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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION III

MICHELLE ISAACS,

Plaintiff,

v.

CIVIL ACTION NO. 05-C-817
(Judge Silver)

DANIEL P. BONNER, DDS

Defendant.

**ADDENDUM TO JUDGMENT ORDER:
ORDER AWARDING ATTORNEY FEES AND COSTS**

2008 JUN 31 PM 3:57
CLERK

This matter came on for a post-trial hearing on the 19th day of June, 2008, upon the Defendant's Itemization in Support of Prayer for Legal Costs, and the Plaintiff's Response and Defendant's Reply thereto. The Plaintiff, Michelle Isaacs, appeared by her counsel, Andrew C. Skinner. The Defendant, Daniel P. Bonner, DDS, appeared by his counsel, Linda M. Gutsell.

The Court has reviewed Defendant's Itemization in Support of Prayer for Legal Costs, and the Plaintiff's Response, Defendant's Reply, and Plaintiff's Rebuttal thereto. The Court reviewed the Judgment Order entered upon the bench trial in this civil action. The Court studied the legal authority cited by the parties in their submissions herein, and conducted independent research of relevant legal authority. The Court heard the argument of counsel for the parties.

On the basis of all of the foregoing, it is the decision of the Court that the Defendant's prayer for attorney fees and costs incurred herein should be granted, and that the

Defendant be awarded the sum of Twenty-Nine Thousand Four Hundred Eighty-Seven Dollars and Fifty-Two Cents (\$29,487.52). This Order modifies the Judgment Order entered on March 21, 2008, and, together with the March 21, 2008, Judgment Order, should be considered the final judgment in this case.¹ The Court's decision is based upon the following findings of fact and conclusions of law which follow the arguments of the parties.

Arguments of the Parties

1. The Defendant argued that, under the "short and plain statement" rule,² the Counterclaim asserted by him in this civil action states causes of action for the common law tort of injurious falsehood,³ abuse of process and malicious civil prosecution,⁴ all of which, the Defendant argued, were established by the evidence adduced at trial. Accordingly, the Defendant argued that he has a separate claim for attorney fees and costs as special damages, as an alternative to an award of attorney fees and costs as a measure of punitive damages pursuant to the finding of fraud made by the Court in the Judgment Order. As a special damage, the fees and costs that the Defendant was required to incur because of the Plaintiff's assertion of a false claim against him, is not limited by the considerations prevailing upon the Court in the consideration of an award of punitive damages. The Defendant urged the Court to award fees and costs as a measure of special damages. However, whether awarded as special or punitive

¹ That is to say, that the final judgment in this case consists of the Judgment Order of March 21, 2008, and the instant Order. For the purposes of appeal, the final judgment shall consist of both orders and shall be deemed to have been entered on the date of entry of the instant Order for the purpose of calculating the time to appeal.

² W.V.R.Civ.P. 8(a).

³ In addition to the citations presented in prior submissions, the Defendant at the hearing argued from other cases addressing the tort of injurious falsehood, as the cause of action is not well developed in West Virginia case law.

⁴ The Defendant acknowledged that a claim for malicious prosecution can only be pursued after the entry of a favorable judgment in the underlying case, usually requiring the initiation of a second civil action.

damages, the Defendant argued that he was entitled to recover the whole of the fees and costs incurred by him.

Additionally, the Defendant argued that the attorney fees and costs incurred by him, though far exceeding the compensatory damages ultimately awarded, were reasonable and necessary to the proceedings had in this matter, especially when weighed against the damages to which he would have been subject had the Plaintiff prevailed, which damages would have included statutory liquidated damages and attorney fees.. Accordingly, the Defendant argued that there was no occasion for reduction in the amount sought in either a special damages or punitive damages award.

2. The Plaintiff relied upon the “American Rule” that each party pays his own attorney fees, such that an award of such costs because of a finding of fraud is an exception and is punitive. The Plaintiff argued that an award of attorney fees and costs to the Defendant, being wholly punitive in nature, must be bound by the various factors imposed upon any award of punitive damages. The Plaintiff rejected the assertion that the Defendant has a claim for fees and costs as a matter of special damages, particularly under the injurious falsehood theory, which, according to the Plaintiff, does not apply to the facts in this case. The Plaintiff’s argument was primarily premised upon the guidance provided in the case of *Boyd v. Goffoli*, 216 W.Va. 552, 569, 608 S.E.2d 169, 186 (W.Va. 2004), wherein the West Virginia Supreme Court of Appeals delineated the factors that must be considered in awarding attorney fees and costs pursuant to a finding of fraud. The Plaintiff emphasized that *Boyd* stressed the concept of a “multiplier” by which the relationship of the punitive damages to the compensatory damages should be judged to determine if the punitive award is reasonable, and argued that the award of fees and costs in this

case would far exceed *Boyd's* suggested outside ratio of five to one. Moreover, the Plaintiff urged the Court to consider the limited financial resources of the Plaintiff.

Findings of Fact

1. The Court incorporates by reference all findings of fact set forth in the Judgment Order entered in this matter on March 21, 2008, in which the Court found for the Defendant on the Plaintiff's Complaint and found for the Defendant on his Counterclaim.

2. The Judgment Order awarded to the Defendant compensatory damages in the amount of One Thousand Sixteen Dollars and Sixty Cents (\$1,016.60),⁵ punitive damages in the amount of Five Thousand Dollars (\$5,000.00), and, concluding that the Plaintiff's conduct had been intentionally fraudulent, ruled that the Defendant's prayer for legal fees and costs would be addressed in a subsequent proceeding.

3. Pursuant to the aforesaid Final Judgment Order, the Defendant timely submitted an itemization of the attorney fees and costs incurred in the defense of the Plaintiff's claim and the prosecution of his counterclaim, to which the Plaintiff made timely response, and the Defendant made timely reply.

4. The Plaintiff, without waiving objection to the award of any fees and costs, conceded that the fees and costs claimed by the Defendant were reasonable from the standpoint of the rate charged for services and the work performed for the Defendant.

⁵ This is the sum that the Defendant had already paid to the Plaintiff in an effort to settle the claim made by the Plaintiff to the Wage & Hour section of the W. Va. Division of Labor.

Conclusions of Law

1. The Plaintiff is correct that the general rule followed in American courts is that each party pays his own attorney fees. Syl. Pt. 10, *Boyd v. Goffoli*, 216 W.Va. 552, 569, 608 S.E.2d 169, 186 (W.Va. 2004), quoting Syl. Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (W.Va. 1986). Fraud, however, is an exception to that general rule. *Id.*, at Syl. Pt. 11. The obvious purpose of the fraud exception is that intentional conduct should be punished and discouraged.

The Court's analysis found at pages 24 through 29 of the Judgment Order reveal that the Court's purpose in permitting the Defendant to submit a claim for fees and costs to afford redress for the intentional fraud that the Court found to have been committed by the Plaintiff. Because the Court concludes that the Defendant's prayer for attorney fees should be considered pursuant to its finding of fraudulent conduct, the award sought must be considered pursuant to the prevailing principles governing awards of punitive damages, including such cases as *Boyd*.

2. *Boyd* is distinguishable from the case at bar in material respects. First, in *Boyd*, the Supreme Court found that the punitive damages that had already been awarded were sufficient to reimburse the plaintiffs below for their attorney fees. By contrast, this Court did not consider the Defendant's fees and costs when making the initial award of punitive damages in the Judgment Order in this case, choosing instead to permit the Defendant to present his claim for determination in post-trial proceedings. Had the Court considered fees and costs in the initial award, the punitive damages would have been considerably higher, but the Court consciously kept them low so as to accommodate the post-trial proceedings anticipated.

The *Boyd* Court reaffirmed the 5-to-1 ratio found in Syl. Pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 466, 419 S.E.2d 870 (1992).⁶ As expressly stated by the Supreme Court in *Boyd* and *TXO*, that ratio is premised upon certain factors, which differ from the facts of this case. In its Judgment Order, this Court found, by clear and convincing evidence, that the Plaintiff had acted with actual intent to cause harm to the Defendant, which eliminates one of the factors upon which the 5-to-1 ratio is premised (absence of actual intent to do harm). Also, the Court concludes that it would be difficult to dispute that a compensatory award of \$5,000 or even \$10,000 is negligible in this day and age. The award to the Defendant in this matter is negligible, thus defeating the second factor necessary to the application of the 5-to-1 ratio for punitive damage awards (neither negligible nor very large). Consequently, the Court in the instant case concludes that an award in excess of the 5-to-1 ratio is not *per se* unconstitutional or unreasonable under the *Boyd* and *TXO* criteria.

3. The *Boyd* Court also reiterated the factors for consideration that had been announced in Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). *Boyd*, at Syl. Pt. 4. This Court is aware of the scrutiny required, and applied each of the *Garnes* factors with the requisite scrutiny in considering its initial award of punitive damages. The Court now applies those same factors to the prayer for legal fees and costs.

In considering the harm flowing from the Plaintiff's course of conduct, the Court finds that the actual harm includes the \$1,016.60 which was not owed by Defendant to the Plaintiff, the Defendant having to suffer through the lengthy and costly defense of the suit to

⁶ Syl. Pt. 15 of *TXO* states: "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional."

avoid liquidated damages found not to be owed, and the attorney fees and costs that Defendant incurred. The Court notes that this matter has gone on for almost three (3) years, and the stress visited upon all involved was apparent to the Court during the proceedings herein. The Defendant's reputation as an employer, as well as his resources, was threatened by the Plaintiff's false claim. But, the Court notes that the harm is not limited to the Defendant. The Plaintiff's fraudulent use of the administrative process provided by Wage & Hour was a misuse of a service provided by the public. The Plaintiff's subsequent pursuit of this civil action further taxed the resources of that public service, because the agency personnel had to come into this Court and suffer examination about the underlying administrative activities.

In determining punitive damages, the Court must look at the reprehensibility of the Plaintiff's conduct. One factor that must be considered in determining reprehensibility is how long the Plaintiff continued in her actions. As noted above, the Plaintiff continued her conduct for almost three years. The Court must consider whether the Plaintiff was aware that her actions would cause or were likely to cause harm, which is satisfied by the Court's finding, by clear and convincing evidence, that the Plaintiff committed fraud, and was aware that her actions would cause or were likely to cause harm. In determining the reprehensibility of the Plaintiff's actions, the Court also must consider whether the Plaintiff attempted to conceal or cover up her actions, which the Court finds that the Plaintiff did do, until the entry of the Judgment Order herein in March of 2008. Another factor that the Court considered is whether the Plaintiff made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused. Although no evidence was presented regarding settlement negotiations, the Court finds that the Plaintiff had the opportunity to settle, but did not do so, and pursued the case into and through trial.

In considering the appropriateness and amount of punitive damages, the Court also considered the cost of the litigation. The Court finds that the costs of litigation as to the Defendant were quite reasonable. Counsel for the Defendant represented that she billed her client at one-half her regular hourly rate. Moreover, counsel for the Plaintiff agreed that the number of hours billed and the hourly rate were reasonable.

Another required factor that the Court considered is the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. The Court believes that its finding, by clear and convincing evidence, that the Plaintiff committed fraud, may justify punitive damages in the form of the costs of litigation to the Defendant.

The Plaintiff's financial situation also is relevant. Upon the Plaintiff's testimony, the Court learned that the Plaintiff makes in excess of \$49,000 per year. The Plaintiff has three children, but her husband also is employed, so the household income is not minimal. While there was mention at trial of financial hardships in the past, the Plaintiff's current situation does not present such a situation.

4. Having examined the factors required by *Boyd* and *TXO*, this Court examines the relationship of this case to the multiplier discussed therein. The Court finds that because the Plaintiff committed fraud, she had actual evil intentions, and the use of a larger multiplier than the 5-to-1 ratio in *Boyd* is justified. The Court further concludes that where the actual compensatory damages are negligible, as is the case here where the actual compensatory damages were \$1,016.60, much higher ratios are warranted. As noted above, the Court concludes that even an award of \$5,000 to \$10,000 would have been negligible. An award of

\$5,000 would have rendered a ratio of 6-to-1 on an award of approximately \$30,000 in punitive damages

5. The Court also heard and has considered the Plaintiff's argument that she brought her initial complaint in Magistrate Court, where the maximum recovery would have been \$5,000 and which would not have allowed attorney fees, but that it was the Defendant who removed the case to Circuit Court upon the filing of his counterclaim. The Court understands, however, that counsel had to consider the best avenue for pursuing a claim or defense. After observing the four-day trial, the Court can well understand the Defendant's rationale for wanting to appear in Circuit Court rather than Magistrate Court, and then potentially having to have the case reheard *de novo* in Circuit Court.

6. The Court observes that judges routinely have to make hard decisions. This case presents one such memorable instance. This Court had no preconceptions about the case, but as the case developed during the trial, it became clear that there had been actual, intentional fraud on the part of the Plaintiff. And yet, it was the Plaintiff who was "in the driver's seat" all the way in pursuing false claims through a trial in this Court. The Court feels badly for the Plaintiff, as well as the Defendant. However, feeling badly for the Plaintiff does not alter the outcome in the case.

The Court carefully examined the invoices provided by the Defendant in support of his claim for attorney fees. The Court observes that the rates for attorney fees and legal assistant fees charged for the work done in this case⁷ were very reasonable, especially when compared to prevailing local rates. Moreover, the Court observed the case that was put on at trial, and found the fees and costs to be reasonable in relation to the case tried. There is no basis

⁷ The Defendant was charged \$125.00 per hour for attorney services and \$40.00 per hour for legal assistant services.

for concluding that the Defendant's claim for fees and costs is unreasonable under the circumstances, and, as noted above, the Plaintiff does not dispute this conclusion.

Finally, in reaching its decision, the Court cannot ignore that the Defendant has to write a check to his attorney for the full amount of the fees and costs owed, while he may wait many years to recover the full sum from the Plaintiff, if ever.

The Court concludes that that Defendant's prayer for fees and costs should be granted.

WHEREFORE, for the reasons particularly set forth in the foregoing, the Court ORDERS that, in addition to the compensatory and punitive award set forth in the Judgment Order of March 21, 2008, the Plaintiff shall pay to the Defendant the sum of Twenty-Nine Thousand Four Hundred Eighty-Seven Dollars and Fifty-Two Cents (\$29,487.52) for legal fees and costs herein.

The Court notes the timely exceptions of both parties to any and all adverse rulings herein contained.

This is a final Order, from which any party may seek an appeal to the West Virginia Supreme Court of Appeals under applicable rules.

It is the express intention of the Court that this Order shall be an addendum to the Judgment Order of March 21, 2008, and shall modify the prior Judgment Order so far as it states that it is the final order from which appeal may be taken. The Judgment Order of March 21, 2008, and this Order shall together constitute the final Order in this case from which an appeal may be taken.

The Clerk is directed to retire this matter from the docket of the Court, and place it among causes ended.

The Clerk shall enter the foregoing and forward attested copies hereof to counsel of record for the parties.

ENTER: 7/31/08

Gray Silver, III
GRAY SILVER, III, CIRCUIT JUDGE

A TRUE COPY
ATTEST

Prepared by:

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