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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2012

2110178

Engineered Cooling Services, Inc.

v.

Star Service, Inc. of Mobile

Appeal from Mobile Circuit Court (CV-09-901577)

On Return to Remand

BRYAN, Judge.

On June 8, 2012, we remanded this cause with instructions for the trial court to enter an order stating its reasons for determining that the punitive-damages award in the amount of

$30,000 was not excessive. The trial court has entered such an order, and we will now address the remaining arguments of Engineered Cooling Services, Inc. ("ECS"), regarding the trial court's award of punitive damages.

The trial court's order on remand states:

> "In compliance with the remand instructions, the following are the undersigned's reasons for determining that the punitive damages awarded to the Plaintiff in this trial are not excessive:
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> "1. The undisputed evidence at trial confirms that the industry that Plaintiff Star Service, Inc. of Mobile (hereinafter 'Star') and Defendant Engineered Cooling Systems (hereinafter 'ECS') work in is highly competitive and that gaining knowledge of a competitor's pricing and customer information would be a huge advantage. Furthermore, it was established that when Star first started in Mobile in 2000, it was the only company in the area that focused on fixed-cost maintenance agreements. Defendant Mark Davis (hereinafter 'Davis') started with Star in 2005 and had no prior experience in the commercial [heating, ventilation, and air-conditioning] industry. During the four years he worked at Star, Davis received extensive training from Star and learned how it operated its business.
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> "2. Davis was first approached by Defendant ECS about going to work for them in late 2008 and testified ECS and its President Pete Doyle explained to him that one reason they wanted to hire him and pay him almost two times what he was making at Star was because they wanted to build up their maintenance division of the company and they knew he had been at Star and learned from them.
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> "3. The undisputed evidence is that Davis had

signed an Employee Confidentiality Agreement when he started at Star which among other things prevented him from using, disclosing or removing any of Star's confidential and/or proprietary information and also prohibited him from contacting any of Star's customers for a one year period from the time he left their employment. It was further undisputed that Defendant ECS was put on notice of this agreement by Star both at the time Davis left and again only days later.

"4. The undisputed evidence at trial established that not only did Davis immediately violate the agreement by taking highly confidential documents belonging to Star with him when he left that contained customer lists and pricing information, but that Defendant ECS also intentionally interfered with this agreement between Star and Davis within a few months of Davis becoming an employee when its Vice President and second in command (Ray Rodriguez) and another employee (Joel Beckham) had Davis accompany them to solicit business from companies that were known by all to be Star customers. In fact, it was proven that one of the companies approached by Davis and ECS, Mobile Gas, had just renewed its maintenance contract with Star in late 2008 and it was Davis who had put together and submitted the proposal to Mobile Gas on behalf of Star. Ray Rodriguez, Vice President of ECS, knew Mobile Gas was a Star customer and also knew that Davis had prepared and submitted the proposal for Star and still asked him to go with him to Mobile Gas to solicit their business.

"5. Star put on evidence from two of its customers, Mobile Gas (Danny Caylor) and Mississippi National Guard Readiness Center (John Harnish), and the testimony from both of these witnesses clearly supported Star's position that ECS personnel accompanied Davis to meetings with these customers for the purpose of soliciting their business and that this was all done within the first several

months after Davis left Star's employment.

"6. This Court also finds that the clear and convincing credible evidence in this case establishes that ECS induced Davis to call on other Star customers, namely Dauphin Way United Methodist Church and Holiday Inn Downtown in an effort to solicit their business. Furthermore, this Court finds that ECS also induced Davis to provide them with information relating to the maintenance agreement Star had with The Little Sisters of the Poor, specifically, the price Star was charging for this work, all in violation of the Employee Confidentiality Agreement that ECS was fully aware of.

"7. It was not lost on this Court that after hiring Davis and basically doubling his compensation package, ECS fired him almost a year to the date after hiring him but not before engaging in the conduct set forth above wherein they intentionally and tortiously interfered with the contractual relationship between Star and Davis. After hearing all of the evidence, it is the Court's opinion that Davis' hiring was part of a plan by ECS to gain an unfair advantage in this highly competitive field and that ECS directed and induced Davis to violate his agreement with Star and did so all the while knowing of the Agreement and what was and was not allowed.

"8. This Court finds Defendant ECS's conduct to be premeditated and so reprehensible that the $30,000 punitive damage award is not only not excessive in light of the overwhelming evidence in this case but is justified and necessary in order to punish and properly deter this type of conduct in the future. Regardless of whether ECS was successful in directly stealing away Star customers Mobile Gas, Mississippi National Guard Readiness Center, Dauphin Way United Methodist Church or Holiday Inn Downtown, and even though an exact figure could not be

ascertained regarding lost profits from the Little Sisters of the Poor contract that Star Service lost, the potential harm that was likely to be suffered by Star in the loss of its customers was severe. It is the Court's opinion that the egregious, wrongful conduct by ECS (albeit largely unsuccessful) justifies the punitive damages award in this case.

"9. ECS did not assert that the $30,000 punitive damages award had any significant impact on its financial position.

"10. There is no indication that ECS has already been punished, civilly or criminally, for the conduct which resulted in the punitive damages award.

"11. Finally, although no evidence was submitted as to the litigation cost to Star, the Court notes that Star retained highly competent counsel who presumably did not work for free."

ECS argues that the trial court erred in awarding punitive damages because, ECS says, Mark Davis breached his "Employee Confidentiality Agreement" ("the confidentiality agreement") with Star Service, Inc. of Mobile ("Star"), without being induced to do so by ECS. However, as we indicated in our opinion of June 8, 2012, there was substantial evidence before the trial court that would support a finding that ECS did indeed induce Davis to breach the confidentiality agreement, and the trial court made such a finding in its order on remand. Because that finding is

supported by substantial evidence, we cannot hold that it is erroneous. See Allsopp v. Bolding, 86 So. 3d 952, 959 (Ala. 2011) ("'Under the ore tenus standard of review, we must accept as true the facts found by the trial court if there is substantial evidence to support the trial court's findings.'" (quoting Beasley v. Mellon Fin. Servs. Corp., 569 So. 2d 389, 393 (Ala. 1990))). Therefore, ECS's first argument has no merit.

ECS also argues that the trial court erred in awarding punitive damages because, ECS says, Star was not damaged. However, as we indicated in our opinion of June 8, 2012, there was substantial evidence before the trial court that would support a finding that Star was damaged by the loss of the profit it had derived from its contract to maintain the mechanical heating, ventilation, and air-conditioning ("HVAC") equipment of Little Sisters of the Poor ("Little Sisters"), and the trial court made such a finding in its order on remand. Because that finding is supported by substantial evidence, we cannot hold that it is erroneous. Id. Therefore, we find no merit in ECS's second argument.

Finally, ECS argues that the trial court's award of

punitive damages is excessive because, ECS says, the ratio of punitive damages to nominal damages is greater than 3 to 1. An appellate court applies a de novo standard of review to a trial court's determination regarding whether a punitive-damages award is excessive. See Ross v. Rosen-Rager, 67 So. 3d 29, 41 (Ala. 2010).

> "In reviewing a punitive-damages award, we apply the factors set forth in Green Oil[Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)], within the framework of the 'guideposts' set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and restated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003). See AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001) (Green Oil factors remain valid after Gore).
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> "The Gore guideposts are: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' Campbell, 538 U.S. at 418, 123 S.Ct. 1513. The Green Oil factors, which are similar, and auxiliary in many respects, to the Gore guideposts, are:
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> > "'(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] misconduct; (4) [the defendant's] financial

> position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has been subject to criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct.'

> "Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (paraphrasing the Green Oil factors)."

Ross, 67 So. 3d at 41-42.

Reprehensibility: The First Gore Guidepost and Green Oil Factor (1)

"'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (quoting BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996)). For purposes of the first Gore guidepost, the degree of reprehensibility of the defendant's conduct should be determined by considering whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere

accident." State Farm, 538 U.S. at 419. In the present case, ECS's tortious conduct caused economic harm rather than physical harm. Moreover, its tortious conduct did not evince an indifference to or a reckless disregard of the health or safety of others. Furthermore, there is no evidence indicating that Star, the target of ECS's tortious conduct, was financially vulnerable. However, in its order on remand, the trial court found that ECS's tortious conduct was intentional and premeditated and that it involved repeated actions rather than an isolated incident. As we indicated in our opinion of June 8, 2012, there was substantial evidence before the trial court that would support such findings. Therefore, we must accept them as true. See Allsopp, 86 So. 3d at 959.

> "'Our assessment of the degree of the reprehensibility of the defendant's conduct is broader in a Hammond/Green Oil review than our assessment in a [Gore] review.' Employees Benefit Ass'n v. Grissett, 732 So. 2d 968, 980 (Ala. 1998). In that regard, we consider '"[t]he duration of the conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover up' of that hazard, and the existence and frequency of similar past conduct."' Green Oil, 539 So. 2d at 223 (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially))."

Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003).

In the present case, in its order on remand, the trial court found that ECS had engaged in its tortious conduct over a period of months and that ECS was aware that its tortious conduct, if successful, would cause Star economic harm. As we indicated in our opinion of June 8, 2012, there was substantial evidence before the trial court that would support such findings. Therefore, we must accept them as true. See Allsopp, 86 So. 3d at 959. There is no evidence indicating that ECS concealed a hazard or that it had engaged in similar tortious conduct in the past.

Because ECS intentionally engaged in repeated tortious acts over a period of months with the awareness that its tortious acts, if successful, would cause Star economic harm, we conclude that the first Gore guidepost and Green Oil factor (1) weigh in favor of a finding that the trial court's punitive-damages award is reasonable.

Proportionality: The Second Gore Guidepost and Green Oil Factor (2)

As noted above, ECS argues that the punitive-damages award is ipso facto excessive because the ratio of punitive damages to nominal damages is greater than 3 to 1. In State Farm, 538 U.S. at 425, the United States Supreme Court stated

that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." However, that court has also stated that there is no "bright-line ratio which a punitive damages award cannot exceed," State Farm, 538 U.S. at 425, and that

> "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."

Gore, 517 U.S. at 582.

The United States Supreme Court has not addressed the application of the second Gore guidepost in a case in which only nominal and punitive damages have been awarded. In Tanner v. Ebbole, 88 So. 3d 856, 875-76 (Ala. Civ. App. 2011) (opinion on return to remand), a plurality decision, this court stated:

> "When substantial punitive damages are awarded in a case with only nominal compensatory damages, the ratio will invariably far exceed a single-digit ratio. Although the issue has not been addressed in Alabama, many other courts have struggled with applying the ratio or 'proportionality' guidepost of Gore when only nominal compensatory damages have

been awarded. See Arnold v. Wilder, 657 F.3d 353, 370 (6th Cir. 2011) (stating that the '"Supreme Court's cases on the ratio component of the excessiveness inquiry -- which involved substantial compensatory damages awards for economic and measurable noneconomic harm -- are ... of limited relevance" in § 1983 cases where "the basis for the punitive damages award was the plaintiff's unlawful arrest and the plaintiff's economic injury was so minimal as to be essentially nominal"' (quoting Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 645 (6th Cir. 2005))); Mendez v. County of San Bernardino, 540 F.3d 1109, 1121 (9th Cir. 2008) (upholding a 125,000-to-1 ratio in a § 1983 case and concluding that '[r]atios in excess of single digits in § 1983 suits ... will not generally violate due process when the victim suffers no compensable injury'); Abner v. Kansas City Southern R.R., 513 F.3d 154, 164 (5th Cir. 2008) (upholding a punitive-damages award of $125,000 for each plaintiff in a Title VII racial-discrimination case when the jury awarded each plaintiff $1 in nominal damages and stating that, 'as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant'); Romanski, 428 F.3d at 645 (stating that '[t]his Court and other courts have recognized that where "injuries are without a ready monetary value," such as invasions of constitutional rights unaccompanied by physical injury or other compensable harm, higher ratios between the compensatory or nominal award and the punitive award are to be expected'); Kemp v. American Tel. & Tel. Co., 393 F.3d 1354, 1364 (11th Cir. 2004) (reducing punitive damages of $1 million to $250,000 when plaintiff was awarded $115.05 in compensatory damages and stating that a single-digit multiplier ratio 'would utterly fail to' punish and deter the defendant); Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (stating that 'any punitive damages-to-compensatory damages "ratio analysis" cannot be applied effectively in cases where only nominal damages have been awarded');

> Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella, 350 F.3d 73, 88 (2d Cir. 2003) (stating that 'the ratios referred to in [State Farm] may not apply with equal force when punitive damages are compared to nominal damages'); DiSorbo v. Hoy, 343 F.3d 172, 187 (2d Cir. 2003) (noting that, when nominal compensatory damages are awarded, '"the use of a multiplier to assess punitive damages is not the best tool...."' (quoting Lee v. Edwards, 101 F.3d 805, 811 (2d Cir. 1996))); Lee, 101 F.3d at 811 (holding that, when compensatory damages are nominal, 'a much higher ratio [of punitive damages to compensatory damages] can be contemplated'); Sherman v. Kasotakis, 314 F. Supp. 2d 843, 871 (N.D. Iowa 2004) (stating that 'the ... prudent path [when an award of compensatory damages is nominal] is to apply the Gore guideposts, but [to] place less emphasis on the proportionality requirement'); Howard Univ. v. Wilkins, 22 A.3d 774, 784 (D.C. 2011) (upholding punitive-damages award of $43,677.50 when plaintiff was awarded $1 in compensatory damages and stating that, because '"[p]unitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition," .... there is no need to disturb the jury's punitive damages award under the second Gore guidepost' (quoting Gore, 517 U.S. at 568)); and [Lawnwood Med. Ctr., Inc. v.] Sadow, 43 So. 3d [710] at 732 [(Fla. Dist. Ct. App. 2010)](stating that '[n]othing in [Gore] and State Farm hints how an arithmetical ratio used in cases of purely economic misconduct would function' in a case in which the jury awarded zero compensatory damages and $5 million punitive damages for slander)."

In the present case, because Star could not prove the specific amount of the profits it lost as a result of losing the contract to maintain Little Sisters' mechanical HVAC

equipment, the trial court awarded nominal damages in the amount of $1 only. Consequently, adherence to a single-digit ratio of punitive damages to nominal damages in the present case would result in a maximum punitive-damages award of $9, while the 3-to-1 ratio advocated by ECS would result in a punitive-damages award of $3. Alabama has "legitimate interests in punishing unlawful conduct and deterring its repetition." Gore, 517 U.S. at 568. Considering the reprehensibility of ECS's tortious conduct, neither an award of $3 nor an award of $9 would effectively punish ECS for its tortious conduct or deter it from repeating it.

In Tanner, supra, the trial court's judgment, which was entered on a jury verdict, made awards of nominal damages and punitive damages against each of the three defendants. The judgment made an award of nominal damages in the amount of $1 and an award of punitive damages in the amount of $100,000 against one of the defendants, Paul Averette, Jr. Thus, in the case of the awards against Averette, the ratio of punitive damages to nominal damages was 100,000 to 1. Nonetheless, a plurality of this court upheld the punitive-damages award against Averette. 88 So. 3d at 881-82. The plurality concluded

that, given the reprehensibility of Averette's conduct and the fact that nominal damages of only $1 had been awarded, the application of a strict ratio analysis would undermine Alabama's legitimate interests in punishing unlawful conduct and deterring its repetition. 88 So. 3d at 876. The same is true in the present case.

In Gore, the United States Supreme Court stated: "Only when an award [of punitive damages] can fairly be categorized as 'grossly excessive' in relation to [a state's interests in punishing unlawful conduct and deterring its repetition] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 568. In the present case, we conclude that, given the reprehensibility of ECS's conduct and the fact that nominal damages of only $1 were awarded, the trial court's award of punitive damages in the amount of $30,000 cannot be characterized as "grossly excessive" in relation to Alabama's legitimate interests in punishing unlawful conduct and deterring its repetition. Accordingly, we conclude that the second Gore guidepost and Green Oil factor (2) do not weigh in favor of a finding that the punitive-damages award in the

present case is excessive.

ECS's Profit from Its Misconduct:
Green Oil Factor (3)

ECS did not introduce any evidence relating to this factor in the trial court and does not argue on appeal that this factor weighs in favor of a finding that the punitive-damages award is excessive.

The Financial Position of ECS:
Green Oil Factor (4)

ECS did not introduce any evidence relating to this factor in the trial court and does not argue on appeal that this factor weighs in favor of a finding that the punitive-damages award is excessive.

The Cost to the Plaintiff of the Litigation:
Green Oil Factor (5)

The record contains no evidence regarding this factor, and ECS does not argue that it weighs in favor of a finding that the punitive-damages award is excessive.

Sanctions for Comparable Conduct:
The Third Gore Guidepost and
Green Oil Factors (6) and (7)

The record contains no evidence indicating that ECS was subject to civil or criminal sanctions for its tortious conduct or that it had been involved in other civil actions

arising out of similar tortious conduct. Moreover, ECS does not argue that this Gore guidepost and these Green Oil factors weigh in favor of a finding that the punitive-damages award is excessive.

In summary, the first Gore guidepost and Green Oil factor (1) weigh in favor of a finding that the trial court's award of punitive damages in the amount of $30,000 is reasonable, and none of the Gore guideposts or Green Oil factors weigh in favor of a finding that that award is excessive. Accordingly, we conclude that the trial court's award of punitive damages in the amount of $30,000 is not excessive, and, therefore, we affirm the trial court's judgment with respect to that award.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.