

**No. A12-0713
State of Minnesota
In Court of Appeals**

Diversified Water Diversion, Inc.,

Plaintiff/Respondent,

vs.

IDCA, Inc., et al.,

Defendants/Appellants.

RESPONDENT'S BRIEF

GRIFFITTS LAW OFFICES, PLLC

Kelly Vince Griffitts (#232695)
8053 East Bloomington Parkway
Suite 300
Bloomington, MN 55420
Telephone: (952) 345-1256
Facsimile: (952) 345-1250
kgriffitts@griffittslaw.com

Attorneys for Appellants

FREDRIKSON & BYRON, P.A.

Todd Wind (#196514)
200 South Sixth Street
Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7046
Facsimile: 612.492.7077
twind@fredlaw.com

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE FACTS.....	1
ARGUMENT	9
I. TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS.	9
A. The Jury’s Finding of Wrongful Conduct is Supported by the Evidence.....	11
B. Diversified had a Reasonable Expectation of Profit.....	13
II. JURY’S DAMAGE AWARD NOT EVIDENCE OF PASSION OR PREJUDICE.....	15
III. THE EVIDENCE SUPPORTED THE COURT’S FINDING OF ALTER EGO RESPONSIBILITY AGAINST DEBRA AND MICHAEL HOGENSON.	17
CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Alaska Marine Pilots v. Hendsch</i> , 950 P.2d 98 (Alaska 1997).....	10
<i>Anderson v. Vanden Dorpel</i> , 667 N.E.2d 1296 (Ill. 1996).....	10
<i>Beede v. Nides Finance Corp.</i> , 209 Minn. 354, 296 N.W. 413 (1941).....	12
<i>Berg v. Carlstrom</i> , 347 N.W.2d 809 (Minn. 1984).....	20
<i>Cole v. Homier Distr. Co, Inc.</i> , 599 F.3d 856 (8 th Cir. 2010).....	10
<i>Covey v. Detroit Lakes Printing Co.</i> , 490 N.W.2d 138 (Minn. Ct. App. 1992).....	14
<i>Dunn v. Nat’l Beverage Corp.</i> , 745 N.W.2d 549 (Minn. 2008).....	17
<i>Giroux v. Lussier</i> , 126 Vt. 555, 238 A.2d 63 (1967).....	10
<i>Hanson v. Woolston</i> , 701 N.W.2d 257 (Minn. Ct. App. 2005).....	11
<i>Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.</i> , 636 N.W.2d 560 (Minn. Ct. App. 2001).....	10
<i>Lamminen v. City of Cloquet</i> , 987 F. Supp. 723 (D. Minn. 1997).....	10, 11
<i>Moorhead Econ. Dev. Auth. v. Anda</i> , 789 N.W.2d 860 (Minn. 2010).....	15
<i>Nadeau v. County of Ramsey</i> , 277 N.W.2d 520 (Minn. 1979).....	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Navarre v. S. Wash. Cty Sch.</i> , 652 N.W.2d 9 (Minn. 2002)	11
<i>Olson v. Scholes</i> , 17 Wash. App. 383, 563 P.2d 1275 (Wash. Ct. App. 1977)	10
<i>Ouellette by Ouellette v. Subak</i> , 391 N.W.2d 810 (Minn. 1986).....	13
<i>Peterson v. Holiday Recreational Indus.</i> , 726 N.W.2d 449 (Minn. Ct. App. 2007).....	21
<i>Rush v. Jostock</i> , 710 N.W. 2d 570 (Minn. Ct. App. 2006).....	15
<i>Sievert v. Lamarca</i> , 367 N.W.2d 580 (Minn. Ct. App. 1985).....	14
<i>Thompson v. Winter</i> , 43 N.W. 796 (Minn. 1889)	20
<i>United Wild Rice, Inc. v. Nelson</i> , 313 N.W.2d 628 (Minn. 1982).....	9
<i>Verhel v. Independent Sch. Dist. No. 709</i> , 359 N.W.2d 579 (Minn. 1984).....	15
<i>Victoria Elevator Co. v. Meriden Grain Co.</i> , 283 N.W.2d 509 (Minn. 1979).....	17
<i>Vowell v. Fairfield Bay Community Club, Inc.</i> , 346 Ark. 270, 58 S.W.3d 324 (Ark. 2001).....	10
<i>Wild v. Rarig</i> , 234 N.W.2d 775 (Minn. 1975).....	9, 10
<i>Witte Transp. Co. v. Murphy Motor Freight Lines, Inc.</i> , 195 N.W.2d 148 (Minn. 1971).....	9, 10

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

Minn. R. Civ. App. P. 132.01, subdiv. 3(a).....	22
Rule 59.01(e).....	15
Minn. Stat. § 302A.751	4

STATEMENT OF THE FACTS

Background/ Relationship between Parties

Appellant Michael Hogenson is the owner of Standard Water Control Systems, Inc. (“Standard Water”), a drain tile installation business. Transcript, p. 103. Jack Gieseke and Arthur Hogenson¹ used to work at Standard Water. In or about 2000, Gieseke, Arthur and another former Standard Water employee, left Standard and formed Diversified Water Diversion, Inc. (“Diversified”), a drain tile business competitive with Standard. Transcript, p. 106. Michael Hogenson did not like the fact that his brother and two former employees had formed Diversified. Transcript, p. 106.

In December 2001, Standard sued Diversified in Hennepin County District Court. That case resulted in a settlement that included a nondisparagement clause and an attorneys’ fees provision. Transcript, p. 106. Subsequently, Diversified learned that Michael Hogenson was defaming Diversified to customers. Transcript, p. 107. Diversified sued Standard Water for defamation and breach of the nondisparagement clause from the settlement agreement. The case went to trial and the Court awarded \$30,000 in punitive damages plus attorneys’ fees against Standard Water. Transcript, p. 107. Standard appealed the judgment to the Minnesota Court of Appeals. The judgment was affirmed in September 2008. Transcript, p. 364 (Stipulations read by Court). Standard Water then sought review by the Minnesota Supreme Court, which request was denied. Transcript, p. 109. Thus, by December 2008, Standard had exhausted its appeals

¹ Arthur Hogenson is Michael Hogenson’s brother. To avoid confusion, Arthur Hogenson will be referred to herein by his first name only.

and Diversified held a judgment against Standard in the amount of \$67,717.46.

Transcript, p. 364 (Stipulations). The events that follow relate to Michael Hogenson's desperate effort to avoid paying the judgment and to run Diversified out of business.

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 admits that he did not buy the Fallon Judgment to help Arthur. To the contrary, after buying the Fallon Judgment, Michael Hogenson started foreclosure proceedings and executed on Arthur's assets. There was a Sheriff's sale on January 30, 2009. Transcript, pp. 110-11; Transcript, p. 365 (Stipulations). One of the assets foreclosed upon was Arthur's 50% interest in Diversified. That interest was purchased by IDCA, Inc., another company formed by Michael Hogenson, but which he put in his wife Debra's name. As will be discussed in more detail below, Debra Hogenson had nothing to do with IDCA.

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, Inc., 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 Water, 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.

IDCA, Inc. bought Arthur’s Diversified stock at the Sheriff’s sale on January 30, 2009. Transcript, p. 364 (Stipulations). A week later, on February 9, 2009, Michael Hogenson filed a Notice of Change of Registered Office, changing Diversified’s registered office address to Standard Water’s office. Transcript, pp. 1120-21; Trial Ex. 1. Several facts surrounding this event are important. First, Michael Hogenson was not an officer, director or employee of IDCA, Inc. and had no official authority to act on behalf of IDCA, much less on behalf of Diversified. Transcript, pp. 115, 118. Second, although IDCA had a separate address of 5333 Lakeland Ave., Michael Hogenson did not use that address for Diversified but rather he used Standard Water’s address of 5337 Lakeland Ave.

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 Water’s building. Transcript, p. 126.

After its equipment was seized and taken away, Diversified commenced this lawsuit on February 12, 2009 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.

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 Water 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 Water case to disqualify Fredrikson & Byron as counsel for Diversified and to prevent the judgment against Standard Water from being satisfied out of the supersedeas bond that had been posted by Standard Water. 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, Judge Hedlund 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). After the hearing before Judge Hedlund, 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 Piercing Corporate Veil

IDCA was formed in 2008. Transcript, p. 111. Deb Hogenson is the sole shareholder, officer, director and employee of IDCA. Transcript, p. 112. Michael Hogenson registered IDCA with the Minnesota Department of Revenue. See Trial Ex. 18. Michael Hogenson handled the books and records of IDCA, not Deb Hogenson. Transcript, p. 330. Michael Hogenson acted on behalf of IDCA in dealing with the Internal Revenue Service. See Trial Ex. 15; Transcript, p. 114. Michael Hogenson testified that he was not given authority to make decisions on behalf of IDCA as it related to Diversified (Transcript, p. 118), yet he is the one who changed the registered address of Diversified (Trial Ex. 1) and who called the towing company and orchestrated the seizure of equipment from Arthur Hogenson's private residence. Transcript, p. 122.

Moreover, despite being the CEO and CFO (not to mention the sole shareholder and employee) of IDCA, Debra Hogenson knew virtually nothing about the company. She testified that she did not know how many shares were outstanding in IDCA.

Transcript, p. 172. She did not know what assets, if any, IDCA owned. Id. She testified that she did not know whether IDCA owned any real estate. Id. However, Michael Hogenson did know the answers to these questions. He admitted that IDCA does not own the property it occupies and pays no rent. Transcript, p. 115. Deb Hogenson testified that she was unaware of any source of money for IDCA, including revenue, loans, capital contributions etc. since the time it was formed, other than her initial \$5000 capital contribution. Transcript, p. 180. She also did not know whether IDCA was pursuing any business. Transcript, p. 179. Even Appellants' own expert witness testified that these are things the sole officer would be expected to know. Transcript, pp. 293-94 (testimony of Jeffrey Redmon).

Deb Hogenson was confronted with a series of bank statements which showed various deposits into and withdrawals from IDCA's bank account. For instance, she was asked to explain the source of a \$72,000 deposit on March 31, 2009 given that IDCA supposedly had no business operations. She did not know. Transcript, pp. 184-85; Trial Ex. 8. Similarly, she was asked to explain a transfer of \$30,002.21 that indicates it was to repay a loan. After speculating that it might not have actually been for a loan at all but rather to pay attorney's fees, she admitted she had no idea whether IDCA had ever had any loans. Transcript, p. 185; Trial Ex. 9. On a statement from April 2009, there was a withdrawal of \$81,000 from IDCA's account. After guessing that the money may have been used for attorney's fees, she admitted she did not know what that withdrawal was for. Transcript, pp. 186-87. There were many more examples where Deb Hogenson could not explain the activity in IDCA's bank account. Appellants' legal expert, Mr.

Redmon, testified that the CFO of a company would be expected to know the sources of income/financing and at least have a general idea of expenditures. Transcript, pp. 294-95.

Michael Hogenson ultimately revealed the reason he put IDCA in his wife's name.

He did not want his customers to find out that he was the owner of Diversified:

And the reason again we had my wife own Diversified is I couldn't. I couldn't have any of my competition say that, "Well, Mike owns Standard Water Control and Diversified." So I had to have a clear cut there in those corporations where – I guess some sort of deniability there when you're bidding on jobs....

Transcript, p. 140.

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.

Jack 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, Mr. 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. Mr. 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. Mr. 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, Mr. 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. Mr. 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 Water. When asked about Standard's Yellow Pages advertising expenses, Michael Hogenson said he was not spending "as much as I used to." Transcript, p. 104. Mr. 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.

In *United Wild Rice, Inc. v. Nelson*, the Minnesota Supreme Court stated that Minnesota recognizes "a cause of action for wrongful interference with both present and prospective contractual relations." 313 N.W.2d 628, 632 (Minn. 1982). The Court cited two Minnesota decisions as authority for the recognition of the torts generally – *Witte Transp. Co. v. Murphy Motor Freight Lines, Inc.*, 195 N.W.2d 148 (Minn. 1971); *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975). In *Witte*, the Supreme Court of Minnesota stated that it "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. In *Wild*, the 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 at 790 n.16. Thus, the Court has strongly indicated that a claim for tortious interference with prospective advantage *is* recognized in Minnesota.² Moreover, Minnesota courts have in fact analyzed/applied this claim – not dismissing it on the basis that the Supreme Court had not yet weighed in on the issue. *See Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 (Minn. Ct. App. 2001); *Lamminen v. City of Cloquet*, 987 F. Supp. 723, 732 (D. Minn. 1997) (citing *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982)).

A claim for tortious interference with plaintiff’s business advantage requires a showing of: (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 his economic advantage or benefit;

² The tort of interference with prospective economic advantage has been recognized in other states as well. *See, e.g., Alaska Marine Pilots v. Hendsch*, 950 P.2d 98 (Alaska 1997)(“We have long recognized the tort of intentional interference with prospective economic advantage”); *Vowell v. Fairfield Bay Community Club, Inc.*, 346 Ark. 270, 58 S.W.3d 324 (Ark. 2001); *Giroux v. Lussier*, 126 Vt. 555, 238 A.2d 63,66 (1967)(“all persons legitimately operating in the business community have a right to security against unlawful interference in their commercial dealings with others and the law’s protection is not restricted to enforceable contracts but extends with equal force to reasonable expectancy of profit”); *Olson v. Scholes*, 17 Wash. App. 383, 563 P.2d 1275 (Wash. Ct. App. 1977); *Anderson v. Vanden Dorpel*, 667 N.E.2d 1296 (Ill. 1996); *Cole v. Homier Distr. Co, Inc.*, 599 F.3d 856 (8th Cir. 2010)(applying Missouri law).

and, (5) that plaintiff sustained damages as a result of this activity. *Lamminen v. City of Cloquet*, 987 F. Supp. 723, 732 (D. Minn. 1997) (citing *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982)). This claim does not require proof of specific business deals that were harmed as a result of defendants' actions. The elements are broader and require only "reasonable expectation" and "reasonably probable" levels of certainty.

A. The Jury's Finding of Wrongful Conduct is Supported by the Evidence.

Appellants challenge the jury's finding that Appellants' conduct was "wrongful." The district court denied Appellant's motion for a new trial. An appellate court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cty Sch.*, 652 N.W.2d 9, 21 (Minn. 2002).

Appellants argue that their conduct was not wrongful because they were simply exercising "creditor remedies." Appellants' Brief, p. 18. This argument ignores the fact that the Fallon Judgment was void and thus Appellants never were "creditors" of Arthur Hogenson. Once a judgment is determined to be void, no rights transferred to the third-party purchaser of that judgment. *Hanson v. Woolston*, 701 N.W.2d 257, 266 (Minn. Ct. App. 2005). The district court rejected Appellants' bona fide purchaser claim on precisely this basis – when a judgment is void, no rights are created by or through that judgment. Appellants' Addendum p.10 (Order and Memorandum of Law on Summary

Judgment Motions). *See also Beede v. Nides Finance Corp.*, 209 Minn. 354, 296 N.W. 413 (1941). In *Beede*, the plaintiff sued parties that executed on his car pursuant to a judgment that turned out to be void. On appeal, the Supreme Court explained:

No person has the right to interfere with the property of another without his consent except under legal process. Such process can be issued only under a valid judgment A void judgment is in legal effect no judgment. No rights can be divested or obtained under it. Neither binding nor barring anyone, all acts performed under it and all claims based on it are void. ***One who attempts to enforce such a judgment is not protected by it. 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.***

296 N.W. at 414 (emphasis added). The Fallon Judgment was void and thus no rights were ever created or conferred upon Appellants, including “creditor remedies.”

Even if Appellants could rely on their “creditor” status, their conduct was still wrongful. Neither IDCA nor Michael Hogenson had the authority to change Diversified’s registered address. See Trial Ex. 1. Michael Hogenson did not have the right to enter Authur Hogenson’s private property, much less to take Diversified’s equipment and deliver it to Standard Water. Debra Hogenson’s decision to “settle” Diversified’s \$67,000 judgment against Standard Water for \$12,000 also was “wrongful.” Debra Hogenson pretended to be a Vice President of Diversified. She was never elected or appointed a vice president. She never had authority to enter into such an agreement.

There can be no doubt about Appellants’ intent in taking the above actions. Michael Hogenson admitted in a sworn statement that IDCA’s mission was to “take over Diversified, settle Diversified’s outstanding liabilities and assets, then shut the company

down permanently.” Transcript, p. 119. “[J]ury 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 by Ouellette v. Subak*, 391 N.W.2d 810, 817 (Minn. 1986). Here, there is significant evidence from which the jury could conclude that Appellants’ conduct was “wrongful.” The jury’s determination should be affirmed.

B. Diversified had a Reasonable Expectation of Profit.

Appellants argue that Diversified failed to show causal damage. Mr. Gieseke and Art Hogenson testified that Diversified would have been able to remain in business but for the actions of Appellants. This is supported by the fact that Diversified managed to stay in business for 8 years prior, despite having lost money in many of those years. Appellants’ actions in asserting an ownership interest in Diversified’s equipment, interfering with official registration and communications and preventing collection of a valid and significant judgment against Standard Water (and causing Diversified additional expense at the same time) caused harm to Diversified.

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 Michael Hogenson. 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.

Moreover, in the years where the company 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’s finding that Diversified had a reasonable expectation of prospective economic advantage is entitled to considerable deference. A jury’s answers to a special verdict should not be set aside unless they are “perverse and palpably contrary to the evidence.” *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138 (Minn. Ct. App. 1992). In making this determination, the Court must view the evidence in a light most favorable to the prevailing party. *Sievert v. Lamarca*, 367 N.W.2d 580 (Minn. Ct. App. 1985).

Here, the jury was certainly within the bounds of reason in concluding that IDCA's conduct caused harm to Diversified.

II. JURY'S DAMAGE AWARD 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. *Rush v. Jostock*, 710 N.W. 2d 570 (Minn. Ct. App. 2006). 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 Appellant's 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 first 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 is 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 Mr. Gieseke intentionally placing his confidence in Michael Hogenson (or IDCA) to act in his best interest. Jack 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 and then subsequently seized control of all of the assets and official communications. IDCA (and Mike and Deb Hogenson) wanted it both ways – to insulate themselves from their wrongdoing on the grounds that they thought they were shareholders of Diversified and thus had *the right* to act on its behalf, but then to simultaneously argue that they had no *obligations* to the company because it turned out they were never in fact shareholders. These positions are inconsistent and it is entirely plausible for the jury to have found that by assuming the role of a shareholder in a closely held corporation, IDCA assumed a de facto fiduciary duty. Even if the jury was wrong on the legal elements (as the Court subsequently ruled), the finding certainly does not show “passion or prejudice” because there is a perfectly logical explanation for how that result obtained.

Second, Appellants 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 Jack 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 Mr. Gieseke was \$78,450. Diversified's counsel suggested to the jury that they not award damages for 2008 since Diversified was still in business most 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.

III. THE EVIDENCE SUPPORTED THE COURT'S FINDING OF ALTER EGO RESPONSIBILITY AGAINST DEBRA AND MICHAEL HOGENSON.

The district court's determination that piercing the corporate veil was warranted is reviewed on a clear abuse of discretion standard. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

The seminal case on alter ego liability is *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509 (Minn. 1979). The relevant factors include whether there was sufficient capitalization for a corporate undertaking, whether corporate formalities were observed, whether the officers and directors were active in the company and ultimately,

whether the corporation was “merely a façade for individual dealings.” It is not necessary to establish all of the elements, simply more than one.

The evidence at trial established overwhelmingly that Deb Hogenson was a non-functioning officer. She was supposedly the sole shareholder, officer, director and employee of IDCA. Transcript, p. 112. Michael Hogenson, not Deb Hogenson, handled the books and records of IDCA. Transcript, p. 330. Michael Hogenson registered IDCA with the Minnesota Department of Revenue. Trial Ex. 18. Michael Hogenson acted on behalf of IDCA in dealing with the Internal Revenue Service. Trial Ex. 15; Transcript, p. 114.

Michael Hogenson testified that he was not given authority to make decisions on behalf of IDCA as it related to Diversified, yet he is the one who changed the registered address of Diversified (Trial Ex. 1) and who called the towing company and orchestrated the seizure of equipment from Arthur Hogenson’s private residence. Transcript, p. 122.

Despite being the CEO and CFO (not to mention the sole shareholder and employee) of IDCA, Debra Hogenson knew virtually nothing about the company. She testified that she did not know how many shares were outstanding in IDCA. Transcript, p. 172. She did not know what assets, if any, IDCA owned. *Id.* She testified that she did not know whether IDCA owned any real estate. *Id.* However, Michael Hogenson did know the answers to these questions. He admitted that IDCA does not own the property it occupies and pays no rent either. Transcript, p. 115. Deb Hogenson testified that she was unaware of any source of money for IDCA, including revenue, loans, capital contributions etc. since the time it was formed, other than her initial \$5000 capital

contribution. Transcript, p. 180. She did not know whether IDCA was pursuing any business. Transcript, p. 179. Even Appellants' own expert witness testified that these are things the sole officer would be expected to know. Transcript, pp. 293-94 (Testimony of Jeffrey Redmon).

Deb Hogenson was confronted with a series of bank statements which showed various deposits into and withdrawals from IDCA's bank account. This was curious given Deb Hogenson's testimony that IDCA had no business or any source of revenue. For instance, she was asked to explain the source of a \$72,000 deposit on March 31, 2009. She could not explain that. Transcript, pp. 184-85; Trial Ex. 8. Similarly, she was asked to explain a transfer of \$30,002.21 that indicates it was to repay a loan. After speculating that it might not have really been a loan at all but rather to pay attorney's fees, she admitted she had no idea whether IDCA had ever had any loans. Transcript, p. 185; Trial Ex. 9. On a statement from April 2009, there was a withdrawal of \$81,000 from IDCA's account. After guessing that the money may have again been used for attorney's fees, she admitted she could not explain that withdrawal either. Transcript, pp. 186-87. There were many more examples where Deb Hogenson could not explain the activity in IDCA's bank account. Appellants' legal expert, Mr. Redmon, testified that the CFO of a company would be expected to know the sources of income/financing and at least have a general idea of expenditures. Transcript, pp. 294-95.

Michael Hogenson ultimately revealed the fiction behind IDCA::

And the reason again we had my wife own Diversified is I couldn't. I couldn't have any of my competition say that, "Well, Mike owns Standard Water Control and Diversified."

So I had to have a clear cut there in those corporations where
– I guess some sort of deniability there when you're bidding
on jobs....

Transcript, p. 140.

The evidence showed unmistakably that Debra Hogenson was a non-functioning officer and that IDCA was a façade for the individual dealings of Michael Hogenson and Deb Hogenson. The district court's findings with respect to alter ego liability in this case are certainly within reasonable discretion.

Finally, Appellants argue that Diversified should be barred from seeking to pierce the corporate veil by the doctrine of unclean hands. Appellants claim that Gieseke and Arthur Hogenson made false statements to Berkely Risk Insurance Co. regarding the employment status of Thomas Fallon.³ First, Gieseke testified that while Arthur Hogenson had the corporate authority to hire someone, he did not normally handle that function and did not know that Arthur had hired Fallon. Transcript, p. 203. There were no facts to support the argument that Jack Gieseke “lied” to the insurer. Second, “unclean hands in a collateral matter is not a defense to equitable relief.” *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984). The alleged conduct creating the unclean hands “must have some reference to, some connection with” the disputed issue. *Thompson v. Winter*, 43 N.W. 796, 797 (Minn. 1889). Therefore, the defense “does not apply where the relief sought by the plaintiff and the equitable right claimed by the defendant belong to or grow out of two entirely separate and distinct matters or

³ Thomas Fallon is the person who sued Arthur Hogenson and obtained a \$700,000 default judgment that Michael Hogenson subsequently purchased.

transactions.” *Peterson v. Holiday Recreational Indus.*, 726 N.W.2d 449, 505 (Minn. Ct. App. 2007) (quoting *Lindell v. Lindell*, 185 N.W. 929, 930 (Minn. 1921)). Here, Gieseke’s statements to Berkley are entirely collateral to the issue of whether IDCA is an alter ego of Deb and Mike Hogenson. Whether Fallon was an employee of Diversified involves completely different parties, as it resulted in a dispute between Art Hogenson and Fallon, not Gieseke and IDCA. At the time the statements were made, Mike Hogenson and IDCA had nothing to do with the claim; IDCA was not even in existence yet.

CONCLUSION

For the foregoing reasons, Respondent Diversified Water Diversion, Inc. respectfully requests that the judgment of the District Court be affirmed.

Respectfully submitted this 17th day of August, 2012.

By: _____

Todd Wind (#0196514)
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7046
Facsimile: 612.492.7077
twind@fredlaw.com

Attorneys for Respondent

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 Version 12.0 in 13-pt. font, which reports that the brief contains 466 lines and 5659 words.

Dated this 17th day of August, 2012.

By: _____

Todd Wind (#0196514)
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7046
Facsimile: 612.492.7077
twind@fredlaw.com

Attorneys for Respondent