COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3122 **Cir. Ct. No. 2003CV78**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MICHAEL KIELBLOCK,

PLAINTIFF-RESPONDENT,

V.

HYTEC MANUFACTURING, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Hytec Manufacturing, Inc., appeals a judgment for damages entered against it in favor of Michael Kielblock. Hytec contends the award is speculative. We disagree and affirm the judgment.

Background

¶2 Hytec agreed to replace a harvester head on Kielblock's logging equipment. After Hytec had possession of the equipment for more than a year, Kielblock brought an action for breach of contract, breach of good faith, negligence, negligent misrepresentation, fraud, and unjust enrichment. Hytec failed to file a proper answer and the court entered a default judgment against it, awarding Kielblock $314,000 in damages.[1]

¶3 Hytec appealed, and we affirmed in part and reversed in part. *See* ***Kielblock v. Hytec Mfg., Inc.***, No. 03AP2133, unpublished slip op. (Wis. Ct. App. Mar. 9, 2004). We affirmed the default judgment as to liability but reversed the damage award, concluding the trial court erred when it refused to allow Hytec to provide its own evidence on damages. Accordingly, we remanded for a new trial on damages, and we declined to reach Hytec's argument that the award had been based on speculation.

¶4 Following the hearing on remand, the court entered judgment against Hytec for $170,673. Hytec again appeals, arguing the current award is based on speculation and conjecture.

Discussion

¶5 The amount of damages to be awarded is a factual question. Factual findings are not overturned unless clearly erroneous. WIS. STAT. § 805.17(2).[2]

[1] We have rounded all dollar figures.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

"The general rule is that damages must be proved with reasonable certainty and cannot be based on conjecture." ***Novo Indus. Corp. v. Nissen***, 30 Wis. 2d 123, 131, 140 N.W.2d 280 (1966) (footnote omitted). This rule does not require proof with mathematical accuracy, only that damages can be estimated by the trier of fact with reasonable certainty. ***Id.***

¶6 Hytec contends, as indicated, that all the damages awarded are based on conjecture and speculation, and divides the damages award into seven components. At the outset, Hytec asserts without citation to authority that "[t]he mere existence of this expanse in claimed damages makes the proffer suspect in its entirety." We disagree. The difference might call the initial $314,000 award into question, but its reduction by almost half would suggest that the current award represents only those damages successfully documented and verified. In any event, we address each of Hytec's arguments in turn.

Kielblock's Payments to Hytec

¶7 Kielblock's contract called for him to pay $68,000 to Hytec. Kielblock paid $40,000 and received a $14,000 credit for equipment he traded in. The court awarded Kielblock $54,000 to represent these amounts.

¶8 Hytec first contends this award is erroneous because Kielblock ultimately received what he bargained for—a new harvester head on his equipment. But this argument goes more to Hytec's liability, not Kielblock's damages. The court already determined Hytec breached the contract. The damage award returned the $40,000 Kielblock paid under the contract.

¶9 Regarding the $14,000, Hytec asserts that at most, Kielblock should be entitled to only $12,500, the amount Hytec obtained when it sold the used head.

The equipment's resale value is irrelevant; the contract assigned a value of $14,000 for the head. When awarding contract damages, a party is to be put in the same position it would have been in but for the breach. *See* ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis. 2d 431, 438, 331 N.W.2d 342 (1983). Hytec cannot return Kielblock's original equipment, but it can provide him with the $14,000 value it assigned the equipment in the contract.

Overhead and Depreciation

¶10 The court awarded Kielblock over $43,000 in finance charges and over $2,400 for insurance payments Kielblock made during the sixteen months that Hytec had his equipment. The court also awarded $13,333 in depreciation for the time Hytec had the equipment.

¶11 Hytec first disputes the length of time for which the court awarded these damages. It is indisputable that Hytec had the equipment from June 2002 to September 2003. Hytec argues that Kielblock is responsible for some of that time, but Hytec's liability has already been established.

¶12 Hytec argues the depreciation award is inappropriate because it is based solely on Kielblock's testimony. It argues, without citation to proper legal authority, that expert testimony is required to establish a depreciation value. Failure to cite legal authority is contrary to WIS. STAT. RULE 809.19(1)(e). In any event, the court noted Kielblock had been in the logging business for quite some time and was familiar with the financial business aspects of it, accepting his business-related testimony. We discern no error in the trial court's reliance on Kielblock's sworn statements.

¶13 As far as the finance charges and insurance payments, Hytec has failed to show these are inappropriate as a matter of law because, again, it offers no citation to legal authority. The court's reasoning seems to be that Kielblock understood finance and insurance payments are a normal cost of doing business and, thus, had incentive to make sure he got his equipment back as soon as possible to justify the expenses. But because Hytec was responsible for the delay, preventing Kielblock from working to cover those costs, the court evidently believed it equitable for Hytec to bear the burden instead. While it is true these are not contractual damages, Kielblock's complaint raised multiple equitable issues. It is Hytec's burden to demonstrate error on appeal. It has not, and we will not abandon our neutrality to develop its argument.

Costs of Replumbing the System

¶14 Hytec takes issue with this element of damages awarded because Kielblock evidently needed another company to get the logging equipment to function. Kielblock testified that the company informed him over the phone that the repairs would be $20,000.

¶15 Hytec contends this price quote is "hearsay without exception." This argument is an assertion without authority. Moreover, the court did not award $20,000. It awarded $12,000, an amount Kielblock admitted would likely be sufficient to cover the repair costs. Thus, even if the $20,000 amount was based on hearsay, the trial court did not rely on the hearsay.

Replevin/Bond Costs

¶16 Kielblock paid a $2,300 sheriff's bond to commence a replevin action. Hytec argues this is an inappropriate cost because Kielblock simply had to

pay the contractual balance due to regain his equipment. Kielblock, however, did not seek the writ of replevin until after a judgment was entered against Hytec, which continued to refuse to release the equipment. Thus, Kielblock sought the writ and had to pay the sheriff's bond. The court determined this was a necessary action on Kielblock's part and awarded the fee. Hytec fails to show error.

Skarlupka Repairs

¶17 Kielblock had repairs to his equipment performed by a contractor named Skarlupka, a different contractor than the one who performed the replumbing. Hytec objects to this item, proven through Kielblock's copies of Skarlupka's invoices. Hytec asserts the bills are hearsay and are not Kielblock's business records. Yet again, Hytec fails to provide any citation to legal authority for its argument. It does not even identify the business records exception statute, much less analyze, under the statutory language, the appropriateness of using the invoices.[3]

[3] Kielblock argues that the records are, in any event, admissible under the business records exception. He relies on ***Town of Fifield v. State Farm Mut. Auto. Ins. Co.***, 120 Wis. 2d 227, 229-30, 353 N.W.2d 788 (1984), for the proposition that "invoices received in the course of business of the town clerk's office were admissible as exceptions to the hearsay rule." But what ***Fifield*** actually held was that the town chairperson was qualified to testify from a *summary* of the invoices, prepared by the town clerk in the course of business of the clerk's office.

In ***Berg-Zimmer & Assocs., Inc. v. Central Mfg. Corp.***, 148 Wis. 2d 341, 350-51, 434 N.W.2d 834 (Ct. App. 1988), this court distinguished ***Fifield*** and held that a witness in the case could not testify about documents—including invoices—submitted by a third party because the witness had no first hand knowledge of the creation of the documents. Thus, we are not entirely convinced ***Fifield*** would apply here, but we need not discuss the matter further because Hytec fails to develop its argument.

Subcontractor Payments

¶18 Hytec challenges a $34,000 award for payments Kielblock made to a subcontractor, but again never develops its argument except to say Kielblock is not entitled to recovery. However, Kielblock was contractually committed to certain projects he was unable to complete without his equipment. To avoid breaching the other contracts, he hired a subcontractor to complete his contractual obligations and also leased additional equipment.

¶19 Hytec questions the veracity of Kielblock's claim but the trial court, not this court, makes credibility determinations. *See* ***In re Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). The trial court evidently believed Kielblock's testimony on this component. Hytec also complains the award is too high—Kielblock paid the subcontractor twenty dollars per cord, but Hytec asserts the going rate was fifteen dollars per cord. It contends it should not be responsible for this "bonus" payment to the contractor. Hytec fails to provide any documentation that there was a standard rate and also fails to cite any rule that it is per se improper to hire a subcontractor for more than the going rate.

Prejudgment Interest

¶20 The court taxed prejudgment interest on the $54,000 awarded for the contract breach. Hytec argues this is inappropriate because there is no indication Kielblock formally demanded a specific dollar amount on which prejudgment interest could be based.

¶21 Prejudgment interest is generally available, as a matter of law, whether there is a "fixed and determinate amount which could have been tendered and interest thereby stopped." ***Bigley v. Brandau***, 57 Wis. 2d 198, 208, 203

N.W.2d 735 (1973). Ordinarily, this is the amount of the demand in a complaint. *See* ***id.*** Nonetheless, the court concluded the contractual damages were easily ascertainable, and we agree. Hytec fails to provide any authority to convince us otherwise.

¶22 In short, Hytec spends portions of its brief disputing liability that has already been established. When it addresses the damages issues properly before us, it fails to provide any legal authority for its key arguments, contrary to WIS. STAT. § 809.19(1)(e). Simply identifying the standards of review is insufficient. Hytec also fails to engage in any legal analysis that would demonstrate how the damage awards are speculative or based on conjecture. Hytec demonstrates its disagreement with the judgment, but that is not the standard on which awards are overturned.

By the Court.—Judgment affirmed.

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