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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001160-MR

BLUE SKY INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-000871

MILLERS LANE CENTER, LLC;
MILLERS LANE SHREDDING AND
RECYCLING, INC.; MARK S. BREWER;
CHRIS HARR; HAROLD HARR; AND
ESTATE OF HAROLD HARR APPELLEES

AND NO. 2018-CA-001205-MR

CHRISTOPHER HARR, INDIVIDUALLY;
AND CHRISTOPHER HARR, PERSONAL
REPRESENTATIVE OF
THE ESTATE OF HAROLD W. HARR CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-000871

BLUE SKY INC.;
MARKET STREET PROPERTIES;
DAVID MINNIEAR;
MILLERS LANE CENTER, LLC;
MILLERS LANE SHREDDING AND
RECYCLING, INC.; AND
MARK S. BREWER CROSS-APPELLEES

AND NO. 2018-CA-001217-MR

MILLERS LANE CENTER, LLC;
MARK BREWER; AND MILLERS LANE
SHREDDING AND RECYCLING, INC. CROSS-APPELLANTS

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BLUE SKY INC.;
CHRISTOPHER HARR, INDIVIDUALLY; AND
ESTATE OF HAROLD W. HARR, BY AND THROUGH
ITS PERSONAL REPRESENTATIVE,
CHRISTOPHER HARR CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: This case stems from a $1,600,000 jury verdict for Plaintiff/Appellant, Blue Sky Inc. ("Blue Sky"), on the claims of conversion, tortious interference with contractual relations, and tortious interference with prospective contractual relations. The jury also found for Defendant/Appellee, Millers Lane Center, LLC ("MLC"), on its counterclaims for breach of contract and breach of promissory note, awarding damages of $21,593.34.

For the direct appeal, Blue Sky argues the trial court erred in dismissing its punitive damages claim against Defendants and the case should be remanded for a limited retrial on punitive damages alone. Defendants respond that the trial court properly granted their directed verdict motion and raise several issues regarding a retrial of the punitive damages claim.

For the cross-appeals, Defendants, who were represented by the same counsel in the underlying action, divided into two groups of Appellees/Cross-Appellants and filed separate cross-appeals. The first group consists of Christopher Harr ("Chris Harr") and the Estate of Harold Harr (collectively, the "Harr Defendants"). The second group consists of Mark Brewer, MLC, and Millers Lane Shredding and Recycling, Inc. ("MLS&R") (collectively, "Millers Lane Defendants"). Both groups appeal the trial court's denial of their motion for directed verdict and judgment notwithstanding the verdict (JNOV) on Blue Sky's claims of conversion, tortious interference with contractual relations, and tortious

interference with prospective contractual relations.[1] Both groups also appeal the issue of Blue Sky's mitigation of damages. In addition, the Harr Defendants appeal the trial court's admission of certain evidence from Harold Harr's deposition, while the Millers Lane Defendants request palpable error review for the omission of apportionment in the jury instructions and also appeal the trial court's inclusion of MLS&R in the conversion instruction because it did not exist when the alleged conversion occurred.

After a careful review of the record, we conclude that the trial court erred in dismissing Blue Sky's claim for punitive damages by directed verdict and affirm the remaining issues for the reasons stated below.

BACKGROUND

Blue Sky was a recycling and shredding business owned by Dawn Minniear. Her husband, David Minniear,[2] was not an owner but oversaw most of Blue Sky's operations. Blue Sky serviced various customers, such as Churchill

[1] The judgment on jury verdict states the jury was instructed on "tortious interference with contractual relations" and "tortious interference with prospective contractual relations." Appellees/Cross-Appellants refer to these two torts as "tortious interference with contract" and "tortious interference with prospective business advantage." These two causes of action go by many other names as well, such as business relations, business relationships, and business expectancy. For purposes of this opinion, we will identify the two torts as the trial court did below.

[2] David Minniear was a Plaintiff in the underlying action along with Blue Sky. He is not a party to the direct appeal or to the Millers Lane Defendants' cross-appeal. However, he is a party to the Harr Defendants' cross-appeal.

Downs, Papa Johns, and United Parcel Service. Blue Sky alleged it was the largest paper recycler in Louisville in 2013, grossing almost $900,000.

To operate its business, Blue Sky rented a 27,000 square foot building from MLC. The two-page rental agreement between MLC and Blue Sky, dated June 12, 2013, was for a five-year term. Before moving in, MLC modified the building to accommodate Blue Sky's office and its shredding and recycling operations. MLC's managers were Harold Harr and Mark Brewer. The other individual Defendant is Chris Harr, who is Harold Harr's son and helped with his father's businesses.

In 2014, Blue Sky fell behind in its rent payments to MLC. Apparently, the market for recyclable materials dropped and Blue Sky suffered revenue loss making it difficult for them to pay their rent.

In September 2014, with Blue Sky being three months behind in rent, MLC allegedly made plans to take over Blue Sky's assets and operations along with Thomas Fields. Fields, a former partner/owner in Blue Sky,[3] left Blue Sky under a non-compete agreement and received a weekly buyout payment from Blue Sky for his interest in the company. At some point, Fields notified MLC that Blue Sky defaulted on its promissory note to him, which was secured by a lien. To satisfy his lien, Fields planned on selling Blue Sky's equipment and property. In a

[3] Fields was not a party in the underlying action.

November 4, 2014 email, attorneys for Fields and MLC discussed plans for Fields and MLC to take over and operate Blue Sky's business once MLC locked Blue Sky out of the premises. Apparently, this email was not produced in discovery and Blue Sky only learned of it when it was inadvertently attached to one of MLC's proposed trial exhibits.

Meanwhile, in October 2014, to guarantee Blue Sky's past due rent from July through October, David Minniear made a personal promissory note to MLC for $26,060 to be paid by January 1, 2015, which he gave to Chris Harr. The Millers Lane Defendants contend that David Minniear was told the promissory note meant nothing if Blue Sky did not pay its November rent on time, while David Minniear and Blue Sky thought the promissory note meant Blue Sky was "all caught up." When November's rent check was due, David Minniear tendered a rent check, dated November 7, 2014, for $4,500. Although MLC claimed Blue Sky's rent was $6,000, Blue Sky claimed the parties agreed to a rent reduction to $4,500. Regardless, Mark Brewer testified that when he tried to deposit the November rent check, the check was returned for nonsufficient funds by the bank.

Around this time, although the parties dispute the exact dates, Chris Harr sent a notice to Blue Sky that it was in default of its rental agreement. The notice stated MLC had lien rights and would auction off Blue Sky's property unless it paid $38,280 to MLC within fourteen days. On November 10, 2014,

before the fourteen days had expired and, according to Blue Sky, before it received the default notice, Chris Harr locked Blue Sky out of its office and operations. MLC asserted it could take these actions pursuant to Kentucky Revised Statutes (KRS) 359.220,[4] which is a statute governing self-contained storage units. MLC noted that its rental agreement with Blue Sky contained a section entitled "LIEN," which provided that, pursuant to KRS 359.220, MLC shall have a lien on all personal property stored within the leased space and the property may be sold to satisfy the lien if the customer is in default.

Blue Sky hired attorney Robert Imperial and tried to reach an agreement with MLC to cure the default. Imperial testified that he negotiated a forbearance agreement with MLC's attorney, but Harold Harr refused to sign off on it.

MLC then placed a notice in the *Louisville Defender* newspaper for November 20, 2014, which stated it would be selling the contents of Blue Sky's

[4] KRS 359.220 states:

> (1) The operator of a self-service storage facility or self-contained storage unit shall have a lien on all personal property stored within each leased space for rent, labor, or other charges, and for expenses reasonably incurred in its sale, as provided in KRS 359.200 to 359.250.
>
> (2) The rental agreement shall contain a statement, in bold type, advising the occupant:
>
> (a) Of the existence of the lien; and
>
> (b) That property stored in the leased space may be sold to satisfy the lien if the occupant is in default.

building on November 24, 2014. At trial, Blue Sky contended the notice was deficient because it was required to be placed in the *Courier-Journal*, as the paper of record for legal notices and, therefore, MLC did not follow the proper notice procedures. Blue Sky also argued it had not rented a "storage unit" governed by KRS 359.220 and, even if the leased building was a "storage unit," MLC also seized Blue Sky's trucks, which were parked outside, not inside, of the building. Harold Harr and Chris Harr later admitted that the building leased to Blue Sky was not a self-storage unit. Regardless, in November 2014, MLC relied on this rental agreement for its actions in locking out Blue Sky and conducting an auction of Blue Sky's property.

At the November 24, 2014 auction, Imperial attended on behalf of Blue Sky, while David Minniear waited outside. Imperial testified that the auction was not a traditional auction, as it was unclear what was being sold, to whom, or for what amount. Imperial also testified that Harold Harr tried to speak with him, but he told Harold Harr he was uncomfortable speaking with him outside the presence of MLC's attorney. Chris Harr called MLC's attorney for Imperial to speak with him. After this, Harold Harr went into a "profanity-laced tirade," according to the Millers Lane Defendants, and told Imperial that he and Wendy Reisert (a Blue Sky employee) could take Blue Sky's business and run it better. Harold Harr also stated that he already contacted Blue Sky's customers and

vendors. Harold Harr then challenged Imperial to a fistfight and bragged that he has had guns pointed at him before. As for the auction, in his deposition, Chris Harr testified that he conducted the auction of Blue Sky's property and, because no bids were received, MLC owned everything. At trial, however, Chris Harr testified that he exchanged one dollar with another MLC owner for Blue Sky's property. Regardless, MLC claimed it owned the assets of Blue Sky after the auction.

Shortly thereafter, MLC formed MLS&R, which used Blue Sky's equipment to operate its own shredding and recycling business. MLS&R also hired many of Blue Sky's employees to conduct the business. Furthermore, MLS&R called on Blue Sky's customers, and billed and took payments as Blue Sky. Although David Minniear tried to keep some of Blue Sky's customers, MLS&R largely took over Blue Sky's contracts and accounts. When Blue Sky requested that its accounting and business records be returned so it could invoice customers and prepare its tax returns, David Minniear was told the records had been shredded at the direction of Harold Harr.

Blue Sky and David Minniear filed the underlying action on February 23, 2015, asserting various claims. MLC filed counterclaims asserting breach of the rental agreement and breach of the promissory note.

The matter proceeded to a jury trial in April 2018. At the close of proof, the trial court granted various motions, including Defendants' directed

verdict motion as to punitive damages. After deliberations, the jury returned a verdict for Blue Sky on conversion, tortious interference with contractual relations, and tortious interference with prospective contractual relations, awarding $900,000, $350,000, and $350,000, respectively. The damages were awarded against all Defendants[5] for the aggregate amount of $1,600,000. The jury also returned a verdict against Blue Sky for breach of contract and against David Minniear for default on the promissory note, in the amount of $21,593.34. The trial court entered judgment for Blue Sky for $1,578,406.66, which was $1.6 million minus MLC's award. Defendants' motion for JNOV or for a new trial, pursuant to Kentucky Rules of Civil Procedure (CR) 50.02 and 59.01, was denied by the trial court. This appeal followed.

ANALYSIS

"A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (citation omitted). Upon such motion, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *Id*. Moreover, the court should favor the non-moving party with all inferences which may be drawn from the evidence. *Id.* Once completing

[5] At the time, Harold Harr was alive and a Defendant.

this review, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *Id.* (quoting *Nugent v. Nugent's Ex'r*, 281 Ky. 263, 135 S.W.2d 877, 883 (1940)). If the answer is yes, we must affirm the trial court's order granting directed verdict. *Id.* Further, a reviewing court cannot substitute its judgment for that of the trial court on a directed verdict or JNOV unless the trial court's decision is clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

I. Blue Sky's direct appeal on punitive damages claim

Blue Sky argues the trial court erred in dismissing its punitive damages claim because Defendants' actions and statements in this case were sufficient to demonstrate malice or reckless indifference warranting punitive damages. Blue Sky highlights various evidence to justify punitive damages, including Defendants' failure to comply with procedures for renters, including disregard for the notice and publication requirements for an auction; Defendants' plan to take over Blue Sky's business before it was even in default; Defendants conspiring with Blue Sky's employees who were under non-compete and confidentiality agreements, as well as Blue Sky's vendors, to take over the business before it was even sold; Defendants shredding Blue Sky's employees'

non-compete and confidentiality agreements; and Defendants blocking Blue Sky's access to its accounting records.

The Harr Defendants, on the other hand, claim enforcing a valid lien, however improperly done, is not a basis for punitive damages. They argue Blue Sky was in default, so MLC had a legitimate business purpose in declaring default, denying Blue Sky access to the premises, asserting a lien, and selling Blue Sky's property to satisfy that lien. Moreover, they argue that creating a competing business is not malicious conduct but a legitimate business goal.

Based on a review of the record, after directed verdict motions were heard, the trial court orally held the evidence was insufficient to warrant punitive damages. The trial court noted that, even though Defendants went beyond "self-help" in evicting Blue Sky, they were justified in their actions because Blue Sky owed back rent.[6] The trial court also held that punitive damages are not recoverable in a contract action.

We agree that, pursuant to KRS 411.184(4), punitive damages are not recoverable in breach of contract actions. However, this was not a strict contract action. Blue Sky's claims included conversion, tortious interference with contractual relations, and tortious interference with prospective contractual

[6] Pursuant to KRS 355.9-503, a secured party may carry out self-help repossession when a debtor is in default if there is no breach of the peace. In this case, MLC initially alleged, and the rental agreement provided, that KRS 359.220 governing self-storage units applied.

relations. As Blue Sky argued, punitive damages are frequently linked with conversion claims when a defendant's conduct is malicious. Thus, we must determine whether the trial court's dismissal of Blue Sky's punitive damages claim on directed verdict was clearly erroneous given the evidence in this case.

"Punitive damages existed at common law, and have been part of the fabric of Anglo-American and Kentucky jurisprudence for centuries." *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 337 (Ky. 2014) (footnote omitted). "Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974) (quoting Prosser, *Law of Torts* 4th Ed. § 2). "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others." *Nissan Motor Co., Ltd. v. Maddox*, 486 S.W.3d 838, 840 (Ky. 2015) (quoting *Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56, 59 (Ky. 2013)).

Punitive damages are not automatically tied to specific torts, like conversion or tortious interference. "This is because the misconduct involved cuts across the spectrum of tort litigation, rather than being restricted to one type of tort, or one type of injury." *Fowler v. Mantooth*, 683 S.W.2d 250, 252 (Ky. 1984).

"The threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort." *Id.* The "something more" is "conscious wrongdoing" or malice. *Id.* "Malice may be implied from outrageous conduct, and need not be expressed so long as the conduct is sufficient to evidence conscious wrongdoing." *Id.* Additionally, in considering punitive damages, our Supreme Court has recognized that "[a] person is presumed to intend the logical and probable consequences of his conduct[.]" *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 871 (Ky. 2016) (quoting *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997)).

Here, the evidence supported a conclusion that Defendants intended to take over Blue Sky's business and worked behind Blue Sky's back to take its assets, employees, and customers to not only satisfy its lien but to convert the shredding and recycling business for its own benefit. Harold Harr's statements to Imperial at the auction – that he already contacted Blue Sky's customers and vendors and that he and Wendy Reisart, a Blue Sky employee, could run the business better – proved this was Defendants' intent and that Defendants already set the plans in motion. Moreover, Imperial's testimony regarding the irregular nature of the auction, coupled with Chris Harr's testimony that he bought Blue Sky's assets for one dollar, is further evidence of Defendants' intent to take over Blue Sky's business rather than satisfy MLC's lien. Also, Defendants' decision to

lock out Blue Sky and form MLS&R in light of Fields' notice that he was going to sell Blue Sky's assets to satisfy his lien evidences conscious wrongdoing. The loss of Blue Sky's contractual relations and prospective contractual relations was the logical and probable consequence of Defendants' actions.

It is well-established that punitive damages may be recovered in an action for conversion if the defendant's conduct is sufficiently egregious. *Hensley*, 508 S.W.2d at 762. To recover punitive damages, there must be a finding that the defendant acted with malice, whether actual or implied. Implied malice is conscious wrongdoing. *Fowler*, 683 S.W.2d at 252. In addition, conduct that occurs after the conversion may be relevant in determining if punitive damages are warranted. *See* Proof of Landlord's Conversion of Tenant's Personal Property, 90 Am. Jur. Proof of Facts 3d 341.

In its brief, Blue Sky cites conversion cases in which Kentucky courts have allowed punitive damages. For instance, in *Motors Insurance Corporation v. Singleton*, 677 S.W.2d 309, 315 (Ky. App. 1984), a panel of this Court held that an insurance company's flagrant behavior in converting an owner's car deserved the sting of punitive damages. Likewise, in *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 905 (Ky. 2008) (footnote omitted), another conversion case involving a car, the Kentucky Supreme Court held that "punitive damages may be awarded for conversion if the defendant's conduct is especially reprehensible." Finally, in *First*

and Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 142 (Ky. App. 1988), a conversion action involving a bank's repossession of a boat, a panel of this Court held that "a question of fact existed with regard to whether the Bank's conduct in the repossession implied malice." In affirming plaintiff's punitive damages claim, the Court held that the Bank's decision to repossess plaintiff's boat after plaintiff stated he was going inside to call his lawyer could be found "by a reasonable man to show malice." *Id.*

Similarly, a question of fact exists regarding whether Defendants' conduct in converting Blue Sky's assets implied malice and deserves the sting of punitive damages. Defendants' decision to proceed with the auction after Blue Sky (through David Minniear) tendered a promissory note to pay for the rent arrearage and after Imperial tried to cure the default could be found by a reasonable person to show malice, especially when coupled with Harold Harr's statements that he already set plans in motion to take over Blue Sky's business. While Defendants argue they had a legitimate business purpose in selling Blue Sky's assets and creating a competing business, Blue Sky disputed those motives. Therefore, we conclude there was sufficient evidence to present the issue of punitive damages to the jury and the trial court erred in dismissing this claim by directed verdict.

The Millers Lane Defendants' individual arguments regarding punitive damages

The Millers Lane Defendants do not disagree that punitive damages may be available in this case. Instead, they argue each Defendant's conduct must be examined individually and, as to them, the trial court correctly ruled punitive damages were not warranted. They also argue that: (1) Mark Brewer should have been immune from liability, pursuant to KRS 275.150,[7] because he was a member of MLC; (2) MLS&R cannot be liable for Chris Harr's actions, even if they were reckless, because he was not a member of MLS&R; and (3) MLC cannot be liable if its member, Mark Brewer, is also liable.

These arguments are premature and not ripe for adjudication before this Court. *See McDaniel v. Commonwealth*, 495 S.W.3d 115, 128 (Ky. 2016). As stated, the trial court dismissed Blue Sky's punitive damages claim against all Defendants based on a lack of malice and because punitive damages are not available in a contract action. Having reached that conclusion, the trial court did not need to decide the foregoing issues relating to the individual Defendants. On remand, Defendants may raise these defenses and, after hearing the evidence, the trial court may decide those issues.

[7] KRS 275.150 is the statute that establishes when a member of an LLC may be personally liable.

The Harr Defendants' individual arguments regarding punitive damages

We next turn to the Harr Defendants' argument that punitive damages are a moot issue because Harold Harr died shortly after trial, on April 29, 2018, and, pursuant to KRS 411.184(2), punitive damages cannot be awarded against an estate for torts committed by a decedent.[8] This case presents an unusual situation where Defendant was alive at the time of trial but died after the premature dismissal of a punitive damages claim.

In *Stewart v. Estate of Cooper*, 102 S.W.3d 913, 916 (Ky. 2003), plaintiffs/appellants sued James Cooper for injuries he caused to them while driving under the influence. Cooper died before trial and his estate was substituted as a party defendant. The trial court dismissed plaintiffs' punitive damages claim concluding that KRS 411.184 does not permit punitive damages to be recovered against a party who did not engage in the wrongful conduct. The Court reasoned that Cooper, not his estate, drove under the influence. Because his estate was the only defendant remaining, it could not have acted toward plaintiffs with fraud, oppression, malice, or gross negligence.

[8] To put Harold Harr's date of death in perspective, we note that trial concluded on April 18, 2018. The trial court entered the final judgment on May 17, 2018. Blue Sky moved to substitute the Estate of Harold Harr as a Defendant on June 14, 2018, which the trial court granted on June 20, 2018. The trial court denied Defendants' motion for JNOV or a new trial on July 26, 2018, and Blue Sky filed its notice of appeal on July 31, 2018.

In this case, Harold Harr died *after* trial. If the punitive damages claim had been presented to the jury and resulted in a verdict against him, then his Estate would be liable for that judgment. However, as discussed, the trial court erroneously dismissed Blue Sky's punitive damages claim against Defendants. So, Harold Harr's liability for punitive damages has never arisen.

Notably, the *Stewart* case contained a dissenting opinion by Justices Wintersheimer and Stumbo who concluded that KRS 411.184, when read as a whole, does not prohibit the award of punitive damages against a decedent's estate. *Id.* at 916-18. The dissent reasoned that, while KRS 411.184(2) only allows a plaintiff to recover punitive damages "upon proving . . . that *the defendant from whom such damages are sought* acted toward the plaintiff with oppression, fraud or malice[,]" KRS 411.184(1)(f) defines "punitive damages" as an award "against a person to punish and to discourage him *and others* from similar conduct in the future." (Emphasis added.) Thus, according to the dissent, punitive damages could lie against an estate to discourage "others" from similar conduct. *Id.* at 917.

Unless the Kentucky Supreme Court decides to revisit *Stewart*, however, we agree that punitive damages cannot be recovered against the Estate of Harold Harr. Therefore, on remand, Blue Sky's punitive damages claim against the Estate of Harold Harr should be dismissed.

For the new trial on punitive damages, Blue Sky argues that, even though Harold Harr died after trial, punitive damages can be assessed against his companies, MLC and MLS&R, for vicarious liability. We agree. If Blue Sky can prove that Harold Harr was grossly negligent and that his principal or employer companies authorized, ratified, or should have anticipated his gross negligence, then MLC and MLS&R may be liable for punitive damages on a vicarious liability theory. *See* KRS 411.184(3); *see also Berrier v. Bizer*, 57 S.W.3d 271, 283 (Ky. 2001).

For their final argument regarding punitive damages, the Harr Defendants claim that, because we have concluded that Blue Sky was erroneously deprived of its punitive damages claim, they are entitled to a retrial of all of Blue Sky's claims and not a limited trial on punitive damages alone. We disagree. Pursuant to *MV Transportation, Inc.*, 433 S.W.3d at 339, a limited trial on punitive damages alone is proper.

> The jury deciding the punitive damage claim will not decide any of the same questions decided by the jury in the first trial. The general liability question decided by the jury in the first trial will not be addressed by the jury that decides whether MV's conduct warrants punitive damages. Whatever the next jury decides about punitive damages will not be in conflict with any verdict determined in the first trial.

Id. at 340. We also disagree with the Harr Defendants' complaint that, if the jury at the first trial had the option of awarding punitive damages, it may have awarded

a lesser amount in compensatory damages and, thus, a retrial on all issues is required. As support, they claim this case is distinguishable from *MV Transportation, Inc.* because they are disputing the jury's award of compensatory damages as excessive, whereas the defendants in *MV Transportation, Inc.* did not. While we acknowledge Defendants are disputing the amount of damages, they have not complained that the jury violated its duty and failed to follow the trial court's instructions by "padding" the compensatory damages as a "de facto" punitive award. *See id.* As the Court concluded in *MV Transportation, Inc.*, we have no reason to believe the jury violated its duty in this case by inflating the compensatory damages award and we will not speculate that it did.

Although it may be inconvenient and expensive, much of the evidence at trial may need to be presented again upon remand for the punitive damages trial. However, a complete retrial on all issues would not alleviate any of that inconvenience or expense. *Id.* at 341. Accordingly, on remand, the only issue for the jury to decide will be the punitive damages claim.

II. Cross-Appeals (Nos. 2018-CA-001205 and 2018-CA-001217)

A. Claims for conversion and tortious interference

For their first alleged error, Defendants argue the trial court erred by denying their motions for directed verdict and JNOV on Blue Sky's claims for conversion, tortious interference with contractual relations, and tortious

interference with prospective contractual relations. As discussed, Blue Sky presented sufficient evidence to prove its conversion claim against Defendants, as well as sufficient evidence to warrant a punitive damages instruction. Accordingly, we conclude that the trial court did not err in denying Defendants' motion for directed verdict or JNOV on the conversion claim and turn our attention to the tortious interference claims. We will then address Defendants' arguments regarding the amount of damages awarded for the three claims.

In *Hornung, supra,* the Kentucky Supreme Court recognized that "contractual relations or prospective contractual relations are protected from improper interference." *Hornung*, 754 S.W.2d at 857. To determine whether the interference is improper, the trial court should consider "the interfering party's motive, the interest that party sought to promote or protect, the means of interference, and whether or not malice was shown." *Id.* at 858. Thus, to prevail, "a party seeking recovery must show malice or some significantly wrongful conduct." *Id.* at 859. Notably, a party can act with malice in the absence of "ill will"; indeed, "malice may be inferred in an interference action by proof of lack of justification." *Id.* (citations omitted).

In the *Hornung* case, a television network had a contract with the National Collegiate Athletic Association (NCAA) to broadcast a series of college football games. *Id.* at 856. The contract gave the NCAA the right to approve or

disapprove any announcer used on the broadcast. *Id.* The network submitted Paul Hornung's name, but the NCAA did not approve him. *Id.* at 856-57. Subsequently, Hornung sued the NCAA for intentional interference with a prospective contractual relation. *Id.* at 855. In overturning a jury verdict for Hornung, the Kentucky Supreme Court recognized that the NCAA was entitled to exercise its approval right in good faith, even if doing so was to the detriment of Hornung's prospective contractual relation with the network. *Id.* at 859-60.

Here, Blue Sky did not allege that Defendants' decision to lock it out of the leased premises was improper interference. The problem, as alleged by Blue Sky, was that Defendants used the lien provision in the rental agreement for an improper purpose – to take over Blue Sky's employees, vendors, and customers, and form its own shredding and recycling business even after Blue Sky tried to cure the default. These allegations distinguish this case from *Hornung*. The fact that Defendants had the right to assert a lien under the rental agreement with Blue Sky does not justify its wrongful actions in auctioning Blue Sky's assets for one dollar and taking over Blue Sky's business. Similarly, the jury's finding that Blue Sky breached its rental agreement with MLC does not prove Defendants were justified in their actions.

Defendants also argue their conduct was justified because they formed MLS&R, a competing shredding and recycling business. They argue competition is a legitimate motive for interfering with a plaintiff's business.

In competition situations, the Restatement (Second) of Torts §768 provides that a defendant's conduct in causing a third party not to enter into a prospective contractual relation with a third person is not improper, provided that four factors are present: (a) the relation concerns a matter involved in the competition between the actor-defendant and the plaintiff; (b) the actor does not employ wrongful means; (c) the actor's conduct does not create or continue an unlawful restraint of trade; and (d) the actor's purpose is at least in part to advance his interest in competing with the plaintiff. *See* 103 Am. Jur. Proof of Facts 3d 275 (originally published in 2008). Overall, Restatement §768 makes clear that "competition is not an improper basis for interference." *Id.* § 768, cmt. (a). While the Kentucky Supreme Court has not considered whether to apply Restatement §768 in cases involving competitors, the Sixth Circuit and district courts within it have held that Kentucky law would look to Restatement §768 in cases between competitors. *See Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 309 (6th Cir. 2011) (collecting cases).

Here, MLS&R was not originally a competitor of Blue Sky when Defendants allegedly devised the plan to take over Blue Sky's business.

Defendants established MLS&R to complete the plan to take over Blue Sky's operations and operate the business as their own, which violated subsections (a), (b), and (c) of Restatement §768. Once the ownership and control of those assets passed to MLS&R, the intent to participate in the tortious conduct can also be inferred to the company.

While competition may be a proper basis for interfering with contractual relations or prospective contractual relations, Defendants fail to meet the four factors of Restatement §768. Defendants hired most of Blue Sky's employees, knowing most of them were covered by non-compete and non-disclosure agreements. Also, Blue Sky presented evidence that Defendants called its customers and surreptitiously took over Blue Sky's accounts without the customers even knowing. They even billed and took payments in Blue Sky's name. Here, establishing MLS&R as a competitive business did not justify Defendants' interference with Blue Sky's business.

Based on the record, we conclude that the trial court did not err in allowing the jury to decide the tortious interference claims. Blue Sky introduced evidence about its customers and vendors and explained how Defendants interfered with its business and prospective business. The trial court's decision to deny Defendants' motion for directed verdict and JNOV on the tortious interference claims was not clearly erroneous.

Defendants next argue that the trial court erred in denying their motion for JNOV or for a new trial because the jury's damages award was not supported by the evidence. They claim no expert witness testified regarding the value of Blue Sky's business, no customers testified regarding their contractual relations with Blue Sky, and they question the jury awarding identical damages for the two tortious interference claims. In addition, Defendants argue the $900,000 conversion award was excessive because Blue Sky's itemization of damages for "equipment and inventory" was "not to exceed $400,000" and Blue Sky should be bound by that number. They further argue that Blue Sky improperly included the value of leased conveyors and shredders in its compilation of damages. Finally, the Millers Lane Defendants argue the jury awarded a large amount of money because the jury was prejudiced by Harold Harr's arrogance and Chris Harr's incompetence.

In response, Blue Sky argues the jury's award was consistent with the trial court's "not to exceed" amount in the instructions and, in fact, the damages were $600,000 less than Blue Sky requested.[9] Blue Sky further claims that, under *Nami Resources Co., L.L.C. v. Asher Land & Mineral, Ltd.*, 554 S.W.3d 323, 338

[9] None of the parties provides a citation to the record for the jury instructions and, based on this Court's review, it appears the jury instructions were not made part of the record on appeal. "[W]hen the record is incomplete, we assume that the omitted record supports the decision of the trial court." *Harper v. Commonwealth*, 371 S.W.3d 763, 769 (Ky. App. 2011) (citing *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)).

(Ky. 2018), even if the jury's damages award exceeded the evidence on a particular claim, it should not be disturbed unless the entire verdict egregiously exceeded the evidence. Furthermore, Blue Sky argues that conversion damages can include a business's goodwill and/or lost profits. *See Motors Ins. Corp. v. Singleton*, *supra.* Finally, Blue Sky claims the shredder and recycler were being leased-to-own and their value was convertible like its other tangible property.

"[W]e have never held it incumbent upon a jury to state how or by what method of calculation it arrived at its verdict. It is sufficient if the amount is sustained by the evidence." *Scobee v. Donahue*, 291 Ky. 374, 164 S.W.2d 947, 949 (1942). "The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because [the court] would have reached a different conclusion." *Hazelwood v. Beauchamp*, 766 S.W.2d 439, 440 (Ky. App. 1989). Moreover, if the issue of excessive damages has been squarely presented to the trial judge, who heard and considered the evidence, a reviewing court on appeal cannot "substitute [its] judgment on excessiveness for [the trial judge's] unless clearly erroneous." *Asbury University v. Powell*, 486 S.W.3d 246, 264 (Ky. 2016) (quoting *Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984)).

Here, Defendants argued the damages were excessive in their motion for JNOV or a new trial. Pursuant to CR 59.01, the trial court had the discretion to

grant a new trial on the ground of excessive damages but declined to do so. We do not find this decision to be clearly erroneous.

"If the verdict bears any relationship to the evidence of loss suffered," the trial court will not disturb the jury's assessment of damages. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 579 (Ky. 2009) (quoting *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 28 (Ky. 2008)). According to the record, Blue Sky presented evidence that its gross revenue was $898,239 in 2013. Blue Sky also introduced as evidence the list Fields compiled upon leaving the company, which reflected the value of Blue Sky's equipment. Moreover, David Minniear testified regarding Blue Sky's equipment, contracts, and customers. While Blue Sky may not have introduced many of its actual contracts with customers, we note that the trial court gave a missing evidence instruction because Defendants allegedly shredded Blue Sky's business records. The jury may have considered this instruction when deciding the evidence regarding damages. As stated, the trial court's denial of Defendants' motion for JNOV or new trial based on damages was not clearly erroneous.

B. Mitigation of damages

Both groups of Appellees/Cross-Appellants appeal the mitigation of damages issue. The Harr Defendants argue the trial court erred by denying their

motion for directed verdict and/or JNOV[10] on Blue Sky's failure to mitigate damages, while the Miller Lane Defendants argue the jury failed to follow the instruction regarding Blue Sky's duty to mitigate, so the judgment should be set aside as clear error. Both groups reason that Blue Sky had money to cure the default of the lease in November and if Blue Sky had paid its rent on time, then all the losses to Blue Sky's business could have been avoided. In the alternative, they argue Blue Sky could have obtained an injunction, which may have stopped the auction of Blue Sky's business and mitigated the damages.

In response, Blue Sky argues the jury was given the mitigation instruction tendered by Defendants. And, at trial, the jury heard Defendants' arguments about how the auction could have been avoided if Blue Sky had paid MLC. Instead of finding Defendants' arguments persuasive, however, the jury was persuaded by Blue Sky's argument that most of the amount being demanded was not due for another two months and that, if Blue Sky turned over all its cash, it would have nothing left to make payroll or cover its other expenses.

[10] The Harr Defendants fail to cite where in the record they made a motion for directed verdict on the issue of Blue Sky's failure to mitigate damages. Without citation to the directed verdict motion, the Court has no way to confirm if such a motion was made or properly preserved for review on appeal. They similarly fail to cite where in the record they made a motion for JNOV. Although they attached a copy of the JNOV motion to their brief, this does not obviate the specific language of CR 76.12 requiring citations to the record. This rule allows the Court to confirm the document was presented to the trial court and is properly before us. Nevertheless, because we can confirm the issue was preserved by their JNOV motion, we will undertake a review with a warning to counsel to strictly adhere to CR 76.12 in the future.

A party is required to mitigate his damages. *Morgan v. Scott*, 291 S.W.3d 622, 640 (Ky. 2009). However, a party's "efforts to minimize or avoid losses need not be unduly risky, expensive, burdensome, or humiliating." *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. App. 2014) (citing 24 *Williston on Contracts* § 64:27 (4th ed. 2010)). The party committing the breach bears the burden of proving that the plaintiff failed to mitigate his damages. *Id.*

If a party introduces evidence that another party failed to properly mitigate his damages, then the jury should be given a failure to mitigate instruction. *Id.* Here, Defendants do not contend that the trial court failed to give a mitigation instruction or that the instruction was defective. Instead, they assert that the jury must have failed to follow the instruction because it found Blue Sky breached its lease but nevertheless awarded damages to Blue Sky for conversion and tortious interference claims.

It was not incongruous for the jury to find that Blue Sky breached its lease, while also finding Defendants liable for conversion and tortious interference. "It is a longstanding principle that a jury is presumed to follow a trial court's instructions, and those instructions must be based upon the evidence presented." *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008) (footnotes omitted). Defendants fail to provide any other evidence that the jury failed to follow the given instruction on the duty to mitigate.

Based on the evidence, the trial court did not err in denying Defendants' motion for JNOV regarding mitigation of damages. Likewise, we see no error to set aside the judgment based on the Millers Lane Defendants' argument that the jury failed to follow the mitigation instruction.

C. The Harr Defendants' specific cross-appeal issue

In their cross-appeal, the Harr Defendants argue the trial court erred by allowing the jury to hear certain evidence which was mainly discussed during Harold Harr's deposition. Harold Harr was unavailable to testify at trial due to illness, so Blue Sky presented him as a witness by deposition instead. The Harr Defendants moved, *in limine,* to exclude the following evidence at trial: (1) an incident involving the discharge of a gun; (2) Harold Harr's prior litigation; and (3) Harold Harr's wealth. After hearing arguments and reviewing Harold Harr's deposition, the trial court denied Defendants' motion and allowed these portions of Harold Harr's deposition to be read into evidence. We review a trial court's evidentiary rulings under an "abuse of discretion" standard. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000).

First, during his deposition, Harold Harr testified that he fired a handgun during an April 15, 2015 business meeting of MLS&R. The Harr Defendants argue this evidence was irrelevant and prejudicial because the incident

occurred after MLS&R took over Blue Sky's premises, Blue Sky was not present for the incident, and the incident had no bearing to Blue Sky's claims.

Second, during Harold Harr's deposition, he testified regarding his lawsuit successes. The relevant portion is below:

> Q: You mentioned YUM threatened to sue you. What other lawsuits have you or a business you owned –
> A: I've had 38 lawsuits being sued or suing somebody else. I've won every one of them, and I plan on winning this one. Throw it away.

The Harr Defendants argue this testimony portrayed Harold Harr as having a litigious nature and was an inappropriate attack on his character.

Third, during Harold Harr's deposition, he was asked about his educational background. In response, he volunteered that he was a multimillionaire who was used to sitting at the head of the table and getting his way "on my planes, my cars, or whatever." Blue Sky's counsel asked Harold Harr if he had, indeed, made the court reporter move her materials so he could sit at the head of the table during the deposition, which he admitted. The Harr Defendants argue this testimony was only read to the jury to set a negative tone about Harold Harr and, thus, was irrelevant and prejudicial.

In response, Blue Sky argues Defendants knew Harold Harr's deposition could be read to the jury if he was unavailable for trial and when he became unavailable, that is what happened. As to the first issue, Blue Sky claims

Harold Harr shot the gun after Wendy Reisart, a former Blue Sky employee, refused to show Harold Harr the accounting records. As a result, all the employees who were knowledgeable about the shredding and recycling business quit. This explained why MLS&R was not as profitable and, therefore, was relevant to Blue Sky's damages claim. In addition, Ms. Reisart and other former Blue Sky employees were brought in to the underlying lawsuit as third-party defendants. Defendants sought apportionment against them, so Blue Sky claims the incident was relevant to liability.[11] As to the second issue, Blue Sky claims testimony regarding Harold Harr's prowess in litigation was relevant to prove Harold Harr's state of mind to take over Blue Sky's business and his malicious intent toward Blue Sky and David Minniear. For instance, at the auction, Harold Harr told Attorney Imperial about winning thirty-five lawsuits because he papered the other side to death. In addition, in a voicemail to David Minniear, Harold Harr threatened to crush him into dust with his success in thirty-five lawsuits. As to the third issue, Blue Sky argues Harold Harr's testimony regarding his wealth and entitlement was volunteered information in response to appropriate questions about his background. Blue Sky argues this testimony could not be excised from the deposition without being misleading to the jury.

[11] Defendants' proposed jury instructions included the Third-Party Defendants in an apportionment instruction. The jury's verdict did not include these Third-Party Defendants, although it is unclear whether the trial court eventually dismissed these parties.

Pursuant to CR 32.01(b), it was proper for the deposition of Harold Harr, who was a party at the time of trial, to be read to the jury. The question is whether the trial court abused its discretion in admitting the evidence at issue.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. "Evidence which is not relevant is not admissible." KRE 402. However, relevancy "is a determination which rests largely in the discretion of the trial court. . . ." *Transit Auth. v. Vinson*, 703 S.W.2d 482, 484 (Ky. App. 1985) (quoting *Glens Falls Insurance Company v. Ogden*, 310 S.W.2d 547 (Ky. 1958)). The trial court may exclude relevant evidence "if its probative worth is outweighed by the threat of undue prejudice to the opposing party." R. Lawson, *The Kentucky Evidence Law Handbook*, § 2.00 at 21 (2nd ed. 1984). *See also* KRE 403. Furthermore, KRE 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."

We conclude that the gun incident may have been relevant to Blue Sky's claim for damages as it tended to prove that the shredding and recycling business may have been more profitable if the experienced employees had not quit after Harold Harr fired the gun during the MLS&R meeting. Likewise, testimony

regarding Harold Harr's prior litigation may have been relevant to show Harold Harr's intent to take over Blue Sky's business in spite of any legal consequences. We agree that Harold Harr's testimony regarding his wealth and entitlement was of questionable relevance at trial. However, even if allowing this testimony to be read to the jury was error, it was of a minor nature and we cannot say that it affected the Harr Defendants' substantive rights to merit reversal. CR 61.01. Accordingly, the trial court did not abuse its discretion by admitting such testimony into evidence.

D. The Millers Lane Defendants' specific cross-appeal issues

1. Apportionment

The Millers Lane Defendants argue the trial court should have provided an apportionment instruction to the jury. They admit this issue was not preserved and, therefore, request palpable error review pursuant to CR 61.02.

The Millers Lane Defendants admit that, at the end of proof and before the jury was instructed, apportionment was considered. On the record, Blue Sky's attorney informed the trial court that the parties discussed apportionment even though Defendants had not tendered an apportionment instruction. Blue Sky's counsel then specifically asked Defendants' counsel if Defendants wanted an apportionment instruction. Defendants' counsel confirmed they did not.

Essentially, the Millers Lane Defendants regret their decision not to seek apportionment. They complain that they should have asked for an apportionment instruction to separate their liability from the Harr Defendants' liability because Harold Harr was Blue Sky's target of wrongdoing. The Millers Lane Defendants further complain that the trial court should have asked them, *sua sponte*, about their decision to be jointly represented by the same attorney.

According to KRS 411.182(1), the trial court instructs the jury to find each party's percentage of fault "unless otherwise agreed by all parties[.]" Here, the parties agreed they did not want an apportionment instruction.

Moreover, pursuant to CR 51(3), no party may complain about the failure to give an instruction "unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." Otherwise, the failure to give an instruction is waived. *See Mullins v. Commonwealth*, 350 S.W.3d 434, 438-39 (Ky. 2011). The purpose of the rule is to "obtain the best possible trial at the trial court level by giv[ing] the trial judge an opportunity to correct any errors before instructing the jury." *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162 (Ky. 2004) (footnotes and internal quotation marks omitted). "It is well settled that a party may not on appeal complain of error in the instructions which was not called

to the attention of the trial court either by objection (specifying the grounds) or by offered instructions." *Blankenship v. Staton*, 348 S.W.2d 925, 928 (Ky. 1961).

Accordingly, it was incumbent upon Defendants to seek an apportionment instruction. Because Defendants did not want such an instruction at trial, they are precluded from complaining about that choice on appeal. *See* CR 51(3); *see also Tackett v. Commonwealth*, 445 S.W.3d 20, 28-29 (Ky. 2014) (finding counsel had no objection to the admission of certain evidence at trial and cannot complain the admission of that same evidence rises to the level of palpable error).

In support of our holding, Kentucky case law regarding invited error is instructive, if not directly on point. In *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011), two defendants were convicted for their roles in a robbery and murder. On appeal, one defendant alleged that the facts failed to support his convictions of additional charges. *Id.* at 37. However, during the trial he had tendered jury instructions to the judge and referred to evidence which he believed supported instructions on the charges. *Id.* The Court held that any error in instructing the jury was not merely unpreserved but invited by the defendant. *Id.* Because a party is generally estopped from arguing an invited error on appeal, the Court held that the defendant was precluded from arguing the court erred by instructing the jury as he wanted. *Id.*; *see also Mullins*, 350 S.W.3d at 439

(holding waived errors reflect a party's knowing relinquishment of a right and are not subject to appellate review).

A party cannot ask a trial court to do something and, when the trial court does it, complain on appeal that the trial court erred. Here, Defendants specifically waived any objection to the omission of an apportionment instruction. Such an invited error amounts to a waiver not subject to appellate review.

The Millers Lane Defendants further complain that their trial counsel should not have represented Defendants jointly. "[A] party may not raise an issue for the first time on appeal[.]" *Taylor v. Kentucky Unemployment Ins. Comm'n*, 382 S.W.3d 826, 835 (Ky. 2012) (citation omitted). This claim is not properly before us and will not be addressed.

2. Conversion claim against MLS&R

The Miller Lane Defendants' final argument is that the trial court erred by including MLS&R in the conversion instruction because it was not formed until after the conversion of Blue Sky's property occurred. However, the Millers Lane Defendants fail to state how they preserved this issue for appeal in violation of CR 76.12(4)(c)(v). A fundamental principle of appellate procedure is that an issue not raised or adjudicated by the trial court will not be considered when raised for the first time on appeal. *See Ten Broeck Dupont, Inc. v. Brooks*,

283 S.W.3d 705, 734 (Ky. 2009). Because Defendants failed to preserve this issue, we will not address it on appeal.

CONCLUSION

For the foregoing reasons, we reverse and remand this case for the jury to determine Blue Sky's claim for punitive damages. Otherwise, we affirm the verdict.

ALL CONCUR.

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