STATE OF MICHIGAN

COURT OF APPEALS

NARTRON CORPORATION,

Plaintiff/Counterdefendant-
Appellant/Cross-Appellee,

v

AMWAY CORPORATION,

Defendant/Counterplaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED
October 12, 1999

No. 201487
Osceola Circuit Court
LC No. 90-005238 CK

Before: Hood, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Plaintiff and counterdefendant Nartron Corporation appeals as of right a circuit court judgment awarding defendant and counterplaintiff Amway Corporation $878,688 in damages, $556,620.66 in interest, and $124,888.98 in taxable costs, following a bench trial in this action that primarily involves claims for breach of contract and misappropriation of trade secrets. Amway has filed a cross-appeal. We affirm in part, reverse in part, and remand for further proceedings.

Nartron first argues that the trial court erred in determining that the August 10, 1988, purchase order agreement was not a production requirements contract. We disagree. The agreement provides that Phase III is limited to "product finalization for full production." We decline Nartron's invitation to rewrite the contract as "product finalization *and* full production." *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Furthermore, the trial court was not bound to conclude that the parties had a production requirements contract because of a purported admission by Amway in its pleadings. A judicial admission is not binding on the court because the court may allow it to be withdrawn. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420-421; 551 NW2d 698 (1996). Thus, even if Amway's answer were a judicial admission, the court was not required to accept it as conclusive. The court's failure to hold Amway bound by the purported admission is not a basis for reversal.

Nartron next argues that there was no evidence of repudiation of the August 10, 1988, agreement. We disagree. Walter Gorak's testimony concerning the December 22, 1989, meeting indicated that Nartron not only refused to agree to Addendum A, but also would not honor the provisions of the August 10, 1988, agreement. This testimony supports the trial court's finding that Nartron repudiated the agreement.

We also reject Nartron's claim that the trial court's interpretation of the provision concerning ownership of the patent rights to the EOL indicator is contrary to the language of the agreement and the intent of the parties. The critical portion of the provision is the phrase "this R & D project." The trial court found that the parties used this phrase to refer to the research and development project that resulted in the EOL indicator. Having reviewed the evidence, we discern no clear error in this determination. *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).

Nartron further argues that the trial court erred in finding that trade secret destruction resulted from Nartron's patent application and the display at an SAE trade show. Nartron also challenges the trial court's award of damages for complete trade destruction. We conclude that it is necessary to remand this case for further consideration of these issues.

The trial court awarded damages for misappropriation of trade secrets without making findings on that claim in its liability opinion. Amway's counter-complaint alleged separate counts of misappropriation of trade secrets and breach of the confidentiality agreements. As a result of the parties' failure to consistently distinguish these claims, the trial court's opinion on liability discusses the breach of the confidentiality agreements claim, without reference to the separate claim for misappropriation of trade secrets. Nonetheless, despite the absence of findings concerning liability for misappropriation of trade secrets, the trial court's opinion on damages and resulting judgment both indicate that Amway was awarded damages for this claim.

Nartron asserts that Amway disclosed the alleged trade secrets through its panel testing of the EOL indicators. One of the factors to be considered in determining the existence of a trade secret is "the extent of measures taken . . . to guard the secrecy of the information . . . ." *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 182; 364 NW2d 609 (1984), quoting Restatement of Torts, § 757, Comment 6. Thus, the circumstances of the panel testing, including who participated and the steps taken to ensure confidentiality, are relevant to evaluating whether a trade secret existed. Because the trial court did not make findings concerning the trade secrets claim, it is unclear whether the court considered this factor or any of the other factors set forth in *Hayes-Albion*.

Nartron also claims that the trial court erred in holding that complete trade destruction resulted from Nartron's display at the SAE trade show and the patent application. Misappropriation of a trade secret claim requires proof of use, not public disclosure. However, public disclosure is critical to determining the appropriate measure of damages. *Softel, Inc v Dragon Medical and Scientific Communications, Inc*, 118 F3d 955, 969-970 (CA 2, 1997); *University Computing Co v Lykes-Youngstown Corp*, 504 F2d 518, 535 (CA 5, 1974). In this case, the trial court did not make a finding that trade secret destruction occurred as a result of Nartron's activities. Rather, the court found that Nartron breached the confidentiality agreements by its display and patent application. Although the two claims require similar proof, we are unwilling to treat the court's findings and conclusions on the breach of confidentiality agreements claim as a substitute for findings and conclusions on the misappropriation of trade secrets claim.

In light of the issues raised by Nartron, we conclude that remanding for further proceedings is appropriate. On remand, the court shall make findings of fact and conclusions of law concerning the misappropriation of trade secrets claim, including whether trade secrets existed in light of the circumstances of the panel testing, and whether Nartron's activities destroyed the value of the identified trade secrets or were mere uses. The court shall also reevaluate the award of damages in light of these findings.

Next, Nartron challenges the trial court's inclusion of amounts paid for development of the "paddle wheel" EOL indicator in the award of cover damages under MCL 440.2712(1); MSA 19.2712(1). We agree with Nartron that the costs attributable to the development of the "paddle wheel" EOL indicator are not recoverable as cover damages because it operates on a different principle than the Nartron-produced EOL indicator, and the Gems/Robertshaw EOL indicator was available as a more equivalent substitute.

When an equivalent product is available, a purchaser is not entitled to recover the full cost of cover for a product that is better than what was purchased. Goods that are selected as cover need not be identical. Comment 2 to UCC § 2-712 indicates that the definition of "cover" "envisages . . . goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case . . . ." The issue of upgrading is discussed in one treatise as follows:

> What of the buyer who covers by purchasing goods of superior quality for use as a commercial substitute? Suppose, for example, that seller breaches a sales contract for four-speed food blenders. Desiring to take advantage of the Code's cover provision, buyer procures a substitute contract for more expensive eight-speed food blenders. If comparable four-speed machines were available, it is clear that buyer should not recover the full difference between his cover price and the contract price. Although Comment 2 instructs that the substitute need not be the least expensive cover, nothing in the Code indicates that the buyer is free to pass over an identical substitute and to select his own windfall. Indeed 1-106 [general provision indicating that remedies should be administered to put the aggrieved party "in as good a position as if the other party had fully performed"] aims at matching performance, nothing more. [White & Summers, Uniform Commercial Code (3d ed), § 6-3, pp 248-249.]

Recovery of costs for an improved product depends in part on evidence suggesting that a more comparable substitute was not available. Compare *Freitag v Bill Swad Datsun*, 3 Ohio App 3d 83; 443 NE2d 988 (1981) and *Mueller v McGill*, 870 SW2d 673 (Tex Ct App, 1994). See also *Valley Die Cast Corp v ACW, Inc*, 25 Mich App 321, 336-337; 181 NW2d 303 (1970).

In the present case, the evidence demonstrated that the Gems/Robertshaw EOL indicator was a feasible and more comparable substitute for the EOL indicator that Amway purchased from Nartron. The better performance of the paddle wheel EOL indicator and other features that made the proposal by FutureFlo attractive suggest that the decision to abandon the development of the Gems/Robertshaw EOL indicator for the domestic water treatment system may have been a valid business judgment. However, Amway is not entitled to select its own windfall. Accordingly, we reverse the trial court's award of $357,090 as damages for the design and development of the paddle-wheel EOL indicator.

Nartron raises several challenges to the trial court's award of costs. The trial court has discretion whether to award costs to a prevailing party. *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). Although the decision whether to tax costs is discretionary, any costs that the court awards must be authorized by statute. *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996). A trial court abuses its discretion by taxing litigation expenses without statutory authority. *Id*. at 623.

We agree with Nartron that the trial court abused its discretion by taxing as "exemplifications" the expense of trial charts ($26,467.44), court reporter fees for transcripts prepared for Amway's convenience ($1,579.82), and photocopying documents produced in discovery by Amway and documents filed by Amway and served on Nartron ($5,100.90). These expenses are not authorized by MCL 600.2546; MSA 27A.2546, because they are not within the definition of an exemplification, e.g. "[a]n official transcript of a document from public records, made in form to be used as evidence, and authenticated or certified as a true copy." Black's Law Dictionary (5th ed).

Nartron also claims that the fees for depositions not read into evidence may not be taxed as costs under MCL 600.2549; MSA 27A.2549, which states:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

In *Portelli v I R Construction Products Co*, 218 Mich App 591, 605; 554 NW2d 591 (1996), this Court stated, "The plain language of the statute states that such costs are recoverable where the deposition is 'read in evidence' at trial *or* where it is 'necessarily used.'" Therefore, we reject Nartron's argument that the depositions must be read into evidence. However, we agree with Nartron that MCL 600.2549; MSA 27A.2549 does not authorize the taxing of the expense of deposition exhibits. Therefore, the trial court erred by awarding $611.94 for deposition exhibits.

Nartron claims that the trial court erred when it awarded Amway $84,707.96 as expert witness fees in the absence of a detailed itemization of the work performed. A trial court has discretion under MCL 600.2164; MSA 27A.2164 to authorize expert witness fees for court time and for the time required to prepare for testifying. *Herrara v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989); *Fireman's Fund American Ins Companies v General Elec Co*, 74 Mich App 318; 253 NW2d 748 (1977); *Gunderson v Village of Bingham Farms*, 1 Mich App 647, 649; 137 NW2d 763 (1965). However, this Court has drawn a distinction between preparing for testimony and providing consulting services for a litigant. See *Detroit v Lufran*, 159 Mich App 62, 67; 406 NW2d 235 (1987). See also *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991) (an expert may be compensated for court time and the time required to prepare for testimony, but is not automatically entitled to compensation for all services rendered). Although *Lufran* involves fees allowed in a condemnation case, the distinction between preparation for testimony and consulting is also appropriate in the context of expert witness fees allowed under MCL 600.2164; MSA 27A.2164.

In the present case, the invoices submitted by Amway with its bill of costs do not provide adequate detail for the court to determine an appropriate fee. The invoices submitted to substantiate the expert witness fees for McGavock are from the IPC Group, whose letterhead identifies it as "Litigation/Valuation Advisory Services." The amount billed by IPC includes $61,197 billed for the professional time of individuals other than McGavock himself.[1] Other than the fact that some of the amounts are billed for "Paralegal," no information is provided to indicate who these other individuals are. Moreover, the IPC invoices provide a description of work performed without indicating how much time was spent or who worked on the task. Many tasks described seem to involve consulting services rather than preparation for McGavock's testimony. Without further information as to who the other individuals are or how much of the time billed is for McGavock's court time or time required to prepare his testimony, as opposed to consulting services, the court lacked adequate information to determine an appropriate amount to tax as expert witness fees for McGavock.

Similarly, the invoices submitted for Williamson do not provide adequate detail. His invoices include fees for 17.5 hours for "[d]iscussions with counsel" in August 1993. This description is insufficient to indicate whether that time could be considered trial preparation, as opposed to consulting. Also, during the ten-day period from October 13 to October 22, 1993, inclusive, Williamson billed 131.5 hours for "[r]eading documents; discussing with counsel; preparing for trial; giving testimony." Without more detailed information showing how much time spent on activities can be characterized as trial preparation, the court lacked adequate information to determine an appropriate amount to tax as expert witness fees for Williamson.

Because the invoices supplied to the court were inadequate for the court to properly determine a reasonable fee, the court on remand shall allow Amway to submit more detailed information to support the requested fees and allow the parties the opportunity for further briefing. The court may also conduct an evidentiary hearing on this issue if deemed necessary. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 83; 577 NW2d 150 (1998); *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989).

Nartron also claims that Amway taxed amounts for filing fees that it never paid. Specifically, Nartron challenges: (1) the award of $62 for filing a counterclaim in 1990, when, according to Nartron, there was no filing fee at all, or at most $42; and (2) $120 for six motions filed before October 8, 1993, when Osceola Circuit Court first began charging fees for filing motions. On remand, the court shall disallow these costs unless Amway provides evidence that the filing fees were actually paid.

On cross-appeal, Amway argues that the trial court erred in granting Nartron's motion for summary disposition concerning its claim for increased costs and lost profits allegedly attributable to

Nartron's breach of contract. The court concluded, as a matter of law, that the increased costs and lost profits could not have been within the contemplation of the parties because, at the time of contracting, the parties did not know if the project would proceed to phase II or phase III.

The parties' uncertainty at the time of contracting about the circumstances under which they would be required to perform does not preclude a finding that consequences of a breach were foreseeable. In *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1; 516 NW2d 43, (1994), the plaintiff insured a tractor-trailer used for hauling dry freight with defendants. After the tractor-trailer was stolen, the plaintiff attempted to recover under the insurance policy, but the defendants delayed in settling the claim. The plaintiff filed suit to recover the amount due under the policy as well as lost profits that he claimed were caused by the defendant's failure to pay the claim. The plaintiff prevailed in the trial court. This Court reversed in part, concluding that the defendants' motion for directed verdict should have been granted "because there was insufficient evidence 'to create a factual issue regarding whether the lost profits were foreseeable when the policy was issued.'" *Id*. at 3. However, the Supreme Court disagreed, stating:

> The *Hadley* rule, as stated in *Kewin* [*v Massachusetts Mutual Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980)], . . . requir[es] only that "[t]he damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made." *Id*. at 419 (emphasis added). Applying this objective standard, restated by Calamari and Perillo as damages "the promisor knows or has reason to know" about, the plaintiff submitted enough evidence regarding the element of foreseeability to make out a prima facie case for lost profits. Calamari & Perillo, Contracts (3d ed), § 14-5, p 595. [*Lawrence*, *supra* at 13.]
>
> * * *
>
> The evidence in this case, when combined with the nature of the underlying transaction, was sufficient to allow a jury to infer that at the time the parties entered into the contract, the defendants reasonably knew or should have known that in the event of breach this plaintiff would lose profits. Under Michigan law, the plaintiff presented a prima facie case. [*Id*. at 15.]

Lawrence illustrates that a party may be held liable for the foreseeable consequences of its breach even when, at the time of contracting, the circumstances under which the breach occurred were not certain to occur. In the present case, as in *Lawrence*, the parties were aware that particular events (the theft in *Lawrence*, the marketing of the product in the present case) *may* occur. In assessing foreseeability of the consequential damages, the uncertainty of the occurrence of these events is not a factor; rather, the focus is whether "the parties knew or had reason to know" that the claimed damages would occur if there was a breach.

In response to Nartron's motion for summary disposition, Amway presented the affidavit of Robin Dykhouse in which she explained why Nartron knew or should have known that Amway would incur increased costs and lost profits in the event of Nartron's breach. In its role as the factfinder at trial, the court could ultimately reject this assertion. However, the court erred in granting Nartron's motion for summary disposition on the basis of its conclusion that, as a matter of law, the lost profits and increased costs were not foreseeable.

Nartron argues that Amway's claim for lost profits due to the delay in introducing the EOL indicator was precluded because profits for a new product are barred as speculative as a matter of law. Recovery of lost profits of a new business depends on whether the damages can be established with a reasonable degree of certainty. *Fera v Village Plaza, Inc*, 396 Mich 639; 242 NW2d 372 (1976). If a business lacks a history "as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented are often but not necessarily too uncertain for recovery." *Id*. at 644-645, quoting 5 Corbin on Contracts, § 1023, pp 147, 150-151. Likewise, Amway's recovery of lost profits due to the delay in the introduction of a new product will depend on whether Amway will be able to establish those losses with a reasonable degree of certainty. To the extent that *Doyle Vacuum Cleaner Co v FJ Siller & Co*, 55 Mich App 601; 223 NW2d 86 (1974), may be interpreted to preclude the recovery of lost profits in all cases involving delay in the introduction of new products, we decline to follow it.

Finally, Amway argues that the court erred in dismissing its shop right and trustee *ex maleficio* claims with prejudice. Amway's argument is premised on the assumption that the claims were dismissed as moot. Nartron disputes this assumption. The record does not indicate the basis for the court's dismissal of these claims. Because Amway's argument is based on an assumption that is not established by the record, Amway has not demonstrated entitlement to relief on this issue.

The circuit court's judgment and underlying opinions and orders are affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] The amount billed for other individuals exceeds the amount, $53,873, billed for McGavock's time. The remaining $4,662 of the $119,372 billed by IPC is for out-of-pocket expenses, such as meals, lodging, transportation, telephone, Federal Express, photocopying, and research.