

In The Matter Of:
DIETZ DEVELOPMENT, LLC, et al. v
JANE PEREZ

FAIRFAX CIRCUIT COURT, JUDGE SCHELL
March 21, 2014

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1 V I R G I N I A
2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY
3 -----x
4 DIETZ DEVELOPMENT LLC, and :
5 CHRISTOPHER DIETZ, :
6 Plaintiffs, :
7 versus : CASE NO. CL 2012-16249
8 JANE PEREZ, :
9 Defendant. :
10 -----x
11 Fairfax, Virginia
12 Friday, March 21, 2014
13 The above-entitled action came on to be
14 heard before the Honorable David S. Schell, a Judge in
15 and for the Circuit Court of Fairfax County, in Courtroom
16 5F, Judicial Center, 4110 Chain Bridge Road, Fairfax,
17 Virginia 22030, beginning at approximately 11:00 o'clock
18 a.m., when there were present on behalf of the respective
19 parties:
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23 LMK-55-14

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2 APPEARANCES:
3 For the Plaintiffs:
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8 For the Defendant:
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14 C O N T E N T S
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1 Now, I know Your Honor has read the
2 briefs. I want to focus on six things that the defendant
3 brought up in their brief and respond to those specific
4 things.
5 First, the defendant gave you the wrong
6 standard. The evidence here should be in the light most
7 favorable to plaintiffs, not defendant. The case law is
8 clear, Bradner versus Mitchell, a 1987 Virginia Supreme
9 Court case. In that case they were challenging the
10 adequacy of damages. When they had one on liability,
11 they granted \$4,000 in compensatory damages and the Court
12 said -- the Virginia Supreme Court said, quote, because
13 the plaintiff prevailed on the issue of liability the
14 facts will be summarized in the light most favorable to
15 him. And that's what the Court should do here.
16 And normally, Your Honor, I don't think
17 that that matters. But this is one of those cases where
18 we're talking about the difficulty of proving damages
19 here and the difficulty of proving that to the jury or
20 how you view those facts and how you view that evidence
21 and viewing it in the light -- the light most favorable
22 to plaintiffs may actually make a difference.
23 The second thing I want to respond to,

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<p>1 Your Honor, is what evidence should be considered. 2 Defendant doesn't respond at all to the case law that I 3 cite, the Government Micro Strategies (sic) case, the 4 Poulston case. Both of those cases stand for the 5 proposition that you can have substantial compensatory 6 damages in a defamation case even when you haven't proven 7 specific economic harm.</p> <p>8 That's exactly why Virginia had adopted 9 the per se defamation standard, because it is difficult, 10 if not impossible, for a defamation plaintiff to come 11 into Court and to show that he suffered some specific 12 harm.</p> <p>13 Defendant's entire brief almost is 14 dedicated to the idea that he couldn't show -- that Mr. 15 Dietz couldn't get on the stand and show that he lost a 16 specific contract. He couldn't show that, Your Honor. 17 He wasn't able to present that evidence. But that's 18 exactly why Virginia has made it slightly easier for 19 defamation plaintiffs -- for per se defamation plaintiffs 20 to prove their damages. We would submit that he proved 21 his damages in the four categories on which Your Honor 22 instructed the jury.</p> <p>23 They are laid out in our brief, but he</p>		<p>1 is the defendant's argument that because this was online 2 and on these websites, Yelp and Angie's List, and because 3 Mr. Dietz was supposedly offered the opportunity to 4 respond he hasn't suffered any damages. Now, that's not 5 the law and they don't cite a single Virginia case or a 6 case from any jurisdiction standing for that proposition. 7 And it would be an incredible leap to say that because 8 you post defamation on a website where the company can 9 respond you don't have to worry about it because that 10 person can't suffer any damages.</p> <p>11 And the other thing, factually it's 12 incorrect. This was not before the jury, Your Honor, but 13 on the day -- I think it was the first day or the second 14 day of trial, Yelp actually took down Mr. Dietz's 15 response. They sent him an email and they said, we're 16 taking it down, we think it violates the terms of service 17 because it mentioned Ms. Perez's full name in his 18 response.</p> <p>19 So, in fact, Yelp does have the ability to 20 take down that response. Mr. Dietz doesn't have any 21 control about whether or not his response stays posted. 22 And you're welcome to swear Mr. Dietz in if you need him 23 to testify to that. But he doesn't have that control.</p>	
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<p>1 showed his damages to his loss of reputation, loss to his 2 business because he lost out on contracts, that he 3 suffered humiliation, and that he suffered out-of-pocket 4 expenses.</p> <p>5 The defendant makes the unbelievable 6 argument that Mr. Dietz and his company benefit from this 7 defamatory language. I think he said that he was better 8 off because of it. On the face of it, that's an absurd 9 argument. But for Your Honor's purposes, they didn't 10 present any evidence of that. They didn't put on the 11 stand a client who said, you know what, I read these 12 statements and I hired him because of those statements. 13 They didn't put on any evidence that he benefitted from 14 these reviews. All the defendant points to is the fact 15 that his revenue went up.</p> <p>16 Now, I can't whether Mr. Battocchi doesn't 17 understand the arguments we made at trial or he is trying 18 to mislead the Court. But the argument, again, Your 19 Honor, is not that his revenue went down. The argument 20 is that he lost out on contracts. His revenue would have 21 gone up more had those defamatory statements not been 22 there.</p> <p>23 Now, the fourth thing I want to respond to</p>		<p>1 So the idea that he has the ability to respond and that 2 it is somehow different from a newspaper or a TV station 3 doesn't hold water. It's not the fact.</p> <p>4 Now, the last two issues, I want to 5 respond very briefly because I don't think they're 6 directly relevant here.</p> <p>7 The first is the arrest warrant. Your 8 Honor, I don't think it goes to your ruling, but I cannot 9 help but respond. Mr. Battocchi says that Mr. Dietz 10 asked to be arrested. I don't know if Mr. Battocchi 11 doesn't understand how warrants work, but they don't just 12 expire. Mr. Dietz has family here, he has friends here. 13 He comes into Virginia. And if he didn't go down to 14 self-surrender, which is what he did -- he didn't go down 15 to pick up a copy of the warrant, he went down to self- 16 surrender on the warrant with me by his side. So that 17 when he came to Virginia, if he got pulled over for 18 speeding when he came to visit his family he wouldn't get 19 arrested.</p> <p>20 The only purpose of putting in that 21 language, Your Honor, is to try to smear Mr. Dietz, 22 rather than focusing on the fact and the law.</p> <p>23 And the last thing I want to discuss, Your</p>	

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<p>1 Honor, is this settlement offer. I honestly -- I haven't 2 been practicing law as long -- I guess Mr. Battocchi -- I 3 never had someone make a settlement offer in a pleading, 4 never mind a pleading to which I can't respond. I think 5 it's inappropriate for us to discuss settlement in Court. 6 I think it's not conducive to actually settling the case.</p> <p>7 But so Your Honor is clear, we did discuss 8 settlement before we filed briefs. Settlement didn't 9 work. And I believe Mr. Battocchi's last email to me was 10 we better work on the briefs.</p> <p>11 So I don't want Your Honor to be left with 12 the impression that there were not settlement discussions 13 and that Mr. Dietz didn't make a settlement offer, what 14 we believe is a very reasonable settlement offer, to try 15 to settle this case. There were those discussions. I 16 think it's inappropriate to discuss them, to disclose 17 them, and I've asked Mr. Battocchi not to disclose them 18 here.</p> <p>19 Your Honor, we ask the Court to decide the 20 issues today based on what is required under the law. 21 You watched the jury -- I'm sorry. You watched the 22 evidence, you heard the witnesses, every single one of 23 them. You can judge who was credible and who was not.</p>		<p>1 haven't put any settlement discussions in our brief, Your 2 Honor. At the last hearing the Court asked of me whether 3 I would accept an agreement not to post -- repost these 4 publications and I told the Court in response, after I 5 considered it, what my position was. I'm not disclosing 6 any settlement discussions with the Court. I am 7 responding to something that the Court addressed to me 8 and I tried to set forth my position as clearly as I 9 could on that issues, Your Honor.</p> <p>10 Starting out, Your Honor, I want to 11 address the standard of review here because I should have 12 quoted from Bradner against Mitchell more extensively in 13 my brief and I did not. This is a case in which the 14 Supreme Court did set aside a verdict that was inadequate 15 and they were drawing a distinction between cases where 16 there is no doubt about liability and there is no doubt 17 about special damages on one hand and other cases where 18 damages are in dispute.</p> <p>19 And because it's an important point, I'll 20 quote a little bit from the opinion. This is starting at 21 487. They say earlier where there is unquestioned proof 22 of -- undisputed proof of special damages and liability 23 is obvious you're entitled to get your special damages.</p>	
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<p>1 You can judge whether Mr. Dietz was on the stand 2 something and smiling or whether or not he was nearly 3 brought to tears when he talked about having to coach his 4 daughter's soccer team not knowing if the parents thought 5 he was a criminal. You watched that and you can judge 6 it.</p> <p>7 An injunction is proper because the First 8 Amendment doesn't protect defamatory speech and a new 9 trial is proper because the jury either ignored the 10 evidence or it ignored Your Honor's instructions.</p> <p>11 Your Honor, we urge the Court to take 12 action to prevent this unfair verdict. The plaintiffs 13 proved the damages. We're entitled to presumed damages. 14 We believe we should be given the opportunity to present 15 that damages testimony to a new jury, who was not there 16 at 7:30 on a Friday night returning a verdict, and give 17 us a chance to get a fair verdict on damages.</p> <p>18 Thank you.</p> <p>19 THE COURT: Thank you, counsel.</p> <p>20 Response.</p> <p>21 MR. BATTOCCHI: May it please the Court, 22 Ray Battocchi for the defendant.</p> <p>23 I'll address the last point first. I</p>		<p>1 On the other hands, when the plaintiff's evidence 2 controverted, doubtful as to nature and extent, or 3 subject to substantial question whether attributable to 4 the defendant's wrong or to some other cause, then 5 neither the trial court nor we, on appeal, can say that 6 the plaintiff's special damages constituted any fixed 7 part of the jury's verdict. In such a case, a rational 8 fact-finder might properly find that the plaintiff is 9 entitled to considerably less than the amount claimed as 10 special damages, rendering it impossible for the court to 11 determine what amount might have been awarded for pain, 12 suffering, and nonmonetary factors. In such a case, the 13 verdict cannot be disturbed on a claim of inadequacy.</p> <p>14 And here, we have no proof of any special 15 damages and, as I'm going to explain in a minute, I think 16 the proof of liability is -- is also questionable.</p> <p>17 Turning to liability, Your Honor, the 18 plaintiff submitted 40 different statements to the jury 19 as defamatory. The jury was instructed that they could 20 -- in effect, they could render a verdict if they found 21 any one of those to be defamatory. Not all of those 22 statements were defamatory per se. There is one in 23 there, for example, that says -- this is one that</p>	

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<p>1 bothered Judge Fortkort, but it said something to the 2 effect that I won on summary judgment in the General 3 District Court case and this case had no merit. 4 There is no way of knowing here which 5 statements the jury found defamatory and which they 6 didn't find defamatory. I've argued at some length in 7 the brief that the most serious statements he claims were 8 defamatory were true based on a substantial amount of 9 evidence -- 10 Well, you're trying to have it both ways, 11 counsel. You objected to the Court requiring the jury to 12 go down each statement statement-by-statement to 13 determine if it was defamatory or not. You objected. 14 Based on your objection I did not instruct the jury to do 15 that. Now you come and argue because we didn't do that 16 there shouldn't be a new trial. 17 MR. BATTOCCHI: What I'm saying -- no -- 18 THE COURT: Now, aren't you having it both 19 ways? 20 MR. BATTOCCHI: No. 21 THE COURT: That's my opinion. Continue 22 with your argument. 23 MR. BATTOCCHI: I just want to respond.</p>	<p>1 did not produce a single witness who said I failed to 2 give Mr. Dietz business because of anything that was 3 posted online, not one. 4 Mr. Popjian never testified about any lost 5 business. Ms. Brenner said that she had no idea what the 6 online reviews were and she didn't give him a contract 7 because he couldn't meet the contracting requirements. 8 So there is a lack -- it would be a 9 different case here, Your Honor, if a witness came in and 10 said I was going to sign a contract with Mr. Dietz, I've 11 read the online reviews and I was turned off and, 12 therefore, I didn't sign a contract. We heard no 13 testimony to that, Your Honor. 14 Further, Mr. Dietz has available all of 15 his company's files. He didn't produce a single proposal 16 or document from his files indicating that he lost 17 business because of anything Ms. Perez said. 18 Now, I would add in this connection, Your 19 Honor, that after the posts were made by Ms. Perez, Mr. 20 Dietz went online and gave voluntarily 10 or 15 media 21 interviews. And in one of those media interviews he was 22 criticized by the broadcaster for having shot himself in 23 the foot by suing his client for \$700,000, but Mr. Dietz</p>		
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<p>1 What I am saying is, at this state of the proceedings you 2 cannot assume that all 40 statements were false. 3 THE COURT: Because you objected. 4 MR. BATTOCCHI: And you sustained it, Your 5 Honor. 6 THE COURT: Right. And -- 7 MR. BATTOCCHI: If you have -- 8 THE COURT: I mean, it's interesting how 9 you can turn on a dime like that. Go ahead with your 10 argument. 11 MR. BATTOCCHI: If you order a new trial, 12 Your Honor, and you instruct the jury they got to make 13 specific findings, that's one thing. But all I am saying 14 is that at this point in the proceedings it is unsound to 15 assume that they found every statement defamatory. They 16 could have found only a -- some of them defamatory. 17 Turning to the evidence, Your Honor, Mr. 18 Dietz's claim that he lost business as a result of this. 19 Well, the objective evidence shows that during the two 20 years before this event his average gross revenues were 21 around \$70,000. During the two years after that they 22 jumped, so his business increased. 23 Now, it's significant to me that Mr. Dietz</p>	<p>1 went on to say there are a lot of other outside groups 2 out there who are posting a lot of damaging things about 3 me. Well, none of his evidence is tied to what Ms. Perez 4 said as opposed to what many of those outside groups 5 said. 6 And, finally, Your Honor, the jury's 7 verdict here found that Mr. Dietz made various defamatory 8 statements about Ms. Perez and that may have damaged her 9 more than it damaged him. In any event, it is another 10 fact which I think supports the conclusion that the 11 jury's verdict of no damage should be affirmed. 12 Now, Your Honor, I set this out in the 13 brief and I'll just repeat it, if we have a new trial I 14 will respectfully submit the new trial should not be on 15 damages alone. The jury should be told -- again, if the 16 Court wants to say tell us which statements are 17 defamatory, then that could be the case. But it would be 18 seriously prejudicial to my client if we had a new trial 19 on damages alone and the jury is told that all 40 of 20 these defamatory statements are false. 21 So for all of those reasons, Your Honor, I 22 respectfully submit that a motion for a new trial should 23 be denied.</p>		

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<p>1 THE COURT: Thank you, counsel. 2 (The Court confers with the Law Clerk off 3 the record.) 4 (Pause.) 5 THE COURT: One moment, please. 6 (Pause.) 7 THE COURT: When the Court is asked to 8 overturn a verdict and set a new trial, we have received 9 some guidance from the Appellate Courts. As a general 10 proposition, a Court should not disturb a verdict unless 11 the verdict is manifestly so inadequate as to show very 12 plainly that the verdict has resulted from one or two 13 causes: One, the misconduct of the jury, that does not 14 appear to be relevant to this case; or, two, the jury's 15 damages' verdict has taken into consideration improper 16 items or elements of damage or has failed to take into 17 consideration proper items or elements of damage or that 18 it has in some way misconstrued or misinterpreted the 19 facts or the law which should have guided it to a just 20 conclusion as to the amount of damages recoverable. 21 In addition, damages should be changed 22 only if they are either so excessive or so inadequate as 23 to shock the conscience and as to warrant the conclusion</p>		<p>1 removed. 2 A reservation is granted in favor of Dietz 3 Construction and Mr. Dietz to bring forward the 4 injunction again if the posts reappear. 5 In my judgment, Ms. Dietz (sic) caused 6 havoc and chaos by her malicious and untrue statements 7 that she posted about Mr. Dietz and Dietz Construction. 8 She may have felt she was justified. The jury found that 9 those statements were defamatory, 12 -- strike that -- a 10 number of her citizens found that. The Court agrees with 11 that. And none of this would have happened is Ms. Perez 12 had just posted the truth, but she posted untruths and 13 she took one little grain and conflated it into criminal 14 activity, investigation by state agencies, Better 15 Business Bureau, referring Mr. Dietz to a state agency, 16 all of which didn't happen. 17 And I think Ms. Perez should look to 18 herself as to why she did that. If you don't like Mr. 19 Dietz and you don't like his company, you don't have to, 20 but that doesn't give you the right to go online and make 21 these untrue statements. 22 If you want to chill free speech, keep it 23 up, because eventually one of these companies is going to</p>	
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<p>1 that the jury has been influenced by passion or prejudice 2 or in some way has misconceived or misinterpreted the 3 facts or the law. 4 The fact that the trial Judge would have 5 come to a different conclusion than the jury is not 6 grounds to overturn a jury verdict. 7 Under the circumstances of this case, I -- 8 my conscience is not shocked by the verdict. I'm 9 surprised by the verdict, but my conscience is not 10 shocked. And I don't think the other standards have been 11 met. 12 Therefore, the Court will deny the motion 13 to set aside the verdict and deny the motion for a new 14 trial. 15 As to the injunction, I've given it due 16 deliberation since we were here last time. In my 17 judgment, the offending posts have been taken down; 18 therefore, there is no actionable injury to be enjoined 19 at this time. The injunction, therefore, is moot and it 20 will be denied on that basis. 21 However, this is not a ruling on the 22 merits of the injunction. The injunction is denied 23 solely due to the fact that the offending posts have been</p>		<p>1 win big. Eventually one of these companies is going to 2 win big and that will be -- that will chill free speech 3 when somebody is hit with a huge monetary verdict. 4 And I was surprised that the jury came 5 back with zero. I didn't think Mr. Dietz was going to 6 get as much as he was claiming, but I thought he was 7 going to get something. But there was -- as I've said 8 previously, there was sufficient evidence for the jury to 9 come to the decision it came to. It's not the decision I 10 would have come to. 11 And I hope that Ms. Perez will learn from 12 this and understand that you cannot take a circumstance 13 that is a minus one circumstance in terms of irritating 14 or being detrimental to her and conflate it to a minus 15 ten by adding lies and untruths. That's not what these 16 companies are in business for. They want honest 17 appraisals so that the consumers can make a decision as 18 to what company they want to use. 19 But when you put on the type of defamatory 20 statements that Ms. Perez put on, you totally warp the 21 system and the purpose for which these companies allow 22 people to post comments. 23 I am encouraged that Ms. Perez took down</p>	

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1 the posts. Hopefully that will be the first step for her
2 and that she won't repeat this kind of activity in the
3 future.

4 Mr. Dietz has a right to protect himself.
5 And I find it very interesting that somebody who puts
6 this kind of untrue material on the internet is shocked
7 when there is push-back, acts like they're the victim
8 when, in fact, they started it.

9 Everything I said just now after my ruling
10 I want to be considered dicta and I do not want it in the
11 order. But every once in a while I think a Judge can
12 take a point of personal privilege to talk to a citizen
13 and that's what I'm doing here.

14 I will ask counsel for Ms. Perez to
15 prepare the order reflecting my ruling, not dicta, of
16 course. When would you like to submit that?

17 MR. BATTOCCHI: I can do it right now,
18 Your Honor. And I will tell Your Honor that those
19 postings are not going back up if I have anything to do
20 with it.

21 THE COURT: That, I do believe.

22 MR. BATTOCCHI: They are not going back
23 up.

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1 CERTIFICATE OF REPORTER
2 I, Linda M. Kia, the Stenomask Reporter
3 who was duly sworn to well and truly report the foregoing
4 proceedings, do hereby certify that they are true and
5 correct to the best of my knowledge and ability; and that
6 I have no interest in said proceedings, financial or
7 otherwise, nor through relationship with any of the
8 parties in interest or their counsel.

9 IN WITNESS WHEREOF, I have hereunto set my
10 hand this _____ day of _____, 2014.

11

12 _____
13 Linda M. Kia
Certified Verbatim Reporter

14

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1 THE COURT: That's encouraging.

2 Please prepare the order and submit it for
3 my signature.

4 Anything else on behalf of Mr. Dietz?

5 MR. BATTOCCHI: One order or two, Your
6 Honor?

7 THE COURT: I think two orders would be
8 better.

9 MR. BATTOCCHI: Thank you.

10 THE COURT: Anything else for Mr. Dietz?

11 MS. KROPF: No, Your Honor. Thank you.

12 THE COURT: All right. That concludes the
13 matter for today.

14 (Whereupon, at approximately 11:28 o'clock
15 a.m., the above-entitled hearing was concluded.)

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\$	20:21 almost (1) 5:13 alone (2) 16:15,19 Amendment (1) 10:8 amount (4) 12:9,11;13:8;17:20 Angie's (1) 7:2 appeal (1) 12:5 appear (1) 17:14 appears (1) 3:20 Appellate (1) 17:9 appraisals (1) 20:17 approximately (1) 22:14 argue (1) 13:15 argued (1) 13:6 argument (8) 3:7;6:6,9,18,19;7:1; 13:22;14:10 arguments (1) 6:17 around (1) 14:21 arrest (1) 8:7 arrested (2) 8:10,19 aside (4) 3:5,11;11:14;18:13 assume (2) 14:2,15 attributable (1) 12:3 available (1) 15:14 average (1) 14:20 awarded (1) 12:11	22:5,9 Battocchi's (1) 9:9 begin (1) 3:6 behalf (2) 3:9;22:4 benefit (1) 6:6 benefitted (1) 6:13 better (4) 6:7;9;10;19:14;22:8 big (2) 20:1,2 bit (1) 11:20 Both (3) 5:4;13:10,18 bothered (1) 13:1 Bradner (2) 4:8;11:12 Brenner (1) 15:5 brief (7) 4:3;5:13,23;11:1,13; 13:7;16:13 briefly (1) 8:5 briefs (3) 4:2;9:8,10 bring (1) 19:3 broadcaster (1) 15:22 brought (2) 4:3;10:3 Bureau (1) 19:15 business (8) 6:2;14:18,22;15:2,5, 17;19:15;20:16	caused (1) 19:5 causes (1) 17:13 challenging (1) 4:9 chance (1) 10:17 changed (1) 17:21 chaos (1) 19:6 chill (2) 19:22;20:2 circumstance (2) 20:12,13 circumstances (1) 18:7 cite (2) 5:3;7:5 citizen (1) 21:12 citizens (1) 19:10 claim (2) 12:13;14:18 claimed (1) 12:9 claiming (1) 20:6 claims (1) 13:7 clear (2) 4:8;9:7 clearly (1) 11:8 Clerk (1) 17:2 client (3) 6:11;15:23;16:18 coach (1) 10:3 comments (1) 20:22 companies (4) 19:23;20:1,16,21 company (4) 6:6;7:8;19:19;20:18 company's (2) 3:16;15:15 compensatory (2) 4:11;5:5 concluded (1) 22:15 concludes (1) 22:12 conclusion (4) 16:10;17:20,23;18:5 conducive (1) 9:6 confers (1) 17:2 conflate (1)	20:14 conflated (1) 19:13 connection (1) 15:18 conscience (3) 17:23;18:8,9 considerably (1) 12:9 consideration (2) 17:15,17 considered (3) 5:1;11:5;21:10 constituted (1) 12:6 Construction (2) 19:3,7 consumers (1) 20:17 Continue (1) 13:21 contract (4) 5:16;15:6,10,12 contracting (1) 15:7 contracts (2) 6:2,20 control (2) 7:21,23 controverted (1) 12:2 copy (1) 8:15 counsel (4) 10:19;13:11;17:1; 21:14 course (1) 21:16 Court (46) 3:2,3,4,4,18,19,21; 4:9,11,12,15;5:11;6:18; 9:5,19;10:11,19,21; 11:2,4,6,7,14;12:5,10; 13:3,11,18,21;14:3,6,8; 16:16;17:1,2,5,7,7,10; 18:12;19:10;21:21; 22:1,7,10,12 Courts (1) 17:9 Court's (1) 3:13 credible (2) 3:11;9:23 criminal (2) 10:5;19:13 criticized (1) 15:22
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