STATE OF MINNESOTA
IN COURT OF APPEALS
A10-50

Lonnie Curtis, et al.,
Appellants,

vs.

Jennie-O Turkey Store, Inc.,
Respondent.

Filed September 14, 2010
Affirmed
Johnson, Judge

Kandiyohi County District Court
File No. 34-CV-08-482

John E. Mack, Mack & Daby, New London, Minnesota (for appellants)

Ryan E. Mick, Christopher Amundsen, Dorsey & Whitney, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

West Central Industries, Inc., terminated a contract with Speedy Pallet Industries, LLC, after Jennie-O Turkey Store, Inc., expressed concerns to West Central about the contractual relationship. Speedy Pallet sued Jennie-O, alleging claims of tortious interference. The district court granted Jennie-O's motion for summary judgment. We

conclude that Speedy Pallet did not submit sufficient evidence of lost profits and, thus, failed to create a genuine issue of material fact as to an essential element of its claims. Therefore, we affirm.

FACTS

Jennie-O is engaged in the business of processing turkeys for sale as food products. Jennie-O operates a facility near Willmar that uses wooden pallets when shipping its products. For years, Jennie-O has purchased pallets from West Central, a non-profit organization in Willmar that provides job training and employment to disabled adults. Between 2003 and 2007, Jennie-O also purchased pallets from a company owned and operated by Lonnie Curtis. But the relationship between Curtis and Jennie-O's buyer, Mike Brown, became strained. The relationship eventually deteriorated to the point that Jennie-O terminated its relationship with Curtis and his company and banned Curtis from its properties.

After Jennie-O ceased doing business with him, Curtis sought to establish a business relationship with West Central. At the time, West Central's primary pallet customer was Jennie-O. Curtis proposed to help West Central find additional customers for its pallets. West Central entered into an oral agreement with Curtis's new company, Speedy Pallet, by which Speedy Pallet would secure new customers for West Central's pallet business and deliver pallets to those customers. Curtis proposed that Speedy Pallet be paid solely by commissions. West Central understood that Jennie-O did not wish to be associated with Curtis in any way. Accordingly, West Central and Speedy Pallet agreed that neither Speedy Pallet nor Curtis would have any contact with Jennie-O. In the first

three months of this arrangement, Curtis secured three new customers for West Central: Lakeside Foods, Inc., Impact Innovations, Inc., and Kay's Naturals.

In August 2007, West Central and Speedy Pallet entered into a written agreement with the same essential purpose as their oral agreement. The written agreement was for a term of three years. Either party could terminate the agreement "upon sixty (60) days' written notice." If West Central were to terminate the agreement for reasons other than "non-performance or misconduct by [Speedy Pallet]," Speedy Pallet could elect either to prohibit West Central from soliciting business from the new customers Speedy Pallet brought to West Central or, in the alternative, to obligate West Central to pay Speedy Pallet a 15% commission on West Central's pallet sales to those customers for three years after the termination of the agreement. The written agreement expressly prohibited Speedy Pallet from contacting Jennie-O.

After the written agreement was signed, Speedy Pallet did not secure any new customers for West Central. Pursuant to the oral agreement, Speedy Pallet continued to receive commissions on the sales West Central made to the three customers secured by Speedy Pallet between May and August 2007. Between July 2007 and July 2008, West Central paid Speedy Pallet a total of $37,185 in commissions.

Problems arose in West Central's business relationship with Jennie-O in January 2008, when Brown learned that Curtis had made representations to third parties concerning a heat-treating machine that Jennie-O had purchased and installed at West Central's facility. Brown sent an e-mail to Charles Oakes, West Central's CEO, asking him to "be sure [Curtis] is not selling a product that in any way links him to" Jennie-O.

In addition, Brown asked Oakes to "explain the relationship and responsibilities that [Curtis] has with [West Central]." Brown cautioned Oakes that "if [Curtis] is associated with [West Central] and in any way that disturbs the great business relationship we have established with [West Central] we will have no choice but to take our business elsewhere." Oakes responded by informing Brown that "Curtis performs commission pallet sales to new customers" for West Central and that "[h]is agreement specifically limits his activities to those areas and restricts him from engaging in any business with" Jennie-O.

Problems arose again in May 2008, when Curtis made a sales call at a Jennie-O plant in Pelican Rapids. Curtis testified that he did not know that the plant was owned by Jennie-O, and the Jennie-O plant manager informed West Central that Curtis excused himself as soon as he was informed that it was a Jennie-O plant. But Brown was displeased. He sent an e-mail to Oakes, stating, "you assured me Mr. Curtis does not work for [West Central], [and] we at [Jennie-O] do not appreciate being deceived." In addition, Brown sent a letter to each member of West Central's board of directors. In the letter, Brown stated that Oakes and Curtis had ignored Jennie-O's "multiple requests to keep Mr. Curtis off our property and out of our business relationship." He further stated that "Jennie-O will, in no way whatsoever . . . be associated with, do business with or be affiliated to Mr. Curtis." Brown stated that Jennie-O's relationship with West Central would "end immediately if we are to be associated with Mr. Curtis again." Brown concluded by stating, "Please find a resolution that will assure us that this situation will not happen again."

As a result of Brown's communications, West Central's board of directors met on May 19, 2008, and decided to terminate the contract with Speedy Pallet. After Brown was informed of West Central's action, he expressed dismay that West Central gave Curtis 60-days' notice. He stated, "Obviously you are further engaged in business with Mr. Curtis than we thought." Brown further stated that "we feel it is in our best interest to re-assess all business with [West Central]" and that Jennie-O "would be better associated with a company where we can have an open, honest and reliable partnership with not only the staff but especially the Executive Director." On May 27, 2008, Brown informed Oakes via e-mail that Jennie-O had "decided to stop all business with [West Central] effective June 1st." Jennie-O later resumed its business relationship with West Central.

In July 2008, Curtis and Speedy Pallet commenced this action against Jennie-O. The complaint alleges that Jennie-O "tortiously interfered with the obligations of contract between [Speedy Pallet] and [West Central], and tortiously interfered with the business relationship between [Speedy Pallet] and [West Central]." In October 2009, Jennie-O moved for summary judgment. Jennie-O argued that Curtis was not a proper party to the action and that Speedy Pallet's claims should fail for lack of evidence. The district court granted Jennie-O's motion. The district court dismissed Curtis from the case on the ground that he is not the real party in interest. With respect to Speedy Pallet's claims, the district court reasoned that Speedy Pallet had submitted evidence sufficient to prove that a contract between Speedy Pallet and West Central existed and that Jennie-O was aware of the contract. But the district court also reasoned that Speedy Pallet had failed to create

a genuine issue of material fact on several issues, namely, whether there was a breach of the contract between Speedy Pallet and West Central, whether Jennie-O intentionally procured a breach, whether Jennie-O's actions were without justification, and whether Speedy Pallet could prove damages.

Speedy Pallet timely filed a notice of appeal. Jennie-O timely filed a notice of related appeal to challenge the district court's reasoning concerning the existence of a contract and Jennie-O's knowledge of a contract. *See* Minn. R. Civ. App. P. 103.02, subd. 2. We need not consider the issues raised by Jennie-O because our resolution of one of the issues raised by Speedy Pallet is sufficient to dispose of the appeal.

D E C I S I O N

Speedy Pallet argues that the district court erred by granting summary judgment to Jennie-O because, among other reasons, the district court erroneously concluded that Speedy Pallet's evidence was insufficient to prove damages. A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the non-moving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

We construe Speedy Pallet's complaint to allege two causes of action: tortious interference with a contractual relationship and tortious interference with a prospective business relationship. To establish a claim of tortious interference with a contractual relationship, a plaintiff must prove five elements: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (quoting *Furlev Sales and Assocs., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). To establish a claim of tortious interference with a prospective business relationship, a plaintiff must prove three elements: (1) a defendant intentionally and improperly committed a wrongful act; (2) that act interfered with the plaintiff's prospective contractual relationship; and (3) the plaintiff suffered pecuniary harm. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982). Common to both causes of action is the requirement that a plaintiff prove "damages" or "pecuniary harm." *See Kjesbo*, 517 N.W.2d at 588; *United Wild Rice*, 313 N.W.2d at 633.

Speedy Pallet's theory of damages is that it sustained lost profits. As a general rule, damages in the form of lost profits

> may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness. This means that the nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts.

Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 266 (Minn. 1980) (quoting *Appliances, Inc. v. Queen Stove Works, Inc.*, 228 Minn. 55, 63, 36 N.W.2d 121, 125 (1949)). The fact that some damages have occurred must, at trial, "be established to a reasonable certainty." *Imperial Developers, Inc. v. Seaboard Sur. Co.*, 518 N.W.2d 623, 626 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). "Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery . . . ." *Cardinal Consulting Co.*, 297 N.W.2d at 267 (quotation omitted). Whether damages have been or may be "established with reasonable certainty . . . *depends upon the circumstances of the particular case*." *Id.* Furthermore, "[d]amages which are remote and speculative cannot be recovered." *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977); *see also Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994), *review denied* (Minn. June 29, 1994). A plaintiff's failure to submit evidence of damages into the district court record in response to a motion for summary judgment justifies a district court's decision to grant the motion. *See, e.g.*, *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 812 (Minn. App. 2007) (affirming grant of summary judgment because evidence of damages was "too remote or speculative"), *review denied* (Minn. Sept. 18, 2007).

Speedy Pallet performed services for West Central between May 2007 and May 2008. Between May 2007 and August 2007, while the oral agreement was in effect, Speedy Pallet secured three new customers for West Central. Speedy Pallet and West Central entered into the written agreement in August 2007. Between August 2007 and May 2008, while the written agreement was in effect, Speedy Pallet did not secure any

new customers for West Central. After West Central terminated the written agreement, Speedy Pallet declined to prohibit West Central from soliciting business from the three customers Speedy Pallet had secured before August 2007. Instead, Speedy Pallet elected to continue receiving commission payments on West Central's sales to those customers. As of July 2008, West Central had paid Speedy Pallet a total of $37,185 in commissions for sales made to those three customers. Thus, Speedy Pallet cannot claim any lost profits arising from the three new customers that it brought to West Central *before* the contract was terminated in May 2008. To prove that it sustained lost profits, Speedy Pallet must prove that it would have secured *additional* customers for West Central *after* May 2008.

The summary judgment record includes Curtis's deposition testimony that Speedy Pallet would have earned "about 300 some thousand dollars a year . . . for the next six years." Curtis testified that this figure was based on the fact that "the whole goal of the whole situation . . . was 1.5 million gross a year." In some situations, a plaintiff may prove lost profits by introducing evidence of its history of profits. *See Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) (holding that plaintiff's evidence of, among other things, prior amounts of gross sales was sufficient to prove lost profits). Historical profits may be sufficient evidence of lost profits if, for example, a company has many unidentified customers, each of whom is responsible for a small portion of the company's revenues. But if a company has only a few customers, each of whom contributes a known, significant amount of revenues, a plaintiff may need to introduce more specific evidence to prove lost profits with reasonable certainty. *See B & Y Metal Painting, Inc.*

v. Ball, 279 N.W.2d 813, 817 (Minn. 1979) (holding that plaintiff's evidence of lost profits was sufficient because its sales to three identified customers "decreased markedly" due to defendant's breach of contract). Whether damages are reasonably certain "*depends upon the circumstances of the particular case*." *Cardinal Consulting Co.*, 297 N.W.2d at 267.

In this case, Speedy Pallet identified a finite number of potential customers and pursued them with individualized contacts, and each of those potential customers could have contributed a significant portion of West Central's revenues. In light of the nature of its business relationship with West Central, Speedy Pallet may not simply refer to its history of commission payments and extrapolate forward in time. This is especially so in light of the fact that Speedy Pallet failed to secure a single customer for West Central during the last nine months of its contractual relationship with West Central. *See Vault, Inc. v. Michael-Northwestern P'ship*, 372 N.W.2d 7, 9 (Minn. App. 1985) (holding that damages are too speculative because plaintiff's business was new and was "devoid of a history of profits"), *review denied* (Minn. Sept. 13, 1985). Thus, to prove that it would have secured additional customers for West Central after May 2008, Speedy Pallet must submit evidence that specifically describes what would have occurred if West Central had not terminated the contract.

When asked to justify his projection of future sales of West Central's pallets, Curtis repeatedly stated in his deposition testimony that he would have achieved his sales goal simply because of his skills as a salesman. He explained, "I guess it's just the salesman. I guess I believe I can do a lot. . . . . It's projections and what you believe. If

I didn't have the belief, I wouldn't be in the business." When asked "how many orders Speedy Pallet would have placed for West Central Industries in terms of pallet sales to customers," Curtis answered, "I couldn't give you a prediction," and "it wouldn't even be an educated guess, it would just be a guess." Curtis did not specifically identify potential customers by name, with one exception, a company called Dooley's. But the evidence in the record concerning Dooley's is lacking in meaning because the deposition transcript has been excerpted in an incomplete manner.[1] Speedy Pallet's evidence is insufficient because it is not capable of proving with reasonable certainty that any particular potential customer would have purchased pallets from West Central. Curtis's testimony that he is a capable salesperson is insufficient because it is nothing more than speculation and, thus, not capable of establishing lost profits to a reasonable certainty.

In sum, the district court did not err by concluding that Speedy Pallet failed to create a genuine issue of material fact concerning whether it sustained lost profits. Without evidence of lost profits, Speedy Pallet cannot prove the elements of its claims. Therefore, the district court did not err by granting Jennie-O's motion for summary judgment.

Affirmed.

[1]The deposition testimony in the summary judgment record indicates little more than the fact that Curtis was in contact with Dooley's but that Dooley's did not place an order. And Curtis's deposition testimony concerning Dooley's is just as vague as his testimony about new customers generally. Curtis testified that if West Central had not terminated the agreement, "I believe we would have [had] that customer." When asked for the basis of this belief, Curtis answered, "Based on my ability to sell, my ability to . . . supply them with the pallets. I guess I don't know what else. As a salesperson I believe I know when I got a sale and when I don't."