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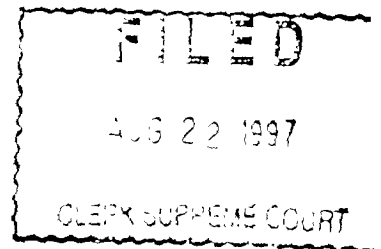
IN THE COURT OF APPEALS OF IOWA

No. 7-210 / 96-486

ROXANNE KRIEPS and JACK KRIEPS,
Appellants/Cross-Appellees,

vs.

HARLEY J. KOHLHAAS, M. ANNE KOHLHAAS, DARYL R. KOHLHAAS,
and **KATHY KOHLHAAS d/b/a RADIO SHACK,**
Appellees/Cross-Appellants.



Appeal from the Iowa District Court for Kossuth County, Frank B. Nelson,
Judge.

The Krieps appeal a judgment in a breach of contract action. **AFFIRMED IN
PART; REVERSED AND REMANDED IN PART.**

Thomas W. Lipps of Peterson & Lipps, Algona, for appellants.

Warren L. Bush, Wall Lake, for appellees.

Heard by Sackett, P.J., Vogel, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme
Court

VOGEL, J.

On appeal from a judgment in a breach of contract action, the plaintiffs, Roxanne and Jack Kriebs, argue the district court erred in: 1) requiring them to prove the exact amount defendants owed under the contract in order to recover damages; and 2) denying their request to tax the costs of defendants' depositions which the plaintiffs introduced at trial. In their cross-appeal, the Kohlhaases argue the district court erred in: 1) failing to base their rent obligation upon six percent of the on-site sales; and 2) failing to award them \$100 per day in liquidated damages for the plaintiffs' violation of the covenant not to compete.

Scope of review. We review actions at law for correction of errors at law. Iowa R. App. P. 4. *Long v. Jensen*, 522 N.W.2d 621, 624 (Iowa 1994).

Background facts. In 1986, the Kriebs rented a building in Algona. They leased one-third of the building to a retail liquor store operator and Roxanne used the remainder of the building to house her Video Factory and Radio Shack businesses. She operated her two businesses until 1989 when she divided the space into two separate stores and sold the Radio Shack franchise and its inventory to defendant Harley, M. Ann, Daryl and Kathy Kohlhaas. The Kriebs and Kohlhaases executed three agreements, a sublease for the property in which the business was located, a contract for the sale and purchase of the business, and an addendum to the contract for the sale of the business. Roxanne continued to operate her Video Factory business in the adjoining store.

The Kriepps filed suit in October 1994 alleging the Kohlhaases were in breach of their agreements with them. The Kohlhaases counterclaimed and at trial they asserted the Kriepps had breached a covenant not to compete.

I. Damages. It is well-established that when a contract has been breached, the non-breaching party should be placed in the position he would have been in had the contract been fully performed. *Macal v. Stinson*, 468 N.W.2d 34, 35-36 (Iowa 1991). The district court found the Kohlhaases had not made all of the payments due under the contract for the sale and purchase of the business and they owed the Kriepps money under the contract. However, the court concluded the Kriepps had failed to prove exact amounts of damages due to enable the court to enter a judgment.¹ The Kriepps claim they were only required to prove their damages with some reasonable measure of certainty and they did.

There is no requirement in our law that an innocent party prove with mathematical precision damages flowing from a breach of contract. *See Conrad v. Dorweiler*, 189 N.W.2d 537, 540 (Iowa 1971). A non-breaching party need only establish their claim “with some reasonable measure of certainty and to show facts affording a reasonable basis for ascertaining the loss.” *Id.* The *Bangert* court concludes wronged parties should not be penalized because of a difficulty in

¹ The court further found the Kohlhaases owed \$1840 in damages for their breach of the addendum to the contract and they owed \$13,669 for past-due rent owed pursuant to the sub-lease.

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ascertaining a precise amount of loss. *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990). “If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.” *Bangert*, 456 N.W.2d at 190 (quoting *Patterson v. Patterson*, 189 N.W.2d 601, 605 (Iowa 1971)).

Roxanne Krieps testified at trial that the balance of the purchase price the Kohlhaases owed for the Radio Shack franchise and inventory was approximately \$12,000. The Krieps also offered into evidence a copy of an amended petition from another pending action. In that action, Iowa State Bank sued both the Krieps and the Kohlhaases for the remaining balance of the SBA loan originally made to the Krieps for the purchase of the Radio Shack business and later guaranteed by the Kohlhaases. There was unrefuted testimony that the unpaid balance to the bank was the unpaid balance under the Krieps-Kohlhaas contract, minus approximately \$2000 owed solely by the Krieps to the bank. The damages requested by the bank from both parties totaled \$12,257.84 as of March 15, 1995, plus interest thereafter at the rate of \$3 3553 per day.

The Kohlhaases did not object to this testimony and even confirmed the amount due under the note. The absence of a challenge is pivotal in awarding damages where there was no claim to an exact amount. *See Dorweiler*, 189 N.W.2d at 540. We find the district court erred in requiring a specific dollar amount in order for the Krieps to be awarded damages. We accordingly reverse and remand to the

district court to enter judgment in favor of the Kriebs consistent with this opinion.

II. Taxing deposition costs. The Kriebs also argue the district court abused its discretion in denying their motion to tax the costs of Kohlhaas's depositions. Our review of the district court's assessment of costs is for an abuse of discretion. *Bokhoven v Klinker*, 474 N.W 2d 553, 557 (Iowa 1991).

The district court did not tax deposition costs because the Kohlhaases were present at trial and the depositions did not impeach the testimony the Kohlhaases gave. However, Iowa Rule of Civil Procedure 144(b) authorizes the use of depositions for any purpose, including trial, provided the deponent was a party adverse to the offeror. The Rule does not require that a party be unavailable for trial or impeached before the depositions can be used. Furthermore, Iowa Rule of Civil Procedure 157(a) provides for taxation of costs to the losing party "such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial." Iowa R. Civ. P. 157(a) (1995). Conversely, the trial court has discretion to deny taxing costs to a party if the use of a deposition is unnecessary because of irrelevant or cumulative testimony, thereby constituting an abuse of Rule 144. There is no indication in this record that the use of the depositions was unnecessary. Kohlhaases admitted in their Resistance to Motion to Tax Deposition Costs that portions of the depositions were read into the record in order to expedite the trial proceedings. In this instance, the use of the depositions served to promote judicial economy by shortening the testimony, a permissible use pursuant to Rule 144. We

000220 therefore find the court abused its discretion in not assessing costs of the depositions to the Kohlhaases; we reverse and remand this matter to the district court for the entry of an order consistent with our decision.

III. On-site sales. The Kohlhaases filed a cross-appeal arguing the district court erred in basing their past-due rent obligation upon six percent of their total gross sales rather than upon six percent of their on-site sales. The contract states:

Rent payable monthly shall be 6% of tenants' gross monthly sales for all business of tenants conducted upon the premises with a minimum monthly rental of \$300.00. . . .

"Conducted upon the premises" was not further defined in the contract. Kohlhaases argue that they had two preexisting businesses which the Kriebs were aware of prior to entering the contract and they never intended to incorporate their other business gross receipts in the rent formula. However, during the discovery process, the Kohlhaases refused to permit the Kriebs to inspect the Kohlhaases' books. As a result, the Kriebs and the court were left to rely on the Kohlhaases' partnership income tax returns to calculate the gross sales. While exhibits 25 through 42 purportedly pertained to off-premise sales, we find, as did the district court, these exhibits were incomplete and were not adequately explained. The Kohlhaases complain that the Kriebs should be faulted for misarranging the exhibits after the Kohlhaases eventually turned them over to the Kriebs. However, the Kohlhaases had their own opportunity to introduce evidence which could have presented their proof in a more organized and complete manner. The Kohlhaases did not offer evidence

sufficient to support their position, nor any evidence supporting their figures of each month's gross and each month's off-premise sales. We do not find the court erred on this issue. We affirm the district court.

IV. Covenant not to compete/liquidated damages. The Kohlhaases also argue the court erred in failing to award them liquidated damages for the Kriepps' violation of the covenant not to compete. The court found the defenses of waiver and estoppel barred the Kohlhaases' claim of breach of a covenant not to compete. After a careful review of the record, we are unable to conclude there was a violation of the covenant not to compete contained in Exhibit 1, paragraph 4. Since we find no breach existed, no liquidated damages can be awarded. We affirm the district court on this issue.

We have thoroughly reviewed the arguments on appeal as well as the record adduced at trial. We reverse and remand to the district court the matters of damages and costs for an order not inconsistent with this opinion. We affirm the district court regarding the issue of on-site sales and liquidated damages. Costs on appeal are assessed to defendants.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Schlegel, S.J., concurs; Sackett, P.J., concurs in part and dissents in part.

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I concur in part and dissent in part. I would affirm the trial court in its entirety.

Appellants challenge the trial court's ruling as saying they only had damages if they proved the exact amount, and the majority has addressed the issue as raised by appellants.

I disagree that is what the trial court held. The trial court found, in part:

While a merchandise inventory was taken, no final inventory amount was testified to by anyone, nor was any monthly amortization payment amount presented to the Court. There is absolutely no evidence of the monthly payment, the interest rate, how many payments were made, when payments ceased, nor how much was due when such payments ceased. All that can be said is that the defendants have not made all the payments due; they do owe the plaintiffs some money.

When the inventory was taken, plaintiffs allege there were some items of inventory that either could not be priced, or were for other reasons not priced, and that the defendants owe plaintiffs for said merchandise. No list of such merchandise was presented. No evidence of pricing of said merchandise was presented other than plaintiff Roxanne Kriebs' statement that the merchandise had an inventory value of \$2000. The parties have never agreed on the value of these items. Defendants believe the items have little, if any, value. There is inadequate evidence in the record upon which the Court could determine (1) if unpriced items actually existed and (2) their value.

1. Plaintiffs have failed to show damages sufficient to enable the Court to enter a judgment with respect to defendants' failure to perform pursuant to Exhibit 1. There is pending in Kossuth County a suit against both plaintiffs and defendants by Iowa State Bank, Equity No. 23317. In that case the parties may well prove who owes what; they have not done so here.

In ruling on post-trial motions, the trial court further said:

The plaintiffs contend the Court incorrectly concluded there was insufficient proof to establish damages with respect to defendants' failure to perform. In addition to the original motion, the plaintiffs filed an addendum thereto which the Court has also considered. The addendum contains portions of the transcript of the trial. The Court has reviewed the transcript, its own notes and the exhibits referred to. The Court is still of the opinion that the RECORD as made does not prove what plaintiffs attempted to prove; the amount of money owed. The transcript provided to the Court is in keeping with the Court's trial notes. There are numerous estimates of various amounts but no evidence of specific amounts.

Our review is at law. The trial court correctly held the burden of proof on this issue was with plaintiffs. The trial court found plaintiffs failed to satisfy this burden.

Furthermore, I do not find the trial court abused its discretion in the order on deposition costs.