

No. 19-2086

IN THE SUPREME COURT OF IOWA

JERRY HOFFMAN, and HOFFMAN INNOVATIONS, INC.,
d/b/a DIY AUTOTUNE,

Plaintiffs-Appellees,

v.

SCOTT CLARK, and REALTUNERS, LLC.,

Defendants-Appellants.

Appeal from

Pottawattamie County District Court, District Court No. LACV116501,
the Honorable Susan Christensen presiding over pretrial proceedings until
September 1, 2018;
and the Honorable Margaret Reyes presiding over pretrial proceeding
following September 1, 2018, trial, and posttrial proceedings.

**FINAL BRIEF BY JERRY HOFFMAN and HOFFMAN
INNOVATIONS, INC., d/b/a/ DIY AUTOTUNE**

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HOFFMAN INNOVATIONS, INC., d/b/a DIY AUTOTUNE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellees agree with Appellants' Statement of the Issues and add that whether Appellants' properly preserved most of their arguments is also at issue, as is whether Appellants have waived any arguments as to the propriety of damages awarded for breach of contract and breach of fiduciary duty by failing to address those damages in any meaningful way in their Brief. (Issue "V" below).

I. Whether the Striking of Pleadings was Justified and the Admitted Facts were Properly Submitted?

Cases

FoGe Invs., LLC v. First Ntl. Bank of Wahoo, 2015 Iowa App. LEXIS 572 (Iowa Ct. App. 2015)

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Krugman v. Palmer College of Chiropractic, 422 N.W.2d 470, 474 (Iowa 1988)

Seneca Waste Solutions, Inc. v. D&K Managing Consultants, LLC, 2015 Iowa App. LEXIS 155 (Iowa Ct. App.) (unpublished)

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Iowa Rule Civ. P. 1.602

II. Whether the court was Justified in Granting Hoffmann's Motion in Limine?

III. Whether the Damages Award was Justified?

Cases

Hockenberg's Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153 (Iowa 1993)

Kuta v. Newberg, 600 N.W. 2d 280 (Iowa 1999)

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

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Rules

Iowa R. Civ. P. 1.1004

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Iowa. Code Section 668A.1

IV. Whether the Award of Attorneys' Fees was Justified?

Cases

Baldwin v. City of Estherville, 929 N.W.2d 691 (Iowa 2019)

Hockenberg's Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153 (Iowa 1993)

IV. Whether Appellants Abandoned their Contract and Breach of Fiduciary Duty Claims?

ROUTING STATEMENT

Appellees agree that this Court would be justified in transferring the matter to the court of appeals, as it presents the application of existing legal principles.

STATEMENT OF THE CASE

Nature of the Case:

This case had the potential to be a fairly standard dispute between former employee and employer. Hoffmann alleged that ex-employee Clark competed with Hoffmann while employed, using Hoffmann property that Clark then retained; that Clark was terminated; that Clark threatened at termination to cause problems for Hoffmann on social media if Hoffmann did not pay him a severance; that Hoffmann refused; that Clark opened a competing entity in violation of a non-compete agreement; and that upon termination, Clark immediately made good on his threats by repeatedly

publishing that Hoffmann knowingly sold defective and fire-prone products out of greed.

What resulted – as noted by the court as being entirely due to Clark’s countless intentional violations of court orders and warnings, is a case unlike any that the two district judges or the lawyers on the case have ever seen.

Through **twelve** motions for sanctions against Clark – all granted and resulting in monetary sanctions, awards of attorneys’ fees, the striking of Defendants’ pleadings and Clark’s repeated incarceration, Clark continuously published false and disparaging remarks about Hoffmann on industry Facebook and web pages, including under aliases (Aug. 13, 2018 Tr. 11:18-25; 19:1-4; 36:3-17; APP VOL III - 411); encouraged others to do so in an effort to destroy Hoffmann; insulted and mocked the assigned judges and the Iowa judicial system; threatened the lawyers with bodily harm; acknowledged his obligations under court orders and then bragged about never honoring them; told the trial judge he would not provide materials as ordered; told the judge he would not appear for contempt hearings as ordered; refused to produce a full Facebook history of all accounts which he used to disparage Hoffmann; and caused an incredible amount of unnecessary delay and expense.

Prior to trial, Appellees filed a Statement of Facts to be presented to the jury – based on the Petition and deemed admitted by the striking of Defendants’ pleadings. Appellants did not respond.

Hoffmann filed a Motion in Limine that was sustained, preventing introduction of evidence that would raise a defense to Defendants’ actions. Clark did not appear for trial and the jury entered a verdict for Plaintiffs.

Defendants appeal, arguing they are entitled to a new trial.

Course of Proceedings:

Appellees agree generally with Appellants’ “Course of Proceedings” and address further relevant points in the Facts section below.

Statement of Facts:

Hoffmann manufactures and sells various versions of a technical product called MegaSquirt (“MS”), including the MegaSquirt Pro, that makes automotive engines perform better. (Aug. 20, 2019 Tr. 73:7-9). There are thousands of settings and it is a complicated product. (Aug 20, 2019 Tr. 74:20-25).

Clark worked for Hoffmann as an engine tuner. (Def.s’ Brief, p. 20).

Clark is very skilled at what he does and has a huge network of people that come to him for technical advice – and he has a huge Facebook following. (Aug 21, 2019 Tr. 139:7-14).

There are many industry Facebook pages and other websites where those interested in engine performance and Megasquirt can review products and discuss related issues. (APP VOL I – 292, 293, 295, 5th Motion for Sanctions, ¶¶ 9-11, 16-17, 27; Aug 21, 2019 Tr. 62:10-25).

On August 4, 2016, Hoffmann fired Clark for insubordination via a phone call. (Appellants' Brief, p. 20-21). During the recorded call, tendered at trial, Clark threatened that if Hoffmann did not pay Clark a severance, Clark would cause Hoffmann problems online. Id.

Clark previously offered to do the same to a Hoffmann competitor for Hoffmann, a request Hoffmann declined. (Aug 20, 2019 Tr. 1-22; Vol. III 431).

Hoffmann refused to pay Clark the severance and Clark quickly made good on his threat – smearing Hoffmann, its professional judgment and abilities. (Appellants' Brief, pp. 20-21; Vol. III 478).

Clark published that Hoffmann was dishonest and knowingly sold defective products that could lead to vehicle fires - out of greed, and that Hoffmann practices destroyed car engines. (Aug 21, 2019 Tr. 78:10-16).

Clark opened RealTuners, which Hoffmann contended violated a noncompetition agreement Clark signed. (Appellants' Brief, p. 21).

RealTuners started a weekly podcast and Clark’s audience tuned in. (Aug 21, 2019 Tr. 139:7-14).

Hoffmann filed a Petition on July 28, 2017 and the case was assigned to the Hon. Susan Christensen. Defendants filed an Answer and Counterclaims.

Hoffmann alleged after filing the Petition that Clark continued to make false and negative statements about him online. (APP VOL I – 34, ¶ 1,).

Naturally, damages due to disparaging online statements are difficult to quantify – i.e., which prospects/customers/business partners saw the statements; which of them decided to act and/or not do business with someone as a result of the statements; and how did it affect the victim?

To minimize these damages, limit the issues for trial, govern the Parties pre-trial conduct through discovery and provide a mechanism for removing and producing such postings via discovery, the Parties submitted a **Joint** Motion for Entry of Consent Order. (APP VOL I - 34, ¶ 3).

The Joint Motion made clear that the purpose of the proposed order was to “narrow the scope of litigation and avoid additional causes of action...” by restricting any disparaging publication regarding another

party's "...services, products, employees or abilities...", true or not, or providing a forum for anyone to do so. (APP VOL I – 34-35, ¶ 3, 5, 7).

The Consent Order enjoined the Parties from making or filing any complaint or charge against each other. (APP VOL I - 46, ¶ 6). The Consent Order required that in the event a Party was contacted by anyone about an adverse party to the case, they respond, "I cannot comment. The Parties are involved in litigation." (APP VOL I - 47, ¶ 10). The Consent Order warned that any violation could result in the imposition of sanctions. (APP VOL I - 48, ¶ 13).

And once the Consent Order was entered, Scott Clark made this case extraordinary.

The day after the Consent Order was entered, Clark wrote on Facebook that he "wouldn't run the latest [Hoffmann] MS3pro stuff, just an FYI on that. Problems." (APP VOL I – 52, 59, Motion for Sanctions, ¶ 16; Aug. 21, 2019 Tr. 56:11-13; APP VOL III - 288). That comment was viewed by others and led to an online "discussion." (APP VOL I – 52, ¶ 17).

Hoffmann's counsel advised Clark's counsel about the issue and warned that a subsequent violation would be brought to the Court's attention with a request for fees and sanctions. (Id. ¶18).

Several hours later, Clark took a question about the MS3 Pro on his podcast, stating, “I only have about 36 more hours before I can’t talk about [Hoffmann] due to a court order...and I shit you not.” Id. ¶ 20.

On January 26, 2018, Clark responded to an online question – not even directed to him, about Hoffmann’s product and advised that the competitor’s product is easier to use, suggesting the MS3Pro is difficult to use. (APP VOL I – 53, ¶ 22-23; 70).

Someone later wrote that he was considering purchasing an MS3Pro. (APP VOL I – 53; 83-84). Clark urged him to be careful and suggested that Hoffmann customers were having “...the most issues and the least enjoyment.” (APP VOL I – 53, ¶ 25; 83-84).

Clark elsewhere addressed a Facebook post about the MS3Pro, offered that another product was superior and suggested that someone who posted positively about Hoffmann was “paid cavalry,” meaning Hoffmann paid people to say good things about his products. (APP. VOL I - 53 ¶ 26; 86-88; 94; 204).

During Clark’s February 20, 2018 RealTuners podcast he acknowledged that he was not permitted to give a forum to disparage Hoffmann (without actually naming Hoffmann) and he and/or his co-hosts laughed about the restriction. (APP VOL I – 54, ¶ 29).

Throughout February and March 2018, Clark made such comments (APP VOL I – 54, ¶ 27-30; 55, ¶ 31; 108; 120; 121), forcing Hoffmann to file a Motion for Sanctions and a request to strike Clark’s Answer and Counterclaims (APP VOL I – 55, ¶ 36).

The Court held a hearing and sustained Hoffmann’s motion, concluding that Clark violated the Consent Order as alleged; and awarded Hoffmann associated fees and expenses; and warned Defendants regarding future violations, including a \$10,000 payment into the registry to be made upon future violations. (APP VOL I - 127-129). To date, Defendants have not paid anything.

Several hours after the Order was served, Clark admittedly got on his Realtuners podcast and repeatedly sang “... justice for sale,” suggesting that Hoffman paid the court for the Order entered hours before. (APP VOL I – 133, ¶ 15, 19; Apr. 26, 2018 Tr. 6:13-25; 7:1-13, 19-25; 8:1-21).

Clark, again acknowledging the Consent Order’s prohibitions, asked if his co-hosts received their “lecture” on what they could discuss and stated in mocking fashion that they should stay away from discussing “fuel injection” – a reference to Hoffmann products. (APP VOL I – 133, ¶ 16).

Hoffmann immediately filed a Second Motion for Sanctions. (APP VOL I – 130).

The following day, Defendants' attorney moved to withdraw, citing a "breakdown" in the attorney-client relationship. (APP VOL I - 139, ¶ 1).

On April 19, 2018, Hoffmann filed a Motion for Contempt and again requested the striking of Defendants' Answer and Counterclaims, arguing that monetary sanctions were not working as a punishment/deterrent and were not being paid. (APP VOL I – 158, 159, ¶ 5).

On April 26, 2018, the trial court held a hearing on the pending motions and saw additional evidence in the form of a message that Clark sent his RealTuners podcast co-hosts (and did not produce via discovery), admitting that he was not permitted to disparage Hoffmann; that he nevertheless violated the Consent Order; that he was willingly and knowingly "violating" the "Gag Order" by sending the secret message and reminding them that they were free to disparage Hoffmann if they chose. (APP VOL I – 162, 165; Apr. 26, 2018 Tr. 19:14-25).

Judge Christensen found that Clark suggested she and justice could be purchased and that Clark, beyond a reasonable doubt, violated the Consent Order again as alleged in Hoffmann's Second Motion. (Apr. 26, 2018 Tr. 33:2-25; 34:1-8; 35:1-25; APP VOL I - 162).

The trial court expressed its frustration that Clark would not comply with the Consent Order and the order from the hearing on the first Motion

for Sanctions. (Id.) The trial court noted that Clark’s publications were hurting Hoffmann and that it was difficult to put a figure on the damages that Defendants were causing him. (Apr. 26, 2018 Tr. 35:7-25). The Court warned Clark that it believed Clark was intentionally violating the Consent Order because he knew how to target the audience of Hoffmann customers and prospects and make things worse for Hoffmann and complicate the case.” (Apr. 26, 2018 Tr. 62:8-18).

Clark admitted that he impugned the Court and apologized and agreed to “accept whatever the Court rules.” (Apr. 26, 2018 Tr. 61:1-7, 19-20).

The trial court warned Clark that the April 2018 hearing was the second time it was ordering him to cease violations of the Consent Order (Apr. 26, 2018 Tr. 62:21-25; 63:1-20). The court warned that Clark was affecting the litigation but also impugning the entire judicial system; and the court’s prior efforts with sanctions upon Defendants were not working and the misconduct was worsening. (Apr. 26, 2018 Tr. 63:1-21).

The trial court again ordered Clark to pay Hoffmann fees and costs - and to pay \$10,000.00 into the registry. (APP VOL I – 162-164). The trial court hoped it would not to have to consider additional sanctions (Aug. 26, 2018 Tr. 65:3-10).

Instead of paying anything and heeding warnings, Clark continued the course, disparaging Hoffmann, including referring to Hoffmann as a “shitty ecu manufacturer” that pays “people to spread stories.” (APP VOL I – 170, Third Motion for Sanctions. ¶24)¹; admittedly referring to a Hoffmann customer’s wife as a “Stank C**t;” and again mocking the trial court by noting his obligations and adding, “Oh, almost forgot. I cannot comment. The parties are in Litigation – just making sure.” (APP VOL I -- 170 ¶ 24, 36, 37; 172, ¶ 36-37; 194; 275-276; APP VOL III – 279-280; Aug. 13, 2018 Tr. 15:8-21; Aug 21, 2019 Tr. 54:13-25).

During these online discussions, someone re-posted a previous Clark post where he claimed Hoffmann products caused a vehicle fire. (VOL I – 172; 199).

Subsequently, Hoffmann filed a Fourth Motion for Sanctions, when he discovered that Clark filed on April 25, 2018 – a day before the Parties were before the trial court, a Petition for Protection against him which had

¹ Clark repeatedly violated the Consent Order by publishing that Hoffmann paid others to comment online about the case. Clark tried to excuse his admitted violations of the Consent Order by blaming those “hired guns” for “baiting” him (May 21, 2018 Resistance, VOL I – 204, ¶ 3; Aug. 14, 2018 Tr. 72:2-5; 83:25; 84:1-2).

not been brought to Hoffmann or the court's attention. (APP VOL I – 208-210, ¶ 4; Aug. 13, 2018 Tr. 18:4-19).

The Petition included (1) an affidavit from Clark's fiancée making disparaging claims against Hoffmann; (b) communications about Hoffmann and weapons he allegedly carried; and (c) allegations of Hoffmann's "violent criminal background." (APP VOL I – 215-218, ¶ 8; Aug. 13, 2018 Tr. 19:20-25).

Clark did not say anything about the Petition or any fear of Hoffmann – who lived in Georgia, at the April 26, 2018 hearing and it appeared to the court that Clark filed a baseless Petition, unconcerned with the effect on Hoffmann or the Court's resources, to hurt Hoffmann for filing motions for sanctions against Clark (APP VOL I – 276-278). Furthermore, Clark's Petition appeared to contain evidence manipulated (copied/pasted/deleted) by Clark, to make Hoffmann appear threatening. (Aug. 14, 2018 Tr. 21:1-25; 22:1-25; 24:17-25, 25:1-5 and exhibits thereto;). Aug. 14, 2018 Tr. 90:10-21; APP VOL I – 276-278).

The Consent Order precluded such a filing without first bringing it to the court's attention. (APP VOL I – 278, ¶ 11-12).

On July 12, 2018, Hoffmann filed a Motion to Compel production of,

among other things, Defendants' Facebook histories, since it became clear that full copies of discoverable communications naming Hoffmann had not been produced by Clark. (APP VOL I - 222-232; Aug. 14, 2018 Tr. 36:23-25; 37:1-25; 38:1-9; APP VOL I - 280-281).

Clark claimed his Facebook history was too large and it contained confidential information (Aug. 14, 2018 Tr. 49:1-12)

On August 7, 2018, Hoffmann served a subpoena on Clark, requiring him to bring sought discovery responses, communications with an out of state lawyer about the case and Facebook documents to the scheduled August 13, 2018 hearing (APP VOL I - 273; Aug. 13, 2018 Tr. 79:22-25; 80:1-10; 89:5-25; 90:1-14).

The hearing was held. (Aug. 13, 2018 Tr., p.1). Clark ignored Hoffmann's subpoena. (APP VOL I - 273; Aug. 14, 2018 Tr. 79:22-25; 80:1-10; 89:5-25; 90:1-14).

The court acknowledged that the pending motions for sanctions and to compel the Facebook documents "went to the heart of the case" (Aug. 13, 2018 Tr. 6:14-15). Clark admitted that financial sanctions could not be paid (Aug. 13, 2018 Tr. 75:7-9, 19-25).

While Clark argued that he provided Facebook documents, he

admittedly used aliases on Facebook – for which he did not provide documents and the court found this to be “deceitful.” (Aug. 13, 2018 Tr. 78:18-23; 80:12-25; 81:1-6, 23:25).

The court made a finding that it had warned Clark previously about violating the Consent Order; that financial sanctions had no effect because he could not pay; that he would do anything on the internet to destroy Hoffmann’s business and that lesser sanctions had not worked. (Aug. 13, 2018 85:5-25; 86:1-20).

The court requested authority under which it could strike Defendants’ pleadings and Defendants had the opportunity to respond. (Aug. 13, 2018 Tr. 93:12-25; 94:1-21).

On August 24, 2018, the court conducted a telephonic hearing. (APP VOL I – 265; 275).

On August 31, 2018, the court entered an order striking Defendants’ Answers and Counterclaims, finding Clark violated the Consent Order as alleged in the Third and Fourth Motions and that he intentionally mocked Hoffmann and the court. (APP VOL I - 276).

The court found Clark’s Petition for Protection violated the Consent Order and was especially troubled by perceived falsification of evidence in the exhibits Clark filed (APP VOL I – 276-278).

The court found that Clark potentially filed a baseless Petition to hurt Hoffmann, without regard for the effect on Hoffmann or the court. (APP VOL I – 276-277). The court noted that Clark had been repeatedly warned and sanctioned by the court for his intentional violations of the Consent Order; that he had been found in contempt and ordered to pay money to Hoffmann and into the court registry; that Clark ignored those orders; filed a baseless Petition and continued “his reckless pattern with apparent disregard for the Court’s Order.” (APP VOL I - 278).

The trial court noted that Hoffmann repeatedly asked the court to strike Clark’s Answer and Counterclaims as a sanction for Clark’s willful ongoing contempt and the court considered it but previously repeatedly opted for less severe sanctions to help bring about compliance with the Consent Order. (APP VOL I - 278). The court found that as evidenced by Clark’s continued misconduct after every hearing, he was not moved or affected by the sanctions imposed against him and the court was unable to gain Clark’s compliance and Clark continued to operate as he wanted to, in disregard of the court’s orders. (APP VOL I - 279).

The court also ordered Clark to provide the login and password for all Facebook accounts he posted under; and the communications between him

and an out of state lawyer that was suspected of assisting Clark, as Clark ignored Hoffmann's subpoena for this information. (APP VOL I - 281).

And then - after Defendants' pleadings and counterclaims were stricken and the Fourth Motion granted, and by Clark's admission, he "really amped it up." (Dec 19, 2018 Hearing Tr. 67:7-17).

The case was subsequently assigned to The Hon. Margaret Reyes, who heard the following issues² and presided over the trial.

Despite the striking of Defendants' pleadings and counterclaims, Clark continued to violate the Consent Order. (Dec 19, 2018 Hearing Tr. 77:12-20).

Clark continued with his same comments and allegations; comparing Hoffmann to a Nazi (APP VOL I – 307; 320); again suggested product problems and that Hoffmann compensated people to harass Clark; (APP VOL I – 306, ¶ 83; 307-308; 321; 326; 331; APP VOL III - 322). He suggested that Hoffmann's business future was in doubt because his business partner "moved on." (APP VOL I – 331, ¶ 100).

² Even if the Court doubled the word limit here, it would be impossible to show herein the text of every order violation. Hoffmann provides some of them as they are relevant to the propriety of the jury's award and Clark's argument that sanctions less than striking pleadings were warranted or would have had some different effect on him.

Clark again acknowledged that he was not supposed to publish such things but promised to dedicate a future series of podcasts to them. (APP VOL I – 317, ¶ 85; 412-413; Aug 21, 2019 Tr. 69:7-25; Aug 21, 2019 Tr. 70:16-25).

Clark advised Hoffmann’s lawyers that he would not turn over his Facebook information or communications with the out of state lawyer who helped him in this case, regardless of the court’s August 31, 2018 order striking his counterclaim and answer. (APP VOL I - 304, ¶ 77; 313).

In response to Hoffmann’s Fifth Motion, Defendants launched an online campaign that included further disparagement of Hoffmann and the allegation that he knowingly sold faulty products. (APP VOL I - 356, ¶ 4; 360, ¶ 18; 370; 399-410).

Clark changed his public Facebook profile picture to read “Stop [Hoffmann] lawsuit REALTUNERS.COM/LEGALFUND” and solicited legal funds from his audience – by violating the Consent Order (APP VOL I – 356; 369; APP VOL III - 304).

Clark wrote that the court was a “rodeo” and suggested that Judge Reyes was corrupt, allegedly haven been taken “to lunch” by Hoffmann’s lawyers and that the judge was siding with Hoffmann’s lawyers because

they were a tight-knit group.” (APP VOL I – 356, ¶ 5; 371, ¶ 11, 12; 358 ¶ 11-12; 382-397; Dec 19, 2018 Tr. 52:3-15).

Clark bragged that he was in contempt and he would likely be incarcerated but repeatedly urged the public on various industry pages (including under another alias) to bombard Hoffmann with communications so that Hoffmann would drop the case. (APP VOL I – 290; 291; 292; 296; 297; 300; 304; 357-359; 377-379; 416-419; Aug 21, 2019 Tr. 62:10-25; APP VOL III - 290, 291, 292, 296, 297, 300, 304).

Clark suggested he would accept incarceration for refusing to turn over Facebook histories as ordered, writing, “No, you cannot have our customers’ contact and financial information – ever.” (APP VOL I – 361, ¶ 29; 421; APP VOL III - 314).

Clark published Hoffmann and his business partners’ phone numbers and urged the public to contact them to pressure Hoffmann to drop the case. (Aug 21, 2019 Tr. 61:9-18; 64:22-25; 65:1-9; 66; Vol III 296-297).

Clark knew that if Hoffmann’s business partners grew weary of contact about the lawsuit, that could be fatal to Hoffmann’s business. (Aug 21, 2019 Tr. 65:21-25; 66:1).

Clark wrote Hoffmann’s partners and threatened that if Hoffmann did not drop the lawsuit, Clark would stop supporting their products and

would report them to various racing and governmental organizations and entities. (Aug 21, 2019 Tr. 86:1-25; 87:88; 89; 90:12-25; APP VOL III - 477).

Clark falsely advised Hoffmann's business partners that Hoffmann knowingly sold faulty products. (Aug 21, 2019 Tr. 89:19-25; 90:1-7).

Clark publicly referred to the case as a "...Bullshit Lawsuit" and wrote, "...heads up. It's a Civil suit which is a joke..." (APP VOL I – 361; 363, ¶ 36; 415; 457; 481).

The Court issued a Rule to Show Cause on November 21, 2018, directing Clark to bring his Facebook history to a scheduled hearing on November 29, 2018.

Clark ignored that mandate (APP VOL II - 6, ¶ 3; 72-74). The Court again ordered Clark to produce the Facebook data. (Dec. 19, 2018 Hearing Tr. 7-25; 8, 9; 28:11-21).

The court found that Clark again "really ramped up" the violations right before the November 29, 2018 hearing with postings, soliciting funds and changing the RealTuners page image to a jail cell with the words "Free Realtuners" behind bars and disparaging Hoffmann. (Dec 19, 2018 Tr. 75:18-22).

After the warning, Clark re-posted the “Free Realtuners” image on various industry forums. (APP VOL II – 10, 11, ¶ 21; 31-33; Dec. 19th, 2018 Hearing Tr. 32:17-25; 46:1-22; June 27, 2019 Hearing Tr. 55:20-23; Aug 21, 2019 Tr. 57:57:1-3).

Clark **told the Court** at the November 29, 2018 hearing that he would not produce his Facebook information despite a court order to do so. (APP VOL II – 6, ¶ 4; 72-74; Dec. 19, 2018 Hearing Tr. 28:11-21).

The court told Clark on November 29, 2018 that Clark was to stop posting anything about Hoffmann, the lawsuit or the court and that the court would not tolerate Clark mocking the court. (Dec. 19, 2018 Hearing Tr. 6:17-25; 7:1-2; 65:6-20; 74:11-25; APP VOL II - 73). The court warned Clark that he was facing incarceration due to his willful violations. (APP VOL II – 73-75).

Clark left the hearing and immediately fielded Facebook questions about how the hearing went, prompting a Sixth Motion for Sanctions. (APP VOL II - 7, ¶ 7-8; 15-16). Clark continued to acknowledge that he could not discuss Hoffmann or the case. (APP VOL II – 7, ¶ 8; 15).

Clark filed a Suggestion of Bankruptcy on December 6, 2018 pursuant to the advice of another lawyer, trying to stay the case and the pending motions for sanctions (APP VOL II – 2, 34). Clark then posted a picture of

the “Get Out of Jail Free Card” from the game “Monopoly” to mock the court. (APP VOL II – 10, ¶ 20; 25-27; December 19, 2018 Tr., 5:16-25; 6:1-5;).

Clark, apparently believing that the lawsuit and the pending contempt issues were stayed, took to Facebook to gloat and admitted that he never intended to comply with orders. (APP VOL II -56, ¶ 17; 62-63; Dec 19, 2018 Hearing Tr. 36:3-10; 47:3-25; 48:1-9; 51:18-25; 52:1-2).

He wrote, “...Under no circumstances will I be releasing confidential information or intellectual property (your tune files!) to third parties without permission. Period... (Dec 19, 2018 Hearing Tr. 48:20-25; 49:1-21).

A non-party responded, writing as to Hoffmann and the court, “That’s awesome...fuck those dick bags hahaha.” (APP VOL II - 56, ¶ 15; Dec. 19, 2018 Hearing Tr. 51:7-8).

A Hoffmann customer, relying on Clark’s publications about Hoffmann products, wrote, “Ah that explains why when I asked [Hoffmann] to reload a chip (5 seconds job to upload the bootloader monitor), they told me I’m better off to buy a whole new board...” (APP VOL II – 56, ¶ 16; 63; Dec. 19 2018 Hearing Tr. 51:13-17).

Clark’s conduct reached a huge audience and caused Hoffmann serious damage. Clark’s audience would repeat his assertions. (Aug 21, 2019

Tr. 67:19-22, 25; 68:1-11). Clark again admitted some violations at a hearing, blaming Hoffmann for baiting him into them. (Dec 19, 2018 Hearing Tr. 57:11-25; 65:2-5).

The court found that Clark was in willful contempt for refusing to turn over the Facebook history as previously ordered and as alleged by Hoffmann in the 6th and 7th Motions for Sanctions. (Dec 19, 2018 Tr. 73:20-25; 79:14-25). The court found that lesser sanctions had no effect on Clark and he continued to willfully violate the court's orders and instructions, fined Clark and incarcerated him for 30 days. (Dec. 19, 2018 Tr., 3:9-25; 4:1-3; APP VOL II – 74-77). The court advised Clark that he was being jailed for his continued violations and to stop – and Clark claimed he understood. (Dec 19, 2018 Tr. 73:5-9). The court again warned Clark not to post about Hoffmann or the litigation and Clark responded, “I understand now.” (Dec 19, 2018 Tr. 73:20-25; 74:1-25; 75:1-22; 76:13).

The court warned Clark not to mock it on social media and to follow its orders. (Dec 19, 2018 Tr. 80:21-25; 81:1-9; 83:10-11).

After Clark was released, he still refused to produce his Facebook information and he continued to disparage Hoffmann, contending that they damaged engines. (APP VOL II – 90; ¶ 12; 91-92; 101-104). He advertised and sold “Free RealTuners” merchandise and referred to Hoffmann as the

“Free Shit Fairy.” (APP VOL II – 108-109; 181; Dec. 19, 2018 Hearing Tr. 32:17-25; APP VOL II – 115, ¶ 16; 116; ¶ 20; 125)

Clark again bragged that he would gladly be jailed (APP VOL II – 119, ¶ 35; 196).

Clark was ordered to appear on March 13, 2019. Shortly before the hearing, Clark bragged that he would never abide by the order to produce Facebook histories. (APP VOL II – 210, ¶ 29; 224, APP VOL III - 321, 322). Clark suggested Hoffmann was “possibly compensating others to cause trouble” for him. (APP VOL II – 210, ¶ 30; 224; Aug 21, 2019 Tr. 74:9-18; 75:18-25; 76:1-3).

As to his incarceration, Clark wrote that it was great for his business and the court “illegally” jailed him. (APP VOL II – 230-236).

Clark bragged, “I haven’t had to pay Hoffmann a single dime...” (APP VOL II – 212; 233-235). (APP VOL II – 257, ¶ 35; 314-315; June 27, 2019 Hearing Tr. 17:7-15).

On March 20, 2019 the court heard oral argument. Clark did not appear despite an order requiring his presence and he admitted that he did not appear so that the court could not incarcerate him. Clark admitted that he violated the orders and instructions as suggested in the 8th, 9th and 10th

motion for sanctions and he again told the court he would never hand over his Facebook histories. (APP VOL II - 252; ¶ 15).

The court found Clark in contempt for failing to appear as ordered; for failing to produce his Facebook information as repeatedly ordered; and for continuing to violate the Consent Order. Id.

Clark was sentenced to ten days in jail for continued violations; three days for failing to appear at the hearing; and an indefinite term for failing to produce the Facebook data. (APP VOL II – 252; 264; 266).

Clark was to turn himself in to the county jail by 5pm on April 22, 2019 or a warrant would issue with no bond. (Id.). Instead of turning himself in, Clark further insulted the Court and Hoffmann; publicly discussed the litigation (through his own and his associates' Facebook accounts); and communicated that he would not provide the Facebook information, despite the court's orders. (APP VOL II – 253, ¶ 18-20).

Clark, using a non-party's account, wrote, "The Judge was appointed to her position by Hoffmann's attorneys local to me (he has 4). If you're into reading 3000+ pages, there are a number of 'errors of law' and 'errors of fact' being forced on me. And I am refusing to be incarcerated illegally. We could easily appeal this – if we had \$50,000 to pay for it." (APP VOL II – 253, ¶ 19, 20; 266; June 27, 2019 Tr. 16:1-15).

Clark continued, “...What shouldn’t be standard practice, is for a judge to sign an order that doesn’t match the record and is full of errors of fact and law...**I have an attorney now...** (APP VOL II – 255, ¶ 28; 269; 273; 302).

On April 25, 2019, a warrant issued for Clark’s arrest. (APP VOL II 319-325).

Clark continued, bragging about evading police - “Crap news: can’t go home to Iowa, because some shady judges, lawyers and a hyper-wealthy stalker [Hoffmann] who believes Jesus told him to kill me, are winning. There actually exists a bench warrant for my arrest...because I refused to forfei[t] my right not to give privileged [FaceBoook] information in a shady lawsuit trying to “shut me down in Jesus name” – I kid you not...I’m not paying anymore iowa property taxes after what we have seen taxpayer dollars fund in iowa courts, we aren’t supporting that kind of racket anymore... (APP VOL II - 329; 345).

Clark then provided a link to the judge’s personal FaceBook page, referring to her as a “scumbag.”) (APP VOL II – 329-330; 345-346; May 17, 2019 Tr. 5:1-5, 12-18; June 27, 2019 Tr. 95:1-14).

Clark suggested Hoffmann brought a “bogus lawsuit designed to

distract you from the fact his products...still aren't fixed." (APP VOL II – 330; 347; June 27, 2019 Tr. 18:16-22).

Clark then threatened Hoffmann's lawyer online with a "fractured pelvis." (APP VOL II – 330, 348; June 27, 2019 Tr. 18:22-25; 19:1).

Clark wrote that the pending warrant against him was unserious, writing that "I'm told a hundred of these go out weekly in my county." And "It's technically less than not appearing for a traffic ticket." (APP VOL II – 331; 357-358).

A RealTuners co-host wrote, "The judge keeps throwing [Clark] out because she got her job as a judge appointed by Hoffman[n]'s lawyer...Hoffman[n]'s lawyer and the judge are pals that go to lunch together all the time...How about conflict of interest...yes...Iowa court system sucks greatly. (APP VOL II – 332; 370; June 27, 2019 Tr. 20:18-25; 21:1; 88:17-19). Again, Clark's friends and audience repeated his claims.

Clark then accused Hoffmann of paying private investigators to harass his fiancé, Mary. (APP VOL II – 332; 373; June 27, 2019 Tr. 21:16-18).

On May 16, 2019 at 5:00 p.m., Clark was arrested and "booked." He had a sinister plan in place in the event he was captured, to try to hurt Hoffmann as much as possible.

After the arrest, someone used Clark's Facebook account to post repeatedly about a newly created website dedicated to Clark's allegations about Hoffmann and including a picture of a burning car – suggesting that Hoffmann products cause fires. (June 27, 2019 Tr. 24:5-24).

A Clark crony wrote, "Scott [Clark] might go to jail but [Hoffmann's] company is tanking" as a result of the FaceBook postings by Clark and his friends. (APP VOL II – 337; 399-405).

After a non-party identified an alleged private investigator as harassing Mary, Clark's friend wrote, "Jerry and Scott both signed an agreement. Jerry has been violating it the entire time but he has a team of high dollar lawyers the Podunk iowa judge is afraid of so he gets by with it. BTW this is one of her first cases. Jerry is violating [the] agreement having a detective follow Scott [Clark] or her. He is just harassing her at this point since [Clark] is already in jail." (APP VOL II – 337; 404).

A Hoffmann prospect responded, "Soooo...don't buy from [Hoffmann] is what I am getting..." The comment was liked. (APP VOL II – 337-399; 405).

Then an apparently angry friend of Clark's wrote Hoffmann after hearing Clark's allegations - "Paying the detective to follow [Clark's fiancé]

after Scott is in jail is a ni**er move. You are going to end up pushing [Clark] to[o] far.” (APP VOL II - 338; 407; June 27, 2019 Tr. 25:24-25).

Clark’s associate – “Bewley,” then contacted Hoffmann to threaten him with violence based on Clark’s harassment claims. (APP VOL II – 338; 409-415; June 27, 2019 Tr. 26:10-25). Bewley repeated his threat and also included a copy of Judge Reyes’ name from the clerk’s website – circled, and suggested Bewley had been watching the alleged detective. (APP VOL II - 338; 409-415).

A conference was held and Clark was again ordered to provide the FaceBook history for the accounts he used. Clark’s counsel then advised that Clark provided “all of his facebook information with no deletion of sensitive information from 2014 through August 2018 which was the date of the order...He took out videos and images which would have added many more hours of download time...” (APP VOL II – 336; 395-397). Clark was released and his assertion about full production proved false. (Dec. 19, 2018 Tr. 14:13-24).

On May 30, 2019 – right after Clark’s release, a non-party discussed his engine issue and wrote, “Megasquirt makes me sad ☹.” (APP VOL II – 339; 424; June 27, 2019 Tr. 28:18-25). Clark responded, “...at least it’s the working kit version.” (APP VOL II – 339, ¶ 82; 424: Ex. 11 thereto, p. 2/2).

On June 4, 2019, someone started a post about Clark being incarcerated and missing a class he was to teach. (APP VOL II – 432-437). An audience member directed the public to the website disparaging Hoffmann. (APP VOL II – 340; 434). Instead of deleting the thread, Clark let it continue. A non-party apparently read Clark’s assertions and wrote in response that he would remove Hoffmann products from his car. (APP VOL II – 340, ¶ 87: 432-437). Another Hoffmann customer since 2006 “has “never ha[d] a complaint...” with Hoffmann or its products but this “drama” encouraged him not to do business with Hoffmann. (Id.; June 27, 2019 Hearing Tr. 62:16-25).

Someone suggested Clark was not being honest and another responded, “...One of Hoffman[n]’s lawyers has ties to the judge that gave the order to have Clark arrested...” (APP VOL II – 340; ¶ 89; 432-437).

Judge Reyes – like Judge Christenson, noted and Clark admitted the power his social media postings had and the damage it could cause to a business. (Dec 19, 2018 Tr. 64:14-25; 65:1-4).

On June 27, 2019, the court held another hearing regarding Hoffmann’s 11th Motion for Sanctions and 12th Motion and Supplement Thereto and the direct contempt for Clark posting about the judge’s Facebook page. (June 27, 2019 Hearing Tr. 3:1-14).

Despite being ordered to appear, Clark did not attend and was again held in contempt. (June 27, 2019 Tr. 114:19-25; 115; 116:1-21; 118:13-16). The judge found Clark violated the Consent Order as alleged in Hoffmann's 11th and 12th Motions. (June 27, 2019 Tr. 102:6-25). The court acknowledged that it had been a year since Clark was ordered to turn over the Facebook information and had not done so. (June 27, 2019 Tr. 6:20-25; 10:19-25). The court acknowledged it had never seen anything like Clark who was so directly and repeatedly contemptuous. (June 27, 2019 Tr. 103:1-11).

Clark again admitted that he improperly posted on Facebook. (June 27, 2019 Tr. 109:19-25).

Despite Clark's continued violations, the case continued toward trial. On August 12, 2019, Hoffmann filed a list of proposed stipulated facts, made up of the allegations in the Petition that were deemed admitted by the striking of the Answers. Defendants did not file an objection or a statement of the case for trial. (Aug 20, 2019 Tr. 13:3-12; 17:12-25; 18:1-25; 19:1-25; 20, 20-24).

The court then held a hearing and considered how to present the stipulated facts to the jury. (Aug. 20, 2019 Hearing Tr. 1-15). The court noted that Defendants still had not produced all Facebook documents

despite the many court orders to do so. (Aug. 20, 2019 Tr. 13:13-25; 14:1-25; 15:1-8; Aug 21, 2019 Tr. 9:21-25; 10; 11; 12:1-17; 21:10-18; 23).

Hoffmann's lawyers proposed that the Court present the list of facts, which was essentially the allegations in the Petition/Complaint and proposed a jury instruction so the jury knew how to handle the stipulated facts. (Aug 20, 2019 Tr. 3:1-15; 6:14-25; 7:5-11).

The court asked if Clark's counsel had a suggestion as to how to present the stipulated facts to the jury and Clark's counsel did not have a proposal – other than to object to the court reading them. (Aug. 20, 2019 Tr. 7:11-19; 11:3-6).

Trial commenced. Clark did not appear (Aug 21, 2019 Tr. 154:16-19).

The jury heard the facts set forth herein via testimony and documentary evidence admitted – and heard that the examples submitted at trial were just some of the many defamations – that we had not even “Scratched the surface” as to Clark's postings about Hoffmann on various forums. (Aug 21, 2019 Tr. 80:17-25; 81:1-7).

Defendants' lawyer told the jury that it was odd for Clark not to be in Court and that he did not condone Clark's behavior and that he wished Clark trusted the jury to give justice. (Aug. 22, 2019 Tr. 42; 43:1-10).
In addition to the foregoing, the jury heard and saw the following evidence:

- Clark’s method of operation was to threaten to hurt people on social media, having offered to do it for Hoffmann to a partner/competitor. (Aug 20, 2019 Tr. 1-22; Aug 21, 2019 Tr. 102:2-24; 103:3-25).
- The jury heard the recording of Clark’s termination phone call, during which he promised to cause problems for Hoffmann, his business and reputation if he was not paid a severance. (Aug 20, 2019 Trial Tr. 54:3-25; 57-59; 61:22-25; 23:1-22; 88:20-25; 89:1-2; Hoffmann Tr. Ex. 102(recording)).
- Clark quickly made good on his threat to hurt Hoffmann, starting with disparaging comments about Hoffmann’s products on Facebook – to Clark’s thousands of followers on Clark’s page, other pages Clark created, Hoffmann’s pages and on industry pages, ultimately reaching millions of people. (Aug 20, 2020 Hearing Tr. 70:19-25; 71:1-25; 72:1-25, 73, 74; Aug. 21, 2020 Tr. 37:1-19; 41:9-25; 1-9; 92:19-25; 93:1-13).
- After his threat, Clark quickly published that even though he was under a non-compete with Hoffmann, he would compete with Hoffmann. (Aug 21, 2019 Tr. 95:1-23; Tr. Exhibit 102 (recording)).
- Upon being fired, Clark immediately started a company – RealTuners, and started contacting Hoffmann customers about teaching training classes and doing it cheaper than Hoffmann did –

and using Hoffmann's materials and property in doing so. (Aug 20, 2019 Tr. 87:10-25; 88:1-19).

- Clark then compete with Hoffmann, by selling classes falsely claimed to be sanctioned by Hoffmann and pocketing the proceeds. (Aug 21, 2019 Tr. 107; 108-113; Vol. III 437).
- Clark falsely and repeatedly wrote that Hoffmann knowingly sold defective products out of greed and others repeated the comments. (Aug 21, 2019 Tr. 25; 68:1-11; 93:9-25; 94:1-24).
- Clark was very effective in hurting Hoffmann. (Aug 21, 2019 Tr. 68:19-20).
- After reading Clark's comments, sometimes, customers would formally request to return their Hoffmann products and sometimes they would just send Hoffmann products back with no information that would allow Hoffmann employees to know where the parts came from. (Aug 20, 2019 Tr. 75:17-20).
- Returned products from customers had to be tested by Hoffmann and it completely overwhelmed Hoffmann's team and they had no time to address legitimate support requests – for example, a mere misconfiguration of the many settings. (Aug 20, 2019 Tr. 76:1-25).

- When customers would report online that they received Hoffmann products back from Hoffmann and Hoffmann said the products were working, Clark would tell the customer that Hoffmann secretly fixed products and returned them and then falsely claimed there was never a problem. (Aug 20, 2019 Tr. 76:1-25; 77:1-6).
- Hoffmann and three of his staff were affected 100% of the time in addressing the results of Clark's comments and several other of his staff, including production staff and tech support staff with drastic ramifications across the organization. (Aug 20, 2019 Hearing Tr. 77:15-25). Hours were increased. Id. at 78:13-25; 79; 80:12-20).
- Hoffmann's staff had to unnecessarily take products apart and inspect them and reassemble them. Id.
- Hoffmann could not market because his staff was in damage control mode due to the effect of Clark's comments. (Id.)
- Hoffmann product and initiative development and work toward the future stopped and the momentum of initiatives in place halted, as the Hoffmann team had to be totally reactive to Clark's attacks. (Aug 21, 2019 Tr. 135:1-9). The company's steady growth came to a screeching halt. (Aug 21, 2019 Tr. 135:1-10).

- Hoffmann had recently released a new product that was to do great things for Hoffmann; it was time to reap the benefits of all the hard work Hoffmann put in and that benefit was taken from Hoffmann by Clark's false postings. (Aug 21, 2019 Tr. 134:1-15).
- Clark's conduct "decimated" Hoffmann's business. It ate all of their time and completely changed the trajectory of business growth, which had been increasing like never before. (Aug 21, 2019 Tr. 81:8-16). At trial, Hoffmann was struggling to make payroll as a result of Clark's attacks. (Id.)
- Hoffmann testified to a 40% drop in the value of the relationships with customers and partners and resellers that were poisoned by Clark. (Aug 21, 2019 Tr. 137, 138).
- Hoffmann lost countless customers due to Clark's defamation and the customers published that he was a horrible person that they used to buy from and never would again. Clark's attacks affected Hoffmann's business relationships with performance shops that used Hoffmann products and product resellers. (Aug 21, 2019 Tr. 136, 137, 138, 139).
- Clark retained company property after his termination. (Aug 20, 2019 Tr. 94: 6-25; 95:1-8).

- Clark published a video depicting Hoffmann as Adolph Hitler, which Clark testified at deposition was hilarious. (Aug 20, 2019 Tr. 99:16-21).
- After the lawsuit was filed, Clark amped up his efforts with hundreds of false comments that the public reacted to and spread. (Aug 20, 2019 Tr. 101:1-17).
- Hoffmann's staff continued to be occupied by the nonstop disparagement, draining Hoffmann and his team. (Aug 20, 2019 Tr. 101:14-25; 102:1). Hoffmann's team could not do damage control because Clark was relentless in his postings (Aug. 20, 2019 Tr. 102:1-16).
- Hoffmann lost customers and resellers due to Clark's publications. (Aug 21, 2020 Tr. 42:10-25; 43; 44-52; 53).
- The jury heard that there was a Consent Order entered and about Clark's violations and the many sanctions imposed and that Clark had not turned over all Facebook documents despite Court orders to do so. (Aug 20, 2019 Tr. 102:17-25; 103-105; 107-110; 113-115; Aug 21, 2019 Tr. 58:2-17; 59:9-25; 60:1-25; 61:22-25).
- Clark created a webpage to look like a legitimate page dedicated to supporting Hoffmann's products; but when Hoffmann customers

visited the page, Clark advised them to stay away from Hoffmann products, damaging Hoffmann. (Aug 21, 2019 Tr. 39:1-25; 40:1-25; 41:1-17).

- The inability of Hoffmann, counsel or respectfully, the trial court, to stop Clark caused Hoffmann financial damage and caused a feeling of helplessness, as he could not defend himself against Clark's disparagement without arguably violating the Consent Order, himself. (Aug 20, 2019 Tr. 105:20-25; 106; 107).
- The jury heard that nobody, including the court, had been able to bring Hoffmann relief from Clark's misconduct. (Aug 21, 2019 Tr. 139:20-25; 140:1-4).
- Clark's false publications that Hoffmann knowingly sold defective products out of greed and that he pays people to keep them quiet were repeated. (Aug 21, 2019 Tr. 128:1-16).
- Hoffmann testified that his company was seeking \$4,500,000.00 in compensatory damages for the defamation/defamation per se and \$1,000,000 for Hoffmann personally. (Aug 21, 2019 Tr. 128:16-17).
- In addition to the above, Hoffmann was asked what the sought figures represent and how he determined them. (Aug. 21, 2019 Tr. 128:18-19).

- As to his personal reputation, Hoffmann testified as to the good name he had, building a business on value and good principles and doing what is right before worrying about profit – that he lost it due to Clark’s actions. (Aug. 21, 2019 Tr. 135:17-25; 136:2-11).
- Hoffmann clarified as to company reputation, he tracked the progression that business was on, the growth rate they had and applied those changes conservatively to future years; that the growth was steady and established and there was no other reason why they would not continue that growth; and the figure was probably low. (Id. at 128; 129:1-16).
- Hoffmann testified that it took from late 2004 to build up his relationships and the company name and he described how he did it, including a focus on value and good principles before money. (Aug 21, 2019 Tr. 131:4-25; 132:1-25; 133:1-17).
- Hoffmann considered the cost to him of building the business and how customers responded to the business during his fifteen years and how after Clark’s attacks they were talking about him and his loss of revenue. (Aug. 21, 2019 Tr. 156:3-21).
- Hoffmann testified as to the damage to the company name and that it would take years to rebuild the name – and that some relationships

he worked to gain were forever lost; that the name is everything.; that customers relied on Clark's statements and they did not believe Hoffmann would take proper care of them; that previous customers and prospects believed as a result of Clark's postings that Hoffmann did not believe service mattered and Hoffmann would not stand behind their product; that people would not buy from those that would treat customers poorly and the public heard from Clark that Hoffmann would treat them poorly; and that in his experience, even if there was some doubt as to Clark's claims, the customer or prospect is going to go with another company that they have not heard such things about. (Aug 21, 2019 Tr. 130:5-25; 131:102).

LEGAL ARGUMENT

I. Striking of Pleadings was Appropriate

A. Error Preservation

Appellants preserved the issue as to the propriety of the striking of pleadings and counterclaims but Appellees deny that the issues now argued relating to "admitted facts" were properly preserved.

Appellants' Brief does not describe how the objection to the presentation of the facts deemed admitted was preserved and the trial court noted that Defendants did not object to any of the proposed facts deemed

admitted, instead only objecting generally to the court reading the facts. (Aug. 20, 2019 Hearing Tr. 7:11-19; 11:3-6).

B. Standard of Review

Appellees agree with Appellants' standard of review for the propriety of striking pleadings and counterclaims.

Appellants also agree that the standard as to the presentation of the facts deemed admitted is "legal error" but disagree that the issue is one of jury instructions.

Rather, the issue is the propriety of the treatment of admissions at trial. Seneca Waste Solutions, Inc. v. D & K Managing Consultants, LLC, 2015 Iowa App. LEXIS 155 (Iowa 2015) (unpublished).

C. Discussion

1. Striking was Warranted

Dismissal of pleadings is a sanction available when a party has violated a trial court's order. *See, e.g.*, Iowa Rule Civ. P. 1.517(2)(b)(2 & 3) (pertaining to a failure to comply with a discovery order); FoGe Invs., LLC v. First Ntl. Bank of Wahoo, 2015 Iowa App. LEXIS 572 (Iowa 2015); Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975); Krugman v. Palmer College of Chiropractic, 422 N.W.2d 470, 474 (Iowa 1988); Suckow v. Boone State Bank & Trust Co., 314 N.W.2d 421,425-26 (Iowa 1982).

Iowa's appellate courts have repeatedly affirmed dismissal of a disobedient party's pleadings, finding that "trial courts have inherent power to enforce discovery rules and have discretion to impose sanctions for a litigant's failure to obey them." Suckow, supra; Estate of Ludwick v. Stryker Corp., 2014 Iowa App. LEXIS 1065, *42 (2014).

Iowa Rule of Civil Procedure 1.602 gives a trial court power to enter orders governing scheduling and case management.

Rule 1.602(2) permitted the court, after consulting with the Parties, to order: Special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems (Rule 1.602(2)(b)(1)); and/or "Any other matters appropriate in the circumstances of the case..." (Rule 1.602(2)(b)(5)).

Furthermore, Rule 1.602(1) permitted the Court to hold a pretrial conference to: expedite the disposition of the action (Rule 1.602(1)(a)); establish early and continuing control so that the case will not be protracted because of lack of management (Rule 1.602(1)(b)); discourage wasteful pretrial activities (Rule 1.602(1)(c)); and improve the quality of trial through more thorough preparation. (Rule 1.602(1)(d)).

Here, the Parties *jointly* asked the Court to execute the Consent Order for precisely these purposes. Because it was jointly proposed, there was no need for additional consultation or conference with the Court.

Clark's willful failure to abide by the Consent Order led to additional issues requiring resolution and motion practice, which exponentially expanded the proceedings and the expense. And sanctions less than dismissal did not work.

As most of the offending statements in this case occurred through Facebook, the case presented unique challenges, including but not limited to: meaningful evidence preservation, huge number of witnesses to published statements and easy deletion of evidence.

As seen, Facebook evidence can quickly change as comments are added and deleted and things can be posted under aliases and reach others across the world. As such, this is a case where a case management order pursuant to Rule. 1.602 was especially appropriate and the Consent Order was an order fitting squarely within the contemplation of Iowa Rule Civ. P. 1.602.

Rule 1.602(5) provides that if a party fails to obey a scheduling or pretrial order, a court may – upon motion or its own initiative, make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 1.517(2)(b)(2)-(4). FoGe, *supra*.

Iowa Rules 1.517(2)(b)(2) and (3) expressly permits a trial court to strike the pleadings of a disobedient party. (APP VOL I - 280) and permit an order refusing to allow a disobedient party to support his claims.

Iowa law also permits a trial court to control the scope and methods of discovery. (Rules 1.503, 1.505) and it permits stipulations for discovery procedure (Rule 1.506).

And Rule 1.501(3) requires that discovery be conducted in good faith. Clark's misconduct implicated and violated each of these provisions.

Furthermore, Clark's long pattern of misconduct supported the striking of pleadings. Krugman, *supra*.

2. Willfulness, Fault and/or Bad Faith

Prior to striking pleadings as a sanction for failing to obey a court order, the court must – and did, find that the disobedience was the result of willfulness, fault and/or bad faith. (Aug. 31, 2018 Order, pp 9-13); FoGe, *supra*; Marovec v. PMX Indus., 693 N.W.2d 779, 786 (2005) (Cady, J., dissenting); accord, Smiley, 236 N.W.2d at 360.

The court found Clark was repeatedly warned and sanctioned and was unmoved and continued to willfully violate the Consent Order. (APP VOL I – 162-164; 272; 276; 278).

Incredibly, Defendants now argue that Plaintiffs did not suffer any actual prejudice by Clark’s violations – contradictory to common sense, what the Parties claimed in their motion requesting the Consent Order and the repeated contrary findings of two trial judges.

Judge Chirstensen acknowledged that the pending motions for sanctions “went to the heart of the case.” (Aug. 13, 2018 Tr. 6:14-15).

Judge Reyes noted that due to Clark’s refusal to stop posting on Facebook, he was able to stop the case from progressing for six months (Dec. 19, 2018 Hearing Tr. 15; 15-25). The court found it was a straightforward case that Clark successfully torpedoed with his violations; that he caused “bleeding” damages and that the case every step of the way is about Clark’s misconduct. (*Id.*; 76:18-25; 77:1-2); Dec 19, 2018 Hearing Tr. 68:12-25; 69:1-9).

Clark argues that there less drastic alternatives to striking pleadings of a mere *pro se* party, like fines and incarceration, but the court allegedly picked the most severe sanction.

This suggestion ignores that the trial court repeatedly tried “less severe” sanctions and warned Clark – to avoid striking his pleadings; and he remained undeterred. (APP VOL I – 224; 278). It also ignores that

continuing to permit Clark's misconduct with the same meaningless sanctions would have rewarded Clark.

Lesser sanctions were meaningless to Clark because as he often bragged, he could not pay them. (Aug. 13, 2018 Tr. 75:7-9, 19-25).

And to the extent Clark now conveniently and without support claims that losing his freedom via incarceration is a "lesser" sanction that should have been imposed instead of striking pleadings, Clark himself told the court that incarceration would most hurt him, explaining that jailing him would force him to lose his home – obviously worse than striking civil pleadings. His request was that he not be jailed. (Aug. 13, 2018 Tr. 73:17-24; 82:3-5).

Appellants claim the court could have let Hoffmann amend the petition with each new violation as another basis for relief instead of striking pleadings – but the stated purpose of the Consent Order was to avoid additional causes of action...," in large part due to the large and difficult to calculate damages associated with the disparagement (APP VOL I - 34, ¶ 3).

Furthermore, adding each new cause of action would have resulted in an impractically enormous Amended Complaint.

Defendants claim now for the first time that Clark was not warned striking pleadings was a possibility. The Consent Order provides that might result in the imposition of sanctions (APP VOL I - 48, ¶ 13).

The court noted that it considered Hoffmann's many requests for striking and chose lesser sanctions, to try to get Clark to cooperate and let the case proceed. (APP VOL I – 278-279).

Clark, while *pro se*, repeatedly acknowledged striking was an option – when he responded to Hoffmann's requests for striking and when **he** asked the court to strike Hoffmann's pleadings. (APP VOL I – 148, ¶ 34; 240, ¶ 5).

Defendants contend that Clark's Consent Order violations were ambiguous, inadvertent or not egregious, and are just the effects of a confused *pro se* party.

This proposition – insulting to anyone who reads what Clark wrote, ignores that Clark **published his obligations** and then knowingly violated them; clearly disparaged Hoffmann and the court; and was represented through most of the motions for sanctions and also received help from two attorneys not listed as counsel. (APP VOL I – 54, ¶ 29; 71; 134, ¶ 22).

The day after the Consent Order was entered, Clark advised against running Hoffmann's latest product due to "problems." (APP VOL I – 52, ¶ 16; 59; Aug. 21, 2019 Tr. 56:11-13).

Clark acknowledged he could not talk about Hoffmann. (APP VOL I - 71).

Clark acknowledged that he was not permitted to give a forum to

anyone to say anything negative about Hoffmann and he and his friends nevertheless suggested Hoffmann was paying money to try to shut RealTuners down. (APP VOL I – 54, ¶ 29; APP VOL III - 321-324).

After the court sustained Hoffmann’s First Motion for Sanctions, Clark immediately got on his RealTuners podcast and suggested Hoffmann paid the court for the order. (APP VOL I – 133, ¶ 15, 19; Apr. 26, 2018 Tr. 6:13-25; 7:1-13, 19-25; 8:1-21).

Clark, acknowledging the Consent Order’s prohibitions, asked if his co-hosts received their “lecture” on what they could discuss and stated in mocking fashion that they should stay away from discussing “fuel injection” – a reference to Hoffmann products. (APP VOL I – 133, ¶ 16).

There is no ambiguity or confusion as to Clark’s statements leading to the striking of Defendants’ pleadings – Clark acknowledged his obligations and immediately then ignored them, because he wanted to hurt Hoffmann.

To the extent Clark claims he was just a confused *pro se*, he unsuccessfully tried that excuse throughout the litigation.

Clark was represented through the filing of the first two motions for sanctions, the hearing on the first and then from approximately the fifth motion for sanctions through the twelfth.

The court disbelieved that lack of counsel kept Clark from filing anything. (Dec. 19, 2018 Tr. 19:17-20).

Judge Christensen noted that despite claims of being *pro se*, the language and format Clark used in filings was unusually sophisticated and suspicious. (Aug. 13, 2018 Tr. 87:19-25; 88:1-20).

Clark later admitted that he was receiving guidance from an out of state lawyer and another Iowa lawyer - neither of record. (APP VOL I – 226; 281(c); Apr. 26, 2018 Tr. 13:3-7; Aug. 14, 2018 Tr. 41:1-22; Dec 19, 2018 Tr. 62:6-10; 63:14-23).

So, it is not difficult to controvert Clark's present claims that lack of counsel caused his misconduct.

As to Defendants general claim that their pleadings and counterclaims should not have been stricken - the practical effect would be a trial court being unable to control its docket and litigants through the discovery process and render it powerless to stop repeated violations of its orders.

The court noted that striking pleadings was a last resort that Clark forced. (APP VOL I – 278-279) The trial court did not “opt” to do it but was wholly justified in its decision.

3. Facts deemed Admitted were Properly Presented

The court presented to the jury approximately 100 paragraphs from Hoffmann's Petition that were deemed admitted by the striking of Defendants' Answers. (APP VOL III – 105-115; 245-247).

These items were treated as admitted facts under Iowa R. Civ. P. 1.510 and 1.511 and read to the jury. (APP VOL III - 246).

When asked for a suggestion on handling the admitted facts, Defendants' Counsel did not offer one, other than to object generally to the court reading the facts. (Aug. 20, 2019 Hearing Tr. 7:11-19; 11:3-6).

The court found that "Defendant was provided an opportunity to object to any of the individual facts, but only generally objected to use of any admitted facts as a whole." (APP VOL III - 246).

Defendants describe what they claim are the "most problematic" admitted facts given to the jury and number them:

11. Hoffmann is entitled to injunctive relief ordering Clark to cease operation of his competing business, return to Plaintiffs all of their property and to stop defaming Plaintiffs and interfering with their business.
87. Equity should not permit Clark to retain these benefits.
88. Clark's actions have shown showed [sic] willful misconduct, malice, wantonness, oppression, or that entire want of care

which would raise the presumption of conscious indifference to consequences.

89. Punitive damages should be awarded to Plaintiffs and against Clark in order to penalize, punish, or deter Clark.
90. By continuing to publish untrue and derogatory things about Plaintiffs, Clark is causing Plaintiffs damage – to their reputation and to their business.
91. This damage is difficult if not impossible to quantify because, in many cases, Clark’s publications are being made via social media postings to the public at large or to groups with various members or to individuals via private messages.
94. Equity dictates that Clark should be enjoined from continuing his activities as described herein.
96. Plaintiffs will continue to suffer damages if Clark’s conduct as described herein is not enjoined.
97. By engaging in the misconduct [sic] described above and by acting intentionally and willfully in causing or attempting to cause Plaintiffs harm, Clark acted in bad faith.
98. By ignoring Plaintiffs’ demand(s) to cease such misconduct, Clark has acted in bad faith and has been stubbornly litigious.

99. By threatening Plaintiffs with the course of conduct upon which Clark has proceeded because Plaintiffs did not pay Clark a severance, Clark has acted in the utmost bad faith.

100. Plaintiffs are entitled to recover their attorneys' fees from Clark and costs of litigation.

Importantly, Appellants admit in their Brief (and the trial court found) that the admitted facts were essentially just a "reassertion of Hoffmann's prior [trial] testimony." (APP VOL III – 246-247).

Also as admitted by Defendants, most of the facts it cites are "completely irrelevant to the jury's damages determination." (Brief, p. 40). As such, if there was any error – which is disputed, it was harmless.

Facts 11, 87, 94, 96 and 100 deal with equity – nothing the jury opined on.

Facts 90, 91, 97, 98 and 99 were all testified to by Hoffmann, as Appellants' Brief suggests.

While Facts 99 and 89 deal with punitive damages – facts "admitted" by the striking of their pleading - both attorneys, the court, the instructions and the verdict form were clear that it was up to the jury whether punitive damages were to be awarded and if so, in what amount. (Aug. 22, 2019 Tr.

40:19-25; 41:1-8; 46:1-25; Aug. 22, 2019 Verdict Form, Questions 5-9; Aug. 22, 2019 Jury Instructions 1-7; APP VOL III – 89-94; 119).

And, the alleged most problematic admitted facts in Defendants’ Brief deal with Clark. The jury also found that RealTuners was liable for punitive damages in the amount of \$3,500,000. (Aug. 22, 2019 Verdict, Questions 8,9; APP VOL III - 119). Therefore, the evidence is that the jury made an independent determination that Clark’s actions were willful and wanton and that punitive damages against both Defendants were proper. (Aug. 22, 2019 Verdict Form, Questions 5-9; APP VOL III - 119)

II. THE COURT WAS JUSTIFIED IN GRANTING HOFFMANN’S MOTION IN LIMINE

A. Error Preservation

Appellees disagree that the Appellants properly preserved their pending arguments as to the court’s refusal to allow them to present certain evidence.

Appellees filed a Response to Hoffmann’s Motion in Limine, without providing any legal argument and argued only that they should be allowed to present “any testimony that might limit the plaintiffs’ claim for damages.” (APP VOL III - 67).

B. Standard of Review

Appellees agree with Appellants’ stated standard of review.

C. Discussion

1. It was Proper to Present the Admissions to the Jury.

On August 12, 2019, Hoffmann filed a Motion in Limine, seeking to exclude evidence as to Defendants’ defenses to their behavior – since they were stricken.

That included testimony about the quality of Hoffmann products or anyone’s opinion about Hoffmann products, since that would seek to provide Defendants with a defense to defamation claims. (APP VOL III - 63).

For the same reasons, Hoffmann also sought to preclude testimony and evidence as to alleged wrongdoing by Hoffmann – because it would prejudice Hoffmann and relieve Clark from the result of the sanction of striking his pleadings. (APP VOL III - 64).

Defendants responded to the Motion in Limine, arguing that they should be allowed to present “any” testimony that might limit the plaintiffs’ claim for damages. (APP VOL III - 67).

The trial court granted Hoffmann’s Motion in Limine on August 16, 2019, apparently agreeing that the relevance of such information was outweighed by the prejudice to Hoffmann and the associated relief it would bring Clark from the order striking his pleadings and the expansion of proceedings such information would cause. (APP VOL III – 69-72).

Defendants now claim that the trial judge erred in refusing to admit certain questions at trial but their request is more accurately phrased as an objection to the granting of Hoffmann's Motion in Limine.

At trial and as justified by claimed relevance to reputation damages, Clark's lawyer asked if Hoffmann used Illegal drugs and Hoffmann answered that he had in his childhood. (Aug 21, 2019 Tr. 142, 143, 144).

Clark's lawyer asked Hoffmann if his products ever started a fire and Hoffmann testified they did not. (Aug 21, 2019 Tr. 144:17-21).

Clark's lawyer asked if anyone ever alleged that Hoffmann products started a fire other than Clark and Hoffmann responded no. (Aug 21, 2019 Tr. 145:23-25; 146:1).

Counsel tried to go further, asking whether Hoffmann ever acknowledged a problem with his products anywhere; whether the MS3 product ever failed; whether Hoffmann struck back at Clark on Facebook; and whether Hoffmann was convicted of a felony. (Appellants Brief, pp. 45-47). Hoffmann's counsel objected each time and the court sustained the objections based on the order granting Hoffmann's Motion in Limine. (Id.; Aug 21, 2019 Tr. 149:7-17; 150:1-12).

Defendants claim that those questions went directly to the amount of damages at issue but what Defendants actually sought via these questions

was to raise a defense to Hoffmann’s defamation claims, or at least to “muddy the waters” on the admitted facts.

Such testimony would have enlarged the proceedings beyond the amount of damages.

It was likely difficult to defend a case with stricken pleadings – but that dilemma is entirely Clark’s fault, as both judges noted. (APP VOL III - 246). The trial court did not err by refusing the evidence, given the relief it would allow Defendants in light of the order striking their pleadings, the prejudice to Hoffmann and the expansion of trial it would have caused.

Regarding Defendants’ claims that Hoffmann failed to show damages, Hoffmann elected to try the case and present evidence in the form of testimony and documents.

Clark did not attend the trial to present any evidence of his own. His lawyer asked Hoffmann about tax returns and advised the jury that he (counsel) would have used tax returns and similar documents to prove damages. (Aug 21, 2019 Tr. 151:1-24; Aug 22, 2019 Tr. 45).

The jury apparently did not require those documents, electing to rely on the evidence Hoffmann submitted via testimony.

Notably, Defendants did not seek to introduce Clark’s or a Defendant-witness’s testimony regarding the value of Plaintiffs’ reputation. Nor did they

seek to introduce Plaintiff's tax records, balance sheets or similar documents to defend the case.

Instead, they elected only to ask Hoffmann questions that would impermissibly raise defenses to the conduct alleged in the Petition – some of which was permitted.

III. THE DAMAGES AWARD WAS JUSTIFIED

A. Error Preservation

Appellees disagree that the Appellants properly preserved their pending arguments on most of the damages arguments.

The trial court noted that Defendants presented no legal argument as to damages objections in their post-trial motions. (APP VOL III - 238).

Appellants seek to attack the jury's award for civil extortion, arguing separate damages for civil extortion had no basis based on the evidence presented. (Brief at 53, 55).

Defendants do not tell the Court where they preserved the extortion issue, other than directing the Court generally to post-trial motions. (Brief, p. 52).

A review of those filings shows that Defendants did not argue anything

about civil extortion and neither the phrase “civil extortion” nor the argument that the jury impermissibly awarded civil extortion damages appear therein.

Defendants therefore failed to preserve the issue for appeal.

Likewise, as to Appellants arguments regarding improperly “Blended Reputational Damages” (Brief, pp. 59-62) and improper damages based on stress to Hoffmann, Defendants did not previously make these arguments or otherwise preserve them (Defendants’ Motion for New Trial and Request for Remittitur and their Motion for Judgment Notwithstanding the Verdict, APP VOL III – 127-131).

In describing how these issues were preserved, Appellants again direct the Court to their post-trial motions (Brief, p. 51-52).

But the issue of impermissible damages blending and an improper award to Hoffmann that included emotional damage is nowhere contained in those documents.

These are new arguments and should not be permitted.

B. Standard of Review

Appellees agree with Appellants’ stated standard of review.

C. Discussion

Appellants argue that the trial court erred in refusing to grant them a

new trial and that they are entitled to a new trial, or “at least a remittitur,” because the jury’s damages were “flagrantly excessive and influenced by passion or prejudice.” (Brief, p. 53).

In reviewing a motion for remittitur or new trial, the court reviews the evidence in the light most favorable to the plaintiff. Kuta v. Newberg, 600 N.W.2d 280, 284 (Iowa 1999). A court must not disturb a jury verdict unless it is flagrantly excessive or inadequate so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support. Id. See also Iowa R. Civ. P. 1.1004(4) and (6). Judges are not to substitute their opinions for juries’ fact-findings when ordering remittiturs. Kuta at 284.

Clark’s attorney advised the jury that he did not believe there was enough evidence to award the \$4.5 million or \$1 million figures and they could not guess. (Aug 22, 2019 Tr. 46; 47).

A review of Defendants’ post-trial motions evidence that they took a vague shotgun approach – providing general allegations without any legal support, which they now hope will serve as a satisfactory method of preservation of the issues. It should not.

Furthermore, the evidence at trial was the recording that Clark

threatened Plaintiffs, made good on those threats, caused Hoffmann distress and worry about what Clark would next do and that Clark then began sending threatening messages to Hoffmann's business partners. (APP VOL III 240-241). As such, the jury was authorized to award damages for civil extortion.

1. Libel per se Compensatory Damages were Justified

The jury awarded Hoffmann Innovations \$2,060,250.00 to compensate it for Clark's libel per se (slander) and \$2,060,250.00 for RealTuners' libel per se (slander) (APP VOL III – 241).

The jury awarded Hoffmann \$500,000.00 against Clark for libel per se and \$500,000.00 against RealTuners for libel per se. (APP VOL III – 122).

Clark's attorney advised the jury that he did not believe there was enough evidence to award the 4.5 million or 1 million and they could not guess. (Aug 22, 2019 Tr. 46; 47).

Appellants' Motion for New Trial seemed to acknowledge that a large award was possible, stating, "...Despite the lack of supporting evidence, the jury should not have come up with more damages tha[n] \$4.5 million in favor of plaintiff DIY AutoTune and \$1,000,000 in favor of Jerry Hoffmann. (APP VOL III - 130).

Defendants requested a new trial alleging that the jury arrived at its verdict as a result of "prejudice, emotion and dislike for the defendant who

failed to appear at all for trial” and there was “no evidence whatsoever to support the claims made by [the Plaintiff] Jerry Hoffmann.” (APP VOL III - 238).

The trial court noted in denying Defendants’ motions that Hoffmann testified as to the damage to his personal reputation and his company’s reputation due to Defendants’ publications. (APP VOL III - 241).

The court stated the standards for its review of Defendants’ post-trial motions – “As a general rule, the party seeking damages has the burden to prove them...if the record is uncertain and speculative as to whether the party has sustained damages, the factfinder must deny recovery.” (APP VOL III - 239).

In Iowa, jury verdicts pertaining to damages will not be disturbed unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, or the result of passion or prejudice or lack of evidentiary support. (APP VOL III - 239).

The trial court continued, “The gist of an action for libel or slander is the publication of written or oral statements which tend to injure a person’s reputation...” Lara v. Thomas, 512 N.W.2d 777, 785 (Iowa 1994).

Certain statements can be characterized as slander per se and “Words are libelous per se if they are of such a nature, whether true or not, that the

court can presume as a matter of law that their publication will have a libelous effect.” Vinson v. Linn-Mar Community Sch. Dist., 360 N.W.2d 108 (Iowa 1984).

Thus, statements categorized as slander per se are actionable without proof of malice, falsity, or special harm. Spencer v. Spencer, 479 N.W.2d 132, 139 (Iowa 1996).

The trial court noted that Hoffmann testified: he started his company in a spare bedroom 15 years prior; that the company provided a unique and highly-technical product to support racing engines; that when he started his business, nobody else manufactured and marketed a product like his; that he testified as to the growth of the company since he started it; that his company lost all of its growth momentum in the two years since Clark’s termination; and that the estimated loss to his personal reputation was \$1,000,000 and the company’s lost growth was \$4,500,000.00. (APP VOL III - 242).

In support of these figures, Hoffmann testified that he had spent the past two years defending and debunking Clark’s false claims about him and his products rather than growing his business, which took a toll on him personally and professionally. (APP VOL III - 242).

Hoffmann testified that he couldn’t sleep, would wake at all hours, was emotionally drained and unable to focus. Hoffmann’s wife Joy similarly

testified to the hours Hoffmann spent addressing Clark's libelous claims over the past two years, the time it took Hoffmann away from his family, and the difficulties he suffered as a result-trouble sleeping and enjoying life. (APP VOL III – 242-243).

At trial, the jury heard how Clark subjected Plaintiffs to nearly daily defamatory postings on racing industry website forum pages and social media platforms such as Facebook. (APP VOL III – 243-244; 264-330). Hoffmann testified that Clark's postings falsely accused Hoffmann of manufacturing dangerous products that could catch fire that was interested in making money regardless of the safety of their products. (APP VOL III – 243-244; 324; 435-436).

Hoffmann testified that the evidence was merely a fraction of what Clark actually posted and that Clark was behind the creation of a website that implied a class action lawsuit was being filed against Hoffmann Innovations' dangerous products. (APP VOL III - 477).

In an example of how Clark attacked Hoffmann personally, Hoffmann testified that Clark created a parody video where Hoffmann was portrayed as an angry and maniacal Adolf Hitler. (APP VOL III - 244; Hoffmann Tr. Exhibit 104 - video) In other postings, Clark mocked Hoffmann's Christian faith (APP VOL. III - 476; Vol. III 322-324) and generally portrayed

Hoffmann as an individual that was only interested in making money and that would pay people with endorsements to maintain their silence over his defective products. (APP VOL III – 264; 317). Further, Clark wrote that Hoffmann was a vengeful stalker and paid to have Mary and others stalked and harassed. (APP VOL III – 302-304; 322).

Hoffmann testified that he spent the majority of his work days over the past two years dealing with customers calling into the company to question the quality and integrity of Hoffmann's products based upon Clark's campaign. (APP VOL III – 243-244).

Hoffmann testified that for a period of two years he and two of his company's 18 employees spent nearly all of their time refuting Clark's false claims which included responding to customers requesting to return products due to fears that the products were dangerous and might catch fire. (APP VOL III – 9-10).

Hoffmann testified about the time he spent testing returned products – that were sent back after customers were frightened about what they heard from Clark, only for Hoffmann to find they were safe and operating normally. *Id.* Hoffmann also testified that he lost a business contract due to the negative information Clark published about Hoffmann's products. *Id.*

Hoffmann’s trial testimony and supportive exhibits provided evidence from which the jury could conclude that the Defendants’ conduct resulted in damage to the Hoffmann and his company. Hoffmann estimated that the damage to his business was approximately \$4.5 million dollars. Id. The jury awarded those damages to Hoffmann, dividing them equally between Clark and RealTuners. Id.

The trial court noted that while calculating damage to an individual’s or a company’s reputation is not easily quantifiable, Hoffmann presented evidence from which the jury could conclude that the Defendants’ conduct resulted in damage to the Plaintiff and his business. In Iowa, the law is clear that “[a]n attack on the integrity and moral character of a party is libelous per se.” Wilson v. IBP, Inc., 558 N.W.2d 132, 139 (Iowa 1996).

As such, the court found that that the verdict was sustained by sufficient evidence and was not contrary to law.

2. Punitive Damages Were Appropriate

Under Iowa Code Section 668A.1, to receive punitive damages, a plaintiff must prove by a preponderance of clear, convincing, and satisfactory evidence that the defendant’s conduct amounted to a willful and wanton disregard for the rights of another. (APP VOL III - 244).

To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. Hockenberg's Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 156 (Iowa 1993); (APP VOL III – 245).

Here, the jury heard that Clark knew how to destroy a company via Facebook, that he threatened Hoffmann with the same if he was not paid a severance and that Clark subsequently made good on his threat with a “barrage of false and damaging online postings about the Plaintiffs.” (APP VOL III - 245). The jury also heard and saw that Defendants knowingly engaged in this behavior despite a court order prohibiting it. (APP VOL III – 304, 305, 308, 316-317)

The jury also heard that the conduct occurred while Clark acknowledged his obligations per the Consent Order, while he was represented and unrepresented, prior to and during the litigation and that it had a huge negative affect on Plaintiffs. From the evidence, the jury concluded that the Defendants' conduct met the required “willful and wanton disregard of the rights of another” standard. (APP VOL III - 245).

The jury was told that punitive damages were optional (Aug. 22, 2019 Tr. 40:19-25; 41:1-8; 46).

The court properly found the punitive damage awards to be consistent with the extent and nature of the Defendants' conduct and the amount necessary to deter such conduct in the future. The court found there was sufficient evidence to support the jury's decision. (APP VOL III - 245).

IV. THE ATTORNEYS' FEES AWARD WAS JUSTIFIED

A. Error Preservation

Appellees disagree that the Appellants properly preserved their arguments as to attorneys' fees awarded.

The basis of Appellants' argument is that their conduct was not "harsh, cruel, or tyrannical" and that Clark was already taxed with fees, resulting in double punishment for the same conduct.

The fees issues as briefed were not preserved for appeal because the arguments were not contained in Defendants' August 19, 2019 Motion to Deny Attorney Fees (APP VOL III – 74) or any of Defendants' post-trial submissions.

Rather, Defendants previously argued only that "Unless attorney fees are allowed by statute or contract, the plaintiffs cannot recover attorney fees." (APP VOL III - 74).

Defendants/appellants are bringing a new argument that they did not previously raise in the lower court, thereby waiving it.

B. Standard of Review

Appellees agree with Appellants' stated standard of review.

C. Discussion

None of the citations Appellants provide in connection with their argument on fees require that fees be awarded only for the conduct prior to the filing of a complaint.

In any event, the court's order awarding fees makes clear that part of rationale for the fee award was the evidence presented to the jury that Clark made disparaging Hoffmann in an attempt to ruin Hoffmann a "full time job" after Clark was terminated. (APP VOL III - 258).

And that evidence at trial included Clark's publication of false statements about Hoffmann prior to the filing of the Petition. (Aug 20, 2019 Tr. 87:10-25; 88:1-19).

Prior to litigation, Clark's behavior "derailed Hoffmann from being able to move his business forward. It stopped them up and ate all of Hoffmann's time as things got worse. Customers would think that if there was a problem with their Hoffmann product, Clark was telling the truth and customers would insist on returning the Hoffmann products. (Aug 20, 2019 Tr. 74:14-25; 75:1-25).

Defendants' Brief also argues that a fees award was improper because with each Order on Hoffmann's Motions for Sanctions, "Clark was punished with paying fines and attorney's fees...in essence" punishing Clark twice for the same misconduct. (Brief, p. 74).

But Clark did not "pay" any fines or attorneys' fees or funds into the court registry, despite orders to do so. And the award of attorneys' fees did not include any of the sums which Clark had already been ordered to pay. (APP VOL III – 146; ¶28-30; 147, ¶ 31; 259).

Defendants are correct about one thing regarding fees – as noted by the district court, to justify an award of fees in Iowa under the common law, the alleged misconduct must exceed the "willful and wanton disregard for the rights of another; such conduct must rise to the level of oppression or connivance to harass or injure another. (APP VOL III - 259; Hockenberg, 510 N.W.2d 153, 159-160).

The determination of whether to award attorney fees under common law rests in the court's equitable powers." *Id.*; Baldwin v. City of Estherville, 929 N.W.2d 691, 701 (Iowa 2019).

In awarding fees, the court found that the evidence showed that the Defendants "doggedly and relentlessly published false, disparaging and

damaging information about Plaintiffs in multiple mediums and multiple forums,” (APP VOL III - 258).

The court noted that the it tried to quell the damage to Hoffmann by entering the Consent Order and sanctioning the Defendants for their repeated violations of it, which the Defendants ignored “entirely and repeatedly.” Id.

When the court prohibited the Defendants from posting or making comments about the litigation to limit the number of contempt applications filed, Defendants continued disparaging Hoffmann and also began posting disparaging comments about the court and the legal system in general, including requesting donations to a legal defense fund. (APP VOL III – 258; 264).

The court found that the evidence showed that Clark threatened Hoffmann to hurt him online and that Clark then made good on that threat and published false statements about Hoffmann in his business and encouraged others to do so, including in an attempt to ruin Hoffmann and/or pressure him to drop the lawsuit. (APP VOL III – 258; 264).

The court expressly found that Defendants’ misconduct is the rare level of oppression or connivance to harass or injurer another, as required by law. (APP VOL III – 259).

The court found that the Defendants blatant disregard for the legal process and the court's orders resulted in numerous contempt hearings and that Clark's defiant conduct delayed litigation, wasted court resources, and drove up the expenses in the case, including Hoffmann's attorneys' fees. (Id.).

V. WAIVER OF APPEAL ON BREACH OF CONTRACT AND FIDUCIARY DUTY AND INJUNCTION

Appellants argue that due to the improper striking of their pleadings and the improper granting of Hoffmann's Motion in Limine, a new trial should be awarded on all portions of the jury's award, including the damages awarded for breach of contract and breach of fiduciary duty. (Brief, p. 54).

Appellants admittedly do not argue that the damages awarded for Breach of Contract or Breach of Fiduciary Duty were unsupported by the evidence presented. Id., fn 4.

Defendants' Motion for New Trial, which cited no law, did not raise the issues of improper contract or fiduciary duty damages as a result of the striking of Defendants' pleadings or the granting of Hoffmann's Motion in Limine – their current argument.

Appellants' Brief provides no meaningful argument on either the breach of contract or fiduciary duty damages or the injunction.

As such, the issues were not preserved and the jury's award on these issues should stand.

CONCLUSION

For these reasons, Appellees respectfully request the court affirm the trial court's judgment.

ORAL ARGUMENT

Hoffmann contends that oral argument is unnecessary.

CERTIFICATE OF COST

The actual cost of printing or duplicating this brief is \$0.00 per document as it was electronically filed.

/s/ Robert Livingston

Dated: October 12, 2020

CERTIFICATE OF COMPLIANCE

This Response complies with the type-volume limitation of Iowa R. App. P. 6.903 because it contains 13,976 (less than the maximum 14,000 words), excluding the parts of the Brief exempted by the Rule. This Response complies with the typeface and type-style requirements of Iowa R. App. P. 6.903 because it was prepared using Microsoft Word in Georgia 14-font point.

/s/ Robert Livingston

Dated: October 12, 2020

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on October 12, 2020, the foregoing Final Brief was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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