UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2556

September Term, 2015

PROEXPRESS DISTRIBUTORS LLC

v.

GRAND ELECTRONICS, INC.

Eyler, Deborah S.,
Graeff,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: May 24, 2017

Appellant, ProExpress Distributors LLC (PED), an online seller of electronic products (including tablet computers) on Amazon.com, filed on 18 September 2014 in the Circuit Court for Montgomery County a civil complaint alleging a trade secrets violation by Appellee, Grand Electronics, Inc. (GE), another retailer of similar products on Amazon.[1] In its appellate brief, PED described the alleged trade secret as "the methodology by which [PED] input information into the Amazon search template in order to drive sales for its online tablet computer business."

PED kept its business documents, including its purported trade secret, in cloud-based,[2] password-protected internet accounts, including Dropbox[3] and Google Drive.[4]

[1] GE was founded by Dongchen "Andy" Lu, a former employee of PED.

[2] PCMag.com defines "cloud storage" as follows:

> A backup and storage service on the Internet. Cloud storage providers generally let users upload any size and type of computer file, whereas e-mail attachments often have limitations. Also called "online storage" and "public cloud storage," a customer's files are downloaded to anyone's computer with a Web browser and password. Many providers are freemium based [the basic service is free but extended or advanced features are not], offering limited free storage and higher capacities for monthly fees. Others charge per-gigabyte-per-month.

PCMag.com Encyclopedia, *Definition of: cloud storage*, http://www.pcmag.com/encyclopedia/term/60889/cloud-storage [https://perma.cc/3YB7-ABKT].

[3] Dropbox is one among many cloud storage services. CNET.com described it as follows:

> You can store any kind of file in Dropbox, by either uploading to the website or adding it with the desktop apps. Those apps live in your file system so that you can easily move files from your computer to the cloud and vice versa by dragging and dropping them into your Dropbox folder. The service automatically and quickly syncs your files across all of your

(Continued…)

PED alleged that Xuan "Victor" Lu,[5] a former at-will employee of CNEST Solutions, Inc., a separate, non-party entity with which (and the employees of which) PED shared access to its internet storage accounts, viewed PED's trade secret in the Dropbox account in or about April 2014, while employed as a consultant by GE.

GE filed an answer and a counterclaim, alleging, among other counts in the latter, defamation and tortious interference with actual and prospective business relationships. The basis for these counts was that PED represented allegedly to Amazon.com (GE's primary marketplace) that GE sold counterfeit products through Amazon and violated PED's intellectual property rights. GE claimed that this resulted in Amazon's preemptive removal of a product (the N7 Tablet) from GE's online store, causing declines in its sales and product visibility on Amazon.

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> devices, so you can access everything, everywhere. There is no size limit on files you upload to Dropbox with the desktop or mobile apps, but larger files can take several hours to upload, depending on your connection speed.

Sarah Mitroff, *OneDrive, Dropbox, Google Drive and Box: Which cloud storage service is right for you?*, CNET.com, https://www.cnet.com/how-to/onedrive-dropbox-google-drive-and-box-which-cloud-storage-service-is-right-for-you/ [https://perma.cc/Z7SL-NWPA].

[4] Like Dropbox, Google Drive is another form of cloud storage. Google touts its service's ability to "[s]tore any file," allow the user to "[s]ee your stuff anywhere," and to "[s]hare files and folders." Google Drive, https://www.google.com/drive/ [https://perma.cc/4RAZ-TBCT].

[5] We cannot determine from the record whether Victor Lu is related to Andy Lu, and, if so, on what basis. PED's complaint reflected the same address for both Lu's.

The circuit court issued several pre-trial orders, including granting summary judgment in favor of GE as to: 1) PED's Complaint, and 2) the above two counts in GE's Counterclaim. At a 5 October 2015 jury trial to determine damages owed by PED to GE on the Counterclaim, the jury returned a written verdict appearing to find PED liable for $4,460 in compensatory damages and $75,000 in punitive damages for each of the two torts for which summary judgment had been granted, defamation and intentional interference with business relations.[6] On 14 October 2015, the court issued a Notice of

[6] The relevant sections of the completed verdict form read as follows [formatting adheres as closely as possible to the original form]:

> 1. Do you find that Counter-Plaintiff, Grand Electronics, Inc., has proven by a preponderance of the evidence that it suffered more than nominal damages of one dollar ($1.00) on Count Three as a result of ProExpress Distributors, LLC's defamation of Grand Electronics?
>
> Yes ✓ No_______
>
> If your answer is YES, in what amount? $4460.00
>
> If your answer to Question 1 is YES, go to Question 3. . . .
>
> * * *
>
> 3. Do you find by clear and convincing evidence that Counter-Plaintiff, Grand Electronics, Inc., is entitled to punitive damages as a result of ProExpress Distributors, LLC's defamation of Grand Electronics?
>
> Yes ✓ No_______
>
> If your answer is YES, what punitive damages do you award? $75,000.00
>
> 4. Do you find that Counter-Plaintiff, Grand Electronics, Inc., has proven by a preponderance of the evidence that it suffered more than nominal damages of one dollar ($1.00) on Count Four as a result of

(Continued…)

Judgment stating that the verdict was entered that day in a total of $79,460.00 (reflecting obviously a single compensatory damages award of $4,460 and a single punitive damages award of $75,000). The court amended the verdict the following day to reflect two awards of $75,000 punitive damages (one for each count), but retaining only a single compensatory award of $4,460.00 (the latter reflecting presumably the principle that only a single compensatory award was allowable for the same economic injuries flowing from both torts), yielding a new total of $154,460.00 in damages.[7]

(…continued)

> ProExpress Distributors, LLC's intentional interference with Grand Electronics, Inc.'s business relationship with Amazon?
>
> Yes ✓ No_______
>
> If your answer is YES, what amount do you award? $4,460.00
>
> . . . If your answer above was YES, skip Question 5 and go directly to Question 6.
>
> * * *
>
> 6. Do you find by clear and convincing evidence that Counter-Plaintiff, Grand Electronics, Inc., is entitled to punitive damages as a result of ProExpress Distributors, LLC's intentional interference with Grand Electronics, Inc.'s business relationship with Amazon?
>
> Yes ✓ No_______
>
> If your answer is YES, what punitive damages do you award? $75,000

[7] The record includes two relevant court documents, dated 15 October 2015, in this regard. The first reads as follows:

> 395518V

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On 13 November 2015, PED filed, under Md. Rule 2-535(a), a Motion To Revise Judgments,[8] requesting

> that the Court reverse its grant of summary judgment as to Defendants/Counter-Plaintiffs' Counterclaim, vacate the related judgment entered pursuant to the jury's verdict reached on October 5, 2015, and reverse the Court's grant of summary judgment as to Count I (Unfair Competition – Misappropriation of Trade Secrets) of its First Amended Complaint. If ProExpress's requested relief is granted, then the Court must order a new trial, except as to Count IV [tortious interference] of Defendants/Counter-Plaintiffs' Counterclaim, upon which judgment should be entered as a matter of law in favor of ProExpress.

The court denied PED's motion to revise, entering an order to that effect on 24 December 2015.

(…continued)

> 10-15-2015 – Clerk's Correction for Docket Entry #154 should read as follows:
>
> (254) VERDICT: IN FAVOR OF THE DEFENDANT, GRAND ELECTONICS, INC. AGAINST THE PLAINTIFF, PRO EXPRESS DISTRIBUTORS, LLC IN THE AMOUNT OF FOUR THOUSAND FOUR HUNDRED AND SIXTY DOLLARS ($4,460.00) IN NOMINAL DAMAGES, SEVENTY FIVE THOUSAND DOLLARS ($75,000) IN PUNITIVE DAMAGES FOR DEFAMATION AND SEVENTY FIVE THOUSAND DOLLARS ($75,000) IN PUNITIVE DAMAGES FOR INTENTIONAL INTERFERENCE TOTALING IN THE AMOUNT OF ONE HUNDRED FIFTY FOUR THOUSAND, FOUR HUNDRED AND SIXTY DOLLARS ($154,460.00)[.]

The second document, a Notice of Amended Judgment, reflected this correction.

[8] We note that the revisory motion was filed greater than 10 days after the final judgment was entered.

On 21 January 2016, ProExpress noted its purported appeal "from all of the Court's Orders and Judgments entered herein . . . ." On 25 April 2016, the circuit court, acting on a motion from GE, entered an order striking partially the appeal "as to all of the Court's Orders and Judgments other than this Court's December 24, 2015 Order denying Plaintiff/Counter-Defendant's Motion to Revise Judgments."[9] PED does not challenge in its brief this limitation on what it appeals here:

> . . . ProExpress's Notice of Appeal was partially stricken by the Circuit Court except for its appeal of the Circuit Court's denial of ProExpress's Motion to Revise the Judgements. Thus, ProExpress now appeals the Circuit Court's Order denying its Motion to Revise Judgments.

QUESTIONS PRESENTED

PED asks that we consider "Whether the Circuit Court Improperly Denied ProExpress's Motion to Revise the Judgments Filed Pursuant to Maryland Rule 2-535(a)." This necessarily compound inquiry requests, broken into its constituent parts, that we consider whether: 1) the circuit court declined improperly to revise its judgment on GE's defamation and tortious interference counterclaims; and, 2) the circuit court

[9] In full, the substance of the court's order reads as follows:

> UPON CONSIDERATION OF Defendants/Counter-plaintiff's Motion Partially to Strike Appeal, any opposition thereto, and the record herein, it is on this 21st day of April 2016, by the Circuit Court for Montgomery County, Maryland, hereby
>
> ORDERED, that Defendants/Counter-plaintiff's Motion Partially to Strike Appeal be, and hereby is, GRANTED, and therefore it is further
>
> ORDERED, that the Notice of Appeal filed on January 21, 2016 by ProExpress Distributors, LLC be, and hereby is, STRICKEN as to all of the Court's Orders and Judgments other than this Court's December 24, 2015 Order denying Plaintiff/Counter-Defendant's Motion to Revise Judgments.

declined improperly to revise its grant of summary judgment in favor of GE on PED's claim for misappropriation of trade secrets.

STANDARD OF REVIEW

PED argues that, because it appeals only legal determinations by the circuit court, we should review the denial of its revisory motion without deference to the trial court. This is not correct entirely. PED appealed the circuit court's denial of its motion to revise, not the court's earlier legal determinations on the merits. Maryland appellate courts review the denial of a motion to revise under an abuse of discretion standard, but are not bound in their analyses to ignore any errors of law:

> In general, the denial of a motion to alter or amend a judgment or for reconsideration is reviewed by appellate courts for abuse of discretion. We have also noted that, when reviewing a trial judge's discretionary rulings, this Court has recognized that trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature.

Miller v. Mathias, 428 Md. 419, 438, 52 A.3d 53, 64 (2012) (citations and quotation marks omitted); *see also Spaw, LLC v. City of Annapolis*, 452 Md. 314, 156 A.3d 906, 934–35 (2017) ("a motion to alter or amend a judgment is reviewed for abuse of discretion.").

DISCUSSION

I.

A. $150,000 in total punitive damages, under the circumstances of the record in this case, is excessive because it duplicates penalties for the underlying misconduct and is disproportionate to the actual harm caused by the misconduct.

PED argues that the total punitive damages award of $150,000 was excessive under Maryland law, federal law, and constitutional due process. In *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998), the Court of Appeals endorsed nine non-exhaustive factors by which to evaluate punitive damages awards, consistent with principles of due process under the federal constitution.[10] PED marshals several factors in support of its argument that the trial court's decision fails analysis under these factors.

First, PED maintains that the gravity of its misconduct does not warrant the $150,000 punitive damages award because it caused only economic harm to GE, a consequence Maryland courts seem to find less harmful to a victim than impacts bearing on health or safety.[11] Second, PED notes, without elaboration, that "there was no

[10] The nine factors identified as considerations relevant to the review of allegedly excessive punitive damages awards are as follows: 1) the punitive damages award should comport with the gravity of the defendant's wrongdoing; 2) the award should not be disproportionate to the defendant's ability to pay; 3) the award should have value as a deterrent; 4) the court may look to civil and/or criminal penalties levied for similar misconduct; 5) the court may consider punitive awards in the same jurisdiction for comparable cases; 6) if the defendant has already paid out a punitive award for the conduct at issue, it could be excessive to require the same defendant pay again; 7) even if the same underlying misconduct gave rise to multiple tort causes of action, it may be excessive to impose punitive damages for each count; 8) the plaintiff's reasonable costs and expenses can be considered; and, 9) there must be a reasonable relationship between the punitive damages award and the actual harm caused by the defendant (as measured by compensatory damages). *Bowden v. Caldor, Inc.*, 350 Md. 4, 27–41, 710 A.2d 267, 278–85 (1998). *Bowden* provides little insight, however, as to the relative weight to be accorded any of these factors.

[11] For example, in *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md. App. 672, 720, 596 A.2d 687, 711 (1991), we noted that, "though excessive, ill-motivated, and, in retrospect, stupid, [economic harm] does not strike us as very high

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evidence introduced of any other punitive damages awards against the same defendant for the same conduct," to bolster apparently its argument that the punitive damages award was excessive.[12] Third, PED invokes perceived hesitancy on the part of Maryland's appellate courts to sanction multiple, "pyramided" awards of punitive damages for a single underlying occurrence or episode of misconduct, even if the underlying misconduct, as here, gave rise to separate causes of action. Finally, PED argues that, under Maryland and federal common law, there must be a reasonable and proportional relationship between compensatory and punitive damages and that, in this case, the ratio is unreasonable.

GE answers that the court applied correctly the *Bowden* principles (understood as guideposts, rather than dispositive mandates), in declining to eliminate or reduce the punitive damages award. GE argues that PED's knowledge that GE did not sell counterfeit goods, representing its malice in claiming otherwise, rises to a high gravity of wrongfulness, despite not threatening health or safety. Second, GE argues there is no

(…continued)
on the scale of reprehensibility[,]" as compared to conduct endangering public health or safety.

[12] PED appears to us, in this way, to misuse this factor. The point of producing evidence that the defendant has paid already a punitive damages award for a particular course of conduct would be to show that having to pay it again could be unfair and excessive. Here, PED states that "the absence of this evidence in the record weighs in ProExpress's favor and supports that the award of $150,000 in punitive damages for a $4,460 compensatory damages award is excessive as a matter of Maryland law." PED offered no explanation for how this factor, applied to the facts, actually "weighs in ProExpress's favor."

bright line ratio litmus test that distinguishes definitively reasonable from unreasonable proportions of compensatory to punitive damages.

The following *Bowden* factors are relevant to our analysis in this appeal, based on the record: the gravity of PED's wrongful conduct; PED's ability to pay the award; the value of the award as deterrence; punitive awards for comparable cases in Maryland; multiple awards stemming from a single underlying act; and, proportionality between the punitive award and the actual harm, as measured by compensatory damages.

> [Appellate courts in Maryland] generally review punitive damages in light of nine, non-exclusive, legal principles articulated by Judge John C. Eldridge, speaking on behalf of [the] Court [of Appeals] in *Bowden*. In describing these factors we explained that the factors are not criteria that must be established but, rather, guideposts to assist a court in reviewing an award, and that not all are pertinent in every case involving court review of punitive damages awards. In addition, we stated that the nine principles are not intended to be exclusive or all-encompassing, and other principles may appropriately be applicable to judicial review of punitive damages awards under particular circumstances.

Khalifa v. Shannon, 404 Md. 107, 142, 945 A.2d 1244, 1264–65 (2008) (citations and quotation marks omitted).

The first four factors, as applied, appear neutral or militate in favor of upholding the $150,000 punitive awards. First, PED made knowingly a false claim, motivated by what seems to be an intent to undermine a competitor's relationship with its primary marketplace, Amazon. Although perhaps not as severe as misconduct that injures health or safety, this is conduct that should be deterred certainly. Second, Mr. Yuchun Zheng, a shareholder of PED, testified at trial that PED generated 7 million dollars in revenue in 2012, 14 million in 2013, and 11 to 12 million in 2014. Thus, PED has likely the ability to pay the punitive award of $150,000. Third, given PED's apparent multi-million dollar annual revenue, a punitive award of $150,000 may not serve as a substantial deterrent to similar actions in the future, but the alternative, reducing the award, would weaken certainly the award's deterrent effect, both on PED specifically and other retailers in general.

Regarding the fourth factor in our analysis, the Court of Appeals explained in *Bowden*, that

> [an] appropriate consideration in judicially reviewing an award of punitive damages is to compare the award with other final punitive damages awards in the jurisdiction, and particularly with awards in somewhat comparable cases. . . .
>
> Apparently the largest award of punitive damages which has ever been upheld by this Court was $700,000, and in that case the size of the award was not an issue before this Court. *Franklin Square Hosp. v. Laubach,* 318 Md. 615, 617–618, 569 A.2d 693, 694–695 (1990). The next ten highest awards of punitive damages upheld by us seem to be as follows: $107,875 (*St. Luke Church v. Smith,* 318 Md. 337, 568 A.2d 35 (1990)); $100,000 each for two plaintiffs, based on two separate acts of fraud (*Nails v. S. & R.,* 334 Md. 398, 639 A.2d 660 (1994)); $82,000 (*Luppino v. Gray,* 336 Md. 194, 647 A.2d 429 (1994)); $50,000 (*Macklin v. Logan,* 334 Md. 287, 639 A.2d 112 (1994)); $40,000 (*Embrey v. Holly, supra,* 293 Md. 128, 442 A.2d 966); $36,000 (*Drug Fair of Md., Inc. v. Smith,* 263 Md. 341, 283 A.2d 392 (1971)); $35,000 (*General Motors Corp. v. Piskor,* 281 Md. 627, 381 A.2d 16 (1977)); $30,000 (*Great Atl. & Pac. Tea Co. v. Paul,* 256 Md. 643, 261 A.2d 731 (1970)); $25,000 (*Montgomery Ward & Co. v. Keulemans,* 275 Md. 441, 340 A.2d 705 (1975)); $25,000 (*American Stores Co. v. Byrd,* 229 Md. 5, 181 A.2d 333 (1962)). Moreover, in most of these cases no argument was made that the punitive awards were excessive.

Bowden, 350 Md. at 31–33, 710 A.2d at 280–81.

At first blush, the punitive damages award of $150,000 in this case might appear incongruous with prior punitive awards discussed in *Bowden*, but, when adjusted for inflation,[13] the relevant prior awards identified in *Bowden* harmonize with the award in the case before us. The punitive damages award of $107,875 in the 1990 *St. Luke Church* defamation case included an award of $105,875 against a single party, which equates with $202,609.35 today. *Embrey*, another defamation case, involved a punitive award of $35,000 against a single party in 1982, now worth $90,296.67. *Great Atlantic* was a case of assault and battery, slander, and false imprisonment, involving $30,000 of punitive damages in 1970, valued currently at $192,474.47. Finally, in the 1962 *American Stores* slander case, the $25,000 punitive award would be worth $201,822.02 today.

The final two relevant factors—whether a single transaction or occurrence of misconduct underlies multiple awards, and whether the punitive award is proportionate to the actual harm—tip in favor of reducing the award. "When the total amount of punitive damages awarded against the defendant is based on separate torts, a pertinent consideration under Maryland case-law is whether the separate torts all grew out of a single occurrence or episode." *Bowden*, 350 Md. at 34, 710 A.2d at 282. In *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 298 A.2d 16 (1972), for example, the Court of Appeals eliminated two of three jury awards of punitive damages, totaling $4,500 each, for each of three tort claims arising from "an episode that was one continuous

[13] Calculations were performed with the CPI [Consumer Price Index] Inflation Calculator from the date (month and year) of opinion publication to March 2017, the most recent date for available data. U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/853S-8R7B].

occurrence." 267 Md. at 425, 298 A.2d at 27 (quotation marks omitted). In the present case, a single occurrence—PED's false communications to Amazon—gave rise to the separate tort claims of defamation and tortious interference. This factor weighs, it seems to us, in favor of eliminating one of the $75,000 awards.

Finally, "[w]hether a punitive damages award bears a reasonable relationship to the compensatory damages awarded in the case, is today generally accepted as a factor to be considered in judicial review for excessiveness of a jury's punitive damages award." *Bowden*, 350 Md. at 39, 710 A.2d at 284.

> [F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. . . . In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425–26, 123 S. Ct. 1513, 1524 (2003) (citations omitted). Here, the actual business harm suffered by GE, as a single award of compensatory damages for both torts, was $4,460. The ratio of actual harm to $150,000 in punitive damages, therefore, is 1 to 33.6. This points in the direction of concluding that the punitive award is unreasonable.

That the punitive damages award of $150,000 stems from a single underlying occurrence, and is so disproportionate to the actual harm suffered by GE, leads us to conclude that it was an abuse of discretion for the trial judge to decline to revise the 15 October 2015 judgment in that regard. Our analysis of these two factors encapsulates our concerns about the $150,000 punitive damages award and outweighs the other relevant considerations. We hold, therefore, that the court should have revised the judgment to eliminate one of the $75,000 punitive damage awards, yielding thus a total damages award of $79,460, when combined with the $4,460 compensatory damages award.

B. GE produced sufficient evidence regarding causality of its damages flowing from PED's misconduct.

PED argues that there was no proper evidence introduced to prove that its wrongful conduct caused actual monetary damage to GE. PED relies in this regard on two lines of reasoning: first, PED maintains that it is a logical fallacy to infer causation from a mere sequence of events, i.e., in this case, PED's wrongful conduct and GE's subsequent temporary loss of sales and increased advertisement costs to re-establish its marketing program. Second, PED argues that, in any event, because this case involves scientific, technical, or specialized facts, expert testimony was required. Thus, because compensatory damages were unwarranted, punitive damages are eliminated automatically for the tortious interference claim, about which the court assumed erroneously that no burden existed for GE to prove motive.

GE counters that its employee, Victor Lu, testified that Amazon required GE to remove its N7 tablet product from the online marketplace as a direct result of PED's misinformation, and that this is an obvious causal link that requires no expert testimonial underpinning. Victor's testimony revealed the following sequence of events: (1) PED made a false statement to Amazon, alleging that GE infringed PED's intellectual property and was selling a counterfeit product through Amazon; (2) Amazon removed promptly from its marketplace GE's best-selling item, the N7 tablet computer; and, (3) immediately following the tablet's removal, GE's sales figures and its product visibility declined, which necessitated increased advertising costs to recapture its marketing position.

Because of the immediacy of the timing of this sequence of events, we do not perceive it was a logical fallacy to infer a causal relationship. In *Bean v. Dep't of Health & Mental Hygiene*, 406 Md. 419, 432–33, 959 A.2d 778, 786 (2008) (quotation marks and citations omitted), the Court of Appeals reasoned that expert medical opinion "is not required on matters of which the jurors would be aware by virtue of common knowledge." The *Bean* Court found expert testimony superfluous because the question at issue "did not present a complex medical issue, but rather depended on resolving a factual dispute, dependent to a great extent on a credibility assessment of Bean's testimony, a matter within a jury's ken." *Bean*, 406 Md. at 432–33, 959 A.2d at 786. Similarly, the simplicity of the timeline and events that GE presented in this case were not matters that required expert interpretation or exposition.

C. PED may not use the attorney-client privilege as both sword and shield.

PED argues that the circuit court erred by determining that its defamatory statement was made with actual malice (a prerequisite for punitive damages[14]), without

[14] In 2016, the Court of Appeals reviewed Maryland's "actual malice" doctrine, explaining that "[punitive] damages are allowable in defamation cases only when the plaintiff establishes that the defendant had actual knowledge that the defamatory

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submitting the issue to the jury, because "there was deposition testimony from ProExpress that any untrue statements were made through counsel and on the advice of counsel." When GE deposed PED's principal, Will Guo, however, the following question by GE went unanswered: "Did you authorize your counsel to tell Amazon that Grand Electronics was infringing on ProExpress' intellectual property?" PED's counsel objected on the basis that an answer would "get to the substance of any communications."

"Such tactics would allow the [party] to use the attorney-client communication to his benefit and then refuse to answer more questions about it. This would be an abuse of the privilege—using it both as a sword and a shield." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 449, 56 A.3d 170, 207 (2012). As in *CR-RSC Tower I*, here, we conclude that PED is attempting to "defend a charge of bad faith **by referencing specific communications with attorneys** that purportedly provided a good-faith basis for certain actions, and then refus[ing] to allow any further investigation into those communications." *Id.* (emphasis in original). Summarizing an earlier court order in the present case, the trial judge stated in his written order, entered on 29 September 2015, that "[g]iven Pro Express's wholesale and repeated failures to provide discovery in this

(…continued)
statement was false and that punitive damages may only be awarded if the plaintiff proves, by clear and convincing evidence, that the defendant had the requisite mens rea, *i.e.*, actual knowledge." *Seley-Radtke v. Hosmane*, 450 Md. 468, 495, 149 A.3d 573, 589 (2016) (quotation marks and citations omitted).

case, the Court on Grand Electronics'[s] motion has previously ruled ProExpress cannot have the benefit of any evidence which they failed to produce in a timely fashion in response to a request for discovery." We hold that the circuit court judge did not abuse his discretion or commit legal error by refusing to revise his determination because PED "cannot now offer those statements as a shield against liability."

D. Tortious interference with business relationships does not require explicit proof of motive.

The final contention with respect to GE's counterclaims centers on whether the trial judge stated correctly that, to prevail on a claim of interference with business relationships, GE need not prove the element of "motive" because the conduct at issue was wrongful based on other grounds (defamation). PED argues that, unlike tortious interference with contractual relationships, prevailing on a claim for tortious interference with business relationships requires proof of motive. GE retorts that the court eschewed correctly consideration of motive, citing *K & K Mgmt., Inc. v. Lee*, 316 Md. 137, 557 A.2d 965 (1989), in which the Court of Appeals reasoned that motive is relevant (counterintuitively) to determining only the impropriety of the underlying conduct, not the alleged wrongdoer's tortious intent. The underlying conduct was determined already to be wrongful, according to GE, as defamation.

> A claim for intentional interference with contractual *or business relations* requires the following elements:
>
> > (1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.

Blondell v. Littlepage, 413 Md. 96, 125, 991 A.2d 80, 97 (2010) (quoting *Kaser v. Fin. Prot. Mktg., Inc.*, 376 Md. 621, 628–29, 831 A.2d 49, 53 (2003)) (emphasis added). Based on this description of the elements of the tort, we conclude that the trial judge did not abuse his discretion or commit legal error by disregarding proof of motive as an element.

II.

Regarding PED's claim that GE misappropriated its trade secrets, PED argues that the trial judge should have vacated his grant of summary judgment in GE's favor for three reasons. The court misidentified the trade secret in question, according to PED, as merely the Amazon search terms, creating thereby a triable issue of fact. Specifically, PED maintains that the trade secret was not just the search terms, but was the "consideration, evaluation, and judgments regarding American culture, American holidays, and a method for combining different search terms in light of these considerations." PED contends that the court failed to appreciate its efforts to secure its trade secrets. Finally, "the Court erred by ignoring the evidence of damages introduced by ProExpress."

GE responds that PED failed to meet its burden to point to admissible evidence demonstrating the existence of a triable dispute of material fact. To that end, GE argues that PED did not identify specifically: (a) its search term methodology or how it differs from the search terms themselves; (b) where the methodology was located within the Dropbox account; or, (c) how GE accessed the methodology. Moreover, GE states that

PED vacillated in its description of the purported trade secret from the search term template to the methodology used to generate those terms. Finally, GE disputes PED's efforts to protect reasonably its alleged trade secret.

Under Md. Code, Commercial Law Art. § 11-1201(e) (2013 Repl. Vol.),

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Because PED did not demonstrate on this record efforts "reasonable under the circumstances to maintain [the methodology's] secrecy," we need not delve too deeply into this issue. In *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 310–11, 849 A.2d 451, 464–65 (2004), the Court of Appeals identified actions that constituted reasonable measures to safeguard secrecy:

> Because of its tiered pricing scheme, Coinco negotiated non-disclosure agreements with its customers to prevent them from discussing prices with other customers. In addition, Coinco marked "confidential" on the specifications for the Bill Pro Validator as well as the Specialty Markets Strategic Plan and other pricing documents that LeJeune either burned or kept in hard copy form. In the company's employee handbook, Coinco communicated the secret nature of its manufacturing processes and business methods by requiring employees to protect such information as confidential.

Here, PED's supposed efforts to protect its alleged trade secrets were not reasonable under the circumstances. PED did not produce evidence that it took reasonable efforts, such as changing the password to the Dropbox account after the employees left to found GE, limiting access on a "need to know" basis within PED, or restricting the dissemination of information with confidentiality or non-disclosure agreements. Thus, we conclude that the circuit court did not abuse its discretion in declining to revisit its grant to GE of summary judgment on PED's trade secret claim.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THAT COURT WITH DIRECTION TO ENTER A JUDGMENT CONSISTENT WITH THIS OPINION. EACH PARTY TO BEAR ITS COSTS.