

Nos. 15-2329 / 15-2330

In the
United States Court of Appeals
for the
Sixth Circuit

DAVID ALAN SMITH,

Plaintiff-Appellee/Cross-Appellant,

v.

LEXISNEXIS SCREENING SOLUTIONS, INC.

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
For the Eastern District of Michigan, Case No. 4:13-cv-10774
The Honorable Mark A. Goldsmith

**FOURTH BRIEF OF PLAINTIFF-APPELLEE/CROSS-APPELLANT
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ARGUMENT

I. Introduction

In his opening brief (the Second Brief in this cross-appeal), David Alan Smith argued that the district court erred in reducing the jury's punitive damages award because it applied an erroneous standard for determining whether one of the *State Farm* reprehensibility factors was satisfied, and because it misclassified the actual damages award as "substantial." The arguments that LexisNexis Risk Solutions, Inc. (Lexis) makes in its responsive brief try to skirt around Smith's argument, and fail to address the reversible error committed by the district court in reducing the jury's constitutionally proper punitive damages award in this case.

II. The District Court's Reduction Of The Punitive Damages Award Resulted From A Flawed Analysis Of Law And Fact

1. Lexis Does Not Dispute That The District Court Applied The Incorrect Legal Standard In Its Reprehensibility Analysis

In determining that Lexis's actions were not sufficiently reprehensible to support the jury's punitive damages award, the district court stated that Plaintiff was required to demonstrate that Lexis's actions occurred on a "wide spread scale." Order on Rule 50(b), RE 70, PageID # 1420. In fact, the correct legal standard for this *State Farm* reprehensibility factor is "whether the conduct involved repeated actions or was merely the result of an isolated instance." *Bach v. First Union Nat'l Bank*, 149 Fed. App'x 354, 365 (6th Cir. 2005) (*Bach I*) (citing *State Farm Mut.*

Auto Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003)). This analysis asks only whether the defendant's conduct was a one-time event, and does not require any showing that the actions were "widespread" or extensive.

Lexis does not, and cannot, dispute that the district court used the incorrect standard. Use of the incorrect legal standard is reversible error, and grounds to reinstate the jury's award. *Jones v. Illinois Central R. Co.*, 617 F.3d 843, 850 (6th Cir. 2010). Because the district court here held Smith to an unreasonably high standard, and because there was evidence of "repeat action" at trial, the district court's reduction of the punitive damages award should be reversed, and the jury's punitive damages verdict should be reinstated.

2. The Evidence At Trial Supports An Inference Of Repeated Inaccurate Reporting By Lexis

Lexis also argues that the evidence at trial does not show any repeat action, but that position is mistaken. Smith's case was not a one-time event. The evidence at trial was clear that Lexis repeatedly treated other consumers in the same way as Smith, by uniformly failing to require its employer-customers to provide middle names, never using the middles names already available from other sources, and always matching criminal records to consumers using *only* first name, last name and date of birth. Jury Trial Transcript (Tr.), RE 48, PageID ## 740-49, 753-55, 769-70, 807-09. These were the actions that gave rise to the FCRA violation in this case,

and as the jury recognized, these were repeat actions stemming from poor policies and practices, not from any isolated instance of human error.

Lexis also misconstrues the evidence concerning nearly 800 cases (in only four states) where Lexis's own records show that Lexis determined that criminal record information appearing on those 800 consumer reports was misattributed, *and had to be removed from the disputing consumers' files*. Trial Exs. 10-13, App. ## 046-071. If those criminal records were accurate, they would not have been removed from the disputing consumers' files. On the other hand, if they could not have been verified as belonging to the disputing consumers, the FCRA requires that they must be removed. 15 U.S.C. § 1681i(a)(5).¹ That is the very essence of Smith's claim – that misattributed criminal records information was put in his file by Lexis, but was removed only after he disputed, and after the harm was done.

Lexis speculates that there might have been other reasons why some of the criminal records, disputed as being attributed to the wrong person, were removed from nearly 800 consumer reports. Lexis's witness at trial, however, could not

¹ **Treatment of inaccurate or unverifiable information**
(A) In general If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—
(i) promptly delete that item of information from the file of the consumer
(emphasis added). 15 U.S.C. § 1681i(a)(5).

confirm a single instance when other reasons caused the removal of a record. Tr., RE 48, PageID ## 812-14.

Moreover, the “other reasons” about which Lexis now speculates (for example, Lexis being unable to reach a conclusion within 30 days) do not help Lexis’s case, because there are “inherent dangers in including any information in a [consumer] report that the credit reporting agency cannot confirm is related to a particular consumer.” *Cortez v. Trans Union, LLC*, 617 F.3d 688, 710 (3d Cir. 2010) (affirming liability under FCRA section 1681e(b), the same claim as in the case at bar, where a consumer reporting agency could not confirm that a particular criminal/terrorist alert related to the person about whom it sold a report to a third party). When Lexis cannot even reach a conclusion that a record is properly attributed *within 30 days after a dispute*, it cannot seriously argue that it had confirmed that it was properly attributed in the first instance when it originally included that criminal record in that consumer’s file.

In sum, there was sufficient evidence of Lexis’s repeat action of misattributing criminal records in violation of the FCRA. Smith’s case was surely not “an isolated instance.” *Bach I*, 149 Fed. App’x at 365. The district court erred in holding Smith to a higher and undefined standard of “widespread” violations.

III. The Jury's Actual Damages Award Is Fully Supported By The Evidence And Is Not Substantial By Sixth Circuit Standards

1. The Harm To Plaintiff Inflicted By Lexis's Inaccurate Reporting Extends Well Beyond His Period Of Unemployment

Lexis argues that \$75,000 was too generous a compensatory damages award for purpose of this case, allegedly because Smith's period of unemployment was relatively short. That contention misconstrues the evidence of harm in this case, and it is also irrelevant to the question of whether the punitive damages award was excessive because the compensatory damages award was purportedly "substantial," as the district court erroneously found.

Contrary to Lexis's view, Smith's harm in this case cannot properly be measured by only the period of unemployment. Very serious harm to a person's good name and reputation can be caused in a matter of seconds. Here the jury understood that Lexis in fact caused Smith serious emotional and reputational harm that was weighty and long-lasting.

The evidence demonstrated that Smith was ashamed and humiliated in front of his wife and his mother-in-law, from whom he had to borrow money in order to live while unemployed. Tr., RE 47, PageID # 601-02, 665-66. This type of harm does not simply evaporate once a person is back at work. Smith had been trusted by his employer with keys to client locations and blank checks. *Id.* at PageID ## 580-81. That type of trust was never restored after the Lexis report. *Id.* at PageID ##

603-04. Smith lives and works in a small community in the Upper Peninsula of Michigan. *Id.* at PageID ## 576-77. He was made fun of as a “favorite felon” at a client store in the presence of approximately 20 people. *Id.* at PageID ## 604, 607-08. That type of blow to a person’s reputation in a small community lasts well beyond the time that a person is out of work.

The jury understood that the harm to Smith’s good name and reputation, and also the emotional harm that he suffered, could not neatly be bracketed between the date he was sent home (in front of his new and old colleagues) and the date he resumed employment. Moreover, emotional and reputational harm is simply not a matter of measuring days of unemployment. Lexis simply misconstrues the factual record when it suggests that the compensatory damages award was not substantiated by the evidence. It was. Lexis cannot now un-ring this bell – the damage is done. And the damages to Smith went well beyond his period of unemployment.

2. Whether An Award Is *Substantial* Is Different From Whether The Award Is *Substantiated*

Ultimately, however, Lexis’s argument that the compensatory damages award was allegedly not *substantiated* by the factual record is not germane to the question of whether the punitive damages award was excessive because the compensatory damages award was purportedly *substantial*. “Substantial” relates to the monetary size of the award, not to the weight or sufficiency of the evidence supporting that award.

In his opening brief, Smith cited to authority from this Circuit and others discussing the much larger compensatory damages awards that courts have deemed to be substantial. *See* Second Brief at pp. 48-49. Lexis does not cite to any authority to the contrary, or any case finding a five-figure compensatory damages award to be substantial. The decisions cited by Smith which discuss whether a compensatory award is substantial generally do not focus upon how sufficient or weighty the evidence was supporting the compensatory award. Those decisions seek to assess whether the size of the total award (compensatory and punitive) will have an appropriate impact upon the wrongdoer.

The notion that “substantial” is tied to the sufficiency or weight of the facts underpinning compensatory damages in any particular case is also unsupported by any authority cited by Lexis. Furthermore, that notion makes little sense, given the objectives of punitive damages, which are to deter and punish a wrongdoer. In civil litigation, deterrence and punishment are meted out by the amount of money a wrongdoer has to pay. Courts look to whether the amount of money a wrongdoer has to pay in a verdict consisting of both compensatory and punitive damages will properly serve to deter and punish that party. While a given award may be substantial for a small company and insubstantial for a larger one, there is no

argument in this case that Lexis is unable to withstand a total award of \$75,000 in compensatory damages and \$300,000 in punitive damages.²

Once liability is established, compensatory damages are upheld, and the only issue remaining is the size of the punitive damages award, there is no constitutional purpose to revisit prior analysis of the sufficiency or weight of the evidence supporting compensatory damages. In espousing this view, Lexis is simply recycling its arguments against compensatory damages. Those arguments have no merit, and no place in a constitutional analysis concerning the size of a punitive damages award in any event.

CONCLUSION

This Court should reinstate the jury's punitive damages verdict in this case and find that \$75,000 in compensatory damages is not so substantial as to require a constitutional reduction of a \$300,000 punitive damages award.

Respectfully submitted,

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² Indeed, the evidence at trial was that Lexis is a national company that sells over twenty million background reports every year. Tr., RE 48, PageID # 732. Lexis is now, and was at the time of trial, a part of the Symphony Technology Group with over \$2 billion in revenue. *Id.*; <http://www.symphonytg.com/about.php>.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 1,862 words (according to the word processing software, Microsoft Word, which was used to prepare the brief), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in plain, 14-point Times New Roman typeface; footnotes appear in plain, 14-point Times New Roman typeface.

s/ John Soumilas

John Soumilas

Dated: April 14, 2016

CERTIFICATE OF SERVICE

I, certify that on April 14, 2016, I electronically filed the foregoing Fourth Brief of Plaintiff-Appellee/Cross-Appellant David Alan Smith with the Clerk of Court using the CM/ECF filing system, which will send notification of such filing to:

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