

**From the January 23, 2006 Virginia Lawyers Weekly.**

## **Tort**

### **Defamation - Remittitur - Former Manager - Company Losses**

In this suit by an army veteran and former employee of the National Security Agency who had a top-secret security clearance, and who alleged the chairman of the board of his former employer, defendant Government Micro Resources Inc., defamed him by telling executives of his new employer, Seisint Inc., that plaintiff was responsible for \$3 million in losses to GMR, the trial court erred in ordering remittitur of the \$5 million jury award to plaintiff on the defamation claim, and the jury verdict is reinstated.

The Supreme Court affirms the trial court's reduction of plaintiff's breach of contract award from \$200,500 to \$112,500, and the punitive damage award of \$1 million to the statutory cap of \$350,000, under Va. Code Sect. 8.01-38.1.

The defamation claim in the motion for judgment and the bill of particulars was that two statements were made to Seisint executives at an indeterminate time around April 12, 2002, attributing the loss of large amounts of money to plaintiff's management of GMR. The Oct. 8 interrogatory answer named a previously "unidentified" Seisint executive to whom one of the statements was made and identified the location and time frame of one of the statements. The information provided in the Oct. 8 interrogatory answer, the motion for judgment and the bill of particulars was consistent with the statements provided to the jury as plaintiff's defamation claim. Therefore, the first statement was pled within the limitations period.

GMR next argues that the statements at issue were matters of opinion and thus could not be the basis of a defamation claim. According to GMR, the terms "exorbitant" and "mismanaged" contained in the allegedly defamatory statements submitted to the jury represented the board chairman's subjective judgments and were expressions of opinion only.

The alleged defamation in this case is that plaintiff's mismanagement caused GMR to lose money in 2001 which, in turn, was the basis for his termination. Whether a company's financial loss is the result of mismanagement is a fact that can be proven. Indeed, in this case, the parties introduced substantial evidence regarding the cause or causes of GMR's financial losses. The evidence also established that government contracting was a very competitive business and success was often based on contacts with "the appropriate people." The trial court observed that the evidence showed that the board chairman's statements were made as a matter of fact with the intent to defame plaintiff so that he would not be able to go to Seisint and get employment with them and cut GMR out of the picture.

We conclude that the trial court did not err in ruling that the alleged defamatory statements were not opinion.

Based on plaintiff's testimony and on the board chairman's testimony that he told two Seisint executives that the company lost \$3 million and "we had to let [plaintiff] go," there was sufficient proof of defamation.

There also was sufficient evidence of actual malice to support an award of punitive damages. The board chairman himself testified that he knew plaintiff did not lose \$3 million for GMR and that "it would be false if someone said that." According to one of the Seisint executives, the board chairman called the executive either the day of or the day after plaintiff's termination and told him that plaintiff had mismanaged GMR and lost a tremendous or exorbitant amount of money. Another Seisint executive testified that at a meeting in April, the chairman also initiated the conversation regarding plaintiff stating that plaintiff "had been removed from his job because he lost \$3 million." In neither of these conversations did the chairman mention that the company's

financial situation had been affected by a reduced line of credit, the \$1.1 million loss in the first half of 2001, the \$400,000 accounting error, or the \$1.4 million drop-ship inventory problem, none of which could be attributed to plaintiff.

In summary, the chairman knew his statements were false. He initiated both conversations in which he defamed plaintiff. Our independent review of the record, considering the evidence in the light most favorable to plaintiff, shows clear and convincing proof of actual malice.

Even if the alleged defamation was entitled to a qualified privilege, the privilege would have been lost if the jury found the chairman uttered the statements with actual malice. The jury was required to and did find that the statements were made with actual malice when it awarded punitive damages. Because we have already concluded that the record supports the award of punitive damages, we hold that any failure to instruct the jury on qualified privilege was harmless error.

We hold that the trial court abused its discretion in setting aside the jury verdict of \$5 million on compensatory damages for defamation and in ordering remittitur. We conclude the record does not contain sufficient evidence regarding plaintiff's emotional distress caused by termination from GMR to conclude that the jury included damages based on such emotional distress in its defamation award. Nor does the record support the trial court conclusion that the jury had improperly included in the defamation award economic injuries plaintiff had identified as flowing from his job loss, such as his loss of GMR stock options.

In deciding to order remittitur, the trial court failed to address plaintiff's evidence regarding the injury to his reputation, humiliation and embarrassment. The trial court also failed to acknowledge plaintiff's right to recover greater damages because he presented evidence of his untarnished reputation prior to the defamation and of his fear the defaming remarks reached members of the business community beyond the Seisint executives.

Verdicts for defamation per se are not suitable for comparison because each case is factually unique and because juries are entitled to presume and award compensatory damages even if the plaintiff cannot prove actual injury. We find no merit in GMR's argument that plaintiff's verdict is excessive when compared with other defamation verdicts.

In summary, the alleged defamatory statements were timely and properly pled and proven and were not statements of opinion. Assuming without deciding that the statements were entitled to qualified privilege, the failure to instruct the jury on this issue was harmless error because actual malice was established by clear and convincing evidence. The trial court abused its discretion in setting aside the jury award for compensatory damages based on defamation and in ordering remittitur because the record does not support the trial court's conclusion that the award was excessive or was the product of jury confusion and commingling. Further, the trial court failed to consider elements of recovery upon which the compensatory damage award could be based and the evidence which supported those elements.

We affirm the judgment of the trial court, but reverse that portion of the judgment setting aside the compensatory damage award on plaintiff's defamation claim and ordering remittitur and enter final judgment reinstating the jury verdict on that award.

*Government Micro Resources Inc. v. Jackson* (Lacy, J.) No. 050943, Jan. 13, 2006; Prince William County Cir. Ct. (Millette) E. Duncan Getchell Jr., Robert L. Hodges for appellants; Elaine C. Bredehoft, Kathleen Z. Quill for appellee VLW 006-6-017, 28 pp.

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