COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1115

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

MEDICAL EDUCATIONAL SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

HEALTH EDUCATION NETWORK, L.L.C., LOIS POSTLEWAITE AND SYLVIA KAY SANDBORG,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Medical Educational Services, Inc. (MEDS), appeals a judgment awarding it $11,209 damages against Lois Postlewaite, Sylvia Kay Sandborg and Health Education Network, L.L.C. (HEN). MEDS brought this action alleging conversion and alleging misappropriation of trade secrets. Because

MEDS failed to supplement its answers to interrogatories with respect to damages, the court excluded MEDS's exhibit calculating certain conversion damages. It also denied MEDS's request to submit to the jury the issue of punitive damages.

The jury returned a verdict awarding MEDS $12,000 for misappropriation of trade secrets and $100,000 for conversion. At motions after verdict, the trial court ordered that it should have excluded not only MEDS's exhibit, but also all of the testimony relating to the exhibit given by MEDS's owner, Verna Pearson. As a result, it concluded that absent Pearson's testimony, the jury's damage award for conversion was excessive. It also concluded, as a matter of law, that the items taken were not trade secrets and struck all damages relating to trade secrets.

On appeal, MEDS argues that the trial court erroneously (1) struck Pearson's testimony, after trial was concluded, as a discovery sanction; (2) held that the verdict was excessive and reduced the jury's conversion damages from $100,000 to $11,209; (3) refused to submit the issue of punitive damages to the jury; and (4) struck $12,000 damages for trade secrets.

We conclude that the trial court erroneously exercised its discretion when, after trial was concluded, it struck all Pearson's testimony relating to conversion damages and reduced the verdict to $11,204. We further conclude that it erroneously refused to submit for jury consideration the issue of punitive damages and overturned the jury's award for theft of trade secrets. Therefore, we reverse the judgment and remand with directions to reinstate the jury's conversion damages and hold trial on the issue of punitive damages.

1. Facts and Procedural Background

Although lengthy, we recite portions of the record to put the issues in context.[1] MEDS, a company started in 1981 by Verna Pearson, conducts continuing education seminars primarily for health care professionals. In 1992, Pearson hired Postlewaite as a program planner. Sandborg, hired in a similar capacity, eventually became Postlewaite's assistant.

In October and November of 1993, Postlewaite planned just one or two seminars, a dramatic decrease from the five to eight seminars normally scheduled. On December 27, Postlewaite informed Pearson that she was resigning from MEDS. Postlewaite advised Pearson that she did not plan to go into the seminar business. On January 17, 1994, Sandborg informed Pearson that she was going into business with Postlewaite.

Pearson testified that after Postlewaite and Sandborg left, the employees assigned to take over MEDS's programs found information and materials needed to hold seminars missing. An audit revealed large amounts of material missing from MEDS's program files. MEDS brought this action for misappropriation of trade secrets and conversion.[2] Postlewaite did not dispute that she had removed some materials from MEDS's premises that she had generated, which she believed would be useful in starting her own business. She testified, however, that she believed the materials she removed belonged to her or

[1] Although the record discloses many factual disputes, a review of the sufficiency of the evidence requires the record to be viewed in the light most favorable to the plaintiff. *See* § 805.14, STATS. Because the record is over 1,000 pages, we do not attempt to include an extensive summary but recite those portions that support the verdict.

[2] MEDS claimed that Postlewaite took items including registrant lists, mailing label strategy and course evaluations.

were worthless. Much of the testimony at trial revolved around the nature and value of the materials missing from MEDS.

Pearson testified that after Postlewaite resigned, they met to discuss a chiropractic program MEDS had planned in Minnesota, and Postlewaite

> pulled out of her briefcase the Minnesota chiropractic program file and put it on the desk and said, "I don't know how this got into my materials," … and said that I had three options, I could either pay her for the file or give her a percentage or she would cancel the program, so I told her I was going to think about it. [S]he grabbed the file from me and put it in her purse and said, "I think not," and I said, "that's my file," I said, "you don't have any right to take that," and she said, "I'll cancel that program, all you need is already in the drawer" … and [she] marched out of the house with the program file.

Postlewaite's new company, HEN, put on the Minnesota chiropractic seminar on the same date, using the same speakers that had originally been scheduled by MEDS. Pearson testified that she looked but was unable to find the resources that Postlewaite asserted remained at MEDS. Pearson assigned someone to reconstruct the file and resurrect the program but, after six or eight weeks, MEDS was unsuccessful. The speakers never returned telephone calls and MEDS never was able to put on the chiropractic seminar.

MEDS's expert witness, Gerry Kaye, testified that it was his opinion that "a good seminar is easily worth $50,000." He said that the sum of $50,000 represented more than just the idea, but included "all the information that goes with the idea, the mailing lists, knowing how the thing is put together … who to invite, what people thought about it, all of the thought that went into developing the course content." He testified that a lot of hard work goes into planning a

seminar, and that mailing list strategy, program evaluations and registrant lists were critical to profitability.

Kenneth Olson testified as HEN's expert. His seminar company has classes on mail list selection, how to get them, where to get them, how to choose them: "That's the number one question we are wondering, where are they coming from, who are these [people]." He asks his site coordinators to talk to customers to find out who they are and where they are from. He testified that he uses program evaluation summaries to determine whether he is meeting his customers' expectations, and that they were valuable because they told him how to improve his faculty. He improves profitability by developing a topic and mailing list strategy.

Olson also testified that he would not give out mailing label strategy, registrant lists or evaluation summaries to the general public or his competitors. The difference between a mailing list and a mailing list strategy is that "one is [the] physical product, which you buy or rent and send out. The other is what the strategy would be, the part that drives you to select which of those you'd send out." He agreed that the strategy is very crucial and that "planners live and die with the strategy." He testified that he would not have to tell a professional planner not to make these items accessible to the general public.

At trial Pearson also testified, without objection, as follows:

> Q. Can you tell me whether seminars generally become more profitable as they go through this maturing process and are put on a number of times?
>
> A. Yes, they do. Otherwise we're not doing our job very well.
>
> Q. Okay. Do you have anything to base that on, or is that just kind of your gut feeling?

> A. Well, I've done a couple different ways of evaluating that. For instance, with Lois's [Postlewaite] programs, the start-up programs had a profit average of about $2400 per program; whereas, in the later times that she provided those seminars, it was over $5,000 per program as a profit. That's after all the expenses are paid.

Pearson testified that she increases profitability by developing the mailing lists, adding new professional categories and groups to the program, and talking to people who attend to address their specific needs in MEDS's brochures. For example, there may be as many as 80,000 nurses in a given state, and she would not mail to all of them, "it would break the bank." At the seminar sites, one would learn that pharmacists and dietitians would also be interested in a given topic, and those two professional organizations are much easier to market to than nurses. She testified that registration lists are used to see how many people and what kinds of people attended the seminars. Mailing lists are updated and refined regularly. She further testified without objection:

> Q. Can you tell me whether you have looked at the productivity lapse your office suffered after the program file portions were missing?
>
> A. I have.
>
> Q. What did you do?
>
> A. Well, I tried to evaluate … that senior person that I gave most of those seminars to and looked to see what her productivity was for the first quarter of 1994 where she was reconstructing and reputting [sic] together these files and in the same period during 1995, and there were approximately ten fewer programs that she was able to produce in mental health programs and additional programs for other areas.

Pearson testified that the reason this experienced employee had fewer seminars "was that we had to spend a great deal of energy reconstructing those files, doing that research that we had already paid Lois [Postlewaite] and Kay [Sandborg] to do the year before." Pearson was unaware of any other

variable to account for the fewer number of seminars produced in 1995. She further testified that MEDS' materials were kept in its files and not available to competitors or the general public.

When asked to assign a value to the damages MEDS suffered as a result of having to reconstruct files due to the missing materials, she asked permission to refer to her list, marked as Exhibit 25, which included a calculation of $50,000 in damages based upon ten fewer seminars at a loss of a $5,000 apiece. Exhibit 25 gave rise to a number of objections, which ultimately resulted in the issues now before us on appeal.

The defendants objected to Exhibit 25 because MEDS failed to supplement discovery with respect to damages, stating that "the only serious objection that I really have to this exhibit is the duty to seasonably supplement." Defendants claimed prejudice because there is no way to verify whether MEDS put on ten fewer seminars.[3]

Because the information had not been provided timely in discovery, the trial court held that the appropriate sanction would be to prohibit the introduction of Exhibit 25. The court also ruled that because there was no

[3] Interrogatory number 22 asked MEDS: "What damages do you claim the plaintiff has sustained as a result of the alleged misappropriation of trade secrets by Lois Postlewaite and Sylvia Sandborg and how do you arrive at your damages?" The answer given was "Unknown. Discovery and investigation are ongoing." At that point in time, the complaint only alleged a claim based upon trade secrets. The complaint was later amended to include a claim for conversion.

At the time of Pearson's initial deposition, she was asked: "And tell me a dollar amount that you believe you've been damaged as a result of the loss of that mailing label information?" to which Pearson replied, "I'd have to do some work on that to find out." At a second deposition, Pearson was asked: "Is there anything else on how you believe that MEDS was damaged as a result of the theft of any materials?" Pearson responded: "The overall impeding our continuing to provide programs because we were recreating what was already ours."

contemporaneous objection to Pearson's testimony preceding the exhibit, "the court will not strike that testimony." On protestation by defendants, the court indicated it would revisit the issue before closing arguments.

The court was not reminded of the issue of striking Pearson's testimony before closing arguments. During MEDS's closing argument, the defendants objected to MEDS's calculation of $50,000 damages based upon ten fewer seminars at $5,000 apiece. After MEDS's closing argument, which was not recorded, the court ruled that "that is not a proper measure of damages in this case, because, according to the ruling with regard to discovery, it's not a proper measure of damages."

At the verdict conference, the court denied MEDS's request for an instruction on punitive damages, concluding that there was insufficient evidence to submit the issue to the jury. The jury returned a verdict answering all fourteen questions in favor of MEDS. It awarded damages for theft of trade secrets as follows: $2,000 for misappropriation of the registrant lists; $5,000 for mailing list information and strategies; and $5,000 for program evaluations and summaries. It also awarded $100,000 damages for conversion.

At motions after verdict, the defendants' counsel stated that "I certainly am not saying that that was a willful failure" to comply with discovery rules, but argued that the trial court should exclude all of Pearson's testimony relating to ten fewer seminars at $5,000 apiece. The court agreed, explaining that, initially, it excluded only Exhibit 25

> because the plaintiff failed to supplement its response in prior discovery so as the court to have found as to it having amounted to a willful concealment. It would have deprived the defendant of a meaningful opportunity to respond to this theory either by discovery or evidence to contradict it.

> In line with this ruling, the court struck and excluded Exhibit 25 in that area and ruled that there could be no further testimony regarding a computation of damages based upon ten fewer seminars at this $5,000 each. However, there had been testimony that there were ten fewer seminars put on.

The court stated that because there had been no contemporaneous objection, it had initially ruled that Pearson's other testimony supporting damage calculations would not be stricken. In response to the defendants' motions after verdict, however, the court concluded that it had erred at trial when it did not strike all of Pearson's testimony relating to ten seminars at $5,000 apiece. The court held that absent Pearson's testimony, the only evidence of damages consisted of a variety of manuals, publications, and other materials valued at a total of $11,954.[4] As a result, it held that damages awarded for conversion were excessive. It further held:

> [L]oss of profit is not an appropriate measure of conversion damages. The appropriate measure is the value at the time of the taking. In viewing the evidence most favorably to the plaintiff as to the value at the time of the taking, the same result would be indicated as before and the motion is granted on those grounds as well.

Additionally, the court struck the jury award with respect to misappropriation of the registrant lists, mailing label strategies, and evaluation summaries, holding that the items taken were not trade secrets as a matter of law.

[4] The discrepancy between these numbers and the $11,209 awarded is not an issue on appeal.

The court ordered a new trial on the issue of damages for conversion unless MEDS elected to accept the reduced amount under § 805.15(6), STATS.[5]

2. Discovery Sanctions

We conclude that the trial court erroneously exercised its discretion when, after trial was completed, it struck all evidence in support of MEDS's damage claim for lost seminars resulting from the defendants' theft of materials after trial was completed. We review the imposition of discovery sanctions to determine whether a trial court has reasonably exercised its discretion. ***Milwaukee Constructors v. Milwaukee Metro. Sewer Dist.***, 177 Wis.2d 523, 530, 502 N.W.2d 881, 883 (Ct. App. 1993). A discretionary decision will be sustained if the court has examined the relevant facts, applied a proper standard of law using a rational process, and reached a reasonable conclusion. ***Paytes v. Kost***, 167 Wis.2d 387, 393, 482 N.W.2d 130, 132 (Ct. App. 1992).

Section 804.01(5), STATS., provides that a party who has responded to a discovery request must supplement the response to include information acquired thereafter when "the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Section 804.01(5)(b)2, STATS. If a party fails seasonably to supplement or amend a response when obligated to do so under § 804.01(5) the court in which the action is pending on motion shall

[5] MEDS did not elect to accept the reduced amount. The court ordered that as an additional discovery sanction at the new trial, no testimony that MEDS put on ten fewer seminars at $5,000 apiece would be allowed. Because the court limited the evidence at the new trial, the parties stipulated that damages would be the reduced figure and the court entered judgment, from which this appeal was taken. Because of our holding it is unnecessary to address MEDS's argument that the court erred when it limited damages at the new trial.

make such orders in regard to the failure as are just, and among others, it may enter an "order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence." Section 804.12(2)(a)2, STATS.

The trial court explained: (1) at trial, it failed to make the discretionary decision it said it would make before closing arguments, and the failure to exercise its discretion is an "abuse of discretion and is error per se;" and (2) in exercising its discretion, "the court finds that the evidence should have been struck to be consistent with the ruling involving Exhibit 25." It held that "[b]y failing to strike the objected to testimony, it invited the jury to speculate that there were fewer seminars as the result of the conversion." It further held that an "objection could not have been contemporaneous in that this theory of damages had not been provided in discovery and was provided for the first time with Exhibit 25." The trial court held that to be consistent, it should have struck all the testimony which violated discovery rules, and the discovery violation was prejudicial because "it prevented the defendant from a meaningful examination of the records of the plaintiff and prepare whatever evidence there may have been to counter this evidence." Additionally, the court held that absent the evidence that should have been struck, "the only evidence relating to damages for conversion is Exhibit 25A and the testimony of the defendant" that many of the items were worthless. [6]

The record does not support the trial court's rationale. The defendants waived their objection to Pearson's testimony when it failed to make a

[6] Exhibit 25A was a redacted version of Exhibit 25, showing only $12,484 in conversion damages and limited to the value of certain manuals and other items.

contemporaneous objection. *See* § 901.03, STATS. It is undisputed that at her second deposition, Pearson explained that MEDS had been damaged because it lost the opportunity to present seminars as a result of Postlewaite's conduct but did not specify the exact number of seminars lost. At trial, she stated the number was ten and that is the evidence claimed to be nondisclosed.

The court's post-verdict ruling, which had the effect of eliminating all but a small fraction of MEDS's damages, resulted in one of the most serious sanctions the court has available. By striking the evidence after the fact, MEDS was foreclosed from establishing damages from other sources, such as the cross-examination of defendants' witnesses. Under § 804.12, STATS., courts have broad power to sanction for the failure to provide discovery. ***Gerrits v. Gerrits***, 167 Wis.2d 429, 446, 482 N.W.2d 134, 141 (Ct. App. 1992) (Trial courts have "both the inherent power and statutory authority to sanction parties for failure to comply with procedural statutes or rules and for failure to obey court orders."). Nonetheless, trial courts should tailor sanctions to the severity of a party's misconduct. ***Johnson v. Allis Chalmers Corp.***, 162 Wis.2d 261, 273-74, 470 N.W.2d 859, 869 (1991).

Drastic penalties, such as dismissal of a party's claim, should be imposed only where such harsh measures are necessary. *See* ***Hudson Diesel, Inc. v. Kenall,*** 194 Wis.2d 531, 541, 535 N.W.2d 65, 69 (Ct. App. 1995). Unintentional conduct will not support a severe sanction, such as dismissal, absent a finding of extreme or persistent misconduct or violation of discovery procedures that would be considered part of a continuous attempt to obstruct litigation. ***Id***. at 543, 535 N.W.2d at 70. Here, the defendants conceded that the nondisclosure was not willful.

The sanction imposed is grossly disproportionate to MEDS's conduct. The court must determine whether less severe sanctions are available and explore alternative remedies. ***Id.*** at 545-46, 535 N.W.2d at 70-71. The court made no specific finding of egregious conduct, and the record fails to suggest any support for such a finding. There is no suggestion that the defendants brought discovery motions or that orders compelling discovery were violated. There is no indication of any warnings given, or any history of dilatoriousness.

As the court pointed out, the defendants were deprived of the opportunity to effectively examine MEDS's records and counter the testimony that MEDS was unable to put on ten seminars due to the time it spent re-creating files. However, when a sanction is so severe as to deprive a litigant of approximately $90,000 damages, and the conduct is not alleged to be egregious, the court is obligated to explore less drastic alternative measures. Here, the court did not explore any alternatives. We conclude therefore that striking all Pearson's damage testimony, after the trial was concluded, and without exploring less drastic alternatives, was an erroneous exercise of discretion.

3. Excessive Verdict

The trial court erroneously held lost profits could not be used as a measure of conversion damages. "[A]s a general rule in tort actions there may be recovery for loss of profits if the plaintiff can show with reasonable certainty the anticipation of profit." ***Krueger v. Steffen***, 30 Wis.2d 445, 450, 141 N.W.2d 200, 202 (1966). "Conversion damages are intended to compensate a wronged party for the loss sustained because his or her property was wrongfully taken." ***Management Computer Servs. v. Hawkins, Ash, Baptie & Co.,*** 206 Wis.2d 158, 188, 557 N.W.2d 67, 74 (1996).

The defendants argue that the general rule in Wisconsin is that the owner of converted property may be awarded the market value at the time of trial, as well as interest. The problem with this argument is that it ignores the question at what marketplace the items should be valued. MEDS offered expert testimony that when marketed at a seminar site, a reasonable measure of value of the items that go into putting on a seminar is the amount of profit that can be made. Because the record disclosed that MEDS anticipated a profit with reasonable certainty, using lost profits as a practicable measurement of damages was permissible.

We further conclude that the court erroneously found that the verdict was excessive. When reviewing whether a judgment is excessive, the evidence must be viewed in the light most favorable to the verdict. ***Fahrenberg v. Tengel,*** 96 Wis.2d 211, 231, 291 N.W.2d 516, 525 (1980). A reviewing court must search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict that the jury could have reached but did not. ***Coryell v. Conn,*** 88 Wis.2d 310, 317-18, 276 N.W.2d 723, 727 (1979). "[A]ll that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience." ***Fahrenberg,*** 96 Wis.2d at 236, 291 N.W.2d at 527 (citations omitted).

Here, the jury heard Kaye testify as an expert that a good seminar is "easily worth $50,000." He testified that this figure represented all that goes into developing a seminar, determining who to invite, developing mailing lists, evaluations summaries, and putting the entire program together. The jury heard Pearson's testimony that Postlewaite marched out of MEDS's office with the chiropractic file, canceled MEDS's chiropractic seminar planned in Minnesota, and that her new company put it on instead. The jury also heard Pearson testify

that after six to eight weeks attempting to reconstruct that program, MEDS was unable to reschedule the seminar for that date or for any date thereafter. The jury could have reasonably inferred that the conversion of the chiropractic file sabotaged MEDS's efforts to successfully put on a chiropractic seminar not only on the day scheduled but also in the future. Because MEDS was an experienced and successful seminar company, the jury could have reasonably inferred that the loss of the file, representing the work that had gone into planning and developing the chiropractic program, was "easily worth $50,000," as MEDS's expert, Kaye, testified.

The jury could have also inferred that Postlewaite removed other materials, including mailing lists, registrant lists, various manuals and other publications from several other MEDS's files. Before Exhibit 25 was introduced, Pearson testified without objection to the effect that a mature seminar could be expected to bring a $5,000 profit and that MEDS lost ten seminars as a result of attempting to audit and reconstruct program files from which items were taken. Without considering Exhibit 25, the jury could have considered Kaye's and Pearson's testimony and find that MEDS suffered a total loss of $100,000 due to the conversion of materials from its files.

Although conflicting testimony may have permitted the jury to reach a contrary result, the court's role is not to search for evidence a jury could have reached but did not. Our role is to search the record for evidence to support a jury's verdict and to accept the reasonable inferences the jury could have drawn from the evidence to reach its verdict. ***Weiss v. United Fire & Cas. Co.,*** 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995). Viewing the record in the light most favorable to MEDS, we conclude that credible evidence supports the verdict of $100,000 conversion damages.

4. Punitive Damages

We conclude the trial court erroneously refused to submit the issue of punitive damages to the jury.[7] Whether there is sufficient evidence to submit to the jury the issue of punitive damages is a question of law we review de novo. ***Loveridge v. Chartier***, 161 Wis.2d 150, 188-89, 468 N.W.2d 146, 158-59 (1991).

The middle burden of proof applies to determine whether a defendant's conduct permits the imposition of punitive damages. *See* ***Wangen v. Ford Motor Co.***, 97 Wis.2d 260, 294 N.W.2d 437 (1980). As a result, the plaintiff must show to a reasonable certainty by clear, satisfactory and convincing evidence an entitlement to punitive damages. ***Loveridge,*** 161 Wis.2d at 191, 468 N.W.2d at 159.[8]

To support an award for punitive damages, the plaintiff must show that the defendant acted with wanton, willful, or reckless disregard of the plaintiff's rights, ***Syring v. Tucker,*** 174 Wis.2d 787, 799, 498 N.W.2d 370, 373 (1993); ***Hollibush v. Ford Motor Credit Co.,*** 179 Wis.2d 799, 813, 508 N.W.2d 449, 455 (Ct. App. 1993), or that the harm was inflicted with vindictiveness or malice under circumstances of aggravation, insult, or cruelty, ***Kinks v. Combs,*** 28 Wis.2d 65, 79, 135 N.W.2d 789, 797 (1965). The term "outrageous conduct" is used as an abbreviated form of reference to these standards. *See* ***Wangen,*** 97 Wis.2d at 268, 294 N.W.2d at 442; ***Brown v. Maxey,*** 124 Wis.2d 426, 431 n.1,

[7] Because this action was commenced July 12, 1994, § 895.85, STATS., effective May 17, 1995, governing the imposition of punitive damages, does not apply.

[8] While the middle burden of proof applies to the issue of the plaintiff's entitlement to punitive damages, the ordinary civil burden applies on the amount of punitive damages. *See* WIS J I—CIVIL 1707.

369 N.W.2d 677, 680 n.1 (1985); and ***Wheeler v. General Tire & Rubber Co.,*** 142 Wis.2d 798, 818, 419 N.W.2d 331, 339 (Ct. App. 1987); *see also* WIS J I--CIVIL 1707.

Initially a trial court must determine whether the evidence demonstrates a proper case to submit the issue of punitive damages to the jury. ***Bank of Sun Prairie v. Esser,*** 155 Wis.2d 724, 735, 456 N.W.2d 585, 590 (1990). "It is not necessary for this court to conclude that, had it been the jury, it would have so held [that the defendant's conduct was outrageous]. Rather, the question is whether a reasonable jury, acting reasonably, could have so found." ***Durham v. Pekrul,*** 104 Wis.2d 339, 348, 311 N.W.2d 615, 619 (1981).

The record would have permitted, at a minimum, an inference of reckless indifference to MEDS's rights. Here, the jury heard Postlewaite testify that without telling any one she removed items from MEDS's files that she thought would be helpful in starting her own company. While she claimed that she believed these items belonged to her, there was evidence to the contrary. While Postlewaite denied to Pearson that she was starting her own seminar company, she nonetheless removed MEDS's materials and started a seminar company within weeks of leaving MEDS.

The jury could have reasonably inferred that Postlewaite told Pearson that she did not plan to start a seminar business when, in fact, she had such plans. A jury could reasonably infer that Postlewaite's dishonesty with Pearson was to prevent Pearson from taking additional steps to safeguard MEDS's property. When Pearson told her not to take the chiropractic file because it did not belong to her, Postlewaite's response was to grab the file and cancel MEDS's program. The jury could conclude that these actions were taken with reckless

indifference to MEDS's rights. "Reckless indifference to the rights of others and conscious action in deliberate disregard of them … may provide the necessary state of mind to justify punitive damages." ***Brown***, 124 Wis.2d at 433, 369 N.W.2d at 681 (quoting 4 RESTATEMENT (SECOND) OF TORTS § 908, cmt. b, at 465 (1977)).

The jury also heard Postlewaite's expert testify to the detrimental effect Postlewaite's actions could have on MEDS. When asked if, "[t]aking the mailing list strategy would have the effect of sabotaging MEDS's efforts to put on seminars in the same general topic area," Postlewaite's expert testified: "Perhaps." He added that "I'm not so sure I'd be willing to give that one up, but perhaps it would, assuming there's no one there who knew anything else about the business." Nonetheless, the jury heard testimony from which a reasonable inference could be made that items Postlewaite removed from MEDS's files were taken with reckless disregard of MEDS's proprietary rights. Because the record discloses a satisfactory foundation for the submission of the issue of punitive damages, we reverse the trial court's decision not to submit the issue and remand for a trial on the punitive damage issue.

5. Trade Secrets

Finally, we conclude that the trial court erroneously ruled that what constitutes a trade secret is a question of law. Whether an issue presents a question of fact or a question of law is a question of law that we review de novo. ***Crowley v. Knapp,*** 94 Wis.2d 421, 429-30, 288 N.W.2d 815, 819-20 (1980). In ***Corroon & Black-Rutters & Roberts, Inc. v. Hosch,*** 109 Wis.2d 290, 294, 325 N.W.2d 883, 885 (1982), our supreme court explained that whether a trade secret exists is a mixed question of law and fact, and:

> [W]hen a mixed question of law and fact is presented to this court, there are two component questions which must be answered. The first question is what, in fact, actually happened. The second question, whether those facts as a matter of law fulfill a particular legal standard, is a question of law.

As a result, we conclude that whether a trade secrets exists is a mixed question of fact or law.

> Trade secrets are defined in § 134.90(1), STATS., to mean
>
> (c) information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
>
> 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

At motions after verdict, the trial court held that registrant lists, mailing list information and strategies and program evaluations summaries are not trade secrets as a matter of law. The record contains conflicting evidence whether the items derive independent economic value and whether they were subject to reasonable efforts to maintain secrecy. As a result, the court erroneously answered the questions as a matter of law.[9] The court is instructed to reinstate the jury's verdict with respect to trade secrets. Under § 134.90(4), STATS., the court may in its discretion consider the award of MEDS's attorney fees.

[9] The parties do not discuss any issue with respect to potential duplication of damages and, consequently, we do not address the issue on appeal. ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

In conclusion, we have determined that the trial court erroneously reduced MEDS's conversion damages and struck its trade secret damages. We further conclude that the court erroneously refused to submit to the jury the issue of punitive damages. We reverse the judgment with instructions to reinstate the jury's verdict. We further direct the court to hold a trial on the issue of punitive damages and to consider the issue of attorney fees pursuant to § 134.90(4), STATS.

By the Court.—Judgment reversed and cause remanded with directions.

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