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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 2, 2022 Session

**JAY R. WILFONG v. CHARLES R. KAELIN, JR.**

**Appeal from the Chancery Court for Wilson County  
No. 08260 Charles K. Smith, Chancellor**

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**No. M2021-01007-COA-R9-CV**

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This matter is before this court on a Tennessee Rule of Appellate Procedure Rule 9 interlocutory appeal to determine “whether the trial court erred in determining that it cannot order a new trial on the issue of punitive damages only.” Under Tennessee Rule of Civil Procedure 59.07, “[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action . . . .” Accordingly, this court concludes that trial courts may order new trials addressing the limited matter of punitive damages without need of retrying the entirety of the parties’ dispute.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Chancery Court Vacated;  
Case Remanded**

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Angello L. Huong, Lebanon, Tennessee, for the appellant, Jay R. Wilfong.

John S. Hicks, Nashville, Tennessee, and Sonya S. Wright, Murfreesboro, Tennessee, for the appellee, Charles R. Kaelin.

**OPINION**

I.

The trial court found tension between this Court’s decision in *Westmoreland v. Tolbert*, No. 89-125-II, 1990 WL 48464 (Tenn. Ct. App. Apr. 11, 1990) and Tennessee Rule of Civil Procedure 59.07. The trial court determined that based upon *Westmoreland*, Tennessee trial courts cannot address errors arising with regard to punitive damages without ordering a new trial for the whole case, including any compensatory claims. As

noted in our order granting permission for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, the issue before this court is limited to the question of “whether the trial court erred in determining that it cannot order a new trial on the issue of punitive damages only.”

As background in framing the legal issue before this Court, the facts of the present appeal relate to agreements connected with a transfer of land in Wilson County, Tennessee. Appellant Jay Wilfong sold land to CRK Real Estate, LLC (“CRK”). CRK is a single-member LLC of which Appellee Dr. Charles R. Kaelin, Jr., is the sole member. Dr. Kaelin executed a Promissory Note and Deed of Trust both as the sole member of CRK and in his individual capacity as a guarantor.

The Promissory Note and Deed of Trust required Mr. Wilfong to be notified if the property was transferred and allowed Mr. Wilfong to mandate accelerated payment of the amount owed on the property should a transfer occur. CRK transferred the property to Mount Juliet Investor, LLC. According to Mr. Wilfong, no notice was provided to him of this transfer. Mr. Wilfong asserts, in addition to failing to disclose the transfer, that Dr. Kaelin actively concealed that transaction and subsequent related transactions. That concealment included, according to Mr. Wilfong, false information being provided in connection with Dr. Kaelin taking additional steps that undermined Mr. Wilfong’s interests such as falsely denying that the property was used by CRK in connection with refinancing.

Mr. Wilfong filed suit, alleging breach of contract, conspiracy, and fraud. He sought compensatory and punitive damages. A four-day jury trial was conducted in September 2017. The jury determined that Dr. Kaelin breached the parties’ contract and committed fraud. The jury awarded Mr. Wilfong \$750,000 in compensatory damages and determined Mr. Wilfong was entitled to punitive damages. The parties presented additional evidence during the punitive damages phase of the trial. The jury awarded Mr. Wilfong an additional \$900,000 in punitive damages.

After the conclusion of the jury proceedings, the parties filed various motions, including Dr. Kaelin’s Motion to Disapprove Punitive Damages and/or Remittitur. At the hearing, the parties and trial court discussed whether the punitive damage phase of the trial had complied with *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

The Court: And I really don’t know what I did in May, but I’m of the opinion that I need to have a jury trial on punitive damages only and follow all those steps. And I forgot the case. . .

Mr. Huong: *Hodges*.

Mr. Hicks: *Hodges*.

The Court: The *Hodges* case sets out about five, six, ten things that ha[ve] to be covered. I think to keep this from going upstairs and coming back and wasting more time it would be better for us

just to get a jury, because I don't think – I'm of the opinion all those items were not addressed, and they should be addressed individually and specifically. So we're going to have a jury trial on punitive damages, only on punitive damages. Liability and everything else is settled. If I hadn't have had a jury, I would have just let you come in and put these items on before me and I'd make a decision. That's what I did, and that's what I had a few days ago. . .

Ms. Wright: . . . So you're just basically saying you're ordering us a new trial as to the punitive damage part.

The Court: Yes. Do you understand it? . . . And then if you have something else after that to bring up, bring it up, but we need to get the trial right first. . . . Follow *Hodges* and then we'll let the jury make a decision on how much punitive damages, if any punitive damages, and then any other things that maybe went on with the trial or the hearing or y'all felt like we made – the jury or myself made a mistake, you could bring it up, and we'll address those things. Let's clean up the trial now without – that's why I wanted y'all in here. . . . I'm just saying to address any other issues.

Ms. Wright: After the new trial?

The Court: Yes.

Mr. Hicks: So do the punitive damages phase and then address all the post-trial issues following that?

The Court: Yes. And put that in the order that post-trial issues will be addressed later.

The trial court entered an Order on October 17, 2018, granting a new trial as to the amount of punitive damages only. The trial court stated

1. The Court is concerned that the proof that was submitted in this case as to the punitive damages was not in compliance with the dictates of the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) and its progeny. As a result, the Court ORDERS a new trial shall be conducted only as to the amount of punitive damages to award;
2. Following the conclusion of the new trial as to the punitive damages, the Court will address any further post-trial motions. . . .

Dr. Kaelin objected. He asserted that such an approach was unduly prejudicial to him and that all issues must be retried based upon *Westmoreland v. Tolbert*, No. 89-125-II, 1990 WL 48464, at \*9 (Tenn. Ct. App. Apr. 11, 1990). The trial court ordered additional briefing “on the sole issue of whether a new trial can be held on the issue of punitive damages only,

or whether a full new trial must be granted as to all issues, including but not limited to, both compensatory and punitive damages and liability.” Both parties filed briefs for the trial court’s consideration.

In his brief before the trial court, Mr. Wilfong argued that Tennessee Rule of Civil Procedure 59.07 allows a trial court to order a new trial as to all or part of the issues, including the sole issue of punitive damages. Mr. Wilfong also relied in his brief upon multiple cases from the Tennessee Court of Appeals and the Tennessee Supreme Court where Tennessee appellate courts have remanded a case for a new trial on the issue of punitive damages only. Disagreeing with Mr. Wilfong, Dr. Kaelin argued that a new trial could not be limited to the question of punitive damages but instead must be on all issues in accordance with the *Westmoreland* decision.

In a September 30, 2019 order, the trial court agreed with Dr. Kaelin and concluded that it could not order a new trial on the sole issue of punitive damages only, stating,

The parties submitted briefs as ordered by the Court on the sole issue of whether a new trial can be held on the issue of punitive damages only, or whether a full new trial must be granted as to all issues including, but not limited to, both compensatory and punitive damages and liability. The Court concludes that it cannot order a new trial on the issue of punitive damages only and therefore ORDERS that a full new trial is GRANTED as to all issues, including, but not limited to, both compensatory and punitive damages and liability.

All other matters are reserved, pending further order.

Accordingly, believing itself bound to do so, the trial court granted Dr. Kaelin’s motion for a new trial as to all issues, including liability, compensatory damages, and punitive damages.

Mr. Wilfong sought permission for an interlocutory appeal. In an August 23, 2021 order, the trial court granted Mr. Wilfong’s motion for an interlocutory appeal finding

a conflict of law between Rule 59.07 of the Tenn. R. Civ. Proc. (which allows the trial court to order a re-trial on particular issues of a case) and the case of *Westmoreland vs. Tolbert*, 1990 WL 48464 (Tenn. Ct. App. 1990), previously cited by [Dr. Kaelin] in a prior hearing which suggests a new trial on only the issue of punitive damages in front [of] a new jury might create prejudice against the Defendant.

In pursuing an interlocutory appeal, the parties stated the issue to be presented as: “Does the case of *Westmoreland vs. Tolbert*, 1990 WL 48464 (Tenn. Ct. App. 1990) prohibit the

trial court from ordering a new trial before a different jury on the issue of punitive damages only.” We granted Mr. Wilfong’s request for interlocutory appeal to consider “whether the trial court erred in determining that it cannot order a new trial on the issue of punitive damages only.”<sup>1</sup>

## II.

As noted above, this case before us is an interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9. In addressing an interlocutory appeal, Tennessee appellate courts are limited to reviewing only “those questions clearly within the scope of the issues certified for interlocutory appeal.” *Metro. Gov’t of Nashville & Davidson Cnty. v. Tennessee Dep’t of Educ.*, 645 S.W.3d 141, 147 (Tenn. 2022). Therefore, the sole issue before this Court is “whether the trial court erred in determining that it cannot order a new trial on the issue of punitive damages only.” This raises a question of law involving the interpretation of a Rule of Tennessee Civil Procedure; accordingly, our review of the trial court’s decision is de novo with no presumption of correctness. *See, e.g., Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009) (noting that “[i]nterpretation of the Tennessee Rules of Civil Procedure is a question of law, which we review de novo with no presumption of correctness”).

## III.

In *Westmoreland v. Tolbert*, an unpublished 1990 decision, this court stated the following:

[I]f there is to be a new trial, it will not be limited to the punitive damage issue. While some issues can be bifurcated for trial in exceptional circumstances, *see Ennix v. Clay*, 703 S.W.2d 137, 139 (Tenn. 1986), the consideration of punitive damage awards is not one of them. Permitting a separate trial on punitive damages in front of a new jury would create a significant likelihood of injustice due to the prejudice to the defendant. In addition, much of the proof with regard to punitive damages is intertwined with the proof regarding liability and actual damages. Judicial efficiency would, therefore, not be served by conducting separate trials on the punitive damage issue alone.

1990 WL 48464, at \*9 (footnote omitted). Perceiving error in the punitive damages portion of the proceedings in the present case, the trial court believed its hands to be tied by the *Westmoreland* decision. The trial court understood *Westmoreland* to prevent trial courts from ordering a new trial solely to address punitive damages. Instead, the trial court in the

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<sup>1</sup> Following delays connected with requests by the parties for extensions for their briefing and to reschedule oral argument, this matter came to be heard before this court on November 2, 2022.

present case believed that to fix an error relating to punitive damages, *Westmoreland* required a new trial as to the entirety of the parties' dispute, including as to liability and compensatory damages.

As an initial matter, the *Westmoreland* dicta appears to not be as all-encompassing as the trial court in this case perceived. The *Westmoreland* Court actually affirmed the \$20,000 compensatory damages judgment in that case while declining to embrace the plaintiffs' attempt to reinstate the punitive damages award. *Id.* at \*1 & \*9. The trial court in *Westmoreland* had wholly remitted the punitive damages award with no new trial being ordered and without explanation of the grounds for those decisions. *Id.* at \*1 & \*7-9. The nature of the grounds asserted in the defendants' motion for new trial in the case appeared to the appellate court to present two possible explanations for the trial court's action. *Id.* at \*8. One, the trial court perceived an error as to the amount of the punitive damages awarded. *Id.* Two, there was some other error that had occurred among those asserted in the defendants' motion for new trial, which, in general, attacked the verdict both with regard to the compensatory damages and punitive damages. *Id.* This understanding is reflected in the *Westmoreland* Court's directive in remanding that

[i]f the trial court disapproves of the amount of punitive damages, then it should deny the motion for new trial and should suggest a remittitur that bears some relationship to the jury's verdict. If, however, the trial court disapproves of the punitive damages in any amount, then it should grant a new trial for one of the grounds stated in the [Defendants'] motion.

*Id.* at \*9. In other words, the apparent sweep of *Westmoreland* may have owed much to the nature of the particular circumstances of that case and the inconsistency and obscurity of the basis of the trial court's decisions. *Id.* at \*8.

Regardless, a restrictive understanding of *Westmoreland* runs squarely contrary to subsequent related developments in Tennessee law. Notably, two years after *Westmoreland*, the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*<sup>2</sup> "reformulated Tennessee's approach on punitive damages, on both substantive and procedural grounds."<sup>3</sup> Among the important procedural changes in Tennessee law, in contrast to the *Westmoreland* Court's objection to bifurcation, the Tennessee Supreme Court adopted a bifurcated approach to punitive damage proceedings.<sup>4</sup> In *Hodges* itself, the Tennessee Supreme Court affirmed the compensatory damage award and remanded the matter for a new trial as to punitive damages alone. 833 S.W.2d at 902. The *Hodges* Court ruled that

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<sup>2</sup> 833 S.W.2d 896 (Tenn. 1992).

<sup>3</sup> Steven W. Feldman, 22 *Tenn. Prac. Contract Law and Practice* § 12:31(2022).

<sup>4</sup> Lawrence A. Pivnick, 2 *Tenn. Cir. Ct. Prac.* § 26:2 (2022) (noting that "[i]n 1992, the Supreme Court, in *Hodges v. S. C. Toof & Co.*, held that trials seeking punitive damages shall be bifurcated")

“[t]he compensatory award is affirmed, the punitive award vacated, and the case remanded for a trial on the issue of punitive damages. . . . [T]he judgment of the trial court is affirmed in part, vacated in part, and the case remanded for a trial to determine whether, and in what amount, an award of punitive damages is proper.” *Id.*

The trial court’s perception of a conflict between the *Westmoreland* decision and Tennessee Rule of Civil Procedure 59.07 stands central to its reasoning for granting Mr. Wilfong’s application for permission for interlocutory appeal. Rule 59.07 became effective on July 1, 2008, nearly two decades after the *Westmoreland* decision. Tennessee Rule of Civil Procedure 59.07 provides that “[a] new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted.” As reflected in *Hodges* itself, Tennessee courts have granted new trials solely as to punitive damages rather than requiring reconsideration of the entirety of the case. In fact, both the Tennessee Supreme Court and the Tennessee Court of Appeals have remanded cases for new trials as to punitive damages only. *See, e.g., Loope v. Goodings Million Dollar Midways, Inc.*, 553 S.W.2d 573, 576-77 (Tenn. 1977) (stating “[i]f the petitioner is unwilling to accept the suggested remittitur, the cause will be remanded to the trial court for a new trial as to the issue of punitive damages only”); *Wasiolewski v. K Mart Corp.*, 891 S.W.2d 916, 919 (Tenn. Ct. App. 1994) (holding “we affirm the judgment of compensatory damages but reverse and remand for a new trial on the issue of punitive damages in accordance with this opinion”); *Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC*, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at \*53 (Tenn. Ct. App. Apr. 18, 2018) (holding “we vacate the amount of punitive damages and remand to the trial court for a new hearing solely as to the amount of punitive damages that may be awarded in this case. . .”). Tennessee courts are far from alone in adopting such an approach, which is plainly the predominant understanding of

state courts<sup>5</sup> and also the approach of the federal courts<sup>6</sup> to handling errors arising in connection with punitive damages.

Permitting a new trial solely to address the matter of punitive damages raises, in Dr. Kaelin's view, concerns about judicial efficiency and unfairness stemming from allowing separate consideration of punitive damages rather than requiring reconsideration of claims for compensatory damages. Where an error is solely in connection with the determination of whether punitive damages are warranted or the amount thereof, and not in relation to the compensatory damage claim, it is unclear how judicial efficiency is enhanced by mandating that a new trial must also embrace a redetermination regarding the compensatory damage claim. Addressing a similar argument, the Missouri Supreme Court observed, correctly in

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<sup>5</sup> See, e.g., *Hash v. Hogan*, 453 P.2d 468, 471 (Alaska 1969) (affirming the trial court's grant of a new trial on the issue of punitive damages only under Alaska R. Civ. P. 59(a)); *Maxwell v. Aetna Life Ins. Co.*, 693 P.2d 348, 362 (Ariz. Ct. App. 1984) (remanding case for a new trial on the sole issue of punitive damages); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 991-93 (Cal. 1978) (affirming the granting of a conditional new trial on punitive damages); *Kimmey v. Peek*, 678 P.2d 1021, 1024 (Colo. App. 1983) (reversing and remanding for a new trial on punitive damages); *Lyman v. Cellchem Int'l, LLC*, 803 S.E.2d 375, 376 (Ga. Ct. App. 2017) (remanding for the sole purpose of a new trial regarding punitive damages); *Kish v. McDonald's Corp.*, 564 So. 2d 1177, 1188 (Fla. Dist. Ct. App. 1990) ("In conclusion, we affirm the trial court order granting a new trial on the issue of punitive damages. We also affirm the denial of the motion for new trial as to damages for trespass."); *Ford v. Guarantee Abstract & Title Co., Inc.*, 553 P.2d 254, 277 (Kan. 1976) (ordering remittitur or conditional new trial for the sole issue of punitive damages); *Baker v. Manter*, 765 A.2d 583, 586 (Me. 2001) (remanding for a new trial on the issue of punitive damages); *Union Carbide Corp. v. Nix*, 142 So. 3d 374, 393 (Miss. 2014) (finding the trial court's statements to the jurors could have unduly influenced the juror's award of punitive damages and remanding for a new trial as to punitive damages); *McCrainey v. Kansas City Mo. Sch. Dist.*, 337 S.W.3d 746, 756 (Mo. Ct. App. 2011) ("[W]here there [is] no error in the jury's finding of liability, the plaintiff should not have to risk his verdict where the only remaining issue was with regard to punitive damages."); *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1085 (Nev. 2009) (affirming the court's denial of a new trial on the issue of compensatory damages, but remanding and reversing for a new trial on the sole issue of punitive damages); *Longo v. Pleasure Prods., Inc.*, 71 A.3d 775, 777 (N.J. 2013) (remanding for a new trial on the issue of punitive damages because of flawed jury instructions); *Rhein v. ADT Auto., Inc.*, 930 P.2d 783, 792 (N.M. 1996) ("Plaintiffs are entitled to a new trial on the issue of punitive damages. . . ."); *Bank of N. Am. v. Bell*, 493 S.W.2d 633, 637 (Tex. Civ. App. 1973) (conditioned affirmance on remittitur or otherwise remanding for a new trial on punitive damages); *O'Brien v. Snow*, 210 S.E.2d 165, 168 (Va. 1974) ("[T]he sole question to be determined on remand will be whether the plaintiffs are entitled to recover for punitive damages and, if so, the amount thereof."); *Badger Bearing, Inc. v. Drives & Bearings, Inc.*, 331 N.W.2d 847, 855 (Wis. Ct. App. 1983) (since "the scope of a new trial is discretionary with the trial court," "[w]e conclude that compensatory and punitive damages are separable and that justice would not be served by mandating a new trial on all damages questions as the invariable alternative to acceptance of a changed amount of punitive damages").

<sup>6</sup> See, e.g., *Alexander v. Riga*, 208 F.3d 419, 435 (3d Cir. 2000) (remanding "the case for a new trial solely to present to a jury the question of punitive damages"); *Kirk v. Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 390 (8th Cir. 2018) (noting "we have often remanded for retrial of punitive damages only"); *E.E.O.C. v. Heartway Corp.*, 466 F.3d 1156, 1171 (10th Cir. 2006) (stating that "we remand for a new trial, solely on the issue of punitive damages" and citing other decisions to similar effect).



our view, unfairness arises instead from requiring a party to risk a valid compensatory damage award as part of a new trial to address error connected with the punitive damages award and that requiring a retrial as both compensatory and punitive damages would be judicially inefficient. *Burnett v. Griffith*, 769 S.W.2d 780, 791 (Mo. 1989).

As sometimes occurs, and can be challenging to avoid in the context of Tennessee Rule 9 of Appellate Procedure interlocutory appeals, the arguments at times strayed beyond the confines of the limited question before this court. We understand the question before us as limited to considering whether the trial court's conclusion that Tennessee trial courts cannot order a new trial solely to address the matter of punitive damages in accordance with the *Westmoreland* decision is correct. That is, must a Tennessee trial court necessarily order a new trial as to the whole proceeding to correct errors even if they only pertain to the award of punitive damages. For reasons discussed above, we conclude that Tennessee trial courts' hands are not so tied. Where an error relates to punitive damages, trial judges may order a new trial that is limited to considering the matter of punitive damages only. The parties plainly diverge in their respective understanding of the trial court's conclusions as to the merits of a new trial on the matter of liability and the compensatory damage award. This issue is not before us in this appeal. If the trial court finds error requiring a new trial regarding the determination of liability or the compensatory damage award, then nothing in this decision should be interpreted as precluding ordering a new trial with a scope extending beyond the question of punitive damages. Alternatively, if an error warranting a new trial is limited to the matter of punitive damages, this decision is intended to make it clear that pursuant to Tennessee Rule of Civil Procedure 59.07 a trial court may order a new trial exclusively on the matter of punitive damages.

### III.

We vacate the trial court's order in which the court concluded Tennessee trial courts cannot order new trials pertaining only to punitive damages. We remand to the trial court to apply the principles enunciated herein. Costs of this appeal are assessed against the Appellee, Charles R. Kaelin.

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JEFFREY USMAN, JUDGE