

Glassman v Feldman
2022 NY Slip Op 30582(U)
February 24, 2022
Supreme Court, New York County
Docket Number: Index No. 102140/2009
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

DONALD GLASSMAN, Plaintiff,

- v -

ROBERT J. FELDMAN, Defendant.

INDEX NO. 102140/2009 102988/2012

MOTION DATE

MOTION SEQ. NO. 005, 006, 007

DECISION + ORDER ON MOTION

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The following papers were read on the parties' applications to set aside the jury verdict pursuant to CPLR 4404:

Re: Plaintiff's motion (NYSCEF Document Numbers): Notice of Motion (Doc. 53); Supporting Affirmation (Doc. 54); Exhibits A-E (Docs. 55-59); and Opposition Affirmation (Doc. 63).

Re: Defendant's motion (NYSCEF Document Numbers): Notice of Motion (Docs. 60&62); Supporting Affirmation (Doc. 65); Exhibits 1-6 (Docs. 66-75); and Opposition Affirmation (Doc. 61).

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of plaintiff Donald Glassman to set aside a portion of the jury verdict is granted in part, and the motion of defendant Robert J. Feldman to set aside the jury verdict and vacate the award of punitive damages is denied, in accord with the following memorandum decision. The two motions are consolidated herein for decision.¹

Background

Defendant Robert J. Feldman ("Defendant") is a criminal defense attorney. This action arises from Defendant's representation of plaintiff Donald Glassman ("Plaintiff") in an October 2007 criminal trial in the Criminal Term of Supreme Court, New York County, on charges of non-forcible rape in the third degree. Plaintiff was represented in the criminal trial by non-party

¹ Plaintiff's motion is sequence number 005. Defendant filed his motion under two sequence numbers - 006 and 007. Thus, to be clear, there are only two motions for disposition. While certain filings may not have been filed in perfect order, the record relating to motion sequence numbers 005, 006, and 007 contain a complete record of the post-trial motions disposed of in this decision and order.

Howard L. Blau, Esq. During the criminal trial, Plaintiff met Defendant and the parties had several discussions regarding Plaintiff's trial. When the jury returned a guilty verdict on the rape charge, Plaintiff called Defendant in a distressed state and expressed dismay that he had been denied the right to testify at the trial. Defendant counseled Plaintiff to request a hearing to set aside the jury verdict pursuant to Criminal Procedure Law ("CPL") § 330. Following his conviction, Plaintiff discharged Mr. Blau and retained Defendant to represent him in connection with the request for a CPL § 330 hearing. In November 2007, Defendant filed a motion under CPL § 330 to set aside the guilty verdict against Plaintiff on the ground that Plaintiff had been denied his constitutional right to testify in his own defense at the criminal trial. In April 2008, Plaintiff was advised that Defendant's knowledge regarding Plaintiff's right to testify on his own behalf, gleaned through the parties' pre-retention discussions during Plaintiff's trial, made Defendant an essential fact witness for the purposes of the CPL § 330 hearing. Plaintiff then discharged Defendant and retained new counsel who ultimately represented him in the hearing. Following the hearing, Criminal Term granted Plaintiff's motion for a new trial and a new trial proceeded in early 2009. On February 11, 2009, Plaintiff was acquitted of all charges following a non-jury trial.

On February 17, 2009, Plaintiff commenced the action captioned *Donald Glassman v Robert J. Feldman, Esq.* (index No. 102140/2009 [the "First Action"]), to recover damages for breach of contract and malpractice arising from Defendant's representation of Plaintiff in connection with the CPL § 330 motion, and on the ground that Defendant committed malpractice and ethical violations by undertaking representation of Plaintiff with knowledge that Defendant was a material fact witness concerning Plaintiff's knowledge regarding his right to testify in his own defense. The complaint interposed causes of action for breach of contract and legal

malpractice and was later amended to add a cause of action for violation of Judiciary Law § 487.

During the pendency of the First Action, Plaintiff commenced the action captioned *Donald Glassman v Robert J. Feldman, Esq.* (index No. 102988/2012 [the “Second Action”]), which interposed causes of action for defamation *per se*, intentional infliction of emotional distress, negligent infliction of emotional distress, and for injunctive relief in connection with certain InterNet comments regarding Plaintiff that Defendant posted to two websites.

The cases were later consolidated for trial, which proceeded before this court on the causes of action for breach of contract, malpractice, defamation *per se*, intentional infliction of emotional distress, and violation of Judiciary Law § 487. At trial, the jury answered the questions presented to it on the verdict sheet as follows:

1. Did the Defendant breach his contract with Plaintiff? YES
2. State the amount of damages, if any, owed by Defendant for breaching his contract: \$10,000
3. Did Defendant depart from good and accepted legal practices in his representation of Plaintiff? YES
4. Did the Defendant’s departure from good and accepted legal practices result in damages to Plaintiff? YES
5. State the amount of damages, if any, owed by Defendant for his departure from good and accepted legal practices: \$20,000
6. Did the Defendant violate Judiciary Law § 487 by engaging in Deceptive Conduct? YES
7. Was the Defendant’s violation of Judiciary Law § 487 willful? NO
8. State the amount of damages, if any, owed by the Defendant for his violation of Judiciary Law § 487: \$0
9. If the answer to question 8 is more than zero, you will award treble damages, i.e., triple the amount stated in your answer to question 8. Please record that number immediately below: [No answer]
10. Did the Defendant make false and defamatory statements about Plaintiff on the Internet? YES
11. Did the defendant publish the statement in a grossly irresponsible manner without consideration for the standards of information gathering and dissemination followed by responsible parties? YES

12. Did the defendant intentionally inflict emotional distress on plaintiff? YES
13. State separately the total amounts awarded, if any, for each of the following items of damages to date: Past pain and suffering \$0
14. State separately the amounts awarded, if any, for each of the following items of damages and the period of years over which such amounts are intended to provide compensation for the future. Future pain and suffering \$0
15. Is plaintiff entitled to punitive damages against defendant? YES
16. State the amount of punitive damages you award against defendant: \$250,000

(NYSCEF Doc. No. 55.)

Plaintiff moves pursuant to CPLR 4404 (a) and 5501 (c) to set aside the portion of the verdict that awarded zero damages for past and future pain and suffering and for an additur on the grounds that the award is inconsistent with the determination of liability on the defamation and intentional infliction of emotional distress causes of action; grossly disproportionate to the \$250,000 award for punitive damages; wrong as a matter of law; and constitutes a material deviation from reasonable compensation for the past and future emotional distress suffered by Plaintiff. Plaintiff seeks the application of a 2-to-1 proportion for an award of punitive to compensatory damages and an additur of \$60,000 damages each for Plaintiff's past and future pain and suffering, for a total additur of \$120,000.

Defendant opposes Plaintiff's motion and separately moves to set aside the entire jury verdict because it was "illogical, internally repugnant and against the weight of the evidence" (NYSCEF Doc. No. 65 ¶ 2). Defendant argues that the jury's verdict on the legal malpractice claim is not supported by the evidence presented; that the jury award of zero damages for the Judiciary Law § 487, defamation, and intentional infliction of emotional distress claims does not support the award of punitive damages; that Plaintiff's expert, David Horowitz, should not have been permitted to testify at the trial because his testimony did not relate to issues that were outside the scope of a lay person's knowledge and because he lacked the requisite expertise in

criminal law; and, finally, that the verdict on the breach of contract claim should be set aside because “Plaintiff’s entire case for breach of contract relied on . . . Horowitz’ opinion” (NYSCEF Doc. No. 65 ¶ 3).

Discussion

Under CPLR 4404 (a), after a trial of a cause of action by a jury, the court may, upon motion, “set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.” New York courts have articulated two distinct standards of review available under CPLR 4404 (a) (*see, Killon v Parrotta*, 28 NY3d 101, 108 [2016]). Under CPLR 4404 (a) (and *Killon*), the court may: (1) examine the facts to determine whether the weight of the evidence comports with the verdict; or (2) consider whether the evidence was insufficient as a matter of law, rendering the verdict utterly irrational (*Nemeth v Brenntag North America*, 183 AD3d 211, 216 [1st Dept 2020]). The court “may not disregard a jury verdict as against the weight of the evidence unless ‘the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence’ (*id.*, quoting *Killon*, 28 NY3d at 107)). “The remedy for a verdict that is against the weight of the evidence is to remit for a new trial” (*id.*). However, where “the jury verdict is found insufficient as a matter of law, [the court] must determine that the verdict is utterly irrational, meaning there is no valid line of reasoning or permissible inferences from the evidence presented by which a rational person could reach the jury’s conclusion” (*id.*). “The remedy for an utterly irrational verdict is a judgment in favor of the moving party” (*id.*).

Similarly, a trial court may set aside a jury award of damages as inadequate or excessive pursuant to CPLR 5501 (c), where the court finds that such award “deviates materially from what would be reasonable compensation.” Although CPLR 5501 (c) expressly addresses the Appellate Division’s authority to overturn a jury’s damage verdict, its “material deviation” standard has been applied to trial courts as well (*see, Ashton v Bobruitsky*, 214 AD2d 630, 631 [2d Dept 1995]; *Inya v Ide Hyundai, Inc.*, 209 AD2d 1015 [4th Dept 1994]; *Cochetti v Gralow*, 192 AD2d 974 [3rd Dept 1993]; *Shurgan v Tedesco*, 179 AD2d 805 [2d Dept 1992]).

A. Plaintiff’s Motion

Plaintiff seeks to set aside that portion of the jury verdict that awarded zero damages for pain and suffering as insufficient as a matter of law.

Past Pain and Suffering:

On the issue of past pain and suffering attributable to his claim for intentional infliction of emotional distress, Plaintiff is correct. Where the evidence establishes that a plaintiff has suffered an injury resulting in pain, the jury’s failure to award damages for pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation (*Califano v Automotive Rentals*, 293 AD2d 436 [2002], *citing Ramos v New York City Hous. Auth.*, 280 AD2d 325, 326 [1st Dept 2001], *quoting Kennett v Piotrowski*, 234 AD2d 983, 984 [4th Dept 1996]; *see, Pares v LaPrade*, 266 AD2d 852, 697 NYS2d 413 [4th Dept 1999]; *Kriesel v May Dept. Stores Co.*, 261 AD2d 837 [4th Dept 1999]; *Corsaro v Mt. Calvary Cemetery*, 258 AD2d 969 [4th Dept 1999]; *Grasso v American Brass Co.*, 212 AD2d 994 [4th Dept 1995]; *see also, Laraby v Village of Potsdam Hous. Auth.*, 252 AD2d 603 [3d Dept], *appeal dismissed* 92 NY2d 1002 [1998]). Because severe emotional distress is an element of the cause of action for intentional infliction of emotional distress, by finding in favor

of Plaintiff on his cause of action for intentional infliction of emotional distress, the jury necessarily concluded that Plaintiff suffered severe emotional distress, i.e., pain and suffering. Accordingly, the award of zero damages for past pain and suffering was contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation for past pain and suffering.

“Nonpecuniary damages, the key component in the tort of intentional infliction of emotional distress, are, by their nature, not susceptible to mathematical computation” (*Laurie Marie M. v Jeffrey T.M.*, 159 AD2d 52, 56 [2d Dept 1990], *affd* 77 NY2d 981 [1991], quoting *McDougald v Garber*, 73 NY2d 246, 257 [1989]). A plaintiff’s subjective testimony of pain is sufficient to establish an injury for which he or she is entitled to compensation, but the proof must satisfactorily establish that the injury is more than minimal (*see, Laurie Marie M., supra; Levine v Abergel*, 127 AD2d 822, 824 [2d Dept 1987]; *Fraday v State of N.Y.*, 19 AD2d 783, 783 [3d Dept 1963]). Moreover, the “existence of severe emotional distress and proximate cause may be inferred . . . without expert medical opinion where . . . plaintiff has testified as to [his or] her emotional condition” (*Murphy v Murphy*, 109 AD2d 965, 966 [1985]).

At trial, Plaintiff offered the following testimony regarding injury he suffered as a result of Defendant’s InterNet comments:

I’ve wanted to kill myself on more than one occasion, particularly – as a result of these smears against me, particularly during that period after my father died and before I got remarried in 2016 when I was dating again. I was in – I was in law school during that period and just starting my career as an attorney. And I could see that both – I saw clear evidence that both my personal life and my professional life were being – had been damaged by these posts, that these false posts smearing me with rape, which I had been specifically exonerated of, and all these other accusations, which are completely made up. Being a predator, being mentally ill, it’s severe distress, and occasionally I thought of killing myself.

(Trial Transcript [11/4/2019] at 65.) Plaintiff also testified that, prior to being remarried in 2016, the comments negatively impacted his social life in the following manner:

So typically . . . I have utilized online dating. And I would meet – I would meet a woman, have a date or maybe two dates, and then I would get a call or an email saying, of, by the way, I – is this you Glassman that I read about, mentally ill, rapist, you are a serial predator? I’m sorry – you know, and a lawyer is saying these things about you.

And I would try to explain But it would fall on – it would fall on deaf ears usually. That would be the last thing I would hear from that woman.

(*Id.*, at 65-66.) Regarding his professional life, Plaintiff testified that:

I have no reason to think that he posted these things about me until 2011 And from then until present day, since then, you know, I got my degree, I got my license, I still have not been able to secure a full-time position with benefits.

And I have to, I have to attribute that in some – in large part to these smears about me on the internet

(*Id.*, at 67.)

Plaintiff also indicated that the impact to his professional life is “harder to quantify,” but he indicated that he has been unable to secure “a full-time job with benefits” since being terminated from his prior positions during the pendency of the criminal trials in 2008, despite having “a couple of master’s degrees, and an Ivy league bachelor’s degree And . . . a JD, a law license, and I speak a couple of foreign languages.” (*Id.*, at 66.) No expert testimony or other evidence was offered at trial regarding Plaintiff’s emotional distress.

As indicated above, this court finds that the jury’s zero compensatory damages award for past pain and suffering (Answer to Verdict Question 13) – in the face of the jury’s explicit finding of intentional infliction of emotional distress, as well as its award of punitive damages in an amount of \$250,000 (Answers to Verdict Questions 12, 15, and 16) – “deviates materially from what would be reasonable compensation” (*Donlon v City of N.Y.*, 284 AD2d 13, 14 [1st

Dept 2001]). Given the recognition by the jury of punitive relief (quantified at \$250,000), which this court finds supportable by the evidence adduced at trial, the court concurs with plaintiff's request that additur in relation to the zero dollar award for *compensatory* damages is quite appropriate. And, given that juxtaposition between a clearly justified punitive award and an inconsistently unreasonable compensatory non-award, this court concurs with plaintiff's counsel's recommendation of a compensatory additur reflecting an approximate 2-to-1 ratio of punitive to compensatory damages that has been endorsed by federal and state appellate courts (*see, Turley v ISG Lackawanna, Inc.*, 774 F3d 140 [2d Cir 2014]; *Lynch v County of Nassau*, 278 AD2d 205 [2d Dept 2009]; *Pollard v E.I. DuPont Nemours, Inc.*, 412 F3d 657 [6th Cir 2005]; *see also, Solis-Vicuna v Notias*, 20 Misc 3d 723 [Sup Ct Kings County 2008] [applying an approximate 3-to-1 ratio of punitive to compensatory damages], *affd* 71 AD3d 868 [2d Dept 2010]). Applying such an approximate 2-to-1 ratio results in a compensatory award herein in the amount of \$120,000 – an aggregate amount requested by plaintiff's counsel on his within motion for additur (albeit, stated by counsel as \$60,000 for past pain and suffering and \$60,000 for future pain and suffering, which, per the following section, this court does not adopt).²

² The suggested amount is decidedly reasonable in light of various other actions yielding verdicts on past pain and suffering claims, in substantially higher amounts (*see, e.g., Torbati v Heidings*, 2018 WL 3364563 [Sup Ct NY County 2018] [compensatory additur from \$100,000 to \$375,000]; *Bouveng v NYG Capital LLC*, 1:14-cv-05474-PGG-DCF [SD NY June 29, 2015] [\$1,500,000 verdict on defamation claim]; *Carossia v City of N.Y.*, index No. 102289/1999 [Sup Ct NY County Mar. 28, 2005] [\$740,000 verdict for intentional infliction of emotional distress and defamation]; *Brancaleone v Mesagna*, index No. 16605/1992 [Sup Ct Nassau County Sept. 23, 1999] [\$2,500,000 verdict for intentional infliction of emotional distress and defamation]; *Tulino v City of N.Y.*, 1:15-cv-07106-JSR [SD NY Mar. 5, 2019] [\$2,000,000 verdict for intentional infliction of emotional distress and defamation]). (*See, Donlon v City of N.Y.*, 284 AD2d 13, 15 [1st Dept 2001] [appropriate to examine other similar cases in trying to determine whether any award constitutes “reasonable compensation” (CPLR 5501[c]), while recognizing that such examination “cannot, due to the inherently subjective nature of non-economic awards, be expected to produce mathematically precise results”].)

The court finds, as further instructive, the decision by the Appellate Division, First Department, in *Kern v News Syndicate Co., Inc.* (20 AD2d 528 [1st Dept 1963]). That defamation case – not much differently than this one – involved a very low compensatory award (\$1,000) juxtaposed against a somewhat substantially higher punitive award (\$50,000). That court, taking note of the very low compensatory award, concluded that “[t]he verdict for the plaintiff in the sum of \$1,000 compensatory damage shows that the jury did not conclude that he was injured seriously by the libel. That fact is significant in considering the award for punitive damages.” (*Id.*, at 528.) **But,**

Future Pain and Suffering:

On the issue of future pain and suffering, the Appellate Division, First Department, has held in personal injury actions that where a jury awards damages for future medical expenses, a zero jury award for future pain and suffering is inconsistent and should be overturned as a matter of law (*Scott v Posas*, 194 AD3d 454 [1st Dept 2021]; *Paucay v D.P. Group General Contractors/Developers, Inc.*, 187 AD3d 496, 496 [1st Dept 2020]; *Sanchez v City of N.Y.*, 97 AD3d 501, 506 [1st Dept 2012]). However, Plaintiff offered no such evidence at trial, relying instead on his testimonial evidence to prove damages. Plaintiff testified that, as a result of Defendant's comments, he suffered from past suicidal thoughts and struggled in his dating life, but was remarried in 2016; but neither of these factors is an indicator of future pain and suffering. Additionally, the comments in question took place nearly a decade before the trial. Under these circumstances, it was not utterly irrational for the jury to conclude that Plaintiff was not entitled to any damages for future pain and suffering. Therefore, no cause exists to disturb the jury award on this basis.

Plaintiff also argues that in a defamation *per se* case, "actual damages are *presumed* regardless of the pleadings or proof presented at trial, [and] the compensatory damages cannot be zero or a nominal amount" (NYSCEF Doc. No. 54 ¶ 32). Plaintiff is incorrect in this assessment. Where a defendant is liable for defamation *per se*, compensatory damages are presumed, but nominal damages may be awarded where the plaintiff fails to establish actual damages (*Hinsdale v Orange County Publications, Inc.*, 17 NY2d 284, 291 [1966] ["We conclude, therefore, that the complaint sufficiently alleges a publication libelous per se. It will be for a jury to say what

that court took pains to add the following notable caveat: "The basis for awarding such [punitive] damages was the reckless conduct of the defendant. Although such conduct is by no means to be approved, from a punitive viewpoint it is much less evil than, and must be distinguished from, a case where the defendant deliberately and maliciously sets out to destroy a person professionally and otherwise." (*Id.* [emphasis added].)

damages (be they substantial or nominal) the several plaintiffs are entitled to”]; *Orlowski v Koroleski*, 234 AD2d 436, 437 [2d Dept 1996]). “In a libel case, more perhaps than in any other, the jury is generally considered to be the supreme arbiter on the question of damages” (*Lynch v N.Y. Times Co.*, 171 AD 399, 401 [1st Dept 1916]). “The amount of the damages to be awarded in an action for defamation of character is peculiarly within the province of the trier of the facts; his award should not be disturbed unless it is palpably or grossly inadequate. In an action of this character it is seldom that the amount of the damages awarded by the jury or other trier of the facts will be increased by the court” (*Kruglak v Landre*, 23 AD2d 758, 759 [2d Dept 1965]). “Many elements enter into an action for libel or slander, which are not present in other actions for personal wrongs. A man may be grossly libeled, and still his character and reputation may be such that he suffers no injury, or the circumstances under which the libel is published or the slander uttered be such that no substantial damage ought to be given” (*id.* [internal citations omitted]).

Here, it was not utterly irrational or against the weight of the evidence for the jury to conclude that Plaintiff was not injured by the Defendant’s defamatory comments where his reputation was already damaged by the prior rape conviction, despite the subsequent acquittal, and the comments were made on two relatively obscure websites. Additionally, Plaintiff testified that he had no reason to believe that Defendant made any defamatory comments prior to 2011; but Plaintiff was unable to find gainful employment after he was terminated from his prior positions during the pendency of the first criminal trial in 2008 until the time of this trial (*see*, Trial Transcript [11/4/2019] at 65). Plaintiff’s failure to find gainful employment for two years prior to Defendant’s comments lends credence to a conclusion that the Defendant’s actions did no additional harm to his employment prospects. An award of nominal damages for the

defamation claim is not palpably or grossly inadequate under these circumstances, and it is a long-established rule of New York law that the failure to award nominal damages does not constitute cause to set aside a jury verdict (*Lynch, supra*). Therefore, cause does not exist to disturb the jury award due to the failure to award compensation for defamation. Accordingly, Plaintiff's motion is granted only to the extent that the award for past pain and suffering is increased to \$120,000.

B. Defendant's Motion

Defendant moves to set aside the verdict on the ground that it was "illogical, internally repugnant and against the weight of the evidence" (NYSCEF Doc. No. 65 ¶ 2). It is unclear from this language whether Defendant relies exclusively on the "weight of the evidence" standard or whether he also seeks to set aside the verdict as insufficient as a matter of law; but Defendant's motion fails under either standard. With respect to breach of contract, Defendant's motion is, in effect, a motion to reargue this court's decision to permit Plaintiff's expert witness, David Horowitz, to testify. "The admission of an expert opinion is a matter within the sound discretion of the court" (*Oboler v City of N.Y.*, 31 AD3d 308, 308 [1st Dept 2006] [citation omitted], *aff'd* 8 NY3d 888 [2007]). An expert opinion is properly admitted when the opinion "would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v Erie County*, 60 NY2d 296, 307 [1983]). This court, in what it feels was its exercise of sound discretion, and after due consideration, permitted Mr. Horowitz' expert testimony at trial, and Defendant has failed to present any compelling legal or factual basis to revisit, or overturn, that ruling.

Regarding malpractice, Defendant argues that Plaintiff has failed to satisfy the “but for” requirement of the claim.³ “In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation omitted]). “To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer’s negligence” (*id.*). “A plaintiff’s damages may include litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney’s wrongful conduct” (*id.*, at 443).

At trial, Plaintiff offered evidence that he was caused to retain new counsel and incur additional litigation expenses after Defendant’s termination and that he was also caused to pay a fee to Defendant in order to secure Defendant’s testimony as a fact witness at the CPL § 330 hearing. It was not against the weight of the evidence for the jury to conclude that the Plaintiff would not have incurred these expenses but for Defendant’s negligence. Therefore, it is the determination of this court that the jury verdict on the claims for breach of contract and malpractice comport with the weight of the evidence presented at trial, and Defendant’s motion is denied as it pertains to these claims.

Defendant also seeks vacatur of the award of punitive damages on the ground that punitive damages are not recoverable on the claims for breach of contract or malpractice as a matter of law. As Defendant correctly notes, punitive damages are ordinarily “not recoverable

³ To the extent that Defendant reargues certain facts presented at trial and references purported facts or evidence which were not adduced at trial in support of his motion, these are unpersuasive and not appropriate for consideration on a post-trial motion.

for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights” (*Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 613 [1994]). However, the jury also found Defendant liable for violation of infliction of emotional distress and defamation arising from Defendant’s inflammatory InterNet comments, which were made over two years after Plaintiff commenced the action for breach of contract and malpractice and were separate and apart from the contractual relationship between the parties. These claims support an award of punitive damages, which are recoverable in all actions based upon tortious acts which involve elements of malice, fraud, oppression, insult, wanton or reckless disregard of one’s rights, or other circumstances of aggravation, as a penalty to the defendant and an admonition to others (*see, Le Mistral, Inc. v Columbia Broadcasting Sys.*, 61 AD2d 491 [1st Dept., 1978], *appeal dismissed* 46 NY2d 940 [1979]; *see also, Walker v Sheldon*, 10 NY2d 401 [1961]; *Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381, 381 [2d Dept 2006] [“Punitive damages are recoverable where the conduct in question evidences ‘a high degree of moral culpability,’ or ‘the conduct is so flagrant as to transcend mere carelessness,’ or ‘the conduct constitutes willful or wanton negligence or recklessness’”], *quoting Lee v Health Force, Inc.*, 268 AD2d 564, 564 [2d Dept 2000]).

A claim for violation of Judiciary Law § 487 may also support an award of punitive damages (*Cohen v Kachroo*, 115 AD3d 512, 514 [1st Dept 2014]). It is well settled that, “[w]hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of . . . the jury, and such an award is not lightly to be disturbed” (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978] [citations omitted]; *see, Solis-Vicuna v Notias*, 71 AD3d 868, 871 [2d Dept 2010]; *Laurie Marie M., supra*). The award of punitive damages was particularly appropriate here because

Defendant’s action were all the more egregious due to his attorney-client relationship with the Plaintiff (*Neuman v Frank*, 82 AD3d 1642, 1643 [4th Dept] [“The fiduciary duty of an attorney, however, extends both to current clients and former clients and thus is broader in scope than a cause of action for legal malpractice”], *citing Greene v Greene*, 47 NY2d 447, 453 [1979]). For these reasons, Defendant’s motion for vacatur of the award of punitive damages is denied.

Defendant further argues that the jury verdicts in favor of Plaintiff on the claims for violation of Judicial Law § 487, defamation, and intentional infliction of emotional distress should be vacated because an award of punitive damages cannot stand without an award of punitive damages. However, this court has already determined that the jury’s failure to award compensatory damages was in error. Therefore, this portion of Defendant’s motion is denied.

Accordingly, it is

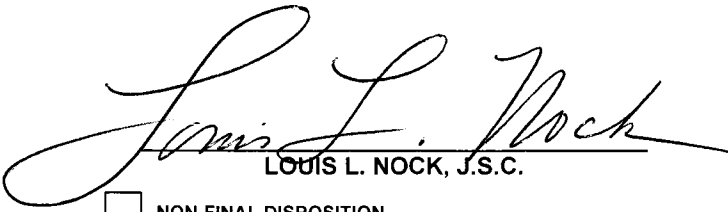
ORDERED that Plaintiff’s motion is granted in part, and the jury award for past pain and suffering on the cause of action for intentional infliction of emotion distress is modified to \$120,000; and it is further

ORDERED that the remainder of Plaintiff’s motion is denied; and it is further

ORDERED that Defendant’s motion is denied in its entirety.

This shall constitute the decision and order of the court.

ENTER:


LOUIS L. NOCK, J.S.C.

2/24/2022
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	<input checked="" type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE