

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1289

Cir. Ct. No. 2001CV752

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**WESTERN WISCONSIN WATER, INC.
D/B/A LA CROSSE PREMIUM WATER,**

PLAINTIFF-APPELLANT,

v.

**ACUITY, A MUTUAL INSURANCE COMPANY,
AND CRYSTAL CANYON BOTTLED WATER,**

DEFENDANTS,

**CRYSTAL CANYON, INC. AND AUTO OWNERS
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

PEKIN INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for La Crosse County:
ELLIOTT M. LEVINE, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Bridge and Hoover, JJ.

¶1 PER CURIAM. Western Wisconsin Water, Inc., appeals the judgment of the circuit court after remand from this court. On remand, the circuit court concluded that there was insufficient evidence to support the award of punitive damages. Western argues that the circuit court erred when it reduced the punitive damages award to zero, and that the issue on remand was whether the award was excessive, not whether there was sufficient evidence to support it. Crystal Canyon asserts that the only question before the circuit court was whether the punitive damages award was supported by sufficient evidence and that the court, in effect, correctly ruled that it was not. We conclude that both issues were properly before the circuit court. We conclude the circuit court erred when it determined that there was insufficient evidence to support the punitive damages award and also conclude that the award was not excessive. Consequently, we reverse the judgment of the circuit court with directions to reinstate the award of punitive damages.

¶2 This is a trademark infringement case that is before us for a third time. Our last decision contains detailed background facts. Here, we provide a shorthand version of those facts. Western bottled and sold La Crosse Premium Water in large containers used in water coolers. It has a registered trademark for “La Crosse Premium Water.” In 1997, Western sold its distribution business to J.P. Hering Company and allowed them to use the logo for La Crosse Premium Water. J.P. Hering used the logo on, among other things, the uniforms of its truck

drivers and its delivery trucks. The contract also provided that Western had the right to repurchase the business if J.P. Hering decided to sell.

¶3 J.P. Hering eventually sold the distributorship to Crystal Canyon, without first offering it to Western. Crystal Canyon began using the uniforms and delivery trucks with the La Crosse Premium Water logo on them to make customer calls. This went on for six weeks, despite demands by Western that Crystal Canyon stop. Western then decided to start a new distributorship, and attempted to regain some of its former clients.

¶4 Western sued Crystal Canyon alleging several claims. The circuit court granted summary judgment to Crystal Canyon and Western appealed, and we reversed in part and remanded.

¶5 After the remand, a jury trial was held before Judge Michael Mulroy on the trademark infringement claim. The jury found Crystal Canyon had infringed on Western's trademark, and awarded Western \$336,000 in compensatory damages and \$100,000 in punitive damages. Crystal Canyon brought a post-verdict motion to remit or, in the alternative, for a new trial. The circuit court construed this to be a request to change the jury's verdict on causation from "yes" to "no," and granted the motion. Western again appealed. We once again reversed, concluding that there was sufficient evidence of causation. *Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.*, 2007 WI App 188, ¶¶1, 22, 36, 305 Wis. 2d 217, 738 N.W.2d 114. We remanded "for the limited purpose of addressing Crystal Canyon's motion to remit damages." *Id.*, ¶36.

¶6 On remand, the case came before Judge Elliott Levine. Judge Levine considered Crystal Canyon's post-verdict motion to "remit" the damages,

or in the alternative for a new trial on damages only.¹ After hearing the parties' arguments and reviewing the trial transcripts, Judge Levine denied the request to reduce the compensatory damages, but changed the punitive damages award to zero, concluding that the evidence was insufficient to support such an award. Western again appeals, and, once again, we reverse and remand with directions.

¶7 The focus of this appeal is the punitive damages award, but the parties dispute the context in which we should address that award.² Western, in its brief-in-chief, argues that the punitive damages award was not excessive and, therefore, should not have been reduced to zero. As to Judge Levine's conclusion that the evidence was insufficient to support any punitive damages award, Western argues that this issue was decided by Judge Mulroy when he allowed the question to go to the jury and, hence, Judge Levine was bound by this determination based on the doctrine of law of the case.

¶8 Crystal Canyon argues in its responsive brief that Judge Levine correctly concluded that Western presented insufficient evidence to support an award of punitive damages. Further, Crystal Canyon contends that Judge Levine

¹ Crystal Canyon did not file a new motion. The court considered the post-verdict motion that Crystal Canyon filed after trial.

² For the most part, this opinion ignores the part of Crystal Canyon's motion that challenged the compensatory damages. We note, however, that this part of the motion explains the need for a remand. A motion to reduce excessive compensatory damages is discretionary and must be addressed in the first instance by a circuit court. See *Badger Bearing, Inc. v. Drives & Bearings, Inc.*, 111 Wis. 2d 659, 670, 331 N.W.2d 847 (Ct. App. 1983). Furthermore, one of the considerations in determining whether punitive damages are proper is the relationship of the punitive damages award to compensatory damages. See *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶53, 261 Wis. 2d 333, 661 N.W.2d 789. Thus, remand on the punitive damages issue was appropriate then. But now the compensatory damages issue has been resolved and this change in posture explains why we address the merits of Crystal Canyon's punitive damages arguments in this appeal.

was not bound by law of the case doctrine and that Western's failure to address the merits of the sufficiency issue constitutes waiver.

¶9 In its reply brief, Western continues to maintain that the issue is whether the punitive damages were excessive and it asserts that Crystal Canyon did not challenge the sufficiency of the evidence before the circuit court. Further, Western argues that our last decision remanded the matter solely to address Crystal Canyon's "motion to remit," which Western equates solely with the excessiveness issue. Thus, according to Western, the only issue before us is whether the punitive damages award should have been reduced because it was excessive.

¶10 We begin our analysis by disagreeing with Western's assertion that Crystal Canyon's trial court motion did not challenge the sufficiency of the evidence supporting a punitive damages award. The trail to this conclusion begins with inartful language in Crystal Canyon's post-trial motion.

¶11 Shortly after the trial in 2006, Crystal Canyon filed a motion that included a request to reduce punitive damages. Although intertwined, Crystal Canyon's motion argued both that the punitive damages were excessive and should be reduced and that those damages were not supported by sufficient evidence. Rather than separate out these distinct arguments, Crystal Canyon presented, in a blended fashion, reasons why the award should be reduced and why it should be eliminated because it was not supported by sufficient evidence. Crystal Canyon lumped these two arguments under its lead-in request "to remit ... the \$100,000 in punitive damages to \$0." This is confusing phrasing because remit language, when used in conjunction with damages, is usually a reference to reducing, not eliminating, excessive damages. Reducing an award to zero,

however, is the equivalent of holding that there is insufficient evidence to support any award. Nonetheless, it is readily apparent from the arguments actually made that Crystal Canyon was indeed making both arguments.³

¶12 Judge Mulroy did not address this request because he reversed the awards on a different basis. Judge Mulroy concluded that the trial evidence was insufficient to support a finding of causation with respect to the underlying trademark infringement claim. Western appealed that ruling and, in our prior decision, we disagreed with the judge’s causation analysis. We concluded that the evidence of causation was sufficient. *Western Wisconsin Water*, 305 Wis. 2d 217, ¶¶22, 36. At that point, it made sense to remand to the circuit court so that it could address Crystal Canyon’s motion to reduce the damages awards.

¶13 Understandably, we paid little attention to exactly what Crystal Canyon was arguing in that regard and simply repeated language in Crystal Canyon’s motion. We remanded “for the limited purpose of addressing Crystal Canyon’s motion to remit damages.” *Id.*, ¶ 36. Earlier in that opinion we stated, in pertinent part, that Crystal Canyon “moved the court to remit ... the punitive damages from \$100,000 to zero.” *Id.*, ¶9. On remand, Judge Levine correctly understood that we remanded the matter so that he could address Crystal Canyon’s motion without commenting on exactly what Crystal Canyon was arguing in that motion.

³ Western argues that Crystal Canyon’s post-verdict motion did not mention the statute that allows a challenge to the sufficiency of the evidence. We disagree. The motion refers to WIS. STAT. § 905.14 (2005-06), which was obviously intended as a reference to WIS. STAT. § 805.14, the statute authorizing just such a sufficiency challenge.

¶14 Consequently, when the case returned to Judge Levine, he was in the same position with respect to this motion as Judge Mulroy was when it came before him. And, as we have explained, Crystal Canyon’s motion includes the argument that the evidence was insufficient to support punitive damages. It follows that Judge Levine properly addressed the sufficiency issue.

¶15 We do not, however, agree with Judge Levine’s conclusion that the evidence was insufficient. An award of punitive damages requires proof of “(1) evil intent deserving of punishment or of something in the nature of special ill-will; or (2) wanton disregard of duty; or (3) gross or outrageous conduct.” *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶45, 261 Wis. 2d 333, 661 N.W.2d 789. The question of “whether the evidence establishes a proper case for the allowance of punitive damages and for the submission of the issue to the jury” is decided by the trial court. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 298, 294 N.W.2d 437 (1980). “Section 805.14, Stats., makes clear that motions challenging the sufficiency of evidence to support a verdict or an answer in a verdict are only to be granted if no credible evidence supports the verdict.” *Sievert v. American Fam. Mut. Ins. Co.*, 180 Wis. 2d 426, 433, 509 N.W.2d 75 (Ct. App. 1993) (footnote omitted), *aff’d*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). Once submitted to the jury, the award of punitive damages “is within the discretion of the jury, and ‘[w]e are reluctant to set aside an award merely because it is large or we would have awarded less.’” *Trinity Evangelical*, 261 Wis. 2d 333, ¶46 (citation omitted). “[T]he evidence must be viewed in the light most favorable to the plaintiff, and a jury’s punitive damages award will not be disturbed, unless the verdict is so clearly excessive as to indicate passion and prejudice.” *Id.*, ¶56.

¶16 The jury could have viewed Crystal Canyon’s conduct in continuing to use the La Crosse Premium Water logo after it bought J.P. Hering’s business, and after it was told by Western to stop, as an intentional disregard of Western’s rights, done with malicious intent to deceive Western’s former customers. The evidence supported a finding that Crystal Canyon knew it was not authorized to use the logo, that it could have avoided using the logo, and that officers at Crystal Canyon did not care about any rights Western had in that regard. Moreover, there was evidence that one Crystal Canyon officer said that he wanted to “bring Brian Elder [a Western officer] and La Crosse Premium Water [a reference to Western] to their knees.” This is sufficient evidence to support a jury finding that Crystal Canyon had “evil intent,” acted with “wanton disregard of duty,” or engaged in “gross or outrageous conduct.” Consequently, we conclude that Judge Levine erred when he concluded that the evidence was insufficient to support the punitive damages award.

¶17 Western also argues that Judge Levine was barred by the law of the case doctrine from considering this sufficiency question because Judge Mulroy had previously ruled on the topic when he gave the issue to the jury. However, law of the case doctrine holds that the decision of an appellate court binds that court and the circuit court in the same proceeding. *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82. The doctrine does not prohibit a trial court on remand from reconsidering a prior ruling. *See id.*, ¶26.

¶18 We turn to the question whether the punitive damages award was excessive. We review this question *de novo*. *Trinity Evangelical*, 261 Wis. 2d 333, ¶48. “An award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing.” *Id.*, ¶50.

The purpose of punitive damages is to punish unlawful conduct and to deter its repetition. *Id.*, ¶46. To determine whether an award is excessive, Wisconsin courts consider three guideposts established by the United States Supreme Court: “(1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct.” *Id.*, ¶52. Wisconsin courts have been encouraged to consider the following six factors:

1. The grievousness of the acts;
2. The degree of malicious intent;
3. Whether the award bears a reasonable relationship to the award of compensatory damages;
4. The potential damage that might have been caused by the acts;
5. The ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct, and
6. The wealth of the wrongdoer.

Id., ¶53. Finally, courts should be reluctant to interfere with the jury’s discretion “merely because [the award] is large or we would have awarded less.” *Id.*, ¶46.

¶19 Applying the factors as set forth in *Trinity Evangelical*, and viewing the evidence in the light most favorable to Western, we conclude that the punitive damages award was not excessive.

¶20 As noted above, there was evidence from which the jury could conclude that Crystal Canyon acted with malice, particularly the “bring [them] to their knees” comment. This and other evidence does not show a high degree of maliciousness, but it is significant that the jury did not award high punitive

damages; the award was approximately one-third of the compensatory damages award. Finally, we are mindful that we should defer to the jury's discretion. Consequently, we conclude that the punitive damages award "bears a reasonable relationship to the award of compensatory damages." *See id.*, ¶63.

¶21 We remand to the circuit court with instructions that it reinstate the jury's award of \$100,000 in punitive damages.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

