

No. A12-0713

State of Minnesota
In Supreme Court

John Gieseke,
On Behalf of Diversified Water Diversion, Inc.,

Respondent,

vs.

IDCA, Inc., et al.,

Appellants.

RESPONDENT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. LEGAL ISSUES

A. **Whether Tortious Interference with Prospective Economic Advantage is a Valid Tort Claim in Minnesota?**

Rulings Below: The district court and the Court of Appeals held in the affirmative.

Authority: *Wild v. Rarig*, 234 N.W.2d 775, 790 & n.16 (Minn. 1975); *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982); *Witte Transp. Co. v. Murphy Motor Freight Lines, Inc.*, 193 N.W.2d 148 (Minn. 1971); 4 *Minnesota Practice* CIV JIG 40.35 (2006).

B. **Whether the Trial Court Erred in Denying Appellants' Motion for Judgment as a Matter of Law.**

Rulings Below: The district court and the Court of Appeals held in the negative.

Authority: *Ouellette v. Subak*, 391 N.W.2d 810, 817 (Minn. 1986); *Moorhead Econ. Dev. Authority v. Anda*, 789 N.W.2d 860 (Minn. 2010).

C. **Whether the Trial Court Abused its Discretion in Denying Appellants' Motion for New Trial.**

Rulings Below: The district court and Court of Appeals held in the negative.

Authority: *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549 (Minn. 2008); *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010).

STATEMENT OF THE FACTS

Background/ Relationship between Parties

For the past twelve years, Michael Hogenson, the man behind IDCA¹ has been on a mission to destroy his brother Arthur and Jack Gieseke (“Gieseke”) and their company, Diversified Water Diversion, Inc. (“Diversified”). Michael Hogenson owns Standard Water Control Systems, Inc. (“Standard”). Arthur Hogenson and Gieseke are former employees of Standard. Transcript, p. 103. In 2001, Gieseke and Arthur Hogenson left Standard and formed Diversified, a direct competitor of Standard.

In December 2001, Standard sued Diversified in Hennepin County District Court. That case resulted in a settlement that included a nondisparagement clause and an attorney’s fees provision. Transcript, p. 106. After learning that Michael Hogenson and Standard were disparaging Diversified, Diversified sued Standard. That case went to trial and the Court awarded \$30,000 in punitive damages plus attorney’s fees against Standard. Transcript, p. 107. Standard appealed to the Minnesota Court of Appeals which affirmed the decision in September 2008. Transcript, p. 364 (Stipulations read by Court). Standard then sought review by the Minnesota Supreme Court, which request was denied. Transcript, p. 109. Thus, by December 2008, Standard had exhausted its appeals and Diversified held a judgment against Standard in the amount of \$67,717.46. Transcript, p. 364 (Stipulations).

¹ Michael Hogenson created IDCA and put it in his wife Debra’s name, making her the sole shareholder, officer and director. The district court pierced IDCA’s corporate veil holding both Michael and Debra Hogenson personally liable for IDCA’s actions. The finding regarding piercing the corporate veil is not before this Court. A.29-30.

The Fallon Judgment

In 2007, Michael Hogenson became aware of a \$700,000 default judgment that had been entered against his brother Arthur (“Fallon Judgment”). Through another company of his, MWH Properties, LLC, Michael Hogenson bought the Fallon Judgment from Thomas Fallon. Transcript, pp. 110, 176; see also Transcript, p. 364 (Stipulations). Michael Hogenson then started foreclosure proceedings and executed on Arthur’s assets, including his 50% interest in Diversified. There was a Sheriff’s sale on January 30, 2009. Transcript, pp. 110-11; Transcript, p. 365 (Stipulations). IDCA purchased Arthur’s Diversified stock at the foreclosure sale.

The Fallon Judgment was vacated on jurisdictional grounds in August 2010. Transcript, p. 365 (Stipulations). The events that form the basis of the present case took place between the time that Michael Hogenson acquired the Fallon Judgment in May 2008 and the time that judgment was vacated in August 2010. In that interval, Michael Hogenson, pulling all of the strings for IDCA, did his best to put Diversified out of business, and he ultimately succeeded.

Facts Relevant to Tortious Interference Claim

Diversified was formed in December 2001. Transcript, p. 191. Diversified often competed head-to-head with Standard and was successful. Transcript, p. 199. Diversified was able to obtain about 100 jobs a year from 2002-2008, with revenues consistently around \$400,000. Transcript, p. 209. Diversified was profitable in 2008. Transcript, p. 225. Diversified built a reputation that was reflected in a consistent “A” or “B” rating on Angie’s List. Transcript, p. 207.

After purchasing the Fallon Judgment, Michael Hogenson began to take steps to insert himself in the affairs of Diversified. Gieseke testified that given the uncertainty about Michael Hogenson's ownership of the stock and his intermeddling in the company, he was unable to conduct business. Transcript, p. 249. A week after the Sheriff's sale, on February 9, 2009, Michael Hogenson filed a Notice of Change of Registered Office, changing Diversified's registered office address to Standard's office. Transcript, pp. 1120-21; Trial Ex. 1. Michael Hogenson was not an officer, director or employee of IDCA and had no official authority to act on behalf of IDCA, much less on behalf of Diversified. Transcript, pp. 115, 118.

The next day, February 10, 2009, Michael Hogenson contacted North Suburban Towing and instructed them to go to Arthur Hogenson's private residence and seize equipment belonging to Diversified. Transcript, p. 122. The equipment seized was taken to Standard's building, not to IDCA. Transcript, p. 126.

After its equipment was seized and taken away, Diversified commenced this lawsuit to get its equipment back. Because IDCA was purporting to exercise rights as a shareholder of Diversified, the original complaint included claims under Minn. Stat. § 302A.751. IDCA responded by suing Diversified's counsel, Fredrikson & Byron, by way of third-party complaint. Transcript, p. 178. This frivolous move was ultimately voluntarily withdrawn.

On February 18, 2009, less than a month after purporting to purchase Arthur's interest in Diversified, and a week after changing Diversified's registered office and taking control of Diversified's equipment, Debra Hogenson purporting to act on behalf of

Diversified as its “Vice President” entered into a “Settlement Agreement and Mutual Release” with her husband Michael Hogenson on behalf of Standard Water, to “settle” the \$67,000 judgment for \$12,000. Transcript, p. 128. Deb Hogenson was never an officer or director of Diversified. Transcript, p. 193. Furthermore, Deb Hogenson admitted that she understood Standard was fully capable of paying the full amount of the judgment (\$67,000) and that the money would be helpful to Diversified. Transcript, pp. 175-76.

On March 19, 2009, IDCA brought a motion in the Diversified-Standard case to disqualify Fredrikson & Byron as counsel for Diversified and to prevent the judgment against Standard from being satisfied out of the supersedeas bond that had been posted by Standard. Michael Hogenson signed a sworn affidavit in connection with this motion in which he revealed his true intent. He stated that IDCA intended to “take over Diversified, settle Diversified’s outstanding liabilities and assets, then shut the company down permanently.” Transcript, p. 119.

On May 18, 2009, the district court denied the motion to disqualify counsel and ordered release of the bond to pay the judgment. Trial Ex. 27. The parties stipulated that IDCA’s actions in this regard cost Diversified \$8,265 in attorney’s fees. Transcript, p. 365 (Stipulations). IDCA also agreed to drop its claims against Fredrikson & Byron. The case then was stayed by agreement until resolution of the appeal on the underlying Fallon Judgment. That judgment was overturned on August 27, 2010. Transcript, p. 365. IDCA finally returned Diversified’s equipment on December 10, 2010. Id.

Facts Relevant to Damages

Diversified had been in business since 2000. Diversified was able to obtain 100 jobs per year and generate revenues in the range of \$400,000 consistently. Transcript, pp. 199, 209. In 2006, Diversified had gross revenues of more than \$450,000 and a gross profit of \$289,571, after paying the officers \$45,984. Transcript, p. 216. Appellants' accounting expert admitted payments to the officers in small, closely held corporations are interchangeable with profit. Transcript, p. 363 (testimony of Michael Bromelkamp). For example, in 2004, Diversified showed a net loss for tax purposes of \$34,000 but paid officer compensation of \$82,360. Mr. Bromelkamp acknowledged this was the equivalent to profit – it all depends on how the officers want to account for it. Transcript, p. 363.

Michael Hogenson also admitted there is value to being consistently in business because of the ability to build reputation and get word-of-mouth referrals. Transcript, p. 104. Diversified had been successful and had built a solid reputation as evidenced by its “A” and “B” rating on Angie’s List. That rating changed to an “F” as a result of Michael Hogenson’s actions. Transcript, p. 207.

Gieseke testified about his expectations if Diversified had been able to operate in 2009-2011. Michael Hogenson admitted that 2009 was a very good year in the drain tile business, despite the general economy still being sluggish. Transcript, p. 334. This was due to significant rainfall that year. *Id.* Nevertheless, Gieseke was not projecting growth in revenues, but merely expecting them to remain constant, consistent with what

Diversified had achieved for many years. Thus, gross revenue for purpose of estimating damages was expected to be \$400,000. Transcript, pp. 125-26.

From gross revenue, cost of goods sold is deducted to arrive at gross profit. Cost of goods sold includes the products used, such as drain tile, gravel etc. Transcript, p. 209. Gieseke testified that based on his experience (as backed up by the tax returns used at trial) the cost of goods sold represented about 25-30% of gross revenue. Transcript, pp. 213, 226. Thus, with gross revenue of \$400,000, the estimated cost of goods sold would be \$120,000 (using the high end of the estimate, 30%). *Id.* Appellants' accounting expert had no basis to challenge the reasonableness of this estimate. Transcript, p. 360.

Once gross profit is determined, other business expenses must be deducted. Gieseke discussed these expenses in detail and provided estimates for business going forward. For example, although he testified that Diversified did not need to rent a building, Gieseke allowed for a rental expense consistent with past practice. Transcript, pp. 227-28. One of the more significant expenses is advertising. However, Diversified's advertising expenses had been falling, from \$80,000 in 2004 to \$55,000 in 2005 and \$46,528 in 2006, when Diversified had its biggest year from a revenue standpoint. Transcript, pp. 215, 217; Transcript, p. 363. Gieseke testified that he expected these expenses to continue to fall if Diversified had been able to operate in 2009 and 2010. This testimony is consistent with Michael Hogenson's testimony regarding his own experience with Standard. When asked about Standard's Yellow Pages advertising expenses, Michael Hogenson said he was not spending "as much as [he] used to."

Transcript, p. 104. Gieseke provided the jury with a complete roadmap to calculate expected profits in 2009-2011. Transcript, p. 230.

ARGUMENT

I. TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS.

A. Minnesota Recognizes a Cause of Action for Tortious Interference with Prospective Economic Advantage.

In *Wild v. Rarig*, this Court stated that “[w]rongful interference with contract and wrongful interference with business relationships, also known as interference with contractual relations and interference with prospective advantage, are actionable tort claims in Minnesota.” 234 N.W.2d 775, 790 & n.16 (Minn. 1975) (citation omitted). The Court relied in part on its opinion in *Witte Transp. Co. v. Murphy Motor Freight Lines, Inc.*, 193 N.W.2d 148 (Minn. 1971), in which it stated: “This Court has long recognized that there lies an action for the wrongful interference with *non-contractual* as well as contractual business relationships.” 193 N.W.2d at 151 (emphasis added). In 1982, this Court again recognized the cause of action. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982), citing Restatement (Second) of Torts § 766B.

After *Wild* and *United Wild Rice*, the Court of Appeals repeatedly addressed the subject tort without ever questioning whether it was a recognized cause of action. The court simply applied the elements and in each case found that the claim did not apply. *See Midway Manor Conv. & Nursing Home, Inc. v. Adcock*, 386 N.W.2d 782, 788 (Minn. Ct. App. 1986) (refusal by Doctor and social worker to refer patients to a specific nursing home was not “wrongful” in that the doctor and social worker did not act with bad

motives); *Glass Serv. Co. v. State Farm Mut. Auto Ins. Co.*, 530 N.W.2d 867 (Minn. Ct. App. 1995) (State Farm’s policy of advising potential glass repair customers that they could be liable for a part of the glass repair costs if they chose Glass Service Company not “wrongful” because statements were truthful).

The confusion was created in *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560 (Minn. Ct. App. 2001). There, citing *United Wild Rice*, and with no mention of *Wild* or *Witte Transp.*, the Court of Appeals noted that the Supreme Court had only recognized the tort of prospective contractual relations and not tortious interference with business expectancy. *Id. at* 569 n.4. The Court of Appeals in the present case interpreted *United Wild Rice* differently: “[O]ur reading of *United Wild Rice* informs us that, in *United Wild Rice*, the supreme court did not recognize a new tort but rather referred to the subject tort by two new names – ‘wrongful interference with ...prospective contractual relations’ and ‘”intentional interference with prospective contractual relations.”’ R9. The Court of Appeals referred back to the Restatement which this Court relied on for the elements of the tort, and the comments regarding the type of relations covered. *See* Restatement (Second) of Torts § 766B cmt c. Among other things, the comments indicate that the expression, prospective contractual relations, is not to be interpreted “in a strict, technical sense.” *Id.* Included are interferences with the opportunity to sell goods and services “and any other relations leading to potentially profitable contracts.” *Id.* Also included “is interference with a continuing business.” *Id.* As this Court stated in *Wild*, tortious interference with prospective advantage “protects an interest in the reasonable expectation of economic advantage.” 234 N.W.2d at 790, n.16.

Furthermore, the Restatement notes that the English common law decisions from which this tort developed “extended the same principle to interference with *business relations* that are merely prospective and potential” and that under the tort, liability was imposed for interference with business expectancies. Restatement (Second) of Torts § 766B cmt. c. Based on this Court’s decisions in *Wild, Witte* and *United Wild Rice*, as well as the Restatement, the Court of Appeals held that this Court has already recognized interference with prospective economic advantage as a valid tort. R11.²

B. The Elements of the Claim and Changes Proposed by Appellants.

Perhaps the best recitation of the individual elements of a claim for tortious interference with prospective business or economic advantage was set forth by the United States District Court in *Lamminen v. City of Cloquet*, 987 F. Supp. 723 (D. Minn. 1997). Applying Minnesota law and citing *United Wild Rice*, the Court held that to recover for tortious interference with business, a plaintiff must show: (1) the existence of a reasonable expectation of economic advantage; (2) defendants’ knowledge of that expectation of economic advantage; (3) that defendants wrongfully and without justification interfered with plaintiff’s reasonable expectation of the economic advantage; (4) that in the absence of the wrongful act of defendants, it is reasonably probable that plaintiff would have realized the economic advantage or benefit; and, (5) that plaintiff

² The Court of Appeals also took note of the United States District Court’s opinion in *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp.2d 823 (D. Minn. 2012) in which the Court (J. Nelson) reviewed *Wild, Witte, United Wild Rice* and *Harbor Broad.* and concluded that “Minnesota recognizes a claim for wrongful interference with non-contractual business relationships, that is, a claim of tortious interference with prospective advantage.” R11.

sustained damages as a result of this activity. 987 F. Supp. at 732. The Court of Appeals adopted these same elements in *Harbor Broad. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 (Minn. Ct. App. 2001). See also *Glass Serv. Co. v. State Farm Mut. Ins.Co.*, 530 N.W.2d 867, 871 (Minn. Ct. App. 1995) (“To establish a claim for tortious interference with prospective business relations, a plaintiff must prove the defendant intentionally committed a wrongful act which improperly interfered with the prospective relationship”); *Moore v. Hoff*, 821 N.W.2d 591 (Minn. Ct. App. 2012) (characterizing the tort as “intentional interference with prospective advantage”).

Appellants contend that this tort should be limited to existing, specifically identifiable relationships. Appellants’ Brief at 28. However, none of the Minnesota cases discussing this tort imposes that requirement. In *Glass Serv. Co.*, the plaintiff complained about State Farm’s practice of advising policyholders making replacement glass claims that, due to Glass Service Company’s pricing, part of the cost might not be covered under the insurance policy. There is nothing in the decision that indicated Glass Service Company was required to identify specific customers – the complaint was that *any* potential glass customer who called State Farm would be steered away from Glass Service Company. The court found that State Farm’s statements were true and based on a legitimate business interest and, thus, to the extent that there was any interference with plaintiff’s business, it was not “wrongful” and the claim failed. Similarly, in *Midway Manor Conv. & Nursing Home, Inc. v. Adcock*, 386 N.W.2d 782 (Minn. Ct. App. 1986), the plaintiff nursing home complained that a doctor and social worker had intentionally interfered with its business by refusing to steer patients to its facility. Again, there was

no discussion about particular patients – indeed, the claim was about unknown future patients. The court applied the elements and found the alleged interference was not wrongful.

If the tort were limited to specifically identifiable third parties, many businesses would be left without a remedy, even for intentional, admittedly wrongful interference. For example, a restaurant or retail store does not have readily identifiable future customers. These businesses only know that they have, in the words of the Restatement, a continuing business. The same is true for Diversified. Interference with a continuing business is actionable if the other elements are met.

II. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION FOR JMOL BECAUSE THERE WAS EVIDENCE TO SUPPORT THE JURY'S VERDICT.

The standard of review on a district court's denial of a JMOL motion is *de novo*. However, "jury verdicts are to be set aside only if manifestly contrary to the evidence viewed in a light most favorable to the verdict. A verdict will not be set aside unless the evidence against it is practically conclusive." *Ouellette v. Subak*, 391 N.W.2d 810, 817 (Minn. 1986); *Moorhead Econ. Dev. Authority v. Anda*, 789 N.W.2d 860 (Minn. 2010).

A. Diversified had a Reasonable Expectation of Business Opportunity.

Appellants argue that because Diversified cannot identify specific customers that it was prevented from doing business with, it cannot recover on this claim. As discussed above, however, identification of specific prospective customers is not a requirement for this claim. The first element of the claim, as identified by the *Harbor Broadcasting* court, among others, is "the existence of a reasonable expectation of economic advantage

or benefit.” *Harbor Broad.*, 636 N.W.2d at 569. Again, the Restatement specifically says that interference with continuing business is covered by this tort.

The testimony of Jack Gieseke established the reasonable expectation that Diversified would have been able to conduct business in 2009-2011 but for the interference by Appellants. Diversified had remained in business for more than 8 years and was profitable in 2008. Transcript, p. 225. Gieseke testified about the expectation of continued revenue. Gross revenues had been very consistent over the years in the range of \$400,000. Transcript, pp. 199, 209. In 2006, Diversified had gross revenues of more than \$450,000 and a gross profit of \$289,571, after paying the officers. Transcript, p. 216.

Diversified had consistently maintained an “A” or “B” rating on Angie’s List until the time of the Sheriff’s sale and was getting a larger portion of business from customer referrals. Transcript, p. 207. Diversified had an expectation of continued jobs and continued revenue. Michael Hogenson testified that 2009 was a very good year in the drain tile business, which further supports the jury’s conclusion that Diversified could reasonably have expected to be profitable, particularly since it had turned a profit in 2008. Transcript, 334. The jury was certainly within the bounds of reason in concluding that Diversified had a reasonable expectation of continuing business.

B. Appellants knew or Should have Known of the Business Expectancy.

Appellants’ claim that they had no way of knowing that Diversified expected to be in business is disingenuous. If Appellants really thought Diversified was out of business, they would not have gone to the extreme lengths to put Diversified out of business.

Contrary to Appellants' current position, Debra Hogenson, the sole officer, director and shareholder of IDCA testified at trial that the reason IDCA purchased the stock of Diversified was because she "knew they were in business for years so it was a running company." Transcript, p. 174. Ms. Hogenson further testified that her intent was to keep Diversified in business: "I truly thought that maybe we could make a go of Diversified." Transcript, p. 172. The jury was clearly entitled to find that Appellants were aware of Diversified's business expectancy given the testimony of IDCA's sole officer, director and shareholder that she had the same expectation of economic advantage from Diversified.

C. Appellants Intentionally and Wrongfully Interfered with Diversified's Business.

Appellants admit that the evidence established that Appellants' intent was to put Diversified out of business. Appellants' Brief, p. 45. Appellants rely again on the hope that this Court will impose a strict requirement that a plaintiff must identify specific customers in order to sustain a claim for tortious interference with prospective economic advantage. But, there is no such requirement and intentionally putting a competitor out of business through wrongful means is actionable. There is no question about the intent in this case.

Appellants argue that their conduct was "justified" (or not wrongful) because they were simply exercising creditor's remedies when they foreclosed on and then seized Diversified's assets. Without citing any authority, Appellants argue that their acts cannot be wrongful because at the time they occurred, the Fallon Judgment was still valid (had

not yet been overturned). The reason that Appellants do not cite authority for that proposition is that there is none. To the contrary, the law is that once a judgment is determined to be void, it is void ab initio. No rights transferred to the third-party purchaser of that judgment. *Hanson v. Woolston*, 701 N.W.2d 257, 266 (Minn. Ct. App. 2005); *see also Beede v. Nides Finance Corp.*, 209 Minn. 354, 296 N.W. 413 (1941) (a party who causes a levy to be made under an execution issued upon a void judgment acts without justification and is liable as a trespasser for having caused a wrongful levy). The Fallon Judgment was void ab initio and thus no rights were ever created or conferred upon Appellants, including “creditor remedies.” Thus, Appellants’ trespass upon private property, conversion of Diversified’s equipment and other actions to enforce the void judgment are wrongful as a matter of law. Indeed, Appellants do not challenge the jury’s finding that Appellants were guilty of conversion. R14.

Factors relevant to determining whether an actor’s conduct is improper for the purposes of tortious interference with prospective economic advantage include:

- (a) the nature of the actor’s conduct,
- (b) the actor’s motive,
- (c) the interests of the other with which the actor’s conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor’s conduct to the interference, and
- (g) the relations between the parties.

R.A., Inc. v. Anheuser-Busch, Inc., 556 N.W.2d 567, 571 (Minn. Ct. App. 1996) (quoting Restatement (Second) of Torts § 767 (1979) (quotation marks omitted)).

The test is unavoidably vague because of the countless factual scenarios in which such conduct can arise. According to the Restatement (Second), the “real question is whether the actor’s conduct was fair and reasonable under the circumstances.”

Restatement (Second) of Torts § 767(g) cmt. See *Midway Manor Conv. Nursing Home, Inc. v. Adcock*, 386 N.W.2d 782 (Minn. Ct. App. 1986) (no evidence that policy of not referring patients to nursing home was based on “bad motive”). It cannot be argued that in the name of competition, an actor can trespass on private property, convert a competitor’s equipment and pretend to be an officer of a company to settle a significant judgment for pennies on the dollar in order to benefit her husband, the judgment debtor. Viewing the evidence in a light most favorable to Diversified, there is no question that the jury’s findings are reasonable. Here, there is significant evidence from which the jury could conclude that Appellants’ conduct was wrongful.

D. In Absence of Interference, it is Reasonably Probable that Diversified would have Realized its Business Expectancy.

Appellants argue that Diversified was essentially out of business at the time of the foreclosure sale and so it is not reasonably likely that but for Appellants’ action, it would have been able to stay in business. Both Jack Gieseke and Arthur Hogenson testified that they would have remained in business. This was not a false hope. Diversified had remained in business for more than 8 years and was profitable in 2008. Transcript, p. 225. Even in the years where Diversified showed a net loss for tax purposes, Diversified was able to pay its officers compensation which Appellants’ accounting expert admitted was the equivalent to profit in a closely held company like Diversified. Transcript, p.

363. The fact that Diversified was not operating at the time of the foreclosure sale does not preclude the claim. Gieseke testified that given Michael Hogenson's actions, he "wasn't sure where the company was actually going, who my partner was going to be." Transcript, p. 249. Arthur Hogenson testified: "As far as I was concerned, we never went out of business." Transcript, p. 302. The jury was entitled to credit this testimony given Diversified's history of consistent numbers of new customers and revenue. Again, viewing the evidence in a light most favorable to Diversified, the jury's findings of causal harm should be affirmed.

E. Diversified Sustained Damages.

The fifth element is that the plaintiff sustained damages. This is similar to the analysis in D above. Again, Diversified provided evidence of its expected revenues, expenses and other items and evidence that Appellants' conduct forced them out of business. The loss of this business expectancy is damage. The amount of the damage award will be discussed in the next section.

III. THE JURY'S DAMAGE AWARD IS NOT EVIDENCE OF PASSION OR PREJUDICE.

Appellants argue that they should have been granted a new trial under Rule 59.01(e), because the jury's damage award was the result of passion or prejudice. A new trial on damages should be granted only where the verdict is so excessive or inadequate that it could only have been rendered on account of passion or prejudice. *Dunn v. Nat'l Beverage Corp.*, 745 N.W. 2d 549 (Minn. 2008). A verdict should be set aside only if it "shocks the conscience." *Verhel v. Independent Sch. Dist. No. 709*, 359 N.W.2d 579, 591

(Minn. 1984). The district court denied Appellants' motion for a new trial on this point. That decision is reviewed on an abuse of discretion standard. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010).

Appellants argue that the jury's finding on a special verdict question which was ultimately rejected by the district court reflects passion or prejudice. The issue was whether, to establish a fiduciary duty, the person making the claim must have intentionally placed his or her "trust" in the other person. Appellants suggest that because Jack Gieseke admitted that he did not "trust" Michael Hogenson, the jury's findings on this issue show a disregard of the law and imply passion or prejudice. However, Diversified argued that the question was really one of responsibility and not "trust" in the sense of Gieseke intentionally placing his confidence in Michael Hogenson (or IDCA) to act in his best interest. Gieseke may not have actually "trusted" Michael Hogenson, but he had no choice but to rely on Hogenson's (or IDCA's) obligation to act in Diversified's best interest after IDCA purportedly "acquired" the stock in Diversified. Given this interpretation of the fiduciary duty issue, it is entirely plausible for the jury to have found that by assuming the role of 50% shareholder in a closely held corporation, IDCA had a de facto fiduciary duty. This is exactly what Diversified's counsel argued. Even if the jury was wrong on the legal issue (as the district court subsequently ruled), the finding certainly does not show "passion or prejudice" because there is a logical explanation for how that result obtained.

Appellants also argue that the amount of the verdict was excessive. However, the amount of the award for tortious interference (\$220,000) follows the evidence developed

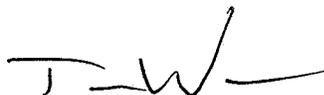
at trial, particularly through the testimony of Gieseke, who testified about expected revenues and expenses. The revenues were based on historical performance. The estimate for cost of goods sold was 25-30% of gross revenue. Transcript, p. 209. Appellants' accounting expert had no basis to disagree with this estimate. Transcript, p. 360. Gieseke then addressed other business expenses line by line and provided an estimate with a basis for each. Appellants did not provide any contrary numbers for the jury to consider.

The jury's determination of damages should not be disturbed unless "the failure to do so would be shocking or would result in plain injustice." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008). The jury's award on the tortious interference claim follows the mathematical calculation provided. The net income from the numbers provided by Gieseke was \$78,450. Diversified's counsel suggested to the jury that they not award damages for 2008 since Diversified was still in business at least part of that year but then suggested that if Diversified had been permitted to survive it could have made money in 2009-2011 – years that Mike Hogenson told the jury were very good years in this business. Transcript, p. 406. If the jury simply multiplied the projected net income by the nearly 3 years in question, the result would have been \$235,350. An award of \$220,000 for interference is within the realm of reason and supported by the evidence presented. It certainly is not "shocking" or manifestly contrary to the evidence. The district court did not abuse its discretion in denying Appellants a new trial on this point.

CONCLUSION

For the foregoing reasons, Respondent Diversified Water Diversion, Inc. respectfully requests that the judgment of the district court and Court of Appeals be affirmed.

Respectfully submitted this 28th day of June, 2013.



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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word 2010 in 13-pt. font, which reports that the brief contains 5,097 words.

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