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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-229

Filed 2 January 2024

Orange County, No. 20CVS1358

KEVIN POIMBOEUF, Plaintiff,

v.

TONY MERRITT, ILENE MERRITT, MERRITT'S GRAVEL PIT, INC., and TIK, LLC, Defendants.

Appeal by defendants from judgment entered 19 July 2022 by Judge Alyson Adams Grine in Orange County Superior Court. Heard in the Court of Appeals 28 November 2023.

*Kevin Poimboeuf, for the plaintiff-appellee.*

*Ward & Smith, P.A., by Christopher S. Edwards, Josey L. Newman, and Jordan M. Spanner, for the defendant-appellants.*

TYSON, Judge.

Tony Merritt (“Tony”) and his wife, Ilene Merritt (“Ilene”), appeal the trial court’s order denying their motion for Judgment Notwithstanding the Verdict

(“JNOV”). Our review reveals no error at trial, in the jury’s verdicts, or in the judgments entered thereon.

## **I. Background**

Kevin Poimboeuf’s (“Poimboeuf” or “Plaintiff”) long-term girlfriend, Shelley Welch Riselvato (“Riselvato”), owns Wildflower Preschool, a farm and nature preschool located in Carrboro.

Wildflower Preschool opened and operated at two locations since 2016. For the first two years, Wildflower Preschool operated inside a leased barn on a farm located in Chapel Hill. The barn and animals therein were destroyed by a fire in April 2018. Riselvato had already purchased another property, where she intended to permanently operate Wildflower School, and began building a new preschool after the fire.

The rebuilt Wildflower Preschool bordered and shared an access easement with the adjacent Merritt’s Gravel Pit, Inc. (“Merritt’s Gravel Pit”). Merritt’s Gravel Pit is owned and operated by Defendant Tony. Defendant Ilene is not an employee on the payroll of Merritt’s Gravel Pit, but she often helps with the business, including greeting customers, answering phone calls, taking invoices, faxing documents, interacting with inspectors, and occasionally writing and signing checks from the business account.

Katelyn Merritt (“Katelyn”), Tony’s and Ilene’s daughter, is the Vice President of Merritt’s Gravel Pit. TIK, LLC (“TIK”) owns the land from where Merritt’s Gravel

Pit operates. Tony, Ilene, and Katelyn Merritt are each one-third member-owners of TIK.

Riselvato and the Merritts have endured a contentious relationship since Riselvato first visited the property adjacent to Merritt's Gravel Pitt. Shortly after the property was listed for sale, Riselvato's realtor instructed her to review the property. While there, Tony and Katelyn confronted Riselvato, accused her of trespassing, told her the property was not for sale, and reported her to the Orange County Sheriff's Office. Tony's mother owned the property Riselvato eventually purchased, and selling the property was a source of contention amongst members of the Merritt family.

Once Riselvato and Poimboeuf began constructing Wildflower Preschool, Riselvato's and Poimboeuf's relationship with the Merritt family quickly deteriorated. Tony accused Poimboeuf of exposing his penis in the presence of children and reported Poimboeuf to law enforcement officers. Although the Merritts filed a complaint at the magistrate's office to bring criminal charges against Poimboeuf, those charges were later dismissed. The Merritts also accused Riselvato and Poimboeuf of cutting their telephone line, which ran along the easement between the two properties. Lastly, the Merritts accused Poimboeuf of burning down the barn, where Wildflower Preschool previously held classes, along with burning down a house in Charlotte.

This animosity led to two explosive interactions between the Merritts and

Poimboeuf and Riselvato. In April 2020, Riselvato began constructing a wall on her property line to reduce the noise coming from Merritt's Gravel Pit during school hours. Poimboeuf was helping Riselvato with the construction. Tony drove a blue tractor onto Riselvato's side of the easement, and at some point both Ilene and Katelyn joined the confrontation. This encounter quickly became heated, and during the conversation Tony made sexual gestures towards his crotch when accusing Poimboeuf of exposing his penis. The Merritts' "statements were loud, sustained, and contained offensive language." Poimboeuf recorded the interaction.

On another occasion in May 2020, Tony used machinery to uproot a large pine tree separating Merritt's Gravel Pit from Wildflower Preschool. Riselvato leaped in front of the excavator to prevent Tony from removing the remaining trees. Katelyn, Ilene, and Poimboeuf were also present. Tony and Ilene yelled at Riselvato and Poimboeuf for over two hours during this encounter, and, again, the "statements were loud, sustained, and contained offensive language." Poimboeuf recorded this conversation, too.

During the two encounters, Tony made the following statements to Poimboeuf:

- "F--ked with a tractor again, you egg-headed son-of-a-b--ch."
- "Hey, we found out about that house you burnt down in Charlotte, too, big boy. You a barn burning motherf--ker, ain't ya?"
- "You got a tractor down there you f--ked with. You got pictures where you took trespassing. You have placed yourself at the scene. You f--ked

with my excavator.”

- “Motherf--ker took his thumb and his forefinger and go owa, owa, owa. G--damn, the boys think that’s funny as hell, bro.”

Ilene directed the following statements to Poimboeuf:

- “Kevin, why don’t you tell ‘em that they dismissed the charges of you shaking your weenie at us. That is disgusting.”
- “He got in trouble, but they dismissed it. Carrboro didn’t want y’all to be exposed that y’all do that stuff to children.”
- “It’s pitiful what you do to children.”
- “Don’t expose yourself like you did before.”
- “What did they tell you they let you off for, huh? When you exposed yourself in front of the preschool? What did they say they dropped the charges for, do you know? Do you know why they dropped the charges? Yes[,] when you exposed yourself. You remember, don’t you[,] Kevin?”

Poimboeuf filed a complaint for defamation and the clerk issued civil summonses against Tony, Ilene, Merritt’s Gravel Pit, and TIK (“Defendants”) on 16 December 2020. Poimboeuf sought compensatory and punitive damages. Tony, Ilene, and Merritt’s Gravel Pit each moved to dismiss on 22 February 2021, and those motions were denied on 9 November 2021.

Before trial, the parties stipulated to certain facts regarding the fire that destroyed the barn Riselvato had leased, where Wildflower Preschool had previously

operated. Several law enforcement agencies investigated the fire and listed the cause as undetermined, because they were “not able to determine the origin of the fire or how it was set.” The parties stipulated to the cause of the fire as being undetermined, and the trial judge instructed the jury they “may accept” that fact “as true.”

A trial was held from 25 to 28 April 2022. Poimboeuf proceeded *pro se*. The Merritts were represented by counsel. The videos documenting the two encounters between Poimboeuf, Riselvato, Tony, Ilene, and Katelyn were admitted into evidence and published to the jury. Poimboeuf presented evidence tending to show the encounters caused him “embarrassment and anxiety and negatively affected his relationship with Riselvato and his quality of life.”

At the close of Poimboeuf’s evidence, Defendants moved for a directed verdict. The trial court allowed the motion to dismiss TIK, but denied the motions as to Tony, Ilene, and Merritt’s Gravel Pit.

The jury deliberated on 28 April 2021. Immediately before returning their verdicts, the jury submitted a note to the trial judge and asserted being afraid to find the Merritts guilty. The trial judge noted the jurors “express[ed] concern for their own safety in light of the possibility Defendants might be able to access their contact information.” The trial judge addressed counsel for each of the parties outside of the presence of the jurors, saved the note as an exhibit, and instructed the bailiffs regarding security protocols.

The jury’s unanimous verdicts found:

ISSUE ONE: Did the defendant Tony Merritt slander the Plaintiff?

ANSWER: Yes

ISSUE TWO: Did the defendant Ilene Merritt slander the Plaintiff?

ANSWER: Yes

ISSUE THREE: What amount of presumed damages is the Plaintiff entitled to recover from Tony Merritt?

ANSWER: \$5,000

ISSUE FOUR: What amount of presumed damages is the Plaintiff entitled to recover from Ilene Merritt?

ANSWER: \$5,000

ISSUE FIVE: What amount of actual damages, if any, is the Plaintiff entitled to recover from Tony Merritt?

ANSWER: \$0

ISSUE SIX: What amount of actual damages, if any, is the Plaintiff entitled to recover from Ilene Merritt?

ANSWER: \$0

ISSUE SEVEN: Is the defendant Tony Merritt liable to the Plaintiff for punitive damages?

ANSWER: Yes

ISSUE EIGHT: Is the defendant Ilene Merritt liable to the Plaintiff for punitive damages?

ANSWER: Yes

ISSUE NINE: What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff based on the liability of the defendant Tony Merritt for punitive damages?

ANSWER: \$20,000

ISSUE TEN: What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff based on the liability of the defendant Ilene Merritt for punitive

damages?

ANSWER: \$20,000

ISSUE ELEVEN: Was Tony Merritt the agent of the defendant Merritt's Gravel Pit, Inc. at the time the slander occurred?

ANSWER: Yes

ISSUE TWELVE: Was Ilene Merritt the agent of the defendant Merritt's Gravel Pit, Inc. at the time the slander occurred?

ANSWER: Yes

ISSUE THIRTEEN: Is the defendant Merritt's Gravel Pit, Inc. liable to the Plaintiff for punitive damages?

ANSWER: Yes

ISSUE FOURTEEN: What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff based on the liability of the defendant Merritt's Gravel Pit, Inc. for punitive damages?

ANSWER: \$30,000

Tony, Ilene, and Merritt's Gravel Pit entered a Motion for JNOV and Motion for New Trial on 25 May 2022. A hearing was held on 6 July 2022. The trial court denied the motion on 19 July 2022. Tony, Ilene, and Merritt's Gravel Pit filed a timely notice of appeal on 12 August 2022.

## **II. Jurisdiction**

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

## **III. Issues**

Defendants argue the trial court erred by denying their Motion for JNOV and Motion for a New Trial and assert the jury's award should be set aside because the



statements do not constitute slander *per se*.

Second, Defendants argue punitive damages were erroneously awarded against Merritt's Gravel Pit, without an award against the corporation for compensatory damages, in violation of N.C. Gen. Stat. § 1D-15(a) (2021). Defendants further argue the jury awarded excessive damages because they were prejudiced against Defendants, as is evidenced by their note.

#### **IV. Motion for JNOV and Motion for New Trial**

##### **A. Standard of Review**

The standard of review for the denial of a directed verdict or JNOV is the same and inquires whether the evidence, taken in the light most favorable to the nonmoving party, is sufficient as a matter of law to be submitted to the jury. If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for JNOV should be denied. Whether a party is entitled to a directed verdict or JNOV is a question of law that we review de novo.

*Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 41, 846 S.E.2d 647, 660-61 (2020) (citations, internal quotation marks, and alterations omitted).

##### **B. Slander *Per Se***

"The term defamation covers two distinct torts[:] libel and slander. In general, libel is written while slander is oral." *Phillips v. Winston-Salem / Forsyth Cty. Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994).

Slander involves more than simply speaking negatively of another person or

business. A defendant may be liable for slandering another by making a false statement of fact that “tend[s] to prejudice another in his reputation, office, trade, business or means of livelihood.” *Donovan v. Fiumara*, 114 N.C. App. 524, 534, 442 S.E.2d 572, 578 (1994) (citation and quotation marks omitted).

Some false remarks are considered slander *per se* because the law has designated certain classes of remarks as “in themselves (*per se*)” sufficient to “form the basis of an action for damages[.]” *Id.* at 527, 442 S.E.2d at 574 (quoting *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969)). For slander *per se* statements, “malice and damage” are “presumed” as a matter of law. *Id.*

Slander *per se* is “an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.” *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (citation and quotation marks omitted).

In determining whether a statement may be considered defamatory *per se*, the statement standing “alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The [statement] must be defamatory on its face within the four corners thereof.” *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 318, 312 S.E.2d 405, 409 (citation and internal quotation marks omitted). “The question always is how would ordinary men naturally understand the

[statement.]” *Id.*

False accusations of crime or offenses involving moral turpitude are actionable as slander *per se*. As a preliminary matter, we agree with the Court of Appeals in the case *sub judice* that child abuse is one such crime or offense involving an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government.

*Dobson v. Harris*, 352 N.C. 77, 79, 530 S.E.2d 829, 833 (2000) (citations, internal quotation marks, and alterations omitted).

Here, the trial court considered Defendants’ arguments that their statements should not be considered slander *per se* because: (1) Defendants did not accuse Poimboeuf of an offense involving moral turpitude; and, (2) Defendants’ statements “on their face” required further context. The trial court heard all of the evidence, watched the videos, heard the tenors and tones of each witness’s statements, and concluded: “Taken in the light most favorable to the Plaintiff and considering the circumstances and the Defendants’ words, tones, and gestures, the Defendants imputed crimes of moral turpitude to the Plaintiff and made statements that were actionable *per se*.”

The trial court, after viewing the evidence in the light most favorable to Poimboeuf, did not err as a matter of law by submitting the evidence to the jury to find the facts and by allowing the jury’s verdict to stand. *See Desmond*, 375 N.C. at 41, 846 S.E.2d at 660-61. Defendants’ arguments are overruled.

**C. Punitive Damages**

Defendants argue punitive damages were erroneously awarded against Merritt's Gravel Pit, without an award against the corporation for presumed or compensatory damages in violation of N.C. Gen. Stat. § 1D-15(a) (2021). Defendants further argue the jury awarded excessive damages because they were prejudiced against Defendants.

Our General Statutes explain “[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages *and* that *one* of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct.” N.C. Gen. Stat. § 1D-15(a) (2021) (emphasis supplied).

“Malice” is defined as “a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.” N.C. Gen. Stat. § 1D-5(5) (2021). “Willful or wanton conduct” is defined as “the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.” N.C. Gen. Stat. § 1D-5(7).

Punitive damages may not be awarded against another for vicarious liability:

Punitive damages may be awarded against a person *only if* that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or

*if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct* constituting the aggravating factor giving rise to punitive damages.

N.C. Gen. Stat. § 1D-15(c) (2021) (emphasis supplied).

Our Supreme Court has held: “even though nominal damages must be recoverable in order to support a punitive damages award, there is no requirement that nominal damages actually be recovered.” *Chisum v. Campagna*, 376 N.C. 680, 705, 855 S.E.2d 173, 190-91, *reh’g denied*, 377 N.C. 217, 855 S.E.2d 799 (2021) (quoting *Collier v. Bryant*, 216 N.C. App. 419, 434, 719 S.E.2d 70, 82 (2011)). *Accord Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992).

Here, an award for punitive damages against Merritt’s Gravel Pit is allowed under N.C. Gen. Stat. § 1D-15(c), because the jury found “the officers, directors, or managers of the corporation participated in or condoned the conduct[.]” Tony is the President of Merritt’s Gravel Pit. Tony initiated the confrontations with Poimboeuf and Riselvato in April 2020 by driving the tractor onto Riselvato’s property and accusing them of cutting Merritt’s Gravel Pit’s telephone line. Tony was also heavily involved in the encounter in May 2020, which spanned two hours. Poimboeuf presented evidence sufficient to allow the jury to decide whether to award punitive damages under N.C. Gen. Stat. § 1D-15(c), and the trial court did not err by failing to disturb the jury’s award.

Further, punitive damages may be awarded in the absence of nominal

damages, as long as nominal damages could have been awarded. *See Chisum*, 376 N.C. at 705, 855 S.E.2d at 190-91; *Collier*, 216 N.C. App. at 434, 719 S.E.2d at 82; *Hawkins*, 331 N.C. at 745, 417 S.E.2d at 449. Defendants’ argument is overruled.

Defendants argue the jury’s note questioning whether Defendants could access their contact information demonstrates the jury improperly considered evidence outside of the statutory list of factors in N.C. Gen. Stat. § 1D-35(2) (2021). Defendants further argue a new trial should have been granted, pursuant to Rule 59(a)(6) of the North Carolina Rules of Civil Procedure, because the jury awarded “[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]” N.C. Gen. Stat. §1A-1, Rule 59(a)(6) (2021).

The trial court’s order denying Defendants’ JNOV explained:

The awards of punitive damages were not excessive. The fact that the jurors expressed apprehension about their safety shows how egregiously wrong and reprehensible they perceived the words and acts of the Defendants to be after hearing the evidence, including viewing videos of the sustained tirades. The jury properly determined on the basis of the evidence and instructions on the law what amount of damage would adequately punish the Defendants for egregiously wrongful acts and deter the Defendants and others from committing such acts. The jurors’ award was not made on the basis of bias or prejudice.

The jury did not impermissibly consider factors outside of those listed in N.C. Gen. Stat. § 1D-35(2), which include factors such as “[t]he reprehensibility of the defendant’s motives and conduct[.]” “[t]he duration of the defendant’s conduct[.]” and

“[t]he existence and frequency of any similar past conduct by the defendant.” N.C. Gen. Stat. § 1D-35(2)(a), (d), and (g).

Defendants have also failed to show any abuse of discretion by the trial court’s decision to refrain from granting a new trial. *See Davis v. Woods*, 286 N.C. App. 547, 555, 882 S.E.2d 558, 566 (2022) (“Motions for a new trial are governed by Rule 59 of the North Carolina Rules of [Civil] Procedure and are generally reviewed by the appellate courts for an abuse of discretion.” (citation omitted)). Defendants’ arguments are overruled.

## **V. Conclusion**

The trial court heard all of the evidence, watched the videos, and concluded: “Taken in the light most favorable to the Plaintiff and considering the circumstances and the Defendants’ words, tones, and gestures, the Defendants imputed crimes of moral turpitude to the Plaintiff and made statements that were actionable *per se*.” The trial did not err as a matter of law when it submitted the evidence to the jury and let the jury’s verdict stand. *See Desmond*, 375 N.C. at 41, 846 S.E.2d at 660-61.

The trial court did not err by allowing the jury to determine whether Merritt’s Gravel Pit was liable for punitive damages, because Tony “participated in or condoned the conduct.” N.C. Gen. Stat. § 1D-15(c). Punitive damages may be awarded in the absence of nominal damages, as long as nominal damages could have been awarded. *See Chisum*, 376 N.C. at 705, 855 S.E.2d at 190-91; *Collier*, 216 N.C. App. at 434, 719 S.E.2d at 82; *Hawkins*, 331 N.C. at 745, 417 S.E.2d at 449.

The jury did not impermissibly consider factors outside of those listed in N.C. Gen. Stat. § 1D-35(2). The trial court properly denied Defendants' motion for JNOV. The trial court did not abuse its discretion by failing to grant a new trial. *See Davis*, 286 N.C. App. at 555, 882 S.E.2d at 566.

Defendants received a fair trial, free from prejudicial or reversible errors they argued at and after trial and preserved for appeal. *It is so ordered.*

NO ERROR.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).