COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2639

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

ANTHONY KISH AND
ACTION MEDICAL SERVICE, INC.,
A WISCONSIN CORPORATION,

PLAINTIFFS-RESPONDENTS,

V.

HEALTH PERSONNEL OPTIONS CORPORATION,
N/K/A HPOC,
A MINNESOTA CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Health Personnel Options Corporation (HPO) appeals from a judgment entered after a jury found that HPO breached its contract

with Action Medical Services (Action), by refusing to return certain assets and that HPO wrongfully converted those same assets. HPO argues that the trial court erred by: permitting Action to sue for breach of contract and conversion, because the conversion claim was barred by the economic loss doctrine; not requiring Action to elect one of the two remedies, breach of contract or conversion; permitting the jury to award lost future profit damages for both the breach of contact claim and the conversion claim; finding that there was sufficient proof of a conversion; permitting the damages awarded for the breach of contract to stand; failing to grant a new trial because of jury perversity; and denying HPO's request for remittitur.[1]

We determine that the economic loss doctrine does not apply to the facts presented here; thus, HPO's first argument fails. However, we reverse the trial court's finding that there was sufficient evidence to sustain the conversion claim and we reverse the breach of contract damages award because the trial court improperly instructed the jury. We remand for a trial on the breach of contract damages issue only and direct the trial court to instruct the jury that any breach of contract damages must be measured against the purchase price Action would have been entitled to had the contract been consummated.[2]

[1] HPO also argues that the trial court erred by placing Kish's name on the verdict. We decline to address this issue as it has not been adequately briefed. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

[2] We decline to address the remaining appellate issues because our decision on these issues makes it unnecessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

I. BACKGROUND.

This suit stems from the proposed, but never consummated, sale of Anthony Kish's medical placement business, Action Medical Services, to Health Personnel Options Corporation. Kish decided to sell the business after his diagnosis of cancer led to the company's financial difficulties which, in turn, prevented the company from paying its medical malpractice insurance premiums and its tax liabilities. As a result, the company could no longer offer medical malpractice insurance to its temporary medical workers and tax liens of approximately $84,000 were levied against the company.

HPO offered to buy Action in March 1993, but HPO did not want to purchase the company until Action paid or otherwise removed the tax liens levied against the company. To accommodate this problem and to allow HPO to immediately begin running the business, the parties entered into two agreements. The first agreement, entitled "INDEPENDENT CONTRACTOR AGREEMENT," was an interim agreement that allowed HPO to manage Action for a limited period. The second agreement, entitled "ASSET PURCHASE AGREEMENT," obligated HPO to buy Action with an anticipated closing date of May 10, 1993 if the tax liens were removed. This second agreement also provided, however, that if the tax liens were not removed by May 10, 1993, this agreement would remain in effect and HPO would continue to manage Action, with the closing date being postponed until such time as the liens were removed or until July 10, 1993, the contract termination date.

The parties commenced operating under the interim agreement and HPO made all the required payments to Action. Action's workers became HPO employees and Action gave HPO its client list and market research. Advertising

formerly done in Action's name was placed in HPO's name and one of Action's telephone numbers was published in HPO's policy manuals and given to temporary employees so they could contact the office. Incoming telephone calls were answered "Action Medical Service/Health Personnel Option." The interim agreement required HPO to pay seventy-five percent of the gross profits generated during the first thirty days of the transition period to Action and fifty percent of the gross profits generated during the remaining thirty days, with a maximum cap of $20,000. Under this formula, HPO paid Action $8,866.63. The "ASSET PURCHASE AGREEMENT" sale price was also to have been based on future profits. Had the sale been completed, HPO would have been required to pay Action forty percent of the gross profits for the first six months following the closing, and twenty-five percent of the gross profits during the next six months but not to exceed $55,000.

Shortly before the expected closing date of May 10, 1993, HPO moved to new offices as had been previously planned. At about this same time, Action learned that the state and federal revenue departments would not release their liens on the company assets, forcing a postponement of the closing. HPO continued to operate the business after May 10, 1993, and the record shows no significant changes in the operation of the business occurring after the termination date of July 10, 1993. In fact, following the termination date, little contact occurred between HPO and Kish until April 4, 1995, when Action and Kish sued HPO.

The original suit contained seven causes of action, but by the time of trial, only two causes of action remained—a breach of contract claim based upon HPO's refusal to return Action's assets turned over to it pursuant to the interim agreement, and a tort claim for conversion of these identical assets. The jury trial

proceeded on both causes of action and the jury verdict contained two separate damage questions. The jury found that HPO both breached the contract and unlawfully converted Action's assets, and awarded $222,000 as damages for the breach of contract, and $1,200,840 as damages for the conversion. HPO brought post-trial motions seeking relief, all of which were denied; this appeal follows.

II. DISCUSSION.

A. The economic loss doctrine.

Ordinarily, the standard of review of a jury verdict requires this court to sustain the jury's verdict if there is any credible evidence to support it. Here, however, the issue presented is an issue of law and the standard of review is controlled by ***Sunnyslope Grading, Inc. v. Miller, Bradford and Risberg, Inc.***, 148 Wis.2d 910, 915, 437 N.W.2d 213, 215 (1989). "The question of whether Wisconsin law allows recovery [under undisputed facts] is a question of law which is reviewed by this court without deference to the trial court's determination." ***Id.***

HPO argues that the economic loss doctrine should be applied in this case because the parties in this action are two commercial entities "capable of bargaining to allocate the risk of loss inherent in any commercial transaction." ***Stoughton Trailers, Inc. v. Henkel Corp.***, 965 F. Supp. 1227, 1230 (W.D. Wis. 1997). HPO further argues that, if applied, the economic loss doctrine would require dismissal of Action's suit for conversion because the economic loss doctrine distinguishes contract claims and tort claims and a party cannot recover from a tort claim when the damages are "solely economic in character, arising from a commercial transaction." *See* ***Stoughton Trailers***, 965 F. Supp. at 1230; ***Raytheon Co. v. McGraw-Edison Co.***, 979 F. Supp. 858, 866 (E.D. Wis. 1997). HPO cites no case which is exactly on point, but it argues that the economic loss

doctrine adopted in Wisconsin in ***Sunnyslope*** should be extended because of the factual similarities and because the policy considerations underpinning the economic loss doctrine are also present here. HPO notes that, as in ***Sunnyslope***, the dispute in this case is between two commercial parties of relatively equal bargaining power with one seeking to recoup its economic loss. HPO also asserts that an expansion of the doctrine is required because the three policies controlling the extension of the economic loss doctrine found in the later case of ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis.2d 395, 573 N.W.2d 842 (1998), are equally applicable to the fact situation present here.

For further support, HPO notes that after ***Sunnyslope*** was decided and the supreme court extended the doctrine in ***Daanen***, several federal court cases predicted that the economic loss doctrine in Wisconsin would cover commercial breach of contract disputes involving service contracts and the purchase of real estate. ***Ice Bowl L.L.C. v. Weigel Broad. Co.***, 14 F. Supp.2d 1080, 1082 (E.D. Wis. 1998); ***Stoughton Trailers***, 965 F. Supp. at 1233; ***Metal Processing Co. v. Amoco Oil Co.***, 926 F. Supp. 828, 832 (E.D. Wis. 1996).

Action responds that the economic loss doctrine does not apply because this case falls within one of the areas of dispute best governed by tort law. It asserts that this case presents one of "those instances, [where] the traditional concern of tort law prevails: protecting society from an unreasonable risk of danger." ***Stoughton Trailers***, 965 F. Supp. at 1231. We decline to extend the economic loss doctrine to cover the facts presented in this appeal, but we do so for different reasons than those argued by Action.

"The economic loss doctrine is a judicially created doctrine providing that a commercial purchaser of a product cannot recover from a

manufacturer, under the tort theories of negligence or strict products liability, damages that are solely 'economic' in nature." ***Daanen***, 216 Wis.2d at 400, 573 N.W.2d at 844-45 (citation omitted). As noted, Wisconsin first recognized and applied the economic loss doctrine in ***Sunnyslope***, 148 Wis.2d at 910, 437 N.W.2d at 213, in a suit brought by a purchaser against the manufacturer of a defective backhoe that was protected by a warranty. In ***Daanen***, the supreme court extended the doctrine by barring a tort suit brought by a purchaser of a defective rock quarry crusher who had no privity of contract with the manufacturer. As noted, several recent federal cases have predicted the extension of the doctrine. In ***Ice Bowl L.L.C.***, 14 F. Supp.2d at 1082, the court observed that the economic loss doctrine applies in Wisconsin to commercial contracts for services, *see also* ***Stoughton Trailers***, 965 F. Supp. at 1233,[3] and in ***Metal Processing Co.***, 926 F. Supp. at 832, the court held that the economic loss doctrine extends to commercial real estate transactions.

Although we acknowledge the doctrine's vitality and the possibility of the economic loss doctrine's further extension in Wisconsin, we determine that the dispute here is unlike those in the cited cases and does not involve the policies which resulted in the doctrine's existence. Thus, this case does not warrant an extension of the economic loss doctrine.

First, we observe there is no defective product or service involved in this suit. This is a suit resulting from the failure of an unsuccessful buyer, after the expiration of a contract, to return assets that were lawfully obtained. Second, the

[3] This case has been criticized with respect to the court's determination that the economic loss doctrine does not apply to cases of intentional misrepresentation. *See* ***Raytheon Co. v. McGraw-Edison Co.***, 979 F. Supp. 858, 873, 873 n.12 (E.D. Wis. 1997).

public policies addressed in ***Daanen***, which govern the economic loss doctrine, are not in operation here.

> [T]he economic loss doctrine … is generally based on three policies … (1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against the risk.

Daanen, 216 Wis.2d at 403, 573 N.W.2d at 846. We reach no conclusion as to whether the tort law remedies are inappropriate under the facts. We do determine, however, that the dispute here does not concern the protection of a commercial party's freedom to allocate economic risk, nor does it concern the type of economic loss present in the other economic loss doctrine cases. This suit concerns the failure to return assets obtained in contemplation of the purchase of an ongoing business. This distinguishes it from the cases where a product or service was placed in the market place. The losses are also of a different species than those found in the cases applying the economic loss doctrine. The economic loss experienced in those cases applying the doctrine were losses limited to the actual product, service, or land purchased. This is not the situation here. Thus, we conclude both the facts and the nature of this suit fall outside the reach of the economic loss doctrine.

Insufficient Proof of Conversion

Next, we address HPO's argument that the trial court erred in finding that there was sufficient evidence in the record to support a conversion claim.

The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support the verdict. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 576-77, 547 N.W.2d 592, 598-99 (1996). "A jury verdict will be upheld unless, 'considering all credible evidence and reasonable inferences therefrom in the light most favorable' to the verdict, 'there is no credible evidence to sustain it.'" ***Watts v. Watts***, 152 Wis.2d 370, 380, 448 N.W.2d 292, 296 (Ct. App. 1989) (citations omitted).

Conversion is the "wrongful exercise of dominion or control over a chattel." ***Production Credit Ass'n v. Equity Coop. Livestock Sales Ass'n***, 82 Wis.2d 5, 10, 261 N.W.2d 127, 129 (1978). Ordinarily, conversion claims concern the wrongful taking of property, but the claim can also include, as is alleged here, the wrongful refusal to give back property originally lawfully obtained. *See* ***Production Credit Ass'n v. Nowatzski***, 90 Wis.2d 344, 353, 280 N.W.2d 118, 122 (1979). In the latter situation, to sustain a claim of conversion, the rightful owner is required to prove that a demand was made for the return of the property, that the owner was entitled to the property, and that the withholding interfered with the right of the owner to control and use it. ***Id.*** HPO asserts that none of the elements of the tort of conversion were proven. Specifically, HPO states that there is no credible evidence that a demand was ever made and, it argues, even if the minimal evidence found in the record supports a finding that a demand was made, the demand occurred on either May 8 or 9, 1993, a time when Action was not entitled to the property. Further, HPO argues that the uncontroverted testimony indicates that any demand was subsequently withdrawn by Kish.

The "ASSET PURCHASE AGREEMENT" obligated HPO to return the assets to the seller in the event of a termination. The pertinent provision reads: "**Closing or Termination.** ... If this Agreement terminates … then the Buyer shall return the assets to the Seller." Although the contract required HPO to return the assets, another provision allowed HPO "to use any and all information, files, lists, research, marketing and goodwill as Seller learns or develops from the date hereof including any such information, files, lists, research, other business information and goodwill it becomes aware of from the Assets." Thus, while the agreement obligated HPO to make the assets available to Action in the event of a termination, it permitted HPO to continue to use many of these same assets after the contract expired.

WIS J I CIVIL—2200.1 sets out the following elements of conversion when the claim deals with the failure to return property:

> [An] (owner) … must establish:
>
> 1. that (defendant) who had lawfully come into possession of the property, refused to surrender it to (owner) after (owner) demanded that the property be returned;
>
> 2. that (owner) was entitled to the return of the property; and
>
> 3. that the withholding of the property by (defendant) seriously interfered with the right of (owner) to control and use the property.
>
> A refusal by a person to return the property because of a legitimate reason and for a reasonable length of time after the demand is made is not a conversion. In addition, a person is not required to comply with a demand made at an unreasonable time or place, or in an unreasonable manner, or upon an employee who has no authority to return the property. In addition, a person may in good faith detain property for a reasonable time to identify (owner) or to determine (owner)'s right to possession.

Claiming that there is proof in the record of a demand, Action relies principally on Kish's testimony. It also asserts, however, that the summons and complaint in this lawsuit fulfilled the requirement of a demand for the return of the assets.

Kish testified that on either May 9 or May 10, 1993, he overheard a telephone conversation between William Corallini, Kish's accountant, and another person he believed to be Martin Kiefer, a HPO executive. He claimed that he was in the same room with Corallini and heard him ask Kiefer for either the money or the return of the assets. HPO posits that this telephone conversation does not qualify as a "demand." It further argues that it is inadmissible hearsay, and thus, not credible evidence. HPO contends that even if the telephone conversation legally fulfills the elements of a demand, it was not made at a time when HPO was legally obligated to comply and, in any event, it was withdrawn the next day by Kish. HPO's argument that Kish withdrew the demand made on Action's behalf revolves around the events that occurred the day after the telephone call when Kish permitted HPO to copy its software, and to remove Action's employees and assets to another site.

Although the trial court ruled that Kish's testimony was sufficient proof of a demand, the trial court failed to address whether the other elements of the tort of conversion were proven. The trial court did, however, express some concern about the reliability of Kish's testimony. In the hearing on the motions after verdict, the trial court stated, "I will state on the record here, this statement [of Corallini's heard by Kish] was pure hearsay." Whether the statement is inadmissible is an issue that has been waived by the appellant's failure to object to its admission. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990) ("[I]n the absence of a specific objection … a party has not preserved its

objection for review."); ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review an issue raised for first time on appeal). Nevertheless, we conclude that the record does not support a finding that the tort of conversion was proven. First, the undisputed facts indicate that Action was not lawfully entitled to the assets when Corallini made his demand. Second, Action withdrew the demand when, one day later, no objection was raised by Kish to the copying of Action's software and the removal of Action's assets and employees. Third, we determine that no demand was ever made after Corallini's statement because the summons and complaint do not contain a demand for the return of the assets in the pleadings.

The record reflecting Corallini's "demand" on Action's behalf for the return of Action's assets is limited. Only Kish's testimony supports the assertion that a demand was made. Kish testified that, while in the same room with Corallini, he overheard Corallini ask, in a telephone call, for either the money or the return of the assets. He believed that Corallini was speaking to Kiefer. Kish testified, "I heard part of the conversation; and I did not hear what Mr. Kiefer said." Later, Kish was asked:

> Q. Was it your understanding of the conversation that you heard with Mr. Corallini on that May 8th or 9th that he was telling them, and you heard him tell them: Pay the money or return the assets?
>
> A. Yes.

Even if the phone call qualifies as a demand, the undisputed facts indicate that the demand was not made when Action was legally entitled to the assets. Action was not entitled to the assets' return until July 9, 1993. An essential element of the tort of conversion is that the "owner was entitled to the return of the property." WIS J I CIVIL—2200.1. HPO could lawfully refuse to

accept Corallini's demand on May 8 or May 9, even though the May 10th closing had to be postponed, in reliance on the alternate provision in the contract permitting it to continue its operation of Action until July 9th. Thus, we conclude that the element of conversion—that the owner was entitled to the property—was not met.

Further, assuming that the telephone call was a legally enforceable demand, we note that Kish withdrew the demand when he permitted HPO to copy Action's software, remove the company assets, and relocate with Action employees the next day. These acts are inconsistent with the acts of a party demanding the return of assets. Although the record indicates that, on the date of the move, Kish voiced some initial concern, he eventually permitted the software to be copied and the employees and assets to be moved by HPO. Kish's subsequent actions also lend support to the conclusion that he withdrew the earlier demand for return of assets. It is undisputed that Kish never personally demanded the return of Action's assets, and between July 10, 1993 and the commencement of this lawsuit, a period lasting over two years, no demand was made by anyone asking for Action's assets. Consequently, we conclude that Kish withdrew any demand by Corallini for the return of Action's assets.

Finally, the pleadings do not support Action's claim that they demanded the return of the assets. The summons contains no language regarding a demand. The complaint reads, "**FOURTH CAUSE OF ACTION**: **TROVER & CONVERSION.** … Defendant HPO being in possession of said certain assets of plaintiff Action Medical … has unlawfully converted and disposed of the same to its own use, to the Damage of the Plaintiffs … in the sum of $55,000." This language is not a demand for the return of the assets. It is merely a request for money damages in the amount of $55,000. Consequently, we conclude that no

credible evidence or reasonable inferences support the conversion claim. Thus, Action made no demand for the return of its assets when it was legally entitled to the return of the property; any alleged demand relied upon by the respondents was withdrawn; and the pleadings do not contain a demand for the assets. On remand, the trial court is instructed to dismiss the conversion claim.

Breach of Contract Damages

We next address HPO's contention that the trial court erred in instructing the jury that it could award lost future profits stemming from the breach of contract. The respondents argue that the jury verdict must be sustained because there was sufficient evidence in the record to sustain such an award. Whether the jury was entitled to award lost future profits for the breach of contract claim is a legal issue that we decide independently. *See* ***T&HW Enters. v. Kenosha Assocs.***, 206 Wis.2d 591, 604, 557 N.W.2d 480, 484 (Ct. App. 1996) (Award of damages for lost profits may not be speculative or conjectural; "[w]hether facts fulfill a particular legal standard is a question of law subject to *de novo* review."). We conclude that the trial court erred in instructing the jury that it could consider lost future profits in determining the damages for the breach of contract.

The trial court instructed the jury that "the loss of prospective or future profits is a proper basis for awarding damages resulting from a breach of contract when the circumstances are such that the future damages may be computed with some reasonable certainty." We determine this instruction was improper because it permitted the jury to award Action additional future profits beyond those bargained for in the sale price. Further, the parties never contemplated that a breach would include amounts for future profits.

Under the contract provisions found in the "ASSET PURCHASE AGREEMENT," HPO would have been required to pay Action a portion of its gross profits.

> "Purchase Price" means forty percent (40%) of the Buyer's Gross Profits for a period of six (months beginning as of the date of the Closing and twenty-five percent of the Buyer's Gross Profits for a period of an additional six (6) months. Gross Profits for any partial month shall be computed for the days of the month covered by this Agreement. Notwithstanding anything herein to the contrary, the Purchase Price shall not exceed Fifty[-]five thousand Dollars ($55,000).

It is readily apparent that the parties incorporated a figure for future profits in the sale price. By awarding Action lost profits exceeding $55,000, the jury placed Action in a better position than it would have been had the sale been consummated. This is contrary to law.

"Contract damages are to be compensatory. A party is not entitled to be placed in a better position because of a breach than he would have if the contract had been performed." ***Hanz Trucking, Inc. v. Harris Bros. Co.***, 29 Wis.2d 254, 268, 138 N.W.2d 238, 246 (1965) (citations omitted). A proper award of damages must place the recipient "in the position [he or she] would have occupied had no breach occurred." ***Luebke v. Miller Consulting Eng'rs***, 174 Wis.2d 66, 74, 496 N.W.2d 753, 756 (Ct. App. 1993).

WIS J I—CIVIL 3735 instructs: "The injured party is entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the failure of the other party to perform." *See also* ***Schubert v. Midwest Broad. Co.***, 1 Wis.2d 497, 502, 85 N.W.2d 449, 452 (1957) (damages for breach of contract are awarded to put plaintiff in as "good a

position financially as he would have been in but for the breach"); ***Dehnart v. Waukesha Brewing Co.***, 21 Wis.2d 583, 595, 124 N.W.2d 664, 670 (1963) ("The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach.").

Additionally, "[d]amages may not be recovered beyond those within the reasonable contemplation [of the parties] for breach of contract." ***Morse Chain Co. v. T. W. Meikle-John, Inc.***, 241 Wis. 45, 52, 4 N.W.2d 162, 165 (1942). The jury awarded $222,000. When the parties agreed to a purchase price that included a formula for factoring in future profits in the purchase price and capped that figure at $55,000, the parties obviously did not contemplate an award of an additional $167,000 for future profits if a breach were to occur. This is particularly true here where Action seeks the return of assets, many of which HPO is still entitled to use, and HPO could have purchased the exclusive use of the assets for $55,000. Obviously, therefore, the parties could not have contemplated additional compensation of $167,000 for the failure to return some of the assets following the termination of the contract. Under these circumstances, an award that included lost future profits is duplicative.

Thus, we conclude it was error to permit an award of lost future profits. The purchase price amount included future profits and the parties, in calculating the sale price based on the company's future profits, never contemplated an award of lost future profits beyond the maximum $55,000 if the contract were breached. As a result, we must remand this matter for a new trial on the breach of contract damages. We direct the trial court to instruct the jury that, when considering the breach of contract damages for HPO's retention of the disputed assets, it must measure the amount awarded against the total purchase price of $55,000.

By the Court.—Judgment reversed and cause remanded.

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