FILED BY CLERK
OCT 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

J.A. PHELPS, D.V.M. and KATARINA S. PHELPS, husband and wife, Plaintiffs/Appellants, v. THOMAS J. GILBRAITH and AUDREY J. WYSTRACH, D.V.M., husband and wife, Defendants/Appellees.	2 CA-CV 2010-0052 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV200800174

Honorable James A. Soto, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

Cardinal & Stachel, P.C.
By Robert D. Stachel, Jr. and Carolyn A. Fritz
Sierra Vista
Attorneys for Plaintiffs/Appellants

Monroe, McDonough, Goldschmidt & Molla, P.L.L.C.
By D. Rob Burris
Tucson
Attorneys for Defendants/Appellees

B R A M M E R, Presiding Judge.

¶1 J.A. Phelps and Katarina S. Phelps appeal from the judgment awarding them nominal damages of $100 in their declaratory judgment and breach of contract action against appellees Audrey J. Wystrach and Thomas J. Gilbraith. Because the facts relevant to this appeal concern only J.A. Phelps's and Audrey Wystrach's conduct, we refer to them as individuals throughout this decision. Phelps argues on appeal that the trial court erred in denying his motion for new trial and in declining to award him attorney fees pursuant to A.R.S. § 12-341.01. We affirm the award of nominal damages, but vacate the judgment and remand for the court to reconsider the attorney fees issue.

Factual and Procedural Background

¶2 "We view the record in the light most favorable to upholding the trial court's decision."[1] *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). On August 16, 2004, Wystrach sold Phelps her Sonoita-based veterinary practice. The sale contract included a covenant not to compete that precluded Wystrach from engaging in the practice of veterinary medicine for five years within a forty-mile radius of Sonoita and to refrain from providing veterinary service to former customers of the

[1]~~Phelps failed to provide this court with trial transcripts. Although he asserted at oral argument before this court that he had filed those transcripts, it appears he filed only the transcripts' cover pages. The complete transcripts do not appear in our docket. Because we must assume items missing from the record on appeal support the trial court's ruling, this failure would justify our summary disposal of this appeal. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Wystrach, however, provided this court with partial certified transcripts, *see* Ariz. R. Civ. App. P. 11, and excerpts of other testimony in an appendix to her answering brief. Because we prefer to resolve cases on their merits, *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), we will consider the transcripts and excerpts Wystrach has provided.~~

practice. The agreement also required Wystrach to recommend Phelps as her successor to existing customers.

¶3 Nelson Farms, located in Tucson, is a breeder, boarder, and trainer of show horses. As part of its services, it facilitates the provision of veterinary care for its clients' horses. Nelson Farms permits its clients to use any veterinarian, but if a client has none, then Nelson Farms will use one of several veterinarians located in Tucson with whom it has a preexisting relationship. After signing the sale agreement, Wystrach, who lived in Tucson, provided veterinary services to Nelson Farms at its request. According to Trish Nelson, Nelson Farms' principal, it would not have used Phelps for veterinary services had Wystrach been unavailable. She explained that Nelson Farms had preexisting relationships with other Tucson-based veterinarians, would have had no reason to use a Sonoita-based veterinarian, and used Wystrach both because she lived in Tucson and was a friend.

¶4 In April 2008, Phelps sued Wystrach, asserting claims for declaratory judgment and breach of contract based on her alleged violation of the sale contract's non-compete clause. He sought both damages and an order enjoining Wystrach from continuing to practice veterinary medicine in violation of that clause. Phelps filed a motion for partial summary judgment, asserting the non-compete clause was valid and binding and Wystrach had breached it by providing services to Nelson Farms. Wystrach also sought summary judgment, asserting she had not violated the sale contract's non-compete provision and, in order for Phelps to show damages, he had to demonstrate his lost profits with reasonable certainty.

¶5 The trial court granted Phelps's partial motion for summary judgment. The court also granted, in part, Wystrach's motion for summary judgment, concluding the parties did not dispute Phelps had to show damages by proving he had lost profits as a result of Wystrach's breach. After a two-day bench trial solely on the issue of damages, the court, relying in part on Nelson's testimony, found Phelps had failed to prove damages. The court entered a judgment on August 7, 2009, enjoining Wystrach from providing veterinary services "to Nelson Farms or the clients of Nelson Farms until after August 17, 2009," and awarding Phelps $100 in nominal damages. The court also determined that, because Phelps had prevailed "on the issue of . . . breach of the [sale] Agreement" and Wystrach had prevailed "on the damages issues," "each party was partially successful and partially unsuccessful." It therefore ordered that "each party shall be responsible for [its] own attorney's fees and court costs."

¶6 Phelps then filed a motion for a new trial. After oral argument, the trial court affirmed its August 7 findings of fact and conclusions of law, but agreed with Phelps that he was entitled to his costs. The court then entered an amended judgment awarding Phelps his taxable costs. This appeal followed.

Discussion

¶7 Phelps first argues the trial court erred in denying his motion for a new trial and awarding him only nominal damages. We review for an abuse of discretion a court's denial of a motion for a new trial. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007). Phelps contends the court erred "in determining damages based solely on [Nelson's] testimony." Relying on *Gann v. Morris*, 122 Ariz.

517, 596 P.2d 43 (App. 1979), he asserts a court may not consider a customer's testimony in assessing damages for the breach of a covenant not to compete, and the court here should have based its damages evaluation instead on the services Wystrach had provided in violation of the agreement, together with the testimony of both the parties to the agreement. In *Gann*, we summarily affirmed the trial court's damages finding, stating it was "supported by invoices for sales made in violation of the agreement, and testimony of both buyer and seller as to average cost and profits per sale," concluding the trial court had properly "limited its award to the lost profits specifically established by such evidence." 122 Ariz. at 519, 596 P.2d at 45. Nothing in *Gann* limits to invoices and the testimony of the parties to the agreement the evidence a trial court may consider in evaluating whether a party has demonstrated lost profits.

¶8 Phelps contends, however, that Nelson's testimony was irrelevant to the issue of lost profits.[2] He reasons that, because the trial court properly found "a customer's wishes . . . irrelevant" to the issue of whether Wystrach had violated the non-compete clause, her testimony was equally irrelevant to the issue of damages. This argument is unavailing. We agree that whether Nelson Farms would have used Phelps for veterinary services is irrelevant to whether Wystrach had violated the contract's non-compete clause—customers were not excepted from its provisions. But such evidence

[2]Phelps also asserts, without elaboration or citation to authority, that Nelson's testimony was "speculative." We find nothing speculative about her testimony that Nelson Farms would not have used Phelps for veterinary services. Indeed, Nelson testified that someone from Phelps's office had called her offering veterinary services and she had refused.

plainly is relevant to whether Wystrach's breach caused Phelps to sustain lost profits. If a customer would not have used Phelps for veterinary services regardless of Wystrach's breach, Phelps cannot reasonably argue he lost profits he otherwise would have earned by providing services to that customer.

¶9 Phelps cites numerous cases for the proposition that the breaching party's income earned in violation of a non-compete clause may form a basis for calculating damages caused by that violation. But, "[g]enerally, damages for breach of contract are those proximately caused by the breach, or which are within the contemplation of the parties at the time they entered into the contract." *Home Indem. Co. v. Bush*, 20 Ariz. App. 355, 360, 513 P.2d 145, 150 (1973). None of the authority Phelps cites suggests that, when a defendant has breached a covenant not to compete, a plaintiff is relieved of the burden of proving his or her damages were caused by that breach. Indeed, the cited authority is to the contrary. *See, e.g.*, *McNutt Oil & Refining Co. v. D'Ascoli*, 79 Ariz. 28, 32-33, 281 P.2d 966, 969-70 (1955) (plaintiff may recover "all damages which flowed as a direct and immediate result" of breach); *Martin v. La Fon*, 55 Ariz. 196, 199, 100 P.2d 182, 183 (1940) ("gains or profits prevented and lost are a proper element from which to estimate plaintiff's damages" in breach of contract to assign lease); *Dunn v. Ward*, 670 P.2d 59, 61 (Idaho App. 1983) ("The measure of damages is not the amount of profits made by the defendant, rather it is the amount of profit lost to the plaintiff because of the breach [of an anti-competition clause]."); *N. Pac. Lumber Co. v. Moore*, 551 P.2d 431, 435-46 (Or. 1976) (defendant's sales "which would otherwise have been made by plaintiff . . . are a reasonable basis for estimating plaintiff's damages").

¶10 Here, there was uncontroverted evidence Nelson Farms would not have used Phelps irrespective of Wystrach's availability. And Phelps does not identify anything in the record suggesting any of Nelson Farms's customers would have chosen Phelps as their veterinarian had Wystrach been unavailable or even if Wystrach had, pursuant to the sale agreement, recommended Phelps to them as a veterinarian. Phelps stipulated in the parties' joint pretrial statement that "[t]he proper measure of [his] damages is [his] lost profits proven with reasonable certainty." Lost profits are usually the "'direct and natural result'" of the defendant's breach. *Drew v. United Producers & Consumers Coop.*, 161 Ariz. 331, 333, 778 P.2d 1227, 1229 (1989), *quoting Myers v. Stephens*, 43 Cal. Rptr. 420, 433 (Ct. App. 1965). There was no evidence from which the trial court reasonably could conclude Phelps would have earned additional profits but for Wystrach's breach.[3] Thus, we find no error in its conclusion that Phelps failed to meet his burden of proving Wystrach's breach damaged him, and that an award of only nominal damages therefore was appropriate.[4] *See Hale v. Brown*, 84 Ariz. 61, 71-72, 323 P.2d 955, 962 (1958) (nominal damages appropriate when "'no evidence is given of any

[3]Wystrach's earnings from Nelson Farms before she sold the practice apparently were in evidence. We do not suggest such evidence could not be relevant to estimating the amount of Phelps's damages. But, absent evidence that Wystrach's breach actually damaged Phelps, it was not necessary for the trial court to consider Wystrach's pre-sale earnings. *See Home Indem. Co.*, 20 Ariz. App. at 360, 513 P.2d at 150.

[4]Phelps cites *Dawson v. Temps Plus, Inc.*, 987 S.W.2d 722 (Ark. 1999), for the proposition that "[n]ominal damages are only justified in cases where no customers of the business are affected and the breach occurred over a short duration." Nothing in that decision suggests, however, that nominal damages are appropriate only when a breach of a covenant not to compete is brief. Instead, it holds, consistent with Arizona law, that nominal damages are appropriate when a defendant fails to show "damages flowing directly from any breach" of the contract. *Id.* at 729.

particular amount of loss'" caused by breach of contract), *quoting Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891); *Edwards v. Anaconda Co.*, 115 Ariz. 313, 317, 565 P.2d 190, 194 (App. 1977) (nominal damages appropriate when party prevailed on breach of contract claim but damages "were indefinite and cannot be estimated accurately").

¶11 Phelps also asserts he was damaged by loss of the benefit of his bargain with Wystrach—specifically the goodwill included in the purchase price. *See Mitchell v. Mitchell*, 152 Ariz. 317, 319, 732 P.2d 208, 210 (1987) (business's goodwill an "'asset, intangible in form, which is an element responsible for profits in a business'"), *quoting Jacob v. Miner*, 67 Ariz. 109, 120, 191 P.2d 734, 741 (1948). But, again, Phelps jointly stipulated the proper measure of his damages was lost profits—not a loss of goodwill or a calculation derived from a claim that he paid an inflated price for the veterinary practice.

¶12 Phelps further contends the trial court's reliance on Nelson's testimony impermissibly created a "new contractual term" that required him first to "establish that the customer to whom [Wystrach] provided the illegal service would have used [Phelps's] services," in order to show damages from breach of the non-compete clause. We find this argument unavailing. Consistent with Arizona law, the court required Phelps to meet his burden of proving he was damaged by Wystrach's breach of the contract. *See Home Indem. Co.*, 20 Ariz. App. at 360, 513 P.2d at 150. As we have explained, Phelps cites no authority, and we find none, permitting a plaintiff to recover damages as relief for a breach of contract without proof those damages were caused by the defendant's breach.

¶13 Finally, to the extent Phelps suggests the trial court's finding he had failed to prove damages was inconsistent with its finding Wystrach should be enjoined from continuing to provide veterinary services in violation of the contract, he does not develop this argument adequately and we do not address it. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶14 Phelps next contends the trial court erred by declining to award him attorney fees pursuant to § 12-341.01. We review a trial court's decision whether to award fees for an abuse of discretion, *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 31, 20 P.3d 1158, 1168 (App. 2001), and will "uphold a decision on attorneys' fees . . . if it has any reasonable basis." *Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 27, 981 P.2d 1081, 1086 (App. 1999).

¶15 Pursuant to § 12-341.01, a trial court "may award attorneys' fees to the 'successful party' in a 'contested action arising out of a contract' to 'mitigate the burden of the expense of litigation to establish a just claim or a just defense.'" *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, ¶ 9, 155 P.3d 1090, 1093 (App. 2007), *quoting* § 12-341.01(A), (B). In determining whether to award fees, our supreme court has identified a number of pertinent factors:

> (1) the merits of the claim or defense the unsuccessful party presented; (2) whether the parties could have avoided or settled the litigation and whether "the successful party's efforts were completely superfluous in achieving the result"; (3) whether assessing fees against the unsuccessful party will

> cause an extreme hardship; (4) whether the successful party prevailed on all relief sought; (5) the novelty of the legal questions presented; (6) whether the claims or defenses had been previously adjudicated in Arizona; and (7) whether an award of fees would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney fees.

Orfaly v. Tucson Symphony Soc'y, 209 Ariz. 260, ¶ 19, 99 P.3d 1030, 1035-36 (App. 2004), *quoting Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

¶16 The trial court declined to award Phelps his reasonable attorney fees pursuant to § 12-341.01 based solely on its reasoning that Phelps was the successful party as to the breach and Wystrach as to damages, concluding "each party was partially successful and partially unsuccessful." Although Phelps's attempt to prove his monetary damages was unsuccessful, under the circumstances of this case, we do not find that factor necessarily determinative of whether he was the successful party. We observe, for example, that but for Wystrach's breach, Phelps would not have been required to initiate litigation to stop her continuing violation of the covenant not to compete.[5] *See Sanborn v. Brooker & Wake Prop. Mgmt.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994) ("While the award of money is an important item to consider when deciding who is the

[5]Phelps testified he had called Wystrach in 2005 after hearing a rumor she was working in violation of the covenant and she had denied doing so. He then received a letter from Wystrach's attorney instructing him not to contact Wystrach again, but only to contact her attorney. In 2008, when Phelps learned from a magazine article that Wystrach was working at Nelson Farms, he contacted his attorney, who sent Wystrach a demand letter which apparently was refused.

prevailing party, the fact that a party does not recover the full measure of relief it requests does not mean that it is not the successful party."); *see, e.g.*, *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, ¶¶ 15, 34-35, 214 P.3d 415, 419, 422 (App. 2009) (affirming attorney fee award to plaintiff as successful party despite determination plaintiff owed defendant $13,912; plaintiff "brought this litigation seeking a declaration that he was entitled to possession, and he won such a ruling"). Because it is unclear whether the trial court considered all relevant *Associated Indemnity* factors in making its attorney fee determination, we remand this issue to the trial court for reconsideration consistent with this decision.

Disposition

¶17 For the reasons stated, we affirm the trial court's denial of Phelps's new trial motion as to the award of nominal damages, but vacate the judgment and remand the case to the trial court for it to reconsider its denial of Phelps's attorney fee request. We deny Wystrach's request for reasonable attorney fees and costs on appeal pursuant to §§ 12-341 and 12-341.01.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

E S P I N O S A, Judge, specially concurring.

¶18 I write separately to express some reluctance in joining a decision that appears to foster an unfair result in a troublesome case, and to voice somewhat different views on the two issues before us. The evidence clearly established, as the trial court found, that Wystrach had directly violated a reasonable covenant not to compete and did so continuously for a protracted period of time. I would find Phelps also introduced evidence that Wystrach had substantially profited from her breach and that her profits were his losses. *See Gann* 122 Ariz. at 519, 596 P.2d at 45 (in context of sale of business, defendant vendor's sales and profits resulting from breach of covenant not to compete evidence of purchaser's loss); *B&Y Metal Painting Inc. v. Ball*, 279 N.W. 2d 813, 817 (Minn. 1979) (plaintiff's damages inferable where defendant seller of business violated covenant not to compete by doing business with former customers and new owner's sales to those customers declined).

¶19 Phelps, of course, did not partake in any of the business and profits deflected by Wystrach's clandestine, at least to Phelps, retention of the veterinary practice's largest client, Nelson Farms. Thus, regardless of any other profits or losses Phelps experienced after purchasing the practice, there is no question that its revenues attributable to Nelson Farms dropped from a significant percentage before the sale, to zero thereafter. *See Martin*, 55 Ariz. at 199, 100 P.2d at 183 (previous revenues of assigned business relevant to assignee's estimate of lost profits). Accordingly, Phelps introduced both pre- and post-sale evidence from which it could be inferred Wystrach's illegitimate gains were his losses. As the Minnesota Supreme Court noted in *Ball*:

> Because the loss of profits in a complex market can rarely be ascertained with certainty, the plaintiff must often rely on reasonable inferences to establish his loss. Without allowing such inferences, the defendant could purposely breach a covenant not to compete and remain immune from liability.

279 N.W. at 816. I believe that principle is well-illustrated in this case.

¶20 The course of the litigation below, however, as delineated in our decision, does not permit a more equitable resolution of this appeal. As we have noted, Phelps stipulated specifically in the joint pretrial statement that his monetary damages were limited to his lost profits due to Wystrach's breach. Although Phelps introduced evidence raising an inference that Wystrach's gains were his losses, he had the burden of proof and could not stop there. I find instructive the following explanation in *Ball*, on which Phelps relied as a supplemental authority during oral argument:

> [O]nce a plaintiff raises a reasonable inference as to the amount of lost profits caused by a defendant's breach of a covenant not to compete, the defendant is liable for such amount unless evidence is presented to rebut the inference and to establish that the loss was caused by factors other than the breach.

Id. at 816; *see also TruGreen Cos., L.L.C. v. Mower Bros., Inc.*, 199 P.3d 929, 932 (Utah 2008) (general rule of damages for breach of covenant not to compete is "'the amount that the plaintiff lost by reason of the breach, not the amount of profits made by the defendant.'"), *quoting Trilogy Network Sys., Inc. v. Johnson*, 172 P.3d 1119, 1121 (Idaho 2007). Wystrach introduced testimony that Nelson Farms would not have employed Phelps, and it was the trial court's prerogative to accept or reject that evidence. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009) (trial court determines credibility of witnesses); *Fowler v. Printers II, Inc.*, 598 A.2d 794, 807 (Md. Ct. Spec.

App. 1991) (although customers testified they would not have used plaintiff's business even had defendant employee not breached non-solicitation agreement, "trial judge was certainly free to find this testimony not credible"). Thus, under the circumstances here, although "[t]he gains enjoyed by the breaching [party] can be relevant to [the] damage inquiry, [they] cannot alone support a damage award." *TruGreen Cos., L.L.C.*, 199 P.3d at 933.

¶21 Finally, although it was suggested at oral argument and appears possible that Phelps could have causes of action for other claims, such as fraudulent inducement and breach of the implied covenant of good faith and fair dealing, such matters are not before us. Therefore, despite Phelps's impassioned arguments that the court's ruling results in "a windfall and a free pass for [Wystrach's] breach," we are bound by his tactical choices and the record before us, such as it is.

¶22 Turning to the trial court's attorney fees ruling, I do not necessarily disagree with the majority but would go farther and find this the rare case where a denial of fees was an abuse of discretion. As we have noted, but for Wystrach's violation of the contract, Phelps would not have had to bring this suit and expend attorney fees in the first place. Moreover, not only did Phelps establish he had no alternative but litigation to arrest Wystrach's ongoing breach of the purchase agreement, he obviously would not have been in the position of attempting to demonstrate his damages had it not been for Wystrach's wrongful retention of the business's largest client and continued disregard of the non-compete covenant. Phelps additionally demonstrated, as found by the trial court, that Wystrach also had violated a second section of their agreement by failing to

recommend Phelps to her customers, including Nelson Farms. Thus, under *Associated Indemnity*, Phelps amply demonstrated his claim was a necessary and just one by establishing a knowing breach of the contract, prevailing on the merits of the core issue, and obtaining injunctive relief. 143 Ariz. at 570, 694 P.2d at 1184. And, the zero-fee award here surely works to discourage parties with tenable claims from litigating legitimate contract issues for fear of incurring substantial amounts of attorney fees involved in such litigation. *See Orfaly*, 209 Ariz. 260, ¶ 19, 99 P.3d at 1036.

¶23 Accordingly, I reluctantly but necessarily join in today's decision and would further direct the trial court to determine and award Phelps his reasonable attorney fees.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge