

IN THE COURT OF APPEALS OF IOWA

FILED

APR 20 1988

CLERK SUPREME COURT

Filed April 20, 1988

EDWIN R. BOWERS, d/b/a
BOWERS ELECTRIC,

Plaintiff-Appellant,

vs.

KOSSUTH FABRICATORS, INC.,

Defendant-Appellee.

8-38
87-308

Appeal from the Iowa District Court for Kossuth County (No. 21779) -
James H. Andreasen, Judge.

Plaintiff appeals from the district court's rendering a judgment notwithstanding the verdict, setting aside the jury award for plaintiff's claim for lost profits **AFFIRMED.**

Thomas J. McCann of Foxhoven & McCann, Des Moines, for
plaintiff-appellant.

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, for
defendant-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

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Plaintiff, Edwin R. Bowers, d/b/a Bowers Electric, appeals the decision of the trial court to render to the defendant, Kossuth Fabricators, Inc. (Kossuth), a judgment notwithstanding the verdict on Bowers' claim for lost profits. He asserts he presented sufficient evidence to provide the jury a rational basis from which it could compute his lost profits.

In the course of his work as an electrician, Bowers developed a tool which enabled him to drill holes inside walls and other hard to reach places. Bowers entered into an agreement with Kossuth to manufacture the tool. The process required attaching the head and tail pieces to a flexible steel rod. The process used by Kossuth, however, resulted in the tool breaking at the welds. Bowers consequently sued Kossuth, alleging breach of implied warranty of fitness for a particular purpose and negligence. Bowers requested damages for the replacement and repair of the damaged tools, and for lost profits.

The trial court submitted both of these theories to the jury. It found \$1,622.94 in damages for replacement and repair under the implied warranty claim and \$100,000.00 in damages for lost profits under the negligence claim. The jury assessed thirty percent negligence to Bowers and seventy percent negligence to Kossuth, thereby awarding Bowers a recovery in the amount of \$70,000.00 for lost profits. The trial court set aside this award for lost profits in a judgment notwithstanding the verdict, concluding there was insufficient evidence in the record to support the submission of this claim to the jury. This appeal by Bowers followed.

This case was tried at law, so our review is on assigned errors only. Iowa R. App. P. 4. When reviewing a judgment notwithstanding the verdict, we view the evidence in the light most favorable to the party against whom the motion

had been directed. Kurth v. Van Horn, 380 N.W.2d 693, 695 (Iowa 1986). The judgment is appropriate in cases where each element of the claim is not supported by substantial evidence. Id. Any issue without evidentiary support should not be submitted to the jury for determination. Dutcher v. Lewis, 260 N.W.2d 404, 406 (Iowa 1977). A mere scintilla of evidence is not sufficient to require denial of a motion for judgment notwithstanding the verdict. See Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). Additionally, the trial court is vested with considerable discretion in determining the sufficiency of the evidence. Id.

The issue on appeal is whether Bowers introduced sufficient factual data to furnish a reasonably certain basis for computation of probable loss of profits. Harsha v. State Sav. Bank, 346 N.W.2d 791, 798 (Iowa 1984). If not, the "new business rule," which deems potential profits from an untried business as too speculative to be recoverable, applies. Id. at 797. Potential profits are deemed too speculative under the new business rule "because there are no available data of past business from which the fact of anticipated profits could have been established." Id.

Our review of the record reveals the following. At trial, Bowers introduced substantial evidence establishing the duty owed him by Kossuth, breach of that duty, and the breach was the proximate cause of any loss of profits he may have sustained. We are not convinced, however, he provided sufficient evidence to furnish the jury a rational basis for computing those lost profits. Bowers showed that his tool was marketable, that he had made an initial sale to one wholesale company, and potential sales of an unknown quantity to a few other wholesale companies had been lost due to the breakage of the tool as a result of its negligent manufacture by Kossuth. Bowers did not, however, show even

an approximation of retail sales of the tool, which would have provided some indicia of expected future sales. Nor did Bowers provide evidence of his net profits on his initial sale or of his expected net profits on future sales. This failing was primarily due to the dearth of evidence introduced regarding his costs, particularly his marketing and overhead expenses. Profits are defined as the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them. King Features Syndicate v. Courier, 240 Iowa 870, 882, 43 N.W.2d 718, 726 (1950). Thus the lack of evidence regarding these costs made the determination of profits obtained or lost entirely speculative. Certainly Bowers was not required to prove his lost profits to a mathematical certainty, but a reasonable basis from which the amount could be approximated or inferred must have been shown. See Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1975). It was not shown in this case.

We conclude therefore the trial court was correct to have granted Kossuth judgment notwithstanding the verdict on the issue of Bowers' alleged lost profits.

AFFIRMED.

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C J (dissenting)

I respectfully dissent The court said in Harsha v State Savings Bank,
346 N W 2d 791, 798 (Iowa 1984)

The new business rule is not absolute If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury (citation)

I believe the evidence is sufficient in this case to submit the issue of future profits to the jury