*Chapter 2*

Business Ethics

***Case 2.1***

C.A.5 (Tex.),2014.

Scott v. Carpanzano

--- Fed.Appx. ----, 2014 WL 274493 (C.A.5 (Tex.))

United States Court of Appeals,

Fifth Circuit.

**Rick SCOTT, also known as Chief Rick Scott, Plaintiff–Appellee**

**v.**

**Salvatore CARPANZANO; Carmela Ann Carpanzano; Marisa Belcastro, Defendants–Appellants.**

No. 13–10096.

Jan. 24, 2014.

Before [BARKSDALE](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0194463701&FindType=h), [PRADO](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0197176801&FindType=h), and [HAYNES](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0316723601&FindType=h), Circuit Judges.

PER CURIAM: [FN\*](#Document1zzB0012032601332)

Rick Scott filed suit against Salvatore Carpanzano, Marisa Belcastro, and Carmela Carpanzano (collectively, the “Defendants”) and others, alleging various claims relating to his loss of approximately $2,000,000 placed in an escrow account. The district court entered default judgments against the Defendants. The Defendants appeal the district court's denial of their subsequent motions to set aside the default judgments. We AFFIRM the district court's denial of relief to Salvatore Carpanzano and Marisa Belcastro, and VACATE the district court's denial of relief to Carmela Carpanzano with respect to the monetary default judgment against her and REMAND for further proceedings.

**I. Background**

In December 2011, Rick Scott (“Scott”) sued Salvatore Carpanzano (“Mr.Carpanzano”) and others in state court alleging various claims related to the wrongful transfer of funds that Scott placed in an escrow account. Mr. Carpanzano removed the case to federal court asserting diversity and federalquestion jurisdiction. Mr. Carpanzano also filed a motion to dismiss for lack of personal jurisdiction, which was denied. At the time of these initial filings, Mr. Carpanzano was represented by Stephen Walraven. But on February 6, 2012, Walraven filed a motion to withdraw as counsel, informing the court that Mr. Carpanzano “failed to cooperate with the discovery process” and “refused to appear as requested and ordered.” Walraven averred that he had sent a copy of the motion to Mr. Carpanzano by certified mail, regular mail, and email, with no response. He further stated that he believed Mr. Carpanzano to be out of the country at the time, but that prior efforts to contact him by email had been successful. Walraven provided the court with Mr. Carpanzano's last known mailing address and email address. Mr. Carpanzano did not file a response to the motion to withdraw, and the district court granted the motion on February 10, 2012.

By February 16, 2012, Mr. Carpanzano had retained the law firm of Springer & Steinberg to represent him. According to Scott's counsel, attorneys with Springer & Steinberg informed them that they represented Mr. Carpanzano, but that they had not been authorized to enter an appearance in the district court. While the Springer & Steinberg attorneys never entered an appearance in the district court, they conducted extensive settlement negotiations with Scott's attorneys and communicated with Mr. Carpanzano regarding the potential for settlement up until September 2012.

Scott filed his second amended complaint on March 28, 2012, adding as defendants Mr. Carpanzano's wife, Marisa Belcastro (“Ms.Belcastro”), and Mr. Carpanzano's daughter, Carmela Carpanzano (“Ms.Carpanzano”). Ms. Belcastro and Ms. Carpanzano were personally served with the second amended complaint. Scott emailed the second amended complaint to Mr. Carpanzano's last known email address and Mr. Carpanzano's attorneys at Springer & Steinberg.

The second amended complaint asserts numerous claims and contains substantial factual allegations against Mr. Carpanzano and Ms. Belcastro. In relevant part, it alleges that Scott entered into an escrow agreement regarding a contemplated loan transaction, pursuant to which Scott was to transfer $2 million into an escrow account maintained by a trust and investment company owned and managed by Mr. Carpanzano and Ms. Belcastro. The complaint alleges that Mr. Carpanzano made significant misrepresentations regarding the contemplated loan transaction, escrow account, and trust and investment company, which induced Scott into wiring $2 million to the escrow account. Further, it alleges that immediately after Scott placed the funds in the account, Ms. Belcastro initiated a series of transactions by which she withdrew or transferred the majority of the $2 million out of the account in violation of the escrow agreement.

By contrast, the second amended complaint does not contain any factual allegations of acts, omissions, or knowledge on the part of Ms. Carpanzano. The only fact alleged relating to Ms. Carpanzano is that $46,608.94 of the funds transferred out of the account were used to purchase a 2008 Land Rover Range Rover that was titled in Ms. Carpanzano's name.

The Defendants did not file answers to the second amended complaint, and Scott sought and obtained a clerk's entry of default against each of them. Scott then filed motions for default judgment against the Defendants. Hearings were held on the motions, but the Defendants did not appear at the hearings. On June 14, 2012, the district court entered a default judgment against Mr. Carpanzano and Ms. Carpanzano for $2,050,000 in actual damages, jointly and severally with the other defendants, $4,100,000 in punitive damages against Mr. Carpanzano, and $50,000 in punitive damages against Ms. Carpanzano. On August 28, 2012, the district court entered a default judgment against Ms. Belcastro for $2,050,000 in actual damages, jointly and severally with the other defendants, and $4,100,000 in punitive damages.

On December 18, 2012, through newly retained counsel, the Defendants filed motions to set aside the default judgments. Mr. Carpanzano argued that the default judgment against him should be set aside as void pursuant to [Federal Rule of Civil Procedure 60(b)(4)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L), and all three Defendants argued that the default judgments should be set aside for good cause pursuant to [Federal Rules of Civil Procedure 55(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) and [60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L). After holding a hearing, the district court denied the motions. The Defendants timely appealed the district court's denial of their motions.[FN1](#Document1zzB00212032601332)

**II. Mr. Carpanzano's Request Pursuant to** [**Rule 60(b)(4)**](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L)

[Federal Rule of Civil Procedure 60(b)(4)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) allows a court to relieve a party from a final judgment if the judgment is void. [FED.R.CIV.P. 60(b)(4)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L). It applies only when a judgment is premised on a “jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.” [*United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 271, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2021590751). Our review of a district court's [Rule 60(b)(4)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) ruling is effectively *de novo* because a judgment is either a legal nullity or not. [*FDIC v. SLE, Inc.,* 722 F.3d 264, 267 (5th Cir.2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2030925669&ReferencePosition=267).

Mr. Carpanzano argues that the default judgment against him is void for want of due process because he was not served with the second amended complaint, the motion for default judgment, or the default judgment in compliance with [Federal Rule of Civil Procedure 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L). *See* [FED.R.CIV.P. 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L) (governing service of pleadings and other filings). Even assuming that Scott did not comply with [Rule 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L), Supreme Court precedent and precedent of this court make clear that serious procedural irregularities during the course of a proceeding, without more, do not amount to a deprivation of due process. *See* [*Espinosa,* 559 U.S. at 272](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=2021590751&ReferencePosition=272) (“[F]ailure to serve [a party] with a summons and complaint deprived [the party] of a right granted by a procedural rule.... But this deprivation did not amount to a violation of [the party's] constitutional right to due process.” (internal citation omitted)); [*Callon Petroleum Co. v. Frontier Ins. Co.,* 351 F.3d 204, 210 (5th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003846985&ReferencePosition=210) (noting that “[p]rocedural irregularities during the course of a civil case, even serious ones,” do not amount to a due process violation that would render a judgment void (citation and internal quotation marks omitted)). Instead, the measure of due process is whether there was “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [*Espinosa,* 559 U.S. at 272](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=2021590751&ReferencePosition=272) (citation and internal quotation marks omitted).

[[1]](#Document1zzF12032601332) The record demonstrates that Mr. Carpanzano received notice sufficient to satisfy his right to due process. He was well aware of the pendency of the action against him: there is no dispute that Mr. Carpanzano was served with the initial complaint in this action, removed the case to federal court, and filed a motion to dismiss. Thereafter, his attorney withdrew and notified all involved that he believed Mr. Carpanzano was out of the country but that “prior efforts to contact him by e-mail ha[d] been successful.” While the typical means of providing notice to a party whose attorney has withdrawn may be by regular mail to the party's last known mailing address, *see* [FED.R.CIV.P. 5(b)(2)(C)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L), Mr. Carpanzano recognizes in his appellate brief that reliance on this method may have, itself, violated due process because attempts to serve him by this method had repeatedly proven unsuccessful and he was purportedly out of the country. *See N.* [*Y. Life Ins. Co. v. Brown,* 84 F.3d 137, 142–43 (5th Cir.1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996116891&ReferencePosition=142) (finding a judgment void for want of due process where a court tried to serve a party at an address it should have known was not his last known address).

In these circumstances, the most reasonable means of providing continued notice to Mr. Carpanzano may have been at his last known email address as provided by his previous counsel. In addition, once Scott's attorneys were notified that Mr. Carpanzano was represented by attorneys at Springer & Steinberg, providing notice to Mr. Carpanzano's new counsel was likely the most reasonable means of providing continued notice to Mr. Carpanzano. *See* [FED.R.CIV.P. 5(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L) (“If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.”); [*Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 92, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1990169285) (“Under our system of representative litigation, each party ... is considered to have notice of all facts, notice of which can be charged upon the attorney.” (citation and internal quotation marks omitted)). Scott employed both of these means of providing notice to Mr. Carpanzano.

Scott's attorneys attest by affidavit that they sent all relevant filings and notices to Mr. Carpanzano's last known email address, an alternate email address believed to belong to Mr. Carpanzano, and the email address of Mr. Carpanzano's new counsel. Copies of the emails were attached to the affidavits. Notably, although Mr. Carpanzano is in the best position to dispute this evidence, he does not do so. He does not offer any evidence, or even attest, that he did not receive these emails or that either email address used by Scott's attorneys did not belong to him. Mr. Carpanzano admits that he retained the Springer & Steinberg law firm to represent him in this matter, and he never states that his attorneys did not receive these emails or did not remain in contact with him. Moreover, the affidavits by Scott's attorneys and attached emails confirm that Mr. Carpanzano's attorneys received the emails and were actively participating in settlement negotiations on his behalf and communicating with him regarding the matter.

Under the circumstances of this case, we have no difficulty concluding that Mr. Carpanzano received notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections. *See* [*Espinosa,* 559 U.S. at 272](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=2021590751&ReferencePosition=272).[FN2](#Document1zzB00322032601332) The default judgment against him is not void for want of due process.

**III. The Defendants' Request Pursuant to** [**Rules 55(c)**](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) **and** [**60(b)(1)**](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L)

*A. Applicable Law*

[Rule 55(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) provides that a “court may set aside an entry of default for good cause, and it may set aside a default judgment under [Rule 60(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L).” [FED.R.CIV.P. 55(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L). [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) provides that a court may relieve a party from a final judgment for “mistake, inadvertence, surprise, or excusable neglect.” [FED.R.CIV.P. 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L). Where, as here, a party seeks to set aside a default judgment pursuant to [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L), this court has consistently held that three primary factors are to be considered: whether the defendant willfully defaulted, whether a meritorious defense is presented, and whether setting aside the default judgment would prejudice the plaintiff. *See* [*Jenkens & Gilchrist v. Groia & Co.,* 542 F.3d 114, 119 (5th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=119); [*Lacy v. Sitel Corp.,* 227 F.3d 290, 292 (5th Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292).[FN3](#Document1zzB00432032601332) Of these factors, two can be determinative: a district court may refuse to set aside a default judgment if it finds either that the default was willful or that the defendant failed to present a meritorious defense. *See* [*Jenkens & Gilchrist,* 542 F.3d at 119–20](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=119). Other facts that may be considered include whether the public interest is implicated, whether there is significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. [*Id.* at 119.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2016836970)

In conducting this analysis, “federal courts should not be agnostic with respect to the entry of default judgments, which are generally disfavored in the law.” [*Lacy,* 227 F.3d at 292](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292) (citation and internal quotation marks omitted). “[Rule 60(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) [should be] applied most liberally to judgments of default, since trial on the merits is to be favored over such a truncated proceeding. Unless it appears that no injustice results from the default, relief should be granted.” [*In re OCA, Inc.,* 551 F.3d 359, 370–71 (5th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (citation and internal quotation marks omitted).

We review a district court's denial of a motion to set aside a default judgment pursuant to [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) for abuse of discretion; however, “[b]ecause of the seriousness of a default judgment, ... even a slight abuse of discretion may justify reversal.” [*Jenkens & Gilchrist,* 542 F.3d at 118](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=118) (quoting [*Lacy,* 227 F.3d at 292)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292) (internal quotation marks omitted). Whether a defendant willfully defaulted is a factual finding that we review for clear error. [*In re OCA, Inc.,* 551 F.3d at 367](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=367).

*B. Willful Default*

“A *willful default* is an ‘intentional failure’ to respond to litigation.” *Id.* at 370 n. 32 (emphasis in original) (quoting [*Lacy,* 227 F.3d at 292).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292) The district court found that all three Defendants willfully defaulted based on evidence that the Defendants were aware of the proceedings against them and that the Springer & Steinberg attorneys were specifically instructed not to enter an appearance in this case. We review the district court's finding as it applies to each defendant.

The evidence substantially supports the district court's finding as to Mr. Carpanzano. First, Mr. Carpanzano's first attorney withdrew because Mr. Carpanzano “failed to cooperate with the discovery process” and “refused to appear as requested and ordered .” Second, affidavits by Scott's attorneys and supporting emails suggest that Mr. Carpanzano instructed his second set of attorneys to negotiate settlement of this matter but not to enter an appearance in the district court. Significantly, Mr. Carpanzano never denies this allegation. Third, this same evidence demonstrates that Mr. Carpanzano and his attorneys were well aware that the case was proceeding toward default and that they were in communication with each other during this time. Fourth, the evidence suggests that, once final execution of settlement papers was at hand, Mr. Carpanzano also ceased communication with his second set of attorneys and did not finalize the settlement. Finally, other than ambiguously suggesting that a health condition (unsupported by any evidence of what the condition was) and absence from the country (unsupported by any evidence that electronic communication was not possible from that country) prevented him from defending this action, Mr. Carpanzano offers no real reason why he did not answer the second amended complaint despite having attorneys in the United States who were communicating with him regarding the case and actively pursuing settlement.

[[2]](#Document1zzF22032601332) In short, the district court's finding that Mr. Carpanzano willfully defaulted is not clearly erroneous. Accordingly, we hold that the district court acted within its discretion in refusing to set aside the default judgment against Mr. Carpanzano. *See* [*In re OCA, Inc.,* 551 F.3d at 370](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (stating that we may hold a district court acted within its discretion in denying relief from a default judgment if the defendant willfully defaulted). We therefore do not address how the remaining good-cause factors might apply to Mr. Carpanzano.

By contrast, the record does not support the district court's finding that Ms. Belcastro and Ms. Carpanzano also willfully defaulted by retaining counsel and then instructing them not to enter an appearance in the district court. We have found nothing in the record indicating that Ms. Belcastro and Ms. Carpanzano were ever in contact with the Springer & Steinberg attorneys or that they retained them as counsel. Scott puts forth no such evidence.[FN4](#Document1zzB00542032601332) Instead, the emails submitted by Scott's attorneys reveal that at the time Mr. Carpanzano hired the Springer & Steinberg attorneys, Ms. Carpanzano and Ms. Belcastro were not defendants in this action; after the second amended complaint was filed, the proposed settlement circulated between Scott's counsel and Mr. Carpanzano's counsel simply contemplated that any settlement would serve to release the claims against the majority of the defendants, including Ms. Belcastro, Ms. Carpanzano, and others. Ms. Carpanzano states in her affidavit that her father hired the Springer & Steinberg attorneys and that they never contacted her.

[[3]](#Document1zzF32032601332) In their evidence, both Ms. Belcastro and Ms. Carpanzano repeatedly indicate that they were relying on Mr. Carpanzano (husband to one, father to the other) to make sure their interests were protected. Nothing in the record contradicts this assertion. While their reliance on Mr. Carpanzano acting with the attorneys he retained may have been negligent, it does not amount to an “ ‘intentional failure’ to respond to litigation.” [*In re OCA, Inc.,* 551 F.3d at 370 n. 32](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (quoting [*Lacy,* 227 F.3d at 292).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292) Because it is not plausible in light of the record as a whole, the district court's finding that Ms. Belcastro and Ms. Carpanzano willfully defaulted is clearly erroneous. [FN5](#Document1zzB00652032601332) We therefore consider whether the remaining factors support denying relief to Ms. Belcastro and Ms. Carpanzano.

*C. Meritorious Defense*

A district court has the discretion not to set aside a default judgment if the defendant “fails to present a meritorious defense sufficient to support a finding on the merits” in its favor. [*Lacy,* 227 F.3d at 293](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=293). This generally requires that the defendant provide “definite factual allegations, as opposed to mere legal conclusions, in support of her defense.” [*Jenkens & Gilchrist,* 542 F.3d at 122](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=122). In determining whether a meritorious defense exists, the underlying concern is “whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” [*In re OCA, Inc.,* 551 F.3d at 373](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=373) (citation and internal quotation marks omitted).

[[4]](#Document1zzF42032601332) In this case, the second amended complaint asserts the following claims against Ms. Belcastro: aiding and abetting a breach of fiduciary duty, violation of the Texas Fraudulent Transfer Act, civil conspiracy, violation of the Texas Theft Liability Act, and violation of the Texas Deceptive Trade Practices Act. It contains specific factual allegations implicating Ms. Belcastro in these claims, including that she was a managing member of the trust company that Scott's funds were entrusted to, that she performed a series of wrongful transfers to others from the purported escrow account, that she wrongfully transferred funds to her own personal account from the purported escrow account, and that she wrongfully withdrew funds from the purported escrow account. In total, these facts amount to an allegation that Ms. Belcastro wrongfully withdrew or transferred the majority of the $2 million Scott placed into the escrow account. At the hearing on the motion for default judgment, Scott submitted evidence supporting these factual allegations.

Ms. Belcastro's defenses before the district court were that she had no knowledge of the inner workings of her husband's business, she did not personally enter into a contract with Scott or seek to defraud him, and she had limited involvement in the facts of this case. Beyond a brief, half-page affidavit asserting these defenses, Ms. Belcastro offers no evidence to support her defenses. Nor does she deny involvement in the alleged transactions. In fact, she admits to opening the account and transferring funds out of the account. The district court found that she failed to demonstrate a meritorious defense in part because she made “only conclusory statements about available meritorious defenses.” We agree. Ms. Belcastro did not provide “definite factual allegations” or evidence that would lend support to her general defenses. [*Jenkens & Gilchrist,* 542 F.3d at 122](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=122). Significantly, she does little to rebut the substantial factual allegations in the second amended complaint, the evidence put forth by Scott to secure the default judgment against her. In light of this and her admitted involvement in the allegedly fraudulent transactions, it is apparent that Ms. Belcastro falls short of presenting “a meritorious defense sufficient to support a finding on the merits” in her favor. [*Lacy,* 227 F.3d at 293](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=293). Her paltry showing also does not demonstrate that there is a “possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” [*In re OCA, Inc.,* 551 F.3d at 373](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=373) (citation and internal quotation marks omitted). Given this conclusion, we hold that the district court acted within its discretion in refusing to set aside the default judgment against Ms. Belcastro. *See* [*id.* at 370](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2017615366) (stating that we may hold that a district court was within its discretion in refusing to grant relief from a default judgment if the defendant failed to present a meritorious defense). Thus, we do not consider how the remaining good-cause factors might also apply to her situation.

[[5]](#Document1zzF52032601332) The analysis yields a different result in regards to Ms. Carpanzano. The second amended complaint is entirely devoid of any factual allegations to support the two claims asserted against her (aiding and abetting a breach of fiduciary duty and violation of the Texas Fraudulent Transfer Act). It contains no factual allegations of acts or omissions on the part of Ms. Carpanzano. It does not allege that she ever was in contact with Scott, that she was in control of the trust or escrow account, or that she wrongfully transferred any funds out of the account. Nor does it allege any intent or knowledge on the part of Ms. Carpanzano. The only fact relating to Ms. Carpanzano alleged in the second amended complaint is that $46,608.94 of the funds transferred out of the account were used to purchase a Land Rover Range Rover that, at the time of the filing of the second amended complaint, was titled in Ms. Carpanzano's name. Indeed, an examination of the complaint reveals that there is not “a sufficient basis in the pleadings” for the judgment of $2,050,000 in actual damages, let alone $50,000 in punitive damages, entered against Ms. Carpanzano. [*Nishimatsu Constr. Co. v. Hous. Nat'l Bank,* 515 F.2d 1200, 1206 (5th Cir.1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1975110843&ReferencePosition=1206) (holding that “[t]here must be a sufficient basis in the pleadings for” the default judgment entered and that “[a] default judgment is unassailable on the merits but only so far as it is supported by *well -pleaded* allegations, assumed to be true” (emphasis in original)). Scott also did not offer any evidence or arguments to implicate Ms. Carpanzano in the events in question—he focused his efforts on Mr. Carpanzano and Ms. Belcastro.

The defenses presented by Ms. Carpanzano to the district court assert that she had no knowledge of the details of her father's business transactions, she did not personally enter into any contracts with Scott or seek to defraud him, and—as made “clear from the Second Amended Complaint”—she had limited involvement in the facts of this case. Given the lack of accusations against her, it is difficult to expect more from her in the way of denials. In other words, there is nothing specifically stated in the complaint as to which we would expect a denial or agreement. She has never denied receiving the Land Rover (nor does she seek its return in these proceedings). That is the only accusation against her.

When Ms. Carpanzano's defenses are considered in light of the second amended complaint, it is apparent she had little to no involvement in the facts of this case and that Scott failed to state a claim against her—itself a meritorious defense. *See, e.g.,* [*Taizhou Zhongneng Imp. & Exp. Co. v. Koutsobinas,* 509 F. App'x 54, 58 n. 4 (2d Cir.2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2029749845&ReferencePosition=58) (unpublished) (“Because [the plaintiff] failed to state a claim against [the defendant, the defendant] also had a meritorious defense against [the plaintiff's] claims.” (citation omitted)); [*United States v. One Parcel of Real Prop.,* 763 F.2d 181, 183–84 (5th Cir.1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1985127769&ReferencePosition=183) (finding that a defendant “obtusely” presented a meritorious defense in a forfeiture action where the complaint did not contain any allegations that she obtained the subject property with illegal proceeds and she proved that she was the owner of the property). Ms. Carpanzano's denial of involvement in her father's business and in the Scott transaction—in the absence of any indication in the complaint or anywhere else that she was involved—is sufficient to support a meritorious defense.

In addition, the underlying concern in determining whether a meritorious defense is presented is “whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” [*In re OCA,* 551 F.3d at 373](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=373) (citation and internal quotation marks omitted). In Ms. Carpanzano's case, it is almost certain that the outcome after a full trial would not be a judgment of $2,050,000 in actual damages and $50,000 in punitive damages, as was achieved through the default judgment. Even if Scott were able to prove the entirety of the second amended complaint, we fail to see how it would justify a judgment of $2.1 million dollars against Ms. Carpanzano: simply receiving a vehicle that was paid for with her father's ill-gotten gains does not support millions of dollars of liability. *See id.* (finding that the defendant presented a meritorious defense where, on the discrete facts of the case, there was “a possibility that the outcome after trial would not mirror the default judgment”).

We thus conclude that Ms. Carpanzano has presented a meritorious defense. We therefore go on to consider how the remaining factors apply to Ms. Carpanzano.

*D. Prejudice to Scott*

For this factor, the plaintiff must show that setting aside the default judgment will result in “loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion.” [*Lacy,* 227 F.3d at 293](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=293) (citation and internal quotation marks omitted). It is not enough that the plaintiff will be required to prove his case or that any potential recovery will be delayed. *Id.*

As a result of our ruling in this case, Scott will still have a judgment against the parties he alleged caused him the harm—Mr. Carpanzano and Ms. Belcastro. We can find nothing about setting aside the judgment only as to *Ms.* Carpanzano that prejudices Scott beyond the normal issues of litigating a case. Scott argued before the district court that setting aside the default judgments against *all three* of the Defendants would produce increased difficulties in discovery and provide the Defendants with further opportunities to hide or dispose of the funds that were transferred out of the escrow account. The district court agreed when assessing the Defendants as a group. Scott's brief does not address how he would be prejudiced if only the monetary default judgment against Ms. Carpanzano were set aside; he refers only to the harm that would ensue if the default judgment against *Mr.* Carpanzano was vacated. By the time the Defendants filed their motions to set aside the default judgments in this case, Scott had successfully seized the 2008 Land Rover Range Rover pursuant to a constructive trust in his favor. Since the vehicle is in Scott's possession, setting aside the monetary default judgment against Ms. Carpanzano will not provide further opportunity for Ms. Carpanzano to hide or dispose of the vehicle.[FN6](#Document1zzB00762032601332) Because Ms. Carpanzano has made no effort to set up a meritorious defense to or otherwise dispute the seizure of the Land Rover, we leave that portion of the district court's order intact.

We recognize that Ms. Carpanzano has failed to participate in postjudgment discovery and do not condone her behavior in this regard. We conclude that such conduct is best addressed by a sanctions or contempt order. It is unlikely that her punishment for failing to respond to discovery would equal the size of the monetary default judgment currently in place.[FN7](#Document1zzB00872032601332)

*E. The Remaining Factors*

The parties presented little argument on the remaining factors that may be considered, and the district court did not address them. *See* [*Jenkens & Gilchrist,* 542 F.3d at 119](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=119) (stating a court need not consider all of the factors). The only one that we find clearly weighs either for or against vacating the default judgment against Ms. Carpanzano is the substantial-financial-loss factor. Undoubtedly, $2.1 million in damages militates strongly in favor of a trial on the merits. *See* [*In re OCA, Inc.,* 551 F.3d at 374](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=374) (finding that a loss of several hundred thousand dollars weighed in favor of setting aside a default judgment); [*Jenkens & Gilchrist,* 542 F.3d at 122](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=122) (finding that a loss of approximately $1.3 million militated in favor of setting aside a default judgment).

In sum, we affirm the district court in full as to Mr. Carpanzano and Ms. Belcastro, since the former willfully defaulted and the latter failed to present a meritorious defense. As to Ms. Carpanzano, however, we conclude that the district court's order was at least a “slight abuse of discretion” as to the denial of relief from the monetary default judgment. *See* [*Jenkens & Gilchrist,* 542 F.3d at 118](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016836970&ReferencePosition=118) (“Because of the seriousness of a default judgment, ... even a slight abuse of discretion may justify reversal.” (quoting [*Lacy,* 227 F.3d at 292)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292)). We therefore vacate the order in this regard only. *See* [*In re OCA, Inc.,* 551 F.3d at 370–71](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (“Unless it appears that no injustice results from the default, relief should be granted.” (citation and internal quotation marks omitted)).

**IV. Conclusion**

We VACATE that portion of the district court's order that denies relief from the monetary portion of the default judgment entered against Carmela Carpanzano, AFFIRM the order in all other respects, and REMAND for further proceedings consistent with this opinion.

[FN\*](#Document1zzF0012032601332) Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[FN1.](#Document1zzF00212032601332) After filing a notice of appeal, Mr. Carpanzano filed a motion to dismiss for want of subject-matter jurisdiction in the district court. Having examined the issue ourselves, we conclude, as did the district court, that subject-matter jurisdiction exists pursuant to [28 U.S.C. § 1332(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1332&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4).

[FN2.](#Document1zzF00322032601332) We hold only that, in the specific circumstances of this case, the notice received did not constitute a violation of the constitutional right to due process. *See* [*Espinosa,* 559 U.S. at 272](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=2021590751&ReferencePosition=272). We specifically do not address whether [Rule 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR5&FindType=L) was satisfied or whether the notice employed here would suffice under different facts.

[FN3.](#Document1zzF00432032601332) We have explained that this “good-cause” analysis developed from our interpreting “[Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) as incorporating the [Rule 55](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) ‘good-cause’ standard applicable to entries of default.” [*In re OCA, Inc.,* 551 F.3d 359, 369 (5th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=369). In 2007, [Rule 55](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) was reworded as part of the general restyling of the Federal Rules of Civil Procedure. *See* [FED.R.CIV.P. 55](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) advisory committee's note on 2007 amendments. Although this rewording was “intended to be stylistic only,” *id.,* we observed in dicta that it “may one day cause us to reassess the relationship between the [Rule 55(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) good-cause standard and [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L),” [*In re OCA, Inc.,* 551 F.3d at 370](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370). Nevertheless, since [Rule 55(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) was reworded, we have continued to apply the good-cause factors to motions to set aside default judgments, *see, e.g.,* [*In re Marinez,* 589 F.3d 772, 777–78 (5th Cir.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2020648146&ReferencePosition=777), as have our sister circuits, *see, e.g.,* *United States v. $285,350.00 in U.S. Currency,* No. 13–6081, 2013 U.S.App. LEXIS 24104, at \*3–4 (10th Cir. Dec. 4, 2013); [*United States v. Chesir,* 526 F. App'x 60, 61 (2d Cir.2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2030673559&ReferencePosition=61) (unpublished); [*Dassault Systemes, SA v. Childress,* 663 F.3d 832, 838–39 (6th Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2026662281&ReferencePosition=838); [*Brandt v. Am. Bankers Ins. Co. of Fla.,* 653 F.3d 1108, 1111 (9th Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2025845636&ReferencePosition=1111); [*Sourcecorp Inc. v. Croney,* 412 F. App'x 455, 459 (3d Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2024417989&ReferencePosition=459) (unpublished). This case presents no occasion for us to reassess the analysis. The parties and the district court employed our traditional good-cause analysis, with none proposing modification. Furthermore, were we to analyze this case pursuant to [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) only, we find that the outcome would be the same because the goodcause factors largely overlap with the factors considered under a motion pursuant to [Rule 60(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) alone. *See* [*In re Marinez,* 589 F.3d at 776–77](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2020648146&ReferencePosition=776) (listing both the [Rule 60(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) factors and the good-cause factors and observing that the outcome of the case would be the same irrespective of which standard applied); [*In re OCA, Inc.,* 551 F.3d at 370](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (noting that “conflation of the applicable standards in this case would be harmless”).

[FN4.](#Document1zzF00542032601332) In fact, in the section of Scott's appellate brief devoted to this argument, Scott mentions only the actions of Mr. Carpanzano. He does not address how Ms. Belcastro and Ms. Carpanzano willfully defaulted, nor does he explain why Mr. Carpanzano's actions should be attributed to his wife and daughter.

[FN5.](#Document1zzF00652032601332) It appears that the district court relied upon the post-judgment failure of Ms. Belcastro and Ms. Carpanzano to respond to discovery and discovery orders to support the finding of willfulness. However, under the willful-default factor, our cases do not broadly take into account all potentially culpable actions of the defendant. The inquiry is properly constrained to examining the defendant's pre-default actions to determine whether the defendant intentionally failed to file an answer or other responsive pleading after being served with a complaint. *See, e.g.,* [*In re OCA, Inc.,* 551 F.3d at 370 n. 32](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2017615366&ReferencePosition=370) (“A *willful default* is an intentional failure to respond to litigation.” (emphasis in original) (citation and internal quotation marks omitted)); [*Lacy,* 227 F.3d at 292](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000506975&ReferencePosition=292) (describing willful default as an “intentional failure of responsive pleadings” (citation and internal quotation marks omitted)); [*In re Dierschke,* 975 F.2d 181, 184–85 (5th Cir.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1992170778&ReferencePosition=184) (describing willful default as an intentional or willful “failure to answer”); [*Fed. Sav. & Loan Ins. Corp. v. Kroenke,* 858 F.2d 1067, 1070 (5th Cir.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988130291&ReferencePosition=1070) (considering the defendant's “culpability in allowing a default judgment to be entered against him”). Here, the record does not demonstrate that Ms. Belcastro and Ms. Carpanzano acted intentionally or willfully in failing to file an answer or other responsive pleading.

[FN6.](#Document1zzF00762032601332) Nor are there any allegations that Ms. Carpanzano took possession of any other proceeds of the escrow account, which she might be able to hide or dispose of if allowed more time.

[FN7.](#Document1zzF00872032601332) Indeed, the court did hold a contempt hearing and adjudicated these three defendant guilty of civil contempt, ordering them to appear for their depositions and respond to interrogatories, assessing attorneys' fees of $1650, and imposing a fine of $500 per day until compliance is reached. This appeal does not seek review of that order.

***Case 2.2***

C.A.7 (Ill.),2012.

May v. Chrysler Group, LLC

692 F.3d 734, 115 Fair Empl.Prac.Cas. (BNA) 1409, 96 Empl. Prac. Dec. P 44,599

United States Court of Appeals,

Seventh Circuit.

**Otto MAY, Jr., Plaintiff–Appellant/Cross–Appellee,**

**v.**

**CHRYSLER GROUP, LLC, Defendant–Appellee/Cross Appellant.**

Nos. 11–3000, 11–3109.

Argued April 13, 2012.

Decided Aug. 23, 2012.

[TINDER](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0162273501&FindType=h), Circuit Judge.

More than fifty times between 2002 and 2005, Otto May, Jr., a pipefitter at Chrysler's Belvedere Assembly Plant, was the target of racist, xenophobic, homophobic, and anti-Semitic graffiti that appeared in and around the plant's paint department. Examples, unfortunately, are necessary to show how disturbingly vile and aggressive the messages were: “Otto Cuban Jew fag die,” “Otto Cuban good Jew is a dead Jew,” “death to the Cuban Jew,” “fuck Otto Cuban Jew fag,” “get the Cuban Jew,” and “fuck Otto Cuban Jew nigger lover.” In addition to the graffiti, more than half-a-dozen times May found death-threat notes in his toolbox. Different medium, same themes: “Otto Cuban Jew muther fucker bastard get our message your family is not safe we will get you good Jew is a dead Jew say hi to your hore wife death to the jews heil hitler [swastika].” The harassment was not confined to prose. May had his bike and car tires punctured, sugar was poured in the gas tanks of two of his cars, and, most bizarrely, a dead bird wrapped in toilet paper to look like a Ku Klux Klansman (complete with pointy hat) was placed in a vise at one of May's work stations. May contacted the local police, the FBI, the Anti–Defamation League, and, of course, complained to Chrysler. And Chrysler responded: The head of human resources at the Belvedere plant met with two groups of skilled tradesmen (like May) and reminded them that harassment was unacceptable, a procedure was implemented to document the harassment, efforts were made to discover who was at the plant during the periods when the incidents likely occurred, and a handwriting analyst was retained and used. Unfortunately, the harasser or harassers were never caught.

May sued Chrysler in 2002 (relatively early in the cycle of harassment) and alleged a variety of claims under [Title VII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=7USCAS1981&FindType=L) and [42 U.S.C. § 1981](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS1981&FindType=L). Only his hostile work environment claim survived summary judgment and made it to trial. And at trial there were only four contested issues: First, whether someone other than May was responsible for the harassment. (Chrysler, obviously, would not be liable for self-inflicted “harassment.”) Second, whether Chrysler took steps reasonably calculated to end the harassment. Third, to determine if punitive damages were appropriate, whether Chrysler recklessly disregarded May's federally-protected rights. And fourth, the amount of damages, if any.

The jury concluded that May carried his burden and awarded him $709,000 in compensatory damages and $3.5 million in punitive damages. Responding to Chrysler's post-verdict motions, the district court sided with May on the first two issues: May had presented sufficient evidence for the jury to conclude that Chrysler was liable for the hostile work environment. The district court believed, however, that the jury's compensatory damages award was excessive. Rather than returning to trial on compensatory damages, May accepted remittitur to $300,000. On the third issue, punitive damages, the district court sided with Chrysler, and concluded that May failed to present sufficient evidence for the jury to decide that Chrysler recklessly disregarded his federally-protected rights. The verdict on punitive damages was therefore vacated. Both parties appeal. Chrysler argues that it should not be held liable at all; May argues that the jury was entitled to conclude not only that Chrysler was liable but that it was reckless, and so the jury's verdict on punitive damages should be reinstated.

The district court correctly rejected Chrysler's motions for judgment as a matter of law on liability. It should have also rejected Chrysler's post-verdict motion for judgment as a matter of law on punitive damages. We reverse in part to reinstate the verdict.

**I. Background**

To understand the particular nature of May's harassment, it is helpful to know a little about May's family story. We therefore begin, briefly, with May's grandfather, who moved to Cuba from Germany around 1911. Although he was Jewish, he married a Protestant woman from Cuba, and May's father was raised as a Protestant. Two years after Fidel Castro took power, when May was eleven, May and his family moved to Florida. When May was seventeen, he converted to Judaism so he could marry his girlfriend (she was Jewish). He has since divorced and remarried several times, but his connection to Judaism has endured, and he identifies as a Messianic Jew. Since 1988, May has worked at Chrysler's Belvedere Assembly Plant, in Belvedere, Illinois, as a pipefitter, repairing and maintaining equipment used to paint and assemble cars.

The events that produced this case started early in 2002 with vandalism to May's car and then to the loaner cars he used as replacements. The first car broke down on his drive home from work—sugar in the gas tank, according to the mechanic. He drove a second car for a few weeks before sugar was discovered in its tank too. That second car also had a tire disintegrate, as did the tire of a third car he drove while the first two were in the shop. All this was reported to the local police and to Chrysler in February 2002. Three months later, May drove over a homemade spike hidden by rags and placed under his tire. He reported the incident to security and police the next day. May didn't notice a response from Chrysler, so he complained to a person in human resources at Chrysler's headquarters in Michigan. Approximately ten days later, Kim Kuborn, a human resources supervisor who eventually became the principal HR person on May's case, called May and told him he could park in the salaried lot, which is monitored by cameras. This solution didn't much please May, however, because a Chrysler security officer told him that some of the cameras did not record, that some did not work, and that the ones that did were not monitored.

The threatening messages started in the first half of 2002, with words “fuck” and “sucks” written on the tag of May's coveralls. In June 2002, a heart with “Chuck + Otto” was found on the wall of a materials elevator. (Chuck was one of May's closest friends at the plant.) May complained to management, but the writing was not removed until August 29. Two days later, May saw “Cuban fag Jew” on the wall of the same elevator. May reported the graffiti and it was cleaned four days later, on September 3. That same day, May found a printout of a chain email titled “Yes, I'm a Bad American” tucked into one of the drawers of his toolbox. The document had some hand-written additions. For example, next to a printed line that said “I think being a minority does not make you noble or victimized, and does not entitle you to anything” was hand-written “Cuban sucks cock fag.” Next to the printed line “I've never owned a slave, or was a slave, I didn't wander forty years in the desert after getting chased out of Egypt. I haven't burned any witches or been persecuted by the Turks and neither have you! So, shut-the-Hell-up already” was written “Cuban Jew [swastika] kill Jew Heil Hitler.” May told his supervisor, labor relations, and security and provided Chrysler a copy of the note. May found another note in his toolbox on September 12. It said: “no one can help you fucken Cuban Jew We will get you Death to the Jews Cuban fag Die.” Chrysler and the police were informed. Additional threatening graffiti targeting May was found on September 19 and 22.

On September 26, the head of human resources, Richard McPherson, and the head of labor relations, Bob Kertz, held two meetings (one with the first and third shifts, one with the second shift) with about sixty people from the skilled trades. McPherson addressed the groups about Chrysler's harassment policy. Some didn't appreciate the reminder; they were upset that skilled trades was being singled-out and complained that McPherson was telling them they could not have “fun” at work anymore. The meeting was just a meeting; McPherson did not meet with the attendees or interview them individually, even those who were upset by his lecture. May, for his part, was upset that McPherson gathered so few people. More than a thousand plant employees had access to the areas where the notes and graffiti were found. May told McPherson and others that he thought Chrysler needed to do more. In particular, he thought installing surveillance cameras and swipe-key door locks (to monitor who was coming and going from particular areas) would be a good idea.

Just a few days after the meeting, on September 30, there was more graffiti: “Otto Cuban Jew die.” At least five similar incidents with the same threatening theme—“a good Jew is a dead Jew”—occurred between September 30 and November 11. On December 7, May found another menacing note in his toolbox. This one told May that his “time is short” and proclaimed “death to the Jews” and “we hate the Jews” signing off with a “Heil Hitler” and swastika.

Soon after receiving the December 7 note, feeling that nothing was being done to stop the harassment, May contacted the Anti–Defamation League, a civil rights organization focused on combating anti-Semitism. In a letter dated December 26, 2002, a representative of the Anti–Defamation League wrote to Chrysler's general counsel in Michigan to inform Chrysler that “Mr. May has reportedly been the victim of numerous death threats placed in his toolbox, scrawled on his lunchbox and in the freight elevator as well as in other areas.” The letter reminded Chrysler that the EEOC had issued a reasonable cause determination but that the threats continued, and encouraged Chrysler to take all necessary remedial action.

In January 2003, the letter from the Anti–Defamation League reached Scott Huller, a staff advisor in Chrysler's corporate diversity office. Huller's responsibilities included investigating civil rights issues at Chrysler's manufacturing facilities. According to Huller's testimony, he had not heard of May until he received the letter from the Anti–Defamation League. The letter prompted Huller to travel to the plant to interview May, and they met for a few hours on January 16 and 17. May told him he genuinely feared for his life and was distressed and depressed. Once again, May recommended security cameras. According to May, Huller was focused on getting a list of suspects. He wanted names. The first day, May refused. At trial, May explained that his attorney told him not to “point the finger” at anybody without direct proof. The second day, however, after consulting with his attorney, May named nineteen employees he had some reason to suspect. May also gave the police a list of names.

It is not necessary to explain why May named each person that he did—the investigation is over—but we will say a few words about three people on May's list who were mentioned frequently at trial: Eldon Kline, John Myers, and Dave Kuborn. Eldon Kline was on the list because he was fired (briefly) for assaulting a Hispanic employee, he had made racist remarks to May, and May had filed a grievance against him. John Myers had also made racist comments to May and was close friends with Kline. May saw Myers' car (suspiciously, May testified) near his own shortly before he discovered it was vandalized, and so suspected his involvement. As for Dave Kuborn (married to Kim Kuborn in HR), there was no testimony that he had problems working with minorities, like Kline and Myers; he made May's list because of their personal history. Dave Kuborn once instructed May to hold open a solenoid on a malfunctioning tire machine so the assembly line would not have to stop. This was dangerous, apparently, and May was upset that he was made to do it. He complained to Chrysler and reported the incident to the Occupational Safety and Health Administration (better known as OSHA) and, eventually, Dave Kuborn was disciplined.

So Huller got what he wanted from May—a list of names. Huller, however, did not interview anyone on the list or instruct the local HR employees to do so (and none did). Instead, Huller used the list to create a template for further investigation. The template was intended to help HR use plant entry and exit data (“gate ring records”) to determine who was in the plant at the times when incidents might have occurred. Completing the spreadsheet was to be Kim Kuborn's job, not Huller's, who did no more substantive work on May's case.

Four days after Huller's meeting with May, more graffiti appeared. And later that same month (January 2003), May reported that someone was calling his work extension and making derogatory remarks in a disguised voice (essentially the same message as the notes and graffiti). May reported the calls but nobody from Chrysler discussed the details with him.

In March, there were two graffiti incidents and May found another death-threat note in one of his toolbox drawers. The note seemed to comment on the absence of harassment in February: “Otto Cuban Jew muther fucker not forget about you your time is coming we will get YOU death to the Jews [swastika].” Chrysler's incident report documented that a police officer who came to the plant to collect the note said that a security camera should be installed to record future harassment.

The rest of 2003 followed a similar pattern.

• April: graffiti (2 incidents)

• May: graffiti (2 incidents)

• June: graffiti (3 incidents), a death-threat note, the tire of the bike May used to get around the plant was slashed, and the changing mat outside his locker was vandalized

• July: graffiti (6 incidents)

• August: graffiti (5 incidents)

• September: graffiti (5 incidents)

• October: graffiti (2 incidents, hateful as ever: “Hang the Cuban Jew”)

• November: graffiti (2 incidents) and a death-threat note

• December graffiti (1 incident)

Sometime in 2003, Chrysler implemented a protocol for handling incidents involving May. According to McPherson (the head of HR at the plant), the person who found the graffiti or note was to notify HR and security, and a picture would be taken. After the incident was documented, someone from HR or security would talk to whoever found the graffiti or the note to establish when it was found. If the incident involved graffiti, the area would be cleaned. Pictures of the incident and details about when and where it happened (including when the area was last seen without graffiti) were collected by Kim Kuborn, who kept a detailed but not quite complete record of May's harassment in a large binder. As already mentioned, Kuborn was also responsible for reviewing gate-ring records to determine who was recorded as being at the plant when she believed a particular incident may have occurred.

In May 2003, Chrysler's lawyers retained Jack Calvert, a forensic document examiner. Chrysler initially gave Calvert pictures (or copies of pictures) of graffiti. Soon Chrysler provided Calvert with an original note from June 2003, which Kim Kuborn collected quickly after its discovery, before the police arrived on the scene to take it themselves, and he went to the police to view more originals. Chrysler also gave him logbooks containing daily entries from many employees on different shifts. After reviewing this material, Calvert told Chrysler's counsel that he thought only one person was responsible for the graffiti and notes, but that he couldn't identify who. Based on what he had seen from the logbooks, he wanted additional “exemplars” (samples of handwriting) from approximately sixty employees. Chrysler responded with a variety of documents, including old job applications. (To jump ahead a bit, Calvert continued to collect exemplars throughout 2004 and into 2005. He ultimately issued his report in July 2007. It was inconclusive. More on this soon.)

The incidents continued through 2004 and ended in 2005:

• January, 2004: graffiti (5 incidents)

• February: death-threat note in May's toolbox

• March: graffiti (2 incidents)

• October: graffiti (2 incidents), May struck in the back with a flying object, submission of swastika in “Team Belvedere Logo Contest,” and May found a dead bird dressed as Ku Klux Klansman in a vise

• February, 2005: May's car vandalized, graffiti (3 incidents), and a death-threat note (“Otto you muther fucker bastard your family is not safe Cuban Jew fuck scum Jew kike nigger lover kikes are varmints spics are roaches niggers are parasites Exterminate all kill them all We hate fucken Jews niggers spics [swastika]”)

• June: graffiti and death-threat note on May's toolbox

• December: graffiti on May's toolbox

Chrysler's outward response to May's harassment involved McPherson's September 2002 group meetings, Huller's January 2003 interviews with May, ongoing documentation of the incidents, and (usually) prompt cleaning of graffiti. Behind the scenes, Kim Kuborn reviewed gate records to see who may have been around the plant when incidents occurred and Calvert was given more handwriting samples to analyze. Chrysler also wanted the jury to know that the employees at the Belvedere plant valued May as a colleague and cared about him as a person. For example, Kim Kuborn testified that “this behavior was completely unacceptable in our eyes, and we wanted to stop it and find out who was responsible for it. We certainly didn't want this kind of activity going on in the plant and making one of our team members as uncomfortable as it clearly was.”

Beyond cataloguing the actions it took in response to May's harassment, and somewhat at odds with the empathy expressed by some employees for May's predicament, Chrysler's defense had another (rather unsettling) theme: *May did it all to himself.* Chrysler kept this defense in the background and at times seemed to deny it was part of its defense at all. For example, when confronted about whether Chrysler really believed May was the culprit, Kim Kuborn said, “I have no evidence that he did this himself.” Chrysler left it primarily to Jack Calvert, the forensic document examiner, and Rosalind Griffin, a psychiatrist hired by Chrysler to analyze May, to make the case *against* May, to argue that May was not being victimized by death threats and suffering because of Chrysler's inaction, but that, more likely, *Chrysler* was actually the victim of May's lies.

We have already summarized the mechanics of Jack Calvert's operation. He was given samples of graffiti and notes and known exemplars (handwriting samples from plant employees), and carefully compared the two. After his initial look at the materials, there were approximately sixty employees he could not rule out, and he requested more samples of their writing. He was given more samples and, during 2004 and 2005, whittled his list down to three. He was never able to reach a conclusion about who did it, but he could only say that there was more evidence “that [this person] did author the material than that he did not” about one employee—Otto May, Jr. Calvert's testimony was challenged, of course. The jury heard that Calvert's list of possible authors was reduced not just by his own professional opinion but also by Chrysler informing him that twenty-six employees could be removed from consideration because they were not at the plant at the time of one of the incidents. The jury heard that those removed included Eldon Kline, John Myers, and Dave Kuborn. The jury also heard testimony that May was not eliminated as a possible perpetrator even though he, too, was not present when some of the incidents occurred. Chrysler never gave that information about May to Calvert. Chrysler did, however, give Calvert a large number of samples of May's writing, including May's notes documenting the harassment where, according to May's testimony, he tried to copy graffiti exactly as printed.

Griffin, the psychiatrist hired by Chrysler, also had a tough assessment of May's role in the harassment. According to Griffin, May has a number of personality disorders. She testified that he is histrionic, narcissistic, paranoid, and, less technically, deceptive. As she put it, he is the kind of person who will “scream louder and louder wolf, wolf, wolf, until they have your attention until you can see that they are very important” and who assumes “people are out to get you and that they're also doing things to persecute you and that they are planning your demise, and there's a conspiracy to bring about your downfall.” In Griffin's opinion, May did not suffer from depression and had no [post-traumatic stress disorder](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&CMD=ML&DocName=Ia99c9de5475411db9765f9243f53508a&FindType=UM). “[T]he injuries that he alleges was (sic) caused by his employer were his own demons within himself.” May's psychotherapist, Dana Kiley, who May had been seeing for eight years, told a different story about May. In her opinion, May had been seriously depressed, and she did not think he had any of the personality disorders Griffin did—not histrionic, narcissistic, or paranoid. She did not think May was deceptive or that the harassment was a hoax.

After a seven-day trial, the jury also rejected Chrysler's implication. And beyond that, the jury decided that Chrysler's efforts to stop the harassment were inadequate, and substantially so, and accordingly returned a large verdict for May. As explained in our opening summary, the jury awarded May $709,000 in compensatory damages and $3.5 million in punitive damages. The compensatory damage award was remitted to $300,000 and the district court granted Chrysler's [Rule 50(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR50&FindType=L) motion for judgment as a matter of law on punitive damages. Both parties appeal.

**II. Discussion**

[[1]](#Document1zzF12028469575)[[2]](#Document1zzF22028469575) We review de novo a district court's grant or denial of a [Rule 50(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR50&FindType=L) motion for judgment as a matter of law. [*Ekstrand v. Sch. Dist. of Somerset,* 683 F.3d 826, 828 (7th Cir.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2027975416&ReferencePosition=828); [*Khan v. Bland,* 630 F.3d 519, 523 (7th Cir.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2024180455&ReferencePosition=523). Thus, like the district court, we decide whether the jury had “a legally sufficient evidentiary basis” for its verdict. [Fed.R.Civ.P. 50(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR50&FindType=L); [*Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 149, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000377873); [*Thomas v. Cook Cnty. Sheriff's Dep't,* 604 F.3d 293, 300–01 (7th Cir.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2021891422&ReferencePosition=300). To do so, we consider all the evidence in the record and “construe the facts strictly in favor of the party that prevailed at trial.” [*Schandelmeier–Bartels v. Chicago Park Dist.,* 634 F.3d 372, 376 (7th Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2024541557&ReferencePosition=376). That includes drawing all reasonable inferences in that party's favor and disregarding all evidence favorable to the moving party that the jury is not required to believe. [*Reeves,* 530 U.S. at 151, 120 S.Ct. 2097;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000377873) [*Schandelmeier–Bartels,* 634 F.3d at 376.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2024541557&ReferencePosition=376) Although we must determine that more than “a mere scintilla of evidence” supports the verdict, [*Hossack v. Floor Covering Assoc. of Joliet, Inc.,* 492 F.3d 853, 859 (7th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2012627804&ReferencePosition=859), we do not make credibility determinations or weigh the evidence, [*Reeves,* 530 U.S. at 150, 120 S.Ct. 2097.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000377873) In other words, our job is to decide whether a highly charitable assessment of the evidence supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion. *See, e.g.,* [*Von der Ruhr v. Immtech Int'l, Inc.,* 570 F.3d 858, 868 (7th Cir.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2019237622&ReferencePosition=868).

**A. Liability**

[[3]](#Document1zzF32028469575)[[4]](#Document1zzF42028469575) To prevail on his hostile work environment claim, May had to prove that he was subject to unwelcome harassment based on his race, religion, or national origin, that it was sufficiently severe or pervasive to create a hostile or abusive work environment, and that there is a basis for employer liability. *See, e.g.,* [*Williams v. Waste Mgmt.,* 361 F.3d 1021, 1029 (7th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004251161&ReferencePosition=1029); [*Mason v. S. Ill. Univ.,* 233 F.3d 1036, 1043 (7th Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000632034&ReferencePosition=1043). Of these, the only contested issue at trial and on appeal is employer liability. Chrysler would not be liable, of course, if May's harassment was self-inflicted. If May clears that basic hurdle, because his claim alleges harassment by coworkers, Chrysler could be liable for the hostile work environment if it did “not promptly and adequately respond to employee harassment.” [*Sutherland v. Wal–Mart Stores, Inc.,* 632 F.3d 990, 994 (7th Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2024433427&ReferencePosition=994). That means, it needed to “respond in a manner reasonably likely to end the harassment.” [*Id.* at 995](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2024433427) (citing [*Porter v. Erie Foods Int'l, Inc.,* 576 F.3d 629, 637 (7th Cir.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2019575757&ReferencePosition=637)). What is “reasonably likely to end the harassment,” of course, depends on “the particular facts and circumstances of the case.” [*McKenzie v. Ill. Dep't of Transp.,* 92 F.3d 473, 480 (7th Cir.1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996176070&ReferencePosition=480). And those “facts and circumstances” include the “gravity of the harassment alleged.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1996176070) It should go without saying that a reasonable response to taunting or insults may be an unreasonable response to death threats or physical violence. Finally, we recognize that success or failure stopping the harassment does not determine whether an employer is liable. Nevertheless, “the efficacy of an employer's remedial action is material to [a] determination whether the action was reasonably likely to prevent the harassment from recurring.” [*Cerros v. Steel Techs., Inc.,* 398 F.3d 944, 954 (7th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006263890&ReferencePosition=954).

[[5]](#Document1zzF52028469575) In this case, the jury was presented ample evidence to conclude that Chrysler did not “promptly and adequately” respond to the harassment. Consider only the death-threat notes and graffiti. By June 2002, there had been two relatively minor incidents. The graffiti was not pleasant, but it had not yet turned threatening. Its tenor started to change at the end of August when “Cuban fag Jew” appeared. A few days later, May found the “Yes, I am a Bad American” note in his toolbox. That note, recall, included, among other things, the phrase “kill Jew.” Approximately one week later, on September 12, May received a more alarming threat: “no one can help you fucken Cuban Jew We will get you Death to the Jews Cuban fag Die.” A full two weeks later, Chrysler held two short meetings with about sixty employees total. Within days of those meetings, the graffiti and death threats resumed. There were more than half-a-dozen incidents between the McPherson meetings and the next notable action by Chrysler in January 2003, when Scott Huller, prompted by a letter from the Anti–Defamation League, traveled from Chrysler's corporate offices in Michigan to interview May. Huller came away from those meetings with May's list of suspects. Huller took that information and created a template for HR at the plant to use in its investigation. But nobody on May's list was interviewed. Within days of Huller's meetings with May, there was more graffiti. And soon after that graffiti, there were threatening calls to May on his work extension. There were seven more incidents—including another death-threat note in May's tool-box—before Chrysler took the next step in its investigation, retaining Jack Calvert, the handwriting analyst. That was May 2003. Every month for the rest of 2003 brought more graffiti, death-threat notes, or both.

For the purposes of Chrysler's liability, we can stop here. During the first year of written threats and harassment, what had Chrysler done? They held a meeting. They interviewed May. And, one year in, they hired Calvert. Did that amount to a “prompt and adequate” response to multiple racist and anti-Semitic death threats? Especially in light of the gravity of the harassment, the jury was presented with more than enough evidence to conclude that Chrysler had not done enough. Chrysler, of course, characterizes its efforts differently. As it has it, the company was like a duck on a river, looking unpertured but paddling like crazy beneath the surface. Kim Kuborn, for instance, testified that she was all-but consumed by May's case and that she had never worked near as much on any other HR matter. Maybe that's true. But the jury certainly did not have to believe that her efforts at documentation with the gate-ring records were “adequate” or, even if it thought her efforts were adequate, that they started “promptly” enough for Chrysler to avoid liability.

In addition to hearing take-it-or-leave-it testimony about Chrysler's behind-the-scenes efforts, the jury heard about what Chrysler did not do. Two things stand out. First, the jury heard that Chrysler did not interview *anyone* on May's list. Not one person. When an employee has been subjected to repeated threats over the course of many months and the employer has a list of names, the employer's investigator should talk to some of those people—or at least a jury would not be irrational to think so. And perhaps that would be asking too much of Chrysler if it had explained to the jury that it had a different approach to the investigation that was also reasonably likely to be effective. *See* [*Williams,* 361 F.3d at 1030](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004251161&ReferencePosition=1030) (an employer's response need not be perfect or “textbook” to avoid liability for a hostile work environment). But the jury heard nothing of the sort. It heard that Chrysler documented the incidents and used gate-ring records to narrow the field of potential suspects. In the face of repeated vicious death threats, a jury could conclude that Chrysler's document-and-narrow approach was not good enough.

Second, Chrysler did not install a single surveillance camera. May asked Chrysler to install cameras and the police made the same suggestion. Chrysler's response was consistent: The plant is *too massive,* four million square feet, the size of a terminal at O'Hare Airport. It is just not possible to cover it with cameras. What's more, the union would (probably) not allow it. Installing cameras with non-union labor would violate the contract with the union. And if cameras were somehow put up with union labor, if that could be negotiated, the perpetrator would know where the cameras were, and so would avoid them easily. But Chrysler's claims about what the union would allow and what was feasible were undermined by testimony that there was no hard rule that cameras could not be used, but only that the union would require notice, perhaps even something as simple as a sign: “surveillance cameras in use.” And, more importantly, Chrysler's cameras-not-possible position was undermined by the fact that in 2008 it did put up a camera (neatly concealed in a fake emergency-lighting fixture) to catch someone destroying company property.

As in the 2008 case, May's situation did not require an encompassing surveillance system. A single camera covering May's large tool box (a tool chest, really)—where most of the threatening notes were found—would have been an important step. McPherson, the HR manager, testified that he considered cameras and that he even discussed the issue with the president of the union. According to McPherson, the union president said that if the camera caught someone doing something wrong, and if that employee were terminated, the union would grieve the termination. The parties dispute whether that means the union would grieve the termination of someone making racist death threats or if it would grieve the termination of *someone else* caught doing something improper, like sleeping on the job. Here we look at the evidence in the light most favorable to May. But regardless of how we interpret McPherson's comments about which dismissals the union would grieve, Chrysler still had an obligation to take steps reasonably calculated to end the harassment. It is not excused from taking those steps because it is concerned about friction with the union. Even if we assume (implausibly) that the dismissal of May's harasser would only have been temporary—that he would have to be rehired after the grievance process—or even if we assume that the camera would not have caught the harasser or would have been discovered and torn out, it would have been a step reasonably likely to end, reduce, or deter the harassment.

Although we mention Chrysler's decisions not to interview and not to put up a camera, we understand that we do not “sit as a super-personnel department.” [*Wyninger v. New Venture Gear, Inc.,* 361 F.3d 965, 978 (7th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004240500&ReferencePosition=978). We certainly do not, but in deciding this appeal we are required to assess the response of the actual personnel department. We did not conjure the ideas of interviewing the employees May considered suspects (or those Chrysler did) or of installing cameras; evidence about why Chrysler did not do those things was presented at trial. The jury had the right to consider that evidence—evidence of exactly what options Chrysler had and entertained—in deciding whether Chrysler took actions reasonably calculated to end the harassment. The evidence easily supports the jury's decision that Chrysler did not.

What about the idea that May himself was the culprit? Calvert, the most important witness on this point, did not conclude that May was the author but only that there was more evidence that May was the author than that he was not. And Griffin, the psychiatrist, testified that May was psychologically disposed, capable, or perhaps inclined, to commit such an astounding deception. That was evidence the jury could have run with but did not. That it did not is unsurprising in light of the testimony from Chrysler employees that they liked May, thought he was truthful, part of the team, and did not think he would have “harassed” himself. And there are also May's own denials. So, to be sure, Chrysler presented some evidence of May's guilt, but that evidence certainly did not (and does not) force any particular conclusion. At most, it raised a question. It was for the jury to answer, and it did, and we will not (and on these facts cannot) second-guess that judgment here. [*Ekstrand,* 683 F.3d at 828](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2027975416&ReferencePosition=828) (“The point is, we are generally forbidden from reexamining the facts found by the jury at trial.”).

**B. Punitive Damages**

[[6]](#Document1zzF62028469575)[[7]](#Document1zzF72028469575) May can recover punitive damages only if he presented sufficient evidence for the jury to conclude that Chrysler acted with “malice or with reckless indifference to [his] federally protected rights.” [42 U.S.C. § 1981a(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS1981A&FindType=L&ReferencePositionType=T&ReferencePosition=SP_3fed000053a85). To act with “malice” or “reckless indifference,” “an employer must at least [act] in the face of a perceived risk that its actions will violate federal law.” [*Kolstad v. Am. Dental Assoc.,* 527 U.S. 526, 536, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1999146017). No evidence of “egregious” or “outrageous” conduct by the employer is required, although, of course, such a showing could support a conclusion that the employer acted with the requisite mental state. [*Id.* at 535, 538, 119 S.Ct. 2118.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1999146017)

We have already explained why it was appropriate for Chrysler to be held responsible for the hostile work environment: Its response was shockingly thin as measured against the gravity of May's harassment. And that would have been true if this kind of harassment would have lasted only for months or a year. The harassment in this case continued for over three years. There were over seventy incidents. As the harassment persisted over months and years, Chrysler had to “progressively stiffen” its efforts. [*EEOC v. Xerxes Corp.,* 639 F.3d 658, 670 (4th Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2025162748&ReferencePosition=670) (quoting [*Adler v. Wal–Mart Stores, Inc.,* 144 F.3d 664, 676 (10th Cir.1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1998109558&ReferencePosition=676)). It was unreasonable for Chrysler to “vainly hope[ ] that ... the same response as before [would] be effective.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2025162748)

If it was negligent to respond to weeks and months of death threats with a pair of meetings and documentation, what happens when that inadequate response does not improve over the course of a year? Two years? Three years? At some point the response sinks from negligent to reckless, at some point it is obvious that an increased effort is necessary, and if that does not happen, punitive damages become a possibility. The facts in this case do not force us to hazard a precise rule about when sticking with the same inadequate strategy becomes reckless. May's harassment continued for years, the threats were extremely serious, and there was scant evidence of an increased effort over time. In short, the jury had plenty to go on. Recall, Chrysler held a pair of meetings in September 2002, documented the events, did gate-ring analysis for many incidents, and used a handwriting analyst. Those measures were all in place approximately one year into the harassment. It continued for two more years.

Chrysler argues that they cannot be liable for punitive damages because they made a good-faith effort to comply with the requirements of Title VII. [*Bruso v. United Airlines, Inc.,* 239 F.3d 848, 858 (7th Cir.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001113406&ReferencePosition=858). A good-faith effort at compliance, however, is not a matter of *declarations* about how much the employer cared about a victim of harassment or about how hard certain HR employees say they worked to rectify the situation. When those declarations are belied by the employer's actions, talking a good game will not immunize an employer from a judgment that it was reckless. The jury reasonably determined that Chrysler's *actions* did not add up to a good faith effort to end May's harassment, and, much less, that its actions were (at least) reckless.

And even if we focus on Chrysler's declared feelings about May, the jury was presented evidence that Chrysler was not as concerned *for* May as it was about getting rid of him and keeping costs down. In April 2003, for example, Richard McPherson met with Kim Kuborn and Judith Caliman, one of Chrysler's lawyers, to discuss the harassment. One of McPherson's notes says: “Even if we win, we still have Otto May.” When asked about this statement at trial, McPherson explained: “I'm saying even if we win, Otto May is still working for the company. So, do we really win. I mean, win, lose, or draw, my opinion, is there a winner, you know.” McPherson then answered again differently and said that he was concerned that May would not feel good “if we win as a company and Mr. May walks away.” We do not say, of course, what the jury had to believe about this testimony, but we can say that the jury did not have to believe Chrysler's own statements about how much it was concerned for May and how much it wanted to protect him from harassment.

Sticking to matters that are undisputed, we think it is also worth mentioning that Kim Kuborn, one of the HR employees principally responsible for May's case, never recused herself from the investigation despite the fact that her husband, Dave Kuborn, was on May's list of suspects. May had at least some reason to put him there: Dave Kuborn had May do something May considered dangerous, May complained to OSHA, and Dave Kuborn was disciplined. But Kim Kuborn did not recuse herself because she “knew he wasn't the person involved” because he was not at the plant when some of the incidents occurred. (She “can't imagine a situation where there could be more than one person involved.”) McPherson testified that his understanding was that “someone at corporate” was looking into Dave Kuborn. Even assuming that vague statement to be true, there is still no question that Kim Kuborn was at the center of Chrysler's investigation after she learned that May had named her husband as a suspect.

The bottom line in this case is simple, even if a little difficult to digest. May was subjected to repulsive harassment for more than three years. Chrysler suspected that May did it all himself. The jury, however, disagreed; Chrysler, it concluded, had not taken reasonable measures to stop the harassment. That was liability. (And, as explained, we have no doubt that the record easily supports the jury's decision on that issue.) With liability fixed, May's case for punitive damages is straightforward and persuasive: Chrysler did not increase its (meager) efforts over a long stretch of time in the face of remarkably awful harassment, and that was reckless. It would be nonsensical to eliminate the award of punitive damages based on sympathy for an argument that May's harms were self-inflicted if another issue, already resolved (liability), requires that they were not. On these unusual facts, there's no splitting the difference. The jury's verdict on liability is affirmed and the jury's verdict on punitive damages will be reinstated.

Before concluding, we have to address two more issues. First, the district court conditionally granted Chrysler's motion for a new trial on punitive damages. It did so for the same reason it granted Chrysler's motion for judgment as a matter of law, that is, because it believed the evidence was insufficient. For the reasons already stated, even under the high standard we use to evaluate a district court's grant of a new trial, we believe that was a mistake. *See* [*Tart v. Ill. Power Co.,* 366 F.3d 461, 479 (7th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004366376&ReferencePosition=479). There is ample evidence to support the jury's verdict; the district court abused its discretion by granting a new trial. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004366376)

[[8]](#Document1zzF82028469575)[[9]](#Document1zzF92028469575)[[10]](#Document1zzF102028469575) Second, although the district court did not rule on whether the jury's $3.5 million award of punitive damages is “grossly excessive” and therefore violates due process, [*State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003269908); [*BMW v. Gore,* 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1996118412), we asked the parties for supplemental briefing so that we might consider that question now, [*Smith v. Kmart Corp.,* 177 F.3d 19, 33 (1st Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999124992&ReferencePosition=33); [*Abernathy v. Superior Hardwoods, Inc.,* 704 F.2d 963, 974 (7th Cir.1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1983116887&ReferencePosition=974) (discussing this court's authority to order remittitur (citing [11 Wright & Miller, Federal Practice & Procedure § 2820](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0102228&FindType=Y&SerialNum=0105638917))). After reviewing the parties' submissions, we are convinced that the punitive damage award does not violate the Constitution and should therefore be reinstated in full. The award is substantial—five times the original compensatory damages and eleven times the remitted amount—but Chrysler's long-term recklessness in the face of repeated threats of violence against May and his family is sufficiently reprehensible to support it. [*State Farm,* 538 U.S. at 419, 123 S.Ct. 1513](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003269908) (discussing “indifference to or a reckless disregard of health or safety” and “repeated actions” as opposed to “isolated incident” as significant factors in assessing the reprehensibility of defendant's conduct). We recognize that “few awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree,* will satisfy due process.” [*Id.* at 425, 123 S.Ct. 1513 (emphasis added)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003269908) (ratio of 145 to 1 grossly excessive). But “[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis.” [*BMW,* 517 U.S. at 583, 116 S.Ct. 1589](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1996118412) (“breathtaking” 500 to 1 ratio grossly excessive); *see also* [*Kapelanski v. Johnson,* 390 F.3d 525, 534 (7th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2005581027&ReferencePosition=534) (3.3 to 1 ratio “easily permissible”); [*Mathias v. Accor Econ. Lodging, Inc.,* 347 F.3d 672, 678 (7th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003712103&ReferencePosition=678) (37 to 1 ratio upheld). Of the three “guideposts” we are required to consider in deciding whether an award of punitive damages violates due process—reprehensibility of defendant's conduct, ratio of compensatory to punitive damages award, and disparity of the award with “civil penalties authorized or imposed in comparable cases,” [*State Farm,* 538 U.S. at 428, 123 S.Ct. 1513](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003269908) (quoting [*BMW,* 517 U.S. at 575, 116 S.Ct. 1589)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1996118412)—only the third factor supports a conclusion that the award is excessive. If this case were only under [Title VII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=7USCAS1981&FindType=L), and not also [§ 1981](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS1981&FindType=L), May's damages would be capped at $300,000. That is a relevant consideration. But especially where the other two (and more important) guideposts cut the other way, “although the punitive damages awarded here are more than the damages available under [Title VII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=7USCAS1981&FindType=L) for analogous conduct, the difference is not enough, by itself, to suggest that the punitive damages award violates due process.” [*Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1284 (11th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2014754356&ReferencePosition=1284) (quoting [*Bogle v. McClure,* 332 F.3d 1347, 1362 (11th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003401257&ReferencePosition=1362)) (punitive damages for a hostile work environment under [§ 1981](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS1981&FindType=L) five times the [Title VII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=7USCAS1981&FindType=L) statutory cap not excessive).

**III. Conclusion**

We affirm the district court's judgment on liability. We reverse the district court's judgment on punitive damages and we also reverse the district court's conditional grant of a new trial. The case is remanded to reinstate the jury's verdict on punitive damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

***Case 2.3***

La.App. 2 Cir.,2012.

Johnson Const. Co., Inc. v. Shaffer

--- So.3d ----, 2012 WL 638058 (La.App. 2 Cir.), 46,999 (La.App. 2 Cir. 2/29/12)

Court of Appeal of Louisiana,

Second Circuit.

**JOHNSON CONSTRUCTION COMPANY, INC., Plaintiff–Appellee**

**v.**

**Bubba SHAFFER d/b/a Shaffer's Auto & Diesel Repair, Defendant–Appellant.**

No. 46,999–CA.

Feb. 29, 2012.

LOLLEY, J.

Shaffer's Auto and Diesel Repair, L.L.C. (“Shaffer”) appeals the judgment of the Shreveport City Court, Parish of Caddo, State of Louisiana, in favor of Johnson Construction Company, Inc. (“Johnson Construction”). For the following reasons, we affirm the trial court's judgment.

**FACTS**

At issue in this appeal is whether an agreement existed between Johnson Construction and Shaffer for the price of repairs to a 1979 Ford dump truck. In March 2007, Johnson Construction's truck needed repairs; among other things, it was leaking oil and water. John Robert Johnson, Jr., the president of Johnson Construction, took the truck along with a 15–ton lowboy trailer to Shaffer for the repairs. The truck was reportedly fixed and Johnson paid the initial bill; however, the truck continued to have the same problems. Mr. Johnson returned to Shaffer with the truck; again, the repairs were reported to be made and Mr. Johnson paid the bill. The mechanical problems with the truck continued, and in July 2007, Mr. Johnson returned to Shaffer a third time and left the truck and trailer. Although Mr. Johnson believed he had been given an estimate of $1,000 for the repairs, he was ultimately sent an invoice for $5,863.49 by Shaffer. Mr. Johnson offered to settle the matter for the amount of the initial estimate plus the cost of the parts and shipping—a total of $2,480. Shaffer did not respond to the offer, and refused to return Johnson Construction's truck or trailer until full payment of the invoice was made, plus storage fees of $50 a day and 18% interest.

Johnson Construction filed suit against Shaffer alleging that its action in withholding his truck and trailer amounted to an unfair trade practice pursuant to La. R.S. 51:1405, *et seq.,* and the matter proceeded to trial. After a trial of the matter, the court concluded that the evidence showed that Mr. Johnson had been quoted a price of $1,000 by Shaffer for the repair work, and Mr. Johnson had not been informed by Shaffer that additional engine work would be performed at an additional cost. Further, the trial court determined that Shaffer had acted deceptively in maintaining possession of Johnson Construction's trailer on which it had performed no work. Accordingly, the trial court awarded Johnson Construction $3,500 in damages under the Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1405, *et seq.,* and $750 in attorneys' fees. Shaffer was awarded $1,000 (the amount of the initial estimate as determined by the trial court) and ordered to release Johnson's truck and trailer immediately. This appeal by Shaffer ensued.

**DISCUSSION**

*The Parties' Agreement*

[1] On appeal, Shaffer raises several assignments of error. First, he argues that the trial court erred in failing to award him the full amount of his invoice (i.e., $5,863.49) and his reasonable storage fees for the truck and trailer. At the outset we point out that Mr. Johnson maintained he had a verbal agreement with Bubba Shaffer, the owner of Shaffer's Auto Diesel & Repair, that the repairs to the truck would cost $1,000. Mr. Johnson also testified that he was not informed otherwise. On the other hand, Mr. Shaffer disputed that an agreement for the price of the repairs was ever reached and maintained that Johnson Construction owed the full amount of the invoice.

[2][3][4] The existence or nonexistence of a contract is a question of fact, and the finder of fact's determination may not be set aside unless it is clearly wrong. *Red River International, Inc. v. Pierce,* 44,869 (La.App.2d Cir.10/28/09), 26 So.3d 196. Furthermore, when there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed if the factfinder's conclusions were reasonable under the evidence. *Menard v. Lafayette Ins. Co.,* 2009–1869 (La .03/16/10), 31 So.3d 996; *Johnson v. City of Shreveport,* 45,819 (La.App.2d Cir.12/29/10), 56 So.3d 1059. A factfinder's decision that is based on its discretion to credit the testimony of one of two or more witnesses can virtually never be wrong. *Menard, supra .*

[5] To enforce an oral agreement pertaining to something priced or valued in excess of $500, the contract must be proved by at least one witness and other corroborating circumstances. La. C.C. art. 1846. A party to the action may be a credible witness, and the other corroborating circumstances need only be general in nature. *Smith v. Dishman & Bennett Speciality Co.,* 35,682 (La.App.2d Cir.01/23/02), 805 So.2d 1220.

If the trial court's conclusion in this matter was reasonable in light of the evidence, we may not reverse its judgment. At the trial of the matter, the trial court was presented with testimony from Mr. Johnson, Mr. Shaffer, and Michael Louton, a mechanic employed by Shaffer. After consideration of the testimony and evidence, the trial court issued thorough reasons for judgment, in which it noted its belief that Mr. Johnson did not authorize Shaffer to perform the additional repairs to the truck, and that the repairs performed were not actually part of the original agreement. The trial court also believed that Mr. Johnson had received a verbal quote of $1,000 for the repairs to the truck, and he did not give authorization to tear the engine down (which was the reason for the additional charges). The trial court did not believe Mr. Johnson was informed of the cost for the additional work.

Considering the trial court's reasons for judgment, along with our review of the record, we cannot say that the trial court was clearly wrong in its determination. Although there were corroborating circumstances to support both parties' contentions, the trial court was clearly within its discretion to credit the testimony of Mr. Johnson over that of Mr. Shaffer and Mr. Louton. Notably, whether there was an initial verbal agreement that the repairs would cost $1,000 was subject to a credibility call by the trial court, which heard testimony from the involved parties. The trial court viewed Mr. Shaffer's testimony on the issue as “disingenuous,” and we cannot see where that was in error. Therefore, the trial court was not in error in (1) determining that an agreement existed between the parties regarding the price for repairs and (2) refusing to award Shaffer the full amount of its invoice in the amount of $5,863.49.FN1

[6] As for the amount that Shaffer contends is due for storage, had it invoiced Mr. Johnson the amount of the original estimate in the first place, there would have been no need to store the truck or trailer. Considering the trial court's determination that an agreement existed between Mr. Johnson and Shaffer in the amount of $1,000, which Mr. Johnson had expressed a willingness to pay, we cannot see how Shaffer would be entitled to any payment for storage when it failed to return the truck and trailer where an offer of payment for the agreed upon price had been conveyed. In other words, the need to store Johnson Construction's truck and trailer was created by Shaffer. Thus we see no error in the trial court failing to award Shaffer storage fees for the truck and trailer.

*Unfair Trade Practices Claim*

[7] Shaffer also argues that the trial court erred in awarding damages and attorneys' fees to Johnson Construction under Louisiana's Unfair Trade Practices and Consumer Protection Law (“LUTPA”).

[8] LUTPA, La. R.S. 51:1401, *et seq.,* does not enumerate those instances of conduct that constitute unfair trade practices, but La. R.S. 51:1405(A) provides that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” What constitutes an unfair trade practice is determined on a case-by-case basis. *Tyler v. Rapid Cash, LLC,* 40,656 (La.App.2d Cir.05/17/06), 930 So.2d 1135; *A & W Sheet Metal, Inc. v. Berg Mechanical, Inc.,* 26,799 (La.App.2d Cir.04/05/95), 653 So.2d 158. In *Berg,* this court explained:

Conduct is deemed unlawful if it involves fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical conduct. A practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious to consumers, including business competitors.

*Id.,* at 164 (citations omitted).

Here, the trial court determined that Shaffer had engaged in unfair trade practices when it refused to release Johnson Construction's trailer on which Shaffer had performed no work. The trial court noted that the evidence showed that Mr. Johnson had made demand on Shaffer to release the trailer and that no repairs had been made on the trailer. The trial court further observed that under La. R.S. 9:4501, Shaffer would not have a repairman's privilege over property upon which no repairs were made. We agree.

Louisiana R.S. 9:4501(A) provides, in pertinent part:

Any person operating a garage or other place where automobiles or other machinery are repaired, or parts therefor are made or furnished, has a privilege upon the automobile or other machinery ***for the amount of the cost of repairs made, parts made or furnished, and labor performed.*** If an estimate was given by the repairman for the repairs, then in order for the amount of the privilege to exceed the amount of the estimate, the repairman must secure authorization to exceed the amount of the estimate[.](Emphasis added).

Considering that Shaffer performed no repairs on the trailer, the repairman's privilege allowed under La. R.S. 9:4501 was inapplicable as to that piece of equipment. *See Van–Trow Olds Cadillac, Inc. v. Kahn,* 345 So.2d 991 (La.App. 2d Cir.1977).

So considering, we see no error in the trial court's characterization of Shaffer's actions with the trailer as holding it “hostage in an effort to force payment for unauthorized repairs.” In *Slayton v. Davis,* 2004–1652 (La.App. 3rd Cir.05/11/05), 901 So.2d 1246, the appeal court concluded that the wrongful seizure of a vehicle was an unfair trade practice under La. R.S. 51:1405. Although the facts of *Slayton* are not precisely on point, we believe it to be analogous to the situation at hand. Shaffer had no legal right to retain possession of the trailer, yet it refused to release it to Johnson Construction. Thus, the trial court did not err in its determination that Shaffer's retention of Johnson Construction's trailer was a deceptive conversion of the trailer.

[9][10] Shaffer also argues that the trial court erred in awarding Johnson Construction general damages in the amount of $3,500 for the “nearly four year unlawful conversion of [its] trailer.” Louisiana R.S. 51:1409(A) provides, in pertinent part:

Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs[.]

As noted by the trial court, Johnson Construction did not provide evidence of the precise value of its loss sustained as a result of its deprived use of the trailer. However, “actual damages” as provided in the statute does not require a precise measurement of the damage—only an “ascertainable loss.” Furthermore, recovery of general damages is allowed under LUTPA. *Slayton, supra* at 1255. Here, it is obvious that Johnson Construction suffered a loss. Shaffer retained possession of the trailer for four years, which most certainly had some impact on Johnson Construction's ability to carry on its business. Despite the fact that Mr. Johnson failed to present a precise value of the loss of use for his trailer, considering the length of time that Shaffer retained it and the amount of the award, we do not believe that the trial court abused its discretion in awarding Johnson Construction general damages in the amount of $3,500.

[11] Finally, Shaffer maintains that the trial court erred in its award of $750 in attorneys' fees to Johnson Construction. Louisiana R.S. 51:1409 mandates an award of reasonable attorney fees and costs to the person bringing the action. Although Mr. Johnson ultimately represented his company *pro se* at the time of trial, he was initially represented by an attorney who prepared the original petition and, later, an amended petition. When Johnson Construction's attorney eventually withdrew from its representation, it was not for a failure to pay by Mr. Johnson, so it can be assumed that the attorney was paid some amount of his fee for the legal work performed. We do not believe the trial court's award of $750 in attorneys' fees was in error, considering that Johnson Construction had been represented at some time in the litigation and had presumably paid some amount in attorneys' fees to its counsel of record.

**CONCLUSION**

For the foregoing reasons, the judgment of the trial court in favor of Johnson Construction Company, Inc. is affirmed. All costs of this appeal are assessed to Shaffer's Auto and Diesel Repair, L.L .C.

**AFFIRMED.**

FN1. Although Shaffer noted in brief that Mr. Johnson, after receiving the invoice, had offered to pay the initial $1,000 plus the additional amounts for parts and shipping (a total of $2480), Shaffer has not argued that, alternatively, it was entitled to at least that amount. Notably, Mr. Johnson's offer to modify the initial $1,000 agreement went unanswered; thus, there was no modification of that agreement.