COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1332

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

GARY L. CRAWLEY,

PLAINTIFF-RESPONDENT,

V.

EDWARD L. MAZOLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: ROBERT W. WING, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

VERGERONT, J. Edward L. Mazola appeals from a judgment awarding Gary L. Crawley $32,654.96 in compensatory damages and $15,000 for punitive damages, following a jury determination that Mazola breached a contract with Crawley and converted money or property belonging to Crawley. Mazola contends on appeal: (1) the trial court erred when it permitted Crawley to assert

the conversion claim as an individual without the corporation as a party; (2) the trial court erroneously exercised its discretion in admitting certain evidence; (3) the trial court erred in the punitive damages jury instruction; (4) the trial court erred in determining that there was sufficient evidence to present a punitive damage claim to the jury; and (5) the trial court erred in deciding that the supplemental motions after verdict were not timely filed. For the reasons we explain below, we reject each of these contentions and affirm.

BACKGROUND

Many of the facts were contested at trial, but the outlines of the dispute are these. Mazola and John Teeples owned a cabin in Black River Falls, Wisconsin (Evergreen property). In April 1994, Crawley, a construction and remodeling contractor, began living in the cabin with Mazola's and Teeples's permission. The terms of his living there were disputed, with Crawley claiming that the rent of $200 per month would be deducted from his repair and remodeling labor and materials, and Mazola claiming that Crawley was to live there and fix up the cabin for sale in lieu of rent.

When Mazola and Teeples sold the Evergreen property eighteen months later, Crawley moved out and submitted a bill to Mazola for $9,014 which, he testified, was the cost of the services and labor he had provided in remodeling and repairing the cabin. According to Crawley, after deducting from that amount the rent he owed for the time he lived there, Mazola owed him $5,414.78. Mazola did not pay Crawley because, he testified, Crawley did not complete all the work before he moved out so he (Mazola) had to hire contractors to complete the work.

During this same time period, Mazola and Crawley entered into a business relationship to build duplexes. Crawley agreed to contribute six real

estate lots in Hatfield, Wisconsin, which he was about to lose because of back taxes, and Mazola agreed to contribute $10,000. Crawley agreed to build the duplexes on the lots and Mazola was to manage the finances and maintain the duplexes. The parties agreed to split on a 50/50 basis all capitalization costs, income, profits and expenses. Although the parties filed the articles of incorporation for a corporation, Osprey Development Corporation, no stock was issued, and no other corporate documents were ever signed or adopted.

Crawley and Mazola agreed that after the duplexes were completed, they would be rented and Mazola would collect the rent. According to Crawley, after he completed the duplexes, he became concerned about the financial standing of the business and how Mazola was spending the rental income he collected. Eventually, on January 8, 1996, Crawley filed suit against Mazola alleging a breach of Mazola's fiduciary duties in managing the business, conversion of enterprise funds, and breach of Mazola's agreement to pay Crawley for his labor and materials on the Evergreen property, less rent. Crawley requested punitive as well as compensatory damages. Mazola filed a counterclaim alleging that Crawley had not paid his half of the expenses for the business, as agreed.

The jury found that Mazola breached his agreement with Crawley regarding the Evergreen property and that Mazola converted to his own use money or property which belonged to Crawley without Crawley's consent or lawful authority to do so.[1] The jury awarded $5,414.78 for breach of the agreement and $27,240.18 for conversion. The jury also found Mazola's conduct was outrageous and ordered him to pay $15,000 in punitive damages. The jury determined that

[1] A claim for breach of fiduciary duty was not submitted to the jury; the trial court decided that the instructions and question on conversion were sufficient.

Mazola did not make a greater contribution than Crawley to the corporation. The trial court denied Mazola's motions after verdict and his supplemental motions after verdict, and entered judgment on the verdict.

Additional facts are set forth below as necessary to discuss each issue Mazola raises on appeal.

NECESSARY PARTY

On January 15, 1997, one day before the trial, Mazola filed a motion in limine and a supporting memorandum of law contending that Crawley and his witnesses should be precluded from seeking to establish a claim for conversion or punitive damages because those claims belonged to Osprey Development Corporation, not to Crawley individually. As claims belonging to the corporation, Mazola contended, they could be brought only in a derivative action on behalf of the corporation, which necessitated joining the corporation as a party. Since the corporation was not a party, Mazola concluded, the claims could not proceed as derivative claims. The trial court heard the motion the next day, just before the trial began. The court denied the motion, stating that it was actually a motion to dismiss, a dispositive motion that should have been brought much earlier.

On appeal, Mazola repeats his argument that Crawley could not assert an individual claim against him for conversion or punitive damages because those claims belonged to Osprey Development Corporation. Crawley responds with arguments on the merits of this assertion but also points out that the trial court properly exercised its discretion in denying the motion in limine as untimely. We agree with Crawley that the trial court properly exercised its discretion and therefore do not address the merits of this dispute.

A trial court's decision to grant or deny motions to dismiss brought shortly before trial is a discretionary determination. *See* ***Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.***, 166 Wis.2d 105, 112, 479 N.W.2d 557, 560 (Ct. App. 1991). We will not reverse a trial court's discretionary decision absent an erroneous exercise of discretion. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App.1991). Where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is consistent with applicable law and that a reasonable judge could reach, we affirm the decision. ***Id.***

Although Mazola entitled his motion a motion in limine, the trial court could properly consider the substance of the motion rather than the title. *See* ***Heritage Mut. Ins. Co. v. Thoma***, 45 Wis.2d 580, 585, 173 N.W.2d 717, 720 (1970). It was reasonable for the court to conclude that the motion was, in substance, a motion to dismiss the claims for conversion and punitive damages as Crawley's individual claims because they belonged to the corporation, and as derivative claims because the corporation was not a party.

It was also reasonable for the trial court to conclude that the motion was untimely. Mazola's answer, filed on January 30, 1996, stated that the complaint failed to state a claim upon which relief could be granted, but otherwise simply denied the allegations of the complaint and asserted the counterclaim. Apparently Mazola did not mention a defense based on the need for the corporation to be a party at the scheduling conference, held on June 25, 1996, because the scheduling order entered as a result of that conference did not refer to any such motion or defense. It did, however, set dates for disclosure of witnesses, close of discovery, and trial—January 16, 1997. No motion was brought asserting this defense until the day before trial. We find unpersuasive Mazola's argument

that he raised the defense in the answer by asserting that the complaint failed to state a claim.

We also reject Mazola's contention that it was Crawley's obligation to conduct discovery to determine the specific basis for the general defense asserted in the answer. It was Mazola's obligation to raise his defense in a manner and with sufficient specificity so that Crawley could respond and the court could rule in a time frame that would permit, in keeping with the scheduled trial date, any necessary amendment to the complaint, joinder of additional parties and additional discovery. We have no hesitation in concluding that the court properly exercised its discretion in deciding that the motion was untimely because it was filed the day before trial and one year after the complaint was filed.[2]

EVIDENTIARY RULINGS

Mazola argues that the court erred in admitting an exhibit (Exhibit 45) presented by Crawley on personal expenses and corporate bills he paid; testimony of Teeples on his prior dealings with Mazola; and testimony of Gordon Meicher, Crawley's accountant, on Mazola's intent. Mazola contends that he was prejudiced as a result of these errors. Since rulings on the admissibility of evidence are committed to the sound discretion of the trial court, we affirm unless the trial court erroneously exercised its discretion. ***State v. Schaller***, 199 Wis.2d 23, 39, 544 N.W.2d 247, 254 (Ct. App.1995).

Exhibit 45

[2] Because it is unnecessary, we do not address the court's alternative basis for denying the motion—the lack of adequate notice of the motion.

Mazola argues that exhibit 45 is irrelevant because it shows expenses incurred by Crawley, and "any personal expenses Crawley may have incurred while being an equal shareholder in the corporation is not a claim he can assert personally." Mazola bases this position on his contention that the corporation "is the sole necessary party and holder of any claims in this matter." However, we have already decided that the trial court properly denied his motion raising this defense because it was untimely. This defense therefore provides no basis for excluding evidence as irrelevant. Because Mazola does not present any other argument in his brief-in-chief to support his claim that this exhibit is irrelevant, we conclude the trial court did not erroneously exercise its discretion in admitting exhibit 45.[3]

Teeples's Testimony

Teeples testified concerning his dealings with Mazola and Crawley on the Evergreen property, which he owned with Mazola. He testified on what he understood their agreement with Crawley to be, what Crawley was owed, whether Crawley was paid and how Mazola handled those obligations with Teeples. Mazola contends that some of Teeples's testimony on the dispute that he had with

[3] In his reply brief, Mazola does present additional reasons for the irrelevancy of this exhibit, referring to the fact that, before the trial court, he objected on the ground that one of the items listed, attorney fees, was not recoverable, and, in particular, "the Sherman attorney bill" was "unrelated to any aspect of the case at hand." The trial court concluded that the exhibit was relevant because Mazola was claiming, in his counterclaim, that he contributed more personal funds to the business than did Crawley, and the exhibit showed what Crawley claimed he paid with personal funds. We generally do not address issues raised for the first time in a reply brief, *see* ***Schaeffer v. State Personnel Comm'n***, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989), and we also generally do not address undeveloped arguments. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). The irrelevancy ground for exhibit 45 asserted in the reply brief is simply a summary of the brief argument made to the trial court, with no elaboration that would permit us to evaluate Mazola's claim that the attorney fees listed in the exhibit are either "not recoverable" or are "unrelated to any aspect of the case at hand." We therefore decline to address these contentions.

Mazola over the Evergreen property and what was owed Crawley, including Teeples' testimony that Mazola was "double billing," should not have been admitted because it constitutes evidence of other crimes, wrongs or acts which is inadmissible to prove the character of a person in order to show that the person acted in conformity therewith. *See* § 904.04(2), STATS. Mazola argues that this testimony was also irrelevant and prejudicial.

Before the trial court, Mazola did not object to Teeples's testimony based on § 904.04(2), STATS., or on grounds of prejudice. *See* § 904.03, STATS., (Relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice). Rather, his objections were based either on foundation, relevancy or hearsay; they contained no explanation by Mazola's counsel that would have alerted the court to either §§ 904.04(2) or 904.03 as a basis for the objections.

An objection to the admissibility of evidence must be reasonably specific in order that the trial court may rule on the objection, and exercise the discretion required in such rulings. *See* ***State v. Romero***, 147 Wis.2d 264, 274, 432 N.W.2d 899, 903 (1988). When a party fails to make an objection with sufficient specificity, that argument against admissibility is waived. *See* ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). We conclude that Mazola waived any objections to Teeples's testimony based on §§ 904.03 or 904.04(2). Since he does not assert that the trial court erred in overruling his objections based on foundation and hearsay, we address only the objections based on relevancy.

Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. ***State v. Bustamante***, 201 Wis.2d 562, 570, 549 N.W.2d 746, 749 (Ct. App.1996). Mazola objected on the grounds of relevancy to these questions to Teeples, and the court overruled each one: (1) What was his deal with Mazola concerning the Evergreen property? (2) How much was the rent for the Evergreen property? (3) Did he ever receive an accounting from Mazola (after Teeples testified that Mazola handled all the financing on the Evergreen property)? (4) Would it be contrary to his agreement with Mazola on the Evergreen property if Mazola and his wife charged for work they did on the property (asked in relation to a document prepared by Mazola to show expenses he had incurred on the Evergreen property)?

Crawley's agreement was with both Mazola and Teeples. The terms of that agreement, and whether and if they were carried out, were related to the agreement Mazola and Teeples had with each other as joint owners of the property. The trial court could reasonably conclude that each of these questions and the answers to each were relevant to the issue of whether Mazola breached the agreement with Crawley by not paying him for his work on the property after deducting his rent.

Meicher's Testimony

Mazola contends that Meicher's testimony should have been stricken because he testified to Mazola's state of mind. Meicher, an accountant, testified as Crawley's expert witness. He testified that he reviewed Osprey Development Corporation's bank statements, tax returns and the documentation that purported to support the tax returns and noticed that the numbers on the tax returns did not match those on the check stubs. He therefore tried to find invoices and other corroborating evidence to support the returns. After detailed testimony about the

inaccuracy and lack of documentation for expenses, and the discrepancy between the receipts and the income reported on the return, he stated:

> All I can tell you is it wasn't right. It was incorrect. It was reported to the government incorrect. It appears to me that it was clearly reported to the government incorrect intentionally.

Mazola's attorney objected to the testimony on the grounds that it called for a conclusion and invaded the province of the jury and moved to strike. The trial court overruled the objection.

Later, in the context of Meicher's testimony on checks that Mazola wrote out to himself, to a woman whom Mazola later married, and to cash for which there was no documentation for expenses, Crawley's counsel asked: "What if any impact in your mind does the fact that these checks are written for even amounts have?" Mazola's attorney objected based on speculation and foundation and was overruled. Meicher answered:

> First of all if you look—I mean it is like this thing formed, and Mr. Mazola was to start putting money in. He was going – As I understand he was going to put $10,000 in and he was going to put the land in it. Right away in November of '94 he starts taking out cash, the 12th, takes out $1,000 even. He takes out five hundred even. The 25th he takes out $1,100. It is like they got their bank loan and here is a chance an opportunity to get cash. And he takes.

Mazola's attorney interrupted this answer by repeating the objection based on speculation, which the trial court again overruled. Meicher continued:

> So all these amounts in cash come out of the account right away. And they are all even amounts for expenses. And as an auditor and an accountant this is something that, you

> know, it raises my ire and it makes me concerned that what is going on here is not right.

Mazola's counsel repeated the objection and moved to strike, and the court again overruled the objection.

Mazola argues that the trial court erred in admitting Meicher's testimony because an expert's conclusions and opinions about a defendant's actual beliefs and intentions at the time of the occurrence is inadmissible. *See* ***State v. Richardson***, 189 Wis.2d 418, 424, 525 N.W.2d 378, 381 (Ct. App.1994). This is a correct statement of the law. We agree with Mazola that Meicher's testimony that the incorrect tax returns were intentionally incorrect was not admissible.

However, Meicher's testimony on the significance of the even amounts of checks presents a closer question. Meicher testified that a corporation's checks for expenses should be written to the vendor, based on the specific amount of an invoice, which should be retained for documentation. He could properly testify that, based on his experience as an accountant, writing checks for even amounts, with no documentation for expenses, made out to cash or to one of the principals or his friend, was an improper practice. He could also testify that this improper practice, based on his experience, was consistent with a misuse of corporate funds. Crawley's attorney's question to Meicher, and Meicher's answer, were not phrased in this way and could be interpreted as injecting Meicher's personal views of Mazola's motives. We will therefore assume that the court's overruling of the objections to this testimony—rather than sustaining the objections, striking the answers and requiring Crawley's attorney to lay the proper foundation—was error.

An evidentiary error is subject to a harmless error analysis and requires reversal or a new trial only if the improper ruling has affected the substantial rights of the party seeking relief. Section 805.18(2), STATS.; ***Nowatske v. Osterloh***, 201 Wis.2d 497, 506-07, 549 N.W.2d 256, 259 (Ct. App.1996). Reversal is required only if the result might, within reasonable probabilities, have been more favorable to the complaining party had the error not occurred. ***Nowatske***, 201 Wis.2d at 506-07, 549 N.W.2d at 259. This requires that we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. After doing so, we conclude the court's rulings on these objections were harmless error.

Meicher's testimony on the incomplete and inaccurate records and tax returns, and Mazola's improper practice of writing checks to himself, his friend, and to cash without documentation, was properly admitted. Crawley testified that Mazola used money from the corporation's account for his personal use, specifically, to insulate the Evergreen cabin; to install a furnace at the cabin; and to buy and install carpet for the cabin. Crawley testified that Mazola got the money out of Osprey's account by writing checks either for cash, to himself or by writing the checks to a non-existing payee so he could collect the cash.

Jeffrey Demert, a construction worker testified that he charged Osprey Development Corporation $3,400 for pouring two concrete slabs for the duplexes; Mazola gave him a check for $9,600; and he (Demert) cashed it, took $3,400 and gave Mazola the rest in cash. Demert also testified that he charged Osprey for a chain saw for the work he did on the duplexes' sidewalk. However, Crawley submitted a canceled check that showed that Mazola wrote a check against Osprey's account for $1,100 for the work Demert did on the sidewalk. Demert testified that he did not receive the $1,100.

Mazola testified that he provided the information to the tax preparer and he took that information from the corporation's check ledger. He acknowledged that on several occasions he wrote checks against the corporation's account to himself but said that he reconciled the checks with the amount that the corporation owed him. He presented canceled checks to support this assertion, but the amounts of the checks he wrote to himself were usually larger than the amounts on the sales' receipts. Mazola admitted that although he wrote a check for $400 against Osprey's account for leasing a CAT, he actually kept the cash but filed the check in the records as paying for the CAT rental.

In view of all the evidence, we are satisfied that it is not reasonably probable that the exclusion of Meicher's erroneously admitted testimony would have altered the jury's verdict. As we have already mentioned, the substance of Meicher's testimony on the significance of the checks' even amounts would have been properly admitted, had it been framed in less personal terms. And testimony on all the irregularities in Mazola's check writing practices was properly before the jury. Meicher's testimony on the inaccuracy of the tax information Mazola provided for the income tax returns was extensive and portrayed such a thorough disregard of basic record keeping and accounting, that exclusion of Meicher's last sentence—the inaccuracy was intentional—would not have significantly diminished the force of his preceding testimony. The clear implication of Meicher's preceding testimony, if the jury chose to believe it, was that Mazola was intentionally not reporting all income and was intentionally taking improper expenses.

JURY INSTRUCTIONS

Mazola argues the trial court gave the wrong instruction on punitive damages because it provided the jury with WIS J I—CIVIL 1707, applicable only to actions filed prior to May 17, 1995, instead of WIS J I—CIVIL 1707.1[4] Mazola

[4] WIS J I—CIVIL 1707 provides in pertinent part:

> PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]
>
> Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.
>
> A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury. The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained.
>
> A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

WIS J I—CIVIL 1707.1 provides in pertinent part:

> PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED ON OR AFTER MAY 17, 1995]
>
> Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.[fn1]
>
> A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person acts

(continued)

objected at the jury instruction conference to an instruction on punitive damages because, his counsel asserted, there was an insufficient evidentiary basis for punitive damages. However, Mazola did not object to WIS J I—CIVIL 1707 on the ground that this action was filed after May 17, 1995, nor did he propose that WIS J I —CIVIL 1707.1 be given if the court decided that an instruction on punitive damages was warranted.

Section 805.13, STATS., provides that failure to object at the instruction conference constitutes a waiver of any error in the proposed instructions or verdict. In order to preserve an error in a jury instruction, a particularized objection must be made. *See* ***Air Wisconsin, Inc. v. North Central Airlines, Inc.***, 98 Wis.2d 301, 311, 296 N.W.2d 749, 753 (1980). And, we may not address an assertion of instruction on verdict error if the issue was not raised at the instruction and verdict conference. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). We conclude that Mazola's failure to object to giving instruction WIS J I—CIVIL 1707 rather than WIS J I—CIVIL 1707.1 constitutes a waiver of that objection.

> in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.[fn2]
>
> The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

Mazola correctly points out that although he may have waived this objection, we may nevertheless reverse if we conclude either that: (1) the real controversy has not been tried, or (2) there has been a miscarriage of justice and we find there is a substantial probability of a different result on retrial. *See* § 752.35, STATS.; *see also* ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805-06 (1990). We decline to exercise our discretionary power to review the alleged but waived instructional error because we are unpersuaded that the alleged error merits review under either standard.

SUFFICIENCY OF THE EVIDENCE—PUNITIVE DAMAGES

As we have stated above, Mazola challenged the sufficiency of the evidence to support an instruction and question on punitive damages. The trial court decided that there was evidence that, if believed by the jury, supported a finding that Mazola was taking money from the corporation and using it for his own purposes and this could support a finding that his conduct was outrageous. In addressing this issue in Mazola's post-verdict motion, the court concluded that there was sufficient evidence to permit the jury to make the finding it did.

Mazola is correct that punitive damages requires a showing "over and above" the breach of duty for which compensatory damages can be given. *See* ***Wangen v. Ford Motor Co.***, 97 Wis.2d 266, 268, 294 N.W.2d 437, 442 (1980). The jury answered "yes" to the question whether Mazola's conduct was outrageous. The instruction defined "outrageous" as:

> A person's conduct is outrageous if the person acts either maliciously or in wanton, willful or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful and in

> reckless disregard of the plaintiff's rights when it demonstrates an indifference on his part to the consequence of his actions even though he may not have intended insult or injury.[5]

In reviewing a judgment based on a jury verdict, this court views the evidence in the light most favorable to the verdict and affirms if there is any credible evidence upon which the jury could have based its decision, particularly where the verdict has the approval of the trial court. ***Shawver v. Roberts Corp***., 90 Wis.2d 672, 681, 280 N.W.2d 226, 230 (1979). A reviewing court has the duty to 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, 276 N.W.2d 723, 727 (1979). In assessing the evidence, we must draw all reasonable inferences from the evidence in favor of the jury's verdict. ***Sumnicht v. Toyota Motor Sales***, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). Although we use the same standard as the trial court in ruling on motions regarding sufficiency of the evidence, we must give substantial deference to the trial court's better ability to assess the weight and relevancy of the evidence. ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995).

Applying this standard, we conclude that a reasonable jury could decide that Mazola's conduct was, at a minimum, wanton, willful and in reckless disregard of Crawley's right, in that Mazola demonstrated an indifference to the consequences of his actions on Crawley's rights as a percent shareholder of the corporation. It may be that other reasonable inferences could be drawn from the

[5] We examine the evidence with reference to the punitive damages instruction actually given, not the one Mazola now contends should have been given.

evidence, but the jury was entitled to choose the evidence, and the reasonable inferences from the evidence, that favored Crawley. Therefore, the trial court did not err in submitting the punitive damage instruction and question to the jury and in denying the post-verdict motion to set aside the jury's "yes" answer.

SUPPLEMENTAL MOTIONS AFTER VERDICT

The jury reached its verdict on January 17, 1997. Under § 805.16(1), STATS., motions after verdict must be filed within twenty days, in this case, by February 6, 1997, unless the court orders a longer time period. On February 3, 1997, Mazola filed motions after verdict.[6] He also filed supplemental motions after verdict, which contain a date stamp by the clerk of courts of February 7, 1997.[7] In support of the supplemental motions, Mazola submitted the affidavit of Mary J. Peterson, a legal secretary at his counsel's law firm, in which she averred that at 3:53 p.m. on February 6, 1997, she faxed a cover letter and the supplemental motions to Claudia Singleton, clerk of court for Jackson County, fax number 715-284-0277. She also faxed those documents to Judge Robert Wing, the judge presiding in the case,[8] and to opposing counsel. She explained that the transmittal sheet indicated transmittal at 16:53 rather than 15:53 because the fax

[6] Of the issues raised on this appeal, this motion raised these: the corporation was a necessary party; the testimony of Teeples, Meicher and exhibit 45 were inadmissible; and the verdict was against the great weight of the evidence.

[7] This motion reiterated the motions in the earlier filing and, in addition (1) renewed the motions to dismiss the complaint at the end of plaintiff's case and the close of all evidence; (2) moved to change the answer "yes" to "no" on punitive damages and change the amount of punitive damages to "unanswered"; (3) moved for dismissal based on unclean hands; and (4) moved for a new trial because of excessive damages or, in the alternative, remittitur.

[8] Judge Robert Wing, is circuit court judge for Pierce County, but he was presiding over this case in Jackson County. Apparently his copy of these documents was faxed to the clerk of court's office in Pierce County.

machine had not been reset with the end of daylight savings time in October 1996, and her office was unable to reset the machine. Peterson's affidavit attached and referenced the transmission sheet for each of the four transmissions, and each sheet indicates that the transmission was "ok." Peterson also averred that on March 10, 1997, she spoke with Kathy Powell of Judge Radcliffe's office,[9] where the plain paper fax machine for number 715-284-0277 is located, and Powell stated that it is her protocol to take any faxed documents down to the clerk of court's office, or someone from that office comes to pick them up. Crawley submitted the affidavit of an employee of his counsel's law firm, in which she averred that on March 6, 1997, she called the clerk of court for Jackson County to ask about the filing date of the supplemental motion and was told that it was filed on February 7, 1997.

The trial court decided that the supplemental motions were untimely filed. It reasoned that, according to the JACKSON COUNTY R. CIR. CT. 31,[10] filing

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[9] Judge Robert Radcliffe is the circuit court judge for Jackson County.

[10] JACKSON COUNTY R. CIR. CT. 31 provides:

> Facsimile documents may be transmitted directly to the Circuit Court for Jackson County for filing only if:
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> ….
>
> b. The circuit court has a facsimile machine physically located within the offices of the Clerk of Circuit Court or the Registrar in Probate….
>
> ….
>
> The party transmitting the facsimile document is solely responsible for ensuring its timely and complete receipt.
>
> The Circuit Court or Judge or Clerk is not responsible for:
>
> a. Errors or failures in transmission that result in missing or illegible documents.

(continued)

by fax is permitted only if there is a fax machine in the clerk of court's office. It interpreted the affidavit of Peterson as establishing the fax machine was in the judge's office, not the clerk of court's office.

Mazola moved for reconsideration of this decision, submitting a supplemental affidavit of Peterson.[11] This motion averred that the fax sent on February 6 to fax number 715-284-0277 was sent to the register in probate and referenced an attached page of the WISCONSIN LEGAL DIRECTORY indicating this fax number was for "Register in Probate, Kathy Powell" for Jackson County.[12] Peterson also averred that there is a fax machine located in the clerk of court's office for Jackson County with fax number 715-284-0270, and she referenced the same page of the legal directory, which so indicated.

Mazola's position at the hearing on the motion for reconsideration was that, because the supplemental motions were faxed to the fax machine in the office of the register in probate, there was compliance with the local rule. Mazola also brought to the court's attention that the court's statement in its earlier ruling—that there was no fax machine in the clerk of court's office—was mistaken. But, he stated, this was not significant because the critical point was that there was a fax machine in the register in probate's office, and a transmission to that machine on February 6, 1997, made the motion timely under the local rule.

> b. Periods when a circuit court facsimile machine is not operational for any reason….

[11] He also submitted a second supplemental affidavit of Peterson, but that is not pertinent to our decision.

[12] The page from the WISCONSIN LEGAL DIRECTORY indicates this same fax number, 715-284-0277, for Judge Robert Radcliffe.

The trial court initially stated its recollection of its prior ruling was that under the local rule there had to be a fax machine in the clerk of court's office and a timely filing on that machine, and that a filing on the fax machine in the register in probate's office did not suffice. After further discussion with the attorneys about the prior ruling, the court acknowledged that it could not recall the precise basis for the ruling without a transcript. However, the court stated it did not consider that the new facts brought to its attention would change its mind on the ruling, and it viewed Mazola's disagreement with the prior ruling as raising a question of law, rather than a question of fact. The court declined to reconsider the ruling.

On appeal, Mazola renews his position that the supplemental motions were timely filed because they were transmitted to a fax machine in the register in probate's office on February 6, 1997. We observe initially that it appears the trial court did address the substance of some, if not all, of Mazola's requests for relief in the supplemental motions, even after ruling that the supplemental motions were untimely. Although Mazola argues that the court erred in ruling that the supplemental motions were untimely, he does not identify the motions that the court did not address because of this ruling, and does not make any argument on the merits of any motions, apart from those issues we have already decided. Since Mazola has not explained how he was adversely affected by the ruling that the supplemental motions were untimely, we could choose not to address this issue. However, because the parties have briefed this issue and in the interests of providing a complete resolution, we will address it.

Local rules governing the filing of papers by fax are permitted by statute in certain situations. Section 801.16(1), STATS., requires that all pleadings and other papers required to be filed by statute "shall be made by filing them with

the clerk of court." With respect to filing by facsimile, the statute provides in the next subsection:

> (2) For papers that do not require a filing fee:
>
> (a) A court may adopt a local rule, if it is approved by the chief judge, that requires the use of a plain-paper facsimile machine and permits the filing of those papers by facsimile transmission to the clerk of circuit court.
>
> (b) If no rule has been adopted under par. (a), a judge may permit a party or attorney in a specific matter to file those papers with the clerk of circuit court by facsimile transmission to a plain-paper facsimile machine.
>
> (c) The party or attorney, by filing papers by facsimile transmission, certifies that permission of the judge or court for filing by facsimile transmission has been granted. Papers filed by facsimile transmission are considered filed when transmitted except that papers filed by facsimile transmission completed after regular business hours of the clerk of court's office are considered filed the next business day.

Section 801.16(2), STATS.

Interpretation of § 801.16, STATS., presents a question of law, which we review de novo, *see* ***Estate of Rice v. County of Monroe***, 187 Wis.2d 659, 663, 523 N.W.2d 168, 169 (Ct. App. 1994), as does interpretation of the local rule. The plain language of the statute requires that Mazola's motions be filed with the clerk of court and authorizes a court to adopt a local rule that permits filing by "facsimile transmission to the clerk of court." The contested section of the local rule is: "Facsimile documents may be transmitted directly to the Circuit Court for Jackson County for filing only if …. (b.) The Circuit Court has a facsimile machine physically located within the offices of the clerk of circuit court or the Register in Probate." This could mean that filings that must be made with the clerk of court may be made by fax only if there is a machine physically located in that office, and filings that must be made with the register in probate may be made by fax only if there is a fax machine located physically in that office.

Alternatively, this could mean that papers that are required to be filed in either office may be filed by fax as long as there is a facsimile machine in one of the offices. Assuming without deciding that both constructions are reasonable, we conclude that the former is more consistent with the purpose of § 801.16 and is supported by other portions of the local rule.

The evident purpose of § 801.16, STATS., is to permit local courts to make filings by fax available to litigants, within the context of the civil procedure rules established by statute. The local rule cannot change the office where papers are required to be filed or the time within which papers must be filed under the statutes. The interpretation of the local rule that Mazola urges means that, even though there is a fax machine in the office where the statute requires this paper to be filed, he may choose to transmit this paper to the register in probate, which has no relation to this matter, and the paper will be considered filed at the time of transmission. The implication of this interpretation is either that filing with the register in probate is an acceptable substitute for filing with the clerk of court, or that it is the responsibility of the register in probate to see that the paper is carried to the clerk of court's office immediately and stamped as filed by the clerk of court. The first implication impermissibly modifies statutory requirements. The second implication imposes an obligation on the register in probate and is inconsistent with the plain wording of the local rule that, "The party transmitting the fax is solely responsible for ensuring its timely and complete receipt." JACKSON COUNTY R. OF CIR. CT. 31.

We conclude that the more reasonable interpretation of the local rule is that where there is, as in this case, a fax machine in the clerk of court's office, a document must be transmitted to that fax machine to be considered filed with the clerk of court at the time of transmission under § 801.16(2)(c), STATS. The trial

court therefore correctly decided that the supplemental motions were untimely filed, although it did so on different grounds.

Mazola asks us to exercise our discretionary power of reversal even if we conclude that the supplemental motions were not timely filed. However, as we have already stated, Mazola does not tell us which issues the trial court did not decide because of its ruling on timeliness, and does not address any issues on the merits beyond those we have already decided. We therefore have no developed argument on the critical questions regarding the appropriateness of exercising our discretionary power under § 752.35, STATS., and for that reason, we do not consider this further.

In summary, we conclude that the trial court did not erroneously exercise its discretion in declining to consider Mazola's motion filed the day before trial. It also did not erroneously exercise its discretion in admitting evidence, except certain statements of Meicher, and those errors are harmless. The objection to the specific version of the punitive damage jury instructions was waived. And, the trial court correctly decided that there was sufficient evidence to sustain the jury's finding that Mazola's conduct was outrageous, and correctly decided that the supplemental post-verdict motions were untimely filed. Finally, we see no basis for exercising our discretionary power of reversal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.