COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP160

Cir. Ct. Nos. 2006CV12462
2007CV523

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

MARK CARSTENSEN,

PLAINTIFF-RESPONDENT,

AVIAN AT TUCKAWAY, LLC
AND TWIN OAKS PROPERTIES, LLC,

PLAINTIFFS,

V.

DANIEL GOECKNER,

DEFENDANT-APPELLANT,

DARWIN PROFESSIONAL UNDERWRITERS, INC.,

DEFENDANT.

DANIEL J. GOECKNER AND
AVIAN AT TUCKAWAY, LLC,

PLAINTIFFS-APPELLANTS,

**WYNDHAM RIDGE, LLC
AND CARSTENSEN CINEMA, LLC,**

PLAINTIFFS,

V.

**MARK E. CARSTENSEN AND
MARK E. CARSTENSEN CONSTRUCTION, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO and WILLIAM W. BRASH, III, Judges.[1] *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Daniel Goeckner appeals the judgment, entered upon a jury's verdict, awarding him $149,891.22 in damages resulting from Mark Carstensen's breach of a mediation agreement between the two of them. Pursuant to the mediation agreement, Carstensen was supposed to pay Dr. Goeckner three installments of $317,000—$951,000 in total—to buy Dr. Goeckner's shares in a piece of property they jointly owned. Carstensen did not pay $634,000 of the $951,000 directly to Dr. Goeckner as mandated by the agreement, however, but instead deposited it in another joint business account the two shared; he did so because that particular business was experiencing cash flow problems and he and

[1] The Honorable John J. DiMotto presided over the trial and ruled on motions after verdict. The judgment was entered by the Honorable William W. Brash, III, who presided over the case following judicial rotation.

Dr. Goeckner had personally guaranteed that business's loan. The jury found that Carstensen breached the mediation agreement, but that damages amounted only to $149,891.22, or the amount of interest Carstensen owed Dr. Goeckner per the terms of the mediation agreement. On appeal, Dr. Goeckner argues that: (1) the award should be increased by at least $634,000, because that is the amount that Carstensen, pursuant to the mediation agreement, was supposed to pay to him directly; and (2) in the alternative, he should be granted a new trial on damages. We disagree with Dr. Goeckner and affirm.

BACKGROUND

¶2 Carstensen and Dr. Goeckner met in 1999 when Carstensen, a real estate developer, was referred to Dr. Goeckner, a psychologist, for counseling. Dr. Goeckner began treating Carstensen for, among other things, depression and anxiety. In doing so, Dr. Goeckner learned that Carstensen was a successful developer of commercial, multi-family, and single-family real estate projects.

¶3 During therapy sessions, Dr. Goeckner and Carstensen began talking about entering a business relationship, and ultimately entered into various real estate ventures. They were members of several limited liability companies: (1) Twin Oaks Properties, LLC; (2) Avian at Tuckaway, LLC; (3) Carstensen Cinema, LLC; and (4) Wyndham Ridge, LLC. Carstensen and Dr. Goeckner also owned interests in a parcel of real property on South Drexel Avenue in Franklin, Wisconsin.

¶4 As time went on, multiple disputes arose between Carstensen and Dr. Goeckner regarding their shared real estate ventures—including a dispute regarding the South Drexel property in Franklin, which the parties decided to mediate. At the conclusion of the mediation, the parties signed an agreement,

dated July 15, 2006, under which Dr. Goeckner was to relinquish his rights to the property and Carstensen was to pay Dr. Goeckner a total of $951,000 in three installments of $317,000. Per the agreement, if a payment was not timely made, interest would be paid to Dr. Goeckner in the amount of 1% over prime on the past due amount.

¶5 Per the mediation agreement, Carstensen paid Dr. Goeckner the first installment of $317,000. Shortly thereafter, however, Avian at Tuckaway, LLC (hereafter "Avian"), a condominium development also located in Franklin, began experiencing cash flow problems. Avian was supposed to have approximately seventy units and was projected to sell out in two years; however, due to a slowing real estate market, only nine condos were sold from 2005 to 2006, and only two or three had sold between 2007 and 2009. At the time, Avian had outstanding loans with Pyramax Bank totaling $4.2 million, which were personally guaranteed by both Carstensen and Dr. Goeckner.[2]

¶6 When Avian began having cash flow problems, Carstensen asked Dr. Goeckner to invest capital into the business. Dr. Goeckner—pointing to a provision in the company's operating agreement requiring a unanimous vote by both himself and Carstensen prior to either of them being compelled to contribute additional cash into the company—refused to do so. Incidentally, Avian's attorney had warned the parties about the dangers of placing unanimous consent provisions in a two-member limited liability company because of the potential for deadlock; however, Carstensen believed he could trust Dr. Goeckner to contribute

[2] At trial, Dr. Goeckner denied that he was personally liable for Avian's loans. However, the personal guaranty was introduced into evidence and there was substantial testimony regarding Dr. Goeckner's personal liability for Avian's loans with Pyramax Bank.

capital to Avian when needed. Moreover, Carstensen testified that there was an oral agreement between himself and Dr. Goeckner that they would contribute capital to Avian on a pro-rata basis when necessary to service Avian's debt.

¶7 When Dr. Goeckner refused to contribute capital to Avian, Carstensen contributed in excess of $1 million dollars of his own money to the company to service its debt and to prevent default. Carstensen then told Dr. Goeckner that the second $317,000 payment due under the South Drexel mediation agreement was offset by Dr. Goeckner's unmet responsibility to repay Carstensen for the capital he had personally provided to Avian. Carstensen also advised Dr. Goeckner that he was offsetting $181,686.80 of the third $317,000 payment against the amount Dr. Goeckner now owed him, and Carstensen sent Dr. Goeckner a check for the remaining balance, $135,313.20. Dr. Goeckner refused to accept the check, however, so the amount was later applied to his capital account for Avian.

¶8 In other words, rather than making the two final installment payments under the mediation agreement directly to Dr. Goeckner, Carstensen put the $634,000 due to Dr. Goeckner into the Avian operating account.

¶9 Not surprisingly, tensions erupted and Dr. Goeckner and Carstensen sued each other. Carstensen's claims against Dr. Goeckner included, as pertinent here, claims for breaching Avian's operating agreement and breaching of the duty of good faith and fair dealing with respect to Avian. Dr. Goeckner's claims, as pertinent here, included a claim alleging that Carstensen breached the mediation agreement by failing to make the second and third payments of $317,000 directly to Dr. Goeckner. The cases were consolidated.

¶10 The case went before a jury. At trial, Carstensen testified that he did not pay the second and third $317,000 payments directly to Dr. Goeckner as prescribed by the agreement, but applied them on Dr. Goeckner's behalf to Dr. Goeckner's capital account at Avian. Carstensen, the vice-president of Carstensen's construction company, and Avian's attorney both testified that had Carstensen not applied the $634,000 toward Avian's debt, Avian would have defaulted on its loans and Pyramax Bank would have foreclosed on Avian's assets, sold them, and sought the deficiency from Carstensen and Dr. Goeckner, who had, as noted, personally guaranteed the loans. While there was no dispute that Carstensen paid the $634,000 to Avian instead of directly to Dr. Goeckner, the parties disputed the amount of interest that would be owed should the jury find for Dr. Goeckner. Dr. Goeckner asserted that the interest calculation should be computed using a fixed rate calculation, and presented testimony showing that the interest due was $251,420. Carstensen, conversely, claimed that any interest due should be calculated based upon a floating interest calculation. An accountant, Dan Roskopf, testified that, based upon a floating rate calculation, the interest due Dr. Goeckner, should Carstensen be found to have breached the mediation agreement, was $149,891.22.

¶11 The jury found that Carstensen did breach the mediation agreement. The jury also found that Carstensen owed Dr. Goeckner damages totaling $149.891.22. As for Dr. Goeckner, the jury found that he did not breach the Avian at Tuckaway operating agreement, but did breach the duty of good faith and fair dealing implied in the operating agreement. The jury also determined that Carstensen should not be awarded any damages for Dr. Goeckner's breach of his duty of good faith and fair dealing.

¶12 After trial, Dr. Goeckner filed a motion, which sought, among other things, to increase the damage award on his claim for breach of the mediation agreement, and, in the alternative, a new trial on the issue of damages. The trial court denied Dr. Goeckner's motion, concluding that there was sufficient evidence to sustain the jury's verdict:

> In this case, the jury found that there was a post[-]mediation agreement breach by Mr. Carstensen, and then the jury determined damages. They didn't determine any of the principal owed under the post[-]mediation agreement. The reasonable inference is the jury found that he got the benefit of the principal. But they did award floating, not the fixed interest.
>
> ….
>
> Now if the principal – if there was no quote unquote "principal damages," how does the jury come up with floating interest? Is it reasonable for the jury to do that?
>
> Searching the record, yes, there is. Mr. Carstensen obviously did the forced contribution under their verbal agreement with respect to their agreements. But instead of giving it to Dr. Goeckner to make the payments, Carstensen did it – it's reasonable to infer – because he feared that Dr. Goeckner wouldn't have paid it. But Dr. Goeckner did use – lose the use of that principal money, because quite frankly until the bank comes calling saying we want it now, Dr. Goeckner conceivably could have invested it and then when asked paid it.
>
> So he did lose the use of the money, and the use of the money is via interest. The floating interest. Obviously things stop as of the date of trial.
>
> But the thing is this. Is it a reasonable – is it reasonable for this court, looking at all the evidence that the jury considered, to find he didn't suffer a principal loss, but he did suffer a loss and that is of the floating interest? I think it's totally reasonable.

¶13 Dr. Goeckner now appeals. Further facts will be developed as necessary.

ANALYSIS

¶14 On appeal, Dr. Goeckner argues that the damages the jury awarded him should be increased as a matter of law. He also argues, in the alternative, that he is entitled to a new trial on damages with respect to Carstensen's breach of the mediation agreement. We discuss each argument in turn.

1. The jury's verdict awarding Dr. Goeckner $149.891.22 in damages should not be increased as a matter of law.

¶15 Dr. Goeckner first argues that we ought to increase the damage award. As noted, the jury awarded Dr. Goeckner $149,891.22. This amount, according to accountant Dan Roskopf's testimony, represented the interest that was due because of Carstensen's failure to make the last two installments of $317,000 directly to Dr. Goeckner, as calculated based on a floating interest rate.

¶16 Dr. Goeckner argues that there was insufficient evidence to support the $149,891.22 damage award because no testimony was presented at trial by either side that *only* interest was due. In other words, he claims that if the jury found that Carstensen breached the mediation agreement by failing to make payments directly to him, then the jury also should have awarded him an additional $634,000, and that, consequently, the lowest amount that the jury should have rendered was $783,891.22. In essence, Dr. Goeckner argues that because he was found to have not breached the operating agreement, it was wrong for the jury to decide—as it presumably did—that he had an obligation to pay Avian $634,000 and therefore did not suffer damage, beyond interest he could have earned, by Carstensen's depositing that amount into the Avian account.

¶17 Dr. Goeckner further argues that the $149,891.22 damage award was speculative because it presupposed that, had Carstensen not paid the $634,000 due

him into the Avian account, "(1) the lender would have called the loan; (2) Avian at Tuckaway, LLC could not obtain alternative financing; (3) the lender would foreclose the mortgage; (4) the lender would pursue a deficiency judgment against the LLC members; (5) the lender would pursue Daniel Goeckner personally; and (6) Daniel Goeckner's personal guaranty was legally enforceable." According to Dr. Goeckner, there was no evidence at trial to substantiate these presuppositions.

¶18 Our review of the jury's award is limited. *See* ***Weber v. White***, 2004 WI 63, ¶16, 272 Wis. 2d 121, 681 N.W.2d 137. We will uphold the jury's award if there is any credible evidence to support it. *See* ***Finley v. Culligan***, 201 Wis. 2d 611, 630, 548 N.W.2d 854 (Ct. App. 1996); *see also* WIS. STAT. § 805.14(1) (2011-12).[3] In applying this narrow standard of review, we consider the evidence in the light most favorable to the jury's determination "because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses." *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Therefore, "if the evidence gives rise to more than one reasonable inference, we accept the particular inference reached by the jury." *See* ***id.***

¶19 "The standard of review in this case is even more stringent because the [trial] court approved the jury's verdict." *See* ***id.***, ¶40. "[W]here, as here, the verdict has the trial court's approval," we must uphold it unless we find "'such a complete failure of proof that the verdict must have been based on speculation.'" *See* ***Finley***, 201 Wis. 2d at 631 (citations omitted).

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶20 Applying our narrow standard of review, we cannot increase the damages in this case because credible evidence supports the jury's award. *See* ***id.***, 201 Wis. 2d at 630. As Carstensen correctly notes, there was plenty of evidence presented at trial establishing that had Carstensen not applied the second and third installments of $317,000 toward Dr. Goeckner's capital account with Avian, Pyramax Bank would have collected those funds from Dr. Goeckner directly. As noted, Carstensen, the vice-president of Carstensen's construction company, and Avian's attorney both testified that had Carstensen not applied the $634,000 toward Avian's debt, Avian would have defaulted on its $4.2 million loan and Pyramax Bank would have foreclosed on Avian's assets, sold them at a sheriff's sale, and sought the deficiency from Carstensen and Dr. Goeckner, who had personally guaranteed Avian's loans. Consequently, even though the jury found that Dr. Goeckner did not breach the written terms of the operating agreement by refusing to make capital contributions when Carstensen asked him to, the jury still could have concluded, as Carstensen argues, "that Dr. Goeckner would have to part with the $634,000 in principal one way or another … it was simply a matter of timing." Contrary to what Dr. Goeckner argues, such a conclusion is not at odds with the jury instructions and could in fact accurately describe the amount that would, as the instructions state, "reasonably compensate [Dr. Goeckner] for all the losses that are the natural and probable results of the breach."

¶21 Given that there was evidence that Dr. Goeckner would have had to part with the $634,000 Carstensen owed him under the mediation agreement, it was reasonable and not at all speculative for the jury to award him damages amounting to the interest he would have made on the money had it been initially deposited directly into his personal account. We find the trial court's analysis convincing on this matter:

> Now if the principal – if there was no quote unquote "principal damages," how does the jury come up with floating interest? Is it reasonable for the jury to do that?
>
> Searching the record, yes, there is. Mr. Carstensen obviously did the forced contribution under their verbal agreement with respect to their agreements. But instead of giving it to Dr. Goeckner to make the payments, Carstensen did it – it's reasonable to infer – because he feared that Dr. Goeckner wouldn't have paid it. But Dr. Goeckner did use – lose the use of that principal money, because quite frankly until the bank comes calling saying we want it now, Dr. Goeckner conceivably could have invested it and then when asked paid it.
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> So he did lose the use of the money, and the use of the money is via interest. The floating interest. Obviously things stop as of the date of trial.
>
> But the thing is this. Is it a reasonable – is it reasonable for this court, looking at all the evidence that the jury considered, to find he didn't suffer a principal loss, but he did suffer a loss and that is of the floating interest? I think it's totally reasonable.

¶22 Furthermore, the case before us is distinguishable from the cases Dr. Goeckner cites as examples of our authority to increase the damage award. Dr. Goeckner cites ***Herkert v. Stauber***, 106 Wis. 2d 545, 317 N.W.2d 834 (1982), and ***W.H. Shenners Co. v. Delzer***, 169 Wis. 507, 173 N.W. 209 (1919), arguing that the jury "made a mistake" in awarding him the $149,891.22 without also awarding an additional $634,000. As Dr. Goeckner himself notes, however, these cases stand for the proposition that "where a verdict is for a sum less than the successful party is entitled to *on undisputed evidence*, the court may increase the damages to conform with the proof presented at trial." *See* ***Herkert***, 106 Wis. 2d at 556 (emphasis added; one set of quotation marks omitted); *see also* ***Delzer***, 169 Wis. at 508. As we have seen from our review of the pertinent facts in the case before us, the issue of damages was disputed. While there was no dispute that Carstensen breached the mediation agreement by not directly paying Dr. Goeckner

$634,000, there was a dispute as to whether Dr. Goeckner actually incurred $634,000 in damages. This issue is best exemplified by Carstensen's closing argument in which counsel argued that Dr. Goeckner suffered no damages as a result of Carstensen's breach:

> You know if – if I have a friend who isn't paying his rent and his kids are going to be evicted, but I owe him a thousand dollars, am I wrong to pay him his rent? Is that any less valuable to him than [if] I gave him the money [directly]? …. What's wrong with that? What is wrong with saying I'm going to take money that I owe you, for whatever reason, and I'm going to pay it toward an obligation that you have, that you committed to, that you're defaulting on? What's wrong with that?
>
> So I want to look at the verdict form for a second. On [Mr. Carstensen's] verdict the first question is, did Mark Carstensen breach the mediation agreement of July 15th, 2006 regarding the South Drexel property?....
>
> I believe that the proper answer to this question is no, but I'm also going to tell you this. If you think that's a technical violation of the agreement, then I want you to look very carefully at the next question, which is what sum of money will fairly and reasonably compensate Daniel Goeckner for Mark Carstensen's breach of the mediation agreement?
>
> If you think that was a breach of the mediation agreement … I suggest to you that the number is zero. How could he possibly be damaged when the money just went to pay his own debts?
>
> ….
>
> How is [Dr. Goeckner] damaged when you take money and you pay it on his behalf to a bank at which he has a personal guaranty…. How is he harmed?

¶23 In sum, because sufficient evidence supports the jury's award, and because there was not "'such a complete failure of proof that the verdict must have been based on speculation,'" *see* ***Finley***, 201 Wis. 2d at 631 (citation omitted), we will affirm the trial court's decision to uphold the $149,891.22 damage award.

2. The trial court properly exercised its discretion in denying Dr. Goeckner's motion for a new trial.

¶24 Dr. Goeckner incorporates all of his arguments in support of his contention that the damage award should be increased to argue, in the alternative, that we should grant him a new trial on the issue of damages. WIS. STAT. § 805.18(2) provides that no judgment shall be reversed or set aside and a new trial granted on the ground of error in procedure, unless the error has affected the substantial rights of the party seeking to reverse or set aside the judgment or to secure a new trial. *See* ***id.*** The decision to grant or refuse a new trial is within the trial court's discretion, and that decision will not be disturbed unless it is manifest that discretion has been improperly exercised. ***Erickson v. Clifton***, 265 Wis. 236, 240, 61 N.W.2d 329 (1953); ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). A trial court acts within its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285.

¶25 As noted, the trial court denied Dr. Goeckner's motion for a new trial, and, for all of the reasons explained in Part I above, we conclude that the trial court properly exercised its discretion in denying Dr. Goeckner's motion for a new trial. We therefore affirm the trial court's decision.

By the Court.—Judgment and order affirmed.

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