COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-0777

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

NTL PROCESSING, INC., A MISSOURI CORPORATION, D/B/A NATIONAL TESTING LABORATORIES,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MEDICAL COLLEGE OF WISCONSIN, A WISCONSIN CORPORATION, AND ADOLF STAFL, M.D.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL from a judgment and CROSS-APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Medical College of Wisconsin (MCW) and Adolf Stafl, M.D., appeal from a judgment awarding damages to NTL Processing, Inc.

for breach of a licensing agreement. NTL cross-appeals from an order denying its request for preverdict interest and double taxable costs under WIS. STAT. § 807.01 (1997-98)[1] because MCW and Stafl rejected NTL's settlement offers.[2] We affirm on the appeal and cross-appeal.

¶2 On appeal, MCW does not challenge the jury's finding that MCW and/or Stafl breached the licensing agreement with NTL and that the breach caused damage to NTL. MCW challenges the $10 million the jury awarded to fairly and reasonably compensate NTL for its damages. Because damages are the focus on appeal, we will only briefly discuss the nature of the conflict between the parties.

¶3 In December 1983, Stafl and MCW licensed to NTL's predecessor, Fotomedics, Inc., exclusive worldwide rights to market Cervicography, a new, patented procedure for cervical cancer screening. Stafl, a professor of obstetrics and gynecology at MCW, invented the procedure and assigned the patent to MCW. NTL alleged that MCW and Stafl breached the licensing agreement in 1991 causing NTL to lose profits. In 1992, NTL sued MCW and Stafl for the breach.

¶4 At the lengthy jury trial, MCW and NTL presented expert testimony relating to NTL's lost profits claim. NTL's expert opined that NTL's damages were in the range of $65 to $95 million. MCW contended that NTL's poor financial condition precluded an award of damages for lost profits. The jury found

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

[2] In a May 12, 1998 order, we stated that we have jurisdiction over the cross-appeal.

that MCW and/or Stafl breached the licensing agreement and awarded NTL $10 million in damages.

¶5 Postverdict, MCW challenged the damages award. The circuit court noted that the range of possible damages for the jury's consideration was $0 to $95 million. The court found that it was for the jury to decide the weight and effect of the experts' "diametrically opposed" opinions of damages and the assumptions they used in rendering their opinions.

¶6 The court found that there was credible evidence that by 1991, when MCW and Stafl breached the licensing agreement, NTL had overcome most of its internal and administrative problems, its primary lender was willing to continue its relationship with NTL even in the absence of timely repayment on the loan, and NTL was moving out of its start-up phase. The court noted that lost profits had to be estimated with reasonable certainty. The court found that the jury had conflicting evidence and reached a verdict supported by credible evidence.[3]

¶7 Our review of the jury verdict is conducted from the perspective of whether there is "any credible evidence which under any reasonable view supports the jury finding." ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 625, 478 N.W.2d 48 (Ct. App. 1991) (citation omitted). The credibility of witnesses and the weight to be given their testimony are left to the jury. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis. 2d 299, 305, 347 N.W.2d 595 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 547 N.W.2d 592 (1996). If more than one reasonable inference may be drawn from the evidence,

[3] We note that before instructing the jury, the court praised the jury as one of the best the court had ever been involved with and noted the consistent attention paid by each member of the jury.

we must accept the inference drawn by the jury. *See* ***id.*** at 305-06. We search for credible evidence to sustain the jury's verdict, not for evidence to sustain a verdict the jury could have reached, but did not. *See* ***id.*** We view the evidence in the light most favorable to the verdict, *see* ***Meurer v. ITT General Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979), and we indulge in every presumption in support of the verdict, particularly where the verdict has the circuit court's approval, *see* ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 352, 564 N.W.2d 788 (Ct. App. 1997). We are mindful of the circuit court's advantage over this court in assessing the impact of the evidence. *See* ***State v. Hagen***, 181 Wis. 2d 934, 948-49, 512 N.W.2d 180 (Ct. App. 1994).

¶8 MCW raises numerous challenges to the damages award: (1) NTL was a start-up business which had never been profitable; (2) NTL's lost profits evidence did not meet the standard of reasonable certainty; (3) NTL's lost profits were speculative; (4) NTL's damages model did not bear any relationship to NTL's past or actual performance; (5) NTL's damages model did not account for other factors that could have caused its losses; (6) NTL's experts assumed that NTL would have been able to secure additional lending to fund operating losses when there was no evidence that such lending would have been available; and (7) the damages award is against the weight of the evidence and excessive.

¶9 We start with how the jury was instructed regarding damages.[4]

> The loss of prospective or future profits is a proper basis for awarding damages resulting from a breach of contract when the circumstances are such that the future damages may be computed with some reasonable certainty. The law places the burden of establishing this reasonable certainty upon NTL.

[4] MCW does not object to the jury instructions on appeal.

> If you find the evidence in this case to be so uncertain that you cannot do more than merely guess, speculate, or conjecture as to whether or not NTL is entitled to recover certain specified damages due to the loss of future profits, then you cannot award damages for future profits in this case. The law permits and allows only such damages as have been proved to a reasonable certainty by the greater weight of the credible evidence ….
>
> Although damages may not be based on speculation, it is not necessary that you should arrive at a conclusion of loss of future profits with mathematical certainty ….
>
> With these general principles in mind, you are instructed that evidence of prior profits in the same business may be used by you as a basis for a computation of loss of future profits as well as any other evidence in this case bearing upon the issue.
>
> The measure of damages for a breach of contract is the amount which will compensate NTL for the loss suffered because of the breach.…. The injured company is entitled to the benefit of its agreement, which is the net gain it would have realized from the contract but for the failure of the other party to perform.

¶10 A business is not precluded from seeking damages for lost profits if it can present credible evidence of "business history and business experience sufficient to allow a fact finder to reasonably ascertain future lost profits." ***T & HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 605 n.6, 557 N.W.2d 480 (Ct. App. 1996). Damages for lost profits are addressed on a case-by-case basis. *See* ***id.*** NTL was required to show a nexus between its track record and its losses due to MCW's breach.

¶11 We first address MCW's claim that NTL was a start-up business which had never been profitable and therefore could not recover lost profits. In support of this argument, MCW relies on ***T & HW***. We conclude that ***T & HW*** is distinguishable and does not bar NTL's lost profits claim.

¶12 T & HW was incorporated to facilitate the development of an indoor recreation and entertainment center. *See* ***id.*** at 596. T & HW's principal leased space for the center from Kenosha Associates. *See* ***id.*** After signing the lease agreement but before T & HW took occupancy, Kenosha Associates terminated the agreement. *See* ***id.*** T & HW sued for breach of contract and lost profits. *See* ***id.*** at 596-97. To support its claim for lost profits, T & HW submitted its accountant's projections for a twenty-year period. *See* ***id.*** at 605. However, the accountant conceded that none of the principal's businesses had ever lasted twenty years. *See* ***id.*** The accountant stated that the projections were for a location in Illinois, not the leased premises in Kenosha, but opined that the projections were equally reliable for either location. *See* ***id.*** On cross-examination, the accountant conceded that he was not familiar with the size of the area from which the center would draw its patrons. *See* ***id.***

¶13 We independently reviewed the evidence and concluded that T & HW's lost profits evidence was too speculative to support the jury's award. *See* ***id.*** We specifically noted that "[t]he Family Fun Center was a new and untried business venture for [the principal]. The concept was unproven and any projections as to profit were purely conjectural." ***Id.***

¶14 In contrast, NTL began operating in 1983 and made sizable investments in finances, labor, marketing and testing in the ensuing years to get Cervicography off the ground. We conclude that the problem in ***T & HW***—a new and untried business venture with an unproven concept—was not present here because there was credible evidence in the record of NTL's progress, business history and experience since its inception. The jury was entitled to accept this credible evidence.

¶15 All of MCW's other challenges to the evidence of damages travel to its weight and credibility. We agree with the circuit court that it was for the jury to sort out the conflicting evidence and assign weight to it. The evidence was of sufficient certainty to permit the jury to resolve the conflicts and find the facts. Turning to that evidence, we conclude that there is sufficient credible evidence to support the damages award.

¶16 NTL presented the testimony of two experts from Arthur Andersen LLP. The experts used NTL's business records and gave opinions regarding NTL's lost profits. They estimated the size of the market and the market demand for Cervicography. NTL's experts also considered NTL's exclusive license for Cervicography and freedom from competition in the United States through the end of 1998, medical expert opinion confirming the efficacy of Cervicography, and the high profit margin for Cervicography which would yield cash flow for growth. The experts also considered the experience of three other companies which offered automated cytology for evaluating cervical health. These companies were start-up companies without profit and with substantial cumulative losses, yet they successfully sold stock in public offerings. The experts estimated NTL's revenues based on projected market share and NTL's historical operating costs. The experts then projected lost profits for the period from 1992-2000. NTL's experts opined that NTL's lost profits had a present value of $65 to $95 million.

¶17 NTL's experts' testimony was subject to cross-examination. We conclude that there is credible evidence in the record to support NTL's lost profits claim and that NTL offered credible evidence of its business history and experience. The jury was free to reject the evidence offered by MCW regarding NTL's financial condition and the likelihood of lost profits.

¶18 MCW criticizes the jury's $10 million award as unsupported in the record. MCW argued that NTL suffered no damages; NTL claimed damages in the millions of dollars. Damages are within the jury's discretion, *see* ***Carl***, 165 Wis. 2d at 625, and the award was within the range of figures placed in evidence. It was for the jury to resolve the conflicts in the evidence.

¶19 MCW complains that NTL's damages model assumed the availability of financing without investigating the validity of that assumption. Therefore, MCW argues, the model was flawed and should not have been presented to the jury. We do not agree that this alleged deficiency warranted the exclusion of the model. Rather, the alleged deficiency was a basis for impugning the model to the jury via cross-examination and the testimony of MCW's experts. Clearly, the jury did not accept NTL's experts' opinions in their entirety, as evidenced by the damages award which was well below NTL's experts' projected lost profits.

¶20 We also reject MCW's claim that the damages award is excessive. In order to overturn a jury verdict which has been approved by the circuit court over a claim of excessiveness, "we must be able to conclude that there is such a complete absence of proof that the verdict is based on speculation." ***White v. General Cas. Co.***, 118 Wis. 2d 433, 440, 348 N.W.2d 614 (Ct. App. 1984). The court found that there was credible evidence to support the jury verdict. MCW has not "met the heavy burden needed to prove that the damages award[] [was] excessive." ***Id.*** at 441.

¶21 We now turn to the cross-appeal. NTL contends that it is entitled to preverdict interest and double taxable costs under WIS. STAT. § 807.01[5] because MCW and Stafl failed to accept a settlement offer that was equal to or less than the judgment. NTL made the following offers to settle: (1) settle all claims against MCW for $10 million plus costs; (2) settle all claims against Stafl for $5 million plus costs; or (3) in the alternative, settle all claims against MCW and Stafl, jointly and severally, for $15 million plus costs. Neither MCW nor Stafl responded to the settlement offers. The jury returned a verdict against MCW and Stafl for $10 million in damages.

¶22 The circuit court denied NTL's request for preverdict interest and double taxable costs under WIS. STAT. § 807.01 because the case was presented to the jury and on postverdict motions as "essentially a package deal."

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[5] WISCONSIN STAT. § 807.01 provides:

> **(3)** After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.
>
> **(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).

¶23 NTL compares its offers to settle of $10 million and $5 million to the $10 million verdict. We are unpersuaded by the comparison. NTL presented its case to the jury as one of joint and several liability. The defendants were not separated, and they had the same representation. The verdict form, which all the parties approved, asked the jury to determine the liability of the defendants and award damages collectively, rather than apportioning individual liability and damages.

¶24 We conclude that it makes more sense to compare apples to apples, that is, NTL's joint and several settlement offer of $15 million versus the jury's $10 million verdict. Because the case was presented as one of joint and several liability and the jury was not required to apportion liability or damages, it is not meaningful to compare the individual offers to settle with the verdict. The $10 million joint and several liability verdict was less than NTL's $15 million joint and several settlement offer. Therefore, NTL is not entitled to preverdict interest and double taxable costs under WIS. STAT. § 807.01.

By the Court.—Judgment and order affirmed.

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