

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 02-0634
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-133

**IN COURT OF APPEALS
DISTRICT II**

OPPORTUNITY HOMES, INC.,

PLAINTIFF-CROSS-RESPONDENT,

MARK E. MALEC,

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

JOHN MALEC AND MALEC HOLDINGS II, LTD.,

**DEFENDANTS-RESPONDENTS-CROSS-
APPELLANTS,**

**PACIFIC INDEMNITY CORPORATION AND FEDERAL
INSURANCE COMPANY,**

INTERVENORS.

APPEAL and CROSS-APPEAL from the judgment and amended judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Mark E. Malec appeals from the judgment and amended judgment entered by the circuit court. John Malec and Malec Holdings II, Ltd. (“MHII”) are the respondents and cross-appeal from the judgments.¹ Mark and Opportunity Homes, Inc. (“OHI”) are the cross-respondents. The parties allege multiple errors by the trial court. We affirm.

¶2 Mark Malec and John Malec are brothers who entered into an agreement to develop a golf course and residential community known as Bristlecone Pines. The agreement provided that it was governed by Illinois law. MHII, a Delaware corporation, was the entity which developed the community. John owned eighty-five percent of MHII’s stock and Mark owned fifteen percent. OHI, a construction company owned by Mark, was to perform construction work for the project. Disputes arose between John and Mark and this lawsuit ensued.

¶3 Mark and OHI brought suit against John and MHII alleging, among other things, breach of contract and breach of fiduciary duty, and seeking compensatory and punitive damages. John counterclaimed alleging, among other things, breach of contract, breach of fiduciary duty, and conversion. The case was

¹ Neither party included copies of the judgments from which they appeal in the appendix to their briefs. The judgment is a “relevant trial court record” entry and as such should be included in the appendix. *See* WIS. STAT. RULE 809.19(2) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

tried to a jury. The jury found that John had breached the agreement and breached a fiduciary duty to Mark. The jury awarded Mark \$700,000 in compensatory damages and valued his share in MHII at \$257,232. The jury further found that MHII owed OHI \$409,034. The jury awarded Mark \$400,000 in punitive damages against John. The jury also found that Mark had breached the contract and awarded John \$50,000 in compensatory damages and \$100,000 against Mark in punitive damages.

¶4 John then brought motions after verdict alleging a variety of errors by the trial court. The court denied most of the allegations of error. The court ultimately concluded, however, that the jury's verdict was inconsistent with Illinois law because "neither party is entitled to be compensated for the other's breach when they themselves have been found to have breached the same contract." The court then vacated the compensatory and punitive damages awards. The court allowed to stand the judgment owed by MHII to OHI, and allowed the jury's valuation of Mark's shares of MHII. The amended judgment states that Mark is entitled to \$267,802 from MHII "upon the condition that Mark E. Malec tender his 15% stock interest in Malec Holdings, II Ltd. to Malec Holdings, II Ltd." Mark appeals and John cross-appeals.

I. Mark's Appeal

¶5 The first issue in Mark's appeal concerns the special verdict form and jury instructions. Mark apparently argues that the circuit court in some way invalidated the special verdict or jury instructions. He argues that John and MHII waived any alleged error in the jury instructions and special verdict form by not objecting to them at the time of trial. John, in his respondent's brief, states: "In his motions after verdict, John argued that the jury instructions and special verdict

form given to the jury for the contract claim did not correctly inform the jury of the applicable Illinois law.” The court has reviewed the record, however, and is unable to find where John argued that the special verdict and jury instructions violated Illinois law. What the record shows is that John argued that the jury’s answers to the special verdict questions—finding that both brothers breached the contract—violated Illinois law. Specifically, John argued that the jury’s answers were inconsistent and logically repugnant to each other and asked the court to change the answer to one of the special verdict questions from yes to no.

¶6 Further, while Mark asserts that he argued that John had waived any challenge to the form of the special verdict questions and the jury instructions, the record shows that Mark’s counsel only briefly mentioned waiver in an oblique context at the hearing on the motions. Although it was not the ultimate reason for its decision, the court appears to have addressed the waiver issue and ruled in Mark’s favor. The court stated as follows:

Let me, for the record, indicate that with the exception of what I am taking under advisement, and that is the issue of the competing findings of breach of contract by the – both sides and what effect it has on those figures in this case under the Illinois case, the rest of the defense objections are overruled. The verdict form was selected by the attorneys. The court has virtually little input in the selection of the wording of the jury questions.

The court specifically finds that this is not a perverse verdict. The record supports the finding and the amounts of dollars to be appropriate and supported by the evidence.

The court then took under advisement the question of the effect of Illinois law on the award of damages. The court ultimately determined that Illinois law prohibited either party from recovering damages when both parties had been found to have violated the contract.

¶7 Our review of the record leaves us somewhat puzzled by the appellant's argument, and the respondent's response. First, it does not appear from the record that John challenged the special verdict form or jury instructions. Second, the record shows that Mark's counsel argued waiver, albeit indirectly. Third, it appears from the record that the circuit court agreed that John was precluded from challenging the special verdict forms and jury instructions. We do not believe the parties have accurately described the trial court's ruling.

¶8 We conclude that the trial court's action in deciding that Illinois law prohibited either party from recovering when both parties breached, constituted a judgment notwithstanding the verdict. *See* WIS. STAT. § 805.14(5)(b). The trial court accepted the jury's findings of fact and specifically found that those facts were supported by the evidence at trial. John and MHII then asked the trial court to apply Illinois law to those facts. The court did so and concluded that Illinois law prohibited the result reached by the jury.

¶9 We review a trial court's decision on a motion for judgment notwithstanding the verdict de novo. *Hicks v. Nunnery*, 2002 WI App 87, ¶15, 253 Wis. 2d 721, 643 N.W.2d 809.

A motion for judgment notwithstanding the verdict accepts the findings of the verdict as true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury. The motion does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law.

Id. (citations omitted).

¶10 The trial court relied on *Cincinnati, Indianapolis & Western Railway Co. v. Baker*, 130 Ill. App. 414 (1906), in reaching its conclusion that a

party who breaches a contract may not then recover for breach from the other party. Mark argues that the circuit court erred because Illinois law allows both parties to recover under certain circumstances, citing *Devon Bank v. Schlinder*, 390 N.E.2d 447 (Ill. App. 1979). Under Illinois law, a material breach of contract will justify non-performance by the other party. *Israel v. Nat'l Can. Corp.*, 658 N.E.2d 1184, 1190 (Ill. App. 1995). A partial breach does not justify the other party's subsequent breach. *Id.* Although Mark specifically argued to the trial court that his breach was first and was not material, the court rejected that argument. The trial court determined that both parties breached simultaneously. We see no reason to disturb this finding. We agree with the circuit court that Illinois law does not allow both parties to recover under these circumstances.

¶11 Mark also argues that the trial court erred by striking the award of punitive damages against John.² The trial court explained to the parties at the hearing on the motions after verdict that punitive damages do not come into play until the court makes a preliminary finding that punitive damages are warranted. The court went on to say: “[T]his court, I think, made it very clear to both sides that I was not satisfied that the threshold had been met; that I felt it more prudent to put the questions on the verdict primarily because of the length of time that each party had spent in trial, the costs of the trial, and at least have those issues available for appellate proceedings.”³

² John argues in his cross-appeal that the court erred in striking the award of punitive damages against Mark.

³ While both parties have cited to the record for this ruling, neither party provides a record cite to the 1200+ page trial transcript where the court decided to put the punitive damages award on the verdict, referred to by the court in the quotation above.

¶12 The court went on to explain that it had been specifically concerned about one incident involving Mark. The court then found that based on the evidence, the parties had shown that they each had “legitimate business problems,” but their conduct did not “rise to the level of outrageous conduct” required for punitive damages.

¶13 Given the circumstances of this case and the claims being made by both sides, we conclude that the trial court acted properly when it submitted the punitive damages question to the jury even when it doubted the standard had been met, and then later disallowed the award. In essence, what the circuit court did was reserve ruling on the issue until after the jury reached its verdict. Given the court’s uncertainty, we conclude this was appropriate. *Cf. Wis. Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 339, 291 N.W.2d 825 (1980).

¶14 The question then becomes whether the circuit court properly determined that the evidence was insufficient to support an award of punitive damages.

“Before the question of punitive damages can be submitted to a jury, the circuit court must determine, as a matter of law, that evidence was presented at trial that would support an award of punitive damages.” *Sharp v. Case Corp.*, 227 Wis. 2d 1, 20-21, 595 N.W.2d 380 (1999). The evidence necessary to allow the punitive damages question to be decided by the jury must warrant a conclusion that to a reasonable certainty the conduct was “outrageous.” *Id.* at 21. The evidence must also be “clear and convincing.” *Hennig v. Ahearn*, 230 Wis. 2d 149, 182-83, 601 N.W.2d 14 (Ct. App. 1999).

City of West Allis v. WEPCO, 2001 WI App 226, ¶¶22, 248 Wis. 2d 10, 635 N.W.2d 873, *review denied*, 2002 WI 23, 250 Wis. 2d 556, 643 N.W.2d 93 (Wis.

Jan. 29, 2002) (No. 99-2944). We review the trial court's decision de novo. *Id.* at ¶23.

¶15 In support of his argument that the evidence supported an award of punitive damages, Mark lists in the argument section of his brief five conclusory statements about John's actions without citation to the record. Mark refers the court to his Statement of Facts in which, he says, the arguments are more fully outlined. The Statement of Facts also includes conclusory statements in which Mark refers to specific pieces of evidence or gives general citations to the record for trial testimony. The court has reviewed the record citations given in the Statement of Facts.⁴ After reviewing this record, we are not convinced that the trial court erred in its determination that the standard for punitive damages had not been met. We affirm the trial court's ruling.

II. John's Cross-Appeal

¶16 In his cross-appeal, John raises ten issues. He argues that (1) the trial court lacked subject matter jurisdiction over the internal affairs of MHII; (2) the trial court impermissibly directed the jury to award greater than zero damages against him; (3) under Delaware law, the evidence did not show that John breached a fiduciary duty to Mark; (4) Mark did not establish any fiduciary duty independent of the duties owed under corporate law; (5) the trial court improperly refused to instruct the jury on the parole evidence rule; (6) John is entitled to a new trial on his claim concerning a personal loan he made to Mark; (7) the court

⁴ In the Statement of Facts, Mark does not explain the context of the testimony, does not identify who is testifying and what role they played in the controversy, and does not explain to the court why this testimony is relevant to support his position.

erred in striking the compensatory damages award to him; (8) the court erred in striking the punitive damages award to him and against Mark; (9) the court erred in refusing to admit the licensing evidence; and (10) the jury verdict is perverse and against the greater weight of the evidence.

¶17 John's first argument is that the trial court lacked jurisdiction to order the dissolution of MHII. We need not address this question, however, because we conclude that the court did not order dissolution of the corporation. The amended judgment states: "An Amended Judgment is hereby entered in favor of Plaintiff, Mark E. Malec, and against the defendant, Malec Holdings II, Ltd., in the amount of \$267,802.00; upon the condition that Mark E. Malec tender his 15% stock interest in Malec Holdings, II Ltd. to Malec Holdings, II Ltd."

¶18 The amended judgment shows that the trial court established a value for the stock if Mark chose to turn the stock into the corporation. The court left it to Mark to decide if he wanted to turn in the stock to MHII. The court did not order the dissolution of MHII and the distribution of its debts and assets to the corporate stockholders. Since the court did not order dissolution, we need not address John's argument that it lacked jurisdiction to do so.

¶19 John's second argument is that the trial court impermissibly directed the jury to award greater than zero damages. When reviewing jury instructions, we consider whether the trial court erroneously exercised its discretion when it gave the instructions. *Downey, Inc. v. The Bradley Ctr. Corp.*, 188 Wis. 2d 435, 441, 524 N.W.2d 915 (Ct. App. 1994). We are not convinced that the circuit court erred.

¶20 John's third argument concerns the sufficiency of the evidence. He argues that the evidence was insufficient to support a finding of breach of

fiduciary duty. Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must give substantial deference to the trial court's better ability to assess the evidence. *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995). When the trial court has concluded that there is sufficient evidence, this court may not set aside the verdict for insufficient evidence unless there is a complete failure of proof. *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). We agree with the trial court's conclusion that there was sufficient evidence to support the jury's determinations.

¶21 John's fourth argument is that Mark did not establish a breach of fiduciary duty. The argument in the brief for the cross-appeal consists of one paragraph in which John refers this court to his response to Mark's appeal, and cites to a page in his brief. The argument in the appeal consists of one paragraph which is devoid of citation to legal authority or the record. Arguments unsupported by reference to legal authority will not be considered. *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W. 2d 794 (Ct. App. 1990). We will not consider this argument.

¶22 John's fifth argument is that the court improperly refused to instruct the jury on the parole evidence rule. Once again, the standard of review is whether the trial court erroneously exercised its discretion when it gave the instructions. *Downey, Inc.*, 188 Wis. 2d at 441. Again, we are not convinced that the circuit court erred.

¶23 John's sixth argument is that he is entitled to a new trial on the personal loan claim. Once again, he argues without citation to legal authority,

including the appropriate standard of review. We will not consider this argument. *See Post*, 157 Wis. 2d at 657.

¶24 John's seventh argument is that the trial court erred when it disallowed the jury's award of compensatory damages to him. He argues specifically that there was no evidence to support the trial court's finding that the breaches were simultaneous. We have already determined in Mark's appeal that this finding was not in error.

¶25 John's eighth argument is the court erred in striking the punitive damages award to him. For the reasons stated in Mark's appeal, we affirm the trial court's decision to strike the punitive damages awards.

¶26 John's ninth argument is that the trial court erred in refusing to admit certain evidence. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). We are not convinced that the trial court erred.

¶27 John's tenth argument is that the jury verdict was perverse. He offers as an example the award of compensatory damages against him in the amount of \$700,000, and the awards of punitive damages to both John and Mark. The trial court, however, on the motions after verdict, struck these awards. We are not convinced that the verdicts still standing are perverse. For the reasons stated, we affirm the judgment and amended judgment.

By the Court.—Judgment and amended judgment affirmed.

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

