No. 19-2086

IN THE SUPREME COURT OF IOWA

JERRY HOFFMANN, and HOFFMANN INNOVATIONS, INC., d/b/a DIY AUTOTUNE,

Plaintiffs-Appellees,

v.

SCOTT CLARK, and REALTUNERS, LLC.,

Defendants-Appellants.

Appeal from
Pottawattamie County District Court, District Court No. LACV116501,
the Honorable Susan Christensen presiding over pretrial proceedings until September 1, 2018;
and the Honorable Margaret Reyes presiding over pretrial proceeding following September 1, 2018, trial, and posttrial proceedings.

JERRY HOFFMANN and HOFFMANN INNOVATIONS, INC., d/b/a/ DIY AUTOTUNE RESPONSE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT RESISTING FURTHER REVIEW

Scott Clark and Realtuners, LLC's (hereinafter "Clark's") Statement Supporting Further Review (hereinafter "Statement") fails to meaningfully apply the grounds for which further review may be granted. (Appellants' Further Review Application, pp. 7-13). See Iowa R. App. P. 6.1103(1)(b). As revealed in Appellants' Table of Authorities, they never even cite to the Rule providing the grounds for which further review may be granted. (Appellants' Further Review Application, pp. 5-6). See id. Clark's Application for Further Review is devoid of any reason to grant further review other than for correction of alleged errors. (Appellants' Further Review Application, pp. 7-13). Correction of such alleged errors falls within the normal circumstances, for which further review is not granted. See Iowa R. App. P. 6.1103(1)(a). To be fair, Clark's Statement does make a passing effort to reframe the alleged errors into a request for this Court's "guidance and instruction" to "clarify" Iowa law. (Appellants' Further Review Application, pp. 7-13). Even then, properly viewed, Clark's Application for Further Review simply raises alleged error clothed in a request for guidance and clarification. Cf. Iowa R. App. P. 6.1103(1)(a). As such, further review is improper. See id.

Regardless, further review would not advance Iowa law because Clark's allegations of error by the Iowa Court of Appeals ("COA") are unsupported.

The errors raised by Clark in his Statement are addressed below. (Application for Further Review, pp. 9-13).

A. Clark claims the COA ignored precedent that holds that appellate determination of whether a district court's sanction of a party is appropriate should be based on the information available to the district court at the time the sanction was levied.

According to Clark, the COA impermissibly considered his ongoing and worsening misconduct as described through Hoffmann's *twelve* motions for sanctions (all granted) in holding that it was within the district court's power to strike Clark's Answer and Counterclaim after granting Hoffmann's *Fourth* Motion for Sanctions.

However, review of the COA's order makes clear that it specifically held that notwithstanding consideration of any later acquired information, the striking of Clark's Answer and Counterclaim was warranted when it was done – after the fourth sanctions motion. (COA Opinion, p. 33). Clark's claim is therefore meritless because the COA's order clearly explains that the COA did what Clark is now claiming it failed to do – considered the propriety of the sanction with the information available to the district court when the sanction was levied.

B. Clark claims that this is a good time for this Court to identify the factors to consider when imposing an Iowa R. Civ. P. 1.517(2)(b)(3) sanction – for "clarification" purposes. But since there is no legitimate appellate point on the issue, there is no need to clarify anything. Clark simply wants a third bite at the apple from this Court.

C. Clark claims that "[i]n analyzing the damages claim, the COA relied *almost* entirely upon the defamatory conduct and actions of Clark rather than on the resultant effect upon the Plaintiffs" (Clark's Application, p. 10) (emphasis added).

Clark claims this conflicts with Rees v. O'Malley in that damages in a libel *per se* case 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) (emphasis added) (other citations omitted). However, Clark admits in his Statement that there was some evidence presented, seemingly arguing that it just was not enough, which on its face obviates Clark's reliance on Rees and his contention that there was "no other evidence" presented. See id. Further and as described below and in the district court and COA's orders, there was evidence of Hoffman's damaged reputation.

D. Clark claims the court of appeals erroneously concluded error was not preserved in certain aspects of the case. Clark suggests this Court should

review this case "to provide more guidance regarding error preservation rules…" (Application p. 13). Given the facts here, however, such "guidance" is unnecessary.

E. Clark challenges the One-Hundred Admitted Facts. First, Clark claims the "most glaring examples of impropriety" of the COA's opinion occur in the analysis of improper jury instruction claims and the award of attorneys' fees.

Prior to trial, Hoffmann submitted a list of proposed facts, taken from the allegations in the Petition, to be deemed as admitted due to the striking of Clark's Answer. Clark did not file any objection to these proposed admissions or a statement of the case for trial. (Aug 20, 2019 Tr. 13:3-12; 17:12-25; 18:1-25; 19:1-25; 20, 20-24).

The facts were treated as admissions under Iowa law and read to the jury and included with the jury instructions.

Clark apparently claims that his brief to the COA argued the following: the facts should not have been deemed admitted because it was wrong of the district court to strike his pleadings; that the Court should not have included the facts with the jury instructions; and that twelve of the one-hundred facts were irrelevant, resulting in error by their inclusion. (Clark Current Brief, pp. 11-12; COA Opinion, p. 40).

As argued in Hoffmann's response to Appellants' opening brief at the COA, Clark did not describe in his opening brief how the objection to the presentation of the facts deemed admitted was preserved.

The COA noted that Clark failed to preserve error on the second and third arguments above. Clark argues that it was error to not consider those arguments. But the COA considered these arguments, finding that "…even if we did consider the arguments, the 100 'facts' arose from allegations made in the pleading and all of Clark's defenses to those facts were struck…it was not an error to instruct the jury on the 'facts deemed admitted." (COA Opinion, p. 41).

F. Clark also contends that the attorneys' fees issue was properly preserved. A review of the Record shows that Clark used new arguments relating to the propriety of the fees award on appeal. As such, the COA did not err.

The COA found that the new complex arguments made by Clark to the COA were not preserved and Clark is unable to point to any place the new issues were raised – or any case that would permit the new arguments to be considered on appeal.

STATEMENT OF THE CASE

Nature of the Case:

This case had the potential to be a fairly standard dispute between former employee and employer. Hoffmann alleged that ex-employee Clark competed with Hoffmann while employed, using Hoffmann property that Clark then retained; that Clark was terminated; that Clark threatened at termination to cause problems for Hoffmann on social media if Hoffmann did not pay him a severance; that Hoffmann refused; that Clark opened a competing entity in violation of a non-compete agreement; and that upon termination, Clark immediately made good on his threats by repeatedly publishing that Hoffmann knowingly sold defective and fire-prone products out of greed.

What resulted – as noted by the court as being entirely due to Clark's countless intentional violations of court orders and warnings, is a case unlike any that the two district judges or the lawyers on the case have ever seen.

Through twelve motions for sanctions against Clark – all granted and resulting in monetary sanctions, awards of attorneys' fees, the striking of Defendants' pleadings and Clark's repeated incarceration, Clark continuously published false and disparaging remarks about Hoffmann on industry Facebook and web pages, including under aliases (Aug. 13, 2018 Tr.

11:18-25; 19:1-4; 36:3-17; Vol III, 411); encouraged others to do so in an effort to destroy Hoffmann; insulted and mocked the assigned judges and the Iowa judicial system; threatened the lawyers with bodily harm; acknowledged his obligations under court orders and then bragged about never honoring them; told the trial judge he would not provide materials as ordered; told the judge he would not appear for contempt hearings as ordered; refused to produce a full Facebook history of all accounts which he used to disparage Hoffmann; and caused an incredible amount of unnecessary delay and expense.

Prior to trial, Appellees filed a Statement of Facts to be presented to the jury – based on the Petition and deemed admitted by the striking of Defendants' pleadings. Appellants did not respond.

Hoffmann filed a Motion in Limine that was sustained, preventing introduction of evidence that would raise a defense to Defendants' actions. Clark did not appear for trial and the jury entered a verdict for Plaintiffs.

The jury entered an award against both Defendants and for Plaintiffs. Defendants appealed, arguing they were entitled to a new trial. The Iowa Court of Appeals affirmed the decisions of the district court.

Course of Proceedings:

Appellees agree generally with Appellants' "Course of Proceedings" and address further relevant points in the Facts section below.

Statement of Facts:

Hoffmann manufacturers and sells various versions of a technical product called MegaSquirt ("MS"), including the MegaSquirt Pro, that makes automotive engines perform better. (Aug. 20, 2019 Tr. 73:7-9). There are thousands of settings and it is a complicated product. (Aug 20, 2019 Tr. 74:20-25).

Clark worked for Hoffmann as an engine tuner. (Def.s' Brief, p. 20).

Clark is very skilled at what he does and has a huge network of people that come to him for technical advice – and he has a huge Facebook following. (Aug 21, 2019 Tr. 139:7-14).

There are many industry Facebook pages and other websites where those interested in engine performance and Megasquirt and competitors can go to review products and their manufacturers and discuss related issues. (APP VOL I – 292, 293, 295, 5th Motion for Sanctions, ¶¶ 9-11, 16-17, 27; Aug 21, 2019 Tr. 62:10-25).

On August 4, 2016, Hoffmann fired Clark for insubordination via a phone call. (Appellants' Brief, p. 20-21). During the recorded call, tenedered at trial, Clark threatened that if Hoffmann did not pay Clark a severance, Clark would cause Hoffmann problems online. (Appellants' Brief, p. 20-21).

Clark previously offered to do the same to a Hoffmann competitor for Hoffmann, a request Hoffmann declined. (Aug 20, 2019 Tr. 1-22; Vol. III 431).

Hoffmann refused to pay Clark the severance and Clark quickly began making good on his threat – smearing Hoffmann, its professional judgment and abilities. (Appellants' Brief, pp. 20-21; Vol. III 478).

Shortly after Clark's termination, he published that Hoffmann was dishonest and knowingly sold defective products that could lead to vehicle fires out of greed and that Hoffmann practices destroyed car engines. (Aug 21, 2019 Tr. 78:10-16).

Clark opened RealTuners, which Hoffmann contended violated a noncompetition agreement Clark signed. (Appellants' Brief, p. 21).

RealTuners started a weekly podcast and Clark's audience tuned in. (Aug 21, 2019 Tr. 139:7-14).

Hoffmann filed a Petition on July 28, 2017 and the case was assigned to the Hon. Susan Christensen.

Hoffmann alleged after filing the Petition that Clark continued to make false and negative statements about him online. (APP VOL I – 34, ¶ 1,).

Naturally, damages due to disparaging online statements are difficult to quantify – i.e., which prospects/customers/business partners saw the

statements; which of them decided to act and/or not do business with someone as a result of the statements; and how did it affect the victim?

To minimize these damages, limit the issues for trial, govern the Parties pre-trial conduct through discovery and provide a mechanism for removing and producing such postings via discovery, the Parties submitted a Joint Motion for Entry of Consent Order. (APP VOL I - 34, ¶ 3).

The Joint Motion made clear that the purpose of the proposed order was to "narrow the scope of litigation and avoid additional causes of action…" by restricting any disparaging publication regarding another party's "…services, products, employees or abilities…", true or not, or providing a forum for anyone to do so. (APP VOL I – 34-35, ¶ 3, 5, 7).

The Consent Order enjoined the Parties from making or filing any complaint or charge against each other. (APP VOL I - 46, ¶ 6). The Consent Order required that in the event a Party was contacted by anyone about an adverse party to the case, they respond, "I cannot comment. The Parties are involved in litigation." (APP VOL I - 47, ¶ 10). The Consent Order warned that any violation could result in the imposition of sanctions. (APP VOL I - 48, ¶ 13).

And once the Consent Order was entered, Scott Clark made this case extraordinary.

Through twelve motions for sanctions (all granted), Clark continued to willfully disparage Hoffmann, Hoffmann products and services; willfully ignore Court orders; refuse to participate in discovery; tell the judge that he would never produce what she required; would gladly accept incarceration before complying with Court orders; contact Hoffmann business partners and warn them of consequences if they continued to do business with Hoffmann; incite others to contact Hoffmann to disrupt his operations; spread falsehoods about Hoffmann on industry webpages; threaten the lawyers with bodily harm; and publicly insult the judges and the Iowa justice system.

The court acknowledged it had never seen anything like Clark who was so directly and repeatedly contemptuous. (June 27, 2019 Tr. 103:1-11).

Trial commenced. Clark did not appear (Aug 21, 2019 Tr. 154:16-19).

LEGAL ARGUMENT

I. STRIKING OF PLEADINGS WAS APPROPRIATE

Dismissal of pleadings is a sanction available when a party has violated a trial court's order. *See, e.g,* Iowa Rule Civ. P. 1.517(2)(b)(2 & 3) (pertaining to a failure to comply with a discovery order); FoGe Invs., LLC v. First Ntl. Bank of Wahoo, 2015 Iowa App. LEXIS 572 (Iowa 2015); Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975); Krugman v. Palmer College of

Chiropractic, 422 N.W.2d 470, 474 (Iowa 1988); Suckow v. Boone State Bank & Trust Co., 314 N.W.2d 421,425-26 (Iowa 1982).

Iowa's appellate courts have repeatedly affirmed dismissal of a disobedient party's pleadings, finding that "trial courts have inherent power to enforce discovery rules and have discretion to impose sanctions for a litigant's failure to obey them." Suckow, *supra*; Estate of Ludwick v. Stryker Corp., 2014 Iowa App. LEXIS 1065, *42 (2014).

Iowa Rule of Civil Procedure 1.602 gives a trial court power to enter orders governing scheduling and case management.

Rule 1.602(2) permitted the court, after consulting with the Parties, to order: Special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems (Rule 1.602(2)(b)(1)); and/or "Any other matters appropriate in the circumstances of the case…" (Rule 1.602(2)(b)(5)).

Facebook evidence can quickly change as comments are added and deleted and things can be posted under aliases and reach others across the world. This is a case where a case management order pursuant to Rule. 1.602 was especially appropriate and the Consent Order was an order fitting squarely within the contemplation of Iowa Rule Civ. P. 1.602.

Rule 1.602(5) provides that if a party fails to obey a scheduling or pretrial order, a court may – upon motion or its own initiative, make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 1.517(2)(b)(2)-(4). FoGe, *supra*.

Iowa Rules 1.517(2)(b)(2) and (3) expressly permits a trial court to strike the pleadings of a disobedient party. (APP VOL I - 280) and permit an order refusing to allow a disobedient party to support his claims.

A. Willfulness, Fault and/or Bad Faith

Prior to striking pleadings as a sanction for failing to obey a court order, the court must – and did, find that the disobedience was the result of willfulness, fault and/or bad faith. (Aug. 31, 2018 Order, pp 9-13); FoGe, *supra;* Marovec v. PMX Indus., 693 N.W.2d 779, 786 (2005) (Cady, J., dissenting); accord, Smiley, 236 N.W.2d at 360.

The court found Clark was repeatedly warned and sanctioned and was unmoved and continued to willfully violate the Consent Order. (APP VOL I – 162-164; 272; 276; 278).

Judge Chirstensen acknowledged that the motions for sanctions "went to the heart of the case." (Aug. 13, 2018 Tr. 6:14-15).

Judge Reyes noted that due to Clark's refusal to stop posting on Facebook, he was able to stop the case from progressing for six months (Dec.

19, 2018 Hearing Tr. 15; 15-25). The court found it was a straightforward case that Clark successfully torpedoed with his violations; that he caused "bleeding" damages and that the case every step of the way is about Clark's misconduct. (Dec. 19, 2018 Hearing Tr. 15; 15-25; 76:18-25; 77:1-2); Dec 19, 2018 Hearing Tr. 68:12-25; 69:1-9).

Lesser sanctions were meaningless to Clark because as he often bragged, he could not pay them. (Aug. 13, 2018 Tr. 75:7-9, 19-25).

Clark published his obligations and then knowingly violated them. (APP VOL I – 54, ¶ 29; 71; 134, ¶ 22).

B. Facts deemed Admitted were Properly Presented

The court presented to the jury approximately one-hundred paragraphs from Hoffmann's Petition that were deemed admitted by the striking of Defendants' Answers. (APP VOL III – 105-115; 245-247).

These items were treated as admitted facts under Iowa R. Civ. P. 1.510 and 1.511 and read to the jury. (APP VOL III - 246).

When asked for a suggestion on handling the admitted facts, Defendants' Counsel did not offer one, other than to object generally to the court reading the facts. (Aug. 20, 2019 Hearing Tr. 7:11-19; 11:3-6).

The court found that "Defendant was provided an opportunity to object to any of the individual facts, but only generally objected to use of any admitted facts as a whole." (APP VOL III - 246).

Appellants admit in their Brief (and the trial court found) that the admitted facts were essentially just a "reassertion of Hoffmann's prior [trial] testimony." (APP VOL III – 246-247).

Also as admitted by Defendants, most of the facts it cites are "completely irrelevant to the jury's damages determination." (COA Brief, p. 40). As such, if there was any error – which is disputed, it was harmless.

And, the alleged most problematic admitted facts in Defendants' Brief deal with Clark. The jury also found that RealTuners was liable for punitive damages in the amount of $3,500,000. (Aug. 22, 2019 Verdict, Questions 8,9; APP VOL III - 119). Therefore, the evidence is that the jury made an independent determination that Clark's actions were willful and wanton and that punitive damages against both Defendants were proper. (Aug. 22, 2019 Verdict Form, Questions 5-9; APP VOL III - 119)

II. THE COURT WAS JUSTIFIED IN GRANTING HOFFMANN'S MOTION IN LIMINE

Hoffmann advises the Court that this issue is not contained on Pages 9-13 of Clark's Statement, which apparently sets forth the claimed errors.

On August 12, 2019, Hoffmann filed a Motion in Limine, seeking to exclude evidence as to Defendants' defenses to their behavior – since they were stricken.

That included testimony about the quality of Hoffmann products or anyone's opinion about Hoffmann products, since that would seek to provide Defendants with a defense to defamation claims. (APP VOL III - 63).

For the same reasons, Hoffmann also sought to preclude testimony and evidence as to alleged wrongdoing by Hoffmann – because it would prejudice Hoffmann and relieve Clark from the result of the sanction of striking his pleadings. (APP VOL III - 64).

Defendants responded to the Motion in Limine, arguing that they should be allowed to present "any" testimony that might limit the plaintiffs' claim for damages. (APP VOL III - 67).

The trial court granted Hoffmann's Motion in Limine on August 16, 2019, apparently agreeing that the relevance of such information was outweighed by the prejudice to Hoffmann and the associated relief it would bring Clark from the order striking his pleadings and the expansion of proceedings such information would cause. (APP VOL III – 69-72).

Defendants now claim that the trial judge erred in refusing to admit certain questions at trial but their request is more accurately phrased as an objection to the granting of Hoffmann's Motion in Limine.

At trial and as justified by claimed relevance to reputation damages, Clark's lawyer asked if Hoffmann used illegal drugs and Hoffmann answered that he had in his childhood. (Aug 21, 2019 Tr. 142, 143, 144).

Clark's lawyer asked Hoffmann if his products ever started a fire and Hoffmann testified they did not. (Aug 21, 2019 Tr. 144:17-21).

Clark's lawyer asked if anyone ever alleged that Hoffmann products started a fire other than Clark and Hoffmann responded no. (Aug 21, 2019 Tr. 145:23-25; 146:1).

Counsel tried to go further, asking whether Hoffmann ever acknowledged a problem with his products anywhere; whether the MS3 product ever failed; whether Hoffmann struck back at Clark on Facebook; and whether Hoffmann was convicted of a felony. (Appellants Brief, pp. 45-47). Hoffmann's counsel objected each time and the court sustained the objections based on the order granting Hoffmann's Motion in Limine. (Appellants Brief, pp. 45-47; Aug 21, 2019 Tr. 149:7-17; 150:1-12).

Defendants claim that those questions went directly to the amount of damages at issue but what Defendants actually sought via these questions

was to raise a defense to Hoffmann's defamation claims, or at least to "muddy the waters" on the admitted facts.

Such testimony would have enlarged the proceedings beyond the amount of damages.

Clark did not attend the trial to present any evidence of his own. His lawyer asked Hoffmann about tax returns and advised the jury that he (counsel) would have used tax returns and similar documents to prove damages. (Aug 21, 2019 Tr. 151:1-24; Aug 22, 2019 Tr. 45).

The jury apparently did not require those documents, electing to rely on the evidence Hoffmann submitted via testimony.

Clark did not introduce documents, opting to ask Hoffmann questions that would impermissibly raise defenses to the conduct alleged in the Petition – some of which was permitted.

III. THE DAMAGES AWARD WAS JUSTIFIED

Appellees disagree that the Appellants properly preserved their pending arguments on most of the damages arguments.

The district court noted that Clark presented no legal argument as to damages objections in their post-trial motions. (APP VOL III - 238).

Appellants seek to attack the jury's award for civil extortion, arguing

separate damages for civil extortion had no basis based on the evidence presented. (Brief at 53, 55).

Appellants did not tell the COA where they preserved the extortion issue, other than directing the court generally to post-trial motions. (Brief, p. 52).

A review of those filings shows that Clark did not argue anything about civil extortion and neither the phrase "civil extortion" nor the argument that the jury impermissibly awarded civil extortion damages appear therein.

Clark therefore failed to preserve the issue for appeal.

Likewise, as to Appellants arguments regarding improperly "Blended Reputational Damages" (Brief, pp. 59-62) and improper damages based on stress to Hoffmann, Defendants did not previously make these arguments or otherwise preserve them (Defendants' Motion for New Trial and Request for Remittitur and their Motion for Judgment Notwithstanding the Verdict, APP VOL III – 127-131).

In describing how these issues were preserved, Clark again directed the COA to their post-trial motions (COA Brief, p. 51-52).

But the issue of impermissible damages blending and an improper

award to Hoffmann that included emotional damage is nowhere contained in those documents.

These are new arguments and should not have been permitted.

Appellants argue that the trial court erred in refusing to grant them a new trial and that they are entitled to a new trial, or "at least a remittitur," because the jury's damages were "flagrantly excessive and influenced by passion or prejudice." (Brief, p. 53).

Clark's attorney advised the jury that he did not believe there was enough evidence to award the $4.5 million or $1 million figures and they could not guess. (Aug 22, 2019 Tr. 46; 47).

A review of Defendants' post-trial motions evidence that they took a vague shotgun approach – providing general allegations without any legal support, which they now hope will serve as a satisfactory method of preservation of the issues. It should not.

Furthermore, the evidence at trial was the recording that Clark threatened Plaintiffs, made good on those threats, caused Hoffmann distress and worry about what Clark would next do and that Clark then began sending threatening messages to Hoffmann's business partners. (APP VOL III 240-241). As such, the jury was authorized to award damages for civil extortion.

A. Libel per se Compensatory Damages were Justified

The jury awarded Hoffmann Innovations $2,060,250.00 to compensate it for Clark's libel per se (slander) and $2,060,250.00 for RealTuners' libel per se (slander) (APP VOL III – 241).

The jury awarded Hoffmann $500,000.00 against Clark for libel per se and $500,000.00 against RealTuners for libel per se. (APP VOL III – 122).

Clark's attorney advised the jury that he did not believe there was enough evidence to award the 4.5 million or 1 million and they could not guess. (Aug 22, 2019 Tr. 46; 47).

Appellants' Motion for New Trial seemed to acknowledge that a large award was possible, stating, "…Despite the lack of supporting evidence, the jury should not have come up with more damages tha[n] $4.5 million in favor of plaintiff DIY AutoTune and $1,000,000 in favor of Jerry Hoffmann. (APP VOL III - 130).

Defendants requested a new trial alleging that the jury arrived at its verdict as a result of "prejudice, emotion and dislike for the defendant who failed to appear at all for trial" and there was "no evidence whatsoever to support the claims made by [the Plaintiff] Jerry Hoffmann." (APP VOL III - 238).

The trial court noted in denying Defendants' motions that Hoffmann testified as to the damage to his personal reputation and his company's reputation due to Defendants' publications. (APP VOL III - 241).

In Iowa, jury verdicts pertaining to damages will not be disturbed unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, or the result of passion or prejudice or lack of evidentiary support. (APP VOL III - 239).

The trial court noted that Hoffmann testified: he started his company in a spare bedroom 15 years prior; that the company provided a unique and highly-technical product to support racing engines; that when he started his business, nobody else manufactured and marketed a product like his; that he testified as to the growth of the company since he started it; that his company lost all of its growth momentum in the two years since Clark's termination; and that the estimated loss to his personal reputation was $1,000,000 and the company's lost growth was $4,500,000.00. (APP VOL III - 242).

In support of these figures, Hoffmann testified that he had spent the past two years defending and debunking Clark's false claims about him and his products rather than growing his business, which took a toll on him personally and professionally. (APP VOL III - 242).

Hoffmann testified that he couldn't sleep, would wake at all hours, was emotionally drained and unable to focus. Hoffmann's wife Joy similarly testified to the hours Hoffmann spent addressing Clark's libelous claims over the past two years, the time it took Hoffmann away from his family, and the difficulties he suffered as a result-trouble sleeping and enjoying life. (APP VOL III – 242-243).

At trial, the jury heard how Clark subjected Plaintiffs to nearly daily defmatory postings on racing industry website forum pages and social media platforms such as Facebook. (APP VOL III – 243-244; 264-330). Hoffmann testified that Clark's postings falsely accused Hoffmann of manufacturing dangerous products that could catch fire that was interested in making money regardless of the safety of their products. (APP VOL III – 243-244; 324; 435-436).

Hoffmann testified that the evidence was merely a fraction of was what Clark actually posted and that Clark was behind the creation of a website that implied a class action lawsuit was being filed against Hoffmann Innovations' dangerous products. (APP VOL III - 477).

In an example of how Clark attacked Hoffmann personally, Hoffmann testified that Clark created a parody video where Hoffmann was portrayed as an angry and maniacal Adolf Hitler. (APP VOL III - 244; Hoffmann Tr.

Exhibit 104 - video) In other postings, Clark mocked Hoffmann's Christian faith (APP VOL. III - 476; Vol. III 322-324) and generally portrayed Hoffmann as an individual that was only interested in making money and that would pay people with endorsements to maintain their silence over his defective products. (APP VOL III – 264; 317). Further, Clark wrote that Hoffmann was a vengeful stalker and paid to have Mary and others stalked and harassed. (APP VOL III – 302-304; 322).

Hoffmann testified that he spent the majority of his work days over the past two years dealing with customers calling into the company to question the quality and integrity of Hoffmann's products based upon Clark's campaign. (APP VOL III – 243-244).

Hoffmann testified that for a period of two years he and two of his company's 18 employees 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. (APP VOL III – 9-10).

Hoffmann testified about the time he spent testing returned products – that were sent back after customers were frightened about what they heard from Clark, only for Hoffmann to find they were safe and operating normally. (APP VOL III – 9-10). Hoffmann also testified that he lost a business

contract due to the negative information Clark published about Hoffmann's products. (APP VOL III – 9-10).

Hoffmann's trial testimony and supportive exhibits provided evidence from which the jury could conclude that the Defendants' conduct resulted in damage to the Hoffmann and his company. Hoffmann estimated that the damage to his business was approximately $4.5 million dollars. (APP VOL III – 9-10). The jury awarded those damages to Hoffmann, dividing them equally between Clark and RealTuners. (APP VOL III – 9-10).

The trial court noted that while calculating damage to an individual's or a company's reputation is not easily quantifiable, Hoffmann presented evidence from which the jury could conclude that the Defendants' conduct resulted in damage to the Plaintiff and his business. In Iowa, the law is clear that "[a]n attack on the integrity and moral character of a party is libelous per se." Wilson v. IBP, Inc., 558 N.W.2d 132, 139 (Iowa 1996).

B. Punitive Damages Were Appropriate

Under Iowa Code Section 668A.1, to receive punitive damages, a plaintiff must prove by a preponderance of clear, convincing, and satisfactory evidence that the defendant's conduct amounted to a willful and wanton disregard for the rights of another. (APP VOL III - 244).

To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. Hockenberg's Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 156 (Iowa 1993); (APP VOL III – 245).

Here, the jury heard that Clark knew how to destroy a company via Facebook, that he threatened Hoffmann with the same if he was not paid a severance and that Clark subsequently made good on his threat with a "barrage of false and damaging online postings about the Plaintiffs." (APP VOL III - 245). The jury also heard and saw that Defendants knowingly engaged in this behavior despite a court order prohibiting it. (APP VOL III – 304, 305, 308, 316-317)

IV. THE ATTORNEYS' FEES AWARD WAS JUSTIFIED

Appellees disagree that the Appellants properly preserved their arguments as to attorneys' fees awarded.

The basis of Appellants' argument at the district court was that their conduct was not "harsh, cruel, or tyrannical" and that Clark was already taxed with fees, resulting in double punishment for the same conduct.

The fees issues as briefed were not preserved for appeal because the arguments were not contained in Defendants' August 19, 2019 Motion to

Deny Attorney Fees (APP VOL III – 74) or any of Defendants' post-trial submissions.

Rather, Defendants previously argued only that "Unless attorney fees are allowed by statute or contract, the plaintiffs cannot recover attorney fees." (APP VOL III - 74).

Defendants/appellants seek to bring a new argument that they did not previously raise in the lower court, thereby waiving it.

The court expressly found that Defendants' misconduct is the rare level of oppression or connivance to harass or injurer another, as required by law. (APP VOL III – 259).

CONCLUSION

For these reasons, Appellees respectfully request the court affirm the Judgment of the Iowa Court of Appeals.

CERTIFICATE OF COST

The actual cost of printing or duplicating this brief is $0.00 per document as it was electronically filed.

/s/ Robert Livingston Dated: June 17, 2021

CERTIFICATE OF COMPLIANCE

This Response complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because it contains 5,356 (less than the two-fifths of the maximum 14,000 words (which is 5,600 words) permitted by Rule 6.903(1)(g), excluding the exempted parts. This Response complies with the typeface and type-style requirements of Iowa R. App. P. 6.903 because it was prepared using Microsoft Word in Georgia 14-font point .

/s/ Robert Livingston Dated: June 17, 2021

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on June 17, 2021, the foregoing Response to Application for Further Review was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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