
IN THE
Supreme Court of Virginia

RECORD NO. 141365

JOSEPH EGAN, SR.,

Appellant,

v.

DAVID BUTLER,

Appellee.

RECORD NO. 141372

ABILENE MOTOR EXPRESS CO.,

Appellant,

v.

DAVID BUTLER,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
NATURE OF CASE	2
MATERIAL PROCEEDING BELOW	4
STANDARD OF REVIEW	4
STATEMENT OF FACTS	6
ARGUMENT	11
I. Exclusion of employment history and quality of job performance regarding future wage claim	11
II. (Abilene only) Abilene cannot be held vicariously liable for punitive damages for the acts of Defendant Egan	16
III. Verdicts should have been reduced	23
CONCLUSION.....	27
CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

CASES

<u>Advanced Marine Enterprises v. PRC, Inc.</u> , 256 Va. 106, 501 S.E.2d 148 (1998)	24, 25
<u>Bardach Iron and Steel Co. v. Charleston Port Terminal</u> , 143 Va. 656, 129 S.E. 687 (1925)	19, 20
<u>Beck v. Comm.</u> , 253 Va. 373, 484 S.E.2d 898 (1997).....	11
<u>Bennett v. R&L Carriers Shared Services, LLC, et al.</u> , 744 F. Supp. 2d 494 (E.D. Va. 2010).....	19, 22
<u>Byrne v. Gainey Transportation Services, Inc.</u> , Case 2:04-cv-02220cm (U.S. District Kansas, 2005)	13
<u>Carter v. Baham</u> , 683 So. 2d 299 (LA App. 1996).....	15
<u>Clarke v. Chapman</u> , 238 Va. 655, 385 S.E.2d 885 (1989)	16
<u>Clarke v. Montgomery Ward and Co.</u> , 298 F.2d 346 (4th Cir. 1962)	19
<u>Coalson v. Canchola</u> , Record No. 130837, S.Ct. Va. (Feb. 27, 2014).....	22
<u>Denton v. Morgan</u> , 136 F.3d 1038 (5th Cir. 1998).....	15
<u>Edwards v. Syrkes</u> , 211 Va. 600, 179 S.E.2d 902 (1971)	15
<u>Floyd v. National R. Passenger Corp.</u> , 1990 U.S. Dist. LEXIS 10143	15
<u>Freeman v. Sproles</u> , 204 Va. 353, 131 S.E.2d 410 (1963).....	19
<u>Gaumont v. State Hwy Commissioner</u> , 205 Va. 223, 135 S.E.2d 790 (1964).....	6
<u>Gonzales v. Comm.</u> , 45 Va. App. 375, 611 S.E.2d 616 (2005)	11

<u>Grattan v. Comm.</u> , 278 Va. 602, 685 S.E.2d 634 (2009).....	5
<u>Hogg v. Plant</u> , 145 Va. 175, 133 S.E. 759 (1926)	20
<u>Jackson's Administrator v. Wickham</u> , 112 Va. 128, 70 S.E. 539 (1911).....	26
<u>Lawlor v. Comm.</u> , 285 Va. 187, 738 S.E.2d 847 (2013)	11
<u>Moore v. Va. International Terminals</u> , 254 Va. 46, 486 S.E.2d 528 (1997).....	24
<u>Neuren v. Adduci, Mastriani, Meeks, and Schill</u> , 43 F.3d 1507 (D.C. Cir. 1995)	13
<u>Noll v. Rahal</u> , 219 Va. 795, 250 S.E.2d 741 (1979).....	5
<u>Paulston v. Rock</u> , 251 Va. 254, 467 S.E.2d 479 (1966)	21, 23
<u>Prudential-Bache Securities, Inc. v. Cullather</u> , 678 F. Supp. 601 (E.D. Va. 1987).....	20
<u>Roughton Pontiac Corp. v. Alston</u> , 236 Va. 152, 372 S.E.2d 147 (1988).....	17, 20, 22
<u>Schleier v. Kaizer</u> , 876 F.2d 174 (D.C. Cir. 1989)	15
<u>Stamathis v. Flying J Inc.</u> , 389 F.3d 429 (4th Cir. 2004).....	2, 18, 22
<u>Thomas v. Comm.</u> , 44 Va. App. 741, 607 S.E.2d 738, adopted upon rehearing en banc 45 Va. App. 811, 613 S.E.2d 870 (2005).....	11
<u>Wilkins v. Peninsula Motor Cars, Inc.</u> , 266 Va. 558, 587 S.E.2d 581 (2003).....	24
<u>Williams v. Comm.</u> , 278 Va. 190, 677 S.E.2d 280 (2009)	6
<u>Zenian v. District of Columbia</u> , 283 F. Supp. 2d 36 (D.D.C. 2003)	13

STATUTES and RULES

Va. Code Ann., § 8.01-38.1 3, 21, 23

Rule 2:403 15

IN THE SUPREME COURT OF VIRGINIA

ABILENE MOTOR EXPRESS CO.,

Appellant,

Record No.: 141372

v.

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JOSEPH EGAN, SR.,

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Appellee.

APPELLEE'S BRIEF

COMES NOW David Butler, by counsel, in response to the Briefs of Appellants, filed by each Appellant herein and files this Appellee's Brief. Egan does not contest Abilene's Issue II-Vicarious Liability of Abilene. Otherwise, the Appellants make the same arguments, so Appellee files one brief in opposition to all of the Appellants claims.

NATURE OF CASE

This case is virtually identical to Stamathis v. Flying J Inc., 389 F.3d 429 (4th Cir. 2004), decided under Virginia law. In that case, a virtually identical verdict and judgment were upheld.

This is an action brought by David Butler against Abilene Motor Express and its maintenance manager, Joseph Egan, Sr. for Malicious Prosecution and Defamation arising out of events on November 4, 2010, and thereafter. The Jury found its verdict for the Plaintiff, against each Defendant, on each count. The Jury carefully awarded specified damages based on the Judge's instructions. On the Malicious Prosecution count, the Jury returned a verdict of \$250,000.00 in compensatory damages against each Defendant; found punitive damages against Egan in the sum of \$50,000.00; found punitive damages against Abilene for \$200,000.00. On the defamation count, the Jury returned a verdict of \$200,000.00 in compensatory damages against each Defendant; found punitive damages against Egan in the sum of \$50,000.00; found punitive damages against Abilene in the sum of \$150,000.00. The Jury's entire verdict totaled \$900,000.00.

The punitive damages verdict against Abilene equaled \$350,000.00, the maximum permitted by statute, and the Jury was aware of that limit,

obviously crafting its verdict to find that specific sum. Egan, the individual Defendant, was found responsible for \$100,000.00 in punitive damages, it is obvious that the Jury took into consideration the fact that he was not a corporate Defendant.

The Judge entered judgment on the verdict, but reduced the total punitive damages of \$450,000.00 in accord with Va. Code Ann., § 8.01-38.1 to \$350,000.00 by making a pro rata reduction in the punitive damages claim against each Defendant. The final judgment totaled \$800,000.00; \$450,000.00 in compensatory damages, and \$350,000.00 in punitive damages.

The Jury was carefully instructed as to what types of damages could be awarded on each count, and it carefully complied with those instructions.

The Complaint alleges, and Defendants' Answer admits, that Egan's actions were taken within the scope of his employment for Abilene (Compl. ¶ 3, Appx. 1; Answer ¶ 1, Appx. 7), that he made criminal charges on behalf of Abilene as well as himself (Appx. 3). Egan was a supervisor, part of Abilene's management, not a mere co-employee. The Appellants, in stating the case, fail to mention that at trial they stipulated that Abilene was liable for Egan's acts, (see Appx. 37, Instruction 7 given without objection;

and Judge Spencer's instructions to Jury Appx. 252) (Compl. Appx 1 ¶ 3, Answer Appx 7 ¶ 1) (Appellee's opening argument Appx. 96, made without objection). Neither Defendant raised as a defense that Defendant Egan had not acted within the scope of his employment regarding punitive damages, until the motion to strike and then only in passing. It was not raised again until the motion to set aside the verdict.

In their statements of the case, the Defendants fail to make reference to the video tape (Appx. 325) of these events. The video was a recording of events made by and under Abilene's control throughout. This video was altered after the events, but was still sufficient to prove that Egan was intentionally and deliberately lying in the claims he made about Butler. After viewing the video this was an easy case for the Jury. The fact that it was altered shows action by the employer to conceal the truth and ratification of facts after the event.

MATERIAL PROCEEDING BELOW

The nature of the case has largely covered the material proceedings.

STANDARD OF REVIEW

Plaintiff agrees that Assignment of Error No. 1 concerning exclusion of past employment history, like all evidentiary matters, is governed by an

abuse of discretion standard. Grattan v. Comm., 278 Va. 602, 685 S.E.2d 634 (2009).

Assignment of Error No. 2, sufficiency of evidence to support a wage loss claim, is correctly subject to an abuse of discretion standard. Whether there was sufficient evidence to permit this issue to go to the Jury, is within the sound discretion of the trial Court, to be reversed only when clearly wrong. See Noll v. Rahal, 219 Va. 795, 250 S.E.2d 741 (1979).

Assignment of Error No. 3 for Defendant Abilene involves striking the evidence of punitive damages. First, it is questionable whether this issue was preserved. The issue is whether Defendant Abilene could be sanctioned for Defendant Egan's acts. This matter had been stipulated as stated by the Judge in instructing the Jury without objection (Appx. 252); see also Plaintiff's opening (Appx. 96, see also Instructions 7 & 8, Appx. 37-38).

If this point is in issue, whether the evidence is sufficient for the issue to go to the Jury involves the evaluation of evidence which is reversible only if clearly wrong, in essence, for abuse of discretion, Grattan v. Comm., 278 Va. 602, 685 S.E.2d 634 (2009).

Assignment of Error No. 3 (Egan) and No. 4 (Abilene) is governed by an abuse of discretion standard as Defendants claim.

Assignment of Error No. 5 (Abilene) was not preserved at trial, and only in the brief accompanying its Motion to Set Aside, it was not even in that Motion itself (Appx. 48-49). To preserve an issue, it must be raised in time for the Court to make a meaningful ruling; not after the trial is over. Gaumont v. State Hwy Commr., 205 Va. 223, 135 S.E.2d 790 (1964).

As this Assignment of Error asserts that punitive damages against a corporation can never exceed the award against the actor, it is a matter of law subject to *de novo* review.

Assignment of Error No. 4 (Egan) and No. 6 (Abilene) are cumulative of the other assignments of error.

STATEMENT OF FACTS

On Appeal, the facts are taken in the light most favorable to the party prevailing below, Williams v. Comm., 278 Va. 190, 677 S.E.2d 280 (2009); in this case, Butler's. The Appellants seem to have forgotten that rule by ignoring the very persuasive video of the events giving rise to this litigation.

Defendant Egan, acting for his employer (Defendant Abilene), as stated by the Court (Appx. 37-38, 252), and as was admitted in Defendant's Answer ¶ 1 (Appx. 7), took out a false charge that he had been assaulted and battered by David Butler (Appx. 121, 222) followed by false accusations that he had been assaulted and stabbed by Butler, made to

people Butler had worked with (Appx. 135, 233). The criminal charge was dismissed with prejudice (Appx. 121; Plaintiff's Exh. 2, Appx. 328). Egan was Butler's supervisor at Abilene (Appx. 216-217).

The Jury was easily able to see the falsity of Egan's claim because they saw a video (Plaintiff's Exh. 1; Appx. 325) which contradicted Egan's claims. The fact that Egan repeated the same false assertions at trial, even introducing a jacket as evidence, which seemed different than the one he wore in the tape (Appx. 226), showed the falsity of his claims initially and at trial.

The tape had been in Plaintiff's employer's hands and had been altered after the fact (Appx. 119-120, 181, 212-215, 230). That alteration had to be done by Defendant Abilene, the employer. However, the tape still showed Butler was truthful, and that Egan was lying.

Supervisors of Egan's reviewed the tape and admitted that it exonerated Butler (Appx. 119-120, 181) and offered him a different employment position, but did nothing to undo the harm of Egan's defamatory claims to its employees, or to stop the criminal prosecution. Indeed, Abilene obtained an agreement through the criminal process to keep Butler off its property (Answer, ¶ 3, Appx 7).

It was the company owner, Keith Jones, who told Butler that Butler was accused of stabbing Egan, and that there was a warrant out for his arrest. He advised Butler to go turn himself in (Appx. 181). Abilene introduced no evidence that it had made any attempt to prevent Egan from making good on his threat to use his position at Abilene (Appx. 109, 147, 210) to “blackball” Butler from the truck mechanic industry in the Richmond area.

A number of witnesses corroborated Butler’s claim of what Egan had done and contradicted Egan’s. Even the defense witnesses’ testimony was at some variance with Egan’s.

Plaintiff introduced damage evidence concerning the malicious prosecution showing that he had paid \$1,200.00 to his criminal defense attorney (Appx. 123, 146). He related the fear he had, knowing he faced the false criminal charge, that he could not sleep, argued with his girlfriend, and at times, drank (Appx. 127). Donna Turner, Plaintiff’s girlfriend, also testified as to how facing these charges harmed him (Appx. 179).

As to the defamation claim, Egan had threatened to see Butler never worked in the trucking mechanic industry again (Appx. 109, 210). Butler testified that he had not had trouble finding work prior to this event (Appx.

126) [a fact confirmed by excluded evidence¹; Appx. 334-337]. After the event, finding work was difficult for Plaintiff (Appx. 126). An available job at Volvo disappeared (Appx. 125-126), as did a job at International Trucking (Appx. 126); other applications were for naught (Appx. 125-126).

Butler did find work as a mechanic at \$15.00 per hour for a while, and then other jobs as a truck driver. These jobs paid less than he had made. Butler used the difference between \$18 per hour at Abilene and \$15.00 per hour at his next job for his wage loss calculations; but his calculations were far more nuanced. Plaintiff's exhibit 4 (5)² (attached hereto) was a detailed interrogatory answer explaining Butler's wage loss calculation and was introduced into evidence (Appx. 133, 163). It showed his losses between age 43 and his planned retirement age of 65 to be \$137,842.00.

The Defendants, contrary to their briefs, were permitted to introduce evidence that Butler changed jobs frequently (Appx. 152-154; Defendant's Exhibit 1) and to argue Butler was an unstable worker. Adverse conduct or

¹ The evidence Defendants wanted to introduce would not show a problem finding jobs.

² The Plaintiff moved the Answer to Interrogatory No. 4 into evidence as Plaintiff's Exhibit No. 4 (Appx. 163); however, it was marked as Exhibit No. 5 (Appx. 86). It was designated for inclusion in the Appendix, but only the Defendants' Exhibit marker was actually included (Appx. 331). Attached hereto is Plaintiff's Exhibit No. 5, the relevant Answer to Interrogatory No. 4. This Answer is actually in the Appendix as part of a pretrial motion (Appx. 15-16).

job changes, after events at Abilene, was fair game for cross-examination (Appx. 152). Evidence was introduced that Butler was fired from Abilene, and Egan snuck in evidence of firing at a previous job (Appx. 217).

The excluded evidence that Defendants complain of is skimpy (Appx. 333 admitted, and 337, the un-redacted version). All of the evidence concerning Butler's jobs after working at Abilene was admitted (Appx. 153-155). The claim that Butler was fired at Volvo came in (Appx. 217) and so did evidence he had worked there before (Appx. 161). The purported problems and discharge at Abilene came into evidence (Appx. 109, 217, 220). The excluded evidence was the last four entries shown on (Appx. 337). That evidence showed he worked from 1999 to 2003 at Highway Express, at \$14.00 per hour; from 2003 to 2005 at C Express Trucking, at \$16.25 per hour; then Super Value from 2005 to 2010 at \$25.00 per hour. This evidence showed there was no break in employment and his wages went up with each job change. This evidence would not have supported Defendants' claim Butler was an unreliable worker. Butler then went to Colonial Volvo again at a raise, for a short time. The evidence that he worked there did come in (Appx. 161). Egan snuck in the claim Butler was fired from there (Appx. 217) [the excluded evidence would have disputed that claim of firing (Appx. 337)].

The Jury was carefully instructed on each count (Appx. 253-256) and the separate damages attributable to each (Appx. 256-261).

ARGUMENT

I. Exclusion of employment history and quality of job performance regarding future wage claim (Abilene I, Egan I).

The decision to admit or exclude evidence is left to the discretion of the Trial Judge and is reversed only when there has been a clear abuse of discretion, Lawlor v. Comm., 285 Va. 187, 738 S.E.2d 847 (2013). An Appellate Court reviews a Trial Court's decision regarding admissibility of evidence for an abuse of discretion, Gonzales v. Comm., 45 Va. App. 375, 380, 611 S.E.2d 616. 618 (2005). "In reviewing an exercise of discretion, we do not substitute our judgment for that of the Trial Court. Rather, we consider only whether the record fairly supports the Trial Court's action." Beck v. Comm., 253 Va. 373, 385, 484 S.E.2d 898, 906 (1997). "Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." Thomas v. Comm., 44 Va. App. 741, 753, 607 S.E.2d 738, 743, adopted upon rehearing en banc 45 Va. App. 811, 613 S.E.2d 870 (2005). There was no abuse of discretion here.

At this juncture, Defendants have limited their claim that this evidence was relevant simply to the monetary damages claim, but claim his "job hopping" showed his damages were speculative. The evidence was plainly

irrelevant on liability and for “character reasons,” and Defendants have abandoned any such claim.

The Judge actually excluded very little employment evidence in this case. By comparing Defendants’ Exhibit 1 (Appx. 333) with the same but un-redacted document (Appx. 337), it can be seen that the Court prohibited the Defendants from going into the Plaintiff’s work history consisting of four jobs, over a span of eleven years. The first three actually show a stable employment history. Butler held those jobs for four years, two years, and five years respectively, and each change was to a higher paying job. It would support none of the claims Defendants make of unstable employment.

Most of the information about Colonial Volvo actually came in; Butler testified he intended to go back to Volvo (Appx. 161), showing he had worked there; and Egan, in spite of the Judge’s ruling, snuck in information claiming Butler had been fired from there (Appx. 217). None of the excluded information would have bolstered Defendants’ argument that his income was downward trending or unpredictable.

The Defendants proffered no evidence except Plaintiff’s own answers to discovery on these matters. They presented no former employers or experts to criticize his performance; they offered no evidence that he was

working at \$18.00 per hour instead of \$26.00 per hour (his previous and highest hourly rate) because of issues in the work place, poor performance or inability to obtain work at a higher rates.

In the absence of such a proffer, the Judge ruled that such evidence was not relevant to the Jury. Attenuated employment histories of this sort have been held to be inadmissible to show a tendency to job hop, Byrne v. Gainey Transportation Services, Inc., Case 2:04-cv-02220cm, U.S. District Kansas, 2005; Neuren v. Adduci, Mastriani, Meeks, and Schill, 43 F.3d 1507 (D.C. Cir. 1995); Zenian v. Dist. of Columbia, 283 F.Supp.2d 36 (D.D.C. 2003); or job performance issues, Neuren, supra. The claims of job hopping and bad job performance were the reasons Defendants claimed they wanted this evidence, so they could argue his wage loss was unsupported. However, as stated above, the evidence of job instability actually occurred after Butler left Abilene and was admitted. The excluded evidence did not support Defendants' claim. The Trial Judge knew what Butler's answers would be, and knew that without proof of job instability or a history of workplace problems, the evidence would be misleading to the Jury concerning wage issues. The truest litmus test for Butler's pre-incident income was the amount he was actually earning at Abilene.

The relevant income figure was what Butler's most recent earnings were, and that was his earnings while at Abilene.

The Jury did hear evidence that Butler was fired at Abilene, that he and Egan disagreed over work issues, and that he had been fired once before by Pablo (Appx. 217). The Judge also permitted the Defense to explore a pattern of voluntary job changes by Butler after events at Abilene (Appx. 153-155), which was more the pattern Abilene was trying to claim than his pre-Abilene history. The Defense could and did use this evidence to argue to the Jury that Plaintiff was not a reliable worker (Appx. 275-278), and that his wage claim was unsupported. So the excluded evidence did not show what Defendants wanted to use it for, while admitted evidence did; and Defendants used what came in to make the points they sought to make. In light of Butler's employment history after Abilene, that was let in; at worst, the excluded evidence was cumulative. Rule 2:403 permits the Judge to exclude such evidence.

Finally, under Rule 2-403, this evidence was far more prejudicial than probative. Its purpose was to make Butler out to be unreliable, when he was not; even when filtered through the claims that the information was necessary to evaluate damages, the prejudice outweighs probative value. Defendants then, and now, do not argue what the excluded evidence

actually shows, but want to put a fictional spin on that evidence not fairly drawn from the facts. Such evidence is inadmissible. Where the prejudicial effect of evidence outweighs its probative value it is properly excluded, Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971); and Rule 2:403.

The cases the Defendants cite do not support their position. Schleier v. Kaizer, 876 F.2d 174 (D.C. Cir. 1989) simply holds that an expert is not needed to establish future wage losses and thus, does not support Defendants' assertions. Denton v. Morgan, 136 F.3d 1038 (5th Cir. 1998) held that future wages cannot be based on information that is three years old, not in conformity with the facts, and speculative whether presented by an expert or not.³ Floyd v. National R. Passenger Corp., 1990 U.S. Dist. LEXIS 10143 held an employee could not base his wage claim on evidence of a former job, Butler did not do that. Carter v. Baham, 683 So.2d 299 (LA App. 1996) actually supports Plaintiff. It states that a Jury's determination of damages should rarely be disturbed. It holds that in Louisiana, loss of income should be based upon a person's capacity to earn, rather than pre-injury earnings. So the test cited by Defendants is to determine something a bit different than what Plaintiff has to show in Virginia. In Virginia, we use

³ The information Defendants seek to introduce here is coincidentally on average, 5 years old.

the prior, actual earnings as a baseline, which was done here. In the case of Clarke v. Chapman, 238 Va. 655, 385 S.E.2d 885 (1989), this Court held a Jury could find lifetime earnings based on a job of only two months duration. The Judge's ruling was fully appropriate and well within her discretion.

II. (Abilene only) Abilene cannot be held vicariously liable for punitive damages for the acts of Defendant Egan (Abilene II).

A. This issue was not preserved, indeed the contrary was stipulated.

The first question is whether or not this was preserved for appeal. Abilene admitted agency throughout. The Complaint alleges agency in paragraph 3 (Appx. 1). It is admitted by Abilene and Egan in its joint Answer (Appx. 7, ¶ 1). In opening statement, Appellee's counsel clearly stated the stipulation that for this case, Abilene had admitted it was responsible for what Egan did (Appx. 96). There was no objection from Abilene. Instruction No. 7 (Appx. 37), given without objection, instructs the Jury that Abilene is responsible for "all damages" caused by its employee acting within the scope of employment, and that ". . . Egan, Sr. was acting as an employee of Abilene Motor Express in these matters" (Appx. 37). Instruction No. 8, again given without objection, states that even willful or malicious acts may be within the scope of employment (Appx. 38). The punitive damages instructions, given without objection (Instruction 28,

defamation, Appx. 45, Instruction 29, malicious prosecution, Appx. 46), embody without so stating this stipulation of agency.

The Judge instructed the Jury that the Defendants had stipulated Egan was an agent of Abilene, again without objection (Appx. 252).

The Defendants stipulated that Abilene was responsible for Egan at trial, just as the Judge said. Since it was stipulated there, it should not be heard here.

Defendant Abilene did not argue that it could not be held for punitive damages; so neither Butler nor the Trial Court had any meaningful opportunity to deal with the issue until the trial was long over.

B. Argument on merits.

In the event the Court does decide to hear this issue, Defendants' argument is without merit. The record shows Defendants stipulated agency, and did so without reservation (Appx. 252).

Defendant Abilene argues that it cannot be held vicariously liable for punitive damages for Egan's acts. The standard for vicarious liability is set in a case cited by Defendants', Roughton Pontiac Corp. v. Alston, 236 Va. 152, 372 S.E.2d 147 (1988). It says if agent's acts were tortuous, then the principle is vicariously liable only if the agent's act "was within the scope of his employment." In this case, Abilene stipulated that Egan's acts were

done within the scope of his employment. Therefore, they have assumed vicarious liability for Egan's acts, even under a *respondeat superior* theory. In a case very much on all fours with our case, Stamathis v. Flying J, Inc., 389 F.3d 429 (4th Cir. 2004), punitive damages for the agent's acts were upheld against the employer.

Furthermore, Abilene's involvement was more than as *respondeat superior*. In its Answer, Abilene claimed that all of the claims against it were barred by the workers' compensation bar. That position is inconsistent with a claim that it was not responsible in punitive damages for Egan's action. Abilene admitted in its Answer that it benefitted from provisions of the dismissal of the criminal action, by obtaining a provision to keep Butler off its premises (Answer ¶ 3, Appx. 7); such a provision shows Abilene's involvement in the criminal case. It was Abilene's owner, Jones, who told Butler a warrant had been taken out for his arrest; and to turn himself in. These actions indicate involvement of and participation by Abilene in the criminal action.

Moreover, evidence showed that Abilene had complete control of the video. This video was altered after the events. That is action by Abilene after the fact, to conceal the truth. Abilene knew the tape exonerated Butler (Appx. 120), but did nothing to stop the prosecution and did nothing

to stop the defamation perpetrated by Egan. In Bennett v. R&L Carriers Shared Services, LLC, et al., 744 F.Supp.2d 494 (E.D. Va. 2010), another case closely on point with ours, the Court quotes the Fourth Circuit “[a] person who places before a prosecuting officer information upon which criminal proceedings are begun, and who later acquires additional information casting doubt upon the accused guilt, should be under an obligation to disclose his discovery to the prosecutor,” citing Clarke v. Montgomery Ward and Co., 298 F.2d 346, 348 (4th Cir. 1962). Abilene took no action to prevent Egan from carrying out his threat to keep Butler from working as a truck mechanic. All of these are actions or inactions by Abilene prove its involvement in the harm caused to Butler.

Egan was Abilene’s supervisor of mechanics; he was part of its management, not a mere co-worker (Appx. 216-217). A corporation acts through its agents; as management, Egan’s actions are directly attributable to Abilene, Bardach Iron and Steel Co. v. Charleston Port Terminal, 143 Va. 656, 129 S.E. 687 (1925). Defendant cites Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963). In Sproles, a motion for summary judgment was sustained; the Court there held that in a sexual assault case, punitive damages could not be awarded versus an employer “for the wrongful act of his servant or agent in which he did not participate, and

which he did not authorize or ratify” citing Hogg v. Plant, 145 Va. 175, 133 S.E. 759 (1926). Obviously, sexual assault cannot be part of the employer’s business. In our case, we deal with actions that are part of the employer’s business. “[a] corporation can only act through agents . . . when one acting as an agent . . . is a permanent employee or officer of the company, the question of the authority and power of such a representative should be left to the Jury.” Bardach Iron and Steel Co. v. Charleston Port Terminals, 143 Va. 656, 672, 129, S.E. 687, 692 (1925). See also footnote 9 of Prudential-Bache Securities, Inc. v. Cullather, 678 F. Supp. 601 (E.D. Va. 1987).

The law, the stipulation, and the facts all prove Abilene is properly answerable for punitive damages. Egan’s acts were done within the context of his employment, and were possible because of his employment with Abilene. Thus, Abilene’s punitive liability was proper for the Jury to consider.

(Abilene only) Abilene claims there was no basis for a Jury verdict against them in an excess of that against Egan. (Abilene II-A)

The Defendants claim that there is no basis for differential in the punitive damages against Egan and the corporation. However, they do not cite any cases which support this proposition. Roughton Pontiac Corp. v.

Alston, *Supra*, simply holds that where a master and servant are sued in court solely for the servant's acts, the master cannot be held if the servant is entirely exonerated; that rule of law is not implicated in this case.

Paulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1966), holds that the Trial Court, and on appeal, the Appellate Court, may review damage awards, both punitive and compensatory for excessiveness. Va. Code Ann., § 8.01-383.1 merely states rules concerning remitter and additur, not germane to the argument here. The cases hold that punitive awards shall not be set aside in the absence of evidence that the Trial Court acted improperly in approving the verdict. There is nothing in this verdict which shocks the conscience. Taken in light most favorable to the Plaintiff, the evidence here shows that the Defendants set out specifically to ruin Plaintiff's job prospects and was fairly successful in doing so. The evidence establishes that Defendants maliciously continued to assert against him a criminal charge that each knew was false, which could have sent Butler to jail. These are not small harms, but are major and important harms, which the Jury correctly realized, needed to be stopped. The Jury awarded punitive damages to do so, and that award should stand.

Abilene runs together various theories in supporting its argument. It first seems to claim evidence of financial condition is required to justify

more in punitive damages against one defendant over the other. There is no Virginia law supporting this assertion; Bennett v. R&L Carriers Shared Service, LLC, et al., 744 F.Supp.2d 494 (E.D. Va. 2010); Coalson v. Canchola, Record No. 130837, S.Ct. Va. (Feb. 27, 2014), and Stamathis v. Flying J., Inc., et al., 389 F.3d.429 (4th Cir. 2003) all approve punitive damages without indicating any need for Plaintiff to prove financial condition.

Next, Abilene seems to claim that the punitive damages claims are inherently inconsistent, but without any clear or stated reasons why these claims are inconsistent. Abilene cites Roughton Pontiac Corp. v. Alston, 236 Va. 152, 372 S.E.2d 147 (1988), but that case only stands for the proposition that where the employer's liability is entirely vicarious, and the Jury returns a verdict exonerating the agent, there is no basis for liability against the company; clearly not on point with this case, where the verdict was against both Egan and Abilene. That case also explicitly points out that where the company's acts are also implicated (as here) this rule does not apply at all even if the agent were exonerated. The evidence supported this Jury's careful award of carefully tailored punitive damages to your Appellee.

III. Verdicts should have been reduced (Abilene & Egan).

The Judge heard evidence and arguments concerning the verdict and felt the Jury verdicts were appropriate under the circumstances. In such cases the Judge's decision is not to be overturned unless clearly wrong Paulston v. Rock, *Supra*.

Each Defendant argues the damages should have been reduced, without giving reasons why. They cite Paulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1966) and Va. Code Ann., § 8.01-383.1, which only hold that the trial Court has the power to reduce excessive damages. Paulston, *supra*, states that substantial deference is given to the Jury in such cases. The Court here did not reduce the damages, and instead approved them (except punitive in excess of the statutory cap). The Court heard the evidence, saw the witnesses, and felt the Jury's verdict was appropriate. Its order should be affirmed.

Double Recovery Claim. Defendants assert that the verdicts effect a double recovery (Abilene III-A, Egan II-A).

Plaintiff agrees that he is entitled only to be made whole once; that double recovery is impermissible. The problem with Defendants' argument is that it is not based on the verdict in this case. The Jury was carefully instructed on both malicious prosecution and defamation; and the different damages associated with each.

The finding instruction (Appx. 39) set out the elements of each charge. Compensatory damage instructions carefully divided out defamation damages (Appx. 42-43) and punitive damages (Appx. 45); from those for malicious prosecution (Appx. 44 compensatory, Appx. 46, punitives). The verdict form specifically required the Jury to state the damages it found on each matter separately, which it did (Appx. 47) (Appx. 260-261).

This Jury considered and weighed these various elements of damages and awarded a carefully crafted verdict specifying just what it awarded for each type of damage. For example, the aggregate of the punitive damages against Abilene totaled \$350,000.00, which the Jury knew was the amount claimed (Appx. 274, 274).

Defendants cite Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 587 S.E.2d 581 (2003) for the proposition that double recovery is prohibited. The Appellee does not contest that point of law; however, this case is distinguishable from Wilkins, because Wilkins brought two separate claims for the same wrong. (See also Moore v. Va. Int'l Terminals, 254 Va. 46, 486 S.E.2d 528 (1997)). It can be distinguished from the present case, because the Jury instructions here made it clear there were two separate types of damages being sought for two separate types of claims. Controlling the instant case is Advanced Marine Enterprises v. PRC, Inc.,

256 Va. 106, 501 S.E.2d 148 (1998), upholding verdicts where verdicts were based on “separate claims involving different duties and injuries” 256 Va. at 124-25, 501 S.E.2d at 159. In Butler’s case, there are two separate claims with two different sets of damages claimed. In its verdict here, this Jury carefully divided out its award in accord with the instructions of law it was given.

The evidence was that Egan set in motion a false prosecution; and that he told people at Abilene and others that he had been assaulted and stabbed by Butler, and prevented him from getting jobs. These are separate acts requiring differing proofs. The Jury was instructed that it could return damages on the malicious prosecution case for the usual associated compensatory damages such as for the defense costs, \$1,200.00 in attorney’s fees, insult, and mental suffering; damages which did not include wage loss. The Jury was also instructed on punitive damages *vis-à-vis* malicious prosecution.

On the defamation count, the Jury was instructed it could award actual damages including reputational loss, out of pocket losses, embarrassment, humiliation, and mental suffering as compensatory damages, and it was instructed on presumed damages associated with defamation; and then punitive damages associated with defamation; damages in short, which did

include wage loss (Appx. 43). Butler could not get a job after these events, and his evidence showed that would be employers knew of Abilene's claims against him, and that it cost him \$137,842.00 in wage loss.

The instructions showed that the attorney's fee charge was properly associated with the malicious prosecution, while the wage loss claim was associated with the damages caused by the defamation. Intangible damages were again specifically set out for the Jury to considered, and the Jury obviously divided and apportioned its verdict among these claims on the two counts. The Jury's verdict is structured to provide only a single recovery. The verdict is presumed to be in accord with the instructions and correct in the absence of evidence to the contrary. "No rule is better settled by the decisions than that when a case has been properly submitted to a Jury, and a verdict fairly rendered, it ought not be set aside unless manifest injustice has been done." Jackson's Adm'r v. Wickham, 112 Va. 128, 70 S.E. 539, at 540 (1911). The Jury was just in its verdict, and no injustice was done to Defendants.

CONCLUSION

In this case, a very conscientious Jury, that was properly instructed, considered the harms done to Plaintiff by Defendants and returned a carefully crafted verdict, fully appropriate on the facts of the case. A seasoned, experienced and able Trial Judge reviewed the matter and entered judgment on the verdict, making a single change as required by statute to reduce the punitive damages. There was no evidence which was excluded that would have assisted the Defendants. Therefore, the Trial Judge's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26 and Rule 5:32 (a) (b) have been complied with. Fifteen printed copies and an electronic copy on CD-ROM of the Appellee's Brief were filed via hand delivery to the Clerk of the Supreme Court of Virginia on February 20, 2015. An electronic copy on CD-ROM of the Appellee's Brief as well as three printed copies of the Appellee's Brief was mailed to opposing counsel (named below) on February 20, 2015.

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A handwritten signature in black ink, appearing to read "William H. Shewmake", with a long horizontal line extending to the right.