[Cite as *Sayavich v. Creatore*, 2009-Ohio-5270.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

WILLIAM SAYAVICH, PLAINTIFF, VS. RONALD M. CREATORE, DEFENDANT THIRD PARTY PLAINTIFF-APPELLANT/ CROSS APPELLEE, VS. DAVID W. BARNITT, THIRD PARTY DEFENDANT-APPELLEE/ CROSS-APPELLANT.	)	CASE NO. 07-MA-217 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Mahoning County, Ohio
Case No. 2003CV01081

JUDGMENT: Affirmed

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

DATED: September 29, 2009

APPEARANCES:

For Defendant Third Party Plaintiff-Appellant/Cross-Appellee Ronald M. Creatore	Attorney Timothy J. Truby Attorney David S. Nichol 1500 One Cascade Plaza Akron, Ohio 44308
For Defendant-Appellee/Cross-Appellant David Barnitt	Attorney Michael J. Moran 234 Portage Tail, P.O. Box 535 Cuyahoga Falls, Ohio 44222 Attorney Andrew W. Suhar 29 E. Front St. P.O. Box 1497 Youngstown, Ohio 44501

[Cite as *Sayavich v. Creatore*, 2009-Ohio-5270.]
DONOFRIO, J.

{¶1} Appellant/cross-appellee, Ronald Creatore, appeals from a Mahoning County Common Pleas Court judgment dismissing his breach of contract claim and awarding him $25,000 on his defamation claim. Appellee/cross-appellant, David Barnitt, cross-appeals from the same judgment.

{¶2} Ronald Creatore, David Barnitt, and William Sayavich formed U.S. Sanitary Corporation (USSC) in 2000 as a holding company in order to purchase the stock of Girton, Oakes & Burger, Inc. (Girton), a fittings and valves distributor. USSC's purchase of Girton was financed by a loan from Provident Bank to Girton and USSC. The sale was final in January 2001. Creatore, Barnitt, and Sayavich each signed a continuing unconditional Guaranty for $725,000 of the loan. All three men became Girton's employees, with Creatore as the president, Barnitt as the chief financial officer, and Sayavich in charge of sales and marketing.

{¶3} Girton began experiencing financial difficulties in 2003 and was facing foreclosure on the Provident loan.

{¶4} According to Barnitt, Creatore began contacting new vendors and ordering large amounts of inventory on credit. Barnitt believed that Creatore was attempting to put Girton into bankruptcy and create a "bust-out." Barnitt alleged that Creatore increased Girton's inventory so that he could purchase the Provident loan and then foreclose on the loan, selling the assets to himself and leaving the vendors with nothing. Barnitt contended that the assets would then be sold to Creatore at a discount, which would leave a balance on the loan and Creatore could then pursue Barnitt on the Guaranty.

{¶5} According to Creatore, Barnitt made fraudulent accounting entries that Creatore had to disclose to Provident. Creatore formed PNH, Inc.[1] to purchase and manage Girton's loans in April 2003. Creatore contends that he did so because of Provident's notice of foreclosure. He further contends that at this time Barnitt was sharing information with Alfa Laval (Alfa), Girton's competitor and also Girton's largest supplier, regarding Girton's private label product line. Creatore alleges that

[1] PNH is an acronym for Provident Note Holder.

this was an attempt by Barnitt to force Girton and Creatore out of business. Creatore contends that while PNH was closing on the loan purchase, Alfa was preparing to file an involuntary bankruptcy petition against Girton with Barnitt's help.

{¶6} Alfa filed an involuntary bankruptcy petition against Girton the same day Creatore purchased the loan. A bankruptcy trustee was subsequently appointed, Creatore was removed as president, and Girton was shut down. The trustee then began to liquidate Girton's assets. Creatore was Girton's only secured creditor. The trustee and Creatore entered into a Compromise Settlement Agreement (CSA), giving Creatore the right to attempt to collect Girton's accounts receivable.

{¶7} PNH filed a complaint against Barnitt and Sayavich in the Summit County Common Pleas Court on the Guaranty. A jury determined that Barnitt and Sayavich did not owe anything to Creatore on the Guaranty.

{¶8} On April 2, 2003, Sayavich filed a complaint against Creatore, Girton, and USSC in the Mahoning County Common Pleas Court raising claims for declaratory judgment, injunctive relief, tortious interference with a contract, defamation, unfair competition, and civil conspiracy. These claims stemmed from allegations that Creatore "froze out" Sayavich from USSC's affairs, took sole control of USSC, and attempted to use a non-compete clause to prevent Sayavich from continuing in his line of work. Sayavich later substituted PNH for Girton as a party because PNH purchased Sayavich's non-compete agreement.

{¶9} Creatore subsequently filed an answer, counterclaim, and third-party complaint adding Barnitt and numerous other corporations and individuals as defendants. Creatore raised claims for breach of contract, defamation, fraud, breach of fiduciary duty, and interference with a contract.

{¶10} Barnitt then filed a counterclaim against Creatore raising claims for slander, libel, and tortious interference with a contract.

{¶11} The trial court granted Sayavich a preliminary injunction enjoining Creatore and USSC from discussing Sayavich's employment status with USSC and from using Sayavich's contracts and agreements with them.

{¶12} Creatore later filed a counterclaim against Sayavich for breach of contract, defamation, fraud, and breach of fiduciary duty.

{¶13} Just prior to trial, the parties dismissed most of the pending claims. The only claims that remained to be litigated in this case were Creatore's claims against Barnitt for defamation and breach of contract. These claims stemmed from Creatore's allegations that Barnitt shared information with Alfa. The information Barnitt allegedly shared with Alfa concerned Girton's private label product line, in violation of a non-disclosure agreement. Additionally, Creatore alleged that Barnitt fabricated information that Creatore was setting up his own company to compete with Alfa and that Creatore intended to "bust-out" Girton leaving Alfa with an uncollectable million-dollar account.

{¶14} The matter proceeded to a jury trial. At the close of the evidence, the trial court dismissed Creatore's breach of contract claim, citing a lack of evidence on damages, and instructed the jury only on defamation. The jury initially returned a verdict in favor of Creatore on the defamation claim. However, it awarded no damages. The court then instructed the jury that damages were presumed for defamation per se and that they needed to further deliberate. The jury then returned a verdict of $25,000 in favor of Creatore. They also found that no punitive damages were warranted. Barnitt filed a motion for judgment notwithstanding the verdict, which the trial court denied.

{¶15} Creatore filed a timely notice of appeal. Barnitt filed a timely notice of cross-appeal.

{¶16} We will address Creatore's assignments of error first and then Barnitt's assignment of error. Creatore raises four assignments of error, the first of which states:

{¶17} "WHETHER THE LOWER COURT ERRED IN SUA SPONTE DISMISSING APPELLANT'S CLAIM FOR BREACH OF CONTRACT PRIOR TO CHARGING THE JURY."

{¶18} Creatore states that throughout the trial the court argued with him that there could be no separate cause of action for breach of contract stemming from communications that also supported the defamation claim. He asserts that he presented evidence that Barnitt breached a non-disclosure agreement by telling Alfa that Creatore and Girton were competing with Alfa. Creatore claims that after he presented this evidence, the trial court precluded him from presenting evidence as to his damages.

{¶19} Creatore further argues that the court dismissed his breach of contract claim without a motion by Barnitt, without explanation, and without compliance with the Civil Rules.

{¶20} A party may make a motion for directed verdict on the opening statement of the opposing party. Civ.R. 50(A)(1). That is what Barnitt did, although he did not specifically call it a motion for a directed verdict.

{¶21} Barnitt initially made a motion to dismiss both the breach of contract and defamation claims after opening statements. (Tr. 53). Later, after both parties had presented evidence, Barnitt asked the court about the status of his motion. (Tr. 717). The court stated that on Barnitt's motion, the only claim remaining was Creatore's defamation claim. (Tr. 726).

{¶22} Although Barnitt termed his motion a motion to dismiss, what he was actually asking for was a directed verdict based on the lack of a claim in Creatore's opening statement. The court apparently held this motion in abeyance and waited to hear the evidence. However, after opening arguments, the court cautioned Creatore that it did not think he had a breach of contract claim:

{¶23} "THE COURT: I want you to articulate once again the breach of contract claim.

{¶24} "MR. NICHOL [Creatore's counsel]: Okay. In the close corporation agreement, the rights to enforce of which were assigned to PNH and Ronald Creatore by the Sixth Circuit Court of Appeals, the nondisclosure provision states, in

effect, that Mr. Barnitt cannot call up a competitor and say this is a product line that we are selling that competes with you. That's the whole point of - -

{¶25} "THE COURT: When was that done?

{¶26} "MR. NICHOL: That was done in March of 2003.

{¶27} "THE COURT: When did the company have financial problems?

{¶28} "MR. NICHOL: Around that time.

{¶29} "THE COURT: Before that time.

{¶30} "MR. NICHOL: Financial problems - -

{¶31} "THE COURT: Before that time.

{¶32} "MR. NICHOL: Which is why he did it, because he knew the ship was sinking.

{¶33} "THE COURT: He knew what?

{¶34} "MR. NICHOL: He knew that the ship was going down.

{¶35} "THE COURT: Well, if the ship was going down, what are the money damages then?

{¶36} "MR. NICHOL: To Mr. Creatore.

{¶37} "THE COURT: Well, what are they? His reputation?

{¶38} "MR. NICHOL: His reputation,

{¶39} "THE COURT: That's why we're back to defamation.

{¶40} "MR. NICHOL: I'm not done - -

{¶41} "THE COURT: Every time - - all the roads lead to Rome in this case, and Rome is the defamation claim.

{¶42} "MR. NICHOL: Okay, there's more. There's more. Because of this breach of the nondisclosure, Alfa Laval did a series of things, not just putting the company out of business, but putting Mr. Creatore out of business.

{¶43} "THE COURT: Once again, defamation." (Tr. 121-22).

{¶44} An appellate court reviews a trial court's ruling on a motion for directed verdict de novo because it presents a question of law. *Pearn v. DaimlerChrysler Corp.*, 148 Ohio App.3d 228, 2002-Ohio-3197, at ¶59. A motion for directed verdict

tests the sufficiency of the evidence at trial, not the weight of such evidence or the credibility of witnesses. Id. The trial court shall grant a motion for a directed verdict when, "after construing the evidence most strongly in favor of the party against whom the motion is directed, [it] finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4).

{¶45} In granting Barnitt's motion, the trial court explained that Creatore had not proven any damages. (Tr. 728). The court pointed out that Creatore's own evidence demonstrated that Girton was "going in the tank" in late 2002 and was insolvent. (Tr. 728). The court then stated to Creatore, "you have a breach of contract claim, but you don't have damages attached to it." (Tr. 729-30).

{¶46} Thus, Creatore's arguments that the trial court dismissed his breach of contract claim without a motion by Barnitt and without explanation are unfounded. The only argument left to address is whether the court complied with the Civil Rules in dismissing the breach of contract claim.

{¶47} For support, Creatore relies on *American Orthopedics, Inc. v. Goins*, 10th Dist. No. 07AP-898, 2008-Ohio-2301. In *American Orthopedics*, the plaintiff filed a complaint against the defendants to recover for materials and services it had provided them. On the day of trial, the defendants and their counsel appeared but neither the plaintiff nor his counsel showed up. Because the plaintiff failed to appear, the court granted the defendants' motion to dismiss the complaint. The trial court attempted to contact the plaintiff's counsel prior to the dismissal. But the court never gave the plaintiff or its counsel notice of its intent to dismiss the complaint.

{¶48} The plaintiff appealed arguing that the court erred by dismissing the complaint without giving notice to its counsel. The appellate court agreed. It pointed out that the trial court dismissed the case under Civ.R. 41(B)(1), which provides that the court may dismiss an action or claim where the plaintiff fails to prosecute. Id. at ¶6. The court then pointed out that the trial court must first provide notice to the plaintiff's counsel of its intent to dismiss. Id. Because the trial court failed to give the

plaintiff the required notice, the court of appeals reversed the dismissal and remanded the matter to the trial court.

{¶49} A significant difference exists between this case and *American Orthopedics*. This case did not involve a dismissal pursuant to Civ.R. 41. Instead, although not specifically termed, this case dealt with a motion for directed verdict pursuant to Civ.R. 50. Furthermore, the trial court here gave Creatore notice before he presented any evidence that it did not believe he could assert a claim for breach of contract because it did not believe that he had suffered any damages. Thus, Creatore's reliance on *American Orthopedics* is misplaced.

{¶50} Creatore cannot point to any way in which the trial court failed to comply with the Civil Rules in dismissing the breach of contract claim as he alleges.

{¶51} As the trial court found, a review of the transcript reveals that Creatore did not present any evidence of damages resulting from the alleged breach of contract.[2] Furthermore, Creatore did not cite to any evidence of damages in his brief. Evidence of damages is one of the elements of a breach of contract claim. *Yoder v. Hurst*, 10th Dist. No. 07AP-121, 2007-Ohio-4861, at ¶27. Thus, without evidence of damages, a breach of contract claim cannot exist.

{¶52} Accordingly, Creatore's first assignment of error is without merit.

{¶53} Creatore's second assignment of error states:

{¶54} "WHETHER THE LOWER COURT ERRED IN PROHIBITING APPELLANT FROM PUTTING ON EVIDENCE OF DAMAGES STEMMING FROM APPELLEE'S DEFAMATORY STATEMENTS AND APPELLEE'S BREACH OF CONTRACT."

{¶55} Creatore argues here that the trial court prohibited him from presenting his damages. He notes that his defamation claim was for defamation per se in which damages are presumed. However, Creatore argues that because the court did not permit his damages evidence, the jury was left with the impression that he suffered

[2] The issue of whether the trial court improperly disallowed Creatore to present evidence of damages is discussed in Creatore's second assignment of error.

no negative financial impact from the defamation. Creatore argues that the court erroneously instructed the jury that he was only entitled to damages that were actually caused by the defamation by a preponderance of the evidence. He further argues that the court should have permitted him to introduce evidence of the attorney's fees he incurred defending litigation stemming from Barnitt's conduct and as to Barnitt's substantial net worth.[3]

{¶56} The admission or exclusion of evidence is within the trial court's sound discretion and we will not reverse such a decision absent a clear and prejudicial abuse of that discretion. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶57} When a statement is defamatory per se, damages are presumed to exist. *Westropp v. E.W. Scripps Co.* (1947), 148 Ohio St. 365, paragraph four of the syllabus. Additionally, "actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725, 745, quoting *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 350, 94 S.Ct. 2997.

{¶58} As Barnitt points out, Creatore spent a considerable amount of time testifying as to his damages. Creatore's counsel specifically asked Creatore, what he was asking for as a result of the defamation. (Tr. 269). Creatore testified that he wanted Barnitt to compensate him for the damages he had suffered and to pay money that would punish him for what he did and prevent him from doing it to someone else. (Tr. 269). Creatore went on to explain at length the harm Barnitt caused to his reputation. (Tr. 270-75). He detailed the way others perceived him as a criminal, the 3,000 hours he spent to collect the accounts receivable to pay down

[3] The issue surrounding evidence of Barnitt's net worth is the subject of Creatore's third assignment of error. Thus, we will address it there.

the debt that Barnitt was the guarantor of, the time he spent trying to re-establish a company, and the efforts he made to clear his name and re-establish his reputation. (Tr. 270-75). When his counsel asked him what was the most important thing that could come from this trial, Creatore stated that it was most important to him that an objective group of people acknowledge that his claims were valid. (Tr. 274).

{¶59} Thus, contrary to his assertion, Creatore did present evidence as to his damages.

{¶60} There was one main instance where the trial court sustained Barnitt's objections when Creatore sought to solicit testimony regarding alleged damages.

{¶61} It was brought out during trial that either the bankruptcy trustee or Alfa had instituted proceedings against Creatore alleging fraud and a bust-out. (Tr. 254-55). Creatore testified that these allegations were never proven. (Tr. 255). He then attempted to testify as to how much money he spent fighting the false allegations against him. (Tr. 256). The trial court sustained Barnitt's objection. (Tr. 256). Creatore was able to testify that he settled with the trustee for $50,000 because it was less expensive than defending the case. (Tr. 259). Later, Creatore testified that Barnitt should pay the $50,000. (Tr. 275). However, the trial court ordered this testimony stricken. (Tr. 275).

{¶62} The trial court allowed Creatore to testify that he spent $50,000 to settle the previous lawsuit against him, instituted by the bankruptcy trustee as a result of the allegations made by Alfa. However, it did not allow him to testify as to what he spent on attorney's fees in that case.

{¶63} The trial court apparently found that the money Creatore expended on legal fess in bankruptcy court was not relevant in this case. Whether relevant or not, Creatore, in his closing argument, made clear that his prior legal fees were not at issue. As Barnitt points out, in his closing argument Creatore's counsel told the jury that the most important thing that Creatore wanted was a judgment that he was defamed so that he could show his children and say that he was defamed. (Tr. 816-17). Creatore's counsel then told the jury:

{¶64} "Beyond that, how has he been damaged? I'm not even going to ask for his actual damages. I mean, how do you compensate somebody for spending four years trying to clear your name, fighting a trustee, fighting a Fortune 500 company, being in court for four years when he obviously had substantial earning ability? That number would be astronomical, and I'm not asking for it. I'm sincerely not." (Tr. 817).

{¶65} Because Creatore made clear that he was not seeking reimbursement for prior legal fees, any such evidence was not relevant to the proceedings at hand.

{¶66} Creatore raises one more issue in this assignment of error. He contends that the trial court erred in instructing the jury:

{¶67} "In this case the burden to prove defamation per se is by clear and convincing evidence. However, in assessing money damages as to what is fair and reasonable, the burden of proof is by a preponderance of the evidence. In other words, once defamation per se is established by clear and convincing evidence, proof of damages need only be proved by a preponderance of the evidence." (Tr. 863-64).

{¶68} As set out above, in cases of defamation per se, damages are presumed. *Westropp*, 148 Ohio St. at paragraph four of the syllabus. Thus, the court's instruction on this point was erroneous.

{¶69} This error is further demonstrated by the fact that the jury initially returned a verdict in Creatore's favor on the defamation claim but returned a zero-dollar award. After the jury's initial verdict was read, the court heard from the parties. Creatore argued to the court that the verdict was inconsistent given that damages were presumed. Creatore asserted that because the court instructed the jury that it had to find damages proven by a preponderance of the evidence, the court's instructions had been inconsistent. (Tr. 887-89). Creatore asked the court to correct this error by instructing the jury that their verdict was inconsistent and that because they found defamation per se, damages were presumed. (Tr. 889). The trial court agreed with Creatore. It re-instructed the jury that damages were presumed and that

they should return to deliberations to come up with a damages award other than zero. (Tr. 895-97). After deliberating once again, the jury returned an award of $25,000.

{¶70} Hence, the trial court corrected its error with the jury instructions. Once the jury returned the zero-dollar verdict, the court re-instructed them that damages were presumed and that they should come up with a damages award. The jury then did just that. Consequently, any error with the court's initial jury instructions was harmless.

{¶71} Accordingly, Creatore's second assignment of error is without merit.

{¶72} Creatore's third assignment of error states:

{¶73} "WHETHER THE LOWER COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE OF APPELLEE'S NET WORTH IN SUPPORT OF PUNITIVE DAMAGES ON APPELLANT'S CLAIM FOR DEFAMATION."

{¶74} Creatore contends here that the court should have permitted him to introduce evidence of Barnitt's net worth. He asserts that evidence of Barnitt's net worth was proper because the jury was to consider punitive damages. Creatore points out that the court permitted Barnitt to introduce evidence of Creatore's net worth and to Barnitt's lack of net worth. This left the jury with the impression that Creatore was wealthy and Barnitt was not, Creatore argues.

{¶75} The purpose of punitive damages is to punish the defendant and deter wrongful conduct. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651. The Ohio Supreme Court had held that evidence of a defendant's net worth is proper evidence for the jury to consider when determining appropriate punitive damages. *Wagner v. McDaniels* (1984), 9 Ohio St.3d 184, at paragraph two of the syllabus. This is because the same punitive damages award would have less of a punishment effect on a wealthy defendant than on a defendant who is not so wealthy. Id. at 187.

{¶76} At least one court has further held that evidence of a defendant's financial status is also relevant in determining compensatory damages in a defamation case. See *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 223.

{¶77} During direct examination, Barnitt testified that Creatore's net worth was five-to-six million dollars. (Tr. 615). Creatore objected. But the court overruled the objection. (Tr. 616). However, on cross examination, Creatore's counsel asked Barnitt if he was a millionaire also. (Tr. 677). The trial court sustained Barnitt's objection to this question. (Tr. 677). Later Creatore's counsel attempted to question Barnitt about a statement he made on paper that he had $900,000. (Tr. 679-80). But once again the court sustained Barnitt's objection even though Creatore argued that Barnitt's financial condition was relevant to this case. (Tr. 680).

{¶78} Because Creatore was seeking punitive damages in this case, the trial court should have allowed him to present evidence of Barnitt's net worth. This was relevant evidence that the jury could have used to consider punitive damages.

{¶79} We do not agree with the Ninth District's decision in *Gosden*, supra, however, that a defendant's net worth is relevant when considering compensatory damages. The purpose of compensatory damages is to compensate the injured party for the damages he or she has sustained. *Schuyler v. Miller* (1990), 70 Ohio App.3d 290, 292. How much or how little money a defendant may have is not relevant as to the actual amount of damages the plaintiff has incurred as a result of the defendant's actions.

{¶80} The jury specifically found that Creatore was not entitled to punitive damages. (Tr. 885-86). Thus, the jury never reached the point of determining what amount of punitive damages was appropriate. Because we conclude that evidence of a defendant's net worth is only relevant as to punitive damages, the error in disallowing evidence as to Barnitt's net worth was harmless.

{¶81} Accordingly, Creatore's third assignment of error is without merit.

{¶82} Creatore's fourth assignment of error states:

{¶83} "WHETHER THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY PERMITTING A PERVASIVE NEGATIVE IMPRESSION OF APPELLANT'S DAMAGES."

{¶84} Here Creatore argues that the trial court repeatedly challenged him on what he collected on the PNH note, which Creatore contends was irrelevant, and left the jury with the impression that the judge knew something that they did not. He contends that this error in addition to the errors alleged in his previous assignments of error resulted in the initial verdict of zero damages followed by a verdict of minimal damages.

{¶85} Here Creatore does not cite to any instances in the transcript where he alleges that the trial court acted improperly. He simply argues that the trial court committed cumulative errors as previously discussed. And we have already determined that Creatore's previous assignments of error lack merit.

{¶86} Therefore, Creatore's fourth assignment of error is without merit.

{¶87} Barnitt raises a single assignment of error, which states:

{¶88} "THE LOWER COURT ERRED IN REJECTING THE FIRST JURY VERDICT WHICH FOUND IN FAVOR OF THE PLAINTIFF AND AWARDED ZERO DOLLARS IN DAMAGES."

{¶89} As noted previously, the jury initially returned an award of zero dollars despite finding in Creatore's favor on the defamation per se claim. The trial court found that because the jury determined Creatore was defamed, they had to award some amount of damages. The court sent the jury back to determine this amount. The jury returned a $25,000 verdict.

{¶90} Barnitt now contends that an award of zero dollars was appropriate in this case. He asks this court to vacate the $25,000 award and reinstate the jury's initial award of zero dollars.

{¶91} Barnitt first asserts that the trial court should have given deference to the jury's first verdict as it was their job to determine the amount of damages. Second, Barnitt argues that a finding of defamation per se and an award of zero

dollars are not inconsistent with each other. He argues that although damages are presumed when defamation per se is found, this presumption is rebuttable. Barnitt asserts that the jury must have heard evidence providing a basis for the amount of damages. He contends that the jury cannot arbitrarily choose an amount to award as damages. Barnitt argues that the jury considered the evidence in this case, found that Creatore was defamed, and found that Creatore was not damaged by the defamation. He contends that the trial court erred by forcing the jury to award an arbitrary amount of damages that they did not find to be supported by the evidence.

{¶92} As this assignment of error deals with the trial court's decision to correct its inconsistent instructions and send the jury back to determine an amount of damages, we will review it for an abuse of discretion. See *Wilhoite v. Kast* (Dec. 31, 2001), 12th Dist. No. CA2001-01-001 (applying Civ.R. 49); *Phillips v. Dayton Power & Light Co.* (1996), 111 Ohio App.3d 433, 447 (applying Civ.R. 49).

{¶93} Barnitt cites to the case of *Wilson v. Wilson*, 2d Dist. No. 21443, 2007-Ohio-178, for support. In *Wilson*, the appellate court in upholding summary judgment on a defamation per se claim, stated that legal presumptions are rebuttable. Id. at ¶14. It then applied the rebuttable presumption idea to the presumed damages in the defamation per se claim at issue.

{¶94} Creatore argues that *Wilson* is distinguishable because it dealt with summary judgment in favor of the defendant. While this is true, the general principle espoused by the Second District still remains that the presumption of damages in a defamation per se claim is rebuttable.

{¶95} But in this case, as discussed in Creatore's assignment of error, the trial court erred in instructing the jury that once it found by clear and convincing evidence that Creatore was defamed, it had to find damages by a preponderance of the evidence. As Creatore argued and the trial court agreed, these conflicting instructions likely resulted in an inconsistent verdict. The trial court realized that its instructions may have been misleading when the jury returned a verdict finding

defamation per se but yet awarding zero damages. Thus, the court rectified its confusing jury instructions by re-instructing the jury that damages were presumed.

{¶96} We will not conclude that the trial court acted arbitrarily, unreasonably, or unconscionably by correcting its own mistake. The court stated that it wanted to make sure before the jury was discharged that it corrected any possible error with its instructions. (Tr. 889).

{¶97} Accordingly, Barnitt's sole assignment of error is without merit.

{¶98} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs in part, dissents in part. See concurring in part, dissenting in part opinion.

DeGenaro, J., concurring in part and dissenting in part.

{¶99} I write separately for two reasons. First, I disagree with part of the reasoning contained within the majority's discussion of Creatore's second assignment of error. More specifically, I would hold that because Creatore failed to object to the trial court's jury instructions he waived all but plain error. In light of the trial court's curative jury interrogatory, the jury instruction does not rise to the level of plain error. Second, I respectfully dissent from the majority's resolution of Barnitt's sole cross-assignment of error. In my view, the trial court abused its discretion by remanding the damages issue to the jury for further deliberations.

{¶100} With regard to the first issue, Creatore argues that the trial court's jury instructions were erroneous in that they set forth the wrong standard for damages in a defamation per se action. The majority agrees that the jury instructions were erroneous, but determined that any error was harmless because the trial court reinstructed the jury and allowed them to redetermine damages. However, the majority does not address the fact that Creatore failed to object to the jury instructions before the jury began deliberations. To the contrary, prior to instructing

the jury, the trial court gave both sides an opportunity to object to the instructions and both sides agreed they were satisfied with the charge.

{¶101} "Absent plain error, a party waives any challenge to jury instructions in a civil case unless that party 'objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.'" *Patio Enclosures, Inc. v. Four Seasons Marketing Corp*., 9th Dist. No. 22458, 2005-Ohio-4933, at ¶70, quoting Civ.R. 51(A).

{¶102} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, at paragraph one of the syllabus.

{¶103} In *Goldfuss*, the Court explained that the doctrine shall only be applied in extremely unusual circumstances where the error complained of, if left uncorrected, would have a material adverse effect on the character of and public confidence in judicial proceedings. Id. at 121. The Court continued that the public's confidence is rarely upset merely by forcing civil litigants to live with the errors they themselves or the attorney chosen by them committed at trial. Id. at 121-122.

{¶104} Since Creatore did not object to the jury instructions until after the jury returned a damages award of zero dollars, he waived all but plain error review. In this case, the jury instructions do not rise to the heightened level required for civil plain error, because the jury *interrogatories* correctly state the law regarding damages for defamation per se claims.

"**JURY INTERROGATORIES**

{¶105} HAS THE PLAINTIFF PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT COMMUNICATED STATEMENTS THAT WERE DEFAMATORY PER SE?

{¶106} YES

{¶107} NO

{¶108} (CIRCLE YOUR ANSWER)

{¶109} TO THE JURY: IF YOUR ANSWER IS "NO", DO NOT ANSWER ANY MORE QUESTIONS. PROCEED TO EXECUTE THE VERDICT FORM FOR DEFENDANT. ADVISE THE BAILIFF THAT YOU HAVE COMPLETED YOUR DELIBERATIONS. IF YOUR ANSWERE [sic] IS "YES", PROCEED TO ANSWER QUESTION 2.

{¶110} * *

{¶111} IF YOU HAVE FOUND THAT THE DEFENDANT'S CONDUCT CONSTITUTED DEFAMATION PER SE, IT IS PRESUMED THAT THE PLAINTIFF SUFFERED MONETARY DAMAGE. STATE THE AMOUNT OF MONEY THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE INJURY INCURRED.

{¶112} $____* * *_____(juror signatures and dollar amount entries omitted)"

{¶113} Thus, it cannot be said that the error in the jury instructions seriously affects the basic fairness, integrity, or public reputation of the judicial process, or challenges the legitimacy of the underlying judicial process itself. In essence, any error in the jury instructions was cured by the jury interrogatories. Therefore, I disagree in part from the majority's analysis. However, I concur with the majority's ultimate resolution of Creatore's second assignment of error.

{¶114} Secondly, I dissent from the majority's resolution of Barnitt's sole cross-assignment of error. Barnitt argues it was improper for the trial court to reject the jury's damage award of zero dollars and send that issue back to the jury for a redetermination of damages. Barnitt argues that although damages for defamation per se are presumed, it is a rebuttable presumption. He advocates that the trial court should have deferred to the jury's finding on damages, especially considering the fact that Creatore seemed more focused on redeeming his good name and reputation rather than actually receiving any monetary award. The majority agrees that the

presumption of damages can be rebutted, but finds no error in the trial court's decision to send the damages issue back to the jury in light of the fact that the trial court's jury instruction on damages was erroneous.

{¶115} A trial court's decision to send an issue back to the jury for reconsideration due to an inconsistency in the verdict is reviewed for an abuse of discretion. *De Boer v. Toledo Soccer Partners, Inc.* (1989), 65 Ohio App.3d 251, 258, 583 N.E.2d 1004; see, also, *Rimsky v. Snider* (1997), 122 Ohio App.3d 248, 257, 701 N.E.2d 710 (discussing Civ.R. 49(B)). An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶116} Further, the court in *De Boer* noted that in evaluating whether a trial court abused its discretion by resubmitting an issue to the jury a reviewing court should weigh two conflicting factors. "On the one hand, a jury should be able to conform its verdict to its intention to avoid the necessity of a new trial; but, on the other hand, the court cannot invade the province of the jury by suggesting or implying that the jury came to the wrong conclusion." *De Boer* at 258.

{¶117} In my view, the trial court in this case abused its discretion by allowing the jury to revisit the issue of damages. Any error with respect to the jury instructions was already cured by the jury interrogatories, which, as aforementioned, contained a correct statement of the law regarding damages for defamation per se claims. Because the jury had before it a correct statement of the law, it was within their province to determine whether the presumption of damages had been rebutted. The jury's zero dollar damage award was not inconsistent with its finding of liability on the defamation per se claim, especially considering that Creatore essentially failed to ask for any monetary damages at trial, instead focusing on his desire to be vindicated with a verdict of defamation against Barnitt. The trial court's decision to force the jury to revisit the issue gave Creatore an unwarranted "second bite at the apple." I would hold that the trial court's decision to remand the damages issue to the jury for further

deliberations was unreasonable and therefore an abuse of discretion. Accordingly, I would sustain Barnitt's sole cross-assignment of error, and reinstate a zero dollar verdict in favor of Creatore.