COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3184

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

SUPER STEEL PRODUCTS CORPORATION,

PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,

v.

OSHKOSH TRUCK CORPORATION,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

WEDEMEYER, P.J. This is an interlocutory appeal and cross-appeal from parts of a trial court order entered October 23, 1996. Oshkosh Truck

Corporation (Oshkosh) appeals from part of the order which bars it on retrial from submitting its investment in certain assets as damages for Super Steel Products Corporation's (Super Steel) alleged breach of contract with Oshkosh. Super Steel cross-appeals from three parts of the same order: (1) the trial court's grant of Oshkosh's renewed motion for a directed verdict with respect to Super Steel's contract claim against Oshkosh; (2) the trial court's grant of Oshkosh's renewed directed verdict motion with respect to its counterclaim that Super Steel repudiated the underlying purchase order contract; and (3) the trial court's reduction of Super Steel's damages to $756,468.01, in the event this court reinstates the jury's verdict on its breach of contract claim.

Because the trial court was clearly wrong in granting Oshkosh's renewed motion for a directed verdict on Super Steel's contract claim, and in reducing Super Steel's damages as awarded by the jury, we reverse and remand with instructions.[1]

I. BACKGROUND

Oshkosh, among other activities, manufactures and sells commercial heavy-duty specialty trucks. Super Steel is a fabricator of steel products. It was a long-time major supplier to Oshkosh in a variety of capacities. One of Oshkosh's product lines is a front-discharge concrete mixer truck. Oshkosh manufactured the truck chassis and purchased the mixer systems from outside suppliers. Prior to 1993, Super Steel had never fabricated a mixer system for Oshkosh, although it had sought the work. Rexworks of Milwaukee was Oshkosh's normal supplier for

[1] Because of our disposition, it is not necessary for us to address the trial court's ruling limiting Oshkosh's damages. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

the system. During 1992, however, Oshkosh decided to redesign its front-discharge cement mixer truck line including the mixer system. It invited Super Steel and London, a Canadian company, to review the Rexworks design that had been used in the past, and to submit qualifier bids to manufacture the four mixer-system components: the drum, the pedestal, the chutes and the superstructure.

After analyzing the Rexworks design, Super Steel concluded that it could fabricate the same components at a cost saving to Oshkosh, and submitted a bid in March 1993. Super Steel's bid proved attractive to Oshkosh. After discussions between the two companies, Oshkosh selected Super Steel as its new mixer-system supplier for its front-discharge concrete mixer trucks. In essence, the contract called for Super Steel to supply 2,000 mixer systems over a seven-year period. Super Steel was to finance the purchase of $1,047,000 of new tooling and equipment and recover this investment over the term of the contract by adding an amortized amount to the unit price of the mixer-system components. Oshkosh decided to retain London to redesign and manufacturer the first 100 drums and superstructures for model year 1994. Super Steel was to redesign and manufacture all of the pedestals and chutes and to take over the fabrication of the remaining drums and superstructures for 1994 commencing with drum and superstructure #101.

Super Steel and Oshkosh designated Robert Wiedenhaft, Super Steel's vice-president of sales, and Michael Wuest, Oshkosh's purchasing agent in charge of the mixer-system project, to finalize the details of the relationship. In part to secure financing for the purchase of new tooling and equipment, and to meet established deadlines for production and shipping, Super Steel sought from Oshkosh written contractual documentation of its new relationship. This caused the creation of Oshkosh's blanket purchase order of June 23, 1993. Although the

project contemplated a newly designed front-discharge mixer system, the old Rexworks design was referenced in the bidding process. There is no dispute that the old Rexworks system was not to be rebuilt, but was to be a starting point for the new design. It was understood that the design upon which Super Steel had based its quote would change after London submitted its design work for the drum and superstructure components. It was further understood that manufacturing costs were intended to be reduced. Thus, the purchase order, by its language, anticipated the formulation of a new design and new costs.

The purchase order, on its face, shows three notes which read as follows:

> Note #1: All items on this purchase order will be covered by the attached terms & conditions.
>
> Note #2: The quantities listed on this purchase order are based on FY 1994 forecast and are subject to change.
>
> Note #3: Pricing represents a "not to exceed" cost and is based on the FY 1993 design; individual purchase orders will be issued once the final design and pricing are established.

(Upper case omitted). The additional terms and conditions were embodied in an attached document entitled "Mixer System Terms and Conditions of Sale" (upper case omitted) and in relevant part stated:

> PRICING-Oshkosh Truck and Super Steel are committed to controlling, and reducing cost; both recognize that effective cost control is the essence of this agreement. While the agreement is in effect, Super Steel will maintain a cost control and reduction program that will reduce the yearly cost the equivalent of 2.5% annually on the direct labor portion of the mixer system. This reduction can be derived from any current business, and is not exclusive to mixer component sales.
>
> ….

> Upon completion of the design, Super Steel will create a base line model for each item listing the following cost elements:
>
> Material (including complete B/M)
> Labor Hours
> Labor Rate
> Manufacturing Overhead
> G&A
>
> Profit is to be fixed at 7% gross.
>
> Pricing will be adjusted yearly and held firm regardless of variation of cost elements during the year. Any reduction in actual cost that increases the yearly weighted average gross profit in excess of 7% will be applied to reducing the loan principal.

Provisions relating to financing and the ownership of the tooling machinery and fixtures read:

> FINANCING-The loan agreement will be handled by Super Steel and last for a maximum of seven years. Principle [sic] and interest payments will be made by Oshkosh Truck in an amortized amount, prorated among the individual mixer components. A minimum payment must be made to Super Steel which equals the principle [sic] and interest payment required by the loan agreement, or the loan may be restructured to differ [sic] costs if agreed upon by both parties.
>
> OWNERSHIP OF TOOLING, MACHINES AND FIXTURES-Super Steel is to hold title for all equipment purchased under the loan agreement and as described in your March 10, 1993, quotation. Responsibility for maintenance of the equipment is Super Steels [sic] and will be handled as is normal practice. After seven years, or at which time the loan is satisfied, Super Steel will transfer title to Oshkosh Truck Corporation for the amount of $1.00. All tooling, machines and fixtures purchased under this agreement are to be used exclusively for Oshkosh Truck products unless Super Steel receives prior written approval from Oshkosh Truck.

Out-of-pocket expenses were provided for as follows:

> CANCELLATION CLAUSE-If the contract is canceled prior to completion of the loan agreement, Oshkosh Truck will be liable for full payment of the loan. In addition upon completion of design, engineering, tooling, capital

> expenditures and plant set up, Super Steel will furnish Oshkosh Truck Corporation an additional cancellation formula based cost on all out of pocket expenses which will be amortized over 2000 mixer system[s]. In case of cancellation, Oshkosh Truck will be responsible for the balance due. This amount will not exceed $500,000 with anticipated brake [sic] down as follows $200,000.00 tooling and fixtures, $45,000.00 MSOE, $100,000.00 plant set up and $155,000.00 engineering, layout, etc.
>
> DESIGN RESPONSIBILITY-Oshkosh Truck will provide design assistance and take responsibility for the current design (London Machine) and maintain final design responsibility for changes to form, fit and function.
>
> Super Steel is to take responsibility for developing a drawing package of the current design, that is acceptable for manufacturing. All future design changes are to be submitted to Oshkosh Truck for final approval in writing before being implemented. Once approved, Super Steel is to develop manufacturing drawings and routings at no cost to Oshkosh Truck. The intent of this agreement is for Super Steel to develop an expertise in mixer design, either by educating existing staff engineers or hiring an engineer with existing product knowledge.

As production moved into process, not all the expectations and desires reached fruition. As of November 1993, pricing had not been finalized. Purchase orders from Oshkosh for component parts of the new system continued to reflect the June 23, 1993 order provision "not to exceed" price based on the Rexworks design. Problems developed for both parties. Super Steel experienced deadline production difficulties, personnel shortages and cost overruns. Oshkosh required many design changes and suffered from design delays. Consequently, by the end of 1993, a new design had not been totally implemented from which total costs of production could be calculated. By the end of January 1994, Super Steel had not yet been paid for its efforts and began to feel financial pressure. Wiedenhaft and Wuest again engaged in discussions about costs. Super Steel was

able to calculate and justify additional fixed costs for some of the components, but not all. It received a new purchase order dated February 7, 1994, from Oshkosh reflecting these changes. It was uncontroverted, however, that final costs for two of the systems components, i.e., the power chutes and the superstructure, were not included because the costs for the new design had not been completed.

By the end of April 1994, Super Steel had acquired sufficient design and cost information to "create a base line model" for each component as required by the purchase order of June 29, 1993. Super Steel documented these items in a report entitled "Start Up Cost Analysis" which it presented to Oshkosh at a May 19, 1994 meeting. The parties agreed to address the issues involved in the cost analysis. The presidents of both companies, Dean Treptow of Super Steel, and Robert Bohn of Oshkosh, were assigned the task to resolve any difficulties presented by the Super Steel cost analysis, but a resolution never occurred. The parties interpreted the purchase order, as amended, quite differently. Eventually, after intermittent discussions and unexplained delays in communicating, the relationship between Super Steel and Oshkosh ceased to exist.

Super Steel filed suit alleging a breach of contract. Oshkosh answered and counter-claimed for repudiation of a contract.[2] A jury rendered a verdict finding: (1) Oshkosh breached its contract with Super Steel; (2) Super Steel was entitled to damages in the total amount of $4,485,442.72; and (3) Super Steel had not repudiated the contract with Oshkosh. On motions after verdict, the trial court granted Oshkosh's renewed motion for a directed verdict, dismissed

[2] Originally, Super Steel alleged claims of breach of contract, breach of joint venture, misappropriation of trade secrets, and fraud. Except for the breach of contract action, all other claims were dismissed by summary judgment.

Super Steel's complaint, and concluded that Super Steel had repudiated the contract between the parties by withdrawing. It also ruled that in the event it is reversed, Super Steel's damages would be reduced. In addition, the trial court ordered a new trial on the issue of Oshkosh's damages, but limited the scope of its damages. Both parties petitioned this court for an interlocutory appeal, which was granted by order of this court dated December 13, 1996.

II. ANALYSIS

A. Super Steel's Claim Regarding Directed Verdict.

Super Steel contends that the trial court erred in granting Oshkosh's renewed motion for a directed verdict after the return of a jury verdict in its favor. In examining this type of challenge, we apply the "clearly wrong" standard of review as enunciated by us in ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995).[3] In considering whether to grant a directed verdict, it is a basic tenet of our law that the "jury is to be the trier of facts and, in any circumstances where the facts are disputed or where different inferences may be drawn from the facts, the jury is to be the fact finder." ***Millonig v. Bakken***, 112 Wis.2d 445, 449, 334 N.W.2d 80, 83 (1983). Thus, a trial court may take a matter from the jury only in very limited circumstances. *See* ***id.*** In considering whether to grant a motion for directed verdict, the trial court must "view the evidence most favorably to the party against whom the verdict is sought to be directed." *See* ***id.*** at 450, 334 N.W.2d at 83. The test is whether

[3] In ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 784, 541 N.W.2d 203, 208 (Ct. App. 1995), we declared that the "clearly wrong" standard is applicable only where the decision under review is that of the trial judge, not the jury, and the question being decided is whether sufficient evidence has been presented to allow the case to be submitted to the jury.

"there is any credible evidence which under a reasonable view would support a verdict contrary to that which is sought." ***Thompson v. Howe***, 77 Wis.2d 441, 448, 253 N.W.2d 59, 62 (1977). "Even if the evidence adduced is undisputed, if that evidence permits different or conflicting inferences, a verdict should not be directed; and upon review after verdict, a court is obliged to accept the one adopted by the jury." *See* ***Bakken***, 112 Wis.2d at 451, 334 N.W.2d at 84.

At oral argument, both parties asserted that the facts are undisputed. We therefore examine those evidentiary facts to determine whether a directed verdict should have been granted. Wiedenhaft, in his capacity as vice-president of sales for Super Steel, introduced the "cost plus" method of contracting to Super Steel's fabrication supply business. Its purpose was to replace the inefficiencies of estimated bidding, and to arrive at true costs. This formula contracting process consisted of using a base-labor rate, applying overhead, material and general administration (G&A) costs to set a profit at 7% of gross revenue. Job files were subsequently made accessible to the buyer for review and cost adjustment. This contract process was used by Super Steel with other major customers. In fact, Wiedenhaft, on behalf of Super Steel, and Wuest, on behalf of Oshkosh, had used the process for years.

Central to this dispute is the interpretation of the June 29, 1993 purchase order, whose relevant provisions were recited earlier in this decision. The order and its addendum were the joint effort of both Wiedenhaft and Wuest. At trial, Oshkosh asserted that the contractual relationship between the parties became firm as of the February 9, 1994 amended blanket purchase order. Super Steel, on the other hand, claimed that the relationship contemplated continuing adjustment because the costs of the power chutes and the superstructure had not been determined. Super Steel asserted that the February prices were simply

"interim" prices until final costs could be determined. To assist the jury in its efforts to determine the intentions of the drafters (Wiedenhaft and Wuest), the trial court instructed the jury as to the meaning of a breach of contract and what constituted a repudiation of contract. It also instructed:

> Whether the parties to a contract gave it a particular construction is to be regarded by you in giving effect to the provisions of the contract. The subsequent acts of the parties showing the construction that they themselves have put upon the agreement are to be considered by you for the purpose of assisting you in arriving at a determination of what the arrangement was between the parties.
>
> With regard to ambiguous terms, you are instructed that ambiguous language in a contract may be construed against the party that drafted the ambiguous language. However, if the ambiguous language was the result of the joint efforts of the parties, then it is not to be construed against either party. In that event you may look to the language of the contract and the conduct of the parties, including other writings and oral representations, to determine the parties' intent with respect to the ambiguous provision.

In addition, the trial court informed the jury as to how the concept of "good faith" applies to every contractual relationship. It instructed:

> Good faith means honesty in fact in the conduct or transaction concerned, that is, an honest intention to abstain from taking unfair advantage of another through technicalities of law by failure to provide information or to give notice or by other activities which render the transaction unfair. There must be an adherence to those reasonable standards of fair dealing which the parties, taking into account the circumstances in which they are doing business, have a right to expect.
>
> Good faith is required at every point, from negotiation through performance.
>
> The duty of good faith does not excuse parties from the specific terms of their contracts, however. Good faith does not imply a duty to modify the underlying terms of the contract to accommodate the other party. Each party to a contract is entitled to insist upon the other party's performance of its contract obligations.

At trial, Super Steel marshaled its evidence to demonstrate that Oshkosh had breached the contract when, on June 16, 1994, Bohn, the president of Oshkosh, after reviewing the start-up cost analysis, announced "we will not pay any of your out-of-pocket expenses." He took this position without ever having read the June 1993 purchase order. Also, Super Steel claimed Oshkosh breached the contract when, on June 30, 1994, Wuest called and informed Super Steel's president, Dean Treptow, that Oshkosh was not going to pay additional tooling and start-up costs, would send a check for $1,047,000 for the tooling costs and a truck to pick up the tooling. Treptow refused the offer. Wuest then uttered a "see you in court" message.

Conversely, Oshkosh claimed that a firm amended purchase order of February 9, 1994, was in existence as a result of the efforts of Wiedenhaft and Wuest, and that Super Steel was seeking unauthorized additional costs that were not intended to be Oshkosh's responsibility. It asserted that when Super Steel refused to commit to delivering forty-to-fifty additionally requested mixer systems before it was paid additional costs, it was holding Oshkosh hostage. In further support of its position, Oshkosh contended that Super Steel repudiated the contractual relationship on August 12, 1994, when it sent a "take it or leave it" letter regarding an August 1 offer. The letter, in effect, stated that if Oshkosh did not accept the new offer, Oshkosh would receive no more mixer systems after Drum #303.

The jury concluded that Oshkosh had breached the contract and Super Steel had not repudiated it. Nevertheless, upon the undisputed facts but disputed inferences, the trial court, in taking the verdict away from the jury, ruled that "from undisputed facts in this case that the breach occurred" before August at

an unspecified time in June and "the breach was an unilateral withdrawal by Super Steel from the contract." The trial court was clearly wrong.

To sustain the action of the trial court, there had to be the absence of any reasonable evidentiary basis to sustain the jury's verdict. The jury heard testimony for two weeks in a highly complex industrial case characterized by the court as "paper heavy." On undisputed facts, the jurors heard two diametrically opposed interpretations of what Super Steel and Oshkosh intended the nature of their contractual relationship to be. Each proposed to the jury a different breach of contract date in their relationship and the trial court declared yet another. All three sides put a different "spin" on the relationship of the parties as formulated by Wiedenhaft and Wuest.

From our review of the record, all three alternatives are reasonably based because each flows from logical inferences that have support in the record. Each party laid the blame for cost overruns at the doorstep of the other. The record reflects a fair quantity of blame could be shared by both. Each party conceded deficiencies in its own performance but, not surprisingly, to only a smidgen in contrast to that of the other. Contrary to Oshkosh's contention of the existence of a fixed unadjustable relationship, Super Steel maintains that the relationship contained provisions intending a price determination process that was never allowed to be completed by representatives of Oshkosh. Super Steel introduced evidence that the February 1994 prices were not final and that all of the baseline prices contemplated by the June 1993 purchase order were not established until late April 1994. This evidence included internal notes that the February prices should be used "for now" and prices would be adjusted as a "history of true costs" was established. There was also evidence that continued efforts were employed to attempt to negotiate the final prices subsequent to February 1994.

Oshkosh participated in such efforts until July 1994, which at least allowed the jury to infer that Oshkosh, too, believed the February prices were not final. Furthermore, there is no evidence in the record as to why Oshkosh did not respond to Super Steel's efforts to resolve the dispute during July and August 1994. The sum of these circumstances, contends Super Steel, constituted the breach by Oshkosh. This evidence satisfies the any credible evidence standard required to sustain the jury's verdict.

What path of persuasion the jury chose to follow considering the breadth and scope of this record, was for the jury alone to decide. The state of the record is such that it provided no justification for trial court intervention. It was clearly wrong for the trial court to grant the renewed motion for a directed verdict after the jury had reached its verdict. Accordingly, we reverse the trial court's directed verdict and remand with directions to reinstate the verdict rendered by the jury.

B. Super Steel's Damages.

We deem the second issue to the cross-appeal by Super Steel to be whether the trial court erred in reducing the damages awarded by the jury. In rendering its verdict, the jury made the following award: (1) $1,629,417.30 for tooling and equipment costs; (2) $933,957.42 for accounts receivable; (3) $45,000 for contract with Milwaukee School of Engineering; (4) $250,000 for start-up costs; and (5) $1,627,070 for future lost profits. In ruling on motions after verdict, the trial court specifically ruled that even if this court reinstates the verdict, the damages should be limited to $756,468.01, which represents approved tool and equipment charges less amortized payments made. It ruled that the accounts receivable and the Milwaukee School of Engineering amounts were not

recoverable because they were not contained within the contract. It also concluded that start-up costs were purely speculative, and thus not recoverable. Although the trial court disallowed lost profit damages, it did not specifically address this item of damage in its ruling.

On appeal, the standard of review of damages reduction is whether the trial court erroneously exercised its discretion. *See* ***Krueger v. Mitchell***, 106 Wis.2d 450, 460, 317 N.W.2d 155, 160 (Ct. App. 1982), *aff'd*, 112 Wis.2d 88, 332 N.W.2d 733 (1983). Like the trial court, the appellate court must reasonably view all the damages evidence as a whole and resolve conflicting testimony in the plaintiff's favor. If there exists a reasonable basis for the trial court's determination, the appellate court will uphold the trial court's exercise of discretion. *See* ***id.*** at 461, 317 N.W.2d at 160. We conclude that the trial court erroneously exercised its discretion in reducing the damages awarded by the jury.

Damages for breach of contract are recoverable to place the non-breaching claimant in the same position it would have been in had the breach not occurred. *See* ***Schubert v. Midwest Broad. Co.***, 1 Wis.2d 497, 502, 85 N.W.2d 449, 452 (1957). Damages for breach of contract are recoverable only to the extent that the evidence permits the loss to be established to a reasonable degree of certainty. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981). However, such damages need not be ascertainable with absolute exactness or mathematical precision. *See* ***Metropolitan Sewerage Comm'n v. R. W. Constr., Inc.***, 78 Wis.2d 451, 462-63, 255 N.W.2d 293, 299 (1977); ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis.2d 305, 323-24, 306 N.W.2d 292, 302 (Ct. App. 1981). The evidence is sufficient if it enables the trier of fact to make a fair and reasonable approximation. *See* ***Schubert***, 1 Wis.2d at 502, 85 N.W.2d at 452.

We first address the tooling and equipment damage award. The trial court reduced this award because the initial tooling and equipment estimate was $1,047,000 and, therefore, there was no reasonable basis for the jury to award a greater amount. However, the record demonstrates that there is credible evidence to support the jury's award. There was testimony from a Super Steel witness that Oshkosh approved tooling and equipment expenses in excess of the $1,047,000 and there was evidence as to the actual purchasing costs of this equipment. Super Steel's damage expert, Dr. Charles Breeden, presented to the jury testimony regarding the actual cost of the equipment, explained the application of the loan interest rate through the date of trial, and deducted a salvage value from those figures to reach the amount attributable to the tooling and equipment. This amount was the exact amount the jury awarded. In addition, Super Steel's Paul Krueger discussed the amounts attributable to the tooling costs in his testimony, and Super Steel's Dale Kanies testified to the costs of the equipment. There is evidence to support this award to a reasonable degree of certainty and, therefore, the trial court should not have reduced the jury's award.

Oshkosh argues that the increased tooling expenses above the initially approved $1,047,000 were attributable to Super Steel's inefficiencies and internal problems and, therefore, not causally connected to the breach. Super Steel was free to argue this to the jury. The jury decided in Super Steel's favor and there is evidence to support the finding. "It is for the jury, not this court, to resolve conflicts in testimony and determine the credibility of witnesses." ***State v. David J.K.***, 190 Wis.2d 726, 741, 528 N.W.2d 434, 440 (Ct. App. 1994).

The next damages category that the trial court eliminated was the accounts receivable award. The trial court ruled that "[t]he accounts receivable simply represent the increased prices for the units delivered, and since those prices

are not provided for in any contract document there is simply no entitlement to any accounts receivable." In rendering this ruling, the trial court was mixing apples and oranges. This decision was based on the trial court's belief that the contract price per unit was that which Oshkosh already paid, i.e., the amount set forth in the February 1994 purchase order, thus eliminating the amounts carried on Super Steel's accounts receivable. The jury, however, rendered a verdict in favor of Super Steel, not Oshkosh. It ruled that Oshkosh breached the contract and awarded damages for accounts receivable, thus indicating that it believed the contract price per unit was the cost-plus figure presented in May 1994 rather than the prices represented on the February purchase order. Accordingly, the trial court erroneously exercised its discretion in eliminating the accounts receivable award.

The next item of damages was a $45,000 award for the contract with the Milwaukee School of Engineering, which encompassed a fee for design work done on behalf of Oshkosh. The trial court ruled that no contract document provided for payment of this expense. The record refutes this ruling. The June 29, 1993 purchase order specifically provided for reimbursement of this expense, and Oshkosh conceded this fact by failing to address this issue in its brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec., Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Accordingly, the trial court erroneously exercised its discretion in eliminating this damage item.

The next item of damages is the $250,000 the jury awarded for start-up costs. The trial court ruled that these damages were purely speculative and, therefore, the jury had no basis on which to make such an award. Oshkosh argues that the start-up costs damage award cannot be sustained because Super Steel admitted that many of the start-up expenses were attributable to its own

inefficiency and mismanagement. Our review of the record demonstrates that there is support for the jury's $250,000 damage award.

First, there was testimony from Super Steel's president, Dean Treptow, to support this award and the June 29 purchase order provides that Super Steel was entitled to $100,000 in "plant set up" costs and $155,000 in "engineering, layout, etc." costs. These expenses fall within the category of start-up expenses and justify the jury's award. Further, Treptow testified he believed Super Steel's start-up costs to date were actually $1.3 million, which can reasonably include the amount attributable to Super Steel's inefficiencies. Breeden prepared an exhibit reflecting start-up costs, in excess of $1.9 million incurred by Super Steel, which were never billed to Oshkosh. The jury awarded only $250,000. Again, because there is credible evidence to support this award, we conclude that the trial court erroneously exercised its discretion in eliminating this amount from the verdict.

Finally, the jury awarded $1,627,070 for lost profits. Although the trial court failed to specifically address this item in its ruling, it is clear from the written order that it eliminated this award. Oshkosh argues that the lost profits are not recoverable because Super Steel was not making *any* profit on the mixer systems and because lost profit damages were based purely on speculation.

Recovery of lost profits for a breach of contract requires three determinations: (1) the defendant's breach of contract must be the proximate cause of the alleged damages; (2) the damages should have been reasonably foreseeable, or within the actual contemplation of the parties at the time they entered into the contract, with the understanding between the parties that the breach of the contract would cause the type of lost profit damages being alleged;

and (3) any future profits must be proven with "reasonable certainty." *See* 2 THE LAW OF DAMAGES IN WISCONSIN § 26.4 at 26-6 (Russell M. Ware ed., 2d ed. 1995).

All three factors are satisfied in this case. Thus, the lost profit damage award is supported by the record. First, the jury found that Oshkosh breached the contract. The contract contemplated the construction of 2,000 units at a 7% profit. The facts demonstrate that with Oshkosh's breach, Super Steel necessarily loses that 7% profit on 2,000 units that were going to be built over time. Super Steel's damage expert calculated the dollar figure attributable to this loss, which supports the jury's award.

We are not persuaded by Oshkosh's claim that Super Steel is not entitled to an award for lost profits because it admittedly was not making a profit at the time the contract was breached. This fact, although true, is based upon the original interim pricing figures set forth in February 1994, which, based on the jury's verdict, were not the actual contract prices. When employing the May 1994 prices, plus the 7% profit provision, Super Steel would receive a profit per unit, which was lost when Oshkosh refused to pay the contract price. Accordingly, Oshkosh's breach was the cause of the alleged damages and reasonably foreseeable. Thus, the first two factors were satisfied.

The third factor, that the future lost profits must be proven with "reasonable certainty," was satisfied as well. Super Steel offered testimony from its damage expert as to the exact amount of lost profits resulting from Oshkosh's decision not to honor the contract. Documents reflecting these figures were presented to the jury. This evidence satisfies the reasonable certainty requirement.

Finally, we are not persuaded by Oshkosh's claim that Super Steel failed to "offset" its lost profit figures from the profit it generated by having its employees, who would have been constructing the mixers, work on other projects. This is essentially a mitigation of damages issue. In other words, Oshkosh is arguing that the future lost profits figure should be reduced by Super Steel's ability to mitigate any lost profits by utilizing workers who otherwise would have been assigned to the mixer project, to generate profits by working on other projects.

The burden of proof relative to mitigation of damages, however, rests with the party asserting it. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co., Inc.***, 83 Wis.2d 749, 752, 266 N.W.2d 382, 384 (1978). Here, Oshkosh is asserting the mitigation argument. Therefore, it has the burden to quantify the profits that were or could have been mitigated. Because it failed to do so, and because there is credible evidence in the record to support the lost profit damages awarded by the jury, we must reject Oshkosh's contention.

We conclude that there is sufficient evidence before the jury from which it could determine that the breach by Oshkosh caused the damages the jury awarded in its verdict. Accordingly, we reverse the trial court's ruling reducing and modifying the damages award and remand with directions to reinstate the jury's damage findings and grant judgment accordingly.[4]

By the Court.—Order reversed and cause remanded with directions.

[4] Oshkosh also argues that the cancellation clause in the contract limits Super Steel's damages. We do not agree. Based on the jury's verdict, neither party exercised its option to cancel the contract. Rather, Oshkosh breached the contract. Accordingly, Super Steel is entitled to the damages that naturally flow from the breach.

Not recommended for publication in the official reports.

No. 96-3184(D)

FINE, J. *(dissenting).* This case turns on what the parties agreed Oshkosh Truck would pay Super Steel for cement-mixer systems. Super Steel wanted Oshkosh Truck to pay more than Oshkosh Truck contends it agreed to pay, and refused to deliver the systems unless Oshkosh Truck caved in. The parties' written agreements are, as both parties recognize, not ambiguous. Accordingly, the lengthy trial testimony as to what the parties *really* meant is, as the trial court noted in its cogent post-trial decision to grant Oshkosh Truck's motion for a directed verdict, "legally irrelevant."

It is black-letter law that an unambiguous contract must be enforced as it is written "even though the parties may have placed a different construction on it," ***Cernohorsky v. Northern Liquid Gas Co.***, 268 Wis. 586, 593, 68 N.W.2d 429, 433 (1955), and that parol evidence may not be used to either create an ambiguity or contradict any of the contract's terms, ***Erickson v. Gundersen***, 183 Wis.2d 106, 117, 515 N.W.2d 293, 299 (Ct. App. 1994). Nevertheless, the trial court permitted the jury to hear the extrinsic evidence.[5] The jury was swayed by that extrinsic evidence, and, erroneously in my view, the majority uses that extrinsic evidence to uphold the jury's verdict without even discussing the legal issue upon which the trial court based its decision. I respectfully dissent.

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[5] Super Steel's reply brief in support of its appeal from the trial court's grant of Oshkosh Truck's motion for a directed verdict asserts that the Wisconsin Supreme Court "held that 'when parties disagree about their intentions at the time they entered into a contract, the question is one of contract interpretation for the jury ....' See Management Computer Service [*sic*], Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis.2d 157 [*sic* should be 158], 180 [*sic* should be 181], 557 N.W.2d 67 (1996)." This is a misleading statement. ***Management Computer Services*** first determined that the contract at issue was "ambiguous" and, therefore, the trial court in that case "properly sent the question of contract interpretation to the jury." ***Id.***, 206 Wis.2d at 180 n.22, 557 N.W.2d at 76 n.22. Here, the contract is *not* ambiguous.

As the trial court recognized, three sets of documents make up the parties' agreement concerning Super Steel's obligation to produce, and Oshkosh Truck's obligation to purchase, cement-mixer systems.

The first document, a preliminary purchase order dated June 29, 1993, set the maximum prices that Oshkosh Truck would pay, unless it later agreed otherwise. Note 3 on the face of this purchase order recited: "Pricing represents a 'not to exceed' cost and is based on the FY 1993 design; individual purchase orders will be issued once the final design and pricing are established."[6] (Uppercasing omitted.) As we will see, individual purchase orders were issued in November of 1993, and in February of 1994. The June 29 preliminary purchase order also declared that Oshkosh Truck's "advance approval in writing is required to effect any increase in price," and noted that "[p]ricing will be adjusted yearly and held firm regardless of variation of cost elements during the year."

The prices set out in the June 29, 1993, preliminary purchase order were superseded by the second set of documents, the individual purchase orders dated November 3, 1993, by which Oshkosh Truck established a "not to exceed unit price" of the following specific components:

- drive pedestal assembly (part number 2053030-U) — $305;
- drum (part number 2068930) — $4026;
- pedestal, roller (part number 2053020) — $1031.11;
- superstructure (part number 2058260-U) — $2863.

The November 3 purchase orders also estimated prices for other components:

- chute extension (part number 2053060) — $75;

[6] The fiscal year began on October 1.

- chute, power fold (part number 2076770) — $500;
- main chute (part number 2053050-U) — $500.

As with the June 29, 1993, preliminary purchase order, the individual November 3 purchase orders all declared that Oshkosh Truck would not pay more for the components unless it agreed to do so in writing, and, as we have seen, any price adjustments were to be made "yearly and held firm regardless of variation of cost elements during the year."

In February of 1994, the parties agreed to the final pricing in a third set of documents for all components other than the superstructure. Again, these documents, like the others, declared that Oshkosh Truck would not pay more for the components unless it agreed to do so in writing and, based on their agreement in the June 1993 preliminary purchase order, any adjustments were to be done "yearly." This final pricing included extras in order to amortize Super Steel's capital investment, and were, as proposed by Super Steel, as follows, per unit:

- drive pedestal assembly (part number 2053030-U) — $449.44;
- drum (part number 2068930) — $5957.20;
- pedestal, roller (part number 2053020) — $1404.50;
- chute extension (part number 2053060) — $119.78;
- chute, power fold (part number 2076770) — $817.26;
- main chute (part number 2053050-U) — $458.98.

As noted, the parties did not agree on a new price for the superstructure; accordingly, the "not to exceed" unit price of $2863 set by the November 3, 1993, purchase order governed. There is no dispute but that Oshkosh Truck paid, and was willing to pay, the prices set out in the relevant purchase orders. The majority, however, holds that, somehow, these "were not the actual contract prices." Majority Op. at 18. Yet, it does not point to anything in the record where Oshkosh Truck agreed "in writing," as

required by the documents to which it did agree, to any other prices. At oral argument, counsel for Super Steel was asked if there was any document "on which Oshkosh Truck has put its signature in which it agreed to prices specified in numbers" that exceeded the ones set out in the February, 1994, modified purchase orders or, in case of the superstructure, the November, 1993, purchase order. He replied: "No."

In support of its contention that Super Steel could raise prices even though Oshkosh Truck did not agree in writing, Super Steel relies on the following from the June, 1993, preliminary purchase order:

> Upon completion of the design, Super Steel will create a base line model for each item listing the following cost elements:
>
> Material (including complete B/M)
> Labor Hours
> Labor Rate
> Manufacturing Overhead
> G&A
>
> Profit is to be fixed at 7% gross.
>
> Pricing is to be adjusted yearly and held firm regardless of variation of cost elements during the year. Any reduction in actual cost that increases the yearly weighted average gross profit in excess of 7% will be applied to reducing the loan principal.

Given the provisions in the purchase orders that either set prices on a "not to exceed basis" or set specific prices, and that also declared that Oshkosh Truck would not pay more than those prices unless it agreed to do so in writing once a year, Super Steel's argument that the foregoing from the June 1993 preliminary purchase order obligated Oshkosh Truck to pay prices unilaterally arrived at by Super Steel and to which Oshkosh Truck did not agree in writing is without merit.

In sum, it is clear from this record that Super Steel made a bad deal and then attempted to change the rules without Oshkosh Truck's written approval—as was required. Super Steel used two trial-weeks of extrinsic evidence to persuade the jury to ignore the unambiguous written contracts. The trial court recognized that this extrinsic evidence was "legally irrelevant," and granted Oshkosh Truck's motion for a directed verdict. The majority also uses the extrinsic evidence to shunt aside those unambiguous written contracts and reverse. I would affirm the trial court's grant of Oshkosh Truck's motion for a directed verdict.[7]

[7] In light of my conclusion that the trial court did not err in granting Oshkosh Truck's motion for a directed verdict, I do not discuss the damages issue.