STATE OF MINNESOTA
IN COURT OF APPEALS
A09-24

C. J. Schaber d/b/a Lefty Schaber Agency,
Respondent,

vs.

Dan Olson Agency, Inc.,
Defendant,
Daniel Olson, et al.,
Appellants.

Filed November 17, 2009
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CV0622672

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from a judgment following a jury verdict in a breach-of-contract action, appellants argue that the district court erred in (1) denying their motions for judgment as

a matter of law and (2) denying their motion for a new trial on the issue of damages. We affirm.

FACTS

In 1960, respondent C.J. Schaber began operating his own State Farm Insurance Agency in Rogers. In 1988, respondent hired appellant Brenda Murphy. During the course of her employment with respondent, Murphy signed an employment agreement with respondent that prohibited Murphy from inducing, advising, or soliciting respondent's customers on behalf of any other State Farm Insurance agency for a period of one year after resigning from employment with respondent.

In November 2005, Murphy gave respondent notice of her intent to resign. Shortly before or after giving her resignation notice, Murphy contacted appellant Dan Olson, who operated a State Farm Insurance Agency in Monticello. Murphy and Olson discussed employment opportunities, and Olson ultimately offered Murphy a position in late November 2005. Murphy accepted the offer, and her employment with respondent terminated on December 31, 2005.

Olson, respondent, and State Farm Insurance Company executed a contract that prohibited Olson from diverting State Farm policies from other State Farm agents to his own account. Nevertheless, between December 19, 2005, and December 23, 2005, Murphy transferred 35 insurance policies belonging to her family members from respondent's agency to the Olson Agency. In addition to the policies of Murphy's family members, respondent noticed that after Murphy's employment terminated, he began receiving transfer forms from a number of his clients requesting that their insurance

policies be transferred to a different agent. Respondent further discovered that within one year after Murphy's employment with his agency terminated, a total of 192 policies transferred from respondent's agency to Olson's agency. Consequently, respondent brought suit against Olson and Murphy (collectively "appellants") for breach of contract, and against Olson for tortious interference with a contract.

At trial, various documents were admitted into evidence indicating Murphy's efforts to effectuate the transfer of insurance policies from respondent's agency to Olson's agency. Moreover, respondent testified that within one year of Murphy's departure from his agency, 192 policies had transferred from his agency to Olson's agency. Respondent claimed that the annual value to his business of the 192 policies was $52,923, or $158,769 over three years.

At the close of respondent's case, appellants moved for judgment as a matter of law. The district court partially granted the motion, dismissing the tortuous-interference claim against Olson, but denied the motion as to the breach-of-contract claims. Appellants then offered the testimony of State Farm agency field executive Merlyn O'Malley, and his successor, Rowan McDonnell. McDonnell and O'Malley testified that when respondent raised an objection to the policies being transferred from his agency to Olson's agency, they interviewed about 24 of the policy holders to determine their reasons for requesting transfers. Both O'Malley and McDonnell claimed that they discovered no evidence that Murphy and Olson had attempted to induce any of the customers to transfer their policies.

Murphy testified at trial and denied breaching any agreement with respondent. On cross-examination, however, Murphy admitted that the 192 policies in question were all transferred from respondent's agency to Olson's agency. Murphy further admitted that she transferred 35 policies belonging to her family members to Olson's agency.

Following trial, the jury reached a verdict in favor of respondent and against appellants severally. Appellants subsequently moved for judgment as a matter of law against respondent on his breach-of-contract claims, or in the alternative, a new trial. The district court denied the motion concluding that respondent had produced direct evidence supporting his breach-of-contract claims. This appeal followed.

D E C I S I O N

I.

A motion for judgment as a matter of law (JMOL) may be brought during trial and may be renewed after a verdict is returned. Minn. R. Civ. P. 50.01, 50.02. JMOL is appropriate under Minn. R. Civ. P. 50 if the verdict is "manifestly against the entire evidence" viewed in the light most favorable to the nonmoving party or contrary to law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted); *see also Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, 761 N.W.2d 877, 881 (Minn. 2009). The reviewing court applies a de novo standard of review to a district court's denial of a motion for JMOL. *Langeslag*, 664 N.W.2d at 864. This court makes "an independent determination of the sufficiency of the evidence to present a fact question to the jury." *Lester Bldg. Sys.*, 761 N.W.2d at 881 (quotation omitted). A district court's denial of a motion for JMOL after a verdict must be affirmed if, "in considering the evidence in the

record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Langeslag*, 664 N.W.2d at 864 (quotation omitted).

Appellants argue that the district court erred in denying their motion for JMOL because there was no evidence supporting a verdict of liability for wrongful conduct by either appellant. We disagree. On a motion for JMOL, a jury's verdict will not be set aside "if it can be sustained on any reasonable theory of the evidence." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (quoting *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998)). The district court must treat as credible all evidence from the nonmoving party and all inferences that reasonably may be drawn from that evidence. *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982). Because it is the jury's function to determine credibility, review of a jury verdict is even more limited when the decision rests upon weighing the credibility of witnesses. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256 (Minn. 1980).

Here, several emails between Murphy and representatives at Olson's agency were admitted at trial that allude to the transfer of policies from respondent's agency to Olson's agency. Among other things, these emails discuss the transfer of policies belonging to Murphy's family members, and Murphy admitted at trial that 35 policies belonging to her family members were transferred from respondent's agency to Olson's agency shortly before and after her employment change. The evidence also included a letter that respondent discovered on his office computer. The letter, authored by Murphy, informed respondent's clients that she would be leaving respondent's agency. Although

Murphy specifically requested that these clients "not request or discuss your insurance issues with me after the end of the year" due to a potential "conflict of interest," she left her home address and encouraged the clients to maintain contact with her.

In addition to the emails and letter authored by Murphy, respondent offered several of Murphy's hand-written notes. One of the notes refers to a "list to [Olson] on who is transferring," and another note states: "[H]i – when is [respondent] retiring? He'll come here then." Moreover, a third note suggests that Murphy advised a policy-holder to transfer from respondent's agency to Olson's agency after a few months time. Finally, respondent offered a document prepared by Murphy that catalogues "insureds [that] have transferred to [Olson's agency], another State Farm Agent, or have been denied transfer, and went elsewhere." Typed next to the names on the list are the following notations: (1) a "+" that "means received"; (2) a "declined"; or (3) a "waiting." This evidence, when viewed in the light most favorable to respondent, reasonably supports the jury's breach-of-contract verdict.

Appellants argue that the jury's verdict should not stand because (1) respondent failed to provide a single piece of direct evidence supporting the breach-of-contract claims and (2) O'Malley and McDonnell testified that, after investigating respondent's claims, they found no evidence of improper inducement on the part of appellants. But although O'Malley and McDonnell testified that their investigation revealed no improper inducement, McDonnell testified that he had never worked in the role of an agency field executive until the day he was tasked with investigating what was going on between respondent's agency and Olson's agency. And O'Malley admitted that, based on his

experience, it was "uncommon" for 192 policies to transfer agencies in a year. The issue is ultimately one of credibility, and the jury apparently did not find O'Malley and McDonnell credible on the issue of whether appellants' conduct violated their respective contracts. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (stating that the factfinder is in the best position to judge the credibility of witnesses). Moreover, despite appellants' claim to the contrary, the evidence discussed above demonstrates that respondent did provide direct evidence of his breach-of-contract claim. This direct evidence, when combined with the inferences drawn from the circumstantial evidence presented, supports the jury's determination that appellants breached their contracts. *See Rochester Wood Specialties, Inc. v. Rions*, 286 Minn. 503, 509, 176 N.W.2d 548, 552 (1970) (stating that juries are entitled to draw inferences from circumstantial evidence, as long as those inferences are reasonably supported by the available evidence).

Appellants further argue that because many of the transfers occurred during the week of December 19, 2005, through December 23, 2005, which was before Murphy's employment with respondent terminated, she could not have violated her employment contract. To support their claim, appellants point to the language of the contract that prohibits the specified conduct for a period of "one year following the termination of this agreement." Appellants argue that because this provision did not go into effect until after the date of Murphy's resignation from her employment with respondent, she could not have been in violation of the employment agreement because the transfers occurred before her employment with respondent terminated.

Appellants' argument is without merit. First, as noted by respondent, the argument has been waived because appellants failed to raise this argument below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that arguments not raised below are waived). Second, appellants' argument ignores the evidence that many of the transfers occurred after Murphy began working for Olson. Finally, appellants' construction of the contract renders the contractual language meaningless, leading to an absurd result. Murphy knew at the time she transferred the policies in late December that she would be working for Olson, and the fact that her employment had not yet terminated does not eliminate her responsibility to act in accordance with her employment contract that mandated that she not improperly solicit clients for the benefit of another agency. Therefore, the district court did not err in denying appellants' motions for JMOL.[1]

II.

Appellants argue that the district court abused its discretion in denying their motion for a new trial because the jury's award of damages was excessive. A new trial may be granted if a verdict is not justified by the evidence or is contrary to law. Minn. R. Civ. P. 59.01(g). "The discretion to grant a new trial on the ground of excessive damages rests with the [district] court, whose determination will only be overturned for abuse of that discretion." *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984).

[1] Appellants also contend that the district court erred in denying their motion for JMOL at the close of respondent's case-in-chief. Because the district court did not err in denying appellants' motion for JMOL after appellants presented their case, the court did not err in denying the motion after respondent's case was presented.

Damages for lost profits are recoverable only when the loss is a natural and probable consequence of the breach and the amount of loss is ascertainable to a reasonable degree of certainty. *Faust v. Parrott*, 270 N.W.2d 117, 121 (Minn. 1978). Although the law does not require mathematical certainty in the proof and calculation of lost profits, it requires evidence of definite profits grounded upon a reasonable factual basis. *See Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980); *Leoni v. Bemis Co., Inc.*, 255 N.W.2d 824, 826 (Minn. 1977). Damages that are remote, speculative, or conjectural are not recoverable as a matter of law. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 399 (Minn. 1977).

Appellants argue that respondent's claim for damages were speculative because respondent made no attempt to introduce evidence of his profits before and after Murphy left his employment. Thus, appellants argue that because the jury had no reasonable basis upon which to reliably estimate respondent's lost profits, its award of damages must be vacated.

We disagree. At trial, respondent premised his calculation of damages based on the annual value of 192 specifically identified insurance policies that were transferred from his agency to Olson's agency. Respondent testified that his calculation of damages was based on a reasonable degree of certainty, and that the damages would place him in the position that he would have been had appellants' breach-of-contract not occurred. Finally, respondent testified that he continues to operate his business and does not intend to retire. Therefore, respondent presented sufficient evidence to provide the jury with a reasonable basis upon which to calculate respondent's damages.

Appellants further argue that the district court erred in denying their motion for a new trial because the verdict is not justified by the evidence. But as noted above, there is sufficient evidence in the record to support the jury's verdict. Accordingly, the district court did not err in denying appellants' motion for a new trial.

Affirmed.