

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 14, 1996

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

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No. 95-2465

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**ALPHONSUS (AL) MITCHELL,  
d/b/a MITCHELL ELECTRIC,**

**Plaintiff-Respondent,**

v.

**RICHARD SHERMAN AND SHERMAN  
ELECTRIC SERVICE, INC.,**

**Defendants-Appellants.**

APPEAL from judgment of the circuit court for St. Croix County:  
SCOTT R. NEEDHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Richard Sherman and Sherman Electric Service, Inc. appeal a judgment awarding Alphonsus (Al) Mitchell \$250,000 in compensatory damages and \$100,000 in punitive damages based on a finding that Sherman and Sherman Electric intentionally interfered with Mitchell's contracts with his employees, that they conspired with Mitchell's former employee, Charles Boley, to violate Boley's fiduciary duty to Mitchell, that they conspired with Boley to

willfully or maliciously injure Mitchell's business, and that Sherman Electric intentionally interfered with Mitchell's contracts with his customers.

The following issues are dispositive of this appeal: (1) whether the law of the case requires Mitchell's claims to be dismissed because our previous decision in this case held that Boley's activities were arguably protected under the National Labor Relations Act (NLRA); (2) whether the trial court erred when it determined that Boley owed Mitchell a fiduciary duty of good faith and loyalty during the term of his employment; (3) whether the trial court erroneously instructed the jury regarding Boley's union organizing activities and whether this unobjected-to error requires discretionary reversal under § 752.35, STATS.; (4) whether there is sufficient evidence to support the jury's verdict finding that Sherman Electric interfered with Mitchell's customer contracts; and (5) whether there is sufficient evidence to support the award of punitive damages for interference with Mitchell's customer contracts.

We conclude that: (1) the claims were not barred by the law of the case; (2) the trial court did not err by determining that Boley owed Mitchell a fiduciary duty during the term of his employment but because the scope of his employment was disputed, the issue whether the alleged breach was within the scope of his employment should have been resolved by the jury as a question of fact; (3) the trial court erroneously instructed the jury and this unobjected-to error requires discretionary reversal under § 752.35, STATS.; (4) there is sufficient evidence to support the jury's verdict with respect to interference with customer contracts; and (5) there is sufficient evidence to support the award of punitive damages with respect to interference with customer contracts. Therefore, we affirm that part of the judgment awarding Mitchell damages for Sherman Electric's interference with Mitchell's customer contracts. However, we reverse the remainder of the judgment and remand for a new trial on the remaining issues.

In 1991, Mitchell owned and operated Mitchell Electric, a non-union electrical shop in Hudson. The shop staffed five electricians, including Charles Boley. Planning to retire, Mitchell attempted to sell his business as a going concern. The business was appraised by a certified public accounting firm at \$200,000; \$50,000 for equipment and \$150,000 for good will.

Sherman is the president of Sherman Electric, which is an Eau Claire-based union contractor employing approximately thirty electricians. Although based in Eau Claire, Sherman Electric did a large amount of business in the Hudson area and was interested in expanding its electrical operations in Hudson.

In early 1991, Local Union # 953 engaged in organizing efforts to unionize electricians and electrical contractors in the Hudson area, including Mitchell Electric. Although Mitchell rejected the union's efforts to organize Mitchell Electric, Boley and other Mitchell employees contacted the union and expressed an interest in joining. Sherman, Boley and union representatives met regarding the possibility of Sherman doing business in the Hudson area and the union soliciting and organizing electricians to create a work force of union electricians available to Sherman. Because Sherman Electric was a union contractor, it could only hire electricians who were referred to it through the union's hiring hall. Two other Mitchell employees attended a second meeting with Boley, Sherman and union representatives. Eventually, Boley and his two coworkers left Mitchell Electric, joined the union, and began working for the new Sherman Electric Hudson branch.

When Mitchell learned of Boley's resignation, he decided to contact Sherman in an attempt to negotiate a sale of Mitchell's business. Sherman met Mitchell at Mitchell's shop to discuss the business. At the end of the meeting, Sherman remarked that he had Plan A, which was to buy Mitchell's business, and Plan B. According to Mitchell, Sherman then taunted him saying, "What are you going to do if we go with Plan B?" Sherman said he would get back to Mitchell but never did. When Mitchell contacted him, Sherman said he was not interested in buying the business.

As manager of the Sherman Electric Hudson shop, Boley's job included finding potential customers in the Hudson area. Boley solicited several Mitchell Electric customers on behalf of Sherman Electric, both before and after he quit Mitchell, telling them that Mitchell Electric was going out of business and Sherman was taking over.

Although Mitchell hired an additional employee, his business began to decline. Due to staff losses, Mitchell was forced to relinquish projects

at a loss and lost opportunities to bid on some projects. Mitchell eventually sold the business to Hanson Electric for \$22,000.

Mitchell initially filed suit against Boley, Sherman and Sherman Electric. Boley brought Local Union # 953 into the action by a third-party complaint. Mitchell subsequently amended his complaint and also brought suit against the union. In his amended complaint, Mitchell alleged four counts against the defendants: (1) All four defendants interfered with his existing and prospective contractual relationships with his employees and customers; (2) Boley breached his fiduciary duty to Mitchell and the other defendants assisted in the breach; (3) Boley, Sherman and Sherman Electric wrongfully and willfully misappropriated business and trade secrets in violation of common-law and the Uniform Trade Secrets Act; and (4) all four defendants violated § 134.01, STATS., by willfully and maliciously injuring the plaintiff in his trade, business and profession.

The trial court granted summary judgment to Local Union # 953 on all counts concluding that the lawsuit was preempted because the union's activities were arguably subject to § 7 or § 8 of the NLRA. The trial court also granted summary judgment to Boley, Sherman and Sherman Electric on the claims for conspiracy and intentional interference with Mitchell's employee contracts on the same basis. In addition, the trial court dismissed Mitchell's claims for violation of trade secrets against all parties due to lack of evidence. Mitchell appealed the issue whether his claims against the defendants were preempted by the NLRA. We affirmed the trial court's conclusion that the union and Boley's actions and activities were arguably protected by the NLRA and therefore the state law tort claims against them were preempted. *See Mitchell v. Sherman*, 187 Wis.2d 388, 398, 523 N.W.2d 738, 744 (Ct. App. 1994). However, we reversed the trial court's conclusion that the claims against Sherman and Sherman Electric were preempted by the NLRA.

On remand, the parties stipulated to dismissing the remaining claims against Boley. However, in the stipulation, Mitchell preserved "all claims of any sort which may exist against Richard Sherman and/or Sherman Electric Service, Inc. whether or not these claims arise out of or involve conduct by Charles Boley."

After a trial, the jury determined that Sherman and Sherman Electric intentionally interfered with Mitchell's contracts with his employees, that they conspired with Boley to engage in conduct in violation of Boley's fiduciary duty to Mitchell and to willfully or maliciously injure Mitchell in his business, and that Sherman Electric intentionally interfered with Mitchell's contracts with his customers.<sup>1</sup> The jury awarded Mitchell \$250,000 in compensatory damages, including \$25,000 for Sherman Electric's interference with Mitchell's customer relations, and \$100,000 in punitive damages, including \$10,000 for interference with customer relations. The trial court denied Sherman and Sherman Electric's motions to grant judgment notwithstanding the verdict, to grant a new trial and to reduce the jury's verdict regarding damages.

### LAW OF THE CASE

Sherman and Sherman Electric first contend that Mitchell's claims are based on Boley's and the union's recruitment of Mitchell employees and therefore must be dismissed under the law of the case. The law of the case doctrine provides that "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court and on later appeal." *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989). Sherman and Sherman Electric suggest that there can be no conspiracy because Boley is the only co-conspirator and we held in our previous decision that Boley was engaged in arguably protected activity under the NLRA.

A civil conspiracy is defined "as a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." *Radue v. Dill*, 74 Wis.2d 239, 241, 246 N.W.2d 507, 509 (1976). Where the conspiracy itself has an unlawful purpose, the means, regarding whether they are in themselves actionable civilly or criminally, are not material. *Id.* at 244, 246 N.W.2d at 510-11

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<sup>1</sup> The claim for intentional interference with Mitchell's contractual relationships with his customers was against Sherman Electric only, based on the acts of its agent, Boley. The trial court dismissed Mitchell's claim that Sherman personally interfered in Mitchell's relationship with his customers.

(holding that a claim for conspiracy to give false testimony in a police investigation was proper despite fact that testimony given in a judicial procedure is immune from civil liability). Acts which are not actionable when committed alone may be wrongful when done in combination and in furtherance of a conspiracy. *Id.* Accordingly, we conclude that there can be a conspiracy between Sherman and Boley to injure business under § 134.01 STATS., and a conspiracy to breach Boley's fiduciary duty, even though Boley was involved in arguably protected activity.

In addition, to hold that Sherman and Sherman Electric could not be held liable for conspiracy with Boley would immunize them from accountability for their actions. In our previous decision, we held that Sherman and Sherman Electric were not engaged in arguably protected activities under § 7 of the NLRA or arguably prohibited activities under § 8 of the NLRA. Because Sherman and Sherman Electric are not accountable under the NLRA, dismissing the conspiracy action against them would immunize them from liability for any wrongful conduct in which they might engage. Based on the foregoing reasons, we conclude that the claims against Sherman and Sherman Electric are not barred by the law of the case.

## FIDUCIARY DUTY

Next, Sherman and Sherman Electric contend that the trial court erred when it determined as a matter of law that Boley owed Mitchell a fiduciary duty of good faith and loyalty during the term of his employment and so instructed the jury. Sherman argues that Boley was merely a rank and file employee and that only supervisors or managers owe a fiduciary duty to their employer.

We agree that the Wisconsin cases dealing with fiduciary duty have involved managers or corporate officers. *See General Automotive Mfg. Co. v. Singer*, 19 Wis.2d 528, 533, 120 N.W.2d 659, 662 (1963); *Racine v. Weisflog*, 165 Wis.2d 184, 190, 477 N.W.2d 326, 329 (Ct. App. 1991). However, the cases have used broad language suggesting that all employees owe a fiduciary duty to their employer.

It is well settled that an agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer.

*Bank of California v. Hoffmann*, 255 Wis. 165, 171, 38 N.W.2d 506, 509 (1949).

Further, case law has established that all servants or employees are agents, *Arsand v. Franklin*, 83 Wis.2d 40, 50, 264 N.W.2d 579, 584 (1978), and that all agents owe their principal a fiduciary duty with respect to matters within the scope of their agency. *Bank of California*, 255 Wis. at 165, 38 N.W.2d at 509. Accordingly, we conclude that all employees owe their employer a fiduciary duty with respect to matters within the scope of their agency. Because it is not disputed that Boley was Mitchell's employee, we conclude the trial court did not err by determining that Boley owed Mitchell a fiduciary duty as a matter of law. However, Boley's fiduciary duty is limited by the scope of his employment. *See id.*

We discuss the scope of Boley's employment because we are remanding for a new trial and the issue may reoccur. The trial court instructed the jury that Boley could not recruit coworkers for employment in a competitive enterprise or solicit Mitchell's customers for Sherman Electric while still an employee of Mitchell. The trial court should not take the issue of scope of employment away from the jury unless it can determine that the actions were within the scope of employment as a matter of law. Because it appears that the scope of Boley's employment with Mitchell was disputed, the scope should be resolved by the jury as a question of fact. If the jury finds that the recruiting of coworkers for Sherman and the soliciting of customers were within the scope of his employment, the jury can then find that these acts were a breach of Boley's fiduciary duty to Mitchell.

## INSTRUCTIONS

Next, the appellants contend that the trial court erroneously exercised its discretion when it granted Mitchell's motion in limine prohibiting

them from referring to the prior proceedings in the case and when it instructed the jury regarding Boley's union organizing activity. Evidentiary rulings and jury instructions are matters of judicial discretion. *D.L. v. Huebner*, 110 Wis.2d 581, 624, 329 N.W.2d 890, 909 (1983); *Ollhoff v. Peck*, 177 Wis.2d 719, 724, 503 N.W.2d 323, 325 (Ct. App. 1993). Accordingly, we will affirm the trial court if it examined the relevant facts, applied the proper standard of law and reached a conclusion a reasonable judge could reach. *Ollhoff*, 177 Wis.2d at 724-25, 503 N.W.2d at 325.

The trial court concluded that evidence detailing the procedural history involved would be of no relevant purpose in determining the issues before the court and would only confuse the jury. Sherman's counsel voiced concern that if the jury was not aware that the union organizing activity of Boley was lawful, the jury may be led to believe the organizing was unlawful. The trial court determined that Sherman's concern could be remedied and explained through a proper instruction. The trial court instructed the jury as follows:

You have heard evidence presented and have previously been instructed that the defendants, Richard Sherman and Sherman Electric Services, Inc., engaged in activities with Local Union 953 and with Charles Boley. Neither the union nor Charles Boley, as previously instructed, are defendants to this lawsuit.

Further, you are instructed that union organization and formation activities which may have been engaged in by Local Union 953 and Charles Boley are governed and determined by federal law and are not issues to be considered or determined in this case.

The first paragraph of the instruction was given at the beginning of the second day of trial after Sherman voiced concerns again and the entire instruction was given after the close of testimony. However, the jury was also instructed that if Boley recruited former employees on behalf of Sherman Electric while he was still a Mitchell employee it would constitute an overt act in furtherance of the conspiracy, and that Boley's fiduciary duty of good faith and loyalty to Mitchell precluded him from recruiting coworkers for employment in a competitive enterprise.



We agree with the trial court that a curative instruction could have solved the problem. However, we conclude that the court failed to properly instruct the jury. An error of law is an erroneous exercise of discretion. *United Fire & Cas. Co. v. Kleppe*, 174 Wis.2d 637, 641, 498 N.W.2d 226, 227 (1993). While we may not determine the legality of union organizing activity under the federal law, the union organizing activity is lawful under Wisconsin law. See § 111.04, STATS.<sup>2</sup> Union organizing is protected activity that by itself cannot form the basis of liability for interference with employee contracts, cannot be regarded as a breach of fiduciary duty and cannot be considered an act in furtherance of a conspiracy. Boley recruited other Mitchell employees to join the union. Once the employees joined the union, they could no longer work for Mitchell because he was a non-union electrical contractor. Because Sherman Electric was the only union electrical contractor in the area once it opened shop, the employees' only option in the area once they joined the union was to work for Sherman Electric. Accordingly, Boley's recruiting union membership from Mitchell employees could not standing alone be regarded as a breach of fiduciary duty or considered as a basis for liability.

The trial court instructed the jury that the union organizing activities were governed by federal law and were not issues to be considered, but also instructed that the recruiting of employees could be considered as a breach of Boley's fiduciary duty and as an act in furtherance of the conspiracy. These jury instructions were erroneous because they were incomplete and failed to place Mitchell's claims within the proper parameters. The court should have instructed the jury that the union organizing activity could not by itself form the basis for liability for interference with employee contracts, breach of fiduciary duty or conspiracy. Because lawful activity done for an unlawful purpose as part of a conspiracy is actionable, the jury should have been instructed that the activity is actionable only if the conspiracy had an unlawful purpose. The jury should not have been permitted to infer that the union activity could be

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<sup>2</sup> Section 111.04, STATS., provides:

Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all such activities.

considered a breach of fiduciary duty and considered as an act in furtherance of the conspiracy without a finding of an unlawful purpose.

However, the appellants waived this issue by not making the proper timely objection to the instructions as given. While Sherman and Sherman Electric voiced concerns at the motion in limine and also after the first day of trial, they did not object to the jury instructions. "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." Section 805.13(3), STATS.

While the objections to the instructions were waived, we may still reverse the judgment and order a new trial in the interests of justice if the real controversy has not been fully tried or justice has miscarried. *Vollmer v. Luty*, 156 Wis.2d 1, 17, 456 N.W.2d 797, 804 (1990); § 752.35, STATS. To reverse on the grounds that the real controversy has not been fully tried, we need not find a substantial probability of a different result. *Id.* at 16, 456 N.W.2d at 804. It is sufficient if the erroneous jury instructions had a significant adverse impact on the case and prevented the defendants from having a full, fair trial. *Air Wisconsin, Inc. v. North Cent. Airlines, Inc.*, 98 Wis.2d 301, 317-18, 296 N.W.2d 749, 756 (1980).

We conclude that the real controversy has not been fully tried because of the erroneous instructions and therefore reverse for a new trial in the interests of justice on the issues of interference with employee contracts, conspiracy to injure business under § 134.01, STATS., and conspiracy to breach Boley's fiduciary duty. In this case, the erroneous instructions permitted the jury to infer that the union activity was unlawful and could be considered as a breach of fiduciary duty and as an act in furtherance of the conspiracy without a finding of an unlawful purpose. As previously discussed, union organizing cannot be a basis by itself for a breach of fiduciary duty or for interference with employee contracts. The erroneous instructions had a significant adverse impact on the case and prevented the appellants from having a full, fair trial because the union activity is significant to the issues regarding conspiracy and interference with employee contracts. Without the proper instructions, there is a substantial danger that the jury believed the "raid" on Mitchell employees was itself actionable and a breach of Boley's fiduciary duty. We therefore conclude that the real controversy has not been fully tried in this case and reverse the judgment regarding those issues and remand for a new trial.

## CUSTOMER CONTRACTS

However, the erroneous jury instructions were not relevant to the claim that Sherman Electric, through the acts of its agent, Boley, intentionally interfered with Mitchell's customer contracts. The solicitation of customers did not involve any union organizing activity by Boley. Accordingly, we must address Sherman Electric's claim that there is insufficient evidence to support the jury's verdict that it intentionally interfered with Mitchell's customer contracts. On appeal, we will sustain the jury's verdict if there is any credible evidence to support it. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). This is even more true when the verdict has the trial court's approval. *Id.* If more than one reasonable inference can be drawn from the evidence, we must accept the reasonable inference drawn by the jury. *Id.* at 305-06, 347 N.W.2d at 598. We search for credible evidence to sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach. *Id.* at 306, 347 N.W.2d at 598.

Sherman Electric's contention of insufficient evidence is based on its argument that there was no evidence that Boley contacted customers on behalf of Sherman Electric before he left Mitchell and there was no evidence that Mitchell suffered any damages because Mitchell did not present evidence that he lost any customers. We are unpersuaded. Several of Mitchell's customers testified that Boley solicited them on behalf of Sherman Electric and told them Mitchell was going out of business and Sherman was taking over. Two of the customers also testified that the dates they thought they were contacted were before Boley quit working for Mitchell. In addition, Thomas Nielson, who formerly worked for a Mitchell customer, testified that his company did all of its electrical service projects with Mitchell before Boley contacted him. He further testified that while the company did not quit doing business with Mitchell, the company had Sherman Electric do some of its work including a light project after Boley's solicitation. Based on the testimony of Mitchell's customers, we conclude there is sufficient evidence that Sherman Electric, through the acts of its agent, Boley, intentionally interfered with Mitchell's customer contracts. We therefore affirm the jury verdict finding Sherman Electric intentionally interfered with customer contracts and the compensatory damage award of \$25,000 for the claim.

Finally, we must address whether the punitive damage award of \$10,000 for this claim can be upheld. Punitive damages require malicious,

outrageous, or wanton disregard of personal rights. *Jeffers v. Nysse*, 98 Wis.2d 543, 553, 297 N.W.2d 495, 499-500 (1980). The evidence suggests that Boley contacted Mitchell customers before he left Mitchell and told them that Mitchell was going out of business and Sherman Electric was taking over. Based on this evidence, we conclude that the jury could reasonably determine that this was an outrageous disregard of Mitchell's personal rights. Therefore, we affirm the punitive damage award of \$10,000 for this claim.

## CONCLUSION

In sum, we affirm the judgment finding Sherman Electric interfered with Mitchell's customer contracts and the damage awards relating to that claim. However, based on the erroneous jury instructions, we reverse the remainder of the judgment including the damage awards for the remaining claims under § 752.35, STATS., and remand for a new trial on those issues.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

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