

STATE OF MICHIGAN
COURT OF APPEALS

SOUTHFIELD OBSTETRICAL SERVICES,
P.C., and NORTHWEST OB/GYN
ASSOCIATES, P.C.,

UNPUBLISHED
June 22, 2004

Plaintiffs-Appellees/Cross-
Appellants,

v

VITAL WORKS, INC., f/k/a INFOCURE, INC.,

No. 246254
Oakland Circuit Court
LC No. 01-034020-CK

Defendant-Appellant/Cross-
Appellee.

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant Vital Works, Inc.,¹ appeals as of right the bench trial judgment in favor of plaintiffs Southfield Obstetrical Services, P.C. (“SOS”), and Northwest OB/GYN Associates, P.C. (“Northwest”). Plaintiffs cross-appeal the trial court’s reduction of their award due to comparative negligence. We find that the trial court properly ruled in plaintiffs’ favor, but erroneously found them comparatively negligent. We therefore remand for entry of judgment in favor of plaintiffs in the amount of \$354,530, plus interest at the statutory rate pursuant to MCL 600.6013 from August 16, 2001, through the date of payment in full.

I. Facts and Procedural History

Plaintiffs suffered damages when the computer system on which they kept information vital to their practice crashed in January of 1999. Subsequent to the crash, defendant’s predecessor SDM retrieved the hard drive and backup tapes of the computer system.² When

¹ Vital Works, formerly known as Infocure, Inc., is a successor to Scientific Data Management, Inc. (“SDM”), and SDM Acquisition, Inc., to whom Sheldon Hamburger sold and assigned the accounts of his company, Michigan Systems Engineering.

² Mr. Hamburger provided the software for plaintiffs’ system and taught the staff to create backup tapes several times a week. In 1990, Mr. Hamburger verified that the backup tapes were
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SDM was unable to retrieve the data on the hard drive, the hardware provider, Modern Business Machines, collected the equipment and sent it to a data retrieval expert, Ontrack Data International (“On-Track”). On-Track indicated that SDM erased all of plaintiffs’ databases when they reformatted the hard drive. SDM also misplaced plaintiffs’ most current backup tape. The prior tape was incomplete. As a result, plaintiff Northwest was only able to recover data entered prior to December of 1998, and plaintiff SOS was unable to recover any data.

The trial court granted plaintiffs’ motion for summary disposition regarding defendant’s liability and conducted a trial on the issues of plaintiffs’ comparative negligence and damages. Based on the evidence presented, plaintiffs were awarded \$12,722 for time spent inputting lost data. Although plaintiffs had presented evidence of \$402,126 in lost profits, the trial court reduced the award by fifteen percent to \$341,808, as the evidence failed to account for some of the factors that impacted their revenue. The trial court found that plaintiffs failed to rebut defendant’s allegation of comparative negligence by presenting evidence of their ability to recover the lost data before SDM reformatted the hard drive. The trial court determined that plaintiffs were thirty percent at fault, and therefore, reduced their net damages award to \$248,171.

II. Damages

Defendant argues that the trial court erred in awarding damages to plaintiffs for lost profits because plaintiffs failed to show causation, and thus, lost profits were not proved with reasonable certainty. We disagree. Pursuant to MCR 2.613(C), we review findings of fact in a bench trial for clear error and conclusions of law de novo.³ We also review an award of damages for clear error.⁴ A factual finding is clearly erroneous if a review of the entire record leaves this Court with a definite and firm conviction that a mistake was made.⁵

As the trial court granted plaintiffs’ motion for summary disposition on the issue of defendant’s liability, the issue of causation was resolved prior to trial. Defendant failed to appeal the order granting summary disposition, and the trial was conducted solely on the issues of damages and plaintiffs’ comparative negligence. Defendant’s argument that plaintiffs were required to prove causation in order to prove lost profits is, therefore, misplaced.

Defendant correctly asserts that plaintiff must prove damages with a reasonable certainty.⁶ Damages need not be ascertained with mathematical precision as long as there is a

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complete and readable, leading plaintiffs to the assumption that the system was operational.

³ MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

⁴ *Alan Custom Homes, Inc, supra* at 513.

⁵ *Id.*, *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

⁶ *Alan Custom Homes, Inc, supra* at 512.

reasonable basis for computation.⁷ Lost receivables, like prospective profits, may be established by profits from previous years.⁸

Jim Nemes, plaintiffs' accountant, compared fee income data from 1998 and 1999 financial statements and general ledgers and concluded that plaintiffs suffered a decrease in fee income or "lost receivables" of \$402,126.⁹ Defendant presented the testimony of an accountant, Barry Michael Grant, to challenge Mr. Nemes' methods. Mr. Grant asserted that plaintiffs could have reconstructed their lost billings from daily sign-in sheets and super bills¹⁰ for comparison with collections received.¹¹ The trial court considered Mr. Grant's rebuttal testimony and reduced plaintiffs' award by fifteen percent to \$341,808. Although this method may only be approximate, it is a reasonable basis for computation. The trial court's award of damages for lost profits was, therefore, not clearly erroneous.

III. Comparative Negligence

Plaintiffs cross-appealed and contended that the trial court erred in finding comparative negligence because defendant failed to present any evidence of plaintiffs' negligence. We agree.

Comparative negligence is an affirmative defense, and if proven, reduces damages "to the extent that plaintiff's negligence contributed to the injury."¹² To establish a negligence claim, a party must show: (1) a duty owed to the party, (2) a breach of that duty, (3) causation, and (4) damages.¹³ When asserting comparative negligence, a defendant has the burden of proving that the plaintiff's conduct was both a cause in fact and a proximate cause of his own damages.¹⁴

However, defendant failed to meet its burden. Defendant offered no theory or evidence of plaintiffs' duty and failed to present any evidence of breach or causation. The trial court correctly noted that no evidence was presented regarding the availability of the data after the system crashed, but erroneously concluded that *plaintiffs* had such a burden. Accordingly, the trial court erred when it concluded that plaintiffs were comparatively negligent.

⁷ *Berrios v Miles*, 226 Mich App 470, 478; 574 NW2d 677 (1997).

⁸ *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175-176; 568 NW2d 365 (1997).

⁹ [Trial Transcript, September 19, 2002, pp 205-215.]

¹⁰ Plaintiffs created a "super bill" for every patient visit containing the patient's name, date of service, diagnosis, a record of lab work, and billing codes. A hard copy of the patient's super bill was kept with the daily sign-in sheet for six months to one year. [Trial Transcript, September 19, 2002, pp 97-99, 169-173.]

¹¹ [Trial Transcript, September 19, 2002, pp 288-289.]

¹² *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79-80; 618 NW2d 66 (2000). See also MCL 600.2957; MCL 600.2959.

¹³ *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

¹⁴ *Lamp v Reynolds*, 249 Mich App 591, 599; 645 NW2d 311 (2002).

The trial court properly ruled in favor of plaintiffs. Because it found plaintiffs thirty percent comparatively negligent, however, the trial court erroneously reduced plaintiffs' damages for lost profits and recreating lost data from \$341,808 and \$12,722, respectively, by thirty percent, for a total award of \$248,171. We remand for entry of judgment in favor of plaintiffs in the total amount of \$354,530, which equals \$341,808 plus \$12,722, together with interest at the statutory rate pursuant to MCL 600.6013 from August 16, 2001, through the date of payment in full. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper