

**Affirmed in Part, Reversed and Rendered in Part, and Memorandum Opinion filed
September 14, 2010.**



In The

Fourteenth Court of Appeals

NO. 14-09-00473-CV

ZENO DIGITAL SOLUTIONS, L.L.C., Appellant

V.

K GRIFF INVESTIGATIONS, INC., Appellee

**On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 902722**

MEMORANDUM OPINION

Appellant Zeno Digital Solutions, L.L.C. appeals from the trial court's judgment awarding lost profit damages to appellee K Griff Investigations, Inc. In its first issue, Zeno contends that the trial court erred in awarding \$64,069.50 in lost profits to K Griff because there is no evidence to support the award. In its second issue, Zeno argues that if this court does not render judgment that K Griff take nothing on its lost profits claim, then

it should remand the entire case for a new trial. We affirm in part and reverse and render in part.

FACTUAL AND PROCEDURAL BACKGROUND

K Griff is an investigation firm that provides various services, including background checks for employers, surveillance in workers' compensation and domestic cases, and civil process service for attorneys. Zeno sells document management solutions as well as hardware, scanners, printers, and facsimile machines.

Zeno sold K Griff several copiers and facsimile machines. On August 31, 2005, Zeno sold two Ricoh digital copiers to K Griff. The 1035 copier, which Zeno represented as refurbished, had two fax lines and was to be used by K Griff's civil process department; the 3025 copier, which Zeno represented as new, had three fax lines and was to be used by the firm's background checks department.¹

In May 2006, the Ricoh copiers began exhibiting mechanical problems. Between May 2006 and December 2007, the 3025 copier was non-operational for a total of twenty days and the 1035 copier was non-operational for a total of nine days. K Griff hired outside vendors to repair the machines.²

On August 31, 2007, K Griff filed suit against Zeno alleging violations of the Deceptive Trade Practices Act ("DTPA"), fraud, negligent misrepresentation, and breach of contract. Following a bench trial, the trial court rendered judgment in favor of K Griff and awarded K Griff \$64,069.50 for loss of use and profits, \$9,800 for cost of repairs, and \$8,900 in attorney's fees. Zeno requested, and the trial court subsequently filed, findings of fact and conclusions of law. This appeal followed.

¹ Zeno also sold a small business solutions server and software to K Griff. However, after K Griff was unable to make the server work with its existing system, it returned the server to Zeno for a refund.

² At the time it purchased the machines, K Griff entered into a service contract with Zeno under which Zeno provided maintenance services for the copiers. In March 2006, K Griff cancelled its service contract with Zeno.

I. STANDARD OF REVIEW

Findings of fact in a bench trial have the same force and dignity as a jury verdict. *Haas v. Ashford Hollow Cmty. Improvement Ass'n*, 209 S.W.3d 875, 887 (Tex. App.—Houston [14th Dist.] 2006, no pet.). If an appellant is attacking the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983).

In a legal sufficiency review, we determine whether the evidence at trial would enable a reasonable and fair-minded person to reach the finding under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting this review, we credit favorable evidence if reasonable factfinders could and disregard contrary evidence unless reasonable factfinders could not. *Id.* We must consider the evidence in the light most favorable to the finding under review and indulge every reasonable inference that would support it. *Id.* at 822. If there is no evidence to support the finding, we must then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* We must, and may only, sustain a legal sufficiency challenge when 1) the record discloses a complete absence of evidence of a vital fact, 2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, 3) the evidence offered to prove a vital fact is no more than a mere scintilla, or 4) the evidence establishes conclusively the opposite of a vital fact. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

II. ANALYSIS

In its first issue, Zeno contends that the trial court erred by awarding \$64,069.50 to K Griff for lost profits because there is no evidence to support the award.³ Specifically, Zeno complains that K Griff improperly based its lost profits claim on lost revenue and

³ On appeal, Zeno does not challenge the portion of the trial court's judgment awarding cost of repairs and attorney's fees to K Griff.

failed to account for expenses in its calculations. Further, Zeno argues that even if K Griff's lost revenue was, in fact, lost profit, K Griff did not prove its loss by competent evidence with reasonable certainty.

A party who loses the opportunity to accrue earnings from the use of its equipment may be entitled to recover loss of use damages in the form of lost profits. *See Wiese v. Pro Am Servs., Inc.*, ___S.W.3d ___, No. 14-08-00989-CV, 2010 WL 2813313, at *5 (Tex. App.—Houston [14th Dist.] July 20, 2010, no. pet. h.). The rule concerning sufficient evidence of lost profit damages is well settled:

Recovery for lost profit damages does not require that the loss be susceptible of exact calculation. However, the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained.

ERI Consulting Eng'rs, Inc. v. Swinnea, No. 07-1042, 2010 WL 1818395, at *7 (Tex. May 7, 2010) (quotation marks omitted). Further, a calculation of lost profits must be based on net profits, not gross revenues. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 83 n.1 (Tex. 1992).

At trial, K Griff presented a two-page document entitled "Profit & Loss by Class" for 2006 and 2007 ("Plaintiff's Exhibit 9"). The 2006 statement reflects the following pertinent data:

	<u>1 Apts/Hospital/Staffing⁴</u>	<u>3 Civil Process</u>
Total Income	955,835.86	346,379.11
Total COGS ⁵	<u>347,881.09</u>	<u>270,923.98</u>
Gross Profit	607,954.77	75,455.13

⁴ Department No. 1 is the background checks department.

⁵ "COGS" is cost of goods sold.

The following handwritten notations appear at the bottom of the 2006 statement:

1: 79,652.92 mo 3982.65 day

3: 28,864.92 mo 1443.25 day

The 2007 statement reflects the following relevant data:

	<u>1 Apts/Hospital/Staffing</u>	<u>3 Civil Process</u>
Total Income	1,016,672.47	357,661.35
Total COGS	<u>394,117.57</u>	<u>288,288.80</u>
Gross Profit	622,554.90	69,372.55

The following handwritten notations appear at the bottom of the 2007 statement:

1: 84,722.71 mo (240 work days per year) 4236.14 day

3: 29,805.12 mo (20 days per mo) 1490.26 day

Kathy Griffin, K Griff's owner, testified that the handwritten notations at the bottom of each page represent "the gross revenue per department per day" that was lost in Department Nos. 1 and 3 as a result of copier-related downtime. Kay Hejny, K Griff's bookkeeper, testified that she used the gross revenue figures reflected in Plaintiff's Exhibit 9 to calculate the income lost due to the mechanical problems related to the Ricoh copiers.⁶

⁶ Plaintiff's counsel: All right. And how did you arrive at the per diem numbers that are listed on Exhibit No. 9?

Hejny: Very simply. I took an average.

Plaintiff's counsel: Okay.

Hejny: Of the year.

Plaintiff's counsel: Average of what?

Hejny: Of the year.

Plaintiff's counsel: Okay. But an average of what components?

It is thus clear that K Griff's calculation of daily gross revenue for each of the two departments is based on the annual gross revenue figures (*i.e.*, "Total Income") for each department reflected in Plaintiff's Exhibit 9.⁷ The trial court awarded K Griff lost profit damages in the amount of \$64,069.50.⁸

Zeno argues that the evidence does not support the trial court's award of lost profit damages because K Griff failed to account for expenses in its calculations. We agree. "Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity." *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In other words, lost profits must be based on net profits, not gross revenues. *Holt Atherton*, 835 S.W.2d at 83 n.1; *Weise*, 2010 WL 2813313, at *5.

Hejny: Well, for Department 1 the revenue is reported here on the very first line under sales and services. And so I simply took that number and divided it by 12 to come up with a month and then by 20 to come up with a day that — the number of days that those people typically work.

....

Defense counsel: It's actually pretty nearly impossible to calculate the lost profits, isn't it?

Hejny: It's difficult.

Defense counsel: And you don't have that done here, do you?

Hejny: No. I calculated gross revenue.

⁷ For Department No. 1 in 2006: \$955,835.86 (annual gross revenue) ÷ 240 workdays per year = \$3,982.65 per day. For Department No. 3 in 2006: \$346,379.11 (annual gross revenue) ÷ 240 workdays per year = \$1,443.25 day.

For Department No. 1 in 2007: \$1,016,672.47 (annual gross revenue) ÷ 240 workdays per year = \$4,236.14 per day. For Department No. 3 in 2007: \$357,661.35 (annual gross revenue) ÷ 240 workdays per year = \$1,490.26 per day.

⁸ The trial court awarded K Griff \$59,739.75 for the downtime and loss of use and profits for fifteen days for the 3025 machine, and it awarded \$4,329.75 for three days of downtime and loss of use and profits related to the 1035 machine. This award is based on the 2006 daily gross revenue figures for the two departments reflected in the handwritten notations in Exhibit 9: for Department No. 1, \$3,982.65 (2006 daily gross revenue) x 15 days = \$59,739.75; for Department No. 3, \$1,443.25 (2006 daily gross revenue) x 3 days = \$4,329.75.

Here, Griffin and Hejny unequivocally testified that K Griff's damage calculations were based upon the daily gross revenue of Department Nos. 1 and 3 reflected in the handwritten notations on Exhibit 9. Although Exhibit 9 includes the cost of goods sold attributable to Department Nos. 1 and 3, these expenses are not reflected in K Griff's calculations. Further, Exhibit 9 also includes a column entitled "Administrative," which ostensibly lists firm-wide administrative costs; however, these expenses are not allocated among the departments or otherwise reflected in K Griff's damage calculations. By failing to include these expenses in its calculations, K Griff failed to prove \$64,069.50 in lost profits by competent evidence with reasonable certainty. *See Wiese*, 2010 WL 2813313, at *5 (concluding appellee was not entitled to recover lost profits where there was no evidence that appellee deducted any amount for normal business operating expenses from gross profit calculation); *Texaco, Inc. v. Phan*, 137 S.W.3d 763, 773 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (holding evidence legally insufficient to prove lost profit damages where owners failed to meet burden of proving net profits from which expenses had been subtracted); *see also C.A. Walker Constr. Co. v. J.P. Sw. Concrete, Inc.*, No. 01-07-00904-CV, 2009 WL 884754, at *6 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, no pet.) (mem. op.) (concluding evidence was factually insufficient to support lost profits award because plaintiff's evidence addressed only expected profits but failed to show likely expenses incurred in performing contract).

On appeal, K Griff argues that expenses were, in fact, taken into account in calculating lost profits. At trial, Hejny testified that "whether the machines were working or not we still had to pay for our database fees ... [a]nd we had to pay for our people to be there answering the phones even though they were unable to get the work out." In its brief, K Griff explains that "[w]hat [Hejny] was saying is that by using year-end numbers, all expenses were included in the bottom line, they were sunk costs and not having the down time from the fax machines would have translated in additional revenues that would have gone straight to the bottom line." However, it is clear that K Griff did not use net income in its calculations. *See Wiese*, 2010 WL 2813313, at *5 & n.4 (finding plaintiff

company failed to provide competent evidence of lost profit damages despite president's testimony that the company deducted business expenses from its revenue where alleged deductions were not reflected in calculations). Plaintiff's Exhibit 9 shows that K Griff's net income was \$175,508.68 in 2006 and \$93,577.13 in 2007. As previously noted, K Griff used the annual gross revenue figures ("Total Income") for each department in its calculations. See *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008) (per curiam) (rejecting appellee's claim in his brief that he had timely served responses to plaintiff's request for admissions because "we do not consider factual assertions that appear solely in briefs and are not supported by the record") (quoting *Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006)).

In sum, legally sufficient evidence does not exist to support the trial court's award of lost profit damages under the minimum requirements of *Holt Atherton*. There is no evidence that K Griff deducted any amount for expenses in calculating lost profits. Because K Griff failed to meet its burden of proving net profits, from which expenses had been subtracted, we hold that the evidence is legally insufficient to prove lost profit damages. See *Wiese*, 2010 WL 2813313, at *5; *Phan*, 137 S.W.3d at 773. We sustain Zeno's first issue.⁹

III. CONCLUSION

We reverse the portion of the trial court's judgment awarding K Griff \$64,069.50 in lost profit damages and render judgment that K Griff take nothing on its claim for lost profits. We affirm the remainder of the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Seymore, and Brown.

⁹ Because of our disposition of Zeno's first issue, we need not address its second issue regarding remand.