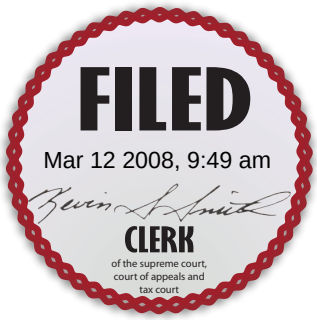

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IN THE
COURT OF APPEALS OF INDIANA

EVERLITE, INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 23A05-0612-CV-730
	)	
JACK SALTS,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-0101-CO-12

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

EverLite appeals the denial of its motion to correct error, which alleged the jury verdict was excessive. Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

Jack Salts owns a trucking company. Salts bought an EverLite dump trailer in 1997 and three more in 1998 so he could haul fly ash and coal. In 1998, all four trailers were developing cracks in their aluminum frames. Salts had the cracks welded, but they cracked again. Salts took the trailers to local repair facilities on numerous occasions to have cracks welded.

In 2000, EverLite repaired one trailer at its West Frankfort, Illinois facility by welding the cracks and reinforcing the frame. EverLite claimed the cracks were caused by failure to keep the trailer greased, but the trailer cracked again on its first use after being repaired and freshly greased. EverLite repaired the trailer again at its facility in Longview, Texas. EverLite reinforced the frame, and the trailer stopped cracking "for a couple years." (Tr. at 81.)

EverLite still claimed the cracks were caused by insufficient greasing of the trailer and told Salts he would have to pay for future repairs and the cost of transporting the trailers to Texas. Salts felt this would be too costly, so he had his other three EverLite trailers repaired by Gillum Machine & Tool, a shop in his own area. Gillum Machine concluded the frames were cracking because the beds of the trailers were too long for the frames and the frames were not thick enough.

Salts brought suit against EverLite, raising claims of negligent design and breach

of warranty. Salts submitted copies of canceled checks as evidence of his repair costs. Most of the checks had notations on the memo line, such as "repairs – welding trailers." (*See, e.g.*, Appellant's App. at 527.) Salts had not kept the corresponding invoices. He also submitted a log showing the number of days his trailers were not operational because they were being repaired. Based on this evidence, Salts asked the jury to award $136,808.39 for repairs and $151,392.00 for the business lost while the trailers were not in use.

The jury awarded Salts $75,317.71 for negligent design, which was reduced to $41,424.74 because the jury assessed his fault at forty-five percent. The jury also awarded Salts $80,000 for breach of warranty, for a total award of $121,424.74. EverLite filed a motion to correct error, alleging the award was excessive. The trial court denied the motion.

DISCUSSION AND DECISION

A trial court has broad discretion to correct error, and we will reverse only for an abuse of discretion. *Palmer v. Comprehensive Neurologic Servs., P.C.*, 864 N.E.2d 1093, 1102 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 212 (Ind. 2007). In reviewing a damage award, we will consider only the evidence that supports the award along with the reasonable inferences therefrom. *Ritter v. Stanton*, 745 N.E.2d 828, 843 (Ind. Ct. App. 2001), *trans. denied* 774 N.E.2d 506 (Ind. 2002), *cert. denied* 536 U.S. 904 (2002). When the evidence concerning damages is conflicting, the jury is in the best position to assess the damages. *Id*. at 844. If the award is within the scope of the evidence and can be explained on any reasonable ground, the award will not be deemed the result of

improper considerations. *Id*. However, if "the damage award is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or consideration of improper evidence, we will find the award excessive." *Id*.

EverLite advances several arguments why the award is excessive. First, EverLite claims the testimony of Jack Gillum, the owner of Gillum Machine, and Dean Bailiff, a Gillum Machine employee, established that no prior repairs had been made to the trailers. Gillum and Bailiff testified they had not noticed any indications the cracks had been welded before. This testimony may have permitted the jury to find that previous repairs had not been made, but it was not required to do so, especially in light of testimony from Salts that prior repairs had been made.

EverLite next argues Salts admitted the repairs by Gillum Machine permanently fixed the trailers. Gillum Machine finished these repairs in April 2002; therefore, according to EverLite, the evidence does not support an award for any repairs made after April 2002. EverLite has cited no portion of the record indicating Gillum Machine succeeded in permanently fixing the trailers, much less an admission from Salts to that effect.[1] EverLite has therefore waived this argument. *See* Ind. Appellate Rule 46(A)(8) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ."); *City of East Chicago v. East Chicago Second Century, Inc.*, 878 N.E.2d 358, 369 (Ind. Ct. App. 2007) ("A party

[1] In fact, portions of the record suggest the repairs were not permanent. Gillum Machine modeled its repairs on those done by EverLite, and the EverLite repairs lasted only a couple years. EverLite's argument appears to mischaracterize the record, and we admonish counsel to support its factual assertions with accurate and relevant citations to the record in the future.

waives an issue where he fails to develop a cogent argument or provide adequate citation to authority and portions of the record.").

EverLite asserts the canceled checks, without corresponding invoices describing the work done, were insufficient evidence of the cost of repairs. It also claims Salts' damages for loss of use were based on a listing prepared eighteen months after the last repairs were made to the trailers.

That a comprehensive list was not produced until 2003 does not mean Salts had not been keeping track of the days his trucks were out of service.[2] While cross-examining Salts, EverLite asked:

> Q. . . . I'm assuming when it comes to the loss of the days out of service, those are just the rough estimate you took from looking at the cancelled checks?
> A. No, . . . my son had written all this down because we knew we [were] going into litigation back, clear back in 2000.
> * * * * *
> Q. And so you're just not putting an estimate on the number of days out of use or lost use from these checks, that there was a separate document that you or your son prepared?
> A. No, we just kept track. Every time we had a trailer down, we kept track of it.

(Appellant's App. at 163-64.) The jury could conclude, therefore, Salts kept track of the days the trailers were out of service as the need for repairs arose. Producing the invoices might have made a stronger case for Salts, but the jury had discretion to weigh the evidence, and its award was within the scope of the evidence.

EverLite also claims Salts' tax returns contradict his evidence of damages.

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[2] EverLite filed a motion to compel in September of 2003, and apparently the list was produced in response.

EverLite argues that because Salts' gross sales increased from 1999 to 2002, while his maintenance and repair costs decreased, he could not have been damaged to the extent he claimed. Salts reported lower maintenance and repair costs in 2001 and 2002, when most of the major repairs were made, than in 1999 and 2000. That Salts' overall maintenance and repair costs went down in 2001 and 2002 does not mean he could not have had an increase of costs related to the cracking trailer frames. In addition, the fact that Salts managed to increase his gross sales over this period does not mean his business was not harmed by his trailers being out of service; if his trailers were operational, his gross sales might have been even greater.

Finally, EverLite notes Salts purchased another EverLite trailer in 2005, and argues he would not have done so if the design was defective. EverLite claims the trailer purchased in 2005 was the same model as Salts' other trailers. Salts testified he purchased another EverLite because one of his EverLite trailers had been totaled and his insurance company told him he had to replace it with a similar trailer. He also believed EverLite had improved its design based on conversations he had with others in the business. It was well within the jury's discretion to accept Salts' explanation for his purchase of another EverLite trailer.

We note the jury awarded Salts less than he requested and assigned forty-five percent of the fault to him. Although fault is a separate issue from damages, that the jury assigned a substantial portion of the fault to Salts suggests it was neither prejudiced in his favor nor carried away by passion or improper considerations. The award was within the scope of the evidence, and the trial court did not abuse its discretion by denying

EverLite's motion to correct error.

Affirmed.

RILEY, J., and KIRSCH, J., concur.