

**IN THE
INDIANA COURT OF APPEALS**

CAUSE NO. 19A-PL-00378

WARSAW ORTHOPEDIC, INC.,
MEDTRONIC, INC., and
MEDTRONIC SOFAMOR
DANEK, INC.,

Appellants
(Defendants Below),

v.

RICK C. SASSO, M.D.,

Appellee,
(Plaintiff Below).

Appeal from the Marshall Circuit Court

Trial Court

Cause No. 50C01-1806-PL-00027

The Honorable Curtis D. Palmer, Judge

Sasso's Cross-Appeal Reply Brief

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**I.
Summary of Argument**

The only question on cross-appeal is whether Sasso's designated evidence gave rise to a reasonable inference Medtronic breached the Vertex Agreement knowingly or recklessly. Sasso designated more than enough evidence demonstrating just that. Based upon this evidence, Medtronic's mental state—and thus the propriety of punitive damages—was a question of fact inappropriate for summary judgment.

Throughout this case—to Sasso, the trial court, the jury, and now this Court—Medtronic claimed Patent No. 6,485,491 (“491 patent”) didn't cover the Vertex system. Sasso designated evidence to show that when Medtronic sought to recover patent infringement damages in a separate federal lawsuit, **it told the court there the '491 patent did cover Vertex.** By itself, this opportunistic flip-flop from *Medtronic v. Globus*, Case No.2:06-cv-042248-ND, (E.D.Pa.2008) (designated through the Affidavit of John Bradshaw, not Irving Rappaport) demonstrates the knowing/reckless mental state necessary for punitive damages. And yet **Medtronic never mentions “*Globus*” by name in its brief**, attempting instead to sweep *Globus* away as part of the trial court's striking of the Rappaport affidavit. To be clear: the trial court never struck the *Globus* evidence; it only struck Rappaport's comments on that evidence.

Even though Medtronic paid royalties for 17 consecutive quarters, added thousands of Vertex parts for royalty payments during those years, and had its executives and lawyers analyze the patent and the product before adding the parts (all consistent with Medtronic's *Globus* positions), Medtronic suddenly ceased Vertex

royalties when new executives hit the front office. Then, despite alleging infringement damages of more than \$20 million based on '491 covering Vertex in the *Globus* litigation, Medtronic counterclaimed here to recover Vertex royalty payments to Sasso claiming there was no coverage. Medtronic lost the counterclaim at trial and does not appeal that loss here. What could be more probative of Medtronic's mental state than its willingness to provide one court a set of facts to recover millions and to provide another court the opposite set of facts to avoid paying millions?

Further, Medtronic's opportunistic flip-flop came as it was breaching other royalty agreements with Sasso at the same time. Agreement by agreement the new executives breached. Through discovery Sasso discovered Medtronic underreported Vertex sales, which was also designated in the summary judgment response. The jury considered that underreporting, agreed with Sasso, and awarded appropriate compensatory damages.

The designated evidence created issues of fact sufficient to get past summary judgment on the recovery of punitive damages, a question of fact under Tennessee law.

II. Argument

1. Whether punitive damages are appropriate is a question of fact.

Medtronic begins its argument citing *Rogers v. Louisville Land Co.*, 367 S.W.3d 196,211 (Tenn.2012) and *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896,901 (Tenn.1992) to assert under Tennessee law, an award of punitive damages "is limited to the most egregious cases." These two cases, and the others in that section, *Goff v. Elmo Greer*

& Sons Constr., Co., 297 S.W.3d 175 (Tenn.2009) and *Lamar Advertising Co. v. By-Pass Partners*, 313 S.W.3d 779 (Tenn.Ct.App.2009), demonstrate, however, punitive damages under Tennessee law is a question of fact here not to be resolved on summary judgment.

All four cases were appealed after a trial. In *Rogers*, the Tennessee Supreme Court reversed an award of punitive damages for the tort of intentional infliction of emotional distress because the plaintiff's theory at trial included no request for punitive damages for breach of contract and the Court held nothing more than such an argument could not be made for the first time on appeal. *Rogers*, 367 S.W.2d at 211-12. In *Hodges*, cited in Sasso's opening brief, the Tennessee Supreme Court reversed the Court of Appeals' decision to vacate a \$375,000 punitive damages award, and then set forth the standard for recovery of punitive damages for future Tennessee contract cases and remanded the case for a trial on punitive damages. 833 S.W.2d at 901. In *Goff*, the Tennessee Supreme Court affirmed the appropriateness of punitive damages, but reduced the award from \$2,000,000 to \$500,000. 297 S.W.3d at 198. In *Lamar*, the Court held, "Whether a party acted in good faith is a question of fact." 313 S.W.3d at 791.¹ The Tennessee Court of Appeals then affirmed the trial court's failure to award punitive damages at trial. *Id.*

¹ There are many other examples of Tennessee courts deciding punitive damages claims at trial. *See e.g., Dog House Invs. v. Teal Props.*, 448 S.W.3d 905,915 (Tenn.Ct.App.2014)(punitive damage award for promissory fraud affirmed), *Wilson v. Americare Sys.*, 2014 Tenn.App.LEXIS 95, at *8 (Tenn.Ct.App.2014)(punitive damage award by jury for "reckless" conduct by a nursing home affirmed but reduced in amount); *Overton v. Westgate Resorts, Ltd., L.P.*, 2015 Tenn.App.LEXIS 45, at **13-15 (Tenn.Ct.App.2015)(punitive damage award affirmed relating to timeshare

While Indiana law does not generally allow punitive damages for breach of contract, Indiana law is in accord when punitive damages are at issue for other claims. Whether a party may recover punitive damages generally is a question of fact. *Gresser v. Dow Chemical Co.*, 989 N.E.2d 339,349 (Ind.Ct.App.2013). Further, that the plaintiff must prove bad faith by clear and convincing evidence is not an appropriate reason to grant summary judgment on punitive damages. *See Wellpoint, Inc. v. Nat'l Union Fire Ins. Co.*, 29 N.E.3d 716,726 (Ind.2015) (“Notwithstanding the elevated burden of proof, we find that the motivations behind CNA’s coverage denial are matters for consideration by the fact-finder at trial and do not qualify for summary judgment.”)

Sasso designated substantial evidence in opposition to Medtronic’s motions, including: (a) an affidavit of Jessica McQuillen certifying hundreds of pages of discovery responses and depositions; (b) an affidavit of attorney John Bradshaw, authenticating three Medtronic briefs in *Globus* (a patent infringement case Medtronic filed involving the ‘491 Vertex patent, *Medtronic v. Globus*, United States District Court, Eastern District of Pennsylvania, Case No. 2:06-cv-042248); (c) an affidavit of Irving Rappaport, who later testified as an expert at trial; (d) an affidavit of Rick Sasso, describing the events in the One Pin, SiLo, and Bryan Disc disputes; and (e) an affidavit of Krista Cox, analyzing the Vertex sales data provided in

contract); *White v. Empire Express, Inc.*, 395 S.W.3d 696,724-25 (Tenn.Ct.App.2012) (reversal of punitive damages verdict for failure to demonstrate “malice” in breach of contract by clear and convincing evidence). Sasso was denied this jury trial right under Tennessee law, which provides for a duty of good faith in the administration of all contracts.

discovery by Medtronic. (Sasso.App.Vol.XIII,pp.240-45.) The designation totaled hundreds of pages. (Sasso.App.Vol.XIV,pp.1-245; Vol.XV,pp.1-228; Vol.XVI,pp.1-238; Vol.XVII,pp.1-208; Sasso.Supp.App.Vol.I.,pp.114-156, Vol.III.,pp.2-226.) Sasso also separately designated issues of fact for this designated evidence. (Sasso.App.Vol.XVII,pp.209-11; Vol.XIII,pp.205-09,231-37.) The designated evidence created material issues of fact as to existence of bad faith by Medtronic, which should have been resolved by the jury, i.e., the normal procedure for assessing punitive damages under Tennessee law.

2. Sasso designated substantial evidence of the *Globus* flip-flop on both '491 patent coverage and the application of claim construction principles generally.

2.1 Medtronic's opportunistic coverage position flip-flop.

Globus is a problem for Medtronic. To escape, Medtronic tries to tie its "opportunistic flip-flop" to the stricken Rappaport affidavits. (See Medtronic Response Brief on Cross-Appeal, p.59.) The problem is *Globus* came through the Bradshaw Affidavit, not Rappaport.

In February 2018, near the end of discovery, Sasso learned Medtronic had sued its competitor (*Globus*) for infringing the '491 patent in *Medtronic v. Globus*, Case No. 2:06-cv-042248-ND,(E.D.Pa.). In October 2007, Medtronic told the *Globus* court the '491 patent covered the Vertex System:

The '491 patent, titled "Posterior Fixation System," describes a screw assembly developed by a team of physicians and Medtronic employees to work with Medtronic's Sextant product and other minimally invasive tools. The patent is practiced by Medtronic's Vertex screws,

a highly successful commercial product used in minimally invasive spinal fusion surgeries.

(Sasso.App.Vol.XV.,p.72.)² On July 15, 2008, Medtronic confirmed Vertex coverage:

The Vertex screw practices Medtronic's U.S. Patent No. 6,485,491 (the "491 Patent"), one of the patents Medtronic has asserted in this case.

(Sasso.App.Vol.XV.,p.152.) At the conclusion of the *Globus* litigation, Medtronic was able to recover up to \$22.5 million in a settlement. (Sasso.App.Vol.XV.,p.134.)

Early in discovery, Medtronic filed the following response to Interrogatory No. 52, asking for Medtronic's position on whether the Vertex system had changed such that it was no longer covered by the '491 patent:

52. ... Do you contend that the Vertex system was once covered by a claim of US 6,485,491 but then evolved so as to no longer be covered? ...

RESPONSE: ... *defendants state that they are not making such a contention in this lawsuit*, although they do contend that Dr. Sasso has not shown he is entitled to royalties after the initial contract period in the Vertex agreement because he has not shown that the '491 patent covers any Vertex product...

(Sasso.App.Vol.XIII,p.240; Sasso.App.Vol.XIV,pp.10,15) (emphasis supplied.)

Medtronic's position, under oath in this litigation that there were no changes to Vertex such that it was once covered by the '491 patent but is no longer, cannot be

² When a product "practices" a patent, it simply means the patent has claims covering the product. See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S.617,634 (2008); *Regents of the Univ. of Cal. v. St. Jude Med., Inc.*, 2017 U.S.Dist.LEXIS 69238, at *2 (N.D.Cal.2017).

reconciled with its position in *Globus* in October 2007 (which it confirmed in July 2008), and its new position in this case.

Medtronic stated to one court the '491 patent covered Vertex to recover infringement damages, and the opposite in the trial court below to discontinue payment of 2% royalties to Sasso and to sue Sasso to get the paid royalties back. No company should be allowed to affirmatively represent coverage in order to recover patent infringement damages and then deny the very same patent coverage to justify stopping royalty payments to the selling inventor. A jury should have been able to consider whether this opportunistic flip-flop was in bad faith.

2.2 Medtronic's failure to inform Sasso of *Globus* is a separate breach of Section 7 of the Vertex Agreement.

Sasso designated that Medtronic never informed him of *Globus*, even though he was a named inventor on the '491 patent. (Sasso.App.Vol.XVI,pp.199-200.) Section 7 of the Vertex Agreement, titled "Infringement," provides that Medtronic, "shall treat any payment received from a third party, after [Medtronic] reimburses itself for all of its litigation costs and expenses, as Net Sales for which [Medtronic] shall pay DR. SASSO the payments required by Section 4.B." (Sasso.App.Vol.X,p.55.) Medtronic further agreed to "cooperate ... in all such matters concerning any such infringement." (*Id.*) Failing to inform Sasso of Medtronic's claim against *Globus* for infringement of the '491 patent and failing to account for any proceeds recovered by settlement, which were represented as \$22.5 million, is a material violation of the Vertex Agreement. Had Sasso been informed of *Globus* at the time of the settlement, he would have asked for an accounting. (Sasso.App.Vol.XVI,p.200.) This separate

breach, not adjudicated as part of the Sasso verdict and subject to an order *in limine* at trial, is additional evidence of bad faith in the administration of the Vertex agreement.

2.3 The designated *Globus* materials showed the same Medtronic witnesses who were going to testify in *Globus* on '491 patent coverage testified in this case but were silenced by Medtronic.

Sasso designated a pleading from the *Globus* litigation listing Tommy Carls, Dr. Kevin Foley, Robert Farris, and Doug King as witnesses. (Sasso.App.Vol.XIV,p.135.) Each person testified in the trial below. (Tr.Vol.9,pp.105-57; Tr.Vol.7,p.234-Vol.8,p.68; Tr.Vol.9.,p.215-Vol.10,p.77; Tr.Vol.10,pp.83-173.) Dr. Foley and Robert Farris are named inventors on the '491 patent and were listed in *Globus* to provide testimony on the '491 patent. (Sasso.App.Vol.XIV,p.135.) **In this case**, Dr. Foley provided affidavit and video deposition testimony before trial that Claims 21 and 48 of the '491 patent covered Vertex. (Sasso.Supp.App.Vol.I,pp.91-107.) Dr. Foley swore in an affidavit he carefully reviewed the '491 patent application (on Medtronic's behalf), including Claim 21, to make sure the patent's claim language covered the use of the offset connectors with the multiaxial screw used in the Vertex system. (Sasso.Supp.App.Vol.II, pp.94-95.) That claim language was approved without amendment by the Patent Office. (*Id.*)

Robert Farris was to testify as to coverage of the '491 patent in *Globus* as well. Here, on June 25, 2018, the trial court ordered Medtronic to provide a witness as to whether Medtronic agreed with Foley's understanding of the claims of the '491 patent. (Sasso.Supp.App.Vol.II.,p.113.) On August 22 and 23, 2018, Sasso took a

30(B)(6) deposition per the trial court's order, but Medtronic refused to provide a witness on that topic. (Sasso.Supp.App.Vol.IV,pp.17-18,24.) Sasso filed an emergency motion to reconvene the deposition, which the trial court denied on September 13, 2018. (Sasso.Supp.App.Vol.IV,p.39.) At trial, the court sustained Medtronic's objections when attempting to examine Farris about whether the inventors intended the '491 patent have a claim that covered using offset connectors with multi-axial screws. (Tr.Vol.10.,pp.50-51.)

The trial court allowed Medtronic to present all its Vertex coverage opinion testimony through a third-party spine surgeon, Dr. Theiss, who was retained just before trial. Theiss' testimony was counter to the intentions of Medtronic's engineers and surgeons named as inventors in the '491 patent. Inventor intention was relevant to the contract language of the Vertex Agreement as found by Judge Miller in remanding the case to state court in 2014:

[T]he important thing isn't whether the Defendant's products are within the scope of any particular patent, but, rather, what the parties intended the agreement to cover.

(Sasso.App.Vol.II.,p.58,54.)

Because Medtronic's intention, as expressed by Dr. Foley, as to patent coverage in 2001 was the same as Dr. Sasso's, there was no legitimate dispute as to the contract language "covered by a valid claim" in the Vertex Agreement. Both sides understood the offset connector placed in the tulip holes of the Vertex screw was intended to be covered by Claim 21. No court ever found that Claim 21 of the '491 patent did not cover Vertex or that Claim 21 was invalid. No competitor ever made such claims.

Manufacturing a dispute in 2013, counter to the understanding of the Medtronic inventors working on the prosecution of the '491 patent, is additional evidence of bad faith.

2.4 The designated *Globus* material includes a flip-flop on the application of generally accepted patent claim construction principles, which also demonstrates bad faith.

Claim construction principles in patent law are used to define claim terminology. The claim terminology needs to be defined from the perspective of a person of "ordinary skill in the art." (Sasso.App.Vol.XV,p.43.) With chemical and electrical patents, defining claim terms often requires expert knowledge because key words are often known only by scientists and engineers familiar with the technology. On the other hand, mechanical and structural patents, such as the ones at issue here, often have language that may be understood by its "plain meaning."

2.4.1 Medtronic flip-flopped on "plain meaning."

Medtronic confirmed a "plain meaning" construction for the '491 patent in its *Globus* brief, which states "Medtronic premises its construction on the plain meaning of the terms." (Sasso.App.Vol.XV,p.41.) Here Medtronic flip-flopped, continually urging the Court **not** to use the plain meaning of the words in the claim such as "transverse" and "channel" and "hole," which do not require advanced knowledge to understand.

For example, Sasso designated evidence that Medtronic told the *Globus* court that in the context of defining axes of spinal medical devices the plain meaning of the word "transverse" is not limited to "right angles":

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The parties generally agree on the meaning of the term 'transverse.' The term has a plain meaning: crosswise or lying across. The transverse axis...lies across the longitudinal axis. The only dispute between the parties concerns whether the plain meaning of "transverse" is limited to "right angles." **The plain meaning is not so limited.** See, e.g., *Acumed*, 483 F.3d at 808 (in the context of spinal medical devices, "'transverse' has a broader scope than 'perpendicular.'")

(Sasso.App.Vol.XV,pp.86-87 (emphasis supplied).) But in arguing for a construction of claim 48, which included an "at right angles" limitation, Medtronic flip-flopped and told the trial court below, "the term 'transverse' is applied to an axis **perpendicular to the longitudinal axis.**" (Medtronic.App.Vol.XV,p.37(emphasis in original).)

Another example. It would have been easy to use dictionary definitions of "channel" and "hole" for claim terminology, as urged by Sasso. But Medtronic insisted, and the Court accepted, a more complicated meaning for channel as something "generally u-shaped," making coverage under Claim 21 turn on a simple dispute: whether the following part of the saddle member is "generally U-shaped":



The jury determined it was, and its finding this portion of the saddle member is "a generally U-shaped opening" within the court ordered definition of "channel" was reasonable and supported by case law.

As described in Sasso's response to the motion to correct error, a "general U-shape" can take multiple forms. (Medtronic.App.Vol.XXI,pp.84-85.) Many patents

Whether the above identified part of the Vertex screw assembly is “generally U-shaped” came down to a question of fact. The jury saw the relevant structure and considered opinions from persons of ordinary skill in the art from both sides (Dr. Parnell, Dr. Sasso, and Dr. Theiss) on this issue. They weighed this evidence and rendered their verdict. **But** the “generally U-shaped” dispute was created by Medtronic’s “plain meaning” flip-flop from *Globus*. Medtronic insisted here that the simple words “channel” and “hole” could not just be given their “plain meaning[s]” — inconsistent with its position in *Globus* relating to the very same patent.

2.4.2 Medtronic flip-flopped on consideration of “embodiments.”

In *Globus*, Medtronic also wrote of the danger of limiting claims to the “embodiments” (i.e., the drawings/pictures in a patent), quoting the Federal Circuit with emphasis:

Although the specification often describes very specific embodiments of the invention, we have **repeatedly warned** against confining the claims to those embodiments.

(Sasso.App.Vol.XV,p.42)(emphasis added by Medtronic.) But in this case, Medtronic again flip-flopped, claiming Figure 24 of the ‘491 patent – one embodiment – is the only example of a covering structure. This position was expressly refuted by a biomedical engineer with a doctorate from Stanford and the express language of the ‘491 patent itself, yet Medtronic still claims here that there was no competent evidence to support the claim coverage found by the jury.

2.4.3 Medtronic flip-flopped on “claim differentiation.”

In *Globus*, Medtronic informed the district court of the doctrine of “claim differentiation” and urged its use:

Difference between the claim also can be helpful in claim construction, **since the presence of a limitation in a dependent claim gives rise to a presumption that the same limitation is not present in a related independent claim.**

(Sasso.App.Vol.XV.,p.45.) Here, Medtronic again flip-flopped. For example, Medtronic argued Sasso's interpretation of Claim 21 could not stand because the patent specifications and embodiments show the saddle “receiving” the “rod” of the offset connector. Sasso's application of Claim 21 to Vertex has the “channel” instead “receiving” a set screw to fix the rod below in place. The doctrine of claim differentiation would require the word “channel” in independent Claim 21 not be limited, as Medtronic urged here, because “channel” is used in dependent Claims 26 and 27 in the phrase “rod receiving channel.” That limitation, as a matter of claim differentiation, demonstrates that a plain unqualified “channel” as in Claim 21 does not have to receive the rod, just as stated by Dr. Parnell.

Paragraph 91 of the Third Amended Complaint alleged specifically, “Medtronic simply unilaterally decided to reinterpret the scope of their own patents” to avoid payment. These designated claim construction flip-flops go to proof of Paragraph 91. The natural position of an owner of a patent is to support coverage of what the inventors intended the patent to cover. Any inventor selling a patent in exchange for royalties from future sales should be able to expect—as a matter of good faith

administration of the agreement—the patent buyer will reasonably support the language of the claims so the patent covers what the parties intended it to cover. Medtronic's brief in *Globus*, which was designated in response to the summary judgment motion on punitive damages, is an example of such good faith behavior with respect to construction of claim language by a patent owner. Medtronic's positions below were not.

3. Sasso designated other substantial evidence of bad faith in the administration of the Vertex Agreement.

Contrary to Medtronic's claim at page 57 of its brief, Sasso designated substantial and relevant evidence, demonstrating malicious underreporting as alleged in Paragraph No. 93 of the Third Amended Complaint.

In a supplemental response to Interrogatory No. 94 served on August 18, 2016, Medtronic admitted it had not paid royalties on a 28-page parts list of Vertex parts, identified as "Exhibit D." (Sasso.App.Vol.XIII,p.215; Sasso.App.Vol.XIV,p.113,133.) After Medtronic produced a sales spreadsheet in October 2016, Sasso discovered that quarterly sales of the parts listed in "Exhibit D" were \$49,090,842.34. (Sasso.Supp.App.Vol.II.,pp.155-156.) Quarterly sales of Navigated Vertex instruments, not included in Sasso sales figures, from 2008 through 2012 were \$7,391,466. (Sasso.Supp.App.Vol.III., pp.158-160.) Overall, quarterly sales Medtronic reported to Sasso with his royalty statements from 2005 through 2012 were \$38,578,421 less than the Vertex sales data produced in discovery. (*Id.*) In 26 of the

30 quarters set forth in Paragraph 51 of the Third Amended Complaint, Medtronic underreported to Dr. Sasso Vertex sales.³ (*Id.*)

Sasso designated evidence that none of the royalty codes created in 2009 and 2010 included “instrument” parts. (Sasso.App.VolXIII,p.216; Sasso.Supp.Aff.Vol.II, p.118.) This was relevant because the Vertex Agreement provided that Sasso would be paid for the “Vertex Reconstruction System” and that originally included implants, instruments, and cases. (Sasso.App.Vol.X,p.52,60-62.) Angela Grant Jones at Medtronic followed orders from her superiors to not code new Vertex instruments for royalties. (Sasso.App.Vol.XV,pp.7-9.) Medtronic never informed Sasso of the new royalty codes or that instruments were being excluded. (Sasso.App.Vol.XVI,p.197.) The 4th Quarter 2010 list of Vertex parts, attached to the Third Amended Complaint as “Exhibit 6” is essentially the same as the list for the first quarter of 2007, attached as “Exhibit 5” even though thousands of parts were added to be royalty bearing in 2009 and 2010. (Sasso.App.Vol.XVI,pp.197-99.) These exhibits hid that new instrument parts were no longer royalty bearing. (*Id.*)

Sasso designated Medtronic's supplemental response to Interrogatory Nos. 116, 120, 124, 128, 132, and 136. (Sasso.App.Vol.XIV,pp.122-29.) These responses, the last five referring back to supplemental response to No. 116, showed high level executives and in-house attorneys, including patent attorneys, analyzed the Vertex

³ This designated evidence was introduced at trial through Ms. Cox and expert CPA Michael Stover. (Tr.Vol.7,pp.9-51; Tr.Vol.7,pp.52-110.) The jury adopted Stover's analysis for Vertex damages. (Tr.Vol.7,p.72; Tr.Vol.15.,p.6.) Medtronic has not appealed the Vertex damages award. On remand, these underpayments should be considered established by the prior verdict.

Agreement and the related patents in 2009 and 2010 and determined to add parts for royalties and to continue paying Vertex royalties. (*Id.*) Sasso designated the second supplemental response to Interrogatory No. 199, which showed that among the executives analyzing the agreements for continued payment of royalties was Coates. (Sasso.App.Vol.XIV,p.47.) Sasso designated Coates was of the opinion that the continuation of royalties was correct because there were several different patents covering the Vertex system. (Sasso.App.Vol.XIV,pp.25-26.) Coates confirmed this at trial. (Sasso Opening Brief,pp.26-28.) Sasso designated deposition evidence that Ellis did practically no investigation of the prior decision to continue paying royalties in 2009 and 2010. (Sasso.App.Vol.XIV,pp.95-96,101-02.)

All this designated evidence also created reasonable inferences of malice and recklessness sufficient to create an issue of fact on punitive damages.

4. Sasso designated Medtronic's similar misconduct administering other Sasso/Medtronic agreements that is relevant to the issue of bad faith.

In his opening brief, at pp.67-69, Sasso cited designated evidence of Medtronic's ill will generally with its administration and adjudicated breaches of the One Pin, SiLo, and Bryan Disc agreements. At page 58 of its brief, Medtronic argues that because those are separate agreements signed at different times about different inventions, they somehow are "irrelevant to Medtronic's good faith performance of the Vertex Agreement." Medtronic was actively administering all these agreements and breached all of them at roughly the same time with the same executives in charge.

Hodges, a wrongful discharge case, provides that punitive damages are appropriate when a defendant has acted knowingly, maliciously or recklessly. *Hodges*, 833 S.W.2d at 901. That is, punitive damages turn on the mental state of the breaching party, a question of fact. Evidence of Medtronic's serial breaching here is relevant to its mental state.

4.1 Sasso meets Mr. King and Mr. Ellis through ADR of One Pin.

Beginning in 2010, Sasso's relationship with Medtronic began deteriorating. (Sasso.App.Vol.XVI,pp.185-86.) In June 2010, Mr. Doug King, the new president of Medtronic Spine, and in-house Medtronic counsel met with Sasso in Indianapolis. (*Id.*,p.186.) King had not been involved in the marketing plan for One Pin so he committed to researching the issue of who was to sell One Pin. (*Id.*) On August 23, 2010, he wrote Sasso stating that Medtronic was to utilize the spine sales force to market One Pin (*Id.*,pp.186-87.)

This was material to the One Pin Agreement because Medtronic had agreed to pay Sasso "milestone" payments over four years based on sales of One Pin. (Sasso.App.Vol.XVII,pp.89-90.) Reaching the milestones was far less likely to occur without the involvement of the spine sales force, which had direct contact with spine surgeons and knowledge of the day to day use of navigation in spine surgeries. (Sasso.App.Vol.XVII,pp.119-20.) However, no amendment to the One Pin Agreement was forwarded by King, no date was given for the launch, and no steps were taken to have the One Pin actually sold by the spine sales force. (Sasso.App.Vol.XVI,p.187.)

In 2011, as step two of ADR, Sasso formally mediated the One Pin Agreement in Memphis and met the new general counsel of Medtronic Spine, Mr. Brian Ellis. (*Id.*) King did not attend. (*Id.*,pp.187-88.) Medtronic made no settlement offer in Memphis. (*Id.*,p.188.) The parties mediated again in January 2013. After that point, practically all interactions with Medtronic were extinguished. (*Id.*)

4.2 While mediating One Pin, Medtronic breaches SiLo.

During the time of the One Pin mediation, Medtronic stopped paying on the SiLo Agreement, which provided for royalty payments through October 1, 2012, but if there was a patent covering the system for which Sasso was a named inventor the payments were to continue. (*Id.*) Two patents, one issued on September 21, 2010, and another on August 21, 2012, with Sasso named as a co-inventor, met the requirements for continued payments. (*Id.*) Sasso was forced to hire counsel to begin dispute resolution communications. (*Id.*; Sasso.App.Vol.XVII,pp.73-74.) Ellis responded on September 4, 2013. (Sasso.App.Vol.XVII,p.77.) Ellis disclosed that Medtronic had failed to “code” certain SiLo part numbers for royalties, in contravention of the SiLo agreement, and had not paid him for those parts for over seven years. (*Id.*,pp.189-90,225-26,237-38; Sasso.App.Vol.XVII,p.77.) Ellis then offered to settle by paying the amounts owed, but never paid, and agreeing to pay for those parts in the future. (Sasso.App.Vol.XVII,p.77.)

4.3 While mediating One Pin, Medtronic breaches Bryan Disc.

Sasso also was a leader in improving ease of use for Medtronic's Bryan cervical disc system. (Sasso.App.Vol.XVI,p.189.) In 2005, he began work on simplifying the instruments used to implant the Bryan Disc. (*Id.*) The instruments created were not

approved for use in the United States, so sales of the simplified system, with the instruments Sasso helped to invent, were limited to sales outside the United States. (*Id.*,p.188.) Medtronic designated Sasso to testify before the FDA and the FDA gave approval to the new technique, which opened up its use by spine surgeons in the United States. (*Id.*,p.189.) In 2012, Medtronic invited Sasso to attend and speak to the spine sales force for the new launch of the Bryan system. (*Id.*) Notwithstanding the United States launch, the quarterly Bryan Disc royalties Medtronic paid to Sasso did not increase. (*Id.*)

Sasso asked his Indiana distributor to give him the part numbers the distributor billed the hospital for a Bryan Disc surgery Sasso had just done. (*Id.*) Sasso determined that Medtronic had created new part numbers for the implants and Medtronic was not paying him for those new part numbers, which made up the great majority of the Bryan Disc sales. (*Id.*) As with the Vertex Agreement, in the Bryan Agreement, Medtronic was obligated to update part number additions with written notice to Sasso. (Sasso.App.Vol.XVII,p.7.) Medtronic breached that obligation.⁴

4.4 While mediating One Pin, Medtronic announces the Vertex “mistake” and ceases payment of royalties.

After all this activity in One Pin, SiLo, and Bryan Disc, in April 2013, Ellis announced Medtronic had been making a “mistake” by paying Vertex royalties after

⁴ Medtronic similarly breached this obligation with Vertex. In its reply/response brief, at page 9, Medtronic writes, “Sasso was paid almost \$18 million in royalties for devices listed on Exhibit B to the Vertex Agreement.” Exhibit B has 77 parts. (Sasso.App.Vol.X.,pp.61-63.) It never was updated even though Medtronic was obligated to “amend” with written notice to Sasso. (*Id.*,p.52.) Medtronic did send royalty letters with Vertex parts lists, but the lists were incomplete and discontinued after 2010. (*Id.*,pp.70-90,117-137.)

2008 and stopped paying them. (Sasso.App.Vol.XVI,p.189.) Sasso filed this lawsuit in August 2013. (*Id.*)

4.5 After Sasso files this suit, Medtronic ends One Pin mediation and files arbitration alleging the opposite of what it had conceded in ADR previously.

In November 2013, while this lawsuit was removed to federal court, Medtronic filed arbitration proceedings against Sasso for One Pin, alleging the opposite of what King had researched and admitted in August 2010. (*Id.*,p.190-91.) The ADR provision of the One Pin Agreement specifically obligated both parties to “consultation and negotiation in good faith and spirit of mutual cooperation.” (Sasso.App.Vol.XVII,p.61.) Because Medtronic was breaching SiLo, Bryan Disc, and One Pin at the same time, Sasso asked for a consolidated proceeding. (Sasso.App.Vol.XVI,pp.191-92.) Medtronic refused. (*Id.*) In March 2015, after months of discovery and a six-day arbitration in Minnesota in February, a 3-member panel awarded Sasso \$2,340,516 and ordered Medtronic to account for further sales of One Pin. (Sasso.App.VolXVII,pp.155-85.)

4.6 Medtronic wrongfully delays correcting Bryan royalty payments for two years after Sasso discovers the error in failing to add new Bryan parts and reports that to Medtronic.

Sasso sent separate arbitration notices and demands for accounting for SiLo and Bryan Disc in February 2014. (Sasso.App.Vol.XVI,p.192.) On March 6, 2014, Sasso brought litigation to compel accountings of SiLo and Bryan Disc. (*Id.*) After a hearing, Ellis agreed to provide the accounting for SiLo and Bryan Disc but only in Memphis. (*Id.*) Sasso sent Gerald Horn, A CPA with Somerset CPAs of Indianapolis, to Memphis. (*Id.*) Horn was given a thumb drive with data supporting the prior Bryan

Disc payments, practically to the penny. (*Id.*, Sasso.App.Vol.XVII,pp.203-08.) He was not given any information on Bryan Disc part numbers Sasso had learned from his Indiana distributor. (*Id.*) On June 30, 2014, Sasso's counsel wrote Medtronic's counsel stating what had not been provided. (Sasso.App.XVII,pp.151-52.)

Medtronic continued to grossly underpay Bryan Disc royalties, with a payment of \$2,034.00 on November 2, 2015. (Sasso.App.Vol.XVI,pp.193-94; Sasso.App.Vol.XVII, p.187.) In February 2016, just before the second arbitration hearing, and right after Ellis left Medtronic, Medtronic wired Sasso a "catchup payment" for Bryan Disc of \$274,618.25. (Sasso.App.Vol.XVI,p.194; Sasso.App.VolXVII,p.191.) No reason was ever given for the delay in payment. (*Id.*) Sasso had incurred tens of thousands of dollars in unreimbursed CPA and attorney fees. (Sasso.App.Vol.XVI,p.194.) In April 2016, a single arbitrator found Medtronic to be in breach of the SiLo and Bryan Disc Agreements. (Sasso.App.Vol.XVII,p.193-202.)

4.7 A reasonable inference may be drawn that King and Ellis were maliciously targeting Sasso in Vertex for challenging their wrongful administration of the One Pin agreement.

On summary judgment on the issue of punitive damages, a court is to draw all reasonable inferences in favor of the nonmoving party. *Alicea v. Brown*, 121 N.E.3d 621,622 (Ind.Ct.App.2019). Sasso contends the corporate behavior exhibited by two new Medtronic Spine executives, King and Ellis, targeted him for daring to question Medtronic's administration of his multiple inventor royalty agreements. This is a reasonable inference to draw from the multiple breaches, and was supported by

Medtronic's later testimony at trial. King testified at trial that his relationship with Sasso was "strained." (Tr.Vol.8,p.124.) Ellis then testified:

Q. You said at the beginning of your testimony that you had conducted a review of something like, 25 or so contracts?

A. More than that, for sure.

Q. Did any of those result in payments being stopped?

A. Absolutely.

Q. Any of them result in a lawsuit?

A. No.

Q. Other than this one?

A. Other than this one, no.

(Tr.Vol.11.,p.110.)⁵ Earlier in his trial testimony, Ellis volunteered "north of 25" as a ballpark estimate. (Tr.Vol.11,p.69.) Reasonably inferring the number as 40, the Sasso contract reviews were 10% of the total number of contracts Ellis reviewed.

In support of its punitive damages summary judgment motion, Medtronic designated deposition testimony from Ms. Angela Grant Jones of the Medtronic Spine finance department stating that there were "more than 50" and perhaps "hundreds

⁵ Early in discovery, Sasso served interrogatories Nos. 34 and 35 requesting this type of information, and moved to compel discovery when Medtronic refused to provide it. (Sasso.App.Vol.III,pp.17,59.) The trial court denied the motion to compel. (Sasso.App.Vol.III,pp.148-49.) On remand, Sasso should be allowed to explore Ellis' reviews thoroughly. They are relevant to the good faith administration of Sasso's contracts and Medtronic has waived privilege by testifying as to the results of the other reviews.

of physicians and third parties who received royalties pursuant to contracts with Medtronic.” (Sasso.App.Vol.XIII.,p.67; Sasso.Supp.AppVol.II.p.111.)

Reasonably inferring the number as 200 for such royalty agreements, Ellis chose to examine just 20% of those agreements. 10% of those Ellis chose were Sasso's. Ellis resolved without challenge every agreement he reviewed, but Sasso's agreements, which were all adjudicated to have been breached. How could Ellis have gotten it so wrong and so wrong only with Sasso? A reasonable inference is that King and Ellis were targeting Sasso for daring to contest their administration of any of the Medtronic/Sasso agreements.

5. Sasso's case for punitive damages was not dependent on the expert opinion of Irving Rappaport, who testified without objection at trial.

Irving Rappaport is an experienced intellectual property attorney who testified without objection at trial. (Tr.Vol.3, pp.64-135.) To be sure, the trial court refused to consider Rappaport's opinion testimony when considering summary judgment, striking two separate affidavits from Rappaport. (Sasso.Supp.App.Vol.IV, pp. 40-42.) The first time, the order was part of the January 17, 2018, “Orders on Defendants' Motion for Partial Summary Judgment,” which Sasso has appealed. The Court reasoned Rappaport's declaration is “mostly legal opinion and an unhelpful treatment of the facts as he sees them.” (Medtronic.App.Vol.II,p.104.) The Court then referenced the striking of the affidavit in the “Count VII – Punitive Damages” ruling. (*Id.*,p.107.) In the second summary judgment ruling, the trial court did enter separate orders at the same time, one granting summary judgment on punitive damages and a different order, holding:

The Motion to Strike is GRANTED. Mr. Rappaport's affidavit, like his prior declaration is (to quote the Northern District of California) "mostly legal opinion and an unhelpful restatement of the facts as he sees them."

(Sasso.Supp.App.Vol.IV,p.40.) The striking of affidavits in summary judgment proceedings is reviewed for abuse of discretion. *Robinson v. Robinson*, 125 N.E.3d 1,2 (Ind.Ct.App.2019). Sasso does not challenge the trial court's refusal to consider the Rappaport affidavits because they were stricken for being "unhelpful" to the trial court in deciding the motion and abuse of discretion is a high standard of review.

However, the affidavits were designated to the trial court and do shed light on the trial court's failure to consider the actual facts relating to malice and recklessness, making it appropriate to refer to them in the opening brief. In responding to the motion to strike, Sasso argued:

It will be helpful for the jury to hear from an experienced lawyer who managed intellectual property contracts with inventors over decades to know whether the Defendants' miscues are within reasonable commercial standards

(Sasso.Supp.App.Vol.IV, p.33.) Both I.R.E. 702 and Tennessee Rules of Evidence 702 provide that expert evidence may be used to "understand the evidence or to determine a fact in issue." (Id., pp.29-30) The Rappaport affidavits were intended to help the trial court to "understand the evidence" but the trial court found them to be "unhelpful." They were not tendered to "determine a fact in issue" as were the affidavits relating to material issues of fact in *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind.Ct.App.2006) or *AKj Indus. v. Mercantile Nat'l Bank*, 779 N.E.2d 543 (Ind.Ct.App.2002). Because this expert affidavit evidence was stricken as "unhelpful"

and not required to establish a material fact in issue, the striking of his affidavit should be treated differently than in the cases cited by Medtronic.

There never was a requirement of expert testimony to establish the right to a trial on punitive damages. As set forth above, the facts analyzed by Rappaport to reach his opinion were designated by other witnesses in response to the summary judgment. A reasonable inference of malice and recklessness can and should be made from the other evidence, without what the trial court determined was "unhelpful" assistance from Rappaport.

6. Justifying the breach of long existing physician royalty agreements under the guise of compliance with the Sunshine Act appears to be an excuse for just eliminating royalties and should have been a question of fact for the jury.

At p.61 of its brief, Medtronic claims "Starting in 2012, Medtronic reviewed its contracts, including the Vertex Agreement, to ensure that it was not overpaying doctors," citing trial testimony, not evidence it designated in support of its summary judgment. In *Alicea*, 121 N.E.3d at 623, cited in Sasso's opening brief, this Court held, "Summary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant's account of the facts." This Court then reversed summary judgment on punitive damages granted in favor of a driver who had "only consumed two and a half (12 ounce) cans of beer" shortly before rear ending the plaintiffs' vehicle. *Alicea*, 121 N.E.3d at 623.

At trial, Ellis testified that he "had a process around only paying fair market value and not paying above that because we didn't wanna make it appear that we were trying to overindulge a surgeon for their...contributions." (Tr.Vol.11.,p.67.) It is

one thing to apply this process to whether Medtronic could provide free meals, exotic trips and the like to a surgeon, and quite another to determine that long existing intellectual property contracts with a surgeon are subject to breach because Medtronic has decided that it may be paying more than fair market value to the surgeon at issue. How could Ellis possibly have known the fair market value of an agreement signed in 2001, on intellectual property supporting a very successful and innovative product, agreed to before he had any connection with the company?

Hiding behind making sure “it was not overpaying doctors” to breach Sasso’s Vertex Agreement and the others is similar to Brown’s claim in *Alicea* of only drinking a couple beers as a reason to throw out a claim for punitive damages in a automobile negligence case. By sharply construing its agreements with Sasso, Medtronic kept additional profits for itself and lowered the amount of money it had to publicly report under the Sunshine Act. The jury could choose to disbelieve Ellis’ claims of compliance with the Sunshine Act in deciding the issue of punitive damages. That self-serving excuse for pocketing additional profits should have been just one factor to be weighed by the jury, along with the evidence Sasso designated, to decide whether to award punitive damages.

IV. **Conclusion**

Sasso designated substantial evidence that would have led a reasonable jury to determine that Defendants acted knowingly, maliciously, recklessly, or fraudulently in its administration of the Vertex Agreement. The jury verdicts on the

Vertex Agreement and the December 1999 Agreement should be affirmed and this Court should remand this case for trial on the issue of punitive damages.

Respectfully submitted,

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Pursuant to Appellate Rule 44(E), the undersigned counsel verifies the foregoing contains fewer than 7,000 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief, Microsoft Word 2018.

/s/ Joseph N. Williams

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Certificate of Service

I certify that on June 17, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on June 17, 2020, the foregoing document was served upon the following persons via IEFS:

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