COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-1910

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HOME SECURITY OF AMERICA, INC., AND HOME SECURITY OF AMERICA INSURANCE SERVICES, INC.,

PLAINTIFFS-APPELLANTS,

V.

KARL R. WELLMAN, CHERYL L. WELLMAN, JOHN W. SNYDER, SNYDER GENERAL AGENCY, INC. AND PROFESSIONAL INSURANCE RESOURCES, LLC, A WISCONSIN LIMITED LIABILITY COMPANY D/B/A PROFESSIONAL INSURANCE RESOURCE MANAGERS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

EICH, J. Home Security of America Insurance Services, Inc., sued two former employees and an insurance-agency competitor, seeking damages for a variety of business torts. After a lengthy trial, the jury found in Home Security's favor on all of its claims and set its damages at $407,000 (plus $50,000 punitive damages against two of the individual defendants). In post-verdict proceedings, the trial court granted the defendants' motion for directed verdict on all but one of the damage questions, effectively reducing the jury's damage award to $7,000. The court's ruling was based on its determination that, while there was evidence to support the jury's findings on essentially all of the "liability" questions, Home Security had failed to prove that the defendants' actions were a cause of its losses.

And while the parties frame the issues somewhat differently, we see the central question on appeal as whether there was any evidence in the record to support a finding by the jury that the defendants' acts were a substantial factor in reducing Home Security's profits. Because our review of the record satisfies us that such evidence exists, we hold that the court erred in nullifying the jury's answers to the damage questions. We also conclude that the trial court acted properly when it set aside the jury's findings of unfair competition on the part of four of the five defendants. Finally, Home Security's arguments have not persuaded us that the punitive damage award should be reinstated. We therefore affirm in part and reverse in part.

Two of the defendants, Karl and Cheryl Wellman, are former officers and employees of Home Security, a company engaged in the business of selling errors-and-omissions insurance to realtors. In a twelve-count complaint, Home Security claimed that the Wellmans, along with a co-defendant, John Snyder, committed a variety of business torts against the company, all arising from the Wellmans' acts of leaving Home Security's employ and starting their own

competing business with Snyder. Also named as defendants were Snyder and his company, the Snyder Agency, and Professional Insurance Resources (PIR), the "new" company formed by the Wellmans and Snyder to compete with Home Security.

Several of Home Security's claims were dismissed prior to trial, and the case ultimately went to the jury on a special verdict asking: (1) whether Karl Wellman breached his fiduciary duty to Home Security by (a) failing to deal honestly and in good faith with Home Security and using his position to further his private interests, and (b) "seizing a corporate opportunity in a manner which breached his fiduciary duty" to Home Security; (2) whether Cheryl Wellman "breached her duty of good faith" to Home Security; (3) whether one or more of the individual defendants, and/or their business entities, engaged in unfair competition with Home Security; and (4) whether two or more of the individual or business defendants conspired to deprive Home Security of one of its major sources of business, known as the "Chicago Insurance" account.[1] Each of the four liability questions were accompanied by a damage question asking "what sum of damages, if any, would reasonably compensate [Home Security] for damages caused" by the described acts. There were also punitive damage questions applicable to Karl and Cheryl Wellman, limited to the unfair competition and conspiracy causes of action.

[1] While the Wellmans were still working for Home Security, the company was notified that one of the primary insurers whose policies it marketed would no longer be doing business in Wisconsin. Karl Wellman, then Home Security's vice-president, located a replacement insurer, the Chicago Insurance Company. Instead of arranging for the Chicago Insurance policies to be sold directly through Home Security, however, Wellman, working through Snyder and his company, arranged for the insurance to be acquired by Home Security through Snyder's agency, with the result that Snyder's agency—and eventually PIR—received substantial premium revenues which otherwise would have gone to Home Security.

The trial court instructed the jury that it could assess damages for Karl Wellman's breach of fiduciary duty in the form of (a) wages or salary paid by Home Security to Wellman, or to anyone working under his authority, if their "efforts [were] diverted for [Wellman]'s personal benefit"; and (b) for any "lost profits" to Home Security "result[ing] from a breach of fiduciary duty or … from unfair competition." The jury was also instructed that damages could be assessed for Cheryl Wellman's breach of her duty of good faith to the extent she was unjustly enriched by her actions. Finally the jury was told that it could assess damages against any or all of the defendants on the "unfair competition" and "conspiracy" counts—which were combined for purposes of the damage inquiry—and that these awards could also include amounts for Home Security's lost profits.

The jury answered all liability and damage questions in the affirmative. With respect to damages, the jury found that Karl Wellman's breaches of fiduciary duty caused damage to Home Security in the amount of $200,000. Next, the jury awarded Home Security $7,000 in damages for Cheryl Wellman's "breach of good faith." With respect to the unfair competition and conspiracy claims against the several defendants, the jury awarded a total of $400,000—although it indicated, in an answer to a separate question, that this sum also included the $200,000 it had previously found on the breach-of-fiduciary-duty claims against Karl Wellman. Finally, after finding that the actions of both Karl and Cheryl Wellman were "outrageous," the jury assessed punitive damages of $25,000 against each of them with respect to the unfair competition and conspiracy claims. The total verdict, then, awarded compensatory damages of $407,000, and $50,000 punitive damages, to Home Security.

The defendants filed several post-verdict motions: for judgment notwithstanding the verdict; to change answers in the verdict; and for a new trial.

In addition, the trial court had reserved its ruling on a motion for directed verdict made by the defendants at the close of Home Security's case; and it took up those motions as well in the post-verdict proceedings.

The trial court concluded that there was evidence in the record to support all of the jury's "liability" answers except those finding that the Wellmans and Snyder had engaged in unfair competition with Home Security.[2]

Turning to damages, the court, in its key ruling in the case, noting again that there was evidence of "wrongs" on the defendants' part, stated that, while "the amount of damages had been proved," Home Security had "failed to produce evidence that the specific wrongs had *caused* the damages" (emphasis in the court's). Based on that conclusion, the court granted the defendants' motion for directed verdict, which it had held in abeyance pending the jury verdict, and, as indicated, nullified the jury's answers to all damage questions other than the one awarding $7,000 damages to Home Security for Cheryl Wellman's breach of fiduciary duty. Then, because it had set aside the jury's compensatory damage awards, the court struck down the punitive damage award, citing the familiar rule that punitive damages cannot be assessed in the absence of compensatory damages. Judgment was entered accordingly, and Home Security appeals. Other facts will be discussed below.

[2] The court reasoned that Snyder was free to compete with Home Security—including contacting its clients—at all times, and that the Wellmans were equally free to do so once they left Home Security's employ. It said, however, that PIR could be found to have unfairly competed with Home Security by soliciting its clients.

I. Damages: Causation

There is a preliminary question as to the appropriate standard governing our review of the trial court's decision granting the motion for directed verdict. Defendants argue that we should treat the decision as a "finding of causation made by the trier of fact," which, they say, may not be set aside unless we deem it to be "clearly erroneous." The cases they rely on, however, were all bench trials, where the court, not the jury, was the trier of fact. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis.2d 455, 459, 267 N.W.2d 652, 655 (1978); ***WTMJ, Inc. v. Sullivan***, 204 Wis.2d 452, 459, 555 N.W.2d 140, 143 (Ct. App. 1996). Here, of course, the jury was the trier of fact. The challenged decision is not a factual finding based on the court's assessment and weighing of the evidence; it is simply the court's ruling on the defendants' claim that Home Security had not put forth sufficient evidence to take the case to the jury. And while several pre-1995 cases may have wavered on the appropriate standard to be applied in such a situation, the supreme court's decision in ***Weiss v. United Fire & Casualty Co.,*** 197 Wis.2d 365, 541 N.W.2d 753 (1995), appears to have settled the issue. Several pre-***Weiss*** cases had discussed the standard of review of a trial court's ruling on motions to dismiss, for directed verdict, and to set aside the verdict in terms of reversing only where the trial court was "clearly wrong" in so ruling. *See* our discussion in ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 783-88, 541 N.W.2d 203, 207-09 (Ct. App. 1995). In ***Weiss***, the court held that, when considering a sufficiency-of-the-evidence challenge—whether in a motion to dismiss at the close of the plaintiff's case, or a motion for directed verdict at the close of all the evidence—the test is the same: such a motion may not be granted "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is

no credible evidence to sustain a finding in favor of such party." ***Weiss***, 197 Wis.2d at 388, 541 N.W.2d at 761, quoting § 805.14(1), STATS. (1993-94). This standard, said the ***Weiss*** court, applies to "both ... the circuit court and to an appellate court on review of the trial court's determination of the motion."[3] ***Id.*** (internal quotation marks and quoted source omitted). And while we are to pay "substantial deference" to the trial court's assessment of the evidence in such circumstances, a court is, nonetheless, "clearly wrong" in taking a case from the jury "[w]hen there is *any* credible evidence to support [it], even though it be contradicted and the contradictory evidence be stronger and more convincing." ***Id.*** at 389-90, 541 N.W.2d at 761-62 (internal quotation marks and quoted source omitted).[4] Our task on this appeal, then, is to search the record for any credible evidence to sustain the jury's finding that a causal relationship existed between the defendants' acts and Home Security's damages.

The test of causation in Wisconsin is whether the defendant's conduct was a substantial factor in contributing to the result—in this case Home Security's lost profits.[5] ***Soderlund v. Alton***, 160 Wis.2d 825, 832, 467 N.W.2d 144, 147 (Ct. App. 1991). The defendant's acts need not be the sole factor, or

[3] When the ruling is made at the close of the plaintiff's case, it may not be granted "unless [the court] finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom, and that there is no credible evidence to support a verdict for the plaintiff." ***Weiss***, 197 Wis.2d at 388, 541 N.W.2d at 761 (internal quotation marks and quoted source omitted).

[4] As occurred in this case, the trial court in ***Weiss*** had granted the defendant' s motion to dismiss prior to the verdict and, in the interest of judicial economy, permitted the case to go to the jury, who found for the plaintiff. On post-verdict motions, the court, based on its earlier order, vacated the jury's answers favorable to the plaintiff, and entered judgment accordingly.

[5] The "substantial factor" test is routinely used in other business-tort cases, *see*, *e.g.*, WIS J I—CIVIL 2780, the pattern jury instruction on the tort of intentional interference with contractual relationships, and we see no reason why it should not apply here as well.

even the primary factor, only a substantial factor. ***Id.*** A defendant's conduct will be considered a substantial factor if it "had such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." ***Merco***, 84 Wis.2d at 458-59, 267 N.W.2d at 654. Central to the concept, of course, is the recognition that "[t]here may be more than one substantial causative factor in any given case." ***Id.*** at 459, 267 N.W.2d at 654-55.

Home Security's case was based largely on the testimony of Dirk Nohre, a conceded expert in the valuation and evaluation of insurance companies and agencies. Nohre testified at length at trial, and submitted a report stating that, in his opinion, the defendants' acts resulted in total lost profits of $896,165 to Home Security over a four-year period beginning with the year of the Wellmans' departure. In its decision granting defendants' motion for directed verdict, the trial court stated that, in its view, Nohre's evidence was insufficient to establish that the defendants' wrongful acts were a cause of the losses incurred by Home Security. Specifically, the court said that: (1) there was no evidence tying Nohre's loss estimates to specific customers lost to the Wellmans and PIR; and (2) Nohre's analysis centered solely on the defendants' wrongful conduct as a cause of Home Security's losses and did not consider other factors which might have contributed to the losses.[6] Defendants urge that position on appeal, citing ***Merco Distributing***

[6] The court also saw a "flaw" in Nohre's calculations because his estimates were made at a time early in the course of the lawsuit when there were twelve claims outstanding against Home Security, and failed to account for the fact that, at the time of trial, only six claims remained. The court did not explain the observation further, other than to state:

> Mr. Nohre believed the damages to be the same, regardless of whether the defendants were found to have engaged in theft of trade secrets, breach of non-compete agreement[s], fraudulent inducement of a settlement agreement, or any of the other nine claims. Since damages on several of these claims are, by law,

(continued)

Corp. v. Commercial Police Alarm Co., *supra*, and maintaining that Home Security failed to establish facts "affording a logical basis for the inference … that the loss occurred [because of their acts]." ***Id.***, 84 Wis.2d at 460-61, 267 N.W.2d at 655. Specifically, defendants contend that the trial court was correct in concluding that Home Security failed to establish "how much of its losses … were due to unlawful activity as distinct from other business factors."

Nohre began his analysis by considering Home Security's profits and losses over time, noting that its revenues had been growing rapidly until the year of the Wellmans' departure, when the trend suddenly reversed and profits began falling, quickly moving the company into a loss position. He then projected what Home Security's earnings and profits would have been had that "event" never occurred—had the Wellmans never left, taking with them Home Security customers and employees. He then compared those estimates to the earnings and profits (or losses) actually experienced by Home Security after their departure, concluding that the difference between the two figures in any given year was "the amount of damages for that particular year." Nohre testified that, in carrying out this analysis, he took into account a variety of other factors, including the normal "attrition" that occurs on a daily basis in the insurance industry—new competition entering the market, old competition leaving, fluctuations in insurance premiums and other business expenses—as well as employee turnover and a variety of other factors, including, in his words, "losses due to fair competition." He stated that

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> computed in different ways, it is clear that Mr. Nohre's assumption that it did not matter whether the jury found liability on one or twelve claims, was erroneous.

The parties do not argue one way or the other from the court's observations in this regard, and we do not consider it necessary to address the point further.

there were many such "variables" operating in the industry, and that his calculations took them all into account.

Nohre also calculated the lost profits resulting from the defendants' diversion of a significant portion of the "Chicago Insurance" premiums which otherwise would have gone to Home Security. *See* note 1, *supra*. Taking these losses, plus those he estimated as flowing from the defendants' hiring of Home Security employees and their successful solicitation of several Home Security clients, Nohre arrived at his $896,165 lost-profits estimate. According to Nohre, he "confirmed" the "trends" he saw in Home Security's profit and loss statements in those years—and tested their "reasonableness"—by gathering information from Home Security staff and considering other data made available to him. He stated that he always tried to be "conservative" in his analysis and projections, and that he was particularly conservative in estimating the assumed "growth rate" in Home Security's business for the years following the Wellmans' departure. And while defendants cross-examined Nohre on his failure to undertake a file-by-file analysis of each of Home Security's customers in estimating losses due to the defendants' diversion of Home Security clients and business, he testified that, in discussions with Home Security staff, he concluded that such an exercise would be impractical, and that he elected instead to consider the company's profit-and-loss trends and the estimates he was able to make from that information, supplemented with discussions of various individual files with Home Security staff.

We believe a reasonable jury could infer from this evidence that the defendants' acts were a substantial factor resulting in lost profits to Home Security. Defendants disagree. They first refer us to language in ***Merco***, the case relied on by the trial court, suggesting that, in situations where a given loss "could be attributed to a condition to which no liability attaches or to one for which

liability does attach," and where "there is no credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences," the matter remains in the area of speculation and conjecture, and a directed verdict is proper in such a situation. *See* ***Merco***, 84 Wis.2d at 460, 267 N.W.2d at 655. They also refer us to a Seventh Circuit case, ***Schiller & Schmidt, Inc. v. Nordisco Corp.***, 969 F.2d 410 (7th Cir. 1992), an action against a former employee (later a competitor) for misappropriation of trade secrets, where the court found a lost-profits damage award to be speculative because the plaintiff's expert witness ascribed 100% of its loss to the misappropriation, and none to the defendant's "lawful competition." ***Id.*** at 415. We do not think either case compels the result the defendants seek.

Taking ***Schiller*** first, because federal district or circuit courts have no appellate jurisdiction over state tribunals, "[s]tate courts are not bound by the decisions of the federal circuit courts of appeal or federal district courts." ***State v. Mechtel***, 176 Wis.2d 87, 95, 499 N.W.2d 662, 666 (1993). Beyond that, as we have noted above, Nohre specifically testified that, in forming his opinion, he took into account a variety of factors other than the defendants' actions in arriving at his opinion—including the effects of "lawful competition" in the insurance industry.

As for ***Merco***, that was an action in which the owner of a warehouse, who had lost property in a burglary, sued the company he had hired to maintain a burglar-alarm system on the premises, claiming that the alarm's failure to function on the night of the burglary was a cause of his loss. There was evidence that, apparently due to no one's fault, the telephone lines connecting the alarm system to the defendant's office were out of order on the night in question. The plaintiff argued, however, that the defendant was negligent in failing to notify him that it

had not received the nightly electronic signal that the alarm had been activated, and, had he been so notified, he would have learned of the phone-line outage and could have sent one of his employees to watch the warehouse that evening, possibly thwarting the burglary. The supreme court concluded that this evidence was insufficient to support an inference that the defendant's negligence was a substantial factor in causing the plaintiff's loss. It said that, while the jury might infer from the evidence that, as plaintiff argued, he could have sent a "watchman" to the warehouse who may have prevented the burglary, it could just as well conclude that, even had he done so, "the burglary might have occurred anyway," in that it "could have taken place before the … employee arrived or after the employee left." ***Merco***, 84 Wis.2d at 459-60, 267 N.W.2d at 655. The court went on to conclude that "because there is no credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences, any finding of causation would be in the realm of speculation and conjecture." ***Id.*** at 460, 267 N.W.2d at 655. As a result, said the court, "[plaintiff] failed to remove the issue of causation from the realm of speculation by establishing facts affording a logical basis for the inference which it claims, namely that the loss occurred [because defendant] failed to notify [plaintiff] that … the alarm system was not functioning." ***Id.*** at 460-61, 267 N.W.2d at 655.

The speculative nature of the evidence in ***Merco*** is apparent. The plaintiff's case was built entirely on supposition: e.g., if the plaintiff had notice of the failure of the electronic activation signal, he could have done "A," and, had he done "A," then "B" might have occurred, which, in turn, might have deterred the burglary. We are not dealing here with such a chain of factual suppositions, but with a challenge to the foundation of an expert witness's opinion. And, as we have noted, that witness explained in detail how he arrived at his loss estimate,

indicating that, contrary to the trial court's and the defendant's assumptions, he did not simply subtract the company's post-Wellman profits from its profits in the preceding years to arrive at his opinion. Rather, as he testified, he considered a variety of factors that can affect an agency's profits and losses in the normal course of business, and matched them with his estimates and projections based on Home Security's actual performance—rolling all of these factors into his opinion. Indeed, when defendants objected to the trial court's receipt of Nohre's opinion at trial, on grounds that it lacked foundation because he had not testified "what [specific] accounts were lost" as a result of their actions, the trial court overruled the objection on the basis that it went to the weight of the testimony, rather than its admission, and that it could be properly tested by cross-examination. We agree with that assessment. *See* ***In re T.L.S.***, 125 Wis.2d 399, 401-02, 373 N.W.2d 55, 56 (Ct. App. 1985), where, citing an earlier supreme court case,[7] we noted that where a party believed there was an inadequate foundation for a witness's opinion, "it was his duty to explore the defect on cross-examination."

Finally, while they don't specifically argue the point in their briefs, at oral argument, defendants' counsel claimed that the jury was required to speculate not only with respect to cause, but also as to the amount of Home Security's damage. Again, we disagree. We understand and appreciate the well-settled rule that a jury may not speculate as to damages, but we also have recognized that, in considering such an objection to a damage award, we start any such analysis by recognizing the jury's wide discretion in this area. ***Jones v. Tokhi***, 193 Wis.2d 514, 524, 535 N.W.2d 46, 50 (Ct. App. 1995). And loss of future profits, like diminution of a person's earning capacity, "necessarily is a

[7] ***Rabata v. Dohner***, 45 Wis.2d 111, 135, 172 N.W.2d 409, 421 (1969).

somewhat speculative determination." ***Id***. And the supreme court has stated with respect to the jury's consideration of lost-profits damages that, while they must be proved with reasonable certainty,

> it is not necessary that the jury should arrive at a conclusion with mathematical certainty. The rule which permits a jury to determine future profits does not require them to arrive at a determination which may be mathematically sustained. In the very nature of things such profits cannot be definitely ascertained or determined.

Reiman Assocs., Inc. v. R/A Adver., Inc., 102 Wis.2d 305, 323-24, 306 N.W.2d 292, 302 (1981). A jury may, in its discretion, conclude that damages are greater, or not as great, as that proposed by an expert witness, and we will uphold a damage verdict if it represents "a reasonable attempt to place a monetary value on the … loss [of future earning capacity], a necessarily uncertain endeavor." ***Weber v. Chicago & Northwestern Transp. Co.***, 191 Wis.2d 626, 635, 530 N.W.2d 25, 29 (Ct. App. 1995) (quoting ***Fischer v. Cleveland Punch & Shear Works Co.***, 91 Wis.2d 85, 101-02, 280 N.W.2d 280, 288 (1979)).

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded [jurors] may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.

Weber, 191 Wis.2d at 636, 530 N.W.2d at 30 (quoting ***Lavender v. Kurn***, 327 U.S. 645, 653 (1946)).[8] Finally, as the supreme court noted in ***Town of Fifield v.***

[8] In upholding the damage award, the ***Fischer*** court also stated, that "the jury could reasonably have concluded that [the] loss … was not as great as [the expert witness's] estimate," and that the jury's award was "a reasonable attempt to place a monetary value on the … loss, a necessarily uncertain endeavor." ***Fischer v. Cleveland Punch & Shear Works Co.***, 91 Wis.2d 85, 101-02, 280 N.W.2d 280, 288 (1979); *see also* ***Milwaukee Rescue Mission, Inc. v.*** (continued)

State Farm Mutual Automobile Ins. Co., 119 Wis.2d 220, 235-36, 349 N.W.2d 684, 691 (1984):

> It is enough if the evidence adduced is sufficient to enable a … jury to make a fair and reasonable approximation…. [A]ll that the litigants have any right to expect is the exercise of the [jurors'] best judgment upon the basis of the evidence presented by the parties.
>
> The jury did just that in the present case. It exercised its best judgment.

We think those observations hold true here, as well. We cannot say that, considering all of the evidence in the light most favorable to Home Security, there is no credible evidence to support a finding that the defendants' acts were a cause of the company's loss, as the term "cause" is defined in Wisconsin law.

II. Unfair Competition

Home Security also argues that the trial court erred in directing a verdict on its unfair competition claim—specifically in its conclusion that there was no evidence in the record that either Karl or Cheryl Wellman, or John Snyder or his company, the Synder Agency, engaged in unfair competition with Home Security.

In the portion of its post-verdict decision considering the issue, the court first responded to Home Security's arguments that there was evidence to establish that the Wellmans had unfairly competed with it by: (1) using Home Security's database to send a letter to Home Security clients introducing PIR as

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Redevelopment Auth., 161 Wis.2d 472, 481-90, 468 N.W.2d 663, 667-71 (1991) (jury has discretion to consider factors underlying an expert's opinion on value and to choose between competing inferences from the evidence so as to arrive at a damage figure that does not track any expert's opinion).

the agency with which they would be dealing with respect to policies obtained through Chicago Insurance; and (2) taking information from Home Security's database and installing it on their home computer. The court concluded that, not only was there no evidence to establish that these two actions damaged Home Security in any way, both of them occurred after the Wellmans had left Home Security's employ, and that they both were perfectly free to compete with Home Security after that time—"even by contacting [Home Security] customers and attempting to secure their business." Then, consistent with its unobjected-to rulings at the instruction conference, the court concluded that evidence of the Wellmans' activities while still employed by Home Security would be relevant only to the "breach-of-good-faith" questions, and that the unfair competition inquiry was limited to activities after they had left. As to Snyder and his agency, the court stated that, never having had any relationship with Home Security, Snyder was free to compete, including working with the Wellmans to set up a competing business. And, said the court, any breaches of good faith the Wellmans may have committed against Home Security could not be imputed to Snyder.

Home Security argues that the court's decision was "nonsensical" in that it had already upheld the jury's answers to other questions in the verdict finding that both Wellmans had breached their fiduciary duty to Home Security, and also had conspired with others to obtain commissions on sales of Chicago Insurance. It claims that all of its causes of action are interrelated and that the jury's answers to fiduciary-duty and conspiracy questions provides an adequate basis for sustaining its findings with respect to the unfair competition claim, and it refers to testimony detailing a variety of actions of the Wellmans during the time they were employed by Home Security that it says fills the bill in this respect. Finally, it states that, "[r]egardless of which tort labels are applied the full panoply

of conspiratorial wrongful conduct carried out by defendants to advance this self-dealing purpose was, by its very nature, 'unfair competition.'"

Defendants respond by pointing out that the trial court had ruled that evidence on the Wellmans' breaches of fiduciary duty could not be used to prove the unfair competition claim—limiting the latter to events occurring after the Wellmans had left Home Security's employ[9]—and had so instructed the jury, without objection by Home Security's counsel.

At the instruction conference, the court informed counsel that, in its view, the breach-of-fiduciary-duty question would be limited to the time Wellman was still employed by Home Security, and the unfair competition inquiry limited to his actions after his departure. The court then stated to plaintiff's attorney that he should "pass that on" to his co-counsel, to which he replied: "Okay." The jury instruction on the unfair competition question, which was sent to the jury room, limited Karl Wellman's unfair competition to the period after January 17, 1995, the date of his resignation from Home Security, and the record does not contain any objection by Home Security's counsel to that instruction—either at the instruction conference, when the court explained that it was so limiting the jury's inquiry on the subject, or after the instruction was read to the jury.[10] Failure to

[9] The ruling would, of course, also relate to the conspiracy inquiry, which was limited to the Wellmans' and Snyder's activities with respect to the Chicago Insurance account—all occurring while the Wellmans were still in Home Security's employ.

[10] At the instruction conference, defendants' counsel asked the court: "Could I request … at the top of the unfair competition instruction, … put Karl Wellman after January 17, 1995, in parentheses?" The court then stated: "I don't have a problem with that; do you, Mr. Palmersheim [Home Security's counsel]?" Home Security's counsel raised no objection, stating only: "Where are we talking?", and moved on to another subject. Then, after reading the instructions to the jury, the court asked Home Security's counsel whether he "h[ad] anything for the record," to which he replied: "No."

object to a jury instruction or special verdict question, of course, waives the issue in any appeal. *See* § 805.13(3), STATS.; *see also* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Home Security has not persuaded us that the trial court erred in directing a verdict in favor of the Wellmans and Snyder[11] on the unfair competition question.

III. Punitive Damages

The special verdict asked whether the actions of Karl and Cheryl Wellman, either or both, were "outrageous"—but only with respect to Home Security's claims for unfair competition and conspiracy to obtain the Chicago Insurance business.[12] The jury answered the question in the affirmative with respect to both Karl and Cheryl and assessed $25,000 punitive damages against each of them. In its lengthy decision on the post-verdict motions, the trial court devoted only a few lines to the issue, stating that, because punitive damages cannot be awarded in the absence of compensatory damages, and since it had set aside the jury's affirmative answers to the unfair competition and conspiracy claims as to the Wellmans, the punitive damage answers must also be nullified. *See*, *e.g.*, ***Weiss***, 197 Wis.2d at 393, 541 N.W.2d at 763 (Wisconsin law does not

[11] Home Security's argument refers to Snyder only indirectly in the course of its argument with respect to Karl Wellman (that he set up a competing company with Snyder while he was still employed by Home Security), and refers to Snyder's agency not at all.

[12] Special Verdict question 10 asked: "If you answered 'yes' in regard to Karl Wellman and/or Cheryl Wellman *in answer [to] number 7 or 8,* then as to them were their actions outrageous" (emphasis added)? Question 7 asked whether one or more of the defendants "engage[d] in unfair competition with [Home Security]"; and question no. 8 asked whether two or more of the defendants "conspire[d] to obtain an exclusive contract whereby all … insurance policies ... underwritten by Chicago Insurance Company had to be sold though defendants." As indicated, the trial court voided the jury's affirmative answers to question 7 with respect to the Wellmans, and we have affirmed that ruling.

allow punitive damages to be awarded in the absence of an award of actual damages).

While affirming the court's nullification of the jury's finding of liability on the part of the Wellmans on the unfair competition claim, we have upheld the finding of liability with respect to the conspiracy claim. The question is thus whether there is any evidence in the record to support the jury's finding that the Wellmans' conduct with respect to the conspiracy claim was "outrageous"—in the words of the jury instruction, that is, whether either or both of them acted "either maliciously or in wanton, willful, or reckless disregard of [Home Security's] rights." WIS J I—CIVIL 1707.[13]

Home Security's argument on punitive damages is limited to the Wellmans' breach of their duty of good faith—which was covered by the opening questions—numbers 1, 3 and 5. As indicated above, however, the jury was asked only to determine "outrageousness"—and thus Home Security's possible entitlement to punitive damages—only with respect to the special-verdict questions 7 and 8 dealing with their alleged unfair competition and with their participation in a conspiracy to obtain the Chicago Insurance business. We have, of course, upheld the trial court's nullification of the jury's answer with respect to

[13] The instruction goes on to state that:

> Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury.

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the unfair competition claim, leaving only the claim that the defendants conspired to deprive Home Security of the Chicago Insurance premiums as a possible basis for any punitive damage award. In its eleven pages of argument on the issue, Home Security never mentions the Chicago Insurance claim; and that is the only (viable) claim encompassed in the punitive damage questions.

Having agreed to so limit the punitive damages inquiry, we do not see how Home Security can argue entitlement to an award of punitive damages based on facts relevant only to a separate and distinct question. In the absence of any argument on the merits of its claim for punitive damages against the Wellmans with respect to the Chicago Insurance conspiracy claim, we see no basis on which to overturn the trial court's order in this respect.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order insofar as it granted a directed verdict with respect to the punitive damage questions, although we necessarily do so for reasons other than those specified in the court's decision. *See* ***State v. Heimermann***, 205 Wis.2d 376, 386, 556 N.W.2d 756, 760 (Ct. App. 1996) (we will affirm the trial court if its decision was right, although for the wrong reason). We also affirm the court's nullification of four of the jury's five answers to the "unfair competition" question, allowing the verdict on that question to stand only with respect to Professional Insurance Resources, LLC. Finally, we reverse the order insofar as it granted a directed verdict with respect to the remaining "liability" questions (nos. 1, 3, 5 and 8).

We therefore remand with instructions for the court to enter judgment in accordance with this decision: against Karl Wellman, on question No. 1, in the sum of $100,000; against Karl Wellman, on question No. 2, in the sum of

$100,000; against Cheryl Wellman, on question No. 6, in the sum of $7,000; and, against the appropriate defendants, on question Nos. 7 and 8, in the sum of $200,000; and for such other proceedings as may be consistent with this opinion.

By the Court.–Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.