

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP2897

Cir. Ct. No. 2005CV127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**NORTHERN AIR SERVICES, INC., LINK SNACKS GLOBAL, INC.
AND LINK HOLDINGS, INC.,**

PLAINTIFFS-RESPONDENTS,

**TROY J. LINK, LINK SNACKS, INC., L.S.I., INC. - NEW
GLARUS, L.S.I., INC. AND JOHN E. LINK,**

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

JAY E. LINK,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

V.

**JOHN A. HERMEIER, LAWRENCE J. JARVELA, MICHAEL McDONALD,
RICHARD MAY, LINK BUILDINGS, INC. AND JACK LINK CATTLE
COMPANY, INC.,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Judgment affirmed in part and reversed in part; order reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Jay Link appeals an order reducing a punitive damages award against Jack Link, and a judgment that, among other things, awarded those reduced damages. Jay argues the circuit court lost competency to reduce the award because Jack's motion after verdict was filed late. We agree, reverse the order, and direct the circuit court to amend the judgment and reinstate the full punitive damages award to Jay.¹

¶2 Jack cross-appeals that portion of the judgment awarding punitive damages to Jay. Jack argues there was insufficient evidence of punitive damages to present the issue to the jury. We disagree and affirm the awarding of punitive damages to Jay.

BACKGROUND

¶3 This case involved claims and counterclaims between Jay, his brother, and his father, Jack, and a conglomerate of companies they owned in varying shares. A jury awarded Jay \$736,000 in compensatory damages and \$5,000,000 in punitive damages against Jack. Jack filed a motion after verdict requesting, as relevant here, a reduction in the punitive damages award. The court initially rejected the motion as tardy because it was filed one day beyond the

¹ Jay Link raised additional issues not addressed by this decision. Those issues are disposed of by separate order released today.

statutory deadline. However, the court reconsidered and addressed the motion, relying on *State v. Treadway*, 2002 WI App 195, 257 Wis. 2d 467, 651 N.W.2d 334, to conclude the motion was timely. The court then reduced Jay's punitive damages award to \$736,000 on due process grounds. Jay appeals and Jack cross-appeals.

DISCUSSION

¶4 Jay argues the circuit court had no authority to consider Jack's motion to reduce the punitive damages award. WISCONSIN STAT. § 805.16(1)² requires that motions after verdict "shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by [order]" A failure to comply with the deadline deprives the circuit court of competency to decide the motion. *Hartford Ins. Co. v. Wales*, 138 Wis. 2d 508, 515-16, 406 N.W.2d 426 (1987); *see also Northridge Co. v. W.R. Grace & Co.*, 205 Wis. 2d 267, 286-87, 556 N.W.2d 345 (Ct. App. 1996) (circuit court commits error by granting tardy motion).

¶5 Jack responds that *Treadway*, 257 Wis. 2d 467, ¶¶6-11, held broadly that WIS. STAT. § 805.16's "20-day period does not begin to run until there is a final disposition of the entire litigation." Thus, Jack contends his motion was timely because, although the jury had decided the legal claims, the circuit court had not yet decided the equitable claims at the time of filing.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 Jack overstates *Treadway*'s holding. *Treadway* addressed the statute only as it applied to sexually violent person commitments. There "[w]e conclude[d] that, in WIS. STAT. ch. 980 proceedings, postverdict motions must be filed within twenty days of the commitment order" *Treadway*, 257 Wis. 2d 467, ¶3. Discussing the twenty-day rule for postverdict motions and other appellate issues in a lengthy footnote, we observed: "[W]hile these legal principles remain sound, they are, *to a very limited extent*, qualified in the context of an appeal from a WIS. STAT. ch. 980 commitment order." *Id.*, ¶3 n.1 (emphasis added). Finally, we ended our discussion stating, "we conclude that a sexually violent person committed under ch. 980 preserves the right to appeal, as a matter of right, by filing postverdict motions within twenty days of the commitment order." *Id.*, ¶11. We did not set forth in *Treadway* a new rule applicable to all civil cases.

¶7 At best, Jack might reasonably argue *Treadway* should be *extended* to civil cases involving a situation where the jury's verdict does not resolve all pending issues. No prior case has done so. We also note *Treadway* no longer has any prospective application because the legislature amended WIS. STAT. ch. 980 following our decision. While ch. 980 was silent regarding postverdict and appellate procedure when we decided *Treadway*, *see id.*, ¶9, the legislature subsequently created WIS. STAT. § 980.038. *See* 2005 Wis. Act 434, § 94. Rather than the modified twenty-day civil procedure rule adopted in *Treadway*, ch. 980 appeals are now subject to the procedure for criminal appeals under WIS. STAT. RULE 809.30. *See* WIS. STAT. § 980.038(4).

¶8 Jack, arguing *Treadway* applies to civil cases, emphasizes our focus there on the comparison between WIS. STAT. ch. 980 and criminal cases, where we agreed with the circuit court that "'piecemeal appeals would ... result' if the civil

timeline for postverdict motions were applied[.]” “because ch. 980 trials, like criminal trials, necessarily anticipate a separate dispositional phase” *Treadway*, 257 Wis. 2d 467, ¶¶7, 9. Jack compares the “phased” litigation in this case to that used in ch. 980 cases, arguing it makes no sense to require piecemeal appeals here either. As our quotations from *Treadway* show, however, we explicitly relied on a distinction between civil and criminal cases. Applying the now-defunct *Treadway* situation to a civil appeal would turn the holding on its head. *Treadway* is distinguished from this case because, in contrast to civil procedure, ch. 980 procedure has multiple phases pursuant to statute.³ Further, the historical facts of this case defy Jack’s logic. Jack did not wait until final disposition of the case; rather, he filed his tardy “piecemeal” postverdict motion prior to resolution of the equitable issues.

¶9 Jack also argues *Treadway* created a rule that WIS. STAT. § 805.16(1) will not bar a tardy motion where significant constitutional rights are implicated. *Treadway*, 257 Wis. 2d 467, ¶10, did emphasize that denying the sexually violent person’s postverdict challenges based on counsel’s failure to timely file would both work a manifest miscarriage of justice and infringe the person’s right to the effective assistance of counsel. *Treadway* did not, however, announce a broad new rule that § 805.16(1) does not apply whenever constitutional issues are raised in a civil case. The rights of a person facing a loss

³ WISCONSIN STAT. ch. 980 procedure has evolved to rely less on civil procedure. For instance, WIS. STAT. § 980.036 now sets forth discovery procedure, with § 980.036(11) explicitly stating the WIS. STAT. ch. 804 civil discovery rules are inapplicable. Jack nonetheless relies on *State v. Rachel*, 224 Wis. 2d 571, 573-75, 591 N.W.2d 920 (Ct. App. 1999), *aff’d*, 2002 WI 81, 254 Wis. 2d 215, 647 N.W.2d 762, to support his assertion that “commitment proceedings are governed by the rules of civil procedure, including [WIS. STAT.] § 805.16.” *Rachel*, which held civil discovery rules apply to ch. 980 proceedings, has been abrogated by statute. As discussed in the body of this decision, § 805.16 is no longer applicable to ch. 980 proceedings either.

of liberty are not implicated in civil cases such as this one. Further, we note the statute itself does not recognize any exception to the twenty-day deadline where constitutional issues are raised.

¶10 Jack next argues the motion after verdict was, in fact, filed within twenty days of the verdict because it was mailed on the due date, and the parties' filings were previously treated as timely under that circumstance. An informal policy for compliance with scheduling orders does not, however, affect the statutory requirement that motions after verdict be filed and served within twenty days after verdict. "[A] pleading is filed when it is properly deposited with the clerk." *Granado v. Sentry Ins.*, 228 Wis. 2d 794, 796, 599 N.W.2d 62 (Ct. App. 1999). Indeed, the circuit court noted it warned the parties at the conclusion of the jury trial by reading WIS. STAT. § 805.16(1) verbatim. The trial transcript shows the parties agreed twenty days would be adequate.

¶11 Jack also argues his motion should be considered timely filed because Jay's motion after verdict was filed late but considered timely. Jay's motion, however, was filed on the twentieth day just minutes after the clerk's office closed, after counsel had called the office while it was open to inform the clerk the motion was on its way. The clerk placed a memo in the file stating the clerk exercised discretion to accept the motion for filing. We recognized the clerk's discretion to do so in *Granado*, 228 Wis. 2d at 797, 800. Nothing about the acceptance of Jay's filing presents any inequality vis-à-vis Jack's tardy filing the following day.

¶12 Finally, Jack asks us to conduct a discretionary review of his challenge to the punitive damages award to Jay. The failure to present timely postverdict motions does not deprive us of jurisdiction to review the issues

intended to have been raised. *Hartford Ins.*, 138 Wis. 2d at 510-11. Rather, in our discretion, we may decide to review the issues in the interests of justice even though the party may not appeal as a matter of right. *Id.* at 511. We decline to do so in this case.

¶13 Jack argues that because he filed his postverdict motion under the circuit court’s accepted mailing procedure, it would be a miscarriage of justice if the punitive damages award never received judicial scrutiny. We disagree. Following an informal procedure that complied with a court’s scheduling orders rather than the plain language of the postverdict motion statute does not equate to a miscarriage of justice. This is especially so in light of the circuit court’s warning at the end of trial that the statute required filing and service within twenty days of the verdict. “As we have emphasized: ‘[WIS. STAT. §] 805.16 ... provides fair warning that a litigant who fails to make timely motions after verdict acts at his or her peril.’” *Northridge*, 205 Wis. 2d at 286 (quoting *Schmidt v. Smith*, 162 Wis. 2d 363, 372-73, 469 N.W.2d 855 (Ct. App. 1991)).

¶14 The miscarriage of justice standard is not meant to save parties from their own mistakes. Jack is not complaining about a procedural error made by the trial court. “Rather, [Jack] ask[s] us to overlook [*his*] mistake. Our discretion should not be applied in such circumstances.” See *Jacque v. Steenberg Homes, Inc.*, 201 Wis. 2d 22, 29, 548 N.W.2d 80 (Ct. App. 1996), *rev’d on other grounds*, 209 Wis. 2d 605, 563 N.W.2d 154 (1997).

¶15 We have just addressed Jay’s argument—and Jack’s various arguments in response—that the circuit court erroneously considered Jack’s postverdict motion and reduced the punitive damage award against Jack and in favor of Jay. We also briefly address another issue Jay raises. The jury found Jay

breached his fiduciary duties to two of the companies involved in the litigation, and awarded \$1 in compensatory damages to each. The jury also awarded the companies a total of \$5,000,000 in punitive damages against Jay. Pursuant to Jay's postverdict motion, however, the trial court reduced the punitive damages awards to \$1 each. Jay now appeals the \$2 punitive damages award against him. In his reply brief, he then tacks on a new argument why the \$2 award should be vacated. We will not resolve an appeal from such a de minimis award. *See Ziegler v. Wonn*, 18 Wis. 2d 382, 389, 118 N.W.2d 706 (1963); *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 123 n.16, 479 N.W.2d 557 (Ct. App. 1991). We are disturbed that Jay's counsel would raise such an issue.

¶16 We turn now from Jay's appeal to Jack's cross-appeal. Jack states his sole issue as follows: "Did the trial court err when it failed to perform the required 'gatekeeper' analysis before sending Jay Link's punitive-damage claim to the jury?"⁴ Jack then asserts, "[T]he question of punitive damages should never have made it to the jury, because Jay failed to satisfy his burden of proving by clear, satisfactory, and convincing evidence that he was entitled to such damages." Thus, in his argument, Jack focuses not on the court's alleged error or whether that error entitles him to any remedy, but instead on the weight of the evidence. Indeed, Jack begins his reply brief stating:

Jay contends that there was ample evidence to present the issue of punitive damages to the jury. In addition to being inaccurate, this is not the proper standard. The issue is whether Jay presented evidence that was 'clear, satisfactory, and convincing to a reasonable certainty' (WIS

⁴ Jack raised this issue in a motion for directed verdict before the case was sent to the jury, but the judge reserved ruling on the motion at that time. Therefore, Jack's cross-appeal is not precluded by our determination that his postverdict motion was untimely.

JI-CIVIL 1701.1) that Jack acted maliciously toward Jay or in intentional disregard of his rights.

It is Jack, however, who misconstrues the law. This should have been apparent by his reliance on the jury instruction. If the trial judge were to apply the jury standard to determine whether the jury should be permitted to decide the question, then there would be nothing left for the jury to do. Weighing the evidence is within the jury's ambit.

¶17 Whether there is sufficient evidence to submit the question of punitive damages to the jury is a question of law that is subject to independent appellate review. *Strenke v. Hogner*, 2005 WI 25, ¶13, 279 Wis. 2d 52, 694 N.W.2d 296. The punitive damages question should only be submitted if “a reasonable jury could find from the evidence that entitlement to punitive damages has been proven by ... ‘clear and convincing evidence.’” *Id.*, ¶41 (quoting *Lievrouw v. Roth*, 157 Wis. 2d 332, 344, 459 N.W.2d 850 (Ct. App. 1990)). Stated otherwise, the circuit court “should not submit the issue ... to the jury *in the absence of evidence* warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite ... conduct.” *Id.*, ¶40 (emphasis added) (quoting *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990)).

¶18 “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.” WIS. STAT. § 895.043(3). The jury here found Jack committed an intentional tort by breaching a fiduciary duty to Jay.⁵ See *Loehrke v. Wanta Bldrs., Inc.*, 151 Wis. 2d 695, 703, 445 N.W.2d 717

⁵ Jack does not appeal the jury's finding that he breached his fiduciary duty to Jay.

(Ct. App. 1989). Although that finding alone does not automatically justify a punitive damages award, *see id.*, it demonstrates this is not the type of case discussed in *Strenke*, where the court indicated the gatekeeper function was necessary to limit the ability to award damages in cases involving *negligence*:

The legislature intended with the heightened standard that now there would be even fewer negligence cases giving rise to punitive damages.

Accordingly, we expect circuit courts to serve as gatekeepers before sending a question on punitive damages to the jury.

....

When serving in this capacity, we remind circuit courts that punitive damages are not recoverable if the wrongdoer's conduct is merely negligent.

Strenke, 279 Wis.2d 52, ¶¶39-40, 42. Jack's alleged conduct in this case involved intentional, affirmative acts.

¶19 In his briefs, Jack ignores the “bad facts”—even outright denying that his conduct constituted a breach of fiduciary duty—and reargues the merits of the case. In its oral decision, the circuit court noted it did not have adequate time during the pendency of the trial to review Jack's motion, and concluded:

When I look at ... those facts, the reassertion of control letter without board approval, Jack's insistence that both Jay and Troy split the ... proceeds, the memos of May 5th, '05, and May 26th, 05, which were construed as efforts to manipulate and control and the change in the voting rights, on reflection I probably should have denied the motion at the time. But in any event, I deny it now.

Elaborating one example, the facts set forth in Jay's brief regarding the “reassertion of control letter” were as follows:

In 2004, the Links sought [outside] help ... to determine the best organizational structure [for the companies]. Jack

agreed in writing to abide by whatever the directors thought was best for the companies. The consensus solution of the directors was that Jack should step out of the business'[s] day-to-day operations, move up to the position of Chairman, and leave Jay and Troy [(Jay's brother)] each to run a division of the business as co-Ceo's.

....

Jack, however, ignored the recommendations of the manager/directors. In October 2004, he unilaterally issued a memo (while Jay was on vacation) by which Jay – duly elected COO by the Boards of Link Snacks, LSI, and LSI-New Glarus – was stripped of *all* responsibilities in each of those companies. The reason, Jack stated, was “the fact that I am reasserting my control over worldwide meatsnack operations.” In doing so, Jack did not consult any of the Link companies' boards or corporate bylaws.

¶20 We agree with the circuit court and conclude there was not merely some, but plentiful evidence adduced at trial that, if believed, would permit a jury to conclude Jack acted either maliciously or with an intentional disregard of Jay's rights. We will not second-guess the jury's findings and independently evaluate the evidence to determine whether we would have concluded Jay proved his punitive damages case by clear and convincing evidence.

By the Court.—Judgment affirmed in part and reversed in part; order reversed.

Not recommended for publication in the official reports.

