COURT OF APPEALS
DECISION
DATED AND RELEASED

February 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1579-FT

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

SANDRA J. NIX, d/b/a
DIRECT EFFECT PROMOTIONS,

Plaintiff-Appellant,

v.

BROY COMPANY MANUFACTURING
& SALES, INC.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Reversed and cause remanded*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Sandra J. Nix, d/b/a Direct Effect Promotions, has appealed from a judgment awarding her the sum of $261.35 from Broy Company Manufacturing & Sales, Inc. She argues that the trial court erred prior to trial by granting partial summary judgment dismissing her claim for lost profits and lost future profits, and limiting damages that could be awarded at trial to incidental damages. She also argues that the trial court erroneously exercised its discretion in denying her motion for a continuance of the trial date.

Pursuant to this court's order of July 25, 1995, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we reverse the judgment of the trial court.

When reviewing a trial court's grant of summary judgment, we follow the same methodology as the trial court. ***Stann v. Waukesha County***, 161 Wis.2d 808, 814, 468 N.W.2d 775, 778 (Ct. App. 1991). Summary judgment methodology is set forth in § 802.08(2), STATS. ***Stann***, 161 Wis.2d at 814, 468 N.W.2d at 778. We review a summary judgment determination de novo, independent of the trial court's determination. ***Id.*** We examine the record to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. ***Id.*** at 815, 468 N.W.2d at 778.

Based upon these standards, we conclude that the trial court erred in granting partial summary judgment and limiting damages that could be awarded at trial. In her complaint, Nix alleged a breach of contract by Broy arising from her purchase from Broy of scratch-off cards to be used in promotional activities by Wilde Toyota and Kolosso Toyota, two customers of Nix who ordered the scratch-off cards from her. Nix alleged that the cards were defective and sued Broy for lost profits arising from her sale of the cards to Wilde and Kolosso, and lost future profits from her loss of future business with them.

Broy sought summary judgment dismissing Nix's claims for lost profits on the ground that she had not yet been sued by Wilde or Kolosso nor refunded their payments to them. It also contended that she was not entitled to lost future profits because she and Broy did business on an ad hoc basis and such damages were not within the parties' reasonable contemplation.

Damages in contract actions must arise from the breach of contract and must reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of a breach of it. ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 320, 306 N.W.2d 292, 300 (Ct. App. 1981). Damages may include loss of future profits if evidence supports a factual finding that absent the breach of contract, the damaged party would have enjoyed additional business and profits. *See* ***id.*** at 323-25, 306

N.W.2d at 302; *see also* WIS J I—CIVIL 3725. The defendant must have had reason to foresee the loss of future profits as a probable result of a breach of the contract at the time the contract was made. WIS J I—CIVIL 3725. In addition, in situations where a buyer purchases goods from a seller for resale to a third person, the seller may be liable to the buyer for the amount of its probable liability to the third person, even if liability to the third person has not yet been found. *See* ***Cohan v. Associated Fur Farms, Inc.***, 261 Wis. 584, 596-97, 53 N.W.2d 788, 794 (1952).

Nix's deposition, answers to interrogatories and affidavit in opposition to Broy's motion for summary judgment gave rise to an issue of fact for trial as to whether she was entitled to damages for lost profits and lost future profits. In these materials, she indicated that she was in the business of selling scratch-off cards and pull boards to businesses for use as incentives. She indicated that on July 28, 1992, Wilde placed an order with her for 5000 scratch-off cards. She further indicated that after reviewing the Wilde order with a representative of Broy, a manufacturer of such cards, she placed an order for the cards with Broy in August 1992. She stated that she told Broy that she had other customers and if the sale to Wilde went well additional business might result. She indicated that problems arose shortly after delivery of the cards to Wilde, first because the cards were not shuffled properly and, second, because the scratch-off material was too thin, enabling Wilde's customers to see the winning numbers and select winning cards. She indicated that Broy agreed to replace the cards, but instead of doing so picked them up from Wilde, applied additional scratch-off material, and returned them to Wilde in a condition where the scratch-off material could not be removed without destroying the cards. She stated that as a result of these defects, Wilde demanded that she refund its payment, compensate it for losses to its customers, and told her that it would no longer do business with her. She indicated that Wilde had been her customer for five years and that it did not place orders with her in either March 1993 or August 1993, even though it historically and consistently had placed orders in those months.

In the summary judgment record, Nix also indicated that when Broy first agreed to resolve the problems with the Wilde order, she placed an order with Broy to manufacture 1600 cards for sale to Kolosso. She indicated that when the cards were not delivered on time, a Broy representative told her that the order had been forgotten and production had not commenced. However, when Nix told Broy that she was going to take the order elsewhere,

Broy asked for and was given another chance to fill the order. However, as with the Wilde order, cards were delivered which contained scratch-off material which could not be removed without rendering the cards unusable. Nix stated that as a result, Kolosso demanded a refund and told her it would no longer do business with her. She stated that when she did not refund the money, a Kolosso representative told her that Kolosso was going to sue her, although it had not yet done so when the motion for summary judgment was decided.

This record gave rise to material issues of fact as to whether Nix was entitled to damages for profits lost in the August 1992 sale to Wilde and the subsequent sale to Kolosso. A reasonable inference from the record is that Broy knew that Nix was ordering scratch-off cards for resale to her customers. It is thus also reasonable to infer that when Broy agreed to supply the cards, it could foresee that if the cards were defective Nix would lose her profit from the sales. While Nix had not yet refunded the payments made by Wilde and Kolosso at the time summary judgment was sought, the summary judgment record indicated that both had demanded refunds and that Kolosso had informed her that it would sue her if a refund was not made. A material issue of fact therefore existed for trial as to whether Nix was going to be liable to Wilde and Kolosso and whether she would lose her profit from the sales to them.

The summary judgment record also gave rise to a material and triable issue of fact as to whether Nix suffered a loss of future profits as a result of Broy's breach. Nix's affidavit indicated that Wilde had been her customer for five years, that it historically placed orders with her in March and August, and that it did not place orders with her after the August 1992 order, informing her that because of the problems with that order it would no longer do business with her. This evidence gave rise to an issue of fact as to whether Nix suffered an actual loss of future profits as a result of Broy's breach. Moreover, it reasonably may be inferred from the record that at the time Broy entered into the contracts with Nix, it could foresee that such damages would result from its breach. It knew that Nix was ordering the cards for resale purposes. In addition, Nix told Broy that she had other customers and that if the sale to Wilde went well additional business might result. These facts permit the inference that Broy knew that Nix's business likely would be harmed if it

breached its contract and provided defective cards, and that a loss of future profits would probably result.[1]

Broy therefore failed to prove that Nix would be unable as a matter of law to prevail on her claim for lost profits and lost future profits. Summary judgment in its favor was therefore unwarranted, and the matter is remanded for trial without limitation of the damages issue. Based on this disposition, we need not address the issue of whether the trial court properly denied Nix's motion for a continuance of trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] Broy relies on ***Chrysler Corp. v. E. Shavitz & Sons***, 536 F.2d 743 (7th Cir. 1976), contending that the federal appeals court has recognized that under Wisconsin law, damages for loss of future profits may be awarded only when the parties to a contract have an express agreement to include such damages or they have a close business relationship. Aside from our doubts as to the validity of Broy's construction of the holding in ***Chrysler,*** Broy's reliance on it is misplaced. It is a federal court decision which is not binding on this court. Moreover, rather than applying Wisconsin court decisions, it applies Illinois state court decisions interpreting commercial code provisions. *See* ***id.*** at 744-45. The other cases cited by Broy for this proposition similarly apply the law of other states. Broy has cited no Wisconsin law establishing that damages for loss of future profits in a breach of contract action are similarly limited in this state.