IN THE COURT OF APPEALS OF IOWA

No. 7-330 / 06-1381
Filed November 15, 2007

6305 SW 9TH STREET, L.L.C.,
Plaintiff-Appellant/Cross-Appellee,

vs.

SONS OF GEIL, L.L.C.,
Defendant-Appellee/Cross-Appellant,
CLEAR CHANNEL OUTDOOR, INC.
Defendant-Appellee.

CLEAR CHANNEL OUTDOOR, INC.,
Cross-Claim Plaintiff,

vs.

SONS OF GEIL, L.L.C.,
Cross-Claim Defendant.

Appeal from the Iowa District Court for Polk County, Scott Rosenberg, Judge.

6305 SW 9th Street, L.L.C. appeals from the trial court's ruling granting Sons of Geil, L.L.C. a new trial on damages in a breach of contract case. Sons of Geil, L.L.C. cross-appeals from the trial court's ruling admitting a written purchase agreement over Sons of Geil, L.L.C.'s foundation, authenticity, and hearsay objections and basing the damages awarded on the price recited in that agreement. Sons of Geil, L.L.C. also claims the damage award is not supported by the evidence. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines, and Timothy C. Hogan of Hogan Law Office, Des Moines, for appellant.

Jeffrey L. Goodman and Marcy A. O'Brien of Goodman and Associations, P.C., West Des Moines, for appellee Sons of Geil, L.L.C.

Scott L. Long and Rebecca A. Brommel of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for appellee Clear Channel Outdoor, Inc.

Heard by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

6305 SW 9th Street, L.L.C. (6305) appeals from the trial court's ruling granting Sons of Geil, L.L.C. (Geil) a new trial on damages in a breach of contract case. Geil cross-appeals from the trial court's ruling admitting a written purchase agreement over Geil's foundation, authenticity, and hearsay objections and basing the damages awarded on the price recited in that agreement. Geil also claims the damage award is not supported by the evidence. We reverse and remand on appeal and affirm on cross-appeal.

I. Background Facts and Proceedings.

At all times material to this case, 6305 and Geil owned adjacent commercial properties in Des Moines. Clear Channel Outdoor, Inc. (Clear Channel) owned a leasehold interest in the Geil property pursuant to a series of billboard leases. One or more of Clear Channel's leases granted Clear Channel a right of first refusal to purchase the Geil property.

In September 2003 Richard Hurd, on behalf of 6305, and William Geil, on behalf of Geil, signed a purchase agreement for the sale of the Geil property to 6305 for $243,000. 6305 subsequently received a written offer from Bucks, Inc. to purchase both properties for $1,025,000. In June 2004 Clear Channel notified Geil of Clear Channel's intent to exercise its right of first refusal to purchase the Geil property.

As a result, 6305 sued Geil for breach of contract and specific performance of the September 2003 purchase agreement. 6305 also named Clear Channel as a defendant and requested the trial court declare 6305's rights under the September 2003 purchase agreement superior to Clear Channel's right

of first refusal to purchase the Geil property. Clear Channel cross-claimed against Geil for breach of contract and specific performance of Clear Channel's right of first refusal to purchase the same property.

The trial court tried the parties' equitable claims for specific performance and declaratory relief before the breach of contract claims. The trial court's September 7, 2005 "Findings of Fact and Conclusions of Law on Equitable Claims" states:

> 1. The contractual right of first refusal in the lease to purchase the Property preempts any offer from 6305 or any acceptance by Geil and such right is paramount and superior to 6305's Offer to Purchase.
> 2. Clear Channel's right of first refusal in the lease to purchase the Property entitles Clear Channel to the Property.
> 3. Geil shall specifically perform under the right of first refusal contained in the 2000 Lease by selling the Property to Clear Channel and Clear Channel shall purchase the Property from Geil pursuant to the terms of the Offer to Purchase, including a purchase price of $246,000.00, in conformity with Exhibit P.

The trial court also ordered the sale proceeds be deposited with the clerk of court pending resolution of the parties' remaining claims. Geil specifically performed under its contract with Clear Channel as ordered. 6305 subsequently sold its property to a third party for $625,000.

Following a bench trial on the parties' remaining claims, the trial court determined Geil breached its contract with 6305 and 6305 was entitled to both general and consequential damages totaling $278,073. The trial court's June 26, 2006 "Findings of Fact, Conclusions of Law and Judgment" included the following:

> In regard to the general damages, sufficient evidence has been presented by the Plaintiff at trial to show and establish a

reasonable basis for this Court to infer an amount of damages in this matter. Specifically, the Plaintiff presented substantial evidence to permit the computation of the general damages by subtracting Plaintiff's costs to acquire the Geil property and the adjacent property from the fair market value of the assemblage of the two properties. The fair market value of the Geil property when combined with the adjacent property was $1,025,000. Such value was established by the admission of the Bucks' purchase agreement which represented an offer to purchase the combined properties made by a third party in an arm's length transaction. This value was further established and supported by the opinions expressed by Richard Hurd based upon his ownership interest, personal involvement and expertise.

The Plaintiff purchased the adjacent property in August of 2003 for $450,927. Had Geil performed as required under the Offer to Purchase Agreement, the Plaintiff would have purchased the Geil property for $246,000. Thus, the total acquisition cost would have been $696,927. Accordingly, after deducting $50,000 for sales commission, the Plaintiff suffered general damages equal to $278,073 as a result of the breach. The Bucks' Purchase Agreement is important in that it is a benchmark for establishing the fair market of the assembled properties in an arm's length transaction. Mr. Hurd further testified as to the fair market value of the assembled properties based upon his ownership interest, personal involvement and expertise. Mr. Hurd testified that he has been a commercial real estate developer for more than 30 years and that during that time he has bought, sold and developed numerous properties with similar characteristics to the properties involved in this litigation. He discussed several substantially similar developments in and around Des Moines which he actually paid $1,000,000 or more for similar property. Mr. Hurd testified that, in his opinion, the fair market value of the Geil property, when combined with the adjacent property, was fairly represented by the Bucks' Purchase Agreement or approximately $1,025,000.

Mr. Hurd also had extensive personal and professional knowledge of the property in question in that he first became aware of the Geil property approximately 20 years ago when he purchased the shopping center located on the adjacent property. He eventually sold and then repurchased that property once again owning and managing the property directly adjacent and next door to the Geil property. Mr. Hurd was also the majority owner of the entity that entered into a purchase agreement for the Geil property in 1999 in a sale that did not consummate. Mr. Hurd was also the principal architect of the purchase agreement in this matter and negotiated the purchase agreement on behalf of the Plaintiff. He remained personally involved in the sale following the execution of the Offer to Purchase agreement.

> In addition, the Plaintiff offered the testimony of Chris Thomason in support of the value established by the Bucks' Purchase Agreement. Mr. Thomason had previously placed the Geil property under contract in 1999 for $325,000. He testified that although the sale was not finalized, Geil was informed that the purchaser was interested in the Geil property for the purpose of constructing a Walgreen's store on an assemblage of the Geil property and the adjacent property. Mr. Thomason further stated that because the Geil property standing alone was not large enough for such a development, the purchaser had also entered into a contract with the then owner of the adjacent property for $800,000. Accordingly, Mr. Thomason testified that the purchaser had both properties under contract for more than $1,100,000. This testimony further confirms the value established by the Bucks' Purchase Agreement.
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> A party may not recover damages for breach of a real estate contract unless the harm was reasonably foreseeable. The evidence as presented in this case establishes that at the time of the execution of the Offer to Purchase agreement, Geil was fully aware of the Plaintiff's plans for development and knew that the failure to convey the property would result in a substantial loss to the Plaintiff. William Geil admitted at trial that at the time of the contract he knew that the Plaintiff was a commercial real estate investor, that the Plaintiff owned the adjacent property, and that the Plaintiff intended to raze the then existing structures and resell or redevelop the assembled properties. The purchase agreement also expressly informed Geil that Richard Hurd was a licensed real estate agent "acquiring the [Geil property] for investment purposes." In addition, the real estate appraisal prepared by Mr. Bill Carlson on behalf of Geil several months before the parties entered into the Offer to Purchase Agreement informed Geil that due to the "limited depth" of the Geil property, the "highest and best use" of the Geil property was "for assemblage with the property to the north."

Geil moved for a new trial, citing the trial court's admission of the Bucks' purchase agreement over its foundation, authenticity, and hearsay objections. Geil also claimed the trial court award was based on an improper measure of damages and the evidence did not support the damages awarded. Geil argued any damages should have been limited to the difference between 6305's offer and the fair market value of the Geil property. The trial court agreed, stating, "[I]t

seems the property included in the original contract is the only property that should be considered when calculating general damages." The trial court accordingly granted Geil's motion for a new trial only with regard to damages. Because the trial court's ruling granted Geil's request for a new trial, the remaining issues were not addressed.

On appeal, 6305 claims the trial court erred by ignoring the fundamental rule of contract law that the non-breaching party is entitled to recover damages reasonably contemplated by the parties at the time the contract was made and the trial court's ruling granting Geil a new trial, therefore, must be reversed. Geil cross-appeals from the trial court's ruling admitting the Bucks' purchase agreement over Geil's foundation, authenticity, and hearsay objections and basing the damages awarded on the price recited in that agreement. Geil also claims the damage award is not supported by the evidence.

II. Evidentiary Issues.

We review hearsay rulings for correction of errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006) (citing *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003)). We review other evidentiary rulings for an abuse of discretion. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003) (citing *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003)).

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. . . ." Iowa R. Evid. 5.103(*a*). If nonconstitutional errors are claimed, "we presume prejudice—that is, a substantial right of the [party] is affected—and reverse unless the record affirmatively establishes otherwise." *State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa

2004). When substantially the same evidence is in the record, erroneously entered evidence is not considered prejudicial. *Estate of Long v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 88-89 (Iowa 2002) (citing *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986)). In addition, if the erroneously admitted evidence is merely cumulative of other evidence in the record, it is not considered prejudicial. *Vasconez v. Mills*, 651 N.W.2d 48, 57 (Iowa 2002) (citing *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998)). Even if we assume without deciding the Bucks purchase agreement was erroneously admitted over Geil's objections, any resulting error was harmless. Our review of the record indicates at least two witnesses, Hurd and Thomason, testified to the value of the combined properties at issue. Because the Bucks purchase agreement was merely cumulative of other evidence in the record, we affirm on this issue.

III. Motion for a New Trial.

Our standard of review of the grant of a motion for a new trial depends on the grounds asserted in the motion and ruled upon by the trial court. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993) (citing *Julian v. City of Cedar Rapids*, 271 N.W.2d 707, 708-09 (Iowa 1978)). "If the motion and ruling are based on a discretionary ground, the trial court's decision is reviewed on appeal for an abuse of discretion." *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996) (citing *Ladeburg*, 508 N.W.2d at 696). On the other hand, if the motion and ruling are based on a legal issue, the trial court's decision is reviewed on appeal for correction of errors at law. *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 480 (Iowa 2004) (citing *Ladeburg*, 508 N.W.2d at 696). Here, the motion and

ruling were based on a legal issue. *See* Iowa R. Civ. P. 1.1004(5), (6), (8). Therefore, our review is for correction of errors at law.

Other principles guide our review. We are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(*d*). Furthermore, "[w]here there is substantial evidence in the record to support the trial court's decision, [we are] bound by those findings of fact." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991) (citing Iowa R. App. P. 14(*f*)(1); *Midwest Recovery Serv. v. Wolfe*, 463 N.W.2d 73, 74 (Iowa 1990)). However, we are not bound by a trial court's application of legal principles or its conclusions of law. *Alden v. Iowa Dist. Ct.*, 479 N.W.2d 318, 320 (Iowa 1992) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S. Ct. 2447, 2459, 110 L. Ed. 2d 359, 380 (1990); *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991)).

When a party has breached a contract, the non-breaching party is entitled to be placed in the position he or she would have occupied had the contract been performed. *Yost v. City of Council Bluffs*, 471 N.W.2d 836, 840 (Iowa 1991) (citing *Lakota Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 639-40 (8th Cir. 1975)). This type of damage is known as the non-breaching party's "expectation interest" or "benefit of the bargain." *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (citing *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997); Restatement (Second) of Contracts § 344(a) (1978); 22 Am. Jur. 2d *Damages* § 45 (1988)). The burden is on the non-breaching party to prove

damages. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996) (citing *Poulsen v. Russell*, 300 N.W.2d 289, 295 (Iowa 1981)).

In a real estate action, the non-breaching party may seek general damages. *Macal v. Stinson*, 468 N.W.2d 34, 35-36 (Iowa 1991). General damages are "the difference between the real estate's fair market value at the time of the breach and the contract price." *Gerard v. Peterson*, 448 N.W.2d 699, 702 (Iowa Ct. App. 1989) (citing *Gordon v. Pfab*, 246 N.W.2d 283, 288 (Iowa 1976)).

The non-breaching party may also seek consequential damages, including lost profits. *Potter v. Oster*, 426 N.W.2d 148, 150 (Iowa 1988) (citing E. Farnsworth, *Contracts* § 12.1, at 813 (1982)).

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

Vogan v. Hayes Appraisal Assocs., Inc., 588 N.W.2d 420, 425 (Iowa 1999) (quoting *Hadley v. Baxendale*, 9 Exch. 341, 344 (1854)). Stated another way, the damages must be either the natural, direct result of the breach or foreseeable. *Midland Mut. Life Ins. Co.*, 579 N.W.2d at 831 (citing *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994)). In determining

whether the damages are foreseeable, we must examine the contract's language, its nature and purpose, and the circumstances attending its execution. *Kuehl*, 521 N.W.2d at 718 (citing 22 Am. Jur. 2d *Damages* § 460, at 541).

Furthermore, the non-breaching party must establish that the lost profits are reasonably certain. *Jamison v. Knosby*, 423 N.W.2d 2, 6 (Iowa 1988) (citing *Dopheide v. Schoeppner*, 163 N.W.2d 360, 367 (Iowa 1968)). Thus, lost profits may not be speculative, remote, or conjectural. *Nettleland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 167 (Iowa Ct. App. 1993) (citing *Kansas City Life Ins. Co. v. Hullinger*, 459 N.W.2d 889, 897 (Iowa Ct. App. 1990)) (citing *Jamison*, 423 N.W.2d at 6). If the amount of lost profits is uncertain, recovery is allowed provided a reasonable basis in the evidence exists from which the factfinder can infer or approximate lost profits. *Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 288 (Iowa 1981) (citing *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 153 (Iowa 1979)).

Iowa courts do not allow a non-breaching party to recover lost profits arising out of a collateral contract unless the above requirements have been met. *Benschoof v. Reese*, 250 Iowa 868, 875, 97 N.W.2d 297, 301 (1959); *Rule v. McGregor*, 117 Iowa 419, 424, 90 N.W. 811, 812 (1902). The Iowa Supreme Court has said:

> the line of distinction between profits which are remote, consequential, or not within the contemplation of the parties and those which are proximate and absolute and certain and within the contemplation of the parties seems to rest . . . [on] whether they are to arise directly out of the contract in question or its subject-matter and to constitute the immediate fruits of the contract or whether they are to result from collateral engagements or enterprises. 15 Am. Jur. *Damages* Sec. 152. Profits are usually considered too remote, however, which are not the immediate fruits of the principal

> contract but are dependent on collateral engagements and enterprises, *not brought to the notice of the contracting parties, and not, therefore, brought within their contemplation or that of the law*. 15 Am. Jur. *Damages* Sec. 154.

Benschoof, 250 Iowa at 875, 97 N.W.2d at 301 (emphasis added) (internal quotation marks omitted). Moreover,

> the cases in which future profits were rejected as speculative or too remote were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not a consequence flowing in a direct line from the breach of such contract. Familiar instances of such profits which are thus speculative and remote are those which might have been realized on a new contract with a third person, which could have been consummated with the proceeds of the contract sued on if the latter had not been broken, for in such a case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and *are not stipulated for or contemplated by the parties to the contract sued on*.

Rule, 117 Iowa at 424, 90 N.W. at 812 (emphasis added) (internal quotation marks omitted). The supreme court has also said:

> If it appears by such circumstances that the contract was entered into, and known by both parties to be entered into to enable one of them to serve or accomplish a particular purpose, whether to secure a gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties.

Snyder v. Sargeant, 197 Iowa 475, 484, 196 N.W. 22, 26 (Iowa 1923) (quoting Sutherland, *Damages*, at 188 (4th ed.)) (internal quotation marks omitted). Additionally,

> [t]he principle that damages, to be recoverable, must have been in the contemplation of the parties at the time the contract was made, does not require that the defaulting party know the specific details of the injury or of the damages which followed in fact.

Kuel, 521 N.W.2d at 718-19 (quoting 22 Am. Jur. 2d *Damages* § 463, at 542) (internal quotation marks omitted).

The trial court's conclusion the property that is the subject matter of the original contract is the only property to be considered in measuring damages is irreconcilable with the foregoing authorities. The controlling consideration is not the property that is the subject of the original or collateral contract. Rather, it is the circumstances within the contemplation of the parties at the time the contract was formed as well as the foreseeability of the damages. *See Benschoof*, 250 Iowa at 875, 97 N.W.2d at 301; *Rule*, 117 Iowa at 424; 90 N.W. at 812. Moreover, the existence or precise terms of the Bucks' purchase agreement need not have been in the contemplation of the parties at the time the September 2003 purchase agreement was signed. *See Kuel*, 521 N.W.2d at 718-19 (citing 22 Am. Jur. 2d *Damages* § 463, at 542). The trial court erred by concluding otherwise, and Geil was not entitled to a new trial based on error in fixing the amount of recovery in an action upon contract. *See* Iowa R. Civ. P. 1.1004(5), (6), (8).

The remaining question is whether the damages awarded are supported by the evidence. As noted earlier, the trial court found 6305's damages totaling $278,073 were foreseeable. Stated another way, the trial court found that at the time the contract was made the parties contemplated that 6305 would combine its property with Geil's property and either resell or redevelop the properties and were aware that Geil's failure to convey its property would result in substantial losses to 6305. The trial court also found that these damages could be determined with a reasonable certainty. Our review of the record confirms the

substance of the testimony cited by the trial court in support of the earlier-quoted findings of fact. It is sufficient to note that the cited testimony provides substantial evidentiary support for the trial court's findings of fact, and we are bound by them on appeal. *See Iowa Fuel & Minerals, Inc.*, 471 N.W.2d at 862 (citing Iowa R. App. P. 14(*f*)(1); *Midwest Recovery Serv.*, 463 N.W.2d at 74).

We accordingly reverse the trial court's ruling on Geil's motion for a new trial and remand for entry of judgment as provided in the trial court's June 26, 2006 "Findings of Fact, Conclusions of Law, and Judgment." As noted earlier, we affirm on the issues raised in Geil's cross-appeal.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.