IN THE COURT OF APPEALS OF IOWA

No. 9-430 / 88-1111

MERCY HOSPITAL,

Appellee,

vs.

HANSEN LIND MEYER, INC.,

Appellant.

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Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

Appellant appeals a district court judgment awarding appellee $1,751,951.85 plus statutory interest from the date of the lawsuit for damages arising from construction of two hospital additions. **REVERSED AND REMANDED.**

Steven L. Udelhofen of Jones, Hoffman & Huber, Des Moines, for appellant.

David A. Elderkin and Cynthia Hanna Camp of Elderkin and Pirnie, Cedar Rapids, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ., but decided en banc.

SCHLEGEL, P.J.

Hansen Lind Meyer (Meyer) appeals a district court judgment awarding Mercy Hospital (Mercy) $1,751,951.85 plus statutory interest for damages arising out of the construction of two hospital additions.

Meyer contends the district court should not have permitted the testimony of the hospital administrator concerning lost profits and should not have awarded damages for lost profits based on speculative and inadequate evidence. Meyer challenges the award of prejudgment interest as unconstitutional and inappropriate. Meyer also contends the court erred by: permitting the jury to consider the cost of recaulking the building; permitting the testimony of an engineer concerning the devaluation of the building; and improperly instructing the jury.

In 1969 and 1973, Mercy employed Meyer to act as architect concerning additions to the hospital.

In 1979, several problems arose with the additions. Cracking and rusting appeared, bricks began to crumble, and water penetration occurred. Bats and wasps began entering the building.

Meyer was contacted about the problems and responded to Mercy in 1982. Meyer recommended that recaulking of the additions would correct the problems. An internal Meyer memo, however, suggested otherwise.

The recaulking was not entirely successful and Mercy contacted two engineering firms. The two firms found major problems with the condition of the two hospital additions. Eventually, the decision was made to replace the entire exterior brick.

In December 1984, Mercy filed suit against Meyer and several other defendants involved in constructing the additions. Just after trial started, Mercy settled its case with all remaining defendants except Meyer.

At trial, Meyer made several objections to the testimony of Mr. Gullickson, a current associate administrator at Mercy. Meyer objected to his testimony claiming that his method of calculating lost profits was too speculative and based on reports not divulged to him prior to trial. Meyer also objected to testimony by an engineer concerning devaluation of the building because of the problems.

Following trial, the jury assessed fault of 55% to Meyer and 15% to the three settling parties. The damages were awarded as follows: (1) $2,370,860 for costs of repair; (2) $66,306 for costs prior to repair; (3) $57,650 for future expenses; (4) $688,451 for lost profits; (5) $0 for diminution of value; and (6) $2,100 for incidental expenses. Mercy was also awarded $3,185,367 from Meyer for fraudulent misrepresentation. This last amount was reduced by the judge to $66,306 and Mercy was awarded $1,751,951.85

plus statutory interest from the commencement of the lawsuit. Meyer filed this appeal.

The present action was tried at law and therefore our scope of review is on assigned errors only. Iowa R. App. P. 4.

I. **Lost Profits.** The appellant argues there are two main weaknesses in the district court's award of lost profits. The first relates to the lack of expertise of the plaintiff's expert, Mr. Gullickson, and the second is the speculative nature of the lost profits in this case. Both of these weaknesses are a sufficient basis for reversal.

The receipt of opinion evidence, lay or expert, rests largely in the sound discretion of the trial courts. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). Expert testimony has several other requirements which must be met before its admission is warranted. Expert testimony is not admissible unless the witness is shown to be qualified and the facts upon which he bases his opinion are sufficient to enable a witness so qualified to express an opinion which is more than mere conjecture. Id. It is not enough that a witness be generally qualified in a certain area, he must also be qualified to answer the particular question propounded. Id. The discretion of the trial court ceases where the record shows as a matter of law the witness is not qualified or the facts upon which the opinion is based are not sufficiently stated by the witness. Id.

In this case the witness was qualified to talk about what the present profits were. He may also have been qualified to discuss how the hospital calculated its profits in general. However, it is apparent he does not understand how lost profits should be calculated. All of the testimony as to lost profits focused around the inconvenience imposed upon certain patients and the possibility that they might not return. This inconvenience took place during construction and some of the effect of their failure to return would have taken place after completion of the construction. Mr. Gullickson did not even consider the profits of the hospital after construction. He placed no consideration on the effect of DRGs, which could allow the hospital to bring in profits even though no patients were in the rooms. The computation of lost profits is very speculative and the expert must know more than the facts surrounding this particular hospital's present income. The defendant's expert was unable to offer a counter opinion because he would have had to examine extensive records and did not have time, given the lack of notice provided by Mercy. Mr. Gullickson appeared to be pulling his opinion out of thin air; in other words, his opinion was nothing more than mere conjecture. The trial court erred in allowing Mr. Gullickson to testify as to lost profits.

Even assuming that Mr. Gullickson was qualified to testify regarding lost profits, the facts presented by Mr. Gullickson were not sufficient to satisfy the standard set out in Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975). The federal court was interpreting Iowa law on the issue of lost profits. Lost profits are recoverable under Iowa law, provided: (1) there is proof that some loss occurred; (2) that such loss flowed directly from the agreement breached and was foreseeable; and (3) there is proof of a rational basis from which the amount can be inferred or approximated. Id. at 640. The record shows no rational basis upon which a specific claim for lost profits can be made. The opinion appears to be based on faulty reasoning. It is also based on a severe lack of factual data. The proof presented on the lost profits issue was far too speculative to be placed before the jury. We remand for a new trial on this issue only.

It would have been much easier if the plaintiff had supplemented his interrogatories to allow the defendant more time to prepare an expert to rebut Mr. Gullickson. This failure by the plaintiff need not be discussed by this court given the apparent lack of proof on the lost profits issue; however, an opposing expert would have gone a long way toward convincing this court that the jury had the issue squarely before it and thereby prevented a new trial.

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II. Prejudgment Interest. The Iowa Code specifically allows for the award of prejudgment interest. "The interest shall accrue from the date of the commencement of the action." Iowa Code section 535.3. The Iowa Supreme Court has recently interpreted this section to mean that interest shall accrue from commencement of the action with certain exceptions. In re Marriage of Baculis, 430 N.W.2d 399, 401-02 (Iowa 1988). Prejudgment interest is not allowed on awards for: punitive damages; expenses incurred after the action has commenced; certain orders for specific performance; and future damages. Id. at 402-03. The damages awarded in this action are varied and do not all fall under the statute allowing prejudgment interest. We hold that interest for expenses shall accrue only as those expenses are incurred by the hospital, except for future expenses, which shall accrue on the date of the entry of the previous judgment. The interest on the lost profits, which may or may not be awarded on remand, shall accrue from the date of the judgment awarding such profits.

III. Other Issues. The remaining issues raised by appellant are without merit and warrant only a brief discussion. The jury instructions were not crystal clear, but were certainly understandable. The jury apparently did not quite understand the fraud instruction, but it is clear that they wished to award at least the maximum amount allowable for damages, which the trial court did. We affirm the trial court on this issue.

The testimony by Dale Moore and Mr. Gullickson on the devaluation of the building was within their expertise and therefore within the discretion of the trial court. There is no evidence to suggest an abuse of discretion occurred, and the trial court's ruling will not be disturbed on appeal.

The evidence of recaulking the building was properly submitted to the jury. Whether or not the caulk lasted as long as promised is a fact question which the jury is certainly able to determine.

We remand to the trial court for a new trial on the issue of lost profits and further action consistent with this opinion. Costs are to be taxed against the appellee Mercy Hospital.

REVERSED AND REMANDED.

All judges concur except Habhab and Donielson, JJ., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent from that part of the majority opinion that remands this case for retrial on the issue of lost profits. I would affirm the award as fixed by the jury.

The receipt of opinion evidence, lay or expert, rests largely in the sound discretion of the trial courts. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). I find no abuse of this discretion. I believe that Mr. Gullickson was qualified to testify regarding lost profits. The facts he presented were sufficient to satisfy the standard set out in Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975). Lost profits are recoverable under Iowa law, provided: (1) there is proof that some loss occurred; (2) that such loss flowed directly from the agreement breached and was foreseeable; and (3) there is proof of a rational basis from which the amount can be inferred or approximated. Id. at 640. The record is sufficient to show a rational basis upon which a specific claim for lost profits can be made. The weight of Mr. Gullickson's testimony and his credibility should be left to the jury.

Donielson, J., joins this dissent.