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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2075

Megan Guetzkow, as mother and natural guardian of E.I., a minor, et al.,
Respondents,

vs.

Brian John Irgens,
Appellant.

Filed August 17, 2020
Affirmed
Reyes, Judge

Wright County District Court
File No. 86-CV-18-2938

Thomas E. Kiernan, Kiernan Personal Injury Attorneys, PA, Buffalo, Minnesota (for respondents)

John G. Westrick, Savage-Westrick, PLLP, Bloomington, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Johnson, Judge; and Larkin, Judge.

U N P U B L I S H E D   O P I N I O N

REYES, Judge

In this appeal from judgment against appellant for tort claims arising out of sexual conduct against two minors, appellant argues that (1) the district court lacked personal jurisdiction; (2) insufficient evidence supports the district court's punitive-damages awards; (3) the Double Jeopardy Clauses of the U.S. and Minnesota Constitutions prohibit

the awards; (4) the awards violate the Excessive Fines Clauses of the U.S. and Minnesota Constitutions; and (5) the award amounts violate his due-process rights. We affirm.

FACTS

Appellant Brian John Irgens pleaded guilty to first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(g) (2014), for digitally penetrating his then-15-year-old stepdaughter, respondent M.G. Irgens is serving a 144-month sentence in the Moose Lake correctional facility for the offense. M.G. and her mother, respondent Megan Guetzkow, brought this civil action on behalf of M.G. and respondent E.I., who is the biological daughter of Guetzkow and Irgens. Guetzkow alleged that Irgens committed battery against M.G. and E.I. (count I); intentional infliction of emotional distress against M.G. and E.I. (count II); intrusion upon seclusion as to M.G. (count III); and public disclosure of private facts about M.G. (count IV). Guetzkow also asserted a claim for punitive damages.

Following a court trial, which included testimony from M.G., Guetzkow, a child psychologist, a forensic analyst, and a CornerHouse interviewer, the district court found Irgens liable on counts I and III for his conduct from December 2014 to February 2015. In addition to the conduct underlying his criminal offense against M.G., the district court found that Irgens surreptitiously placed a camera in the family's shared bathroom to capture, record, and store images of M.G. undressing. It found that appellant began coming into M.G.'s room at night and would touch her genitals and that she on one occasion forcibly kicked him off her bed as he attempted to climb onto the bed. It also found that

he had touched E.I's genitals on multiple occasions while in her room. E.I. was six years old at the time.

The district court awarded compensatory damages of $116,621.15 to M.G. and $175,000 to I.E. It also awarded punitive damages of $150,000 to M.G. for battery, $100,000 to M.G. for intrusion upon seclusion, and $300,000 to E.I. for battery. Irgens filed posttrial motions for dismissal, judgment as a matter of law, and a new trial based on the same issues he raises on appeal. The district court denied his motions. This appeal follows.

DECISION

Irgens argues that (1) the district court lacked personal jurisdiction over him; (2) insufficient evidence supports its punitive-damages awards; (3) the Double Jeopardy Clauses prohibit the awards; (4) the award amounts violate the Excessive Fines Clauses; and (5) the award amounts violate his due-process rights. We address his arguments in turn.

I. The district court properly determined that it had personal jurisdiction over Irgens.

Irgens argues that the judgment against him is void because, although he received personal service, the Moose Lake correctional facility warden did not, which Minn. R. Civ. P. 4.03(a) requires. We are not persuaded.

We review service of process de novo. *Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540, 547 (Minn. 2018). We review the district court's findings of fact for clear error and will set them aside only if we have the "definite and firm conviction" that the district court

made a mistake. *See Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotation omitted).

As an initial matter, Guetzkow argues that Irgens waived his defense of lack of personal jurisdiction based on improper service by not moving to dismiss the action. Irgens raised this defense in his June 4, 2018 answer, but he did not file a motion to dismiss at that time. He raised the defense again on July 30, 2018, in his response to Guetzkow's motion to attach his property. Following the August 28, 2018 motion hearing, the district court addressed and rejected his argument, concluding that Guetzkow properly served him. Irgens then filed a posttrial motion to dismiss based on lack of jurisdiction more than one year later, which the district court denied.

A defendant must assert the defense of insufficient service of process in an answer or a motion to dismiss. Minn. R. Civ. P. 12.08(a). A defendant who asserts the defense in an answer but does not bring a motion to dismiss does not waive the defense by merely participating in the litigation and responding to the merits of the case unless he "affirmatively invokes the court's power to determine the merits of all or part of a claim" before giving the district court an opportunity to rule on his defense. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 869 (Minn. 2000); *see also Juelich v. Yamazaki Mazak Optonics Corp.*, 670 N.W.2d 11, 16 (Minn. App. 2003), *aff'd*, 682 N.W.2d 565 (Minn. 2004).

Here, although Irgens did not move to dismiss due to improper service of process until his posttrial motions, he raised the defense twice in the first two months of the case, thereby providing the district court with "an opportunity to rule on [his] defense" in its first

order. *See Patterson*, 608 N.W.2d at 869. He therefore did not waive this defense. Moreover, because both parties were on notice of this issue and the district court addressed it, we will consider whether Irgens received proper service of process.

A party must serve a summons, as relevant here, "[u]pon an individual by delivering a copy to the individual personally" and, "[i]f the individual is confined to a state institution, *by serving also* the chief executive officer at the institution." Minn. R. Civ. P. 4.03(a) (emphasis added). The chief executive officer (CEO) of a prison is its warden. *See State ex rel. Turnbladh v. Dist. Court*, 107 N.W.2d 307, 309 (Minn. 1960). We strictly construe compliance with rule 4.03. *See Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 609 (Minn. 2016). However, "[a]n individual [can] appoint[] an agent to receive service of a summons." *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 822 (Minn. App. 1999). And a corporation may designate an agent who has implied or express authority to accept service. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. App. 1992), *review denied* (Minn. July 16, 1992).

Irgens argues that Guetzkow has not shown that she served the warden, as opposed to a designee, which he argues neither Minn. R. Civ. P. 4.03 nor any statute authorizes. The district court found that Irgens received personal service and that the warden received service through a designee. The record includes a certificate of personal service from the Carlton County Sheriff's Office that supports this finding. It also contains an affidavit from the Moose Lake correctional-facility associate warden stating that it received, processed, and recorded the summons and complaint in accordance with standard practice for accepting service on behalf of the warden.

Irgens does not dispute that he received personal service, as rule 4.03(a) requires, or that the associate warden who accepted service is an agent of the warden. Further, while the rule provides that the CEO of a state institution in which a defendant is confined "also" be served, the rule does not clearly mandate personal service on the official or prohibit an agent from accepting service on behalf of the official.[1] Irgens cannot identify any case supporting his interpretation. Because Guetzkow personally served Irgens and an agent of the warden, service of process was effective.

II. The district court did not abuse its discretion by determining that sufficient evidence supports its awards of punitive damages.

Irgens argues that the evidence does not support the punitive-damages awards based on the factors in Minn. Stat. § 549.20, subd. 3 (2018). We disagree.

We review a district court's award of punitive damages for an abuse of discretion. *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 312 (Minn. 1982). Determining the amount of a punitive-damages award "rests almost exclusively" with the factfinder, and we will disturb the award only when it "is so excessive as to be deemed unreasonable." *See Hammersten v. Reiling*, 115 N.W.2d 259, 266 (Minn. 1962). We review whether the award is reasonable based on the factors in section 549.20,

[1] In an early case regarding a statute with similar language requiring personal service on a defendant and, "[i]f the defendant [has] a resident guardian . . . to such guardian *also*," the Minnesota Supreme Court concluded that the failure to serve a defendant's guardian did not render the judgment void. *See Schultz v. Oldenburg*, 277 N.W. 918, 922 (Minn. 1938) (emphasis added) (quoting Mason's Minn. Stat § 9228 (1927)). It concluded that the statute was directory, not mandatory. *Id.* at 923. A "[v]iolation of a directory statute does not result in the invalidity of the action taken" under the statute. *Sullivan v. Credit River Twp.*, 217 N.W.2d 502, 507 (Minn. 1974).

subdivision 3. *See Estate of Hartz v. Nelson*, 437 N.W.2d 749, 755 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

As relevant here, the factors in section 549.20, subdivision 3, include (a) the seriousness of the hazard to the public from the defendant's misconduct; (b) "the duration of the misconduct and any concealment of it;" (c) "the degree of the defendant's awareness of the hazard and of its excessiveness;" (d) "the attitude and conduct of the defendant upon discovery of the misconduct;" (e) "the financial condition of the defendant;" and (f) "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct."[2]

A. Hazard to the public

Irgens argues that the record contains no evidence that he presents a hazard to the public because he committed the sexual abuse within his home, against family members. But Irgens does not show how members of his family are not members of the public. And he does not show how the district court's findings that he could sexually assault future children and that any sexual acts "committed against children are of immense concern to the public" are clearly erroneous. We recently explained the "widespread social and economic impact" of child sexual abuse, which makes it clear that intrafamilial child abuse reaches beyond the family. *See State v. Madden*, 910 N.W.2d 744, 748 (Minn. App. 2018), *review denied* (Minn. June 19, 2018). Likewise, *Estate of Hartz*, to which Irgens cites,

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[2] The district court also made findings on a factor regarding the profitability of the misconduct to the defendant, finding it is not profitable, and Irgens does not challenge this factor.

does not support his position, as we concluded there that an attorney did not present a "danger of repetition" of legal malpractice because he was suspended from practice and had not applied for readmission in the more than ten years since the misconduct. *See* 437 N.W.2d at 751-52, 756. Irgens also argues that a finding that he will act against others in the same manner violates Minn. R. Evid. 404(b), and that, even if he poses a risk to the public, the state has the remedy of committing him under Minn. Stat. ch. 253B (2018). We have reviewed these arguments, and they lack merit. This factor favors the awards.

B. Duration and concealment of misconduct

Irgens acknowledges that this factor supports an award of punitive damages but argues that it does not support the total amount awarded. Irgens's reliance on *Estate of Hartz* in support of his argument is again misguided. *Estate of Hartz* involved a punitive-damages award of $700,000 for four instances of attorney misconduct, only one instance of which the tortfeasor took "some initial effort to conceal." 437 N.W.2d at 756. The record here supports the district court's findings that Irgens actively concealed his sexual conduct against both children and his recording of M.G., which occurred over three months. This factor supports the awards.

C. Irgens's awareness of the hazard

Irgens argues that the district court's finding that he was aware of the hazard is clearly erroneous because a "hazard" requires a risk or danger to the public, which does not include his "misconduct." Because Irgens provides no legal analysis or citation for his contention, he forfeits this issue. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1

(Minn. App. 1994). Moreover, as discussed above, his conduct posed a danger to the public. This factor supports the awards.

D. Irgens's attitude and conduct upon discovery of misconduct

Irgens argues that, although the district court did not clearly err in finding that he has consistently denied wrongdoing, it failed to recognize his guilty plea in the criminal proceedings. He also concedes that this finding supports awards of punitive damages, but not in the amounts awarded. While Irgens did plead guilty, he did so only to an offense against M.G., not E.I. This factor supports the awards.

E. Irgens's financial condition

The district court found that, although Irgens is currently incarcerated, he is the sole heir to his father's estate, which includes real-estate properties, and that he is "by all accounts, able-bodied and retains the ability to fully participate in the workforce once he is released from confinement."

Irgens argues that these findings are clearly erroneous because they are not based on any evidence about his financial condition, which Guetzkow had the burden to prove, citing to *Johnson v. Ramsey County*, 424 N.W.2d 800, 807 (Minn. App. 1988), *review denied* (Minn. Aug. 24, 1988). He further argues that the district court impermissibly speculated about his employment prospects after his incarceration, particularly in light of the employment difficulties felons and convicted sex offenders face. We disagree for three reasons.

First, evidence of his financial condition is not an essential element that Guetzkow had to prove under Minn. Stat. § 549.20 (2018). *See Nugent v. Kerr*, 543 N.W.2d 688, 691

(Minn. App. 1996), *review dismissed* (Minn. July 10, 1996). Second, Irgens's reliance on *Johnson*, which we decided before *Nugent*, is misguided because we explicitly declined in *Johnson* to address the issue of who bore the burden of showing a defendant's financial condition in an action for punitive damages. 424 N.W.2d at 807.[3] Third, as in *Johnson*, the record contains evidence of Irgens's financial condition. The record shows that two of the real-estate properties that he is expected to receive from his father's estate each have a taxable market value of more than $200,000, one of which is Irgens's homestead. While Irgens supports his contention that felons and sex offenders face employment difficulties generally, he does not point to anything in the record that makes the district court's finding that he will be able to work after his incarceration so speculative as to be clearly erroneous. The district court properly considered this factor.

F. Total effect of other punishment

Irgens argues that the district court failed to consider the total effect of its awards against him, even though it explained why it made each award.

The total effect of punishment includes consideration of "compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject." Minn. Stat. § 549.20, subd. 3. Here, the district court considered the total compensatory damages for

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[3] In *Johnson*, we affirmed the district court's remittitur of a punitive-damages award from $300,000 to $50,000 after it received information that the jury had not heard about the defendant's salary. 424 N.W.2d at 806-07. We concluded that the district court acted within its discretion by scrutinizing the award based on the defendant's ability to pay. *Id.* at 808.

M.G. and E.I. of $291,621.15 as well as Irgens's incarceration for one instance of sexual abuse against M.G., and it specifically found that the compensatory-damages awards "do not foreclose an award of punitive damages." Irgens's reliance on caselaw that encourages district courts to consider damages from other lawsuits is inapplicable because he does not identify any lawsuits against him that the district court failed to consider. *See Indep. Sch. Dist. No. 622 v. Keene Corp.*, 495 N.W.2d 244, 254 (Minn. App. 1993), *rev'd in part on other grounds*, 511 N.W.2d 728 (Minn. 1994). The district court properly considered this factor.

G. Reasonableness of awards in light of factors

Irgens argues that the amounts of the punitive-damages awards are "unsupported" because of the compensatory-damages awards, the lack of evidence about his financial condition, the duration and concealment of his misconduct, his guilty plea in the criminal proceedings, and his 144-month sentence, which lessens the need for the punitive and deterrent role of punitive damages. As discussed above, the district court considered these factors, and the record supports its findings on each of them.

Finally, Irgens argues that punitive damages are not required to inform the public of the wrongfulness of his acts because the wrongfulness of intrafamilial sexual abuse is clear. While Irgens cites to caselaw and a statute stating that child sexual abuse is illegal, he provides no legal authority for his apparent contention that the clearer the wrongfulness of an act, the less need there is for punitive damages to punish and deter its commission. On the contrary, punitive damages serve to punish and deter "*according to the gravity of the act*." *Father A v. Moran*, 469 N.W.2d 503, 507 (Minn. App. 1991) (emphasis added).

Irgens concedes that "the reprehensibility of [his] acts is self-evident," and our caselaw recognizes the severe gravity of child sexual abuse. *See, e.g.*, *Madden*, 910 N.W.2d at 748. Considering these factors, the district court did not abuse its discretion by awarding M.G. $250,000 and E.I. $300,000 in punitive damages.

III. The Double Jeopardy Clauses of the U. S. and Minnesota Constitutions do not prohibit the punitive-damages awards against Irgens.

Irgens argues that the punitive-damages awards against him violate the Double Jeopardy Clauses of the U.S. and Minnesota Constitutions, relying on *United States v. Halper* for much of his double-jeopardy analysis. 490 U.S. 435, 109 S. Ct. 1892 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488 (1997). But *Halper* stated that "[t]he protections of the Double Jeopardy Clause *are not triggered by litigation between private parties*." *Id.* at 451, 109 S. Ct. at 1903 (emphasis added). The Minnesota Supreme Court has reaffirmed the same. *See Rew v. Bergstrom*, 845 N.W.2d 764, 795-96 (Minn. 2014). Because the current action is between private parties, it does not trigger the Double Jeopardy Clauses.

IV. The punitive-damages awards do not violate the Excessive Fines Clauses of the U.S. and Minnesota Constitutions.

Irgens argues that the punitive-damages awards are unconstitutionally excessive given his financial condition and his incarceration. The Supreme Court has said definitively that the Excessive Fines Clause of the U.S. Constitution does not apply to private actions for punitive damages. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274-75, 109 S. Ct. 2909, 2920 (1989). The text of the Excessive Fines Clause of the Minnesota Constitution is identical, and it likewise does not

extend to private actions for punitive damages. *See Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 553 (Minn. 2003) (stating decisions of United States Supreme Court have inherent persuasive force when interpreting identical clauses of state constitution and describing that Excessive Fines Clause limits "the *government's* power to extract payments" (emphasis added) (quoting *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 2805 (1993))). The punitive-damages awards do not implicate, and therefore do not violate, the Excessive Fines Clauses.

V. The amounts of the punitive-damages awards do not violate Irgens's due-process rights.

Irgens argues that the punitive-damages awards are excessive in light of the statutory-maximum fine for his offense, the lack of a record about his financial condition, and his incarceration. He also argues that the awards are a due-process violation because they breach his plea bargain. We are not persuaded.

We review de novo a claim of a due-process violation. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing punishments on a tortfeasor that are "grossly disproportional to the gravity of [the] defendant['s] offenses." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434, 121 S. Ct. 1678, 1684 (2001) (quotation omitted). We consider three criteria in assessing whether a punitive-damages award violates due process under the U.S. Constitution: "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive

damages awarded by the [factfinder] and the civil penalties authorized or imposed in comparable cases." *Id.* at 440, 121 S. Ct. at 1687.

Irgens's arguments relate primarily to the third element. *See id.* He again argues that the amounts of the punitive-damages awards far exceed his ability to pay. He notes that the maximum fine in Minn. Stat. § 609.342, subd. 2 (2014), is $40,000 and argues that "no statute warned him he could have almost $500,000 in punitive damages imposed, unrelated to the harm or injury he caused." He argues that the state achieved its interests of punishment and deterrence through the criminal prosecution against him and his resulting incarceration.

But the Supreme Court has upheld punitive-damages awards much higher than Irgens's in relation to maximum fines for the conduct and other damages awards. For example, in *Pac. Mut. Life Ins. Co. v. Haslip*, the Supreme Court upheld an award of more than $800,000 in punitive damages, which it stated is "more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent . . . and, of course, is much in excess of the fine that could be imposed [under the relevant statutes]." 499 U.S. 1, 23, 111 S. Ct. 1032, 1046 (1991). It concluded that the award "did not lack objective criteria." *Id.* The award in *Haslip* was approximately 13 times greater than the maximum fine for felonies. *See id.*; Ala. Code § 13A–5–11 (capping fine for "Class A" felonies at $60,000). In *TXO Prod. Corp. v. All. Res. Corp.*, the Supreme Court upheld a punitive-damages award of $10 million, which was more than 500 times greater than the jury's award of actual damages. 509 U.S. 443, 453, 113 S. Ct. 2711, 2718

(1993). The Supreme Court concluded that the award was not "so grossly excessive" as to violate due process. *Id.* at 462, 113 S. Ct. at 2722-23 (quotation omitted).

The punitive-damages award for M.G. is approximately six times the statutory maximum fine, and the award for E.I. is approximately seven times the maximum fine. M.G.'s punitive-damages award is approximately 2.1 times higher than her compensatory-damages award, and E.I.'s is approximately 1.7 times higher than her compensatory-damages award. These amounts are well within the Supreme Court's guidelines. Further, as discussed earlier, Irgens points to no authority, and we can find none, that prohibits punitive damages for private parties due to the defendant also being subject to criminal prosecution. The punitive-damages awards did not violate Irgens's due-process rights.

Finally, Irgens argues in a footnote that the punitive-damages awards constitute a breach of his plea agreement, which fixed the terms of his punishment. But as Irgens himself states, a plea agreement is between a criminal defendant and the government. Respondents were not parties to Irgens's plea agreement. Irgens's plea agreement therefore does not prevent these civil judgments.

Affirmed.