STATE OF MICHIGAN

COURT OF APPEALS

DIANE SPENCER and LA OBSESSION HAIR & NAIL SALON, INC.,

Plaintiffs-Appellees,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
July 17, 2001

No. 217508
Wayne Circuit Court
LC No. 96-648674-NZ

Before: Griffin, P.J., and Jansen and Gage, JJ.

PER CURIAM.

After a jury trial, defendant appeals as of right from a judgment for plaintiff in the amount of $215,000 plus interest. We affirm.

Plaintiff Diane Spencer founded plaintiff entity La Obsession Hair & Nail Salon, Inc. (the salon), which opened for business in January 1993. In 1992, Spencer by land contract purchased a building in Detroit consisting of 7011 and 7013 East Seven Mile Road. The salon operated from the 7011 address, while a candle shop rented the 7013 address. Plaintiff substantially renovated the interior of the beauty shop that existed within the 7011 address at the time she purchased the property. By 1995 and 1996, the salon housed as many as ten or eleven stylists, barbers and manicurists who paid Spencer weekly rent for the workspace they occupied. Spencer herself worked in the salon as a manicurist.

In December 1995, the salon experienced two fires within approximately ten days of each other. By February 1, 1996, Spencer had restored the salon to its prefire condition and celebrated the salon's grand reopening. On May 9, 1996, however, the salon experienced another fire that extensively damaged its interior. Defendant, which in January 1996 had issued a fire insurance policy in the salon's name, refused to cover the claim Spencer submitted involving the May 1996 fire because defendant believed that (1) Spencer had some involvement in or knowledge of the May 9, 1996 fire's origins, and (2) Spencer made material misrepresentations (a) on the salon's application for insurance regarding (i) the dates of the salon's previous fires and (ii) the market value of the building housing the salon and candle shop, and (b) regarding the May 9, 1996 fire's origins.

Plaintiff filed suit alleging counts including defendant's breach of contract, bad faith and misrepresentation. After a seven-day trial, the jury rendered a special verdict finding that defendant failed to prove by a preponderance of the evidence that Spencer committed arson or that Spencer committed fraud or misrepresented material facts. The jury awarded Spencer $125,000 for damage to the building housing the salon, $30,000 for contents damages, and $60,000 for lost profits.

Defendant first contends that the trial court erred in denying its motion for judgment notwithstanding the jury's verdict (JNOV) regarding the jury's finding of lost contents damages amounting to $30,000. Defendant asserts that Spencer presented no evidence regarding the actual cash value of the salon's lost contents. When reviewing a motion for JNOV, this Court considers the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could honestly have reached different conclusions, the verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

The sworn proof of loss Spencer submitted with her claim clearly asserted that the actual cash value of the building at the time of the fire was $75,000. Spencer further claimed in the proof of loss that the amount of lost contents totaled $30,000. The $30,000 contents loss amount was added with the $75,000 building loss for a total loss of $105,000, but the sworn proof of loss itself did not explicitly describe the $30,000 in lost contents as their "actual cash value," the applicable measure of recovery under defendant's policy. The trial testimony of defendant's claims examiner who reviewed Spencer's claim clarified, however, her view that Spencer's assertion of $30,000 in the sworn proof of loss constituted the actual cash value of the salon's contents loss. Furthermore, the examiner's testimony indicated that defendant's insurance adjuster's estimate of the actual cash value of the salon's total insured losses (building and contents) approached within several thousand dollars Spencer's own estimate of the actual cash value of the salon's total insured losses. Viewing Spencer's proof of loss and the examiner's testimony in the light most favorable to plaintiffs, we conclude that the jury reasonably could have found that the actual cash value of the salon's contents loss was $30,000. *Forge, supra*; *Central Cartage, supra*. Accordingly, the trial court properly denied defendant's motion for JNOV with respect to contents loss.

Defendant also suggests that the trial court incorrectly denied its motion for JNOV with respect to the jury's $60,000 award of lost profits because the record evidence did not support any award of lost profits. Defendant initially contends that insufficient evidence demonstrated that the parties contemplated that a breach of the insurance contract by defendant might lead to the salon's loss of profits. Consequential damages, including lost profits, are recoverable for a breach of a commercial contract only when those damages arise naturally from the breach or can reasonably be said to have been in contemplation of the parties at the time they entered the contract. *Lawrence v Will Darrah & Assoc's, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994). In reviewing the reasonableness of a contemplation of consequential damages under the circumstances, we apply an objective standard of foreseeability. *Id*. at 12.

In this case, the application for insurance names the applicant as "La Obsession Hair Salon Inc." The application further denotes the requested building and coverage limits within a

portion titled "Commercial Only Section." The declarations page described the insured building's "Occupancy" as "Commercial Occupant." The schedule of items attached to the declarations page likewise described as "commercial" the building's occupancy. The upper right hand corner of the first page of the "Standard Property Policy" contained the words "Commercial Property." Furthermore, the "Michigan Changes" endorsement to the policy also contained in the upper right corner of its first page the denomination "Commercial Property." In light of the policy's description of the insured as an incorporated hair salon and a "Commercial Occupant," and the repeated references to the policy as concerning "Commercial Property" within the application, the policy itself and the endorsement, we find a sufficient basis for the jury "to infer that at the time the parties entered into the contract, the defendant[] reasonably knew or should have known that in the event of breach this plaintiff would lose profits." *Lawrence*, *supra* at 15.[1]

Defendant further challenges the sufficiency of evidence supporting the jury's award of lost profits. We reject defendant's suggestion that the lost profit testimony of plaintiffs' financial expert, Richard Huddleston, was unfounded speculation.[2] Huddleston opined that the salon's tax returns were "far out of whack," of "very low to poor quality" and contained a "number of gaps," and did not balance, as they should. In reviewing the salon's 1995 tax return, which formed the basis for his lost profit calculations, Huddleston observed that while one form indicated that the salon obtained net income for the year amounting to $2366, an attached balance sheet reflected an approximately $23,000 increase in the salon's fixed assets during 1995. Huddleston ascertained through Spencer that plaintiffs had not borrowed money to improve the salon, and concluded that "this business was also generating, in 1995, another $23,000 that [Spencer] was simultaneously reinvesting in this business." Huddleston suggested that pictures of the salon appearing clean and new, and Spencer's statements concerning her improvements to the building,

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[1] Defendant correctly observes that the instant case is distinguishable from *Lawrence*, *supra* at 13-15, because in this case Spencer failed to elicit any specific testimony of defendant's agents that acknowledged their recognition that the salon would lose profits in the event defendant refused to pay a claim. Contrary to defendant's suggestion on appeal, however, the Supreme Court did not specifically hold that introduction of a "commercial" policy alone constituted an insufficient basis from which to infer that the parties contemplated lost profits:

> *We disagree that the nature of the transaction alone can never be enough*. The defendants' assertions about the availability of money in the marketplace do not necessarily ring true in the insurance contract setting:
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> Legal rates of interest, however, fall far short of commercial rates and the credit worthiness of an insured following a loss may be doubtful. In fact, the insured's purpose in obtaining insurance is often intended to avoid the financial losses the insured would otherwise be unable to bear. [*Lawrence*, *supra* at 14-15, n 17 (emphasis added), quoting Freemon, *Reasonable and foreseeable damages for breach of an insurance contract*, 21 Tort & Ins L J 108, 111 (1985).]

[2] We note that Huddleston, a manager of the City of Detroit's Retirement Systems, who testified as an expert regarding his valuation of the salon, explained that he regularly reviewed and prepared tax returns and performed business valuations.

supported his assumption that $23,135 of the salon's revenues was expended on improvements. Huddleston calculated that adding the omitted $23,135 to the other revenues appearing in the salon's 1995 tax return brought the salon's net cash flow/lost profits for 1995 to $26,882.[3] Because Huddleston's testimony was based on his experience, statements from Spencer, photographs and figures within the salon's tax return, we conclude that Huddleston's opinions represented properly grounded expert testimony, not pure speculation.[4] MRE 702, 703.

In light of Huddleston's testimony concerning the salon's net profit, we conclude that sufficient evidence supported the jury's award of lost profits amounting to $60,000. Although the exact duration of the period for which the jury found lost profits appropriate is not clearly discernible from the verdict, the evidence reflects that the jury could have calculated lost profits for some period of time between 2-1/2 years and 2-1/4 years.[5] Multiplying the length of these periods by the $26,882 annual net profit figure proposed by Huddleston yields between approximately $60,484.50 and $67,205 in lost profits. Accordingly, we conclude that, considering the evidence and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party, the jury reasonably could have calculated lost profits of $60,000. *Forge, supra*.

Defendant additionally claims that plaintiff failed to present any evidence regarding the salon's required rebuilding time after the May 9, 1996 fire, and that the jury's $60,000 lost profits award improperly failed to incorporate the business interruption period during which,

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[3] Defendant correctly argues that damages for lost profits must represent *net* profits lost, *Getman v Mathews*, 125 Mich App 245, 250; 335 NW2d 671 (1983), but apparently ignores that Huddleston specifically testified concerning the salon's net lost profits.

[4] Defendant correctly notes that it introduced financial testimony contradicting Huddleston's opinions, including testimony by the accountant who prepared the salon's 1995 tax return. To the extent the jury obviously chose to credit Huddleston's analysis of the salon's 1995 tax return over the preparing accountant's explanation, this Court will not second guess the jury's finding. *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993) ("[T]he weight to be accorded the testimony of the expert . . . was a matter for the jury to determine.").

[5] The period from the date of the fire (May 9, 1996) to the jury's verdict (November 25, 1998) exceeded two and one-half years. The period from the time defendant should have paid the salon's claim under the policy (approximately the beginning of August 1996) until the jury's verdict (November 25, 1998) constituted approximately two years, three months and three weeks.

pursuant to explicit policy language, plaintiffs were not entitled to coverage.[6] For several reasons, we decline to consider this issue. First, other than citing a case describing the general aim of damages for breach of a contract, i.e., to place the injured party in as good a position as he would have been in if the promised performance had been rendered, *Lawton v Gorman Furniture Corp*, 90 Mich App 258, 267; 282 NW2d 797 (1979), defendant provides no authority for the proposition that plaintiffs must be precluded from recovering any lost profit damages on the basis of their failure to satisfy the burden of providing specific evidence regarding the length of the business interruption period for which the policy excluded coverage. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Secondly, defendant never argued to the jury that it should deduct from any contemplated lost profits the profits attributable to the business interruption caused by the fire. No indication exists that defendant ever requested that the trial court within its instructions regarding lost profits specifically advise the jury that if it reached the issue of lost profits it should consider the contract clause prohibiting business interruption damages. Defendant affirmatively indicated its contentment with the instructions as given. Absent some effort by defendant to bring to the jury's attention the policy's no business interruption damages provision, we conclude that defendant has waived appellate review of this issue. *Farm Credit Serv's of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998) ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.").

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[6] We note our disagreement with defendant's one-sentence suggestion in its brief on appeal that the policy's exclusion of "compensation for loss resulting from interruption of business" should preclude the salon's recovery of lost profits. The Michigan Supreme Court in *Lawrence, supra*, favorably cited *Salamey v Aetna Casualty & Surety Co*, 741 F2d 874 (CA 6, 1984), for the proposition that under certain circumstances lost profits could be recovered for an insurer's breach of its policy. *Lawrence, supra* at 10. In the course of its cited discussion, the Sixth Circuit Court of Appeals rejected the defendant insurer's argument that the involved policy's "business interruption clause should be enforced according to its terms, which limit the recovery to income lost during the period theoretically required for rebuilding the premises." *Lawrence, supra* at 10-11, quoting *Salamey, supra* at 876-877.

> *This claim for lost profits is separate from the claims to enforce the insurance contract*. "The policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach." . . . Salamey here is seeking to collect damages for losses occasioned by Aetna's breach of contract in failing to pay Salamey's claim under the policy. The business interruption clause is thus irrelevant to the measure of damages for breach of contract. [*Lawrence, supra* at 11, quoting *Salamey, supra* at 877 (emphasis added).]

(continued…)

We also refuse to consider defendant's contention, unsupported by any authority, that lost profits were not recoverable because Spencer failed to produce any specific testimony that she intended to repair the salon.[7] *Mudge*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kathleen Jansen
/s/ Hilda R. Gage

(…continued)

As this passage illustrates, business interruption and lost profits do not constitute identical concepts.

[7] We note, however, that several witnesses testified at trial that owning and operating the salon was a dream of Spencer's and that she loved the business, from which the jury reasonably could have inferred Spencer's intent to reopen the salon.