COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2641 **Cir. Ct. No. 2006CV580**

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

I.E.A., INC.,

PLAINTIFF-COUNTER DEFENDANT-APPELLANT,

V.

NIAGARA COOLER, INC. AND MICHAEL SANDERS,

DEFENDANTS-COUNTER PLAINTIFFS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. I.E.A., Inc. (IEA) has appealed from a judgment entered after a jury trial, awarding Niagara Cooler, Inc., damages of $1,004,845, plus costs and interest. We affirm.

¶2 The action arises from a Purchase and Manufacturing Agreement and an amendment to that agreement entered into by IEA and Niagara in April and May 2003 (the Agreement). The Agreement was executed on behalf of IEA by its president, Susan Newell, and on behalf of Niagara by its president, Joseph M. Loiacano. At the time the parties entered into the Agreement, Niagara was in the business of selling radiators, oil coolers, and aftermarket products to the railroad locomotive industry. IEA was a radiator manufacturer. Under the terms of their Agreement, Niagara agreed to purchase its original equipment manufacture (OEM) and aftermarket radiator products exclusively from IEA for marketing to the locomotive OEM and railroad industry worldwide. IEA agreed to be the exclusive manufacturer of OEM and aftermarket locomotive radiators for Niagara, and agreed that all IEA products would be manufactured under Niagara's name brand label. Niagara was to provide all drawings and specifications necessary for the products to be manufactured, and IEA agreed not to use Niagara-owned drawings and specifications for any purpose other than to manufacture products for Niagara. The Agreement provided that either party could cancel it upon written 120-day notice of termination.

¶3 The Agreement also contained a noncompete provision. The noncompete clause (NCC) originally provided: "IEA agrees not to compete with Niagara Cooler in the locomotive aftermarket and upon termination of this agreement IEA agrees not to compete with Niagara Cooler in the locomotive aftermarket for a period of 3 years from the date of the termination of the agreement."

¶4 After execution of the Agreement, Susan Newell was concerned about the length of the noncompete period and Loiacano was concerned that the NCC did not refer to the OEM market. The NCC was therefore redrafted by

Susan Newell and amended on May 6, 2003, to provide: "IEA agrees not to compete with Niagara Cooler in the locomotive aftermarket or the OEM locomotive market upon termination of this agreement for a period of two (2) years from the date of the termination of the agreement."

¶5 IEA began supplying Niagara with radiators in late 2003 and early 2004. Over the course of the next two years, Niagara ordered 413 units from IEA.

¶6 In late 2004, IEA received an inquiry from Cummins-N-Power about making two prototype radiators. IEA initially did not know that the customer for these products was National Railway Equipment Co. (NREC), a past customer of Niagara's in its cooler sales. In September 2005, after the testing of the prototypes, NREC also approached Niagara, who forwarded NREC's package of specifications and drawings to IEA and asked for a price quote for the manufacture of the radiators, an OEM product. On January 9, 2006, IEA gave Niagara a quote of $9250 per unit. Niagara added its own profit margin and, on January 27, 2006, submitted a quote of $11,250 per unit to NREC. In the meantime, IEA also gave a quote to Cummins. Subsequently, IEA gave a direct quote of $10,882 per unit to NREC, which included the cost of paying commissions to Cummins, the IEA sales representative for the Cummins account, and the Newell Company. The latter business was owned by George Newell, Susan's husband.

¶7 Before giving the direct quote to NREC, IEA's sales manager, Todd Sorensen, sent an e-mail to George Newell, who was also a shareholder in IEA.[1]

[1] Together, Susan and George Newell owned eighty-five percent of IEA.

In it, Sorensen asked "how to quote NREC directly without getting into issues with Niagara." Sorensen indicated that his initial thought was to have the Newell Company quote the package. George Newell responded with an e-mail seeking input from Susan Newell and Jim Kettinger, a consultant for IEA. Sorensen subsequently consulted with Kettinger, after which Kettinger informed George and Susan Newell that the relationship between IEA and Niagara had not been profitable for IEA. Kettinger also informed the Newells that after reviewing the Agreement, he and Sorensen agreed that IEA could provide a direct quote to NREC.

¶8 Niagara became aware of IEA's dealings with NREC after IEA gave NREC its quote. When Niagara protested to IEA, IEA rescinded the quote it had given Niagara, confirming rescission on March 8, 2006. On March 10, 2006, IEA entered into a two-year Supply Agreement with NREC. Under the terms of the contract, NREC was required to place an initial order for 182 units and could place subsequent orders based on its needs as reflected in periodically updated forecasts.

¶9 On April 21, 2006, IEA commenced this action, seeking a declaratory judgment that it was free to sell to NREC during the pendency of the Agreement.[2] In an answer and counterclaims filed in June 2006, Niagara alleged that IEA had breached the parties' Agreement by entering into a contract with and accepting a purchase order from NREC. It also alleged that IEA had tortiously interfered with Niagara's prospective contract with NREC.

[2] IEA also alleged that Niagara had tortiously interfered with IEA's prospective economic advantage. That claim was not presented to the jury and is not an issue in this appeal.

¶10 On July 24, 2006, Niagara gave notice of termination of the Agreement with IEA, effective 120 days later on November 21, 2006. In October 2006, IEA amended its complaint.[3] Niagara, in turn, amended its pleadings, adding a counterclaim for breach of contract based on IEA's competition with Niagara after termination of the Agreement. IEA never replied to Niagara's amended counterclaim and did not move for leave to file a belated responsive pleading until shortly before trial. The trial court denied that motion, concluding that nothing in the record demonstrated excusable neglect.

¶11 The jury ultimately returned a special verdict finding that both IEA and Niagara intended to enter into an agreement prohibiting IEA from selling radiators to the locomotive OEM market during the term of the Agreement. Although the jury found that IEA did not materially breach the contract with Niagara by selling OEM radiators before the termination of the Agreement, it found that IEA materially breached the Agreement by selling locomotive OEM radiators to NREC after the termination of the Agreement. It awarded Niagara damages of $383,520 for the breach of contract.

¶12 The jury also found that Niagara had a prospective contractual relationship with NREC, that IEA intentionally interfered with Niagara's prospective contractual relationship with NREC, and that its interference was not justified. The jury found that IEA's interference caused damages to Niagara and

[3] In its complaint and amended complaint, IEA also alleged that Niagara breached its contract with IEA by failing to use its best effort to sell railroad radiators and by purchasing radiators from companies other than IEA. The jury found that Niagara did not materially breach its contract with IEA by failing to use its best efforts to sell the locomotive radiators it agreed to purchase from IEA or by purchasing locomotive radiators from sources other than IEA. IEA has not pursued these issues on appeal.

awarded $254,592 for future damages.[4] The jury further found that IEA acted in intentional disregard of Niagara's rights and awarded punitive damages of $366,733.

¶13 In motions after verdict, the trial court denied IEA's motion to change answers in the verdict or for judgment notwithstanding the verdict. It also denied IEA's motion for a new trial based on the alleged erroneous admission at trial of an offer of settlement (Exhibit 71), and its motion for a new trial on punitive damages.

¶14 IEA's first argument on appeal is that the trial court erred in determining that the NCC was ambiguous, and submitting the issue of the parties' intent to the jury. IEA contends that by prohibiting posttermination competition but making no reference to competition during the term of the Agreement, the NCC was unambiguously limited to posttermination transactions, and permitted IEA to sell in the OEM market during the term of the Agreement. IEA contends that the trial court therefore erred in allowing testimony at trial as to the parties' intent in entering the NCC.

¶15 Determining whether a contract is ambiguous presents a question of law. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). A provision in a contract is ambiguous if it is fairly susceptible of more than one construction. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). When a contract provision is ambiguous and therefore must be construed by the use of extrinsic evidence, the

[4] It awarded nothing for past damages.

question is one of contract interpretation for the jury. ***Id.*** Moreover, because IEA, by Susan Newell, drafted the NCC, any ambiguities in it had to be construed against IEA. *See* ***Hunzinger Const. Co. v. Granite Resources Corp.***, 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995).

¶16 The Agreement prohibited competition for two years after termination of the Agreement, but was silent as to competition during the term of the Agreement. Such silence was inherently ambiguous, particularly when coupled with the provisions indicating that IEA agreed to be the exclusive manufacturer of OEM and aftermarket locomotive radiators for Niagara, while Niagara agreed to purchase its OEM and aftermarket radiator products exclusively from IEA, and to furnish drawings and specifications that could be used only to manufacture products under Niagara's name. Because the NCC was fairly susceptible to conflicting interpretations as to whether competition during the term of the Agreement was allowed, it was ambiguous.

¶17 Because the NCC was ambiguous, the meaning of its terms was for the jury, *see* ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 379, 254 N.W.2d 463 (1977), and the trial court properly permitted testimony as to the parties' intent in entering into it, *see* ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis. 2d 481, 488, 141 N.W.2d 240 (1966). Based on the evidence as to the parties' intent, no basis exists to disturb the jury's answer to special verdict question no. 1, finding that both IEA and Niagara intended to enter into an agreement prohibiting IEA from selling radiators to the locomotive OEM market during the term of the Agreement.

¶18 Appellate review of a jury's verdict is limited and narrow. ***Hoffmann v. Wisconsin Elec. Power Co.***, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. We must view the evidence in the light most favorable to the jury's

verdict and sustain the verdict if there is any credible evidence to support it, regardless of whether there is evidence to support a different verdict. ***Id.*** The credibility of the witnesses and the weight to be given their testimony is for the jury. ***Id.*** Special deference is afforded to a jury verdict that has been upheld by the trial court. ***Id.*** The jury's verdict will be upheld even if it is contradicted by evidence that is stronger and more convincing. ***Id.*** We will not upset the verdict unless there is such a complete failure of proof that the verdict must have been based on speculation. ***Id.***

¶19 Credible evidence supports the jury's finding that the parties intended to enter into an agreement that prohibited IEA from selling radiators to the locomotive OEM market during the term of the Agreement. Although she testified that she believed IEA could compete with Niagara in the OEM market while the Agreement was in effect, Susan Newell also acknowledged that at the time IEA entered the Agreement, it had no intention of competing with Niagara in the aftermarket or the OEM market. As originally written, the NCC prohibited IEA from competing with Niagara in the aftermarket during the term of the Agreement and for a period of three years after termination. Susan testified that, after executing the initial NCC, she and Loiacano both had concerns. Her concern was with the three-year posttermination period of limitation, and Loiacano was concerned because he did not want IEA to compete with Niagara in the OEM market. Susan testified that she understood that Loiacano was concerned that IEA would develop OEM products and sell direct in competition with Niagara. She indicated that she agreed to amend the NCC to accommodate his concern, as well as her concern with the three-year posttermination prohibition.

¶20 Loiacano similarly testified that, before drafting the amended NCC and sending it to him for his signature, Susan Newell assured him that IEA had no

interest in competing with Niagara. He testified that she never told him that IEA wanted to preserve any right to compete with Niagara in the OEM market. Loiacano also pointed out that it would have made no sense for Niagara to have agreed that IEA could compete with it in the OEM market and aftermarket while the Agreement was in force, while prohibiting such competition after termination.

¶21 Based on this evidence, the jury was entitled to find that the parties intended to enter into an agreement that prohibited IEA from selling radiators to the locomotive OEM market during the term of the Agreement, in addition to prohibiting such sales for two years after termination of the Agreement. IEA's contention that the trial court erred in submitting the issue of the parties' intent to the jury, and its contention that the parties intended to prohibit only posttermination competition, therefore fail.[5]

¶22 IEA's next argument is that its contract with NREC was a requirements contract and that deliveries made after termination of the Agreement on November 21, 2006, were lawfully made pursuant to its pretermination contract with NREC. IEA's contract with NREC provided for deliveries by IEA to NREC pursuant to purchase orders based on periodically updated forecasts of NREC's needs. IEA contends that each post-November 21, 2006 purchase order and delivery to NREC constituted the performance of the contract entered into with NREC prior to November 21, 2006. Based on this contention and because the jury found that it did not breach the Agreement by selling locomotive OEM radiators

[5] Based on this conclusion, we need not address the trial court's determination that even if it was error to submit the question of the parties' intent to the jury, it was harmless error because the jury ultimately found in its answer to special verdict question no. 13 that IEA did not materially breach the Agreement by selling locomotive OEM radiators before the termination of the Agreement.

before the Agreement was terminated, IEA asserts that the trial court should have set aside the jury's answer awarding $383,520 in damages arising from orders and deliveries under the NREC contract that occurred after the termination of the parties' Agreement.

¶23 This argument fails for multiple reasons. Initially, we note that IEA never answered Niagara's amended counterclaim which added the claim for breach of contract based on IEA's competition with Niagara after termination of the Agreement. Because IEA did not timely answer Niagara's amended counterclaim and the trial court denied its motion to file a belated answer, IEA must be deemed to have admitted the allegations of the amended counterclaim. *See* WIS. STAT. § 802.02(4) (2007-08).[6] No basis therefore exists to disturb the judgment permitting Niagara to recover on this claim.

¶24 Even ignoring IEA's failure to answer Niagara's amended counterclaim, as noted by the trial court in motions after verdict, IEA agreed "not to compete" with Niagara in the locomotive OEM market for two years after termination of the Agreement. Regardless of whether IEA first signed the contract with NREC and began filling orders before termination of the Agreement, it competed with Niagara in violation of the NCC when it accepted and filled orders from NREC after the termination of the Agreement.

¶25 IEA also contends that the trial court should have granted a directed verdict or judgment notwithstanding the verdict on Niagara's tortious interference with prospective contract claim. IEA contends that the tortious interference claim

[6] All references to the Wisconsin Statutes are to the 2007-08 version.

fails as a matter of law because all of its sales to NREC constituted permissible and privileged competition, an argument we have already rejected. IEA also contends that the tort claim is barred by the economic loss doctrine.

¶26 The issue of whether Niagara's tort claim is barred by the economic loss doctrine is raised for the first time on appeal. Generally, we do not consider issues that are raised for the first time on appeal. ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476. "A fundamental appellate precept is that we 'will not … blindside trial courts with reversals based on theories which did not originate in their forum.'" ***Id.***, ¶11 (quoting ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)). Because IEA failed to raise the economic loss issue in a timely manner in the trial court, it cannot be raised as a matter of right on appeal. Although we may exercise discretion to address a waived issue when it presents a question of law that has been fully briefed and when the question is of sufficient public interest to merit a decision, ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998), we are not persuaded that the public interest necessitates review of IEA's argument.

¶27 IEA also argues that Niagara failed to prove tortious interference. Tortious interference requires: (1) a prospective contractual relationship on behalf of the party making the claim, (2) knowledge by the defending party of the existence of the relationship, (3) intentional acts on the part of the defending party to disrupt the relationship, (4) actual disruption of the relationship, and (5) damages to the claimant caused by those acts. ***Anderson v. Regents of Univ. of Cal.***, 203 Wis. 2d 469, 490, 554 N.W.2d 509 (Ct. App. 1996). Furthermore, the defending party must not have been justified or privileged to interfere. ***Burbank***

Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶44, 294 Wis. 2d 274, 717 N.W.2d 781.

¶28 IEA contends that Niagara did not have a prospective contractual relationship with NREC. It contends that the reasonableness of its understanding of the NCC precludes a conclusion that any interference on its part was intentional. In addition, it contends that Niagara failed to produce evidence of a legally sufficient expectation of future sales to NREC.

¶29 As noted above, the jury found that Niagara had a prospective contractual relationship with NREC, that IEA intentionally interfered with that prospective relationship, and that IEA's interference was not justified. The jury found that IEA's interference caused $254,592 in future damages to Niagara. IEA's arguments are thus challenges to the sufficiency of the evidence to support the jury's verdict.

¶30 As already discussed, a motion challenging the sufficiency of the evidence to support a verdict may not be granted unless, considering all credible evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to support a finding in favor of such party. ***Richards v. Mendivil***¸ 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). This standard also applied to IEA's motion to change the jury's answers. *See* ***id.*** at 670-71.

¶31 Credible evidence supports the jury's findings. Loiacano testified that NREC was a prior customer of Niagara's and that NREC approached Niagara with the drawings and specifications for the locomotive OEM radiators in the fall of 2005. Loiacano testified that before the dispute with IEA, he had been speaking with a NREC representative once every week or two. Sorensen acknowledged

that Niagara had been in negotiations with NREC since September 2005, that NREC was a rail customer with whom Niagara had done business in the past, and that, until IEA submitted its quote, the only companies in the running for NREC's OEM radiator business were Cummins and Niagara. Sorensen also admitted that shortly before IEA decided to submit the direct quote, he had learned that NREC did not want to contract with Cummins. Since this still left Niagara as a potential supplier for NREC, the jury's finding that Niagara had a prospective contractual relationship with NREC is supported by credible evidence.

¶32 The jury's finding that IEA intentionally interfered with Niagara's prospective contractual relationship is also supported by the record. Contrary to IEA's argument, the jury's finding may not be set aside based on IEA's argument that it reasonably believed competition was permitted under the NCC. As discussed above, the evidence at trial indicated that Susan Newell negotiated the Agreement, was aware that Niagara was concerned about competition from IEA, assured Loiacano that IEA would not compete with Niagara in the OEM market, and drafted an amended NCC in part to address Loiacano's concerns. IEA, as revealed in Sorensen's e-mail to George Newell, knew that giving a direct quote to NREC could lead to issues with Niagara. It then chose to give a direct quote to NREC and to rescind its quote to Niagara, knowing that after rescission of its quote to Niagara, Niagara would no longer be able to compete for NREC's OEM radiator business.[7] Under these circumstances, the jury was entitled to find that IEA intentionally interfered with Niagara's prospective contractual relationship

[7] It was for the jury to decide the credibility of the witnesses and their testimony. To the extent Sorensen indicated that NREC would deal only with a radiator manufacturer, the jury was not required to accept his testimony.

with NREC. Based on the evidence indicating that IEA and Niagara intended to prohibit competition between them, the jury was also entitled to reject IEA's contention that it was justified in competing with Niagara and foreclosing Niagara's ability to compete for the NREC business.

¶33 The jury's finding that IEA's conduct caused Niagara $254,592 in future damages is also adequately supported by the record. Damages must be proven with reasonable certainty. ***Management Comp. Serv.***, 206 Wis. 2d at 189. This includes future profits. ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 323, 306 N.W.2d 292 (Ct. App. 1981). However, damages need not be proven with mathematical precision. ***Management Comp. Serv.***, 206 Wis. 2d at 189. Evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation. ***Id.*** If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, the finding will not be disturbed by this court unless the award shocks the judicial conscience. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 446, 405 N.W.2d 354 (Ct. App. 1987).

¶34 Evidence indicated that, at the time of trial, six months remained on the contract between IEA and NREC. Evidence also indicated that over the course of the contract, on average, NREC had purchased six radiators a week from IEA, which would have amounted to the purchase of 156 additional units over the remaining contract period. This historical trend was acknowledged by counsel for IEA in his closing argument, when he disputed Niagara's argument that a higher number should be considered.[8] Because the evidence also indicated that the

[8] Sorensen had testified that he thought NREC's future requirements would be fifteen units per week, an even higher number.

difference between IEA's quote to Niagara and its subsequent quote to NREC was $1632 per unit, the jury's finding that Niagara suffered $254,592 in future losses was reasonable.[9]

¶35 IEA's next argument is that the trial court erroneously exercised its discretion by admitting Exhibit 71, an e-mail in which Susan Newell offered Niagara a five percent commission on NREC orders for settlement purposes. IEA contends that admitting Exhibit 71 violated WIS. STAT. § 904.08.

¶36 At trial, IEA objected to the admission of Exhibit 71. A sidebar conference was held on IEA's objection, at the conclusion of which the trial court admitted Exhibit 71. The sidebar was not recorded and neither the basis for IEA's objection, nor the basis for the trial court's ruling admitting the evidence was summarized on the record.

¶37 To preserve an objection for appeal, a party must timely object to the admission of evidence, stating the specific ground of the objection if it is not apparent from the context. WIS. STAT. § 901.03(1)(a). In this case, IEA's reasons for objecting and the trial court's reasons for admitting the exhibit were apparently stated during the sidebar conference, but are not in the record.

¶38 Appellate courts have frequently cautioned against the use of sidebar conferences. ***State v. Mainiero***, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994). As occurred here, using sidebar conferences often deprives this court of the basis for the objection and the reasons for the trial court's ruling. *See* ***State v. Wedgeworth***, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981); ***Maniero***, 189

[9] Multiplying 156 by $1632 equals $254,592.

Wis. 2d at 95. A party that relies on an unrecorded sidebar conference therefore does so at its own peril. ***Wedgeworth***, 100 Wis. 2d at 528.

¶39 Because IEA's objection to the admission of Exhibit 71 and the trial court's reasons for overruling it are not established in the record, the record does not permit this court to determine whether the trial court properly overruled IEA's objection and admitted Exhibit 71 at the time the objection was made. Because we are unable to assess IEA's claim that the trial court erroneously exercised its discretion when it admitted the evidence, its request for a new trial on this ground is denied. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) (when an appellate record is incomplete in connection with an issue raised by the appellant, we assume that the missing material supports the trial court's ruling).

¶40 IEA's final challenge is to the jury's award of punitive damages. It contends that the evidence was insufficient to permit the submission of punitive damages to the jury under WIS. STAT. § 895.043 and that, even if submission was warranted, the award was excessive.

¶41 Whether punitive damages are recoverable presents a question of law. ***State Bank of Independence v. Equity Livestock Auction Mkt.***, 141 Wis. 2d 776, 785, 417 N.W.2d 32 (Ct. App. 1987). Punitive damages may be awarded when the evidence shows that "the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043(3). A defendant acts in an intentional disregard of the rights of the plaintiff if the defendant acts with a purpose to disregard the plaintiff's rights or is aware that its acts are substantially certain to result in the plaintiff's rights being disregarded. ***Strenke v. Hogner***, 2005 WI 25, ¶38, 279 Wis. 2d 52, 694 N.W.2d

296. The act or course of conduct must be deliberate and must actually disregard the rights of the plaintiff, whether it be a property right or some other right. ***Id.*** The act or conduct also must be sufficiently aggravated to warrant punishment by punitive damages. ***Id.***; *see also* ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶64, 312 Wis. 2d 251, 752 N.W.2d 800. The plaintiff must prove by clear and convincing evidence that the defendant was aware that its conduct was substantially certain to result in the plaintiffs' rights being disregarded. ***Wischer v. Mitsubishi Heavy Indus. Am., Inc.***, 2005 WI 26, ¶34, 279 Wis. 2d 4, 694 N.W.2d 320.

¶42 The evidence at trial permitted a finding that IEA acted in intentional disregard of Niagara's rights. IEA agreed to provide radiators to Niagara for sale by Niagara and assured Niagara that it would not compete with Niagara in the locomotive OEM market during the term of the Agreement or for two years after termination of the Agreement. After giving a quote to Niagara that would have enabled Niagara to sell OEM radiators to NREC, IEA rescinded its quote to Niagara and submitted a direct quote to NREC. It took this action with the knowledge that rescinding its quote to Niagara would prevent Niagara from contracting with NREC. As indicated in Sorensen's e-mail to George Newell, IEA was also aware that its conduct would create "issues" with Niagara, leading Sorensen to consider hiding the deal from Niagara by having George Newell's other company submit the quote. The totality of the evidence thus permitted a finding that IEA's conduct was deliberate and aggravated, in actual disregard of Niagara's rights. Punitive damages were therefore properly submitted to the jury and awarded by it.

¶43 We also reject IEA's contention that the $366,733 award for punitive damages was excessive. A punitive damages award is excessive and violates due

process if it is more than necessary to serve the purposes of punitive damages or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing. ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶50, 261 Wis. 2d 333, 661 N.W.2d 789. The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others from similar conduct, not to compensate the plaintiff for its loss. ***Id.*** Relevant factors may include the grievousness of the acts, the degree of malicious intent, whether the award bears a reasonable relationship to the award of compensatory damages, the potential damage that might have been caused by the acts, the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct, and the wealth of the wrongdoer. ***Id.***, ¶53. The evidence must be viewed in the light most favorable to the plaintiff and the jury's punitive damages award will not be disturbed unless it is so clearly excessive as to indicate passion and prejudice. ***Id.***, ¶56.

¶44 The jury was entitled to conclude that IEA's conduct, as detailed above, was grievous and malicious, designed to steal Niagara's deal and increase IEA's profits beyond what it would have received under its Agreement with Niagara, while eliminating Niagara as a competitor for the NREC contract. The jury was entitled to disregard IEA's argument that its after-tax net profit for 2006 was low and to consider instead IEA's gross receipts and the fact that its profits were lowered by the five percent commission paid to the Newell Company for the NREC sales, and the payment of $366,733 in compensation to the Newells, both of whom were aware of and heavily involved in the deals with Niagara and NREC. The jury was entitled to conclude that punitive damages of $366,733 reflected the egregiousness of IEA's conduct toward Niagara.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.