

**COURT OF APPEALS OF WISCONSIN  
PUBLISHED OPINION**

Case No.: 04-0588

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†Petition for review filed

Complete Title of Case:

**JEFFREY SCHWIGEL AND CLASSIC TOOL & MACHINE  
COMPANY,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**DAVID J. KOHLMANN, JANE KOHLMANN, AND KOHLMANN  
TOOL & DESIGN, INC.,**

**DEFENDANTS-APPELLANTS,†**

**PORT WASHINGTON STATE BANK AND MIDDLE WEST  
MANUFACTURING, INC.,**

**INTERVENORS.**

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Opinion Filed: February 23, 2005  
Submitted on Briefs: January 7, 2005

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JUDGES: Brown, Nettesheim and Snyder, JJ.  
Concurred:  
Dissented:

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Appellant  
ATTORNEYS: On behalf of the defendants-appellants, the cause was submitted on the  
briefs of *Benjamin J. Harris of Harris & Associates, S.C.*, Milwaukee  
and *Paul Piaskoski*, of counsel, of *Paul Piaskoski, LLC*, Milwaukee.

Respondent  
ATTORNEYS:

On behalf of the plaintiffs-respondents, the cause was submitted on the brief of *Daniel W. Stevens* and *Nicholas Zales* of *Stevens & Kroening, LLC*, Brookfield.

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 23, 2005**

Cornelia G. Clark  
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. 04-0588**

**Cir. Ct. No. 00CV000364**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**

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**JEFFREY SCHWIGEL AND CLASSIC TOOL & MACHINE  
COMPANY,**

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**V.**

**DAVID J. KOHLMANN, JANE KOHLMANN, AND KOHLMANN  
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APPEAL from a judgment of the circuit court for Waukesha County:  
MARK S. GEMPELER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 SNYDER, J. David and Jane Kohlmann and Kohlmann Tool & Design, Inc. (Kohlmann) appeal from a judgment on a jury verdict awarding a total of \$412,000 in compensatory and punitive damages to Jeffrey Schwigel and Classic Tool & Machine Company (Schwigel). Kohlmann contends that the trial court erred when it failed to differentiate between Schwigel's contract claim and his conversion claim when instructing the jury on punitive damages. Kohlmann further contends that the jury's punitive damages award was grossly excessive and a violation of due process principles. Finally, Kohlmann argues that there was no credible evidence to support the jury's compensatory damages award. We agree that the trial court erred when it failed to provide a jury instruction on the difference between the contract claim and the conversion claim when awarding punitive damages; nonetheless, we conclude that the error was harmless. We disagree with Kohlmann's remaining contentions and affirm the judgment of the trial court.

## BACKGROUND

¶2 This appeal arises from a retrial pursuant to our remand order in *Schwigel v. Kohlmann*, 2002 WI App 121, 254 Wis. 2d 830, 647 N.W.2d 362. There, Schwigel brought five claims against Kohlmann: breach of contract, negligent misrepresentation, unjust enrichment, promissory estoppel, and conversion of equipment. *Id.*, ¶8. The jury awarded Schwigel compensatory damages of \$250,000 on the contract, misrepresentation and unjust enrichment claims, \$12,000 on the conversion claim, and \$300,000 in punitive damages.<sup>1</sup> *Id.*,

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<sup>1</sup> The jury found in favor of Schwigel on all claims except promissory estoppel. *Schwigel v. Kohlmann*, 2002 WI App 121, ¶9, 254 Wis. 2d 830, 647 N.W.2d 362.

¶9. The historical facts of the current appeal were set forth in our previous opinion, and we provide an abbreviated rendition here for context.

¶3 In 1998, Kohlmann was operating his tool and die business out of a shop he owned in Cedarburg, Wisconsin. After Kohlmann and Schwigel became acquainted, Kohlmann asked Schwigel to move his tool-making business to Kohlmann's shop. Schwigel declined. During October 1999, Kohlmann told Schwigel that he had located a prospective and lucrative motor shaft production job. Since Schwigel had the expertise and machinery to handle the job, Kohlmann again asked Schwigel to relocate to his shop and to take over the prospective job.

¶4 The talks eventually produced a verbal agreement whereby Schwigel would share space in Kohlmann's shop at the cost of \$700 per month. The motor shaft production job was a substantial factor in Schwigel's decision to relocate. Schwigel moved into Kohlmann's shop on or about November 3, 1999. Because of limited space, Schwigel stored some of his equipment in another building owned by Jack Dunfee, a business associate of Kohlmann. Dunfee did not charge Kohlmann for storing Schwigel's equipment, and Kohlmann had the only key to the storage area.

¶5 On November 19, 1999, Kohlmann received a purchase order from the manufacturer for the immediate production of the shafts. After receiving the purchase order, Schwigel and Kohlmann went to Illinois to look into purchasing a machine to mass produce the shaft job. On December 2, 1999, Schwigel received approval from his bank to purchase the mass-production machine. However, two days later, Kohlmann told Schwigel that he was going to buy the machine for himself in order to produce the shafts and keep the job for himself.

¶6 Thereafter, the relationship between Schwigel and Kohlmann deteriorated, and on December 28, 1999, Kohlmann told Schwigel to leave. Without notice to Schwigel, Kohlmann changed the locks on the shop, prohibiting Schwigel from gaining access to his equipment and performing work for his customers. After numerous attempts to get access to the shop, Schwigel contacted the Cedarburg police to help him get his equipment back. On January 18 and 19, 2000, the police supervised as Schwigel moved his equipment out of Kohlmann's shop. At that time, Schwigel also asked to remove his other equipment that had been stored in the building owned by Dunfee. Neither Dunfee nor Kohlmann would allow Schwigel access to the storage building, and the police told Schwigel that if he attempted to access the building he would be charged with trespassing.

¶7 By July 2000, Schwigel had lost all of his customers and he was out of business. Four months later, in November 2000, Schwigel received a phone call from Dunfee who told him to come and get his equipment from the storage building. When Schwigel went to remove his equipment from the storage building, he found that certain items were missing.

¶8 On appeal, we affirmed Kohlmann's liability on the breach of contract, negligent misrepresentation, and unjust enrichment claims, but reversed the compensatory and punitive damages awards. *Id.*, ¶2.<sup>2</sup> We remanded the matter for a new trial on compensatory damages associated with the three claims and on the issue of punitive damages. *Id.*, ¶26. Subsequently, Schwigel chose to pursue damages for breach of contract and punitive damages.<sup>3</sup> Following retrial,

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<sup>2</sup> Kohlmann did not challenge that portion of the judgment associated with the conversion claim. *Schwigel*, 254 Wis. 2d 830, ¶1.

<sup>3</sup> Schwigel explains that he elected to limit the issues on remand because of a concern about "raising new appellate issues regarding the differing measure of damages" on the breach of contract, negligent misrepresentation, and unjust enrichment claims.

the jury awarded Schwigel \$37,000 in compensatory damages for the breach of contract and \$375,000 in punitive damages. The trial court upheld the verdict and entered judgment accordingly. Kohlmann appeals.

## DISCUSSION

### *Jury Instructions*

¶9 Kohlmann first contends that the trial court erred when it failed to instruct the jury that punitive damages cannot be awarded on the breach of contract claim. A trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion to “fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case. *State v. Groth*, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (No. 01-3000-CR).

¶10 The scope of the new trial below was limited to damages. The special verdict contained eighteen questions, sixteen of which were answered by the trial court.<sup>4</sup> The jury was required to make two findings: (1) what sum of money would compensate Schwigel for the breach of contract, and (2) what sum of money should be awarded as punitive damages. In Wisconsin, punitive damages are not available as a remedy for breach of contract. *Autumn Grove*

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<sup>4</sup> The special verdict included sixteen questions that were answered by the trial court on the basis of the original jury verdict and our remand directive in *Schwigel*.

*Joint Venture v. Rachlin*, 138 Wis. 2d 273, 279, 405 N.W.2d 759 (Ct. App. 1987). Neither the jury instructions nor the verdict form itself advised the jury that punitive damages are not to be awarded for the breach of contract and must be determined based only upon Kohlmann’s conduct in relation to the conversion claim. By such omission, the trial court failed to fully and fairly inform the jury of the rules of law applicable to the case.

¶11 Although the trial court did err in its failure to fully instruct the jury, we conclude that the error was harmless. The standard for harmless error is the same for civil and criminal cases. *Town of Geneva v. Tills*, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986). The test is whether there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility of a different outcome is a possibility sufficient to “undermine confidence in the outcome.” *Id.* at 545.

¶12 Schwigel argues that the conduct relating to the breach of contract provided the historical context for the conversion claim and the punitive damages. The trial court shared this view, stating that “all matters of fact relevant to consideration of all aspects of damages are clearly relevant to the jury’s consideration of punitive damages” and therefore the jurors are “entitled to listen to [the negligent misrepresentation and conversion findings to] determine what they feel would be an appropriate punitive damage award if they find that the conduct on the part of the defendants was outrageous.” We agree that the jury heard and considered the same evidence of outrageous conduct that would have

















