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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2022-001761

Jason Snow,

Appellant,

v.

William Alexander,

Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO CALCULATE LOST PROFITS WITH REASONABLE CERTAINTY.
- II. THE CIRCUIT COURT ERRED IN FINDING THAT EXPERT TESTIMONY TO PROVE LOST PROFITS.

STATEMENT OF THE CASE

Appellant, Jason Snow, brought an action against Respondent, William Alexander for damages arising out of a contract for the sale of a restaurant known as the Pumpkintown Café in the Greenville County Circuit Court with case number 2019-CP-23-05514. The case was tried on September 19 and 20, 2022 before a jury and presided over by The Honorable Perry H. Gravely. At the close of the Appellant's case the Respondent moved for a directed verdict based on speculative damages. Tr. p. 158 l. 11-24. The Court denied that motion. Tr. p. 158 l. 25 - p. 159 l. 1.

Prior to closing arguments, Appellant submitted requests to charge, and the trial Court accepted the charges. Tr. p. 176 l. 4-17. Specifically the Appellant requested that the trial Court give the following charge for lost profits:

“Profits” have been defined as the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them. “Profits” are the net income over expenditures in a given period.

Lost Profits are recoverable in an action for breach of contract. First, the profits must have been prevented or lost as a natural consequence of the breach of contract. Second, lost profits must reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of the contract.

When lost profits are contemplated as a measure of damages for a breach of contract, they should be established with reasonable certainty since the recovery cannot be had for profits which are conjectural or speculative. While proof with mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation. The proof must pass the realm of conjecture,

speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

Ralph King Anderson Jr., *South Carolina Requests to Charge – Civil*, 2009 § 19-29, *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (S.C. App. 2004)

The trial court did charge the jury as requested. Tr. p. 224 l. 14 – p. 225 l. 8, RTC 3.

At the close of the trial, the jury returned a verdict in favor of the Plaintiff in the amount of \$445,000.00. Tr. p. 231 l. 19 - p. 232 l. 2. After the jury was dismissed, the Defendant moved to set aside the verdict based the damages being speculative. Tr. p. 232 l. 25 – p. 233 l. 1. The trial Court treated the motion as a motion for JNOV under Rule 50 and granted the motion and set aside the verdict of the jury. Tr. p. 241 – l. 23 p. 242 l. 1., Order 1.

Plaintiff filed a motion to alter or amend on October 3, 2022. The Court denied that motion on November 15, 2022. Order 2.

FACTS

Respondent is and has been the owner of a restaurant known as the Pumpkintown Café since 2017. Tr. p. 31 l. 10-13. In August 2019 Respondent entered into a contract with the Appellant sell the Pumpkintown Café. Tr. p. 31 l. 21-24. The terms of the contract were that Respondent would sell the Pumpkintown Café to the Appellant for \$150,000.00, with \$5,000.00 being paid to Respondent at the time of the contract and a 90-day due diligence period. Tr. p. 31 l. 21 – p. 32 l. 15., Contract. The contract was reduced to writing and signed. Tr. p. 32 l. 16-24. Contract.

During the due diligence period, Respondent provided Appellant with financial documents of the Pumpkintown Café for 2018. Tr. p. 41 l. 5 – p. 43 l. 1. Respondent provided a cash register receipt total dated January 2, 2019 showing a gross pecuniary gains for 2018 of \$379,238.17. Tr. p 42 l. 13-22. Cash Report. Respondent also provided a 2018 tax return for Pumpkintown Café,

LLC stating that it had \$81,969.00 in costs of goods sold and an additional \$101,883.00 in deductions for a total of \$182,852.00 in costs. Tr. p. 42 l. 23 – p. 43 l. 4, Tax Return.

Respondent also informed Appellant that Respondent did not own the real property where the Pumpkintown Café was located and that he had been operating on a month-to-month oral lease with the owners and that the prior owner had operated the business on a month-to-month oral lease for 27 years prior to the Respondent obtaining the business. Tr. p. 56 l. 18-25.

Appellant applied for a loan to purchase the Pumpkintown Café through the Bank of Traveler’s Rest. Tr. p. 64 l. 6-8. The bank would have asked for a lease at least matching the term of the loan in length. Tr. p. 64 l. 14-17. The loan would have been for a 7 year term. Tr. p. 76 l. 8-15. Appellant and his lawyer met with the landlords. Tr. p. 76 l. 20-24. After the conversation Appellant’s lawyer did not have any concerns about Appellant’s ability to obtain a lease that would meet the Bank of Traveler’s Rest’s requirements. Tr. p. 77 l. 6-10. The Bank of Traveler’s Rest would have made the loan in time for Appellant to perform on the contract. Tr. p. 70 l. 21-25.

Respondent refused to sell the Pumpkintown Café pursuant to the contract. Tr. p. 38 l. 10-14. Respondent was still the owner and was operating the Pumpkintown Café as of September 19, 2022, the date of his testimony at trial. Tr. p. 45 l. 20-24.

STANDARD OF REVIEW

“When considering a motion for judgment notwithstanding the verdict, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993). In making this determination, the judge must view the evidence and all its inferences in the light most favorable to the nonmoving party. *Id.* Furthermore, if more than one reasonable inference

exists, the jury verdict must stand. *Id.*” *Force v. Richland Memorial Hosp.*, 471 S.E.2d 714, 322 S.C. 283 (S.C. App. 1996).

ARGUMENT

- I. There is sufficient evidence in the record to support the jury’s verdict as not speculative and made with reasonable certainty or inference.

Plaintiff presented evidence from which his lost profits can be calculated based on the evidence presented at trial of the gross profits of Defendant’s business for the full year prior to the formation of the contract in this case and the evidence of the Defendant’s cost of obtaining them. ““Profits” have been defined as “the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them.”” *Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 371 S.E.2d 532, 296 S.C. 207 (S.C. 1988), citing Restatement of Contracts § 331, Comment B (1932); *see Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct.App.1988) (defining "profits" as the net of income over expenditures during a given period). "The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy." *South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 123, 113 S.E.2d 329, 336 (1960).

In this matter the Respondent testified that he gave the Appellant a cash register report for 2018 showing that the restaurant made \$379,591.62 in gross profits. Tr. p 42 l. 13-22. Cash Report. Respondent also testified that he gave the Appellant the restaurants 2018 tax return showing that the restaurants cost of obtaining those profits were \$183,834.00. Tr. p. 42 l. 23 – p. 43 l. 4, Tax Return. These costs are further broken down on the tax return as:

Costs of goods sold:	\$81,969.00
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Salaries and wages	\$44,120.00
Rents	\$10,800.00
Taxes and Licenses	\$3,746.00
Depreciation	\$11,532.00
Credit and Collection Costs	\$372.00
Liability Insurance	\$1,524.00
Workers Comp Insurance	\$4,176.00
Supplies	\$4,533.00
Telephone	\$1,281.00
Tools	\$624.00
Utilities	\$17,286.00
Waste Removal	\$1,800.00

Given these numbers, it is easy for a trier of fact to calculate the profit the restaurant made in 2018, \$379,591.62 income minus \$183,834.00 costs equals \$195,757.62 net profits for one year.

There was conflicting evidence in the record, most notably in the tax return itself, which stated that the restaurant only had an income of \$162,510.00. However, “[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.” *Weaver v. Lentz*, 561 S.E.2d 360, 348 S.C. 672 (S.C. App. 2002).

There is also testimony in the record, from multiple witnesses, from which a proper time period for the lost profits could be determined. The Respondent operated on an oral month-to-month lease. Tr. p. 56 l. 18-20. Respondent testified that he had been in business with that same month-to-month lease for five years. Tr. p. 58 l. 25 – p. 59 l. 6. Respondent also admitted that remained in business from the time the contract was entered into until the trial, a period of three years. Tr. p. 45 l. 20-24. The bank loan the Appellant was to obtain would have been for a 7 year term and there was no concern about meeting a bank requirement of a lease for the same term. Tr. p. 64 l. 14-17 and Tr. p. 77 l. 6-10. The restaurant had been in business for twenty-seven years

prior to Respondent's purchase of the restaurant for a total continuous operation of thirty-two years. Tr. p. 56 l. 18-25. Given this evidence, a trier of fact may deduce with reasonable certainty that the restaurant would continue to be in operation for many years to come even under a month-to-month lease without resort to speculation and conjecture. There are therefore several time intervals presented in evidence at trial from which a trier of fact could multiply the calculation of one year's profit to find a damages award. Because "it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve" it is up to the trier of fact to determine what time period they choose based on that the reasonable inferences of that evidence. *Id.*

In *Petty v. Weyerhaeuser Co.*, 342 S.E.2d 611, 288 S.C. 349 (S.C. App. 1986) the Plaintiff offered its income over three-month operating history of the business for the determination of lost profits. In *Petty* the Court of Appeals stated that,

"[The Defendant's] argument is that the three month period the business operated in 1974 prior to encountering the debilitating effect of the defective floor does not afford a reasonable basis for calculating lost profits. We reject this argument. The problematic nature of proving damages for loss of profits in a tort action will not prevent recovery where, as here, the plaintiff can present evidence from which the court can make "fair and reasonable approximation of them". South Carolina Finance Corp. [288 S.C. 356] 236 S.C. at 125, 113 S.E.2d at 337. See 4 Restatement of Torts 2d Section 912 (1979); 22 Am.Jur.2d Damages Section 177 (1965) ("Where the wrongful act of the defendant is of such a nature as to prevent determination of the exact amount of damages, the defendant is not allowed to insist on absolute certainty, but only that the evidence show the lost profits by reasonable inference."). We hold that the three month period provides sufficient historical data to support an award for loss of profits. *Id.*

In this case, we have one year of income and costs from an ongoing business. This is ample evidence from which a trier of fact may, and did, make a fair and reasonable determination of approximation of the damages. There is no way to determine what the exact amount of damages the Appellant suffered for many reasons, including that the Appellant could have been a better or

worse restaurateur than the Respondent and would have had greater or lesser profits. However, the wrongful act of the Respondent in breaching the contract prevents an exact determination and he is not allowed to insist on reasonable certainty and the Appellant may prove his damages by reasonable inference.

II. There is no requirement for an expert to prove lost profits.

There is no requirement for an expert witness in a contract case. An expert may testify in the form of an opinion if it will assist the trier of fact to understand the evidence. *See* Rule 702 SCRE. However, there is no requirement for an expert and the opinions of an expert are evidence like any other and it is up to the trier of fact to determine the credibility or weight to give to the expert's opinion. *See Weaver supra*.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and reinstate the jury's verdict.

Respectfully submitted,

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