COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP813 **Cir. Ct. No. 2003CV1661**

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

RAMACHANDRA RAO, M.D.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

WMA SECURITIES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

WORLD GROUP SECURITIES, INC., IDEX INVESTOR SERVICES, INC., STATE STREET BANK & TRUST COMPANY AND DAVID NOVAK,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed in part; reversed in part and cause remanded for proceedings consistent with this opinion.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. WMA Securities, Inc., appeals from an order striking its answer as a discovery sanction and awarding default judgment to Ramachandra Rao, M.D., and from several of the court's subsequent rulings regarding damages. Rao's action asserted WMAS' vicarious and direct liability arising from thefts committed by WMAS' former employee, David Novak. WMAS argues that the court erroneously exercised its discretion because it failed to consider the facts in the record and applied the wrong legal standard in striking WMAS' answer. It contends that the court denied WMAS its constitutional rights during the damages hearing and relied on erroneous evidentiary rulings in reaching its damages award. We conclude that the circuit court properly exercised its discretion in striking WMAS' answer and appropriately determined the amount of Rao's damages, but erroneously exercised its discretion in excluding WMAS' evidence of Rao's failure to mitigate his damages and in failing to deduct the settlement amounts Rao recovered from the dismissed defendants.

¶2 Rao cross-appeals from the portion of the circuit court's judgment denying Rao multiple damages under WIS. STAT. § 895.80 (2003-04)[1] and punitive damages under WIS. STAT. § 895.85. Rao argues that the court erred in concluding that multiple damages were not awardable under WIS. STAT. § 895.80

[1] WISCONSIN STAT. § 895.80(3)(c) allows up to treble damages in a civil action for violation of specified criminal statutes. Because the statute allows damages in a multiple amount, up to three times the amount of actual damages, we refer to damages under § 895.80 as multiple damages.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and when it declined to award punitive damages under § 895.85. We conclude that the circuit court properly denied Rao multiple damages under § 895.80, but erred when it refused to consider Rao's offer of evidence supporting punitive damages. Accordingly, we affirm the court's order striking WMAS' answer and awarding default judgment to Rao, its findings as to the amount of Rao's damages, and the portion of its judgment denying Rao multiple damages. We reverse the court's ruling denying WMAS' request to present evidence of Rao's failure to mitigate his damages, its decision not to offset its award of damages by the amount Rao recovered from the settling defendants, and its ruling denying Rao's request to offer evidence supporting his claim for punitive damages.

Background

¶3 The following facts are taken from the circuit court's order and the parties' affidavits and supporting materials. Additional facts will be developed as needed in the discussion. Between January 2000 and January 2003, David Novak, an employee of WMAS, stole hundreds of thousands of dollars from the account of Dr. Ramachandra Rao. In the midst of the thefts, in April 2001, WMAS terminated Novak for theft from a coworker, although Rao was not notified of the termination. Also during the course of the thefts, in April 2002, WMAS ceased operations and entered into an asset purchase agreement with World Group Securities, Inc.[2]

¶4 In November 2002, Rao consulted his attorney regarding extreme losses in his account. Rao then brought this action against Novak and WMAS,

[2] WGS was a defendant in this action, but reached a settlement with Rao and was dismissed.

among others. In Rao's amended complaint, he alleged that Novak stole a substantial sum of money from him, and that WMAS was vicariously liable for those thefts.[3] Rao also alleged that WMAS was directly liable for intentional and negligent misrepresentation, among other allegations. Rao submitted discovery requests to WMAS in May 2004, and received responses containing a sworn confirmation by WMAS President, Barry Clause. Rao was dissatisfied with WMAS' responses to his interrogatories and moved to compel discovery in July, 2004. The trial court granted his motion. Rao submitted a second set of interrogatories in October, 2004. The responses to those interrogatories included an affidavit by Clause claiming personal knowledge of WMAS' attempts to comply with Rao's discovery requests. In March 2005, the court issued a second order compelling WMAS to comply with discovery. On April 20, 2005, Rao moved for discovery sanctions for WMAS' continuing failure to comply with the court's discovery orders.

¶5 After several more exchanges between the parties, the court heard arguments on Rao's motion for discovery sanctions on May 18, 2005. WMAS stated it had, through its most recent submissions to Rao, fully complied with the court's order. The court found that the submissions of WMAS were unreasonably late, and ordered WMAS to pay $2,000 to Rao's attorneys; further, the court stated that if, after Rao conducted a full review of WMAS' most recent submissions, Rao established that WMAS had continued to withhold material information, the court would strike WMAS' answer.

[3] Novak failed to answer and a default judgment has been entered against him.

¶6 In August 2005, Rao conducted seven depositions of WMAS and WGS witnesses in Duluth, Georgia. Based on information obtained during the depositions, as well as several additional interrogatories to WMAS and alleged inadequate responses, Rao filed a motion in September 2005 to enforce the court's May 2005 order and to strike WMAS' answer. After briefing and arguments, the court struck WMAS' answer and entered default judgment to Rao. The court held a damages hearing, denying WMAS' request for a jury trial on damages, and limiting the hearing to Rao's actual losses. The court excluded Rao's proffered evidence supporting multiple and punitive damages, and also excluded WMAS' proffered evidence of Rao's failure to mitigate his damages. At the hearing, both parties presented experts as to the total amount needed to compensate Rao for his injuries. At the conclusion of the hearing, the court awarded Rao $514,010 in damages. WMAS appeals and Rao cross-appeals.

Standard of Review

¶7 We review a circuit court's decision to impose sanctions for an erroneous exercise of discretion. ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. Similarly, it is within the circuit court's discretion to determine which sanctions to impose for violation of a court order. ***Id.***; *see also* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). We use the same deferential standard of review for a circuit court's decision to admit or exclude evidence. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We uphold a court's discretionary decision if it has examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Johnson***, 162 Wis. 2d at 273. However, we independently review the

court's interpretation of a statute and its application to the facts of this case. *See* ***Murphy v. Droessler***, 188 Wis. 2d 420, 425, 525 N.W.2d 117 (Ct. App. 1994).

WMAS' Appeal

¶8 WMAS contends: (1) that the circuit court erroneously exercised its discretion when it struck WMAS' answer because WMAS' affidavits established that it had not withheld any discovery material and that it had a clear and justifiable excuse for any delay in producing documents to Rao. Thus, the court was required to consider less severe sanctions than striking WMAS' answer; (2) the court denied WMAS its state constitutional rights to a jury trial on damages; (3) the court erroneously excluded WMAS' proffered evidence of Rao's failure to mitigate his damages because WMAS, as the defaulting party, had a right to present that evidence; and (4) the court erred in awarding Rao $514,010 in damages because Rao presented no admissible evidence to prove the amount of his damages, and the trial court failed to deduct the settlement amounts Rao obtained from WMAS' joint tort-feasors, as required. We address each argument in turn.

1. Default Judgment

¶9 Under WIS. STAT. § 804.12(2)(a)3., a circuit court may strike a party's pleading and enter a default judgment if that party fails to comply with the court's discovery orders.[4] "To enter a default judgment, the trial court must

[4] WISCONSIN STAT. § 804.12(2)(a)3. provides, in part:

> (2) FAILURE TO COMPLY WITH ORDER. (a) If a party … fails to obey an order to provide or permit discovery, … the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> ….

(continued)

determine that the 'noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse.'" ***Smith v. Golde***, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999) (citing ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995)). A party acts in bad faith only if it "intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand." ***Hudson Diesel***, 194 Wis. 2d at 543. If a party's misconduct is unintentional but "is so extreme, substantial and persistent that it can properly be characterized as egregious, the trial court may dismiss the action." ***Id.***

¶10 WMAS argues that the circuit court erroneously exercised its discretion by striking WMAS' pleadings because the affidavits it submitted in opposition to Rao's motion to strike its answer established that it had not intentionally withheld any documents during discovery, and that any delay in production was cured by a clear and justifiable excuse. WMAS further argues that the court's decision to strike its answer was an erroneous exercise of discretion because its order did not reflect knowledge of the facts submitted in WMAS' affidavits, the correct legal standard, or the process it used to reach its decision. We disagree.

¶11 After several motions to compel, hearings, briefing and submissions by the parties, the circuit court found that it was "abundantly clear" to the court that WMAS had "done everything possible to avoid giving information about this

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> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

matter to the attorneys for the plaintiff." App-217. The court found that, after the third order to compel discovery:

> It now appears that WMA[S] had not, in fact, furnished all of the information requested at the time of the May 18 order. While WMA[S] assured the court that it was now in compliance, although tardily, subsequent events have disclosed that WMA[S] had critical information in the form of internal documents, both in hard copy form and in electronic data storage concerning its investigation of the activities of Novak. Those documents had been transferred to WGS at the time of the sale but, under an agreement between those two entities, they were available to both WMA[S] and WGS. The fact that those documents existed and had not been disclosed on May 18, 2005, in spite of the representations of [] WMA[S] constitutes a serious violation of this court's order. The representation of WMA[S] to the court was simply false.

¶12 While the court's decision does not explicitly state the facts it utilized from the record or the proper legal standard, we do not agree that those omissions render it erroneous. We may independently search the record to support the court's exercise of discretion. ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995).

¶13 On our own review of the record, we conclude that the court's decision to strike WMAS' answer and enter default judgment in favor of Rao was not an erroneous exercise of discretion. In its order, the court found that WMAS had violated its previous order to compel discovery, because its final release of documents to Rao as of the May 2005 hearing did not contain all responsive documents in its possession. We do not agree with WMAS' assertion that the four affidavits it submitted in opposition to Rao's motion conclusively establish that it had released all responsive documents.

¶14 The affidavit of Kevin Palmer, WMAS' former Compliance Director, states that for four years prior to April 12, 2002, WMAS' Compliance Department used a computer database called "Compliance Manager." He states that after the April 12, 2002 transfer to WGS, the Compliance Manager and all related electronic databases were transferred to WGS, and, as of the transfer, WMAS had no right of access to the program or its related electronic databases.

¶15 The affidavit of William McClean, an attorney for WMAS, states that after WMAS ceased business operations on April 12, 2002, its only labor resource has been a part-time documents clerk. McClean avers that on April 12, 2002, most of WMAS' documents were transferred to WGS, and the two entered into a document custody agreement allowing WMAS copies and occasionally access to those documents. He states WMAS retained hard copies of its Compliance Department's investigation files, and stored them in its documents warehouse, and that the documents WMAS transferred to WGS included hard copies of its operational documents and electronic records, including information maintained in WMAS' "Compliance Manager" computer database system. McClean stated his office and WMAS' documents clerk submitted requests to WGS pursuant to the WMAS/WGS documents custody agreement for documents responsive to Rao's discovery requests, that McClean personally reviewed WMAS' files stored in WMAS' warehouse and maintained by WGS to locate responsive documents, and that McClean personally searched WMAS' compliance files for documents about the investigations of complaints about Novak. McClean states he recovered from the WMAS warehouse WMAS' hard copy Compliance investigation files containing information about complaints against Novak, and forwarded them to WMAS' trial attorney for production to Rao.

¶16 The affidavit of Michael Anderson, formerly employed by WMAS to maintain the company's computer network systems and centralized databases, and subsequently employed by WGS in the same capacity, states that after the April 12, 2002 transfer, WMAS had no right of access to WMAS' previous computer databases. Anderson also states that, to his knowledge, WMAS has had no access to any database containing investigation notes generated by former WMAS Compliance Investigators Matthew Luckey and Brian Hackett since April 12, 2002.

¶17 The affidavit of Barry Clause, President of WMAS, states that WMAS has possession of an electronic database of commissions paid to WMAS' independent agents up to April 12, 2002, but has no possession of or rights of access to any other computer or electronic database that it developed or maintained prior to April 12, 2002. He states WMAS does not possess or have access to the Compliance Manager database it used prior to April 12, 2002.

¶18 Several of the factual assertions in the four affidavits submitted by WMAS are contradicted by other statements by WMAS in the record, specifically by statements given by WMAS' witnesses at the Georgia depositions. Brian Hackett, who was a compliance examiner in the customer complaints division of WMAS until April 12, 2002, when he began the same position in the same division of WGS, stated in his deposition that when he changed companies, his job basically did not change. He stated that the only change that occurred as of April 12, 2002, was that WMAS removed from his office any WMAS customer compliance files for accounts that were started before that date. He further stated that when he transferred from WMAS to WGS, there was no change in the staff for the compliance department. He also stated he had investigated Novak for misconduct, that he had contact with Novak at that time, and that information he

obtained from Novak would be in his notes in the case file, which WMAS retained.

¶19 Matthew Luckey, another former employee of WMAS who investigated Novak's misconduct, stated during his deposition that he kept a record of his investigation of Novak in both hard copy and electronic form. He stated that he believed those notes are now property of WMAS, and that he would still have access to the computer program.

¶20 Finally, Berry Clause stated during his deposition that if anyone wanted to obtain documents regarding Rao's case, they would request those documents from Clause's office. He further stated that he had no personal knowledge of any requests for documents being made, despite his sworn confirmations submitted with WMAS' responses to Rao's discovery requests. Clause then stated that he has an administrative assistant who handles requests for documents, but he had no personal knowledge of any requests to his assistant regarding Rao's case, and had only learned of Rao's case three days before his deposition.

¶21 We conclude that, based on the record, it was reasonable for the circuit court to find that the affidavits submitted by WMAS did not establish that all responsive documents available to WMAS had been released to Rao. While the court did not specifically reference the four affidavits submitted by WMAS, we do not agree that it follows that the court failed to consider them.[5] It is clear

[5] Similarly, we do not agree with WMAS that statements by the court during the hearing on Rao's motion to strike WMAS' pleading establish that the court had no knowledge of the facts in the affidavits. The history of WMAS and its relationship to WGS is not entirely clear from the record, and the court's attempts to clarify the facts does not establish it did not consider WMAS' submissions.

from the court's written decision that it found that WMAS had intentionally withheld its documents concerning WMAS' investigation into Novak's misconduct,[6] which constitutes an implicit finding that WMAS acted in bad faith.[7] *See* ***Brandon Apparel Group, Inc. v. Pearson Properties, LTD.***, 2001 WI App 205, ¶14, 247 Wis. 2d 521, 634 N.W.2d 544. That finding is supported by the depositions in the record, which contradict WMAS' affidavits asserting that such documents do not exist or are not accessible to WMAS. Further, the court specifically referenced the two previous orders to compel discovery and the continuous difficulty the court encountered in obtaining WMAS' cooperation in releasing documents and information. For the same reasons, it follows that the court implicitly found that WMAS did not have a clear and justifiable excuse for violating its discovery order, despite WMAS' argument that it has ceased operations and has only one part-time employee. That finding is supported by the same facts in the record. Thus, we conclude that the court properly exercised its discretion in striking WMAS' answer and entering default judgment for Rao.[8]

[6] Rao asserts that WMAS withheld several other categories of documents as well. The only category of documents mentioned by the circuit court is the WMAS investigation files into Novak's misconduct. Because the court's finding that WMAS withheld its investigation files supports its exercise of discretion in striking WMAS' answer, we need not address whether it found that WMAS withheld other categories of documents, as well.

[7] We do not agree with WMAS that the court's use of the word "appears" connotes uncertainty. The court's order is not equivocal as to its findings about WMAS' violation of its discovery order.

[8] Because we conclude that the circuit court properly found that WMAS violated its discovery orders in bad faith and without a clear and justifiable excuse, we disagree with WMAS' contention that the court was required to consider less severe sanctions. *See* ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 545, 535 N.W.2d 65 (Ct. App. 1995) ("We emphasize that a trial court need only explore alternative remedies where the noncomplying party's conduct is unintentional."). We similarly disagree with WMAS' contention that the documents Rao sought were peripheral to the issue of Rao's case and thus did not support striking its answer as a (continued)

2. Jury Trial on Damages

¶22 WMAS argues that the circuit court erroneously denied its right to a jury trial on damages. In support, WMAS cites article 1, section 5, of the Wisconsin Constitution and ***Jennings v. Safeguard Ins. Co.***, 13 Wis. 2d 427, 109 N.W.2d 90 (1961). We conclude that neither authority supports WMAS' contention.

¶23 Article 1, section 5 of the Wisconsin Constitution provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy[.]" It does not address the rights of a defaulting party to a jury trial on the issue of damages. Similarly, ***Jennings*** reiterates the right of a party to submit the issue of damages to a jury under Wis. Const. art. 1, sec. 5, but does not address the right of a defaulting party to a jury trial on damages. Contrary to WMAS' assertion, case law establishes that a circuit court has discretion to determine the nature of a hearing on damages after entering a default judgment. *See* ***Chevron Chemical Co. v. Deloitte & Touche LLP***, 207 Wis. 2d 43, 44, 557 N.W.2d 775 (1997). Because WMAS has not cited supporting authority for its proposition that a party is entitled to a jury trial following a default judgment, we decline to consider its argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

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sanction. *See* ***id.*** at 544. Whether and to what extent WMAS investigated Novak's misconduct without notifying Rao is not peripheral to the issue of WMAS' liability for Novak's thefts.

3. Evidence that Rao Failed to Mitigate Damages

¶24 WMAS argues that the circuit court erroneously excluded its evidence that Rao failed to mitigate his damages, contending that a defaulting party has a right to offer such evidence. We agree.

¶25 In ***Smith***, 224 Wis. 2d at 530, we reversed the circuit court's decision to deny the defaulting party the right to present evidence at the damages hearing. We explained that, following a default judgment, "[i]f the defendant contests the amount of damages, he may appear at the hearing to assess damages, cross-examine the plaintiff's witnesses, and present evidence to mitigate or be heard as to the diminution of damages." ***Id.***

¶26 We do not agree with Rao that allowing WMAS to present evidence as to mitigation of damages would force Rao to re-litigate the issue of liability that was resolved in the default judgment. As explained in ***Smith***, a contested amount of damages is a distinct issue from liability and may warrant a hearing following a default judgment, during which the defaulting party is entitled to present evidence showing that damages are less than claimed. Thus, we conclude that the circuit court erred in denying WMAS the right to present evidence showing a lesser amount of damages than Rao claimed. However, WMAS may not present evidence negating its liability for damages.

4. Damages Award

¶27 WMAS contends that the circuit court erred in awarding Rao $514,010 in damages. First, WMAS contends that Rao did not meet his burden under ***Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977), to prove his damages "to a reasonable

certainty." WMAS contends that Rao did not offer any admissible evidence to establish his damages, because Rao's witness, Accountant George Kiskunas, had no personal knowledge of Rao's damages and thus his testimony was inadmissible hearsay.[9] WMAS has not convinced us that the court's evidentiary ruling as to Kiskunas's testimony was "manifestly wrong and an erroneous exercise of discretion." *See* ***State v. Hale***, 2003 WI App 238, ¶12, 268 Wis. 2d 171, 672 N.W.2d 130.

¶28 WMAS argues that Kiskunas "based his calculation [of Rao's damages] upon a hearsay summary of withdrawals." It points out that Kiskunas relied on an exhibit prepared in his office[10] using a list of Novak's withdrawals from Rao's account. WMAS contends that the list did not meet any hearsay exception and therefore was inadmissible. However, WMAS does not point us to anywhere in the record that it objected to Kiskunas's testimony as hearsay. On our own review, the only objection we have discovered in relation to Kiskunas's use of the disputed list is WMAS' objection to admission of the exhibits on which Kiskunas relied for his testimony, as follows: "I object to those. They are rife with speculation." Because WMAS did not object to Kiskunas's testimony on hearsay grounds, it has waived that argument on appeal.[11] *See* WIS. STAT. § 901.03(1)(a);

[9] WMAS also contends that Rao's testimony as to his damages was hearsay, and the court erred in admitting it. Because WMAS has not convinced us that Kiskunas's testimony was erroneously admitted, and Kiskunas's testimony supported the court's award of damages, we need not address the admissibility of Rao's testimony.

[10] Kiskunas testified on cross-examination that he and his assistant prepared the exhibit using a summary or list of Novak's withdrawals from Rao's account, and that he personally supervised and checked the assistant's work.

[11] We note that if it were clear from the context of the objection that WMAS was objecting on hearsay grounds, we would deem the argument preserved for appeal. *See* WIS. STAT. § 901.03(1)(a) (requiring objection to admission of evidence to state specific grounds for objection if it is not clear from context). Here, however, WMAS objected to the admission of (continued)

State v. Salter, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984) (evidentiary issue must be raised sufficiently to alert the circuit court to grounds for argument to preserve issue for appeal). Kiskunas's testimony was therefore admitted without a hearsay objection, and the court therefore had a right to rely on that testimony in calculating its damages award. *See* ***Caccitolo v. State***, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975).

¶29 Next, WMAS argues that Rao's evidence of his damages was insufficient because Kiskunas's calculation of Rao's damages was speculative in that it included future tax consequences. WMAS relies on ***Sopha v. Owens-Corning Fiberglass Corp.***, 230 Wis. 2d 212, 226-27, 601 N.W.2d 627 (1999), which explains that "recovery for damages may be had for reasonably certain injurious consequences of the tortfeasor's negligent conduct, not for merely possible injurious consequences." (Citation omitted.) While we agree that ***Sopha*** correctly states the law, we do not agree that it precludes Rao's recovery of an amount that incorporates future tax consequences. Kiskunas, as Rao's accountant, testified as to what he had calculated as the total of Rao's damages, including Rao's losses and his potential tax liability from the unauthorized withdrawals. He testified as to his communications with the IRS regarding Rao's account and the likely tax consequences of Novak's unauthorized withdrawals. Such tax consequences are not "merely possible," but are, according to Kiskunas's testimony, reasonably certain from his experience. Thus, Kiskunas's testimony

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Kiskunas's exhibit because it was "speculation," an imprecise term that does not point to a specific rule of evidence; further, WMAS clearly has various problems with the exhibit, as explained further below, and an objection on "speculation" grounds does not direct us, or the circuit court, to WMAS' particular grounds for objection.

was not erroneously admitted,[12] and provided sufficient evidentiary support for the circuit court's award of damages.[13]

¶30 WMAS also argues that the circuit court erred by not deducting the settlement amounts Rao recovered from WMAS' co-defendants from its damages award. WMAS cites WIS. STAT. § 885.285 in support, which states that settlements "shall be credited against any final settlement or judgment between the parties." At the outset, we note that Rao has not responded to WMAS' argument and thus has conceded this point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Furthermore, Rao has cited no authority to sustain the circuit court's decision to exclude the other settlements on grounds that Rao expended more money in obtaining those settlements than he recovered, which essentially awards Rao his attorney fees. We therefore conclude that this portion of the court's judgment was erroneous.

[12] We are also not persuaded that Rao's submitting Kiskunas's exhibit to WMAS on the first day of trial rendered its admission erroneous. A trial court's decision to exclude evidence in violation of a scheduling order is discretionary, *see* ***Glaeske v. Shaw***, 2003 WI App 71, ¶¶35-36, 261 Wis. 2d 549, 661 N.W.2d 420, and WMAS has not developed an argument why the court's decision was erroneous.

[13] Exhibit 7b demonstrates Kiskunas's calculation of Rao's damages as $482,875. The court explained that it was awarding Rao his damages as Kiskunas calculated, plus $31,135 in accounting fees that Rao had incurred in handling problems with his account as a result of Novak's unauthorized withdrawals, as distinct from accounting fees incurred in the course of this litigation, for a total of $514,010, plus costs. Kiskunas testified that the total amount of fees Rao had incurred with his accounting firm was $41,670, and that $14,535 was in preparation for litigation. A calculation of fees by Kiskunas submitted as an exhibit states that Rao had incurred $41,670 in fees, and that Kiskunas anticipated another $2,000-$3,000 in fees preparing for litigation, and another $5,000 in fees to contest further negative tax assessments as a result of Novak's thefts. Neither party contests the court's calculation of the recoverable amount of Kiskunas's accounting fees. We note, however, that subtracting $14,535 from $41,670 leaves $27,135, and adding another $5,000 results in $32,135, not $31,135.

¶31 Finally, WMAS argues that the circuit court erred in awarding Rao an amount greater than the amount Rao had sought in his amended complaint. WMAS bases this argument on WIS. STAT. § 806.02(2), which allows a plaintiff to "move for judgment according to the demand of the complaint" after the defendant defaults. However, in ***Chevron***, 207 Wis. 2d at 48, the supreme court explained that "[s]ections (1) through (4) of Wis. Stat. § 806.02 apply to default judgments rendered 'if no issue of law or fact has been joined,'" such as in "typical default judgment cases." Thus, in ***Chevron***, where the defendant joined issues of fact and law and was subject to a default judgment due to defense counsel's misconduct, the default judgment was not typical and thus not governed by § 806.02(2). ***Id.*** at 44-50. Here, as in ***Chevron***, issues of fact and law were joined, and default judgment was entered for court order violations. Thus, WIS. STAT. § 806.02(2) does not mandate that Rao can only recover the amount stated in his complaint. Because WMAS cites no other authority for its proposition that the circuit court erred in awarding Rao an amount greater than the amount requested in Rao's amended complaint, we are not persuaded that the court erred in this regard.

Rao's Cross-Appeal

¶32 On cross-appeal, Rao argues that the circuit court erred by: (1) denying Rao multiple damages under WIS. STAT. § 895.80; (2) excluding Rao's proffered evidence of WMAS' wealth, culpability and other bad acts on the issue of punitive damages; and (3) declining to award Rao punitive damages under WIS. STAT. § 895.85. We first address the application of § 895.80 to the facts of this case. Then, we address Rao's second two issues, on punitive damages, collectively.

1. WIS. STAT. § 895.80

¶33 Under WIS. STAT. § 895.80, a prevailing plaintiff in an action for property damage or loss may recover multiple damages "against the person who caused the damage or loss" for intentional conduct contrary to specified criminal statutes, including WIS. STAT. § 943.20, criminal theft. Rao does not allege or argue that WMAS engaged in intentional conduct contrary to § 943.20 that caused loss to Rao. Instead, Rao argues that because Novak intentionally committed theft contrary to § 943.20, and WMAS is vicariously liable for that theft pursuant to the court's default judgment, WMAS is subject to multiple damages to the same extent as Novak. We disagree, and conclude that WMAS did not cause Rao's property loss under § 895.80 to support an award of multiple damages.

¶34 Rao relies on ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, 273 Wis. 2d 106, 682 N.W.2d 328, as support for his argument that a finding that WMAS was vicariously liable for Novak's thefts entitles Rao to multiple damages against WMAS under WIS. STAT. § 895.80. In ***Kerl***, the supreme court addressed the vicarious liability of a franchisor for the criminal conduct of a franchise employee. The court reviewed the doctrine of *respondeat superior* ("let the master answer") and explained that, in some situations, "the law will impose vicarious liability on a person who did not commit the tortious conduct but nevertheless is deemed responsible by virtue of the close relationship between that person and the tortfeasor." ***Id.***, ¶17. If a master/servant relationship is established, "[a] master may be held liable for a servant's torts regardless of whether the master's own conduct is tortious." ***Id.***, ¶¶18-21. Thus, "[v]icarious liability is a form of strict liability without fault." ***Id.***, ¶21. Vicarious liability is distinct from any direct liability for the master's own acts, and "is imposed upon an innocent party for the torts of another because the nature of the agency relationship—

specifically the element of control or right of control—justifies it." ***Id.*** Thus, applying this principle, WMAS' vicarious liability for Novak's torts against Rao is premised on WMAS' innocence as to the intentional theft, but with liability flowing from its relationship to Novak.

¶35 The question, then, is whether WMAS' vicarious liability for Novak's tortious conduct in stealing from Rao—as established through default judgment—supports an award of multiple damages under WIS. STAT. § 895.80. Section 895.80, by its plain language, applies only to the person who caused the loss to the plaintiff by intentional criminal conduct, and we are bound to apply that meaning. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Further, the supreme court has explained that § 895.80 must be strictly construed, and requires specific intent to support an award of multiple damages. ***Tri-Tech Corp. of America v. Am. Srvcs., Inc.***, 2002 WI 88, ¶¶21, 29, 254 Wis. 2d 418, 646 N.W.2d 822. Thus, because vicarious liability follows from unintentional, innocent conduct, it does not support multiple damages for intentional, criminal conduct under § 895.80.

¶36 Rao also argues WMAS is liable for multiple damages for its own misrepresentations to Rao, relying on ***Stathus v. Horst***, 2003 WI App 28, 260 Wis. 2d 166, 659 N.W.2d 165. In ***Stathus***, we upheld the circuit court's award of treble damages under WIS. STAT. § 895.80 against sellers of a house who failed to disclose a basement water defect in their house's updated condition report, after that disclosure in the first condition report prevented the house's sale. We did not identify what criminal statute the sellers had violated as a prerequisite for multiple damages under § 895.80, concluding only that the court had properly exercised its discretion by awarding treble damages based on the willful conduct reflected in the record. ***Id.***, ¶11. We said that the court had reached a reasonable conclusion

that "[b]ecause [the sellers] knew the reasons why the house was not selling, they chose not to disclose the water problems in the new condition report," and thus the court properly "concluded that the willful concealment was of such a nature to warrant trebling damages." ***Id.***, ¶11.

¶37 We are not persuaded that ***Strathus*** compels the conclusion Rao urges. Although in ***Strathus*** we upheld the award of treble damages for a party's misrepresentation to the plaintiffs, we did not address the underlying criminal statutory basis for awarding those damages. Rao has not explained how WMAS' misrepresentation in this case falls under any of the prerequisite criminal statutes listed in WIS. STAT. § 895.80. Accordingly, we conclude that the circuit court properly exercised its discretion in declining to award multiple damages under § 895.80.[14]

2. Punitive Damages

¶38 Rao argues that the circuit court erred in excluding his evidence supporting the award of punitive damages, and then in declining to award punitive damages, under WIS. STAT. § 895.85. We conclude that the circuit court erred by failing to consider Rao's offer of proof as to punitive damages to determine if an evidentiary hearing was warranted.

[14] The parties do not raise the issue of whether Rao is precluded from recovering both multiple damages and punitive damages in this case, and we need not address this issue because Rao is not entitled to multiple damages under WIS. STAT. § 895.80. We note, however, that case law suggests a plaintiff may not recover both multiple and punitive damages for the same course of conduct. *See* ***John Mohr & Sons, Inc. v. Jahnke***, 55 Wis. 2d 402, 409-12, 198 N.W.2d 363 (1972), *superseded by statute on other grounds, as recognized by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, ¶¶23, 74, 284 Wis. 2d 224, 700 N.W.2d 139.

¶39 To support an award of punitive damages, a plaintiff must offer proof that the defendant's act or course of conduct was deliberate, and that

> [the] defendant [was] aware that his or her conduct [was] substantially certain to result in the plaintiff's rights being disregarded—the rights of the plaintiff to safety, health, or life, a property right, or some other right. Furthermore, the course of conduct must actually disregard the rights of the plaintiff. Finally, the act or course of conduct must be sufficiently aggravated to warrant punishment by a punitive damages award.

Wischer v. Mitsubishi Heavy Indus. Am., Inc., 2005 WI 26, ¶30, 279 Wis. 2d 4, 694 N.W.2d 320. The plaintiff need not show that the defendant intended to injure the plaintiff, only that the plaintiff intentionally disregarded the rights of the plaintiff. ***Id.***, ¶¶29-31. A circuit court should submit the question of punitive damages "[o]nly when the wrongdoer's conduct is so aggravated that it meets the elevated standard of an 'intentional disregard of rights.'" ***Id.***, ¶31.

¶40 Under ***Chevron***, 207 Wis. 2d 43, the nature of a hearing on damages following a default judgment is left to the circuit court's discretion. However, in ***Apex Electronics Corp. v. Gee***, 217 Wis. 2d 378, 384-91, 577 N.W.2d 23 (1998), the supreme court explained the process a circuit court is to follow when addressing punitive damages following default judgment.[15] When the complaint "seeks unliquidated damages on a tort claim, a circuit court must first determine

[15] We note that in ***Apex Electronics Corp. v. Gee***, 217 Wis. 2d 378, 384-91, 577 N.W.2d 23 (1998), the supreme court explained that punitive damages following a default judgment are to be addressed according to the intersection of WIS. STAT. §§ 802.02, 806.02, and 895.85, and that earlier in this opinion we explained that § 806.02(2) did not govern Rao's claims under ***Chevron Chemical Co. v. Deloitte & Touche LLP***, 207 Wis. 2d 43, 557 N.W.2d 775 (1997). Although ***Chevron*** dictates that on the facts presented in this case, WIS. STAT. § 806.02(2) does not limit the amount recoverable to the amount in Rao's amended complaint, we are persuaded that the analysis in ***Apex***, relying in part on § 806.02, governs the process to assess punitive damages in this case.

whether proof of any fact is necessary for the court to give judgment." ***Id.*** at 387. Here, Rao sought punitive damages for WMAS' tortious conduct. Thus, the court was required to determine whether proof of any fact was necessary to determine whether WMAS acted deliberately and intentionally disregarded Rao's rights in a manner sufficiently aggravated to support an award of punitive damages.

¶41 If the court determines that additional proof of any fact is necessary before awarding punitive damages, the court determines the method to use to receive that proof, such as by affidavit or hearing. ***Id.*** at 387-88. Inquiry beyond the pleadings following a default judgment is necessary to give the circuit court a "basis for determining the nature of the plaintiff's conduct and the amount of punitive damages, if any, to be awarded." ***Id.*** at 388-89. Moreover, "[p]unitive damages are not automatically awarded when a wrongdoer engages in conduct prohibited by WIS. STAT. § 895.85, the punitive damages statute." ***Id.*** at 389. Instead, the fact finder must determine whether to award punitive damages, and if so, in what amount. ***Id.*** Thus, "a circuit court entering a default judgment on a punitive damages claim must make inquiry beyond the complaint to determine the merits of the punitive damages claim and the amount of punitive damages, if any, to be awarded." ***Id.*** at 390-91.

¶42 Thus, we conclude that the circuit court was required to consider Rao's offer of proof as to punitive damages to determine whether that evidence was sufficient to warrant an evidentiary hearing. While the issue of whether there was sufficient evidence to submit the question of punitive damages is a question of law we review de novo, ***Wischer v. Mitsubishi Heavy Indus. Am, Inc.***, 2005 WI 26, ¶32, 279 Wis. 2d 4, 694 N.W.2d 320, in this case we deem it appropriate to remand to allow the circuit court an opportunity to exercise its discretion in determining the nature of the hearing and to determine whether punitive damages

are warranted. For example, the court may hold an evidentiary hearing, consider Rao's offer of proof to determine if an evidentiary hearing is warranted, or allow Rao an opportunity to submit additional proof to support his case for punitive damages before determining whether to hold a full evidentiary hearing.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded for proceedings consistent with this opinion.

Not recommended for publication in the official reports.