

STATE OF MICHIGAN
COURT OF APPEALS

JOHN WAGNER,

Plaintiff-Appellee/Cross-Appellant,

v

RITA MARROGHI-JABRO,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

April 23, 2009

No. 280632

Oakland Circuit Court

LC No. 2006-071961-CZ

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant Rita Marroghi-Jabro appeals as of right from a judgment, following a jury trial, awarding her damages of \$3,000 on her claim for tortious interference with a business relationship. Plaintiff John Wagner cross appeals, challenging the trial court's denial of his motion for case evaluation sanctions and the court's award of taxable costs to Marroghi-Jabro. Because the trial court did not abuse its discretion when it did not allow Marroghi-Jabro to amend her complaint, limited the evidence Marroghi-Jabro could present regarding damages, and denied Wagner's request for case evaluation sanctions, we affirm and remand for further proceedings consistent with this opinion.

This case arises out of Wagner's sale of his dental practice to Marroghi-Jabro in 2004. Marroghi-Jabro purchased the practice as a going concern for \$575,000. As part of the agreement, Wagner agreed not to engage in any similar business within a 25-mile radius of the practice for seven years. In January 2006, Wagner filed a complaint for breach of contract, alleging that Marroghi-Jabro failed to pay account receivables that were due under the agreement, and improperly prevented him from practicing on certain patients in the office as permitted by the agreement. Marroghi-Jabro filed a counter-complaint that included two claims for breach of contract and a claim for tortious interference with a business relationship. Marroghi-Jabro alleged that Wagner breached the agreement's non-compete clause by soliciting patients of his former practice and conducting business in direct competition with Marroghi-Jabro's practice. Marroghi-Jabro also alleged that Wagner acted in bad faith and willfully breached the agreement by soliciting his former patients, thereby undermining the purpose of the agreement. Marroghi-Jabro requested reasonably foreseeable damages, including, but not limited to, lost profits. She also requested "[q]uasi-[p]ermanent injunctive relief" and specific performance to require Wagner to comply with the terms of the restrictive covenant that

prevented him from competing with Marroghi-Jabro. Marroghi-Jabro's tortious interference claim was based on the same facts.

Before trial, Wagner moved to limit the theories of liability that Marroghi-Jabro could pursue at trial. Wagner sought to prevent Marroghi-Jabro from presenting any evidence related to his alleged failure to help with the transition of the practice.¹ The trial court ruled that Marroghi-Jabro would not be permitted to pursue any claim related to Wagner's alleged failure to assist with the transition of the practice because it was a new theory that Marroghi-Jabro had not pleaded in her counter-complaint, discovery was closed, and the matter scheduled for trial. The trial court acknowledged that Marroghi-Jabro was well aware of the claim long before her attempt to amend and that she had no excuse, reasonable or otherwise, for failing to earlier plead her claim. The trial court subsequently denied Marroghi-Jabro's motion to amend her counter-complaint to cure the perceived pleading deficiencies.

Wagner also filed a motion to limit the evidence that Marroghi-Jabro could present with respect to her claim for lost profits arising from Wagner's alleged breaches of the parties' agreement and interference with Marroghi-Jabro's business relationship with the practice's patients. The trial court ruled that Marroghi-Jabro would be limited to presenting evidence of lost profits related to 20 identifiable patients whom Wagner allegedly treated in violation of the agreement.

At trial, the jury found that both parties breached the purchase agreement, but declined to award either party damages for the respective breaches. The jury also found that Wagner intentionally interfered with Marroghi-Jabro's business relationship or expectancy and awarded Marroghi-Jabro damages of \$3,000 on that claim only. Both parties appeal.

I. Marroghi-Jabro's Appeal

Marroghi-Jabro first argues that she was improperly precluded from pursuing a claim related to the transitioning of the business. This Court reviews a trial court's decision to deny a motion to amend a complaint for an abuse of discretion. "An abuse of discretion occurs when a trial court's decision falls outside the range of principled outcomes." *Shember v Univ of Michigan Medical Ctr*, 280 Mich App 309, 314; 760 NW2d 699 (2008).

MCR 2.118(A)(2) provides that a court should freely grant leave to amend "when justice so requires." In *PT Today, Inc v Comm'r of the Office of Financial and Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006), this Court explained:

The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result;

¹ Marroghi-Jabro argues in her brief on appeal that Wagner sought to preclude evidence related to transitioning the practice and loss of goodwill. The trial court's order of February 7, 2007 only denied Marroghi-Jabro's transitioning the practice claim as not having been properly pleaded.

amendment is generally a matter of right rather than grace. Thus, a motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. [Internal citations and footnote omitted.]

Here, the trial court stated that it was denying Marroghi-Jabro's motion to amend in part because no proposed amended counter-complaint was provided. MCR 2.118(A)(4) does require that amendments be in writing. The record here discloses that, indeed, a copy of Marroghi-Jabro's proposed amended counter-complaint was attached to her motion to amend. Thus, the trial court erroneously believed that a written copy had not been provided. Nonetheless, the trial court also stated that it was denying the motion to amend because discovery had closed, the matter was set for trial, and the trial court accepted Wagner's argument that because of the circumstances he would be prejudiced by the late-filed proposed amendment. Wagner buttressed his argument on the fact that without prior knowledge of the claim, he had conducted no discovery on the issue of transitioning the practice and the trial date was set and was fast-approaching. Indeed, the proposed amendment regarding the claim of Wagner's alleged failure to assist with the transition of the practice was a new claim raised post-discovery by Marroghi-Jabro essentially on the eve of trial. Under the circumstances, the trial court's decision that Marroghi-Jabro's proposed amendment would have caused unfair surprise and prejudiced Wagner, was within the range of principled outcomes and was not an abuse of discretion. *Shember, supra* at 315.

Marroghi-Jabro also argues that the trial court erred when it granted Wagner's pretrial "motion in limine," thereby precluding her from presenting evidence of lost profits beyond that related to 20 identifiable patients whom Wagner allegedly treated in violation of the parties' agreement. Although Wagner's motion was labeled a "motion in limine to strike," the trial court appropriately observed on reconsideration that it was substantively a motion for partial summary disposition. Marroghi-Jabro claimed that after she purchased the practice in May 2004, revenues declined by approximately \$200,000 in 2005. Patient records indicated that at least 441 of approximately 1,200 patients did not return after the sale. Marroghi-Jabro estimated that the practice lost approximately \$550 for each patient who did not return based on the purchase price of the practice divided by the number of existing patients. We do note, however, that Marroghi-Jabro also received as part of the purchase price, the building, land, fixtures, and equipment. Marroghi-Jabro calculated that she lost in excess of \$200,000 in 2005 due to patients who did not return after the sale of the practice. The trial court permitted Marroghi-Jabro to present evidence related to lost revenues associated with Wagner's alleged treatment of 20 identifiable patients,²

² Wagner admitted treating three patients in violation of the agreement, but the trial court allowed evidence regarding other identifiable patients. Wagner was allowed, pursuant to the sales agreement, to treat his orthodontic patients and ten other identified patients who were in the midst of treatment.

but precluded her from presenting additional evidence of lost profits on the basis that it was too speculative to establish a causal link between Wagner's alleged breach of the parties' agreement and the claimed damages.

The appropriate measure of damages for breach of a contract is that which would place the injured party in as good a position as she would have been in had the promised performance been rendered. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). Lost profits arising from a breach, if properly proved, are an appropriate element of damages. *Id.* The party asserting a claim has the burden of establishing lost profits, but the jury should not be permitted to speculate or guess on the amount. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175-176; 568 NW2d 365 (1997). Lost profits must be proven with a reasonable degree of certainty, considering the nature of the case, but mathematical precision is not required. *Jim-Bob, supra*, at 98-99; *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390-391; 385 NW2d 797 (1986). It is appropriate to place before the jury all the facts and circumstances that tend to show a probable amount of damages if the nature of the case only permits an estimation. *Body Rustproofing, Inc, supra* at 391; see also *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-513; 421 NW2d 213 (1988).

In this case, evidence was presented that Marroghi-Jabro paid a higher amount to acquire the dental practice as a going concern with an established patient base. Thus, lost profits were foreseeable as damages if Wagner breached the agreement by improperly soliciting patients from the practice, thereby leading to the loss of an excessive number of patients. See *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13-15; 516 NW2d 43 (1994). Marroghi-Jabro presented evidence that Wagner improperly solicited patients after the sale in contravention of their agreement. Marroghi-Jabro also indicated that she could offer testimony that the standard in the industry was a 10 to 15 percent patient loss after the sale of a dental practice but that her practice lost more than 30 percent of its patients in the year following the sale.

Damages are not speculative merely because they cannot be ascertained with mathematical precision, particularly where the opposing party's own actions caused the imprecision. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). Evidence is sufficient to prove damages if there is a reasonable basis for computing them, even if the amount is only approximate. *McCullagh v Goodyear Tire & Rubber Co*, 342 Mich 244, 254-255; 69 NW2d 731 (1955). Here, Marroghi-Jabro failed to offer a reasonable basis for proving lost profits based on actual, objective data related to the number of patients lost. Marroghi-Jabro's evidence essentially was only that Wagner wrongfully competed with her practice during 2005. And, without establishing any connection or correlation, that her dental practice lost more than the standard in the industry of 10 to 15 percent patient loss in 2005.

The record contains evidence of a loss of patients to other dentists in the area. The record further shows that Marroghi-Jabro possessed the patient lists of Wagner's former patients including those that did not return. In fact, Marroghi-Jabro not only had the names of the 441 non-returning patients, but also their contact information including address and phone number, as well as their dental records. Inexplicably, Marroghi-Jabro offered not one of the patients lost as a witness at trial to provide direct evidence concerning the loss. Because lost profits must be proven with a reasonable degree of certainty, considering the nature of the claims, Marroghi-Jabro had the means and ability to prove the basis of her loss, and if, to any extent, it was the result of the alleged nefarious activity of Wagner. Marroghi-Jabro's bald assertion that Wagner

competed with her practice in violation of the contract and she suffered a loss of patients greater than expected is wholly unsupported by the record evidence. In other words, Marroghi-Jabro offered no evidence whatsoever that the loss of patients she suffered numbering 441, was somehow related to Wagner's competition wherein he treated 20 patients. The lack of evidence of correlation, without more, requires the trier of fact to engage in impermissible conjecture and speculation. The trial court allowed, even after ruling that evidence of damages would be limited to the 20 identified patients, that further direct evidence of damages, if collected, would be admitted. In any event, the trial court allowed Marroghi-Jabro an additional 21 days to document her loss. Marroghi-Jabro provided no other documentation. Because the trial court's determination that Marroghi-Jabro's evidence of lost profits was merely speculative is supported by record evidence, the trial court's decision to limit the damages evidence was within the range of principled outcomes and was not an abuse of discretion. *Shember, supra* at 315.

II. Wagner's Cross Appeal

Wagner's cross appeal challenged the trial court's denial of his request for case evaluation sanctions and its award of taxable costs to Marroghi-Jabro. Wagner claims entitlement to case evaluation sanctions because he accepted case evaluation and Marroghi-Jabro did not. The case evaluation was \$16,000 and the jury verdict was \$3,000. It was, however, appropriate for the trial court to consider the equitable relief received from the court by Marroghi-Jabro to deny Wagner's request for case evaluation sanctions.

MCR 2.403(O)(5) provides:

If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and

(b) it is fair to award costs under all of the circumstances.

MCR 2.403(O)(5) requires that some form of "equitable relief" be granted. Equitable relief consists of "[t]hat species of relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of money damages." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-80; 577 NW2d 150 (1998), quoting Black's Law Dictionary (5th ed), p 484. In this case, Wagner sought reformation of the covenant not to compete and Marroghi-Jabro sought enforcement of that contract provision. The trial court issued an order before the case evaluation was conducted that provided "that Case Evaluation in this matter will not evaluate the equitable relief sought, but will only determine the monetary amount of damages from violation of the contract in question." Thus, the trial court and the parties were aware before the case evaluation was held that the case evaluation would not address equitable relief.

The trial court's final judgment, in addition to awarding money damages to Marroghi-Jabro, dismissed Wagner's claim for equitable relief, thereby continuing the non-compete clause in force. However, the final judgment does not include an affirmative statement directly

enforcing the non-complete clause, instead it is only inferred by the language of the judgment and supported by the record. A rejecting party is subject to case evaluation sanctions dependent upon the ultimate verdict. MCR 2.403(O)(1). Verdict is defined in MCR 2.403(O)(2) as:

- (a) a jury verdict,
- (b) a judgment by the court after a nonjury trial,
- (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

The trial court in ruling on Wagner's motion denying sanctions specifically agreed with Marroghi-Jabro's proposition that she received equitable relief in the form of specific performance of the covenant not to compete as she requested in both her initial counter-complaint and amended counter-complaint. The trial court held in particular, "I think that considering the equitable relief initially in comparison with what the jury did, I don't think sanctions are appropriate." The order that was entered appears incomplete to this Court because it does not reflect the entirety of the trial court's holding. We therefore remand for the trial court to either correct its final judgment to reflect its holding directly providing specific performance of the non-compete clause³ or, in the alternative, assess mandatory case evaluation sanctions in accordance with MCR 2.403(O)(5).

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

³ At oral argument before this Court, all parties stipulated that the covenant not to compete is in full force and effect.