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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Backus Electric, Inc.,

Plaintiff-Respondent,

Appeal No. 2019AP1651

-vs-

Hubbartt Electric, Inc., John M. Lepich, and Joseph D. Stauffer,

Defendants,

Manitowoc County Circuit Court Case No. 2013 CV 517

and

Jason L. Hubbartt,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT JASON L. HUBBARTT

Appeal from a Judgment and Order of the Manitowoc County Circuit Court, Case No. 13 CV 517, the Honorable Mark R. Rohrer, presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases

Federal Cases

Statutes

Jury Instructions

Federal Rules of Evidence

Secondary Authority

STATEMENT OF ISSUES PRESENTED

I. Did the trial court err when it permitted Plaintiff-Respondent Backus Electric, Inc.'s ("Backus Electric") economic damages expert to testify?

The trial court answered: No.

II. Should the jury's verdict be vacated because there was no evidence to show that Defendant-Appellant Jason L Hubbartt ("Hubbartt") caused $555,562 in damages to Backus Electric?

The trial court did not answer within the 90-day jurisdictional deadline and therefore is deemed to have answered: No.

III. Were punitive damages warranted and was the amount of punitive damages excessive?

The trial court did not answer within the 90-day jurisdictional deadline and therefore is deemed to have answered: No.

IV. Should Hubbartt receive a new trial because the real controversy was not tried?

The trial court did not answer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the parties' briefs can fully address all of the issues presented in this appeal.

Publication is requested to give guidance to the bench and bar regarding the application of Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), to expert opinions on business damages and the need for expert testimony to establish causation on matters outside the realm of ordinary knowledge.

INTRODUCTION

Defendant-Appellant Jason L. Hubbartt ("Hubbartt") was an entry-level non-union electrician who rose through the ranks to become vice president of Plaintiff-Respondent Backus Electric, Inc. ("Backus Electric"). Hubbartt and Backus Electric's owner, Don Backus, eventually discussed the possibility of Hubbartt purchasing Backus Electric, but they never were able to reach an agreement. In early April 2013, Don Backus terminated Hubbartt's employment and Hubbartt started Hubbartt Electric, Inc. Following a meeting in which Backus Electric announced to employees that the company was leaving the union, two other Backus Electric employees quit and joined Hubbartt Electric. Neither Hubbartt nor any of Backus Electric's other employees had any noncompete agreements preventing them from working for competing businesses.

Backus Electric thereafter brought the instant lawsuit against Hubbartt, Hubbartt Electric and the other two former Backus Electric employees, claiming *inter alia* that Hubbartt breached his fiduciary duty to Backus Electric and that the breach caused Backus Electric to cease operations in 2015. Following a trial, a jury found Hubbartt

liable to Backus Electric for breach of fiduciary duty, and awarded compensatory damages to Backus Electric in the amount of $555,562, which was more than the entire decline in "economic performance" that Backus Electric's expert witness testified that the company experienced after Hubbartt's departure. The jury also awarded $1 million in punitive damages to Backus Electric.

The jury's verdict should be vacated. Backus Electric's calculation of diminished "economic performance" is not a recognized measurement of damages, does not account for any other lawful factors that contributed to the company's performance, and should not have been admitted at trial. Because the jury's award of compensatory damages erroneously was based on this calculation, it should be vacated. In addition, there was insufficient evidence either to support sending the issue of punitive damages to the jury or to sustain the amount awarded. Finally, if this Court does not vacate the jury's verdict for the foregoing reasons, it should order new trial because the real matter in controversy was not tried.

STATEMENT OF THE CASE

Backus Electric was started in 1981 by Don Backus. (R.350:120; A-App. 127). Backus Electric grew over the years and hired some employees who were trained through the state's apprenticeship program, including Hubbartt. (R.350:121-22; R.353:147; A-App. 128-29, 228). Backus Electric did not enter into noncompete agreements with its employees. (R.350:152-53; A-App. 138-39).

In 2006, following a period when Backus Electric struggled financially and Hubbartt helped turn the business around, Hubbartt was made vice president of Backus Electric. (R.350:169-70; A-App. 141-42). Eventually, Don Backus and Hubbartt discussed the possibility that Hubbartt would buy Backus Electric; however, the two never were able to agree on a purchase price, with estimates differing by as much as $400,000 to $500,000. (R.350:129-31; R.353:76; A-App. 130-32, 224).

Even while insisting that he wanted to sell his business to Hubbartt, Don Backus terminated Hubbartt's employment at Backus Electric on April 10, 2013, after Hubbartt was late to the office. (R.351:11; R.353:145; A-App. 148, 227). The day before, Mary Jane

Backus, Don Backus's wife, found in Hubbartt's work truck an invoice from March indicating that Hubbartt was doing remodeling work and using the name Hubbartt Electric, Inc. (R.350:136-37; R.351:85-86; A-App. 134-36, 161-62). She relayed this information to Don Backus, although the testimony at trial was unclear about whether Mary Jane Backus's discovery factored into Don Backus's decision to terminate Hubbartt. (R.350:171-72; R.351:11, 44-45, 70-73, 85-86; A-App. 143-44, 148, 152-57). After Hubbartt explained to Don Backus that he was late to the office on April 10 because he was meeting with a customer off-site, Don Backus offered Hubbartt his job back. (R.351:12; A-App. 149).

According to Hubbartt, rather than return to his job, he started Hubbartt Electric, Inc. (R.353:154-55; A-App. 229-30). According to Don Backus, Hubbartt accepted his offer to return to work, but quit the following week after Don Backus held a meeting with employees on April 17, 2013 to inform them that he was making Backus Electric a non-union shop. (R.351:45, 73-76; A-App. 153, 157-160).

Three other Backus Electric employees quit after the April 17th meeting. (R.351:75-76; A-App. 159-60). Two of those employees, John

Lepich ("Lepich") and Joseph Stauffer ("Stauffer"), were unhappy with the decision to leave the union, and with years of Don and Mary Jane Backus's mistreatment of employees and customers. (R.351:102-03, 161-62, 177-78; R.352:205-06; A-App. 163-64, 171-72, 173-74, 202-03). After they left Backus Electric, they applied for new jobs through their union and were hired by Hubbartt Electric. (R.351:155-57; R.352:196-200; A-App. 168-70, 197-201).

Some of Backus Electric's customers began taking their business to competing electrical businesses, including the newly-formed Hubbartt Electric. (R.351:145-46, 181-82; A-App. 166-67, 175-76). Backus Electric's sales, which already had begun declining in the 2013 fiscal year, fell further. (R.354:36-37; A-App. 251-52). The next year, Backus Electric shut down its Green Bay site, which it had purchased four years before, and turned over all of its assets to Backus Electric and Automation, a company owned by Don Backus's son-in-law. (R.350:151-152; R.354:37-38; A-App. 137-38, 252-53). Backus Electric and Automation continues to serve customers that were previously served by Backus Electric, and Don Backus helps the company by pulling electrical permits. (R.351:37, 42; A-App. 150-51).

Backus Electric sued Hubbartt Electric, Hubbartt, Lepich and Stauffer (collectively, the "Defendants"), alleging that they conspired to harm Backus Electric. (R.21). A five-day jury trial was held on claims of breach of fiduciary duty and duty of loyalty against Hubbart, Lepich and Stauffer; aiding and abetting breach of fiduciary duty and duty of loyalty against Hubbartt; violation of Wisconsin Statutes section 134.01 (injury to business) against Hubbartt; and civil conspiracy against all of the Defendants. A claim of unjust enrichment against Hubbartt and Hubbartt Electric was reserved for judgment by the court.

Backus Electric presented its case against the Defendants over nearly four of the five days. Backus Electric relied on the testimony of its expert witness, former accountant Stephen Bischel ("Bischel"), to establish damages. Bischel prepared a report for Backus Electric that compared the company's "economic performance" for the four years prior to April 10, 2013, to the four years after that date. (R.213:7-9; A-App. 270-72). Because Backus Electric operated only two more fiscal years after April 10, 2013, Bischel imputed the company's performance from its 2014 and 2015 tax returns to the final two years

of his analysis. (R.352:74; A-App. 188). At trial, Bischel testified that he did not do a more typical analysis of damages, "[b]ecause I was asked to do something different." (R.352:51; A-App. 181). Bischel also conceded that he did not evaluate whether the Defendants' actions caused Backus Electric's losses and that "any and all instances or factors that may have contributed to a diminished performance by Backus Electric was included in [his] final outcome." (R.352:79; A-App. 192). Backus Electric did not call any former customers to testify about their reasons for ceasing to do business with Backus Electric.

When Bischel was asked at trial to comment on criticism by the Defendants' expert witness, Barbara Bader, that his "diminished economic performance" methodology is not recognized by professional journals as a generally accepted model or even a term accepted within the accounting profession, Bischel responded as follows:

> On occasion over the last 30 some years I run into people that have some sort of degree or some sort of certification, that's taught to them, and many times they think that's the only way to do things, and it's got to be done the way I learned.

> But I have lived through a lot of years and have done a lot of court testimony, and have been asked to do a lot of things that I would say weren't taught in a class. It is a fact situation that needs something different. I go back to my experience as to what we've done in real life, and I do calculations, damage calculations, loss calculations, earnings, losses, according to what makes sense that, that it fits the situation. You can't always fit the round peg into the square hole.
>
> And I think that's what she, she learned something and she wants people to use what she learned in her class. And I have never done that.

(R.352:55-56; A-App. 183-84).

Despite acknowledging that he did not follow any generally-recognized method for calculating business damages, Bischel testified at trial that his "economic performance" analysis was "similar to the loss profits, loss of income, loss of earnings, income determination" and that it was "a little bit like the valuation of a business." (R.352:15; A-App. 180). Counsel for Backus Electric also characterized Bischel's work as determining Backus Electric's "lost profits" and "diminution in value of the business" during questioning and closing arguments. (R.354:71, 188; A-App. 259, 265).

The jury found Hubbartt breached his fiduciary duty while employed at Backus Electric. (R.289:1; A-App. 301). In a 10-2 verdict,

the jury determined that Backus Electric suffered $555,562 in damages due to Hubbartt's breach. (R.289:2; A-App. 302). Also in a 10-2 verdict, the jury found that Hubbartt acted "maliciously toward Backus Electric, Inc. or in an intentional disregard of the rights of Backus Electric, Inc." and awarded Backus Electric $1 million in punitive damages. (R.289:7; A-App. 307). The jury did not find Hubbartt or any of the other defendants liable for any other causes of action. (R.289; A-App. 301-07). The trial court dismissed Backus Electric's remaining claim for unjust enrichment. (R.313; A-App. 308).

Following the jury verdict, Hubbartt filed a motion for a new trial or remittitur, in which he argued that the compensatory and punitive damages awards were excessive and based upon insufficient evidence. (R.302). This motion was deemed denied after the trial court failed to issue a decision within 90 days of the verdict, thereby losing jurisdiction. (R.321; R.357:9; A-App. 310, 312).

ARGUMENT

Multiple errors before, during and after the trial in this case call for the jury's verdict to be vacated. Bischel should not have been permitted to testify, pursuant to Wisconsin Statutes section 907.02, because his analysis was not a recognized method of assessing damages and did not assist the jury. Without Bischel's testimony, there is no support for the jury's compensatory damages award and, without compensatory damages, no basis for punitive damages.

Furthermore, the jury's verdict should be vacated because there was insufficient evidence that Hubbartt caused Backus Electric's losses. Backus Electric never presented any expert testimony regarding causation. The court's erroneous evidentiary decisions also prevented Hubbartt from countering Backus Electric's circumstantial narrative for why customers left Backus Electric and why Backus Electric's economic performance declined.

Lastly, the jury's verdict should be vacated because the real matter in controversy was not tried due to Backus Electric's multiple discovery violations and the trial court's erroneous pretrial evidentiary rulings, curtailment of Hubbartt's case, and *sua sponte* discipline

of defense witnesses and restrictions on their testimony during the trial.

I. The trial court erred when it permitted Backus Electric's economic damages expert to testify.

The trial court erroneously denied the Defendants' pretrial motion to preclude the opinion and testimony of Bischel, Backus Electric's economic damages expert, from being admitted on the ground that it did not meet the reliability standard of Daubert and Wisconsin Statutes section 907.02. Whether the court correctly applied the proper reliability standard to admit the testimony of an expert witness is reviewed independently. Seifert v. Balink, 2017 WI 2, ¶¶89, 95, 372 Wis. 2d 525, 568, 570, 888 N.W.2d 816, 838, 839. If the trial court applied the correct reliability standard, the subsequent decision to admit expert testimony is reviewed for an erroneous exercise of discretion. Id., ¶96, 372 Wis. 2d at 570, 888 N.W.2d at 839.

A. The trial court improperly permitted Bischel to testify regarding Backus Electric's post-April 10, 2013 diminished "economic performance."

Bischel did not perform an analysis of either Backus Electric's lost profits or loss of business value, which are the typical

methodologies for measuring damages in a loss-of-business case. See Susan K. Allen, et al., *Determining Damages in Business Litigation*, BUSINESS LITIGATION AND DISPUTE RESOLUTION IN WISCONSIN §§ 4.3-4.13 (3d ed. 2019). Instead, he calculated the difference in Backus Electric's "economic performance" for the four years prior to April 10, 2013 and the four years after April 10, 2013, per the request of Backus Electric's counsel. Based on this comparison, Bischel estimated that Backus Electric's "economic performance" diminished by $552,000 over that time period. (R.213:7; A-App. 270).

Bischel admitted at both his deposition and at trial that his opinions were attorney-driven and not in accordance with industry standard. That was clear from the following exchange at Bischel's deposition:

> Q Is economic performance, the calculation you did, is that a recognized method of determining damages?
>
> ....
>
> A I recognized it.
>
> Q If I wanted to figure out how this was done, what sort of – what treatise or book could I go to to determine how to calculate economic performance?
>
> A I don't know where you'd go.

> Q Did you use any specific methodology from any book or treatise in order to perform your calculations?
>
> A I don't generally or have never generally used books or treatises to do my expert witness work.
>
> Q So how do you determine that the method you used was an appropriate calculation of damages in this matter?
>
> A I discussed with [Backus Electric's counsel] what he wanted to know, which was how the business performed prior to April 10th and subsequent to April 10th. And then I used my 40 years of experience to calculate what that performance meant, what it was before and after April 10th.

(R.213:21; A-App. 275).

Bader, the Defendants' expert witness, criticized Bischel for not employing a generally accepted method of calculating damages for a loss-of-business case, such as a lost profit analysis, and for not analyzing which economic losses were caused by the Defendants versus other possible causes. (R.213:26-29; A-App. 278-81). Based on Bischel's deposition testimony and Bader's report, the Defendants moved to preclude Bischel's testimony and opinions because they did not meet the standard articulated in Daubert and codified by Wisconsin Statutes section 907.02.

The trial court denied the Defendants' motion, stating in relevant part as follows:

> In his report Bischel is comparing normalized income for Backus Electric, Inc, for a period of time from June 30, 2010 until June 30, 2013 against a period of time from June 30, 2014 until June 30th 2017. He is using the same methodology and factors in arriving at these figures during this time period. He is not saying that this data shows a loss in profits over this time. All it appears he is doing is pointing out the differences in income utilizing the same factors.
>
> Now Bischel has a vast amount of experience in the CPA field and has testified in over 200 cases involving testimony about loss profits and loss of income and loss of earnings. Clearly with this experience as a CPA he can disseminate and calculate this information.
>
> He can based on his accounting experience attest that this information is accurate.
>
> Therefore under Wisconsin Statute Section 970.02 he may render the opinion contained in his report. He though can be cross examined about his data by the defense as to the weight of his opinion in determining damages.
>
> Now this decision is premised on the fact that the plaintiff has not indicated to this Court that it's going to have Mr. Bischel testify beyond what is contained in his report. If Mr. Bischel's testimony were to venture into testifying that this is a proper measurement for accessing loss of profit damages the Court will have to take a closer look at this.

(R.355:18-19; A-App. 115-16).

The trial court erred when it permitted Bischel to testify regarding his theory of damages. Bischel's opinion was not based on a method of calculating damages recognized by his own profession or Wisconsin law, and therefore it should have been excluded by the trial court pursuant to Wisconsin Statutes section 907.02(1). Absent Bischel's testimony, there is no support for the jury's verdict on damages.

B. The trial court erred when it permitted Bischel to testify because his "economic performance" analysis is not a recognized method of analyzing damages and was not helpful to the jury.

Wisconsin Statutes Section 907.02(1) provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This statute codifies the standard articulated in Daubert. Seifert, ¶¶6-7, 372 Wis. 2d at 537, 888 N.W.2d at 823. Because Wisconsin Statutes

section 907.02(1) mirrors Federal Rule of Evidence 702, Wisconsin courts look to federal and state cases interpreting the text of Rule 702 or an analogous state law for guidance. Seifert, ¶55, 372 Wis. 2d at 551, 888 N.W.2d at 830.

When faced with a proffer of expert testimony, the trial judge must determine whether the expert is proposing to testify to (1) scientific, technical or other specialized knowledge that (2) will assist the trial of fact to understand or determine a fact in issue. Daubert, 509 U.S. at 592. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. Widespread acceptance of the reasoning or methodology is an important factor in determining whether particular evidence is admissible. Id. at 594.

To guide the analysis of whether there is a reliable basis for the expert's opinion, the Daubert Court provided a non-exhaustive list of factors: "(1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and

(4) whether the technique has been generally accepted in the scientific community." Id. at 592-93. The Federal Rules Advisory Committee added five more factors:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.
>
> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Seifert, ¶¶62-63, 372 Wis. 2d at 555-57, 888 N.W.2d at 831-32 (internal citations omitted).

The party seeking to "admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method and, therefore, are reliable. This requires some objective, independent validations of the expert's methodology. The

expert's assurances that he has utilized generally accepted scientific methodology is insufficient." Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998). An expert's opinion needs to be based on more than simply that expert's credentials. See Minasian v. Standard Chartered Bank, PLC, 109 F.3d 1212, 1216 (7th Cir. 1997). Even after determining that a witness is qualified and his or her opinion is reliable, the trial court must decide whether the expert's testimony as to the particular matter will "assist the trier of fact." Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005).

Bischel's opinion should have been excluded because it admittedly was not based on any recognized methodology that has been tested, reviewed or recognized within his professional community; it was developed expressly for the purposes of testifying in this case; it did not take into account alternate explanations for the results; and Bischel employed a methodology for the sole purpose of providing a favorable report for Backus Electric.

There are two established methods for calculating damages in cases where the defendants are alleged to have essentially destroyed the business. Those methods are (1) loss of business value and (2) lost

profits. See Allen, et al., *supra*. When calculating the alleged damage to Backus Electric, Bischel did not employ either of these methods, nor any other method that has been peer-reviewed and tested. (See R.355:6; A-App. 103). Bischel testified at his deposition that the reason he did not choose a widely-used and accepted method was because he "discussed with [Backus Electric's counsel] what he wanted to know, which was how the business performed prior to April 10th and subsequent to April 10th." (R.213:21; A-App. 275). He testified that he did not use any books or treatises to help determine how to calculate this concept of "economic performance" but "used [his] 40 years of experience to calculate what that performance meant, what it was before and after April 10th." (Id.).

This is the very definition of an impermissible *ipse dixit* expert opinion and should not have been admitted. Although Daubert provides a flexible standard, it still has teeth. State v. Giese, 2014 WI App 92, ¶19, 356 Wis. 2d 796, 806, 854 N.W.2d 687, 691. Where the only support for the accuracy of the expert's method is his or her own say-so, it should not be admitted. Giese, ¶20, 356 Wis. 2d at 807, 854 N.W.2d at 692.

The trial court did not evaluate Bischel's opinion against the Daubert factors before finding it admissible. Rather, the court relied solely on Bischel's experience. (See R.355:13-19; A-App. 110-16). Examination of the cases cited by the trial court in its decision demonstrates the error of the court's approach.

For example, State v. Smith, 2016 WI App 8, ¶3, 366 Wis. 2d 613, 618, 874 N.W.2d 610, 612, involved the reliability of expert testimony offered by the director of the Walworth County Advocacy Center regarding reactive behaviors common among child abuse victims. The trial court in Smith found that such expert testimony was "not amenable to the five factor test under *Daubert*" and, therefore, "look[ed] at other indicia of reliability." Smith, ¶8, 366 Wis. 2d at 618, 874 N.W.2d at 612. Because similar testimony had been admitted in Wisconsin and in jurisdictions governed by Daubert, and because the expert had "sufficient knowledge, skill, experience, training or education, in order to qualify her as an expert," the trial court found the testimony reliable and admitted it. Smith, ¶3, 366 Wis. 2d at 618-19, 874 N.W.2d at 612. This Court affirmed, agreeing that the testimony did not neatly fit the *Daubert* factors" and that the trial court therefore

"appropriately considered other factors bearing upon the reliability of the testimony." Smith, ¶9, 366 Wis. 2d at 622, 874 N.W.2d at 613.

In contrast to Smith, the trial court in the instant case never determined that the Daubert factors were inapplicable to Bischel's opinion, nor did it make any finding whether those factors would "fit" its analysis of Bischel's report. The court simply disregarded the factors altogether and determined that Bischel's testimony was reliable based upon Bischel's "vast amount of experience in the CPA field" and previous qualification as an expert witness "involving testimony about loss profits and loss of income and loss of earnings." (R.355:18-19; A-App. 115-16). However, there was no evidence that Bischel employed the same methodology inside or outside a court-room prior to this case, whether he had testified about a company's "economic performance" previously, or the circumstances under which any such testimony might have been accepted. Bischel's own testimony that this was "a fact situation that needs something different," (R.352:56; A-App. 184), indicates that his "economic performance" analysis is not something that he has either utilized or testified about previously. Nor did Bischel adequately explain why this

case needed "something different" from a recognized method of estimating damages. His only response to why he did not do a lost profit analysis was that "counsel decided what they needed me as an expert to do. And that's what I did." (R.352:51; A-App. 181).

The court also relied on Seifert to support its decision to allow Bischel's testimony. Seifert was a medical malpractice case in which the defendants objected to testimony by the plaintiffs' expert on the applicable standard of care. Seifert, ¶¶37-38, 372 Wis. 2d at 546, 888 N.W.2d at 827. Based on his extensive experience as a practicing, supervising and teaching obstetrician, the plaintiffs' expert testified that, in his opinion, the defendant doctor breached the standard of reasonable care for family practice doctors practicing obstetrics. Id., ¶¶38-49, 372 Wis. 2d at 546-49, 888 N.W.2d at 827-28. Defendants argued that this testimony was not the product of reliable methods pursuant to Wisconsin Statutes section 907.02(1) because it was solely based on the expert's personal experiences. Seifert, ¶37, 372 Wis. 2d at 546, 888 N.W.2d at 827.

The trial court in Seifert found that in rendering his opinion in the case, the plaintiff's expert employed "the ordinary methodology of

medicine: conscientious use of the thousands of instances in which he had delivered babies and made decisions about the care of individual patients and his teaching and hospital experiences relating to obstetrics." Seifert, ¶105, 372 Wis. 2d at 573, 888 N.W.2d at 840. The court found that the Daubert factors "were not helpful in evaluating this methodology because a medical expert's personal clinical experience is not subject to precise measurements." Seifert, ¶106, 372 Wis. 2d at 573, 888 N.W.2d at 840. The Wisconsin Supreme Court affirmed, noting that in medical malpractice cases, "the methodology often relies on judgment based on the witness's knowledge and experience. Accordingly, reliability concerns may focus on the personal knowledge and experience of the medical expert witness." Seifert, ¶123, 372 Wis. 2d at 578, 888 N.W.2d at 842–43.

Seifert is in stark contrast with the facts of this case. This is not a medical malpractice case and Bischel's personal experiences as an accountant are not the same as a doctor who regularly performs a medical procedure, observes the outcome and then relies on observation to inform future practice. Bischel's profession relies on a set of

standard methodologies and requires adherence to those methodologies to ensure accurate, consistent results. Bischel's personal experiences are irrelevant to the practice of accounting. Unlike in Seifert, where the Daubert factors were found not to fit the facts of the case, the Daubert factors are a perfect fit to evaluating whether the methodology of an accountant estimating lost profits or business value was appropriately applied to the facts of the case. Bischel should have used such a methodology instead of inventing one created by Backus Electric's counsel. Because he did not, his opinion was not reliable and should not have been admitted.

Finally, the trial court in this case looked to Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). It is difficult to see how Kumho Tire supports the trial court's decision. Although the Kumho Tire Court acknowledged that a trial court might have to go outside the Daubert factors, when appropriate, to determine whether certain expert opinion testimony would be admissible in appropriate cases, it made clear that Daubert should be applied where possible, and other factors should be consulted only where Daubert is not relevant due to the circumstances of the case. See Kumho Tire, 526 U.S. at 151.

In the instant case, no one argued, let alone showed, that the Daubert factors were not pertinent to assessing the reliability of Bischel's opinion. Rather, the trial court skipped this step and decided that Bischel's opinion was admissible based on Bischel's long career as an accountant. (R.355:18-19; A-App. 115-16). This is error.

C. Absent Bischel's opinion, there is no evidentiary support for the jury's decision to award $555,562 in compensatory damages to Backus Electric.

Without Bischel's opinion there is no support in the record for the jury's decision to award Backus Electric $555,562 in compensatory damages. The jury's award was $3,562 higher than the $552,000 that Bischel calculated as Backus Electric's diminished "economic performance" following April 10, 2013. This can be explained only by the jury adding to the damages sought by Backus Electric a bill to Cedar Crest Ice Cream, (R.262; R.247:4), which presumably already would have been accounted for in Bischel's numbers.

Because the trial court erred when it admitted Bischel's opinion, and because without Bischel's opinion there is no evidence that supports the jury's compensatory damages award, that award should be vacated.

II. The jury's verdict should be vacated because there was no evidence to show that Hubbartt caused $555,562 in damages to Backus Electric.

The jury's verdict also should be vacated because there was insufficient evidence to establish causation. In reviewing the sufficiency of evidence on appeal, this Court views the evidence in the light most favorable to the jury's verdict, and will sustain the jury's verdict if there is any credible evidence "under any reasonable view, that leads to an inference supporting the jury's finding." W. Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc., 2007 WI App 188, ¶13, 305 Wis. 2d 217, 226, 738 N.W.2d 114, 118.

Expert testimony was required to show that Hubbartt's alleged breach of fiduciary duty caused damage to Backus Electric; however, neither Bischel nor any other plaintiff's expert testified as to causation.[1] Moreover, even if expert testimony was not required to establish causation, there was no evidence introduced at trial to support an inference that Hubbartt was responsible for Backus

[1] Defendants' expert witness, Barbara Bader, testified that numerous factors, such as those set forth at pages 31-32, *infra*, should have been considered by Bischel. (R.354:33-43; A-App. 248-58).

Electric's entire post-April 10, 2013 performance. In addition, Hubbartt was prejudiced by the court's decision to prevent the Defendants from introducing evidence that overbilling by Backus Electric inflated its sales and caused it to lose customers and income.

A. Because no expert testified that Hubbartt's breach of fiduciary duty caused Backus Electric's losses, there was insufficient evidence to support the jury's verdict.

Breach of fiduciary duty requires proof of three elements: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach caused the plaintiff damage. Groshek v. Trewin, 2010 WI 51, ¶12, 325 Wis. 2d 250, 259–60, 784 N.W.2d 163, 167. Where the evidence establishes that the cause of the plaintiff's loss could be attributable to a condition where no liability attaches, and to one where liability does attach, it establishes only a "mere possibility" of causation and cannot support a jury verdict. Merco Distrib. Corp. v. Commercial Police Alarm Co., 84 Wis. 2d 455, 460, 267 N.W.2d 652, 655 (1978). A jury should not attribute all losses to a defendant's illegal acts when there is evidence of significant other factors. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1162 (7th Cir. 1983).

Because it is improper for a jury to attribute all losses suffered by a business to an employee's breach of fiduciary duty when there are significant other factors that could have contributed to the losses, a plaintiff needs an expert to assist the jury in separating out losses caused by the breach from those losses caused by other factors. Wisconsin law requires such expert testimony for all matters involving special knowledge, skill or experience on subjects that are outside the realm of ordinary experience. Wal-Mart Stores, Inc. v. Labor & Indus. Review Comm'n, 2000 WI App 272, ¶16, 240 Wis. 2d 209, 222, 621 N.W.2d 633, 638. "In situations where the factual question of causation is 'so complex or technical' that a lay fact finder 'without the assistance of expert testimony would be speculating,' the absence of expert testimony constitutes an insufficiency of proof." Id. Whether expert testimony is required to prove an element of a claim is a question of law that the appellate court reviews *de novo*. Id., ¶11, 240 Wis. 2d at 218, 621 N.W.2d at 637.

Based on the complexity of the matters in this case, an expert witness was necessary to establish that Hubbartt's alleged breach of fiduciary duty caused damage to Backus Electric, and to establish the

extent of the damage caused by that breach. Backus Electric did not provide such testimony, and therefore, there was insufficient proof to establish causation.

Bischel, Backus Electric's damages expert, testified that he was expressly asked to not provide an opinion regarding what caused Backus Electric's diminished economic performance after April 10, 2013. (R.352:52; A-App. 182). Accordingly, Bischel's analysis did not factor out customers that may have left Backus Electric and not gone to Hubbartt Electric, customers that may have left Backus Electric and gone to Hubbartt Electric for reasons unrelated to any breach of fiduciary duty, or any other alternate factors for why Backus Electric's "economic performance" may have declined after April 10, 2013. The way Bischel's analysis was performed, any and all factors that may have caused Backus Electric's diminished performance were included in the final outcome. (R.352:79; A-App. 192).

Because Bischel did not look at other potential factors that might have caused Backus Electric's losses, he did not look at the effect that Backus Electric's acquisition of Qwest Electric in Green Bay

had on sales, income or profits, or the effects of management's decision to close that site in 2014. (R.354:35-36; A-App. 250-51). Bischel did not explore why sales dropped between fiscal years 2012 and 2013, even though Hubbartt and the other Defendants still were employed by Backus Electric and Hubbartt Electric was not a competitor for most of that time. (R.354:36; A-App. 251). Bischel did not explore whether the related-party transfer of assets from Backus Electric to Backus Electric and Automation masked potential income that Backus Electric purposely chose not to pursue. (R.354:37-38; A-App. 252-53). In fact, Bischel did not explore any of the decisions made by management at Backus Electric to determine whether it was responsible for its own losses during this time, even though he acknowledged that the construction market is volatile. (R.352:86-87; R.354:39; A-App. 193-94, 254).

Backus Electric did not have any other experts establish causation, either. The jury therefore was left to speculate regarding exactly how much of the losses that Bischel testified Backus Electric experienced after April 10, 2013 were caused by Hubbartt's breach of fiduciary duty and how much were caused by other factors. As a result,

there was insufficient proof to support the jury's finding that Hubbartt caused $555,562 in damages to Backus Electric, and the verdict should be vacated. See Wal-Mart Stores, ¶16, 240 Wis. 2d at 222, 621 N.W.2d at 638.

B. Even if expert testimony is not required to establish causation in this case, there was insufficient evidence to support the jury's verdict that Hubbartt's breach of fiduciary duty caused $555,562 in damages to Backus Electric.

Even if this Court determines that expert testimony was not required to link Hubbartt's breach of fiduciary duty to Backus Electric's losses, there was insufficient evidence to support the jury's award in this case. Although Don Backus testified that many of his largest customers left Backus Electric for Hubbartt Electric, (R.350:135-36; A-App. 133-34), no one testified that those customers left because of anything that Hubbartt did in breach of his fiduciary duty while employed at Backus Electric. The only former Backus Electric customer whose testimony was admitted at trial[2] was

[2] The trial court granted a motion by Backus Electric to prevent Dr. Ron Ziolkowski from testifying about the reasons that he left Backus Electric for Hubbartt Electric, on the basis that he was a "minor customer." (R.353:40-41; A-App. 219-20).

stipulated to have left Backus Electric in 2010 due to a billing dispute. (R.353:176; A-App. 233). That customer patronized Eland Electrical until 2015 when it switched to Hubbartt Electric after a third-party referral. (Id.). Other Backus Electric customers also took their business to competing electrical companies other than Hubbartt. (R.351:181-82; R.353:159; A-App. 175-76, 231). Some Backus Electric customers who were included in Bischel's calculations of pre-April 10, 2013 economic performance stopped doing business with Backus Electric prior to Hubbartt's departure. (R.353:159; A-App. 231).

The only way that the jury could have determined that Hubbartt caused $555,562 in damages to Backus Electric would be by attributing the entire decline in economic performance calculated by Bischel to Hubbartt. Attributing the entire decline in economic performance to Hubbartt's breach of fiduciary duty ignores that other lawful factors also might have been responsible for the decline. Regardless of whether Hubbartt breached his fiduciary duty while employed at Backus Electric, there was nothing to stop Hubbartt from leaving Backus Electric and there was nothing Backus Electric could do to stop its customers from leaving — for Hubbartt Electric or for

any of the other competing electrical businesses in the area. Likewise, Backus Electric could do nothing to stop its employees from leaving to work for Hubbartt Electric.

Because some of Backus Electric's diminished economic performance from 2013 through 2017 could have occurred because of lawful as well as any allegedly unlawful activity attributed to Hubbartt, the jury's decision to attribute all of Backus Electric's alleged losses during that time to Hubbartt's breach of fiduciary duty impermissibly was based on speculation rather than a reasonable inference from the evidence. MCI Commc'ns Corp., 708 F.2d at 1162. The jury's award should be vacated.

C. Hubbartt was prejudiced when the trial court refused to permit him to introduce evidence that overbilling by Backus Electric inflated its sales numbers and caused its own diminished economic performance.

The trial court erroneously excluded evidence of customer over-billing by Backus Electric on the basis that it was "speculative" and "more prejudicial than probative." (R.355:32; A-App. 118). A court's evidentiary rulings are reviewed for whether the circuit court exercised its discretion appropriately. Morden v. Cont'l AG, 2000 WI

51, ¶81, 235 Wis. 2d 325, 369, 611 N.W.2d 659, 680. A court appropriately exercises its discretion if it applies the proper law to the pertinent facts and provides a reasonable basis for its ruling. Id.

Wisconsin Statutes section 904.03 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Because nearly all evidence operates to the prejudice of the party against whom it is offered, the test pursuant to Wisconsin Statutes section 904.03 is "not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" State v. Johnson, 184 Wis. 2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). Because the evidence of overbilling by Backus Electric was relevant to the issue of causation and did not tend to influence the outcome of the case by improper means, the trial court erred by excluding this evidence.

Backus Electric was on notice as early as January 2, 2014, that the Defendants' concerns about overbilling would be an issue in the

case, when Lepich stated in response to Backus Electric's interrogatories that he had numerous conversations with Hubbartt about leaving Backus Electric due to overbilling. (R.256:10). The trial court also knew that Backus Electric's overbilling was an issue as early as October 28, 2016, when Backus Electric filed a motion for a protective order, and the court appointed a referee to oversee this and other discovery disputes. (See R.107-09; R.136). Based on partial responses to the Defendants' request for billing records and invoices for Backus Electric, Hubbartt was able to calculate that Backus Electric had been overbilling customers for its employees' time. Hubbartt determined that Backus Electric had overbilled one of its customers, Carmeuse Lime Co., by a total of $22,004.43 from May 18, 2011, through October 31, 2012. (R.220:12, 22-27). Defendants' expert, Barbara Bader, included this information in her report and opined that such information should be considered as part of any analysis of the causation for Backus Electric's loss of sales. (R.213:31-32, 41-46; A-App. 283-84, 293-98). After the court ruled that evidence was inadmissible, the information was stricken from Bader's report and she was not permitted to testify about it. (See R.355:34-35; A-App. 120-21).

Evidence of Backus Electric's overbilling of customers was not unfairly prejudicial because it would not affect the jury's verdict by improper means. Any overbilling of customers by Backus Electric went directly to the issue regarding loss of customers and employees. The court opined that this evidence was speculative because the Defendants had information related to overbilling for only one customer and did not have evidence that the overbilling caused a widespread departure of Backus Electric's customers; however, this ignores the reality that overbilling can affect customers and sales by driving up costs and making Backus Electric less competitive without the customers actually knowing that they are being overbilled.

Furthermore, most of the concerns expressed by the court could have been explored by counsel for Backus Electric in cross-examination and argued to the jury. The court could have given a limiting instruction to prevent the jury from considering the evidence for an improper purpose. The trial court did not appropriately exercise its discretion when it denied the admission of evidence of Backus Electric's overbilling and unfairly prejudiced Hubbartt by preventing

him from presenting a full defense on the issue of causation. Accordingly, the jury's verdict should be vacated.

III. Punitive damages were not warranted and the amount of punitive damages is excessive.

In a 10-2 verdict, the jury found that Hubbartt acted maliciously toward Backus Electric or in intentional disregard of its rights, and awarded Backus Electric one million dollars in punitive damages. (R.289:7). This decision should be vacated. There was insufficient evidence from which the jury could find that Hubbartt acted maliciously or in intentional disregard of Backus Electric's rights. Further, the amount of punitive damages was excessive when viewed in light of the damage alleged by Backus Electric and Hubbartt's purported actions.

A. There was insufficient evidence to support a finding that Hubbartt acted maliciously or in intentional disregard of Backus Electric's rights.

Punitive damages should not have been awarded in this case because Backus Electric did not provide evidence that Hubbartt acted maliciously or in intentional disregard of Backus Electric's rights.

Whether there was sufficient evidence to submit the question of punitive damages to the jury is subject to independent review. Wischer v. Mitsubishi Heavy Indus. Am., Inc., 2005 WI 26, ¶ 32, 279 Wis. 2d 4, 22, 694 N.W.2d 320, 329.

A plaintiff may be awarded 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." Wis. Stat. § 895.043(3). In enacting Wisconsin Statutes section 895.043, the legislature intended to make punitive damages less readily available than under the common law. Roehl Transp., Inc. v. Liberty Mut. Ins. Co., 2010 WI 49, ¶194, 325 Wis. 2d 56, 128, 784 N.W.2d 542, 578. The statutory standard requires a plaintiff to prove the defendant's improper conduct: (1) was deliberate; (2) actually disregarded the rights of the plaintiff, "whether it be a right to safety, health or life, a property right, or some other right;" and (3) was "sufficiently aggravated to warrant punishment by punitive damages." Strenke v. Hogner, 2005 WI 25, ¶38, 279 Wis. 2d 52, 70, 694 N.W.2d 296, 304–05. A defendant acts with intentional disregard if he or she "acts with a purpose to cause the result or consequence" or "is aware

that the result or consequence is substantially certain to occur ...." Berner Cheese Corp. v. Krug, 2008 WI 95, ¶64, 312 Wis. 2d 251, 279–80, 752 N.W.2d 800, 814 (quoted source omitted).

There was no evidence in this case to show that Hubbartt acted maliciously toward Backus Electric. Acts are malicious for purposes of awarding punitive damages when they "are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury are intended." Wis-JI Civil 1707.1. There was no evidence that Hubbartt acted out of hatred, ill will, or a desire for revenge, or that he harbored such feelings toward Backus Electric. In fact, when asked on the special verdict whether the Defendants had acted maliciously toward Backus Electric in violation of Wisconsin Statutes section 134.01, the jury answered "No." (See R.289:6).

Backus Electric's counsel did not develop any argument at trial for how Hubbartt's breach of fiduciary duty was done maliciously or in intentional disregard of Backus Electric's rights, arguing instead that the Defendants "had lied" and should pay punitive damages to deter such conduct by others. (R.354:194-95; A-App. 266-67). In post-trial motions, Backus Electric relied on evidence related to Hubbartt's

alleged spoliation of evidence to support the punitive damages award. (R.304:4-5). However, the jury could not reasonably infer that any of the allegedly spoliated evidence, which at worst was alleged to simply be Backus Electric's business files, would have shown malice or an intentional disregard of Backus Electric's rights necessary to support punitive damages against Hubbartt.

Because there was insufficient evidence for a jury to find that Hubbartt acted with malice or in intentional disregard of any right of Backus Electric, the jury's decision to award punitive damages should be vacated.

B. The punitive damages award was excessive.

The one-million-dollar punitive damages award also should be vacated because it is excessive. Wisconsin courts use a six-factor test to evaluate whether punitive damages are excessive such that they violate due process. Kimble v. Land Concepts, Inc., 2014 WI 21, ¶¶46-47, 353 Wis. 2d 377, 399–400, 845 N.W.2d 395, 407. Those factors are as follows:

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. An appeals court independently reviews whether a punitive damages award is excessive. Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co., 2003 WI 46, ¶49, 261 Wis. 2d 333, 354-55, 661 N.W.2d 789, 799.

Considering the first factor, there was insufficient evidence that the grievousness of Hubbartt's actions warranted punitive damages. Courts are instructed to determine the reprehensibility of a defendant's actions by considering whether the harm was physical as opposed to economic, the conduct evinced a disregard of the health or safety of others, the target of the conduct was financially vulnerable, the conduct involved repeated actions or was an isolated incident, and the harm was a result of intentional malice, trickery, or deceit or mere accident. Id., ¶49, 353 Wis. 2d at 401, 845 N.W.2d at 408. The existence of any one of these factors may not be sufficient to support

a punitive damages award, but the absence of all renders any award suspect. Id.

There is no dispute that the only damages alleged to have been caused by Hubbartt's actions are economic and none of the actions implicated the health or safety of others. There was little evidence that Backus Electric was financially vulnerable and certainly no evidence that Backus Electric was any more financially vulnerable than the Defendants in 2013. The conduct complained of by Backus Electric for which Hubbartt was found liable involved only a single allegation against Hubbartt – that he breached his fiduciary duty. Lastly, although Hubbartt's actions were not accidental, neither did they involve intentional malice or trickery. Although Backus Electric argued that Hubbartt deceived Don and Mary Jane Backus, this was a contested issue and, even if there was evidence to support this finding, that evidence was insufficient to justify a one-million-dollar award.

Considering the second factor, the degree of malicious intent in this case is nonexistent, or at least minimal. As already has been discussed, there was no evidence that Hubbartt exhibited any malice toward Backus Electric, and the jury found that Hubbartt did not have

malicious intent in relation to the Wisconsin Statutes section 134.01 claim.

Considering the third factor, although the punitive damages award is within the caps provided by Wisconsin Statutes section 895.043(6), the compensatory damages award is not reasonably based on the evidence because there was no testimony providing a causal nexus between Hubbartt's actions and the amount of compensatory damages awarded in this case, and is the product of errors argued above. Because the compensatory damages award is excessive, the one-million-dollar punitive damages award is unreasonable and excessive as well.

Considering the fourth factor with respect to the potential damages from Hubbartt's acts, the amount that Backus Electric claimed in damages, via Bischel's report, already comprises all of the losses that it could have suffered no matter the cause. No further damage was possible.

The fifth factor, which compares the amount of the award to civil or criminal penalties that could be imposed for the same conduct, poses a more difficult question. Breach of fiduciary duty is not a crime

and does not carry any criminal penalty. Despite this, Backus Electric characterized the Defendants' actions as theft at various times during trial, and attempted mid-trial to amend their pleadings to add a Wisconsin Statutes section 895.446 claim based on Hubbartt's "theft" of computer files from Backus Electric. (R.245:1-3). The criminal penalties for such a violation range from $10,000 to $25,000. See Wis. Stat. §§ 939.50, 943.20. Even assuming that the value of the computer files would garner a $25,000 fine, the one-million-dollar punitive damages award is forty times that amount and clearly excessive.

The final factor to be considered is the wealth of the wrongdoer and ability to pay the punitive damages award. Reyes v. Greatway Ins. Co., 220 Wis. 2d 285, 303, 582 N.W.2d 480, 487 (Ct. App. 1998). Hubbartt testified that his income ranged between $110,000 and $150,000 in 2014 and 2015, and that he puts most of his income back into his business. (R.353:103; A-App. 225). He was unsure about his net worth, but testified that it might be about $100,000. (R.353:108; A-App. 226). Because there is insufficient evidence that Hubbartt acted with a degree of malice that was harmful to health and safety to

justify an award ten Hubbartt's net worth, the punitive damage award in this case was excessive and should be vacated.

IV. Hubbartt should receive a new trial because the real controversy was not fully tried.

This Court has the inherent authority to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The real controversy is not fully tried when a jury erroneously is not given the opportunity to hear important testimony bearing on important issues in the case. State v. Henley, 2010 WI 97, ¶81, 328 Wis. 2d 544, 581, 787 N.W.2d 350, 368. This Court can exercise its discretion to order retrial in such cases even where the alleged errors were not objected to or otherwise preserved at trial. Vollmer v. Luety, 156 Wis. 2d 1, 13, 456 N.W.2d 797, 803 (Ct. App. 1990). It is not necessary to first find that the outcome would be different on retrial. Id. at 19, 456 N.W.2d at 805.

A new trial on Hubbartt's breach of fiduciary duty is warranted in this case because the real controversy was not fully tried. In addition to the errors discussed above, the improper curtailment of Hubbartt's case and the trial court's *sua sponte* restrictions on witness

testimony and discipline of defense witnesses at trial prevented Hubbartt from presenting a full defense.

A. Hubbartt improperly was prevented from calling witnesses and pressured to enter into stipulations regarding the testimony of missing witnesses.

This was a five-day trial. Backus Electric presented its case over nearly four of those days. When the Defendants finally had a chance to introduce their evidence and their witnesses, the trial court almost immediately started pressuring them to curtail their presentation to fit within the trial schedule. Accordingly, Hubbartt was unable to present a full and fair defense.

The pressure started with the Defendants' first witness. Only eleven questions into that witness's testimony, Backus Electric objected on the ground of relevance. (See R.353:24-25; A-App. 207-08). The jury never heard from that witness again. With time concerns about the length of the Defendants' case apparently paramount, defense counsel was asked to make offers of proof for his witnesses' testimony so that the trial court and Backus Electric's counsel could decide whether the parties could enter into stipulations for those witnesses instead. (See R.353:30-43; A-App. 209-22).

The court limited what the Defendants' witnesses who were former customers of Backus Electric could testify about as follows: "Permit the fact that they were former customers. We will say when the relationship ended and will state because of receiving late statements, but we're not going beyond that period. That's it. Limited inquiry." (R.353:37-38; A-App. 216-17). The trial court also decided to not allow further testimony from the Defendants' first witness because he was "a minor customer" of Backus Electric, and "I would not find it pertinent because we can call every single little customer and every little smaller customer is saying the same thing. We'd be here for the next four weeks. I'm not going to allow it." (R.353:40-41; A-App. 219-20).

Next, defense counsel said that he planned to call the former owner of the Green Bay electric company purchased by Backus Electric to provide evidence of relative business values. (R.353:42-43; A-App. 221-22). The trial court asked Backus Electric to stipulate to the purchase price, which Backus Electric "absolutely" agreed to do. (Id.).

Following this third stipulation to the testimony of a defense witnesses, defense counsel expressed concern about how the jury might view the case if the Defendants ended a week-long trial with no witnesses. (R.353:44; A-App. 223). The trial court overruled this objection, stating that "[u]nder judicial economy, the stipulations … are appropriate." (Id.). In all, under the direction of the trial court, the parties entered into stipulations for four defense witnesses, all of whom had been named on the Defendants' witness list prior to trial. (R.161; R.353:175-77; R.284; A-App. 232-34).

By preventing the Defendants from introducing the testimony of a former Backus Electric customer because he was "minor" and forcing the Defendants to stipulate to the testimony of four additional witnesses, the trial court prevented Hubbartt from putting on a full and fair defense to the charges against him. It was patently unfair for the judge to permit Backus Electric to use up nearly four of the five days reserved for trial and then pressure the Defendants to curtail their case due to concerns about "judicial economy." Although a court has the authority to manage its calendar and the technicalities of trial, it cannot do so in a way that does not afford all parties an equal

opportunity to present their cases. The trial court's actions meant that the real controversy was not fully tried because the Defendants were not permitted to fully and adequately defend themselves.

B. The trial court improperly restricted and struck defense witness testimony.

The trial court improperly restricted the testimony of two defense witnesses, expert witness Barbara Bader and lay witness Nicholas Reimann, even going so far as to threaten, in the presence of the jury, to sanction Reimann. This was improper and interfered with the Defendants' presentation of their case. The court's actions with respect to these two witnesses, which included a *sua sponte* motion to strike some of Bader's testimony that went directly to matters that Backus Electric's expert had testified about, were unfair and prevented the matter from being fully tried.

Backus Electric raised its first objection to Bader's testimony when she stated that because Bischel had not performed a lost profits analysis, his report "serves no purpose to the Court and shouldn't even be provided." (R.354:11; A-App. 238). Backus Electric objected on the ground that Bader's testimony invaded the province of the judge, with counsel misquoting her as saying that "Mr. Bischel's report should not

have even been permitted." (R.354:12-13; A-App. 239-40). The trial court agreed that Bader's testimony was "impermissible in terms of whether or not something should be considered by the Court" and struck that part of her answer. (R.354:14-17; A-App. 241-44).

The court then *sua sponte* instructed Bader that she needed to "stay away from the word damages" when answering questions because "damages" were an issue for the jury to decide. (R.354:18; A-App. 245). When Bader pointed out that "lost profits economic damages" is a term of art within her profession, the court said that she could use the term "economic damages" as long as she did not use the word "damages" alone. (R.354:22, 24; A-App. 246-47).

The court's attempt to prevent Bader from using the word "damages" in her testimony because that is a determination for the jury was clearly erroneous and prejudicial. Wisconsin law recognizes that an expert opinion "is not objectionable merely because they cover one of the ultimate facts to be determined by the jury." Kreyer v. Farmers Co-op. Lumber Co., 18 Wis. 2d 67, 76, 117 N.W.2d 646, 651 (1962) (quoted source omitted). Bischel was permitted to use the word "damages," which included speculating that there "[p]robably would

been [*sic*] a hundred thousand dollars more in damages" if he had used a longer period of time for his calculations, without any *sua sponte* intervention by the court. (See R.352:90, 96; A-App. 195-96). Failure to permit Bader to testify with respect to Backus Electric's "damages" was an erroneous exercise of discretion. See State v. Hutnik, 39 Wis. 2d 754, 763, 159 N.W.2d 733, 737 (1968) ("If a judge bases the exercise of his discretion upon an error of law, his conduct is beyond the limits of discretion.").

In addition, when Bader testified that the absence of any non-compete agreement between Hubbartt and Backus Electric was a factor that should be considered to determine the cause of Backus Electric's decline in performance, the trial court entered its own objection "not to say anything about the noncompete" and struck her answer. (R.354:40-42; A-App. 255-57). It is unclear why the court struck Bader's testimony about Backus Electric's failure to have non-compete agreements in place, which Don Backus testified about on the first day of trial. (R.350:152-53; A-App. 138-39). The court did not stop Bischel from testifying regarding Backus Electric's lack of non-compete agreements. (See R.352:69-71; A-App. 185-87).

The court also restricted the testimony of defense witness Reimann, who worked at Backus Electric and testified that it was his computer files that were found and later removed from Hubbartt's computer. When Reimann testified that he thought the discovery of Backus Electric's electronic folders on Hubbartt's personal computers resulted from "a great misunderstanding," the trial court instructed him not "to give opinions for either side of what you think of what may have or may not have occurred for either side." (R.354:103; A-App. 260). When Reimann subsequently offered his opinion that Backus Electric files unintentionally ended up on Hubbartt's computer, the trial court threatened, in the presence of the jury, to sanction him with a $500 fine. (R.354:103-04, 106-07; A-App. 260-63).

In addition to being both improper and prejudicial for the court to threaten to sanction a witness in front of the jury, the court's action was wrong with respect to the law. Wisconsin Statutes section 907.01 permits a lay witness to testify as to an opinion that is (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical or other specialized

knowledge. Here, Reimann was trying to explain how Backus Electric's files could have ended up on Hubbartt's personal computer without Hubbartt's knowledge: because they were contained on a USB drive that Reimann gave to Hubbartt for safekeeping while he was incarcerated. This testimony both was within Reimann's personal knowledge and was helpful to a fact determination as to whether an unintentional transfer of company files constituted a breach of Hubbartt's fiduciary duty, as well as whether the jury should apply the spoliation inference to his conduct. Therefore, it was admissible pursuant to Wisconsin Statutes section 907.01.

The trial court recognized the admissibility of lay opinion when it permitted Stauffer to answer a question from Backus Electric regarding whether he thought it was inappropriate for Hubbartt to use Hubbartt Electric invoices on side jobs. (R.351:123; A-App. 165). The court also did not make a *sua sponte* objection when Don Backus described it as "done intentionally" when Backus Electric customers left to go to Hubbartt Electric. (R.350:154; A-App. 140). By limiting and threatening sanctions against Reimann for offering the same type

of testimony, the court erroneously exercised its discretion. See Hutnik, 39 Wis. 2d at 764, 159 N.W.2d at 737-38.

The trial court's limitations and open admonishments of these defense witnesses prejudiced the Defendants' ability to present their case and prevented the real controversy from being fully tried. The trial court unfairly limited defense witnesses in the terms that they could use in their testimony without putting similar limitations on Backus Electric's witnesses. The trial court's threat to sanction Reimann for his testimony, which occurred in front of the jury, negatively impacted his credibility on the issue of whether Hubbartt intentionally or unintentionally wound up with Backus Electric's files on his computer. The trial court's admonishments of Bader also likely affected how the jury viewed her testimony when compared to the testimony from Backus Electric's expert. Plaintiff's counsel pounced on the court's treatment of Bader during closing arguments, and encouraged the jury to view her testimony as suspect because of the trial court's interactions with her on the witness stand. (See R.354:186; A-App. 264).

Because the court's limitations on the testimony from these two witnesses was wrong and prejudicial, the real controversy was not tried and a new trial is warranted in this case.

C. The trial court erroneously declined to sanction Backus Electric for numerous discovery violations, which prejudiced the Defendants' ability to present their case at trial.

From the start, Backus Electric obstructed discovery and refused to share information to support its claims, prompting the Defendants to file multiple discovery requests, motions to compel, motions for sanctions, and, after Plaintiff failed to provide discovery that was ordered by the court, motions for dismissal due to discovery violations.(See R.95; R.126; R.147; R.162; R.193; R.202; R.209; R.235). In one of the more egregious examples of Backus Electric's violations, Backus Electric insisted for more than two years that it did not have any employee handbooks. (R.236). On the eve of trial, however, Backus Electric listed an employee handbook as well as other previously-undisclosed documents as exhibits. (R.236; R.240). Following the Defendants' motion to dismiss as a sanction for these blatant violations, the only sanction imposed by the trial court was

that Backus Electric could not introduce at trial documents that it had not produced in discovery. (R.241:2; R.355:39-40; A-App. 122-23).

In addition, based on evidence of overbilling by Backus Electric, the Defendants sought QuickBooks information for other customers to demonstrate an alternative reason for why Backus Electric customers and employees left Backus Electric, and to challenge Backus Electric's damages estimates. (R.149:5). After stalling to provide this information, a year after the information was requested Backus Electric claimed that the computer containing the company's QuickBooks program had been destroyed and such information could not be provided. (R.211). The Defendants sought dismissal of the lawsuit due to Backus Electric's spoliation. (R.235). This motion was denied. (R.241:2; A-App. 300). The trial court subsequently prevented the Defendants from introducing evidence of Backus Electric's overbilling at trial on the basis that Hubbartt only was able to establish that one customer had been overbilled, that "it is not known if other the customers [*sic*] are aware of the potential over-billing" and, in the court's recollection, "the amount of over-billing was an insignificant

amount of money when looking at all of the billing." (R.355:31; A-App. 117).

The cumulative prejudicial effect of Backus Electric's numerous discovery violations and spoliation of evidence, combined with the trial court's erroneous decision to permit Bischel to testify about his attorney-driven measure of Backus Electric's "economic performance," limitations on defense witness testimony, and threats to sanction the Defendants' witnesses in open court, prevented the real controversy from being tried in this case. See State v. Davis, 2011 WI App 147, ¶35, 337 Wis. 2d 688, 707, 808 N.W.2d 130, 140-41 ("cumulative effect" of errors warrants new trial when real controversy not tried). Accordingly, a new trial is necessary to permit Hubbartt to provide a full defense to the claim of breach of fiduciary duty.

CONCLUSION

For the foregoing reasons, the jury's verdict should be vacated or the case should be remanded for a new trial on the breach of fiduciary duty claim against Hubbartt.

Dated at Brookfield, Wisconsin on December _____, 2019.

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BRIEF CERTIFICATION

I certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of those portions of the brief referred to in sections 809.19(1)(d), (e), and (f) is 10,834 words.

Dated at Brookfield, Wisconsin on December _____, 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief of Defendant-Appellant Jason L. Hubbartt which complies with the requirements of Wisconsin Statutes section (Rule) 809.19(12).

I further certify that:

This electronic Brief of Defendant-Appellant Jason L. Hubbartt is identical in content and format to the printed form of the Brief of Defendant-Appellant Jason L. Hubbartt filed with the court and served on all opposing parties.

A copy of this certificate has been served with the paper copies of this Brief of Defendant-Appellant Jason L. Hubbartt filed with the court and served on all opposing parties.

Respectfully submitted this ___ day of December, 2019.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.62 (2) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court necessary for an understanding of the brief; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised in the brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Brookfield, Wisconsin on December _____, 2019.

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