COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1209 **Cir. Ct. No. 2003CV1127**

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

CALVIN FABERT,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

TERRY FABERT,

PLAINTIFF-RESPONDENT,

V.

HOT SPUR PARTNERS, LLC,

DEFENDANT-APPELLANT,

RICHARD F. BEERE,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

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

¶1 NETTESHEIM, J. The principal issue in this case turned on whether Calvin Fabert quit his employment with Hot Spur Partners, LLC, or was terminated by its majority owner, Richard F. Beere. Calvin claimed he was fired; Beere says he quit. The jury believed Calvin.

¶2 Beere and Hot Spur Partners now appeal from the judgment entered on the jury verdict finding that Beere intentionally interfered with and conspired to injure Calvin's business interests, that Hot Spur Partners was unjustly enriched due to uncompensated services performed by Terry Fabert, Calvin's wife, and that Calvin converted $12,573 worth of Hot Spur Partners' property. The Faberts cross-appeal from the portion of the judgment in which the trial court refused to allow evidence of Beere's wealth and to send the punitive damage claim to the jury. Finding no error, we affirm in all regards.

Background

¶3 Richard Beere is a wealthy businessman; Calvin Fabert knows horses. In late 1999, the two formed a limited liability corporation, Hot Spur Partners, LLC. The January 2000 Operating Agreement recited that Hot Spur Partners was organized for the purpose of "buying, selling, training, racing and stabling" horses. The horses, standardbred trotters, would be raced primarily in Wisconsin and Illinois.

¶4 Beere and Calvin were the sole members and initial managers of Hot Spur Partners. Beere contributed $9900 and held 99% ownership. Calvin, whose duties came to include "everything from breeding, to racing" the horses, was credited with a $100 contribution for 1% ownership. The Operating Agreement

also recited that electing or removing a manager or entering into an employment agreement with anyone, including a manager, "shall require the prior approval of Members owning more than 50% of all Member Interests in the Company."

¶5 In January 2000 Calvin's wife, Terry, also began working for Hot Spur Partners. A year later their son, Andy Lapp,[1] followed suit. Terry and Calvin both worked at least fifty to sixty hours a week. Terry's duties included helping to care for the horses, cleaning stalls and doing the bookkeeping. In addition to his other responsibilities, Calvin's duties also included control of employee salaries. Terry was not paid at all the first year, but did not consider herself a volunteer. Calvin and Terry approached Beere several times during that first year about paying Terry. In 2001 she was paid approximately $18,000; in 2002 about $19,685; and in 2003—until she was let go in March—about $4530.

¶6 In October 2000, Hot Spur Partners and Calvin entered into an Employment Agreement. The Employment Agreement provided that it would continue "until terminated," which meant, among other possible scenarios:

> **(d)** Upon no less than thirty (30) days' written notice by the Employee to the Company;
>
> **(e)** Immediately upon Employee's malfeasance, theft, embezzlement or intentional destruction of any property or rights of the Company …; or
>
> **(f)** Immediately upon removal of the Employee as a manager of the Company by the members of the Company pursuant to the Company's operating agreement.

[1] Andy Lapp is Terry's son and Calvin's stepson, a fact we note only to explain Andy's last name.

¶7 Under the terms of the Employment Agreement, Calvin was to be paid an annual salary of $60,000 plus 50% of the horses' race purses. Total purses for 2000 and 2001 were about $139,000. Winnings dropped in 2002 due to horse injuries and track refurbishing.

¶8 Dovercrest Farms is another of Beere's business interests. Several years earlier, Beere began raising sheep there. Beere testified that Dovercrest was profitable "[a]nytime we didn't raise animals," but that it ceased to show a profit. He also testified that although the losses increased each of the past few years, he "[d]efinitely" was "still in Dovercrest."

¶9 Bruce Rowntree was an employee of Dovercrest Farms. Beere knew Rowntree's father, who had a neighboring farm. When Rowntree's father died young, Beere hired Rowntree to work for him. Rowntree became "like a son" to Beere. At the time of this action, Rowntree had been working for Beere for approximately thirty years and Beere was Rowntree's primary source of income. Rowntree's only responsibility in regard to Hot Spur Partners basically was to keep the barn stocked with feed, although various workers testified that Rowntree was at the stables nearly every day.

¶10 Rowntree and Calvin never got along. Rowntree was heard to say, and did not deny at trial, that he deliberately did things to irritate Calvin. Terry testified that Rowntree would "just … show up sometimes … [and] would bring the tractor in," distressing the horses. She also testified that Rowntree threatened Calvin on numerous occasions and, toward the end, told her that Calvin "would not get off. Cal would not have a job. I would not have a job. Andy would not. The horses would not be there. That barn would not be there. Everything would be totally gone." Beere did not take Calvin up on his requests for the three of

them to meet to resolve the two men's differences. Scott Moore and Cassidy Miller, two stable hands, testified that they heard Rowntree boast after Calvin was gone that he "got rid of one trainer and I can get rid of another."

¶11 The discord between Rowntree and Calvin continued to fester. In January 2003, its effects spilled over into an encounter between Beere and Calvin involving some pastureland. Calvin testified that, to reduce crowding of the herd, he suggested to Beere opening twenty acres of an alfalfa hayfield to pasture the horses. According to Calvin, Beere initially agreed but did an about-face a few days later because Rowntree convinced him it was too good a hayfield to be used for pasture. Calvin admits he was very upset about this, but denies that he either threatened to quit or gave Beere an ultimatum. Calvin testified that it was not until a few weeks later that he learned through his wife that Beere was going to fire him and that, in fact, the next day Beere did.

¶12 Beere's recollection differed. He testified that Calvin came to his house, and that he "knew [Calvin] was excited" because he did not remove his boots though he had been in the barn. Beere testified that he told Calvin the twenty acres would not be used to pasture the horses because "that isn't pasture. That's alfalfa. Horses can't be pastured on alfalfa." Beere says Calvin insinuated that Beere was lying about Rowntree having no hand in the decision. That "teed [Beere] off" so he "jumped at" Calvin's ultimatum of "either Bruce Rowntree or me," telling Calvin, "[O]kay. Two weeks." Whether he quit or was fired, Calvin's employment ended in January 2003.

¶13 At first, Beere kept Terry and Andy on. Then on March 7, 2003, Calvin's attorney sent Beere a letter advising him that Calvin was bringing a

lawsuit. Beere fired Terry and Andy the next day, telling them that he did not need them because he was shutting down the business.

¶14 Beere did shut down the business. In early April 2003, he dissolved Hot Spur Partners, but then, according to his trial testimony, simply reorganized as the similarly named Hot Spur Stables[2] and injected nearly $200,000 into the new effort. Hot Spur Stables operated on a larger scale than had Hot Spur Partners, and, Beere testified, basically was "doing the same thing [as] before but with new people." At the time he dissolved Hot Spur Partners, Beere already had begun advertising for a trainer and barn help.

¶15 Hot Spur Partners had, in fact, incurred losses all along: approximately $288,000 in 2000; $363,000 in 2001; and $425,000 in 2002. Beere made additional capital contributions of approximately $1.2 million during this three-year period. Beere disputes Calvin's testimony that he had told Calvin from the outset that he did not want to make money, as he simply needed a tax write-

[2] Beere's testimony suggests that Hot Spur Partners was reorganized as Hot Spur Stables virtually contemporaneous with the dissolution of Hot Spur Partners. Comments made by the court and both attorneys throughout the trial and at the hearing on motions after verdict suggest a similar understanding. However, the appellants imply at several points in their brief that Hot Spur Stables existed for some purpose substantially prior to the dissolution of Hot Spur Partners. For example, they state that "[t]he operations of Hot Spur Partners, LLC were conducted from real estate owned by and leased from Hot Spur Stables, LLC"; that Bruce Rowntree "worked for Mr. Beere attending to the real estate of Hot Spur Stables, LLC"; that Rowntree's "duties for Hot Spur Stables, LLC … required regular interaction with Calvin Fabert"; and that, pending wind-up and liquidation of Hot Spur Partners, Beere put money "into his pre-existing real estate LLC, Hot Spur Stables." The portions of the record to which we are directed, however, make no mention at all of Hot Spur Stables. We remind the parties that WIS. STAT. RULE 809.19(1)(e) (2003-04) requires that briefs contain "citations to the … parts of the record relied on." Implicit in this rule is a requirement that the citations be accurate and complete. We found only through our own examination of the record that Hot Spur Stables, LLC, in fact was organized in 2000. It is not this court's duty, however, to search the entire record to find facts to support a party's contentions. *See* ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

off. The minutes of a February 11, 2003 meeting of Hot Spur Partners state that Beere was "frustrate[d] with the company's financial losses" and that he was "no longer willing to fund the company's operations with additional capital contributions, and expressed his desire that the company be dissolved and liquidated." When the matter was put to a vote, the vote was 99% of the member interests in favor of dissolution and liquidation and 1% against, consistent with the respective ownership interests of Beere and Calvin. The minutes reflect no discussion of Calvin's quitting or termination. They do indicate, however, that the Operating Agreement was amended to reduce the number of managers of the company from two to one, and that, again by a vote of 99% of member interests to 1%, Calvin was removed as a manager. No explanation for the amendment is given.

¶16 After Hot Spur Partners was dissolved and the business was operating as Hot Spur Stables, Beere transferred ownership of seventeen horses from Hot Spur Partners into his own name. The transfer of ownership was accomplished without Calvin signing off on any of the registration papers and without receiving any payment. United States Trotting Association rules require that horses be raced under the name of the bona fide owner. Beere raced the horses in his name and received the purses when those horses won. Calvin also received no compensation when thirty-eight other horses that had remained titled in the name of Hot Spur Partners were sold or for the foals born to them, or for the 12 ½% of purses won by those foals. Beere's accountant testified at trial that amended K1 tax forms for tax year 2001 were filed a week before trial, such that $40,000 previously taxed as income to the Faberts, and used as a write-off for Beere, was eliminated.

¶17 Calvin brought suit against Beere and Hot Spur Partners, LLC, contending that Hot Spur Partners, through Beere, breached the terms of the Employment and Operating Agreements, and that Beere conspired with Rowntree to interfere with Calvin's business interests and employment contract. Additionally, Terry alleged that her year of uncompensated employment unjustly enriched Beere and Hot Spur Partners. Calvin and Terry sought compensatory and punitive damages. Beere and Hot Spur Partners counterclaimed that Calvin had converted several items of property belonging to Hot Spur Partners.

¶18 After Beere's and Hot Spur Partners' motion for directed verdict was denied, the case went to a jury trial. The trial court refused to submit Calvin's punitive damage claim to the jury. The jury found for Calvin on the intentional interference and civil conspiracy claim and awarded him $130,000 in lost wages and $105,000 in lost bonuses. The jury also found for Terry on her unjust enrichment claim, awarding her $22,090. On the counterclaim, the jury found that Calvin had converted certain property of Hot Spur Partners and set damages at $12,573.

¶19 On motions after verdict, Beere and Hot Spur Partners argued that there was insufficient evidence to support the jury verdict, and sought to have the damages adjusted; Calvin sought a new trial on the punitive damage issue. The trial court denied each party's motions, affirmed the verdict and stayed enforcement of the judgment pending appeal.

¶20 Beere and Hot Spur Partners appeal the entire verdict. Calvin and Terry cross-appeal the trial court's ruling not to submit punitive damages to the jury.

¶21 More facts will be set forth as the discussion warrants.

Discussion

¶22 Much of this case can be addressed by answering one question: Whether there is sufficient credible evidence to sustain the jury's finding that Beere interfered with Calvin's business and employment interests and to uphold the damage awards flowing therefrom. The answer is yes.

1. Standard of Review

¶23 The jury verdict went largely in Calvin's favor. Our review of a jury's verdict is limited. ***Morden v. Cont'l AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. If there is any credible evidence which, under any reasonable view, leads to an inference supporting the jury's finding, we will uphold that finding. ***Id.*** We consider the evidence in a light most favorable to the jury's determination, as it is the jury's role, not ours, to assess the credibility of witnesses and to determine the weight given to their testimony. ***Id.***, ¶39. Stated another way, this court is obliged to search for credible evidence that will sustain this verdict, not a verdict the jury could have reached but did not. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979).

¶24 On motions after verdict, the trial court upheld the jury's determination, thereby narrowing our scope of review even further. *See* ***Morden***, 235 Wis. 2d 325, ¶40. In such cases, we afford even greater deference to the jury's determination and will not overturn the verdict unless there is such a complete failure of proof that the verdict must have been based on speculation. ***Id.***

¶25 In addition, we note that both sides correctly cast this case as a credibility battle. Conflicts in testimony necessarily force the trier of fact to sift and winnow, and eventually to choose one version and reject another. *See*

Caraway v. Leathers, 58 Wis. 2d 321, 326, 206 N.W.2d 193 (1973). So where, as here, the case turns on the credibility of the witnesses, we must defer to the assessment made by the trier of fact, with its superior opportunity to observe the witnesses' demeanor and gauge the persuasiveness of their testimony. *See* ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976).

2. Intentional Interference With/Conspiracy to Injure Business Interests

¶26 With these parameters in mind, we consider whether there is any credible evidence in the record which, under any reasonable view, would support the jury's determination that Beere intentionally interfered with and conspired to injure Calvin's business interests.

¶27 This case involved two contracts, the Employment Agreement and the Operating Agreement. Under the terms of the Employment Agreement, Calvin actually could have been fired for virtually any reason—or none—if Beere so chose. Beere, as the majority owner, also had the right to remove Calvin as a member under the terms of the Operating Agreement. Calvin alleged, however, that instead of proceeding in that manner, Beere conspired with Rowntree to accomplish his ends. Calvin asserted, and the jury believed, that Beere fired Calvin contrary to the terms of the Employment Agreement, then attempted to disguise it through after-the-fact board action. The jury agreed with Calvin's argument that even if the individual actions were permissible, as a whole they comprised a pattern of unlawful conduct orchestrated for the purpose of destroying his business interests and future earnings.

¶28 Before getting to the merits of Beere's challenge to the jury's finding of intentional interference and conspiracy, we address his contention that the trial court erred on a threshold basis by submitting the conspiracy claim to the jury.

Beere frames his appellate challenge in the conspiracy language of WIS. STAT. § 134.01. He argues that ***Maleki v. Fine-Lando Clinic Chartered, S.C.,*** 162 Wis. 2d 73, 469 N.W.2d 629 (1991), requires a finding of malice on a conspiracy claim and that, where there are competing reasonable inferences on the question of malice, the claim may not be submitted to the jury. *See* ***id.*** at 84-85.

¶29 Beere reads ***Maleki*** correctly—as it applies to cases involving WIS. STAT. § 134.01. This one does not. Under the common law, a civil conspiracy is a combination of two or more persons acting together to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977). As Beere himself acknowledges, a common law conspiracy claim does not require malice. *See* ***Mendelson v. Blatz Brewing Co.***, 9 Wis. 2d 487, 490-93, 101 N.W.2d 805 (1960); *see also* Comment, WIS JI—CIVIL 2820 (stating that the key difference between a conspiracy under WIS. STAT. § 134.01 and a common law conspiracy is the requirement of malice, which is an integral element of a § 134.01 violation).

¶30 True, Calvin's complaint alleged a WIS. STAT. § 134.01 violation rather than a common law conspiracy claim, and his proposed special verdict included a question on the statutory claim. But the special verdict actually submitted[3] to the jury included no statutory reference, nor was the statutory

[3] Calvin's proposed special verdict question relating to conspiracy read:

> **Question Number 7:** Did the defendant, Richard F. Beere, conspire to injure the business interests and rights of Plaintiff, Calvin Fabert, in violation of Wisconsin Statute Section 134.01?

The special verdict question relating to conspiracy which actually went to the jury read:

(continued)

instruction, WIS JI—CIVIL 2820, "Injury to Business: WIS. STAT. § 134.01," given.[4]

¶31 We also observe that Beere never objected to the special verdict or to the jury instructions either at trial or on motions after verdict. Beere asks how he could have objected when he "was not on notice that a common law claim for conspiracy to interfere with a contract was asserted." While we are not privy to the full content of the off-the-record discussions between the court and the parties' attorneys, the record we do have, combined with a comparison of the proposed special verdict with the one actually submitted to the jury, satisfy us that Beere was—or should have been—on notice. Having acquiesced below, it is too late for Beere to object on appeal. *See* ***Schroeder v. Northern States Power Co***., 46 Wis. 2d 637, 645, 176 N.W.2d 336 (1970).

¶32 We turn, then, to the merits of Beere's challenge to the jury finding of conspiracy and intentional interference with Calvin's business interests. The jury heard evidence that Calvin loved his work and that the Hot Spur Partners affiliation represented to him the fulfillment of a lifelong dream. It heard Beere's testimony that Calvin quit, and Calvin's testimony that Beere fired him when confronted about Rowntree's influence on Beere's decisions. It heard evidence that Beere then fired Terry and Andy, assertedly because he was shutting down the business due to financial losses, only to continue it under a similar name, invest

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> **Question No. 3:** Did the defendant, Richard F. Beere, conspire with Bruce Rowntree to injure the business interests of Plaintiff, Calvin Fabert?

[4] The jury was given the following instructions relevant to the conspiracy claim: WIS JI—CIVIL 2800, "Conspiracy: Defined"; 2802, "Conspiracy: Proof of Membership"; 2804, "Conspiracy: Indirect Proof"; and 2806, "Conspiracy to be Viewed as a Whole."

several hundred thousand dollars more and even expand the operation. The jury heard Calvin's testimony that Beere said he just wanted a tax write-off, Beere's denial that he said that, Beere's testimony that he did, in fact, realize substantial personal tax savings through deductions, and the accountant's testimony that amended tax forms eliminated $40,000 for which Calvin had been taxed and Beere had gotten a write-off.

¶33 The jury heard evidence that numerous horses in which Calvin had an ownership interest were either sold, transferred to Beere, or retained by Hot Spur, all without Calvin's consent or compensation to him. The jury heard Rowntree's testimony that he had minimal duties at the stables, and other testimony that he was there almost daily. It heard testimony that Rowntree and Calvin did not get along, that Rowntree was "like a son" to Beere, and that Rowntree boasted to the effect that he had gotten rid of one trainer and he could get rid of another. Looking at this evidence in the light most favorable to the jury, we cannot say there is no evidence to support the verdict. *See* ***Morden***, 235 Wis. 2d 325, ¶38. Even if not direct evidence of a conspiracy, circumstantial evidence is sufficient to prove the claim. *See* ***Lange v. Heckel,*** 171 Wis. 59, 64, 175 N.W. 788 (1920).

3. Conditional Privilege/Business Judgment Rule

¶34 Still maintaining that Calvin quit, Beere argues that, if he had fired Calvin, his "conditional privilege" as a corporate officer would have allowed him to do so. *See* ***Sprecher v. Weston's Bar, Inc.,*** 78 Wis. 2d 26, 40, 253 N.W.2d 493 (1977) (a corporate officer acting within the scope of his authority cannot, as a matter of law, interfere with the corporation's contracts); *see also* WIS JI—CIVIL

2780. Beere offered a similar argument at trial that the "business judgment rule"[5] protected his business decisions.

¶35 The conditional privilege does not shield *any* business judgment; the privilege allows one the freedom to exercise discretion to protect the best interests of the corporation. ***Sprecher***, 78 Wis. 2d at 40. And whether a corporate actor invokes "conditional privilege" or "business judgment," there is no shield from personal liability if he or she acted with wrongful motives. *See* ***id.***; ***Mendelson***, 9 Wis. 2d at 492.

¶36 We conclude that sufficient credible evidence of improper motive existed.[6] The jury heard, among other things, evidence of Beere's claim that the enterprise was becoming a financial drain, yet he reorganized under another name and continued on an even larger scale; of Rowntree's disruptive presence at the stables and his filial relationship with Beere; of the continued operation of Dovercrest Farms, where Rowntree was employed, despite several years of substantial financial losses; and of Beere's retitling of horses and foals in his name without compensating Calvin. This evidence was sufficient for the jury to infer that Beere's liquidation of Hot Spur Partners was not an exercise of sound business judgment in the face of escalating losses, but that it was, in the words of the trial court, "a subterfuge" based on personal dislike of Calvin for the purpose

[5] The business judgment rule is a judicially created doctrine that limits judicial review of corporate actions taken in good faith, with appropriate care, and in the honest belief that they were in the best interest of the company. ***Einhorn v. Culea,*** 2000 WI 65, ¶19, 235 Wis. 2d 646, 612 N.W.2d 78.

[6] Beere asserts for the first time in his reply brief that the trial court refused to admit certain evidence that he says would have rebutted Calvin's claim of an improper motive. We generally do not address arguments raised in this fashion, and we decline to do so here. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

of wresting from Calvin his due under the two contracts. Whatever other inferences might be imagined, this inference of improper motive is reasonable, and we must support it.

¶37 Beere then comes at it another way. He asserts that the interference with contract claim must fail because Calvin has proved no interference with any contractual right and because, as a matter of law, a party cannot tortiously interfere with his or her own contract. *See* ***Wausau Med. Ctr. v. Asplund, S.C.***, 182 Wis. 2d 274, 297, 514 N.W.2d 34 (Ct. App. 1994).

¶38 To establish a claim for tortious interference with a contract, Calvin needed to show that: (1) he had a contract or prospective contractual relationship with a third party; (2) Beere interfered with the relationship or induced the third party to breach the contract; (3) the interference was intentional; (4) there was a causal connection between the interference and damages Calvin suffered; and (5) Beere was not justified or privileged to interfere. *See* ***Dorr v. Sacred Heart Hosp.,*** 228 Wis. 2d 425, 456, 597 N.W.2d 462 (Ct. App. 1999). Calvin had two contracts: the Operating Agreement and the Employment Agreement, and Calvin's claim for unlawful interference with a business interest implicated both. His "business interest" not only was his minority ownership interest in Hot Spur Partners, but also—as a result of that ownership—his employment with the company.

¶39 Beere's assertion that he cannot interfere with his own contract thus has no merit. Even if true as to his own rights under the Operating Agreement, it is to no avail as to Calvin. In ***Wausau Medical Center***, the court held that the service corporation of Dr. Asplund, the medical center's former employee, could not tortiously interfere with the employment contract between Dr. Asplund and the

medical center because Dr. Asplund and his service corporation in effect were the same person. ***Wausau Med. Ctr.***, 182 Wis. 2d at 297. Here, Beere used the Operating Agreement to interfere with the contract between Calvin and Hot Spur Partners. Calvin, too, was a member of Hot Spur Partners, such that the company was not simply Beere's alter ego. This argument fails.

4. After-Acquired Evidence Rule

¶40 The next issue involves the impact of the jury finding that Calvin converted a horse trailer belonging to Hot Spur Partners on the jury's award of $130,000 in "lost wages" and $105,000 in "lost bonuses." Beere attacks the award based on the interplay of the conversion finding with the "after-acquired evidence rule," asserting that the trial court should have invalidated the jury's award due to Calvin's demonstrated wrongdoing.[7] We disagree.

¶41 The after-acquired evidence rule applies where a wrongfully discharged employee later is determined to have engaged in misconduct that itself would have been grounds for termination. ***McKennon v. Nashville Banner***

[7] As a threshold matter, Calvin notes that Beere did not assert the after-acquired evidence doctrine as an affirmative defense. Affirmative defenses generally are deemed waived if not raised in the pleadings. ***Oetzman v. Ahrens***, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988). Beere responds that authorities are divided on whether or not the doctrine must be pled.

We make two observations. First, two of the three cases Beere cites in support of his position are unpublished memoranda. ***EEOC v. Morgan Stanley & Co., Inc.***, No. 01 Civ. 8421 (RMB)(RLE), 2002 WL 31778779, at *1 (S.D.N.Y. Dec. 11, 2002); ***Arnold v. City of Dayton***, No. 1: 92-CV-562, 1994 WL 904688 at *3 (E.D. Tenn. Mar. 21, 1994). Their substance aside, they are "of no precedential value and for this reason may not be cited … as precedent or authority…" WIS. STAT. § 809.23(3), and we admonish counsel to avoid this practice. *See* ***State v. Cooper***, 2003 WI App 227, ¶¶ 23-25, 267 Wis. 2d 886, 672 N.W.2d 118, *review denied*, 2004 WI 20, 269 Wis. 2d 198, 675 N.W.2d 805 (No. 02AP2248-CR). Second, even if Beere's failure to plead the defense cost him his right to have the issue reviewed, we may in our discretion address the issue nonetheless. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

Publ'g Co., 513 U.S. 352, 362 (1995). The rule permits the former employee to pursue a remedy for the illegal termination, but limits recovery to back pay from the date of the wrongful discharge to the date the new information was discovered. ***Id.*** Beere argues that Calvin's conversion of the trailers should invalidate the entire award for prospective wages and bonuses.

¶42 We first briefly state the facts out of which this issue arises. In December 1999, Hot Spur Partners purchased two Featherlite horse trailers, a 1997 and a 2000 model year, for a total of $26,010. The partnership paid $17,550 for the 2000 model. Calvin contributed none of his own funds toward the purchase price. Calvin testified that the titles first were sent to Beere's home, but that Beere then brought the titles to him and directed him to title both trailers in his and Terry's names to avoid having the trailers become a subject of dispute among Beere's sons. Both trailers subsequently were titled to Andy Lapp, Calvin's son, to avoid tax liabilities. At trial, Beere denied that he ever authorized the titling of the trailers in Calvin's, Terry's or Andy's name.

¶43 In March 2003, Calvin placed the 2000 Featherlite trailer on consignment for resale with an Illinois entity, R.A. Adams Enterprises, Inc. (Adams). The consignment agreement listed "Andy Lapp (Cal Fabert)" as the customer. Calvin represented to Adams that the trailer never was either the property of or titled in the name of Hot Spur Partners, and that Lapp was its valid owner with authority to sell it. Adams sold the trailer and issued Lapp a check for $12,700.

¶44 We conclude the after-acquired evidence rule does not assist Beere. Although the Employment Agreement clearly permitted termination for "malfeasance," Beere did not prove the certainty of actual termination for the

conversion. An employer who seeks to rely on after-acquired evidence of wrongdoing must first "establish that the wrongdoing was of such severity that the employee *in fact would have been terminated on those grounds alone* if the employer had known of it at the time of the discharge." ***McKennon***, 513 U.S. at 362-63 (emphasis added); ***Board of Regents v. State Personnel Comm'n,*** 2002 WI 79, ¶ 32, 254 Wis. 2d 148, 646 N.W.2d 759 (emphasis added).

¶45 As the trial court noted, Beere remained steadfast that Calvin quit, with "never a whisper" from Beere that he would have fired Calvin due to the conversion. Beere disputes Calvin's testimony that the trailers were retitled at his direction, or that he even knew about it, but offered no evidence that he would have terminated Calvin on those grounds alone if he had known. *See* ***McKennon***, 513 U.S. at 362-63. Beere needed to establish that he would have terminated Calvin for the conversion, not just that the Employment Agreement justified it. *See* ***id.*** at 360.

¶46 Beere clearly was aware of the conversion at least as of the time he filed his answer, because he raised it as a counterclaim. What is not so clear is precisely when he became aware of the conversion, whether he viewed it as grounds sufficient to terminate Calvin, or why he did not plead after-acquired evidence as an affirmative defense. The matter was only obliquely addressed in closing arguments, and not argued to the court until Beere's supplemental brief in support of his motions after verdict. The real problem, therefore, is that we are being asked to review the application of a rule that the trial court and jury were given but a glimpse of. We lay at Beere's feet the responsibility for not

developing the theory more fully to the trial court. We affirm the damage award as to lost wages and bonuses. [8]

4. Conversion Damages

¶47 On a related note, Beere asks us to change the $12,573 the jury awarded for the converted horse trailer, implying that there is no reasonable basis for the award. He asserts that the trailer was purchased in March 2000[9] and converted in May 2000. Accordingly, he contends that the starting point of the calculation should have been $17,550, the trailer's purchase price, because "the arm's-length purchase of the trailer … occurred less than two months prior to the conversion."

¶48 Conversion is the wrongful exercise of dominion or control over a chattel. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 188, 557 N.W.2d 67 (1996). Conversion damages are intended to compensate a wronged party for the loss sustained for the wrongful taking of the property. ***Id.*** Generally speaking, the proper measure of damages is the value of the property at the time of the conversion plus interest to the date of trial. ***Id.***

[8] We are struck by the terms "lost wages" and "lost bonuses," and that the special verdict asked substantively about interference with Calvin's rights under the Operating Agreement, while the damage questions were more appropriate to breaches of the Employment Agreement. Beere, however, did not object that the special verdict asked for lost wages as a result of the tort, did not object when Calvin argued it to the jury, and did not challenge it on motions after verdict. Neither party has challenged it on appeal. Accordingly, that issue is waived. *See* ***Wirth***, 93 Wis. 2d at 443.

[9] The invoice from R.A. Adams Enterprises, Inc., is dated March 25, 2000; the price quotation from Adams is dated December 27, 1999; and the Hot Spur Partners check in the amount of $26,010 made out to Adams and signed by Beere is dated December 28, 1999.

¶49 When we review a jury's damage award, we do not substitute our judgment for that of the fact finder. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶ 41, 265 Wis. 2d 703, 666 N.W.2d 38. Rather, we view the evidence in the light most favorable to support the damage award, and determine whether the award is within reasonable limits. ***Id.*** Therefore, to change the jury's award, we must conclude there is no credible evidence to support the verdict regarding Beere's conversion damages. *See* ***Management Computer Servs.,*** 206 Wis. 2d at 187.

¶50 The pivotal question is when the trailer was converted, a matter the testimony does little to clarify. Beere professes not to have been aware of the retitling that Calvin claims he undertook with Beere's blessing soon after the trailer was purchased. The trailer was the subject of numerous exhibits, virtually all bearing different dates and names: a price quotation, an invoice, a Hot Spur Partners check, a drive-away permit, a trailer consignment agreement, a Wisconsin Title & License Plate Application, a Wisconsin Certificate of Title for a Vehicle, a Wisconsin Certificate of Vehicle Registration, and finally a May 8, 2003 check from R.A. Adams Enterprises made out to Andrew Lapp in the amount of $12,700.

¶51 Faced with a mélange of documents and the parties' conflicting testimony, the jury could have settled on one of several dates as the date that the conversion occurred. Determining that the date of conversion was when the trailer finally was sold in 2003 was reasonable. Moreover, the trailer was used for Hot Spur business, not for Calvin's personal use. Nothing was made of Calvin's conversion of it until the lawsuit was started. The jury reasonably could have determined that an amount virtually the same as the trailer's arm's-length value within a year of the trial fairly compensated Beere. As we cannot say there is no

credible evidence to support the verdict regarding the conversion damages, *see* ***Management Computer Servs.,*** 206 Wis. 2d at 187, we affirm the award.

5. Unjust Enrichment

¶52 The jury awarded $22,090 to Terry for 2000, the year she worked at the stables without compensation. Beere asserts that the amount is excessive, in part, because she was a volunteer, and because it exceeds the amount paid to her in subsequent years and disregards her failure to mitigate her damages.[10]

¶53 To recover on her claim of unjust enrichment, Terry needed to show that: (1) she conferred a benefit upon Beere; (2) Beere was aware of the benefit; and (3) Beere accepted or retained the benefit under circumstances that made its retention inequitable. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶14, 273 Wis.2d 471, 681 N.W.2d 302. Beere contends that, since Calvin managed employee matters such as hiring, firing and establishing and paying salaries, it was he who chose not to compensate Terry that year. Therefore, Beere continues, Terry essentially volunteered her services because she could have said to Calvin, "Pay me or I'm leaving," but did not.

¶54 We disagree. Again, looking at the evidence in the light most favorable to the verdict, we cannot say that no credible evidence supports it. *See* ***Management Computer Servs.***, 206 Wis. 2d at 187. The jury heard evidence that Terry worked 50-60 hours a week in the year 2000; that she and Calvin approached Beere about paying her; that while Calvin had authority over certain

[10] Beere has waived the failure to mitigate aspect of the argument because he did not raise it in his answer as an affirmative defense. ***Lobermeier v. General Tel. Co. of Wis.,*** 119 Wis. 2d 129, 148, 349 N.W.2d 466 (1984); ***Oetzman***, 145 Wis. 2d at 571.

employee matters, his 1% stake in Hot Spur Partners did not allow him to determine on his own to pay Terry; that the money that Beere allotted him was insufficient to pay Terry after covering the bills; and that Terry's salary rose from $18,000 in 2001 to $425 per week (which translates to $22,100 annually) at the time of her termination.

¶55 The jury rejected the $32,000 Terry requested on her claim. Instead, it awarded $22,090, which, although $4,000 more than she was paid in 2001, was $10,000 less than what she requested at trial, and mirrored her salary at the time of her termination. This award finds credible support in the record. We affirm.

6. Punitive Damages

¶56 The final issue, raised by Calvin on his cross-appeal, is whether the trial court erred by refusing to send his punitive damage claim to the jury. We review de novo whether, as a matter of law, this question should have been submitted to the jury. ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 614, 563 N.W.2d 154 (1997).

¶57 Calvin notes that claims for conspiracy and interference with contract and for punitive damages both require clear and convincing proof of intentional conduct. *See* ***Kuehler v. Kuehler***, 11 Wis. 2d 15, 26-30. 104 N.W.2d 138 (1960) (intentional torts require middle burden of proof, or proof by clear and convincing evidence); ***Hennig v. Ahearn,*** 230 Wis. 2d 149, 182-83, 601 N.W.2d 14 (Ct. App. 1999) (to obtain punitive damages, evidence must be clear and convincing). Further, WIS. STAT. § 895.85(3) permits 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." Accordingly, Calvin reasons, his punitive damage claim should have gone to the jury because it

requires proof of "the very same elements and facts [as those] necessary to prove intentional interference with contract and conspiracy." We disagree.

¶58 While the phrasing is similar and the level of proof required is the same, it remains that Calvin's claims are distinct. The supreme court has clarified that "intentional" means something different in the context of punitive damages:

> [T]here is a distinction between the intent or malice necessary to maintain an action for intentional tort … and the intent which must be shown to recover punitive damages. For punitive damages to be awarded in addition to compensatory damages for the tort, there must be a showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct.

Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978). *See also* ***Trinity Evangelical Lutheran Church and School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶ 45, 261 Wis. 2d 333, 661 N.W.2d 789, *cert. denied*, 540 U.S. 1074 (2003) (the intent necessary to maintain an action for bad faith is distinct from what must be shown to recover punitive damages).

¶59 Since this case was briefed and argued, the supreme court has issued two related decisions addressing the conduct required for an award of punitive damages. ***Strenke v. Hogner***, 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296, *reconsideration denied*, 2005 WI 134, ___ Wis. 2d ___, 700 N.W.2d 276.; ***Wischer v. Mitsubishi Heavy Indus. Am., Inc.***, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320, *reconsideration denied*, 2005 WI 134, ___ Wis. 2d ___, 700 N.W.2d 276. In ***Strenke***, the court discussed the common law vis-à-vis WIS. STAT. § 895.85(3). ***Strenke***, 279 Wis. 2d 52, ¶¶25-28. Under the common law, the evidence necessary to allow a punitive damage question to be decided by a jury must warrant a conclusion that to a reasonable certainty the conduct was

"outrageous." ***Sharp v. Case Corp.***, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999). A person's conduct was "outrageous" if the person acted either maliciously or in wanton, willful and in reckless disregard of the plaintiff's rights. ***Id.***

¶60 The ***Strenke*** court noted that the statute retains the two categories described at common law, but phrases the second as "an intentional disregard of the rights of the plaintiff." ***Strenke***, 279 Wis. 2d 52, ¶¶25-28, 36. The court clarified that an intentional disregard of a plaintiff's rights does not require either an intent to injure or a knowledge that the conduct is substantially certain to result in injury. *See* ***id.*** at ¶¶33-36. Rather, it "necessitates that the defendant act with a purpose to disregard the plaintiff's rights or be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded." ***Id.***, ¶36.

¶61 The motivation behind passing WIS. STAT. § 895.85(3) was to make it harder to recover punitive damages. ***Strenke***, 279 Wis. 2d 52, ¶22. This "heightened standard," ***id.***, ¶39, obliges the trial court to act as gatekeeper before sending a question on punitive damages to the jury. ***Id.***, ¶40. That gatekeeping function can be explained as follows:

> The circuit court should not submit the issue of punitive damages 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. (quoting ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990)).

¶62 The trial court stated that it saw the case as a "dispute between two people with ownership interest in a company," one of whom was the 99% shareholder who could have "[gotten] rid of Mr. Fabert any time he wanted."

Observing that ending a business relationship "is never pretty [and] [i]n some cases not done appropriately," the trial court concluded that the evidence presented showed no conduct that "rose to the level of shocking the conscience of the Court."

¶63 We hold that the trial court properly discharged its gatekeeping function. This was a business relationship that soured and failed. Fingers pointed in both directions. We see no evidence of either maliciousness or of a purposeful intent by Beere to disregard Calvin's rights or be aware that his conduct was substantially certain to result in Calvin's rights being disregarded.

¶64 In tandem with the punitive damage claim, Calvin asserts that he should have been permitted to introduce evidence of Beere's wealth. The wealth of the defendant is a factor for consideration in calculating punitive damages. ***Franz v. Brennan***, 146 Wis. 2d 541, 548, 431 N.W.2d 711 (Ct. App. 1988), *affirmed,* 150 Wis. 2d 1, 440 N.W.2d 562. Having concluded that the trial court properly refused to send the punitive damages claim to the jury, we conclude that exclusion of wealth evidence necessarily followed.

Conclusion

¶65 We hold that the trial court properly submitted Calvin's conspiracy claim to the jury and that the evidence supports the jury's findings in favor of Calvin on both the conspiracy and intentional interference with business interests claims. We reject Beere's arguments that the law of conditional privilege and the "business judgment rule" established a defense in this case. We also reject Beere's argument that the "after-acquired evidence rule" limited Calvin's recovery in this case. We further hold that the evidence supports the jury's damage awards on Hot Spur Partners' conversion claim and on Terry's unjust enrichment claim.

Finally, we reject Calvin's argument that the trial court erred by refusing to submit a punitive damage question to the jury. We affirm the judgment in all respects.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.