders a new trial due to the excessiveness of the libel damages or lack of evidence to support those damages, then this Court may affirm the breach of contract and fiduciary duty damages.

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.

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 Reply Brief and Argument was $0.00 as it was electronically filed.

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Dated: September 29, 2020

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CERTIFICATE OF SERVICE

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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