STATE OF MICHIGAN

COURT OF APPEALS

WOODBURY AUTOMOTIVE WAREHOUSE ENTERPRISES, INC.,	UNPUBLISHED January 29, 2002
Plaintiff-Appellant,	
v	No. 226787 Oakland Circuit Court
MERRITT HANDLING ENGINEERING, INC.,	LC No. 98-009975-CK
Defendant-Appellee.	

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Plaintiff Woodbury Automotive Warehouse Enterprises, Inc., appeals by leave granted. Woodbury challenges the trial court's order granting defendant Merritt Handling Engineering, Inc.'s motion for discovery sanctions in this breach of contract and warranty action. We reverse and remand.

I. Basic Facts And Procedural History

In February 1996, Woodbury entered into a contract with Merritt for *used* Burroughs shelving for $84,887.00, making a $43,318.50 down payment. Woodbury reserved the right to reject any damaged shelving and informed Merritt in writing at the bottom of the purchase order that its agent would contact Merritt when it was ready to receive the delivery, which would be in approximately four to six weeks.

Woodbury encountered complications with the project in which it planned to use the shelving. As a result, a six to eight week delay occurred before Woodbury instructed Merritt to ship the shelving. In May 1996, Merritt sent the shelving to Woodbury directly from The Phoenix Group, which evidently was Merritt's supplier. The shelving was allegedly nonconforming, so, ten or eleven days later, Woodbury returned the shelving. Woodbury also replaced ("covered") this product with *new* Burroughs shelving, which it purchased through American Handling, Inc., for approximately $150,100.

In October 1998, Woodbury sued Merritt for breach of contract and breach of express and implied warranty under the Michigan Uniform Commercial Code (UCC).[1] As damages, it asked for the difference between the $84,877 contract price and the $150,100 cost to cover the

[1] MCL 440.1101 *et seq*.

nonconforming shelving, incidental damages, consequential damages such as lost profits, and future damages, including costs and attorney fees.

On three occasions during discovery, Merritt requested documentation supporting Woodbury's claims for damages. Woodbury produced three documents in support of its claims. First, it produced a project cost summary dated January 30, 1996. This document, which American Handling had prepared, identified the costs associated with the major project Woodbury was undertaking and estimated that new shelving would cost $135,050. Second, Woodbury provided a May 13, 1996, project cost summary, which American Handling also prepared. This second cost summary reflected that the shelving would cost $0 because Merritt, not American Handling, would be providing it to Woodbury. Finally, Woodbury produced a July 2, 1996, project cost summary that American Handling prepared after Woodbury directed it to order new shelving. This third cost summary lists $150,100 as the price for shelving, which Woodbury claims was "the actual cost of the shelving" it installed. Woodbury argued that its cover damages would thus be "the difference between $150,100 and $84,887, or $65,213."

Merritt, however, was not satisfied with these documents. Accordingly, it subpoenaed Woodbury's purchase records from the Burroughs Corporation, which provided an invoice indicating that the shelving it sold to Woodbury was $85,839.06, not roughly $150,000. Apparently still frustrated with discovery, Merritt moved to exclude Woodbury's evidence of damages as a sanction for Woodbury's failure to comply with its discovery requests. In doing so, Merritt relied on MCR 2.302(E)(2), which provides:

> If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

In turn, MCR 2.313(B)(2)(b) permits a trial court to enter an order barring the party that committed the discovery violation from providing evidence "to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence . . . ." The trial court granted the motion, barring Woodbury from introducing at trial evidence of "any loss of good will" and lost profits. With respect to cover damages, i.e., the cost Woodbury allegedly incurred above its contract price when it claims it was forced to purchase new Burroughs shelving, the trial court ruled that Woodbury

> may only present evidence which substantiates the difference in price between the new Burroughs shelving as quoted by American Handling in the Preliminary Cost Estimate dated January 30, 1996 . . . indicating the projected cost of new shelving to be $135,050 and the actual amount paid by [Woodbury] to American Handling for the new Burroughs shelving, in the Project Cost Summary, dated July 2, 1996 . . . in the amount of $150,100, provided that such evidence has heretofore been provided to [Merritt].

II. Sanctions

A. Standard Of Review

Woodbury contends that the trial court erred in concluding that it failed to provide to Merritt during discovery the requested evidence of the damages it sustained when Merritt allegedly breached its contract. This Court reviews a trial court's ruling concerning discovery sanctions to determine whether the trial court abused its discretion.[2]

B. Evidence

In *Bass v Combs*,[3] this Court explained the matters that should shape a trial court's decision when confronted with a motion for sanctions:

> The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.[4]

As for the specific factors that affect whether to grant a motion for sanctions, they include, but are not limited to:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.[5]

Understanding the concept of cover damages is critical to understanding whether Woodbury actually failed to comply with Merritt's discovery requests. When a seller breaches its duty to provide a purchaser with goods, the UCC permits the buyer to "'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."[6] Subsequently, in a breach of contract

[2] See *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 265; 617 NW2d 777 (2000).

[3] *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999).

[4] *Id*. at 26 (citations omitted).

[5] *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

[6] MCL 440.2712(1).

action, "[t]he buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . ."[7] Any money saved in covering the breach is then setoff from the damages.[8]

Though Woodbury produced three documents in support of its claims, Merritt claimed that they did not support its cover damages. We agree that the first two cost summaries do not support Woodbury's claims for cover damages. The January 1996 document is actually a "preliminary cost estimate," i.e., American Handling's first bid for the project. Woodbury rejected the shelving portion of that bid and elected to have Merritt supply the shelving. Thus, it has no bearing on Woodbury's original price for the shelving under its contract with Merritt or the cost incurred to cover the breach. Similarly, the May 1996 cost summary is irrelevant to Woodbury's cover damages because American Handling prepared the summary while Woodbury still expected Merritt to supply the shelving. Indeed, this cost summary excludes a cost for shelving. Woodbury provides no plausible explanation for how either of these documents would be relevant to its cover damages.

Nevertheless, American Handling's final project cost summary from July 1996 is relevant to the cover damages because it shows what Woodbury ultimately paid for the shelving. Though Merritt contends that this document is irrelevant to Woodbury's cover damages because it is not an invoice, bill, or receipt, Merritt provides no authority that only those sorts of documents can constitute evidence of cover damages. We acknowledge that Burroughs' records reflected a new shelving purchase in the amount of $85,839.06, not $150,100. This certainly casts doubt on whether the July 1996 cost summary reflects the price Woodbury paid. Edward Lyons, Woodbury's employee, however, testified in his deposition that Woodbury ultimately paid $157,500 for the shelving. Though there is a factual dispute concerning the precise amount Woodbury actually paid for the new Burroughs shelving, Woodbury did provide adequate evidence of this half of the equation necessary to compute cover damages.

While one sum necessary to calculate cover damages is, of course, the price ultimately paid for replacement goods, cover damages cannot be calculated without evidence of the contract price.[9] In this case, there is no question that Woodbury provided evidence of the price of its contract with Merritt, including Merritt's January 30, 1996, offer with a number of different options and Woodbury's February 19, 1996, acceptance of the option of used Burroughs shelving for $84,887. The contract price needed to calculate cover damages is the $84,887 reflected in these documents, which Woodbury supplied in response to Merritt's first request for documents. Merritt may not have been completely satisfied with the substance of Woodbury's responses to its discovery requests. However, Woodbury did supply enough documentation for a jury to determine whether and how much it sustained in cover damages, which was responsive to Merritt's discovery requests. This was not the willful failure to reply to discovery requests that ordinarily justifies a sanction as harsh as precluding evidence of damages.[10] There is no

[7] MCL 440.2712(2).

[8] *Id.*

[9] MCL 440.2712(2).

[10] See, generally, *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451-452; 540 NW2d 696 (1995); *Barlow v John Crane Houdaille, Inc*, 191 Mich App 244; 477 NW2d 133 (1991).

indication that the documentary evidence Woodbury provided Merritt met the grounds for supplementation because the responses were "incorrect when made"[11] or "though correct when made, [were] no longer true and the circumstances are such that a failure to amend the response [was] in substance a knowing concealment."[12]

Merritt also points to Lyons' deposition testimony concerning how full the warehouse would be, claiming that this testimony was inconsistent with Woodbury's refusal to admit that it could not specify the sales it lost because it did not have the shelving. Therefore, Merritt claims, Woodbury's failure to update its admissions to conform to Lyons' testimony justified the sanction in this case. However, a plaintiff need only prove the existence of damages[13] and provide a reasonable basis for their calculations without speculation, leaving the ultimate amount to the factfinder.[14] Woodbury accomplished this much by preparing two detailed tables explaining how it calculated its lost profits.[15] There is no inherent inconsistency in Lyons' deposition testimony and the admission that would require supplementation and warrant this sanction in light of this evidence explaining how Woodbury calculated its damages.

In sum, the trial court abused its discretion in barring Woodbury from introducing evidence of lost goodwill and lost profits, and in limiting evidence of cover damages to the difference between American Handling's January 1996 quote for new shelving and its actual price in July 1996[16] at trial as sanctions for Woodbury's purported discovery violations.

III. Summary Disposition Confusion

In its remaining argument in this appeal, Woodbury argues that the trial court erred in concluding that it had failed to provide evidence of lost profits, lost goodwill, and other incidental damages. This argument is in response to Merritt's contention in its motion for sanctions that Woodbury failed to provide evidence of a number of other factors relevant to damages. Merritt alleged that Woodbury failed to give it a reasonable opportunity to cure the shelving problem, that Woodbury's attempt to mitigate its damages by purchasing new shelving was not reasonable or in good faith, and that Woodbury's calculation of other damages was speculative.

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[11] MCR 2.313(E)(1)(b)(i).

[12] MCR 2.313(E)(1)(b)(ii).

[13] See *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1988).

[14] See *Valley Die Casting Corp v ACW, Inc*, 25 Mich App 321, 326; 181 NW2d 303 (1970).

[15] In *Michigan Microtech, Inc v Federated Publications*, 187 Mich App 178, 188; 466 NW2d 717 (1991), this Court approved of a similar manner of calculating lost profit damages.

[16] Woodbury also argues on appeal that the trial court erred as a matter of law in calculating damages in this manner as opposed to the manner prescribed in MCL 440.2712(2). As we read the order, the trial court deviated from the statutory formula as a sanction as opposed to an erroneous conclusion regarding the proper formula. Having already determined that sanctions were not warranted, and without considering whether altering the statutory formula was within the trial court's authority, we reiterate that MCL 440.2712(2) is the proper measure for cover damages to be applied in this case.

The problem with that portion of Merritt's argument, which has now found its way into this appeal, is that it was an argument calculated to support a motion for summary disposition, not a motion for sanctions. Had Merritt moved for summary disposition, it could have challenged the record as inadequate to show a dispute regarding every fact material to Woodbury's claims,[17] such as the existence – as opposed to the amount – of certain damages.[18] Indeed, nothing precluded Merritt from moving for summary disposition and, in the alternative, sanctions.

Instead, the motion in limine Merritt actually filed asked the trial court to determine whether Woodbury's alleged misbehavior during discovery warranted excluding available evidence from the jury as a sanction. Merritt looked for deficiencies in the record only as support for its request that the trial court preclude Woodbury from presenting evidence of damages to the factfinder; Merritt did not ask the trial court to grant summary disposition, refer to MCR 2.116, the court rule for summary disposition, or even ask the trial court to dismiss any of the claims.

Nor can we gather from the record that the trial court actually treated the motion for sanctions as a motion for summary disposition. Had it done so, the resulting order would have addressed whether to dismiss or leave in tact Woodbury's underlying claims for breach of contract and warranty. Quite differently, the trial court devised a sanction aimed at limiting the amount of damages Woodbury could recover at trial. This presupposed that there was no reason to dismiss any of the claims.

Woodbury made an effort to address Merritt's arguments, as out of context as they were, in the trial court and has done so again in this appeal. While we are inclined to agree with Woodbury's arguments that its efforts to calculate damages supported with evidence was reasonable, we have already concluded that the trial court erred in granting this motion for sanctions, which requires reversal. This is the remedy Woodbury sought in this appeal. Thus, there is no need to address this issue, poorly formed because of the way Merritt raised it in the trial court, simply in order to determine whether there might be other reasons to reverse the trial court's decision. Merritt is free to argue to the factfinder at trial any number of pieces of evidence that it believes may show that Woodbury is not entitled to the damages it claims it sustained.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

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[17] See MCR 2.116(C)(10).

[18] See *Denha*, *supra*.