

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001862-MR

MOHAMED ALI

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 98-CI-01324

GHASSAN HAJHAMED

APPELLEE

AND CROSS-APPEAL NO. 2001-CA-001955-MR

GHASSAN HAJHAMED

CROSS-APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 98-CI-01324

MOHAMED ALI

CROSS-APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: KNOFF, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: These appeals emanate from a proceeding in the Campbell Circuit Court. Mohamed Ali brings an appeal from an order of the circuit court entered June 9, 1999. Ghassan Hajhamed brings a cross-appeal from a judgment entered by the court sitting without jury on June 29, 2001. We affirm.

The briefs in this matter are somewhat confusing. We do our best to analyze the complaints presented to us.

It appears that in July 1998, Ali and Hajhamed entered into a contract whereby Hajhamed was to purchase Ali's medical practice located in the city of Bellevue, Campbell County, Kentucky. The practice was identified as Riverside Medical Center. The agreement provided for a cash consideration whereby Hajhamed was to acquire the entire practice, including, *inter alia*, medical records of patients, certain tangible and intangible assets, together with a right of first refusal for the purchase of the real estate. The purchase agreement contained a non-compete clause. Ali entered into possession of the property.

Subsequently, the parties fell into a dispute. Perceiving that Hajhamed had breached the agreement, Ali filed a district court action to dispossess him of the premises. In December, 1998, Ali filed an action in the circuit court to obtain reparation for breach of contract.

While the action was pending in circuit court, the parties reached an agreement to settle all claims and counter-claims emanating from the litigation. A "Settlement Agreement" was executed and the action was dismissed upon joint motions. The order of dismissal was entered January 25, 1999. Subsequently, this agreement, too, fell apart, and the parties returned to court. There were claims and counterclaims. Ali alleged failure to pay and Hajhamed countered, *inter alia*, that Ali violated the non-compete provision, and refused to deliver certain assets.

Both parties moved the court to set aside the order of dismissal. The court refused. Ultimately, the court entered the order from which Ali appeals. Later, the judgment from which Hajhamed appeals was entered.

ALI'S DIRECT APPEAL NO. 2001-CA-001862-MR

During the course of heated exchanges and arguments propounded to the court, the court entered an order on April 9, 1999 providing as follows:

**IT IS FURTHER HEREBY ORDERED AND ADJUDGED** that the balance due the Plaintiff, Mohammed Ali, as calculated by the Defendant, Ghassan Hajhamed, pursuant to the underlying agreements between the parties shall be deposited forthwith by the Defendant, Ghassan Hajhamed, with the Court. Said payment amount shall not prejudice either party, which balance should be calculated and submitted to the Clerk of Courts, and time is of the essence. (Emphasis added).

It is this order which Ali sought to have set aside, and from which Ali's appeal emanates. He wants to gain the funds that have been deposited in the hands of the clerk.

In the June 9, 1999 order from which he prosecutes this appeal, the court stated as follows:

The record reflects that the parties have brought matters relating to enforcement and implementation of the Settlement Agreement before this Court, and have therefore invoked its jurisdiction to adjudicate issues presented in enforcement of the Settlement Agreement. There appears that there still must be a judicial resolution of the allegations of breath, [sic] and any possible result in damages to Defendant. The alleged breach of Settlement Agreement still must be litigated before this Court. This Court finds that it would be inequitable to release the funds pending resolution of a majority of these issues. (Emphasis added).

It appears that Ali may have brought an appeal from an interlocutory order. When the court entered the June 9, 1999 order from which the appeal arises, there remained issues to be decided. We shall nevertheless address Ali's arguments on the merits. Ali argues that the impounding of the funds amounted to an impermissible prejudgment attachment. We disagree. The funds emanated from Medicare and Medicaid payments, and were the subject of litigation. It was only prudent that the court exercise its equitable power to protect any funds that might later be the subject of order or judgment. Ky. R. Civ. P. 67.02. Upon the whole, we can perceive no merit in Ali's appeal.

HAMJAHMED'S CROSS-APPEAL NO. 2001-CA-001955-MR

On cross-appeal, Hajhamed argues the circuit court erred in rejecting his claim for punitive damages. Hajhamed claims such damages under the authority of KRS 411.184 and .186. We think not. It is recognized that punitive damages are ordinarily not permitted incident to breach of contract. See Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357 (1978). Generally, punitive damages are recoverable only when the act is wanton, malicious, reckless, or oppressive. See Ashland Dry Goods Company v. Wages, 302 Ky. 577, 195 S.W.2d 312 (1946). Notwithstanding subsection (4) of KRS 411.186 which provides that "[i]n no case shall punitive damages be awarded for breach of contract," such damages may be awarded if conduct is tortious. See Faulkner Drilling Company, Inc. v. Gross, Ky. App., 943 S.W.2d 634 (1997). Hajhamed seeks to bring his claim under this rule. In doing so, he must prove the tortious elements by clear and convincing evidence. KRS 411.184(2). Wahba, 573 S.W.2d 357.

Upon the whole of the record, we are not convinced the circuit court erred in refusing to submit the claim for punitive damages. While the acts of Ali may have been unreasonable, we cannot conclude they formed a sufficient basis for a jury's finding. There was a decisive dispute between the litigants with each claiming breach of contract. We think Hajhamed was fully compensated by the compensatory award.

For the foregoing reasons, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Brenda L. Bonecutter  
Newport, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

R. Barry Wehrman  
Convington, Kentucky