COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3366

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

NIPULCHANDRA PATEL,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. BUKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

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

PER CURIAM. Robert J. Bukowski appeals from a judgment entered after a jury found against him in a civil action brought by his former business associate, Nipulchandra Patel. Patel filed the action alleging that Bukowski refused to fulfill an agreement to make Patel a co-owner of the business, and instead forced Patel out of the business. Patel's complaint sought

recovery based on breach of contract, promissory estoppel, breach of fiduciary duty, and unjust enrichment, and included a request for punitive damages. Bukowski asserts that: (1) the trial court erred in refusing to dismiss Patel's punitive damages claim on summary judgment; (2) the evidence is insufficient to support the punitive damages award; and (3) the trial court erred in admitting the discovery deposition of Patel's expert witness. We affirm.

I. BACKGROUND

Bukowski formed Alpha Consulting Group, Incorporated, in 1989. Alpha was an investment management consulting firm. Patel's action claimed the following: In the fall of 1989, Bukowski and Patel agreed that Patel would move from New York to Milwaukee to join Alpha, and that Patel would be made a co-owner of Alpha. Bukowski agreed that once Alpha became profitable, he would issue to Patel stock representing Patel's ownership interest in Alpha in lieu of a portion of Patel's share of Alpha's profits. In November of 1989, Patel moved to Milwaukee and began work at Alpha, bringing with him valuable research, software, experience and personal contacts in the investment industry.

After Alpha became profitable, Bukowski refused to issue any stock to Patel. Instead, Bukowski told Patel he was not going to recognize Patel's ownership interest in Alpha. Bukowski then changed the locks to Alpha's business offices, and forced Patel out of the business.

Bukowski never compensated Patel for his ownership interest in Alpha. At trial, Patel testified that, in order to discredit Patel's ownership claim, Bukowski falsely accused Patel of being a liar, and fabricated a "list of lies" to support this false allegation. Bukowski testified, however, that Patel was only an employee of Alpha, and that Patel never had an ownership interest in Alpha. The

jury found in favor of Patel, awarding him compensatory damages for the value of his ownership interest, and punitive damages based on Bukowski's conduct in forcing Patel out of the business. The trial court entered judgment accordingly.

II. DISCUSSION

Bukowski argues that the trial court erred in denying his summary judgment motion to dismiss Patel's punitive damages claim. He asserts that Patel failed to allege any facts that would support a finding of malice or intentional disregard for Patel's rights, and that Bukowski was therefore entitled to summary judgment on the punitive damages claim.

We review the trial court's grant or denial of summary judgment *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment should be granted only where the moving party shows the right to judgment with such clarity as to leave no room for controversy. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. ***Id.***, 97 Wis.2d at 338–339, 294 N.W.2d at 477.

Section 895.85(3), STATS., governs the award of punitive damages, and provides:

> STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the

> defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

In response to Bukowski's motion for summary judgment, Patel submitted an affidavit alleging that Bukowski had falsely accused Patel of lying "as a means of cheating [Patel] out of [his] rights in the business," and a brief arguing that "Bukowski's charges of lying show malice justifying punitive damages." At the summary judgment hearing, Patel again alleged that Bukowski was attempting "to strip [Patel] of [his] ownership interest in the business … under the guise of accusing him of being a pathological liar." Patel's sworn allegations concerning Bukowski's conduct were sufficient to create an issue of material fact regarding whether Bukowski acted with malice or in an intentional disregard of Patel's rights. The trial court did not err in denying Bukowski's motion for summary judgment.

Bukowski next argues that the evidence was insufficient to support an award of punitive damages. He asserts that the only evidence presented in support of punitive damages was the fact that Bukowski had called Patel a liar, and that this evidence is insufficient to support a finding of malice or intentional disregard for Patel's rights.

We will not overturn a verdict awarding punitive damages unless, after considering all credible evidence, and all reasonable inferences that can be drawn from the evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* ***Gianoli v. Pfleiderer***, 209 Wis.2d 509, 527, 563 N.W.2d 562, 569 (Ct. App. 1997); § 805.14(1), STATS.

Credible evidence discloses that Bukowski induced Patel to join Alpha by agreeing to make Patel a co-owner of Alpha, but that after Patel joined Alpha and helped make it profitable, Bukowski refused to issue any stock to Patel.

Instead, Bukowski made false accusations against Patel and forced him out of the business without compensating him for his ownership interest. Contrary to Bukowski's assertion, this evidence reveals more than mere name-calling; it reveals an intent to wrongfully deprive Patel of his ownership rights in Alpha. The evidence is sufficient to support the jury's finding that Bukowski acted with malice or an intentional disregard for Patel's rights.

Bukowski's final argument is that the trial court erred in admitting the deposition of Patel's expert witness. He asserts that the deposition was taken only for discovery purposes and that he did not have an opportunity to adequately cross-examine the expert, and therefore the deposition should not have been admitted.

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. ***State v. Larsen***, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. ***Id.***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

Section 804.07, STATS., provides:

> **(1)** USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> ….

> (c) 1. The deposition of a witness other than a medical expert, whether or not a party, may be used by any party for any purpose if the court finds any of the following:
>
> ….
>
> c. That the witness is unable to attend or testify because of age, illness, infirmity or imprisonment.

Bukowski does not dispute that Patel's expert was unable to testify due to illness, nor does Bukowski dispute that he was represented by counsel at the taking of the deposition. Bukowski argues, however, that the expert's deposition should not have been admitted because it was a discovery deposition and he did not have an opportunity to adequately cross-examine the expert.

The application of a statute to an undisputed set of facts is a question of law, which we review *de novo*. *See* ***Ball v. District No. 4***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). If a statute is plain and unambiguous we must not consult outside sources to ascertain its meaning, *see* ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985), but rather we must apply its plain meaning, *see* ***Standard Theatres, Inc. v. DOT***, 118 Wis.2d 730, 740, 349 N.W.2d 661, 667 (1984).

Section 804.07, STATS., unambiguously states that if a witness is unable to testify due to illness, that witness's deposition is admissible against a party who was present or represented at the taking of the deposition. Section 804.07 does not distinguish between discovery depositions and evidentiary depositions. Further, "one of the purposes served by deposing a witness, whether the deposition is termed a discovery or evidentiary deposition, is to preserve the testimony of a witness who may be unavailable to testify at trial." ***Martin v. Richards***, 176 Wis.2d 339, 355, 500 N.W.2d 691, 698 (Ct. App. 1993), *aff'd in part and rev'd in part on other grounds,* 192 Wis.2d 156, 531 N.W.2d 70 (1995).

Accordingly, the trial court acted within its discretion when it admitted the expert's deposition regardless of the ostensible purpose for which the deposition was taken. *See* ***id.***, 176 Wis.2d at 354–355, 500 N.W.2d at 698 (discovery depositions are admissible under § 804.07, STATS.).

By the Court.—Judgment affirmed.

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