STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1560

Tri State Grease & Tallow Company, Inc., d/b/a Origo,
Respondent,

vs.

BJB, LLC, d/b/a Agri Trading,
Appellant.

Filed June 27, 2011
Affirmed in part, reversed in part, and remanded
Toussaint, Judge

Brown County District Court
File No. 08-CV-08-1060

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Considered and decided by Toussaint, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

TOUSSAINT, Judge

In this appeal from judgment following a jury trial in a breach-of-contract action, appellant BJB, LLC, d/b/a Agri Trading, challenges the denial of its motions for

judgment as a matter of law, a new trial, or remittitur, arguing that (1) the evidence does not support the jury's verdict; (2) opposing counsel improperly focused the jury's attention on the fact that appellant sued respondent Tri State Grease & Tallow Co., Inc., d/b/a Origo, first and that its claims were dismissed; and (3) the district court erred by instructing the jury on lost-profits damages. By notice of related appeal, respondent asserts that the district court erred by (1) limiting its attorney-fee award to 60% of the requested amount and (2) declining to award statutory prejudgment interest for any time period prior to the date of the jury's verdict. We affirm in part, reverse in part, and remand.

D E C I S I O N

On appeal from a motion for judgment as a matter of law, "this court determines whether there is any competent evidence reasonably tending to sustain the verdict." *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. App. 2005). "The jury's verdict stands unless it is manifestly and palpably contrary to the evidence, considered in the light most favorable to the plaintiff." *Id.* "Verdicts are upset only in extreme circumstances." *Id.*

We review the district court's denial of a motion for a new trial for abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel, Breen & Abrahamson, Inc.*, 715 N.W.2d 458, 476-77 (Minn. App. 2006). The court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Id.* at 477 (quotation omitted). The mere possibility that impaneling another

jury and conducting a new trial would bring about an opposite result is not grounds for a new trial. *Heggstad v. Dubke*, 304 Minn. 129, 132, 229 N.W.2d 34, 36 (1975).

Likewise, the district court exercises discretion by granting or denying remittitur, and appellate courts will not reverse unless there was a clear abuse of that discretion. *Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001).

I.

Appellant argues that the evidence was insufficient to support jury findings that (1) it breached a noncompete provision of a joint-venture agreement with respondent; (2) respondent suffered damages including lost profits and did not fail to mitigate those damages; and (3) it breached the terms of an asset-purchase agreement with respondent. We address each issue in turn.

A. Breach of the Joint-Venture Agreement

Appellant first challenges the jury's finding that it breached its joint-venture agreement with respondent—specifically the noncompete provision, which provided that the parties "shall not contact the exclusive customers/vendors of the other party for the purchase or sale of Product for a period of eighteen (18) months from the date of termination of this Agreement." Appellant relies on unrefuted trial testimony that it did not initiate contact with respondent's customers and argues that the phrase "shall not contact" does not preclude appellant from making sales to respondent's customers, so long as respondent's customers initiated the transaction.

We agree with the district court that the prohibition against contact with respondent's customers in the agreement was not limited to contact initiated by appellant. In interpreting written contracts, our primary goal is "to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). In so doing, we must read the words of a contract not in isolation but in context of the contract as a whole:

> Intent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract . . . as a whole.

Id. at 324 (quotation omitted). Because the clear purpose of the no-contact clause in the joint-venture agreement was to preserve respondent's customer relationships, we reject appellant's isolation of the word "contact" in an attempt to limit the scope of that clause. Accordingly, we affirm the denial of the posttrial motions on this ground.

B. Damages

Appellant next argues that the evidence was insufficient to support the jury's award of nearly $500,000 of lost-profit damages. To establish its lost-profits claim, respondent was required to prove by a preponderance of the evidence that "(a) profits were lost, (b) the loss was directly caused by [appellant's conduct], and (c) the amount of such causally related loss is capable of calculation with reasonable certainty rather than benevolent speculation." *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979). Appellant asserts that respondent failed to prove the second and third elements.

With respect to causation, appellant asserts that any losses respondent suffered were caused not by appellant's conduct, but by respondent's voluntary closure of its manufacturing facility in response to investigations by the Minnesota Pollution Control Agency (MPCA) and the City of New Ulm. In support of this assertion, appellant relies on testimony by Michael Hippert, who co-owns respondent with his brother Bruce Hippert, that respondent could not have continued to make product sales without reopening its facility. But Bruce and Michael Hippert also testified that respondent could have, and would have, made improvements to the facility to meet MPCA and city requirements and reopen the facility, and/or obtained product from other suppliers to service its customers. Officials from the MPCA and the city confirmed that respondent could have brought the facility into compliance with their requirements and resumed operations. In this manner, this case is distinguishable from *Blue Water Corp. v. O'Toole*, in which the supreme court held that a bank's damages could not be causally linked to an attorney's malpractice because the bank was unlikely to obtain a charter that it sought, even had the malpractice not occurred. 336 N.W.2d 279, 283 (Minn. 1983). Here, we agree with the district court that the evidence was sufficient to support the jury's verdict with respect to causation.

With respect to damages, appellant argues that respondent's damages calculations were speculative and lacked a reasonable basis in fact. Respondent's damages case was based on the calculations and testimony of Michael Hippert. Hippert started his calculations with a list of 1,551 tons of product that appellant had sold to respondent's customers during the first nine months of the noncompete period. He then performed

four steps to determine the net profit that he believed respondent could have made on sales during the 18-month no-contact period. First, he went through respondent's list of suppliers and determined what the suppliers could supply and at what margin respondent could use those supplies. Hippert based this analysis on records of respondent's historical purchases and sales and came up with weekly average profit margins for respondent's sales during that time period. Second, Hippert applied the profit margins to the 1,551 tons of products sold by appellant, estimating how much product respondent would have obtained from its various suppliers. Because the 1,551 tons represented only nine months of the 18-month no-contact period, Hippert divided his gross-profit number by nine to derive a monthly profit, and then multiplied that number by 18 to determine a total gross profit. Third, Hippert estimated the variable expenses of the liquid facility, again relying on historical information, and subtracting those from the gross profit numbers. Finally, Hippert subtracted the estimated expenses from the estimated gross profits to come up with a net loss of $469,163.40.

Appellant did not challenge Michael Hippert's competence to testify regarding respondent's damages or otherwise object to the admissibility of his testimony. Nor did it call a damages expert to refute Hippert's calculations. Appellant did cross-examine Hippert, pointing out several assumptions in his analysis. Appellant called as a witness its accountant, Kimberly Anderson, who testified that appellant's net profit on sales to respondent's customers for the relevant time period was just $37,750.

We agree with the district court that the evidence was sufficient to support the jury's award of lost-profit damages. Proof of a lost-profits claim does not call for

absolute certainty. *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 266 (Minn. 1980). As the supreme court has explained:

> Because the loss of profits in a complex market can rarely be ascertained with certainty, the plaintiff must often rely on reasonable inferences to establish his loss. Without allowing such inferences, the defendant could purposefully breach a covenant not to compete and remain immune from liability. We conclude that once a plaintiff raises a reasonable inference as to the amount of lost profits caused by a defendant's breach of a covenant not to compete, the defendant is liable for such amount unless evidence is presented to rebut the inference and to establish that the loss was caused by factors other than the breach.

B & Y Metal Painting, 279 N.W.2d at 817; *see also Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) ("Once the fact of loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount."). Moreover, there is support in the caselaw for a damages model that applies the plaintiff's historical profit margins to the sales made by the defendant in violation of a noncompete agreement. *See B & Y Metal Painting*, 279 N.W.2d at 817 (approving damages model that applied plaintiff's profit margin to decreased sales to particular customers); *Cherne Indus. v. Grounds & Assocs.*, 278 N.W.2d 81, 94-95 (Minn. 1979) (approving application of estimated profit margin to sales made by defendant in violation of noncompete agreement). Although not unassailable, Michael Hippert's testimony in this case is sufficient to meet the standard for proving lost profits under Minnesota law.

Appellant alternatively argues that the damages award should be set aside because respondent did not meet its duty to mitigate damages. "It is a well-settled principle of contract law that a nonbreaching party is duty-bound to use reasonable diligence to

mitigate damages." *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. App. 1990). The district court in this case instructed the jury on mitigation, tracking CIVJIG 20.65: "in determining the amount of damages for breach of contract, take into account that the party asking for damages must act reasonably to limit his or her damages." Appellant argues that respondent failed to mitigate its damages because it did not reopen its manufacturing facility or otherwise attempt to compete with appellant for sales. But the Hipperts testified that respondent refrained from selling because of the pending litigation, and the jury apparently found that it acted reasonably in doing so. Because the evidence did not compel a finding that respondent failed to mitigate its damages, we decline to set aside the jury's damages award on this ground.

Appellant finally challenges the sufficiency of the evidence to support a portion of the damages award attributable to a balance owed to respondent when the parties terminated their relationship. But respondent offered documentary and testimonial evidence of an account stated. Thus, we reject this argument.

Because the evidence was sufficient to support the damages award for breach of the joint-venture agreement, we affirm the district court's denial of the posttrial motions on this ground.

C. Breach of Equipment-Sales Agreement

Appellant asserts that there is insufficient evidence in the record to support the jury's finding that appellant agreed to certain costs associated with its purchase of certain of respondent's equipment during a period of time following termination of the joint-venture agreement when the parties were negotiating an asset-purchase agreement. The

"existence of a contract is primarily a question of fact to be determined . . . on the basis of the evidence presented and the surrounding circumstances." *Malmin v. Grabner*, 282 Minn. 82, 86, 163 N.W.2d 39, 41 (1968). "A contract requires a meeting of the minds concerning its essential elements." *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980). Applying these principles here, we agree that there is insufficient evidence to prove that the parties reached an agreement with respect to the disputed costs.

In support of its claim that a contract existed, respondent relies on written drafts of the asset-purchase agreement that the parties exchanged, statements made in conjunction with the ultimately failed negotiations of that agreement, and e-mails exchanged in relation to those drafts. But it is undisputed that the parties never executed the asset-purchase agreement, and we reject respondent's attempt to pick and choose the terms of the unsigned asset-purchase agreement that it wishes to enforce. Accordingly, we reverse the district court's denial of judgment as a matter of law on this ground.

II.

Appellant asserts that it is entitled to a new trial because of irregularity in the proceedings, specifically the focus during trial by respondent's counsel on the fact that appellant sued respondent first and that its claims had been dismissed. "The decision to grant a new trial based on claimed attorney misconduct rests wholly within the district court's discretion." *Lake Superior Ctr. Auth.*, 715 N.W.2d at 479. This is because the district court "is best positioned to determine whether an attorney's misconduct has tainted the jury's verdict." *Id.* Moreover, objections to the conduct of an opposing

attorney must be preserved and the alleged misconduct must be prejudicial. *Id.*

Here, appellant argues prejudice arising from testimony and argument focusing on the early stages of the lawsuit, particularly pointing to Bruce Hippert's testimony that appellant's lawsuit had been "thrown out." Appellant raised this issue to the district court the day after Bruce Hippert testified. The court noted that, after discussion on the record, respondent's counsel had agreed not to raise the issue further. Respondent's counsel agreed, with the exception that he intended to use the verified complaint for impeachment purposes. Appellant's counsel responded: "I'm okay with that, Your Honor, and as long as we live with that, then there's no need for a formal motion on my part."

On the third day of trial, appellant's counsel objected to the admission of deposition testimony referencing the parties' motions for injunctive relief. But counsel agreed to withdraw the objection if the court instructed the jury on the context, and the court did so instruct the jury. In his closing argument, respondent's counsel referenced the litigation in the context of summarizing the facts and to support his assertion that respondent had acted reasonably in not pursuing sales in competition with appellant. Counsel also referenced appellant's allegations in the verified complaint that respondent was unlawfully competing with appellant as impeachment of testimony at trial that respondent could not have made the sales that appellant made.

After carefully reviewing the record, we reject appellant's assertion that irregularity in the proceedings compels a new trial. As an initial matter, it is not clear that appellant has properly preserved this issue for appeal. With respect to the testimony about the lawsuit being "thrown out," appellant did not formally object to or request to

strike the testimony, but rather was satisfied with respondent's counsel's representation that no further references would be made. Appellant made no timely objection to respondent's closing argument. *See* Minn. R. Evid. 103(a) (precluding predication of error on admission of evidence in absence of objection or motion to strike on record). Assuming that appellant did properly preserve an objection, we conclude that the alleged misconduct was not prejudicial, particularly in light of the district court's careful management of the testimony and instructions to the jury about the context of the litigation. Accordingly, we affirm the district court's denial of a new trial on this ground.[1]

III.

Appellant asserts that a new trial is warranted because the district court declined to give appellant's proposed instruction on lost-profit damages. The district court "has broad discretion in determining jury instructions, and this court will not reverse in the absence of abuse of discretion." *Bolander*, 703 N.W.2d at 539 (citing *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)). This discretion extends to both choosing the language of the charge and determining the propriety of a specific instruction. *Id.* (citing *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986)). "An instruction is in error if it materially misstates the law." *Peterson v. BASF Corp.*, 711

[1] Appellant points out that the district court failed to explicitly address this argument in its order denying the posttrial motions. The order does state, however, that "[c]ounsel for [respondent] gave a vigorous but entirely appropriate closing argument, to which counsel for [appellant] did not make an objection." The court continued: "This was, in the opinion of this judge, a very orderly trial. Nothing about it would have caused the jury to be confused or excessively impassioned." We find this analysis sufficient to facilitate our review.

N.W.2d 470, 485 (Minn. 2006). A new trial is required if the error was prejudicial to appellants or if its effect cannot be determined. *Rowe v. Munye*, 702 N.W.2d 729, 743 (Minn. 2005). "In determining whether erroneous instructions resulted in prejudice, we must construe the instructions as a whole from the standpoint of the total impact on the jury." *Id.*

The district court's damages jury instruction closely tracked CIVJIG 20.60. Appellant had requested the following additional jury instruction on lost-profits damages:

> Any award of damages in the form of supposed lost profits must be established with reasonable certainty. Damages in the form of lost profits may be recovered only when they are shown to be the natural and probable consequences of the act or omission complained of and their amount is proven with a reasonable degree of certainty and exactness. 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. In determining whether damages are the natural and probable consequence of the act or omission complained of, you must consider if, but for the [appellant]'s conduct, [respondent] would have had the ability to obtain such profits. Speculative, remote, or conjectural damages are not recoverable.

The district court denied appellant's requested additional instruction, reasoning that it would be duplicative.

We conclude that the district court acted within its discretion by rejecting the additional lost-profits instruction. Appellant argues the district court's damages instruction, while accurate, was incomplete because it did not provide the jury specific guidance on lost-profits damages. Our supreme court has made clear, however, that the principles governing the availability of lost-profits damages are the same principles that govern the availability of damages generally. *See Cardinal Consulting*, 297 N.W.2d at

267 (explaining that lost profits are recoverable when they are the natural and probable consequence of the defendant's conduct and their amount is shown with a reasonable degree of certainty). "The controlling principle is that speculative, remote, or conjectural damages are not recoverable." *Id.* Here, the district court instructed the jury on these contract-damages principles; a specific instruction on lost-profits damages was not required. Accordingly, we affirm the district court's denial of a new trial on this ground.

IV.

By notice of related appeal, respondent challenges the district court's reduction of its attorney-fee request by 40%. This court reviews an award of attorney fees for abuse of discretion. *United Prairie Bank-Mountain Lake v. Haugen Nutrition Equip., LLC*, 782 N.W.2d 263, 272 (Minn. App. 2010). The joint-venture agreement includes an attorney-fee clause: "Should either party need to enforce the terms and conditions of this Agreement, the prevailing party shall be entitled to reasonable costs, disbursements and attorney's fees incurred." The district court acknowledged that the recoverability of fees turned on whether they were incurred as a result of a "need to enforce" the joint-venture agreement. The court then reasoned that substantial fees were incurred early in the litigation in relation to obtaining dismissal of appellant's claims to enforce the unexecuted asset-purchase agreement (instead of the joint-venture agreement) and in seeking and defending against injunctive relief. The court concluded that fees attributable to those matters "are not properly part of this proceeding," relying on caselaw addressed to when causes of action are sufficiently distinct so as to warrant a division of attorney fees.

We conclude that the district court erred by limiting the fee award to certain parts of this litigation. From the day of its cease-and-desist letter, respondent's actions all have been taken because of a "need to enforce" the joint-venture agreement, and it has ultimately prevailed on those claims. Accordingly, we reverse this portion of the judgment. On remand, attorney fees should be awarded without reduction based on the different stages of the litigation.

V.

Respondent argues that the district court erred by interpreting the prejudgment-interest statute, Minn. Stat. § 549.09 (2010), to allow prejudgment interest only from the date of the jury's verdict. This court reviews this issue de novo. *A & L Potato Co. v. Aggregate Indus.*, 759 N.W.2d 57, 58 (Minn. App. 2009).

Subject to certain exceptions not relevant here, statutory prejudgment interest "shall be" calculated from "the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first." Minn. Stat. § 549.09, subd. 1(b). The district court acknowledged that prejudgment interest generally runs from these events but determined that this "general rule" was not applicable in this case because respondent had not incurred all of its damages by the time that the action was commenced. The language of the prejudgment-interest statute, however, is mandatory and provides no exception for damages not yet incurred at the time of the interest-triggering event.[2]

[2] The statute does provide an incurrence rule for special damages incurred after a triggering event in cases in which there has been a written settlement offer. Minn. Stat.

Although neither the Minnesota Supreme Court nor this court has addressed the issue, the Eighth Circuit has predicted that our supreme court would interpret the "plain language of § 549.09" to entitle a party to "prejudgment interest on all pecuniary damages . . . from the inception of the litigation, regardless of when the damages were incurred." *Marvin Lumber & Cedar Co. v. PPG Indus.*, 401 F.3d 901, 919 (8th Cir. 2005). In so holding, the court relied not just on the plain language of the prejudgment-interest statute but also on its dual purposes: to compensate the prevailing party for the lost use of the money and to promote settlements. *Id.* at 918 (citing *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988), and *Skifstrom v. City of Coon Rapids*, 524 N.W.2d 294, 297 (Minn. App. 1994)). The analysis in *Marvin*, although not binding on this court, is persuasive.

Appellant asserts that allowing an award of prejudgment interest on damages not yet incurred promotes an absurd result that could not have been intended by the legislature. *See* Minn. Stat. § 645.17(1) (2010) (stating presumption that legislature does not intend an absurd result). But the presumption against ambiguity "only operates where the words of a statute are ambiguous; the rule cannot generally be used to override the plain language of a statute." *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 639 (Minn. 2006). "We can disregard a statute's plain meaning only in rare cases where the plain meaning utterly confounds a clear legislative purpose." *Id.* (quotations omitted). As the Eighth Circuit explained, allowing prejudgment interest from the date an action is

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§ 549.09, subd. 1(b). Had the legislature intended prejudgment interest on all damages to run from the date that the damages were incurred, it could easily have so stated.

commenced is consistent with the purposes of compensation and promoting settlement. *Marvin*, 401 F.3d at 918.

Adopting the foregoing analysis, we conclude that the district court erred by denying prejudgment interest prior to the date of the jury's verdict, and we reverse that portion of the judgment. On remand, prejudgment interest should be awarded from December 22, 2008, the effective date of respondent's answer and counterclaim.[3]

Affirmed in part, reversed in part, and remanded.

[3] Respondent suggests that it may be entitled to prejudgment interest from the date that it sent a cease-and-desist letter, arguing that it could be construed as a "notice of claim" under the statute. But we are aware of no authority applying that term of art to a letter in which one party asserts that it has a claim against another. *Cf.*, *e.g.*, Minn. Stat. §§ 466.05 (2010) (requiring written notice of claim to municipality of damages arising from tort); 574.10 (2010) (requiring written notice of claim on bond).