No. 93-0140

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

**MANAGEMENT COMPUTER SERVICES, INC.,
A WISCONSIN CORPORATION,**

Plaintiff-Appellant-Cross Respondent,

v. **ERRATA SHEET**

**HAWKINS, ASH, BAPTIE & CO.,
A WISCONSIN PARTNERSHIP,
HAWKINS, ASH, BAPTIE, INC.,
A WISCONSIN CORPORATION,
DAVID D BAPTIE, JAMES O. ASH,
R. ROY CAMPBELL, ROBERT J. DALEY,
WALTER L. LEIFELD, LARRY E. VANGEN
AND JACK E. WHITE,**

**Defendants-Counter Claimants-Respondents-Cross
Appellants,**

MANAGEMENT COMPUTER SERVICES, INC.,

Counter Defendant-Appellant.

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PLEASE TAKE NOTICE that the attached pages 24 through 32 of the majority opinion and the dissent are to be substituted for pages 24 through 33 of the majority opinion and the dissent in the above-captioned opinion which was released on August 31, 1995. (NOTE: This does not include the concurrence which preceded the dissent in the original opinion.)

Dated this 5th day of December, 2006.

Fahrenberg, 96 Wis.2d at 233, 291 N.W.2d at 526.[1]

The high ratios of the punitive damage award to the compensatory award for tort damages and to the potential criminal fine lead us to conclude that the initial award of $1,750,000 is unnecessary to serve the purposes of deterrence or punishment. The punitive award is almost twenty-seven times the compensatory award of $65,000. The punitive award must bear "a reasonable relationship to the award of compensatory damages." ***Tucker v. Marcus***, 142 Wis.2d 425, 447, 418 N.W.2d 818, 826 (1988). Even with "due regard for the discretion of the jury in assessing punitive damages," ***id.*** at 447-48, 418 N.W.2d at 826, the award does not bear a reasonable relationship to MCS's compensatory damages. The potential criminal penalty for willfully, knowingly and without authorization copying computer programs where the damages are greater than $2,500 is a fine not exceeding $10,000 or imprisonment not exceeding five years, or both. Sections 943.70(2)(a) and (3)(b)3, and 939.50(3)(d), STATS. The punitive damages award is 175 times the maximum fine.

We also conclude that the reduced punitive award of $50,000 is insufficient to punish HABCO and to deter others in the future from similar wrongdoing. The compensatory award is in a sense a starting place, since punitive damages equal to compensatory damages are reasonable. ***Dalton v. Meister***, 52 Wis.2d 173, 181, 188 N.W.2d 494, 498 (1971). The $50,000 award by the trial court does not even match the compensatory award for conversion, $65,000. The high degree of outrageous conduct and maliciousness exhibited by HABCO is such that a punitive award merely equal to the compensatory award fails to serve the purposes of punishment and deterrence.

We reach that conclusion because the record shows how easy it is to steal computer programs, once possession of the physical software is obtained. One contemplating such a theft and watching the development of the law might well consider that the ease of theft, the low risk of detection and the

[1] The record contains no evidence of the wealth of any respondent. *See* ***Meke v. Nicol***, 56 Wis.2d 654, 658, 203 N.W.2d 129, 132 (1973) (evidence of an individual defendant's wealth is inadmissible when punitive damages are sought from multiple defendants).

potential profit are worth the cost if punitive damages merely approximate the amount of compensatory damages. We should dissuade software thieves from reaching that conclusion. In this age of computers and the many uses to which they are put in almost every professional, commercial, industrial and governmental context, deterrence of others similarly situated is even more important than punishing the wrongdoer. We conclude that a punitive award only approximating MCS's compensatory damages is far too little.

To accomplish the dual purposes of punishment and deterrence, we conclude that, as a matter of law, reasonable punitive damages in this case are $650,000.[2] This amount is approximately ten times the amount of the compensatory damages award, a far more reasonable relationship in this case, and sixty-five times the maximum fine for computer theft. It better satisfies those purposes in the case before us than does the $50,000 award the trial court directed in its remittitur order. Accordingly, MCS should be given the option of accepting judgment for $650,000 in punitive damages, or having a new trial limited to the issue of the amount of punitive damages.

We direct the trial court to modify the judgment by decreasing the amount of the punitive damages award to MCS from $1,750,000 to $650,000, exclusive of costs, unless within twenty-one days from the date of remittitur, MCS files with the clerk of the circuit court a notice in writing that the plaintiff elects to have a new trial limited to the issue of the amount of punitive damages. If such notice is timely filed, the modified judgment for $650,000 punitive damages shall stand reversed and a new trial had on punitive damages.[3]

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[2] "The ***Powers*** rule ... allows both the trial court and the appellate court to determine a reasonable award and to grant the plaintiff the option of accepting that sum or having a new trial. This court has exercised this kind of control in punitive damage cases." ***Wangen v. Ford Motor Co.***, 97 Wis.2d 260, 307, 294 N.W.2d 437, 461 (1980) (citations omitted).

[3] We fashion our mandate on that in ***Powers***, 10 Wis.2d at 92, 102 N.W.2d at 401, except that we think giving notice to the clerk of circuit court will be more convenient than notice to the clerk of the court of appeals.

5. ISSUES ON RETRIAL

The trial court stated that the retrial if MCS elected it, included the issue whether HABCO's conduct was outrageous. The court erred. No reason exists to retry the issue whether HABCO's conduct was outrageous. Liability for punitive damages has been fixed. To retry that issue would deprive MCS of a liability finding. The amount HABCO must pay because of that liability is the only remaining issue. Evidence relevant to the degree of that outrageousness may be presented by both MCS and HABCO, but the jury should be instructed that as a matter of law HABCO's conduct was outrageous. The only question for the jury is the amount of punitive damages, and it should consider the degree of outrageousness in fixing that amount.

The trial court apparently interpreted ***Badger Bearings, Inc. v. Drives & Bearings, Inc.***, 111 Wis.2d 659, 331 N.W.2d 847 (Ct. App. 1983), as holding that a trial court has unlimited discretion in fixing the scope of a new trial. That was not our holding.

In ***Badger Bearings***, we said that the trial court might grant a partial new trial when the error is confined to an issue which is "entirely separable" from the others. We concluded that "compensatory and punitive damages are separable and that justice would not be served by mandating a new trial on all damages questions as the invariable alternative to acceptance of a changed amount of punitive damages." ***Id***. at 673-74, 331 N.W.2d at 855.

Consequently, because the liability of the respondents for punitive damages will not be an issue, and that issue is separable from the amount of damages, the only issue at the second trial will be the amount of the punitive damages, and evidence relevant to outrageousness will be admissible only on the degree of that outrageousness.

6. INTEREST ON VERDICT

After MCS rejected the $50,000 punitive award, the court scheduled the second trial for June 23, 1992. On June 3, 1992, MCS moved to a continuance, on grounds that counsel (who had been substituted for trial

counsel) was not prepared to try the case on that date. HABCO consented to a continuance, provided that interest on the verdict was tolled through the date of the adjourned trial. Counsel for MCS had no objection to that and obtained the oral consent of MCS's president to the continuance. The court scheduled the trial for October 27, 1992, and tolled interest until that date. MCS claims error.

MCS asserts that it has a statutory right to the interest the trial court tolled. Section 814.04(4), STATS., provides that if a judgment is for the recovery of money, interest at the rate of twelve percent per year from the time of the verdict until judgment is entered shall be computed by the clerk and added to the costs. As MCS points out, the statute has no pertinent exceptions.

However, because counsel for MCS and an officer of MCS consented to a continuance and to tolling interest on the verdict through the date of the adjourned trial, and the trial court relied on that consent, MCS is judicially estopped from claiming that it did not consent. See ***Coconate v. Schwarz***, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991) (judicial estoppel precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously taken). Having consented to the adjournment and to the tolling of interest, it has waived the right to interest on the judgment.

7. WISCONSIN ORGANIZED CRIME CONTROL ACT (WOCCA) CLAIM

MCS sought damages under WOCCA, § 946.80-88, STATS. Section 946.87(4), STATS., provides that a person who is injured by reason of any violation of § 946.83 or § 946.85 has a cause of action for twice the actual damages sustained, attorney fees and costs reasonably incurred and, when appropriate, punitive damages. Section 946.83(3), STATS., provides that no person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a "pattern of racketeering activity." Section 946.82(3), STATS., provides in pertinent part:

> "Pattern of racketeering activity" means engaging in at least 3 incidents of racketeering activity that have the same or similar intents, results, accomplices,

> victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity.

Section 946.82(4) defines "racketeering activity" as any activity specified in 18 U.S.C. § 1961(1) in effect as of April 27, 1982, or the attempt, conspiracy to commit, or commission of any of the felonies specified in particular chapters and sections of the Wisconsin statutes, including § 943.70, the computer-crimes statute. The wilful, knowing and unauthorized copying of data, computer programs or supporting documentation is a crime. Section 943.70.

HABCO moved for summary judgment dismissing MCS's WOCCA claim. The trial court granted the motion because it concluded that any violation of § 943.70, STATS., that occurred before its effective date is not racketeering activity under § 946.82(4), STATS., and HABCO's copying and use of software are not violations of § 943.70. For that reason, the court concluded that MCS did not establish the requisite number of predicate acts necessary to establish a "pattern of racketeering activity" under § 946.82(3).

MCS contends that each unauthorized copying of the stolen software after § 943.70, STATS., became effective is a separate violation of § 943.70, and therefore each act of unauthorized copying is a separate predicate act under WOCCA. MCS submitted an affidavit to the trial court identifying sixty-three acts of copying which occurred after § 943.70 became effective.

The Seventh Circuit rejected MCS's same contention on the same facts in ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 883 F.2d 48 (7th Cir. 1989). In that case MCS sought damages from HABCO under 18 U.S.C. § 1961-68, the Racketeer Influenced and Corrupt Organizations Act (RICO). Violation of RICO requires a "pattern of racketeering activity." 18 U.S.C. § 1962. A "pattern of racketeering activity" requires at least two acts of racketeering activity within a defined period. 18 U.S.C. § 1961(5). MCS argued that each time HABCO made another use of the software it had copied, it committed another predicate act under RICO. The Seventh Circuit said,

> If, as MCS alleged, the contract software at issue was proprietary to MCS, then when HABCO first copied that software it in essence stole the software. HABCO's subsequent use of the allegedly stolen software cannot be characterized as subsequent thefts. When a thief steals $100, the law does not hold him to a new theft each time he spends one of those dollars.... This is simply not a case that involves long-term criminal conduct or activity that could, in common-sense, be called a pattern of racketeering.

Management Computer Servs., Inc., 883 F.2d at 51.

Because WOCCA is patterned after RICO, federal case law interpreting RICO is persuasive authority in our interpretation of WOCCA. ***State v. Evers***, 163 Wis.2d 725, 732, 472 N.W.2d 828, 831 (Ct. App. 1991). We see no reason in this case to apply WOCCA differently from the Seventh Circuit's application of RICO to the same facts. We conclude that the trial court properly granted summary judgment dismissing MCS's WOCCA claim.

8. CROSS-APPEAL

In their cross-appeal, the defendants argue that the trial court should have dismissed MCS's conversion claim because MCS failed to prove its damages, and the court should have granted sanctions against MCS or its counsel.

As we have already said, our disposition of MCS's appeal regarding its compensatory damages for conversion disposes of the first issue in the cross-appeal. The second issue is based upon § 802.05 and 814.025, STATS., and results from MCS's default of proof at the scheduled new trial on punitive damages. Our disposition of MCS's appeal regarding punitive damages disposes of the second issue.

By the Court.--Judgment and orders affirmed in part, reversed in part and remanded with directions.

Recommended for publication in the official reports.

No. 93-0140(D)

DYKMAN, J. (*dissenting*). Had the defendant accountants at Hawkins, Ash, Baptie & Company (HABCO) been lawyers, they would have been disbarred and prosecuted. Stealing from clients is outrageous behavior, and deserves to be substantially penalized. That is what the jury decided when it awarded $1,750,000 in punitive damages to Management Computer Services, Inc. (MCS). But a majority of this court has reduced MCS's compensatory damages from $2,585,750 to $65,000 and has awarded punitive damages of only $650,000 because that figure is exactly ten times the amount of the reduced compensatory award.

The majority fails to understand MCS's theory of recovery and it also adopts a new rule for determining whether a contract is indefinite which is wholly at variance with past precedent. I cannot accept the majority's analyses or conclusions, and therefore, I dissent.

BREACH OF CONTRACT

The basic problem with the majority's analysis of the contract between HABCO and MCS is its conclusion that because nothing in the wording of the contract expressly required HABCO to purchase more than one computer from MCS, HABCO did not breach the contract by buying additional computers from other vendors. But MCS did not and does not contend that the words of the contract required HABCO to purchase computers from MCS. Robert A. Sierp, president of MCS, testified: "[HABCO wasn't] required to buy computers from MCS." But that is not the end of the analysis because the contract between HABCO and MCS dramatically limited the use that HABCO could make of the software MCS sold to HABCO. Only if HABCO purchased additional computers from MCS could HABCO use MCS's software on those computers.

The contract reads:

> This software is proprietary to MCS and shall be furnished upon completion under license to HABCO for use on the HABCO computer installation described in this Agreement. MCS shall provide the non-applications software described above at no extra charge for each

> additional computer system purchased by HABCO through MCS.
>
> Sierp testified:
>
> [T]he objective was if [HABCO was] going to use that software, that contract software, that [it] would buy a computer from us. If [it] wanted to go off and do some tax reporting, [it] could buy any computer [it] want[ed] and we weren't—we would not have been involved in that transaction.

Thus, it is apparent from the parties' contract and from Sierp's testimony that although the contract between MCS and HABCO did not require HABCO to buy MCS computers, if HABCO bought computers from another supplier, it could not use MCS software on those computers. What the majority fails to recognize is that without software, the computers bought from another vendor would be useless to develop turnkey computer systems for public housing authorities. The software furnished by MCS was highly specialized software developed at great cost and it was very valuable to a company in the business of licensing computer systems to public housing authorities.

The jury was asked whether HABCO breached its contract with MCS in three respects. It answered "yes" to all three special verdict questions. The majority dislikes the questions asked, and proposes an alternative. But that is not the test appellate courts use when faced with an argument that a jury question was misleading. In ***Topp v. Continental Ins. Co.***, 83 Wis.2d 780, 785, 266 N.W.2d 397, 401 (1978), the court said:

> This court has frequently stated that the form of the special verdict rests in the discretion of the trial court, and the

> court's chosen form will not be rejected unless the inquiry, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination.

Instead of using this deferential review of the verdict used by the trial court, the majority, without considering the court's instructions, reviews the verdict *de novo*, and decides that it would have used alternative language. I cannot join in this *sub silentio* overruling of ***Topp***. It will only cause confusion for future cases where the proper standard of review for special verdict questions is at issue.

HABCO, MCS, the trial court and the jury all understood MCS's theory of its case. I recognize that the jury questions could have been better worded, but when the jury was first asked whether HABCO breached the parties' contract by failing to purchase computers from MCS, the jury answered "yes" knowing that the contract was not worded: "HABCO agrees to purchase all computers from MCS." The jury responded affirmatively because it knew that the only practical way HABCO could have legally used MCS software for public housing authorities was to buy MCS computers. The jury also knew that HABCO avoided the increased cost of purchasing MCS computers by purchasing computers from another vendor and using MCS software on them in breach of the parties' contract. Because purchasing computers from MCS was the only practical way HABCO could avoid breaching the contract, question one of the verdict settled the real issue over which the parties contended. In any event, I cannot conclude that asking question one was an erroneous exercise of discretion, nor that the question failed to fairly present what everyone knew were the material issues of fact in the case.

The same is true of the second breach question. The jury was asked whether HABCO breached the parties' contract by failing to pay twenty-five percent of the program value to MCS for the use of the contract software. The majority's conclusion, that because HABCO did not purchase additional

computer systems from MCS, HABCO did not breach the contract, is an overly simplistic answer and does not address MCS's theory of the case. The breach is HABCO's use of MCS software on non-MCS computers, not HABCO's failure to buy MCS computers. Had HABCO done what it agreed to do, it would have had to purchase MCS computers. It then would have used jointly owned software on those computers and paid twenty-five percent of the program value to MCS. MCS's damages for HABCO's breach of its agreement not to use MCS software on non-MCS computers equalled the twenty-five percent it would have received had HABCO not breached the contract. I conclude that the verdict form for the second question was not an erroneous exercise of discretion and that it fairly presented the material issues of fact in the case.

The final breach question is the only one the majority directly addresses, but it does so in a way which ignores our standard of review of a jury verdict. The jury was asked whether HABCO breached the parties' contract by failing to compensate MCS for the use of the proprietary software. Had HABCO not breached the contract by using MCS software on non-MCS computers, HABCO would have been required by the contract to pay twenty-five percent of the program value because it would have then used the software purchased through MCS. That was exactly what the jury was asked. Though the jury verdict might have been better drafted, or drafted in a manner which the majority would prefer, that is not what this court reviews. Our review is deferential, not *de novo*. *See* ***Topp***, 83 Wis.2d at 785, 266 N.W.2d at 401. I conclude that the trial court did not erroneously exercise its discretion in wording the third question of the breach of contract verdict as it did. And, given the focus of the trial, I have no doubt but that the form of the verdict fairly presented the material issues of fact to the jury.

There is a problem, however, with this final breach question. Once the jury found the first breach and awarded damages, the facts show that there would be either no breach of the contract by HABCO's failure to compensate MCS for its use of the proprietary software or no damages for the breach. The contract provided that if HABCO bought additional computers from MCS, MCS

would provide HABCO with proprietary software at no extra charge. The jury's affirmative response to the first breach of contract question put MCS in the financial position in which it would have been had HABCO bought additional computers from MCS. MCS would then have provided the proprietary software to HABCO at no cost to HABCO. I would change the answer to breach question number three to "no."

INDEFINITE CONTRACT

The majority concludes that the parties' contract is too indefinite to be enforced. Yet, it never quotes the part of the contract which it believes is indefinite. Apparently, the majority has adopted a new rule of contract law to the effect that a contract is indefinite if it does not mean what one of the parties contends that it means. I am unaware of such a rule. We look to the contract itself to determine whether it is indefinite and therefore unenforceable. Arthur Corbin notes:

> A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are.

1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 4.1 (1993). This is consistent with the RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981), which provides: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." The majority holds: "When the court subsequently ruled that the contract was

insufficiently definite to be enforced, *as MCS would have it enforced*, MCS was left with the quoted question and award based on a theory of the case which no longer applied." Maj. op. at 9 (emphasis added). This new holding looks to the pleadings and the positions taken at trial to determine whether a contract is indefinite. The majority cites no authority for this dramatic change in contract law, and I find none. I believe that the proper test for indefiniteness is to look at the language of the contract to determine whether the contract is too indefinite to be enforced.[4] There is no question but that the contract is sufficiently definite. Even the majority notes: "Since it is undisputed that HABCO used MCS software with computers it bought from vendors other than MCS, *it is arguable that HABCO breached the contract when it used MCS software on non-MCS computers*." Maj. op. at 9 (emphasis added).

Once we conclude that a contract was formed, and that HABCO breached it, facts that even the majority grudgingly admits, the only question becomes the extent of MCS's damages. Because there is evidence to support the damages the jury awarded for HABCO's failure to purchase computer equipment from MCS, and for HABCO'S failure to pay twenty-five percent of the program value for the use of the contract software, I would reinstate that part of the jury's verdict.

[4] Even if we conclude that a contract is ambiguous, we do not necessarily conclude that it is void for indefiniteness. If a contract is ambiguous, we may construe the contract through the use of extrinsic evidence. ***Pleasure Time, Inc. v. Kuss***, 78 Wis.2d 373, 379, 254 N.W.2d 463, 467 (1977).

PUNITIVE DAMAGES

The only rationale that I can discern for the majority's reduction of the $1,750,000 punitive damage award is that the figure it chooses, $650,000, is ten times the amount of the reduced compensatory damages. But why is ten, aside from being a round number with metric significance, the proper multiplier? Would not eleven or nine be just as appropriate? And if "[t]here is no arbitrary rule that punitive damages cannot equal 15 times the compensatory damages," ***Malco, Inc. v. Midwest Aluminum Sales, Inc.***, 14 Wis.2d 57, 66, 109 N.W.2d 516, 521 (1961), why did not the majority award punitive damages of $975,000?

The use of a multiplier as the sole means to determine punitive damages has been specifically rejected. In ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 235-36, 291 N.W.2d 516, 527 (1980), the court said:

> Although the amount of compensatory damages and criminal penalties have some relevancy to the amount of punitive damages and may be factors in determining the reasonableness of the punitive damages award, we have not been willing in the past, and are not willing in this case, to adopt a mathematical formula for awarding punitive damages. In punitive damages, as in damages for pain and suffering, the law furnishes no mechanical legal rule for their measurement. *The amount rests initially in the discretion of the jury. We are reluctant to set aside an award because it is large or we would have awarded less. As we have said in cases involving compensatory damages, "`[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.*'"

(Emphasis added; quoted source omitted.)

The jury saw the witnesses and heard what HABCO did. I cannot conclude that a $1,750,000 punitive damage award against accountants who have stolen their client's software was an insane estimate by the jury. We give juries discretion in their award of punitive damages. I agree that the award is large and I would have awarded less. But that is not the test. We must look at whether "the jury approximates a sane estimate," ***Id.*** at 236, 291 N.W.2d at 527, and, using that test, I would affirm the jury's punitive damage award. The message sent by the majority in a world where computers have provided extensive profits to those who can market the technology, is that crime pays, and pays well. The decision to risk $650,000 by stealing software can be an easy one where the profits can reach millions of dollars. Perhaps a $1,750,000 punitive damage award is not much better than a $650,000 award, but it is a start. It sends the message that courts will not reverse large punitive damage awards where the conduct is criminal and egregious. It allows for the possibility that even larger awards will be sustained when the conduct merits it. And that possibility will, perhaps, give potential computer thieves pause when they contemplate obtaining desired software by theft.

For these reasons, I respectfully dissent.