COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

NOTICE

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No. 95-3428

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

WILLIAM SCHWARTZ AND DOROTHY SCHWARTZ,

PLAINTIFFS-RESPONDENTS-
CROSS APPELLANTS,

V.

JEFFREY SCHWARTZ,

DEFENDANT-RESPONDENT-
CROSS APPELLANT,

MARGARET SCHWARTZ,

DEFENDANT-APPELLANT-
CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. We granted Margaret Schwartz leave to appeal from a trial court order granting a new trial on her abuse of process claim against her former in-laws, William and Dorothy Schwartz, and her now-former husband, Jeffrey Schwartz. Because we conclude that the trial court did not misuse its discretion in granting a new trial, we affirm Margaret's appeal. On the cross-appeal filed by Jeffrey and the Schwartzes, we reject their challenges to the sufficiency of the evidence and the trial court's ruling that the divorce proceedings did not bar Margaret's abuse of process claim.

When a trial court grants a motion for a new trial in the interest of justice, we review the trial court's discretionary decision to determine if the trial court had a reasonable basis for its determination that one or more answers in the special verdict were against the great weight and clear preponderance of the evidence. *See* ***Krolikowski v. Chicago & Northwestern Transp. Co.,*** 89 Wis.2d 573, 580-81, 278 N.W.2d 865, 868 (1979). A trial court misuses its discretion if it grants a new trial based on a mistaken view of the evidence or an erroneous view of the law. *See* ***id.*** at 581, 278 N.W.2d at 868. We do not look for reasons to sustain the jury verdict even if those findings are supported by credible evidence. *See* ***id.*** at 580, 278 N.W.2d at 868. Our focus is on the trial court's findings and conclusions regarding the need for a new trial. *See* ***id.***

The chronology of events relevant to this appeal is undisputed. Margaret commenced a divorce action against Jeffrey in Milwaukee County in October 1992. In March 1994, William Schwartz, Jeffrey's father, commenced an action in Sheboygan County against Jeffrey and Margaret seeking a declaratory judgment that Jeffrey's purchase of stock in two corporations solely owned by

William was rescinded in 1991.[1] Jeffrey did not deny the rescission; Margaret's answer denied the rescission. In August 1994, William filed an amended complaint which restated the declaratory judgment cause of action, added William's wife, Dorothy, as a plaintiff and alleged a second cause of action against Jeffrey seeking recovery of a $98,600 debt allegedly owed to his parents. Margaret answered and alleged a counterclaim against William and Dorothy and a cross-claim against Jeffrey for abuse of process on the ground that the stock rescission memo was signed after divorce proceedings began and William's litigation was not well founded. William and Dorothy's reply to Margaret's counterclaim alleged that the rescission memo memorialized a prior agreement between William and Jeffrey. Further amended pleadings were filed. In summary, William and Dorothy sought a declaratory judgment regarding the status of the stock based on a rescission memo which was signed in 1993 to reflect a verbal understanding reached in 1991 and a money judgment against Jeffrey for debts totaling $98,600. Margaret's counterclaim and cross-claim for abuse of process were also pending.

At the Milwaukee County divorce trial in October 1994, the divorce court found collusion by Jeffrey and William in backdating the rescission memo. The family court valued Jeffrey's stock and included it in the property division. The judgment of divorce was affirmed by this court in ***Schwartz v. Schwartz***, Nos. 95-0527, 95-1966 and 95-3418, unpublished slip op. (Wis. Ct. App. Feb. 18, 1997).

[1] Had the trial court so found, the property subject to division in Jeffrey and Margaret's divorce would have been reduced by this stock.

In March 1995, William and Dorothy moved to dismiss their suit without prejudice. The trial court denied the motion. Margaret filed a motion for frivolous costs under § 814.025, STATS. In August 1995, William and Dorothy moved to dismiss their suit with prejudice. The trial court granted the motion and deferred Margaret's motion for frivolous costs until after trial on Margaret's counterclaim and cross-claim for abuse of process. In September 1995, a jury found that William and Dorothy abused process by starting and prosecuting the Sheboygan County action and that Jeffrey abused process by conspiring with William and Dorothy. The jury awarded Margaret $497.50 in compensatory damages, $85,000 in punitive damages for the Schwartzes' outrageous conduct and $135,000 in punitive damages against Jeffrey for his outrageous conduct. William, Dorothy and Jeffrey filed posttrial motions seeking a new trial and other relief. The trial court granted a new trial on all issues.

Our review is limited to the reasons specified in the trial court's order granting a new trial. *See* ***Krolikowski,*** 89 Wis.2d at 580, 278 N.W.2d at 868. We conclude that the trial court applied the proper legal standards in analyzing Jeffrey's motion for a new trial. The trial court considered that the purpose of punitive damages is to punish and deter the wrongdoer and others from future similar wrongdoing. *See* ***Fahrenberg v. Tengel,*** 96 Wis.2d 211, 234, 291 N.W.2d 516, 526-27 (1980). "An award which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disproportionate to the wrongdoing is excessive and is contrary to public policy." ***Id.*** at 234, 291 N.W.2d at 527. The ***Fahrenberg*** court set out the factors to be considered in evaluating a punitive damages award: (1) the grievousness of the defendant's acts; (2) the degree of malicious intention; (3) the

potential and actual damage arising from the defendant's acts; and (4) the defendant's ability to pay. *See* ***id.***

As to Jeffrey, the court found that the $135,000 award was disproportionate to his wrongdoing because Jeffrey's acts were not violent, did not intentionally inflict emotional harm and were akin to fraud or coercion. The court found that the act of deception in misdating the rescission memorandum was not actively maintained in the litigation,[2] and no false information was provided to support the Schwartzes' claim that Jeffrey was indebted to them in order to affect Margaret's interest in the marital estate.[3]

The court found that the jury overvalued evidence of Jeffrey's misconduct and the bitterness of the divorce and that this motivated the jury to award punitive damages to punish Jeffrey for that conduct, rather than for conduct relating to the litigation involving the rescission memorandum and the alleged debt to his parents. The court also found that the punitive damages award against Jeffrey was disproportionate to Margaret's actual and potential damages.[4] The jury awarded actual damages of less than $500; Margaret's potential damages were limited to one-half of the value of the stock which Jeffrey claimed to have disposed of (the divorce court valued the stock at $50,000) and the impact of the

[2] William testified that the memorandum was not signed in 1991.

[3] William conceded at trial that the $51,000 he claimed Jeffrey owed on a mortgage note was not actually owed because the Schwartzes had forgiven the debt and issued a satisfaction of the mortgage six years before they filed their amended complaint seeking to recover this amount. Neither William nor Dorothy could explain the remaining amounts allegedly owed by Jeffrey.

[4] Because the trial court gave numerous reasons for ordering a new trial, we do not address this ground in detail. However, for purposes of retrial, the recent decision in ***Jacque v. Steenberg Homes, Inc.,*** 209 Wis.2d 605, 563 N.W.2d 154 (1997), may be instructive on the relationship between punitive and compensatory damages.

$98,000 debt on the division of the marital estate. Margaret claimed that the potential damage to her was $74,000. However, the trial court found that the likelihood that Margaret would have suffered such damage due to Jeffrey's conduct was reduced by the discovery undertaken in the Schwartzes' civil action. These discovery procedures revealed the falsity of the Schwartzes' claims regarding the stock and the debt.

The court also found that certain evidence and remarks of counsel during the trial likely inflamed the jury and motivated it to award unreasonable punitive damages. In particular, the trial court cited: (1) Margaret's counsel's reference to the fact that Jeffrey was incarcerated on a contempt finding by the divorce court just prior to the start of the jury trial on Margaret's abuse of process claim,[5] (2) cross-examination of Jeffrey regarding questionable business expenses involving a female companion, (3) the manner in which the trial court advised the jury that the divorce court had already found that Jeffrey and William colluded to backdate the rescission memorandum, (4) evidence that Margaret continued to work during the divorce while Jeffrey, according to William, became unmotivated in his work, (5) evidence introduced by Jeffrey that the parties' children were being treated for emotional problems, and (6) evidence regarding the wealth of the Schwartzes. The court found that all of these factors may have motivated the jury to punish Jeffrey for something other than his conduct in relation to the rescission memo and the alleged debt to his parents. While the court found that there was sufficient evidence of a conspiracy to backdate the rescission memo, it found that direct, rather than circumstantial, evidence of the conspiracy was "so slight as to

[5] Jeffrey moved for a mistrial. The trial court denied the request but conceded that a curative instruction probably would not cure any prejudice arising from the statement. The court found that Margaret's counsel "took a calculated risk" in referring to Jeffrey's incarceration.

raise to a probability the effect of passion on this issue." The court found that while Jeffrey conspired with William to misdate the rescission memo, there was no direct evidence that Jeffrey participated in the commencement of the suit against Margaret in Sheboygan County.

For many of the same reasons, the trial court also granted William and Dorothy a new trial. While the act of incorporating the fraudulent rescission memo into the Sheboygan County pleadings against Margaret justified a punitive damages award, the court found that the $85,000 award against the Schwartzes reflected passion and prejudice and was out of proportion to the actual and potential damages. The court found that the jury was distracted by evidence regarding reasonable attorney's fees, particularly since the trial court found that the evidence was insufficient to submit a question regarding Margaret's attorney's fees to the jury.[6] While the court agreed with the jury that there was direct evidence that the Schwartzes abused process by commencing the suit against Margaret, the court found that because the jury award was attributable to prejudice, a new trial on all issues was required, rather than just a new trial on damages. *Cf.* § 805.15(6), STATS. (new trial only on damages where excessive verdict is not due to prejudice).

On appeal, Margaret argues that the trial court's refusal to instruct the jury that abuse of process may be proved by malice, absence of probable cause or both[7] later led the trial court to disregard such evidence in its decision to order a

[6] As Jeffrey points out, Margaret withdrew her claim for attorney's fees at the close of evidence in favor of pursuing such a claim under § 814.025, STATS., the frivolous claim statute.

[7] Inasmuch as the jury found for Margaret, we do not address Margaret's argument regarding the elements of abuse of process.

new trial. From our reading of the trial court's new trial decision, we conclude that the trial court did not disregard this evidence. Rather, the trial court concluded that the jury gave it too much weight and was probably influenced by conduct which could be considered malicious, e.g., Jeffrey's contempt in the divorce proceeding, his involvement with a female companion and the other matters discussed by the trial court in its decision.

Margaret contends that the trial court's analysis of the ***Fahrenberg*** factors for evaluating a punitive damages award is flawed. We will not address each of Margaret's arguments. However, we note that the trial court did not conclude that punitive damages were unwarranted. Rather, the trial court found that the punitive damages were excessive. We disagree with Margaret that the trial court substituted its judgment for that of the jury. The trial court discharged its obligation to review the jury verdict and found that a new trial was required in the interests of justice.

We also disagree with Margaret that the trial court wrongly cited evidence to which no objection had been made by Jeffrey or the Schwartzes as a basis for its new trial ruling. Ordering a new trial in the interests of justice is appropriate when the trial court concludes that the verdict arose from improper considerations. *See* ***Hanson v. Binder,*** 260 Wis. 464, 467-68, 50 N.W.2d 676, 678 (1952); *see also* § 805.15(6), STATS. The trial court is not precluded from considering unchallenged evidence in evaluating whether justice was served by the jury's verdict.

The trial court was in a better position to analyze the evidence and we defer to its discretionary determination that a new trial is required. *See* ***State v. Hagen,*** 181 Wis.2d 934, 948-49, 512 N.W.2d 180, 185 (Ct. App. 1994). We do

so even if this court, sitting as a trial court, would have exercised discretion in a different manner. *Cf.* ***State v. Franklin,*** 148 Wis.2d 1, 7 n.3, 434 N.W.2d 609, 611 (1989) (court of appeals cannot exercise trial court's discretion). We conclude that the trial court discharged its duty of reviewing the evidence in determining whether to order a new trial on all issues and had a reasonable basis for its decision.

We will briefly address Margaret's claim that the trial court erred in declining to instruct the jury that abuse of process may be proved by malice, absence of probable cause or both. For this proposition Margaret relies on ***Brownsell v. Klawitter,*** 102 Wis.2d 108, 306 N.W.2d 41 (1981). The trial court instructed the jury that to establish abuse of process Margaret had to prove that William, Dorothy and/or Jeffrey "used the legal process of starting this lawsuit and presenting it primarily for a purpose for which it was not designed." This language is essentially the same as that set forth in the pattern jury instruction, WIS J I—CIVIL 2620, Abuse of Process. The trial court felt that the elements of probable cause and malice were incorporated in the pattern jury instruction.

We are hard pressed to find error. The trial court gave the pattern jury instruction. The pattern jury instructions are viewed as persuasive and trial courts should use them, *see* ***State v. Kanzelberger,*** 28 Wis.2d 652, 659, 137 N.W.2d 419, 422-23 (1965), and tailor them to the facts of the case. *See* ***McMahon v. Brown,*** 125 Wis.2d 351, 354, 371 N.W.2d 414, 416 (Ct. App. 1985). We conclude that the pattern instruction was a sufficient instruction to the jury under the facts of this case.

The abuse of process instruction proposed by Margaret treats malice or lack of probable cause as distinct elements of abuse of process. We conclude that

Brownsell does not stand for this proposition. ***Brownsell*** identifies "two essential elements" of abuse of process, ***Brownsell***, 102 Wis.2d at 116, 306 N.W.2d at 45, as "'a wilful act in the use of process not proper in the regular conduct of the proceedings' and an 'ulterior motive.'" ***Id.*** at 115, 306 N.W.2d at 45 (quoted source omitted). Malice and lack of probable cause for issuing the process are types of proof, not elements. *See* ***id.*** at 116, 306 N.W.2d at 45. *See also* ***Pronger v. O'Dell,*** 127 Wis.2d 292, 297, 379 N.W.2d 330, 332 (Ct. App. 1985) (***Brownsell*** elements reiterated); ***Tower Special Facilities v. Investment Club,*** 104 Wis.2d 221, 228-29, 311 N.W.2d 225, 229 (Ct. App. 1981) (***Brownsell*** elements reiterated).

Jeffrey and his parents cross-appeal[8] from the trial court's refusal to grant them judgment notwithstanding the verdict on claim preclusion grounds and refusal to direct a verdict in their favor on liability and damages.

We review the trial court's denial of a motion for judgment notwithstanding the verdict (JNOV) independently and apply the same standards as the trial court. *See* ***Logterman v. Dawson,*** 190 Wis.2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994). Such a motion does not challenge the sufficiency of the evidence to support the verdict. *See* ***id.*** Rather, the motion alleges that the facts found are insufficient to permit recovery as a matter of law. *See* ***id.*** The motion presents the same considerations as a motion for a directed verdict. *See* ***id.*** at 102, 526 N.W.2d at 771.

[8] The Schwartzes elected not to file their own cross-appellants' brief and advised the clerk of this court that they would rely upon the cross-appellant's brief filed by Jeffrey.

Jeffrey argues that he is entitled to JNOV because resolution of the stock issue in the divorce precluded Margaret's abuse of process claim. Under the doctrine of claim preclusion, formerly known as res judicata, *see* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995), a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were or might have been litigated in the former proceeding. *See* ***DePratt v. West Bend Mut. Ins. Co.,*** 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). There must be an identity of parties and an identity of the causes of action or claims in the two cases. *See* ***id.*** at 311, 334 N.W.2d at 885.

Jeffrey's claim preclusion argument is without merit. The trial court properly ruled that the divorce court's ruling in Margaret's favor on the validity of the rescission memo did not preclude her abuse of process claims because a separate action was brought against her in Sheboygan County to enforce the rescission memo.[9] The division of the marital estate did not determine whether William colluded with Jeffrey to abuse the process by filing an action against Margaret in Sheboygan County.

We also disagree with Jeffrey that ***Gardner v. Gardner,*** 175 Wis.2d 420, 499 N.W.2d 266 (Ct. App. 1993), barred Margaret's abuse of process claim. In ***Gardner,*** the wife brought a misrepresentation tort action against the husband claiming that she had been deprived of ownership interest in certain marital property by his alleged misrepresentation. *See* ***id.*** at 424, 499 N.W.2d at 267. The misrepresentation action was commenced while a divorce action was pending. *See* ***id.*** This court held that allegations regarding injury to marital property had to be

[9] We note that the Schwartzes' litigation continued after the Milwaukee County divorce court found that Jeffrey and William colluded regarding the rescission memo.

raised in the divorce proceeding as part of dividing the marital estate. *See* ***id.*** at 431, 499 N.W.2d at 270.

In contrast, Margaret's abuse of process claim was brought in a separate action filed by Jeffrey's parents in Sheboygan County. That action was separate from the divorce proceedings pending between Margaret and Jeffrey in Milwaukee County. Margaret's abuse of process claim arose by virtue of the institution of the Sheboygan County proceeding. Jeffrey reads ***Gardner*** too broadly.

Gardner also does not bar Margaret's punitive damages claim against Jeffrey. *See* ***id***. at 433, 499 N.W.2d at 271 (punitive damages not available for an injury to a marital property interest). Margaret's abuse of process claim is based upon Jeffrey's actions in conjunction with the commencement of the Sheboygan County action by his parents. Margaret's damages on that claim relate to her involvement in that proceeding, not from any harm to her interest in the marital estate being divided by the Milwaukee County divorce court. Margaret was seeking damages for injury arising from matters ancillary to the divorce and allegedly tortious conduct by individuals not parties to the divorce (Jeffrey's parents).

We turn to Jeffrey's claim that the trial court should have directed a verdict in his favor on liability and damages. We independently review whether "'considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party.'" ***Weiss v. United Fire & Cas. Co.,*** 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995) (quoted source omitted). A trial court may not grant a directed verdict "'unless it finds, as a matter of law, that no jury could disagree

on the proper facts or the inferences to be drawn therefrom,' and that there is no credible evidence to support a verdict for the plaintiff." ***Id.*** A circuit court "is better positioned to decide the weight and relevancy of the testimony." ***Id.*** For that reason, we must give substantial deference to the trial court's better ability to assess the evidence. *See* ***id.*** at 389, 541 N.W.2d at 761.

In assessing Jeffrey's motions for a directed verdict, we consider the evidence most favorable to Margaret. We conclude, as did the trial court, that there was sufficient credible evidence of the elements of abuse of process to permit the matter to go to the jury. "Abuse of process" arises when one uses a legal process against another to accomplish a purpose for which it is not designed. The abuser of the process is liable to the other for the pecuniary loss caused thereby. *See* ***Strid v. Converse***, 111 Wis.2d 418, 426, 331 N.W.2d 350, 355 (1983). The elements of the tort are: (1) a purpose other than that which the process was designed to accomplish, and (2) a subsequent misuse of the process. *See* ***id.*** at 427, 331 N.W.2d at 355.

We agree with the trial court's findings that when viewed in the light most favorable to Margaret, the evidence supports a jury verdict of abuse of process. The trial court found that "the jury could find that the rescission memo was purposely misdated, it was intentionally referenced in the [Sheboygan County] pleadings and that the act [sic] was brought to reduce the marital estate. This evidence and the reasonable inferences therefrom supports a jury finding of ulterior purpose (reducing the marital estate) and a willful and improper act (incorporating by reference the misdated memo)." On the question of a conspiracy, the trial court found that "[t]here was evidence presented in this case that Jeffrey and William Schwartz cooperated in misdating the memo. There was evidence that the misdating may have resulted in financial benefit to Jeffrey.

There was evidence that William Schwartz incorporated the memo in his pleadings and that Jeffrey Schwartz, though knowledgeable of the misdating, did not reveal the misdating of the memo in his responsive pleadings. From this evidence the jury was entitled to find that Jeffrey Schwartz had a unity of purpose and common design with William Schwartz in bringing the abuse of process."

We need not address Jeffrey's contention that the trial court should have directed a verdict on damages because we have already upheld its decision to order a new trial and to deny a directed verdict on liability. We do not find the trial court's order for a new trial to be inconsistent with its refusal to grant Jeffrey a directed verdict on liability and damages. Different standards are applied to each analysis and the analyses are not mutually exclusive.

No costs to either party.

By the Court.—Order affirmed.

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