

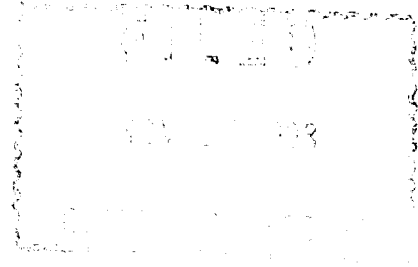
IN THE COURT OF APPEALS OF IOWA

No. 8-449 / 97-0271
Filed November 30, 1998

**NAUTILUS HEALTH CENTERS, INC.,
and NAUTILUS OF MOLINE, LTD.,**
Appellees,

vs.

**DAVENPORT HEALTH ACQUISITIONS, INC.
d/b/a DAVENPORT MEDICAL CENTER,**
Appellant.



Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Davenport Health Acquisitions, Inc. appeals from a jury verdict awarding Nautilus Health Centers, Inc. damages for lost profits and loss of rental bargain resulting from the breach of a commercial lease. **AFFIRMED.**

Stuart R. Lefstein and Jonathan J. Heiple of Katz, McHard, Balch, Lefstein & Feiweger, P.C., Rock Island, Illinois, for appellant.

Michael J. McCarthy, Davenport, for appellees.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Davenport Health Acquisitions, Inc. appeals from a jury verdict awarding Nautilus Health Centers, Inc. damages for loss of rental bargain and lost profits resulting from the breach of a commercial lease. We affirm.

I. Background Facts and Proceedings.

In March 1987, Nautilus Health Centers, Inc. (Nautilus) and Davenport Health Acquisitions, Inc. (Davenport Health) entered into a commercial lease for Nautilus to rent office space in the Davenport Medical Plaza owned by Davenport Health. The lease was for a five-year term with two five-year renewal options. The lease for the initial term provided for no rent in the first year, \$3.50 per square foot per year for the second and third years, and \$5.50 per square foot per year for the fourth and fifth years. Thereafter, the rent would be adjusted according to the National Consumer Price Index, but in no event would the rent be raised more than twenty percent in any one given year.

Nautilus operated an exercise facility on the premises from April 1988 until January 1994. In 1992, a dispute arose between the parties concerning the termination date of the initial lease term. Davenport Health filed a forcible entry and detainer action seeking to remove Nautilus from the premises. The district court entered a ruling determining that the parties' lease terminated on September 24, 1992, and directed Nautilus to vacate the premises by September 17, 1993.

Nautilus appealed the district court's ruling. In supersedeas bond proceedings, Davenport Health indicated the current market rent for the space was \$13,000 per month. The district court ordered Nautilus to pay Davenport Health for the past rent due, pay monthly rent of \$4590, and pay \$6000 each month to be held by the clerk of district court in escrow pending resolution of its appeal. Nautilus was unable to meet these conditions and vacated the leased premises on January 31, 1994.

On December 14, 1994, we reversed the district court's ruling. *See Davenport Health Acquisitions, Inc. v. Nautilus Health Centers, Inc.*, no. 93-1562 (Iowa App. Dec. 14, 1994). We determined Nautilus was entitled to occupy the premises pursuant to the lease and the termination date for the first term was April 1, 1993. Negotiations between Nautilus and Davenport Health failed to result in Nautilus resuming possession of the premises.

Nautilus commenced this action seeking damages for Davenport Health's wrongful termination of the lease and eviction from the premises. The parties stipulated that, after Nautilus left the premises, the unexpired lease term was 110 months.

Prior to trial, the district court granted Nautilus' motion for partial summary judgment on the issue of liability. The case was tried solely on the issue of damages.

At trial, Nautilus presented the testimony of David Nuernberger, a certified accountant, on the issues of loss of rental bargain and lost profits. Nuernberger utilized Nautilus' financial statements for the fiscal year ending March 31, 1992, as

the basis for both calculations. The financial statement used by Nuernberger subtracted total operating expenses and income tax liabilities from gross revenues to arrive at Nautilus' net income after taxes. Included in total operating expenses was the amount of rent payable by Nautilus during the fiscal year. Nuernberger calculated Nautilus' loss of bargain rent at a present cash value of \$628,909. Nuernberger calculated Nautilus' lost profits over 110 months at a present cash value of \$304,135.

Davenport Health presented testimony from John Sherrick, a certified public accountant, who indicated Nautilus' loss of profits was \$26,100. He also indicated that any below-market rent paid should increase the profitability of the business.

Nautilus also called Richard Seidler, chief executive officer for Davenport Health. Seidler testified regarding the market rental value of the premises. Seidler indicated he determined the fair market value of the premises was \$13,000 per month.

At the close of Nautilus' case and at the close of all the evidence, Davenport Health moved for a directed verdict asserting Nautilus had failed to prove the property's rental value. The district court denied the motion.

The jury returned a verdict finding Nautilus' damages were \$590,000 for the loss of a rental bargain, and \$280,000 in incidental damages, including lost profits. After denying Davenport Health's post-trial motions, the district court entered judgment on the jury's verdict.

Davenport Health appeals. It challenges the sufficiency of the evidence supporting the jury's verdict on both lost profits and loss of rental bargain damages.

Davenport Health asserts the district court erred in not granting its motion for judgment notwithstanding the verdict. In the alternative, Davenport Health contends the district court abused its discretion in not granting Davenport Health's motion for new trial.

II. Standard of Review.

Denial by the trial court of a motion for directed verdict is reviewed for correction of errors of law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). A judgment notwithstanding the verdict must stand or fall on the grounds stated in the motion for directed verdict. *Faught v. Budlong*, 540 N.W.2d 33, 35 (Iowa 1995). We review a denial of a motion for judgment notwithstanding the verdict under the same standards as a denial of a directed verdict. *Id.*

The evidence is viewed in the light most favorable to the non-movant and it is determined whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App. 1987). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit the issue to the jury. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict, plaintiffs must show merely there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Miller v. Young*, 168 N.W.2d 45, 51 (Iowa 1969).

A motion for new trial is reviewed for an abuse of discretion. *In re Estate of Highbanks*, 506 N.W.2d 451, 456 (Iowa App. 1993).

III. Sufficiency of the Evidence.

A. Lost Rental Bargain and Lost Profits. Davenport Health contends the award of lost rental bargain and lost profits are not supported by sufficient evidence. It also asserts the jury's award of lost profits duplicates the award of lost rental bargain. We disagree on both counts.

Nautilus called two expert witnesses who testified about the extent of Nautilus' damages. Davenport Health also presented expert testimony on this issue. In addition to expert testimony, the record includes substantial economic and financial information concerning Nautilus' business operations.

The testimony of David Nuernberger was central to the jury's findings on both lost profits and loss of rental bargain. Nuernberger is a certified public accountant with fifteen years of experience in business and tax accounting. Nuernberger

projected the level of lost profits and lost rental bargain Nautilus suffered as a result of Davenport Health's wrongful termination of the lease.

In making his calculations, Nuernberger relied upon Nautilus' financial statements for fiscal year 1992. These financial statements reflected all revenues taken in during the fiscal year, as well as all operating expenses of the business, including rent for the fiscal year. Nuernberger testified in a very detailed and specific manner regarding the methodology he utilized in making his calculations. After several adjustments proposed by Davenport Health's expert, Nuernberger calculated Nautilus suffered lost rental bargain damages of \$628,909 and lost profits of \$304,135. Both of his calculations were reduced to their present value.

We believe Nuernberger's testimony provided substantial evidentiary support for the jury's calculation of the damages Nautilus suffered for both loss of rental bargain and lost profits. *See Ballard v. Amana Society, Inc.*, 526 N.W.2d 558, 561 (Iowa 1995)(applying same analysis). *See also Mercy Hosp. v. Hanson, Lind & Meyer*, 456 N.W.2d 666, 672 (Iowa 1990)(it is for the jury to determine the weaknesses in an expert's testimony). Because the jury's award is within the evidence, we will not disturb it on appeal. *Ballard*, 526 N.W.2d at 561.

Additionally, Davenport Health contends the award of lost profits duplicated the award of lost rental bargain. While we recognize a "successful plaintiff is entitled to one, but only one, full recovery, no matter how many theories support entitlement," *Id.* (quoting *Clark-Peterson Co. v. Independent Ins. Assocs.*, 514 N.W.2d 912, 915

(Iowa 1994)), we are also mindful that the loss of rental bargain and loss of profits are discrete elements of damages recoverable for the breach of a commercial lease agreement. *Dopheide v. Schoppner*, 163 N.W.2d 360, 367 (Iowa 1968). We find the jury's award is not duplicative for much of the same reasons as noted above. The financial statements relied upon by Nuernberger correctly reflected the operating expenses, including rent, which Nautilus incurred during fiscal year 1992. We find the testimony of Nuernberger, coupled with the testimony regarding the complete destruction of Nautilus' business, provides adequate grounds for awarding damages for lost rental bargain and lost profits.

B. Second Five-Year Option Period. Davenport Health contends Nautilus failed to present any evidence demonstrating the anticipated market rental value of the premises for the second five-year option period. It contends, therefore, the jury's verdict, inasmuch as it relates to the second five-year option period, is without sufficient support in the record.

We decline to address this issue, as it was not properly preserved for review. A motion for judgment notwithstanding the verdict cannot be sustained on any ground or proposition not asserted in an earlier motion for directed verdict. *Dutcher v. Lewis*, 221 N.W.2d 755, 760 (Iowa 1974). Our review of the record indicates this issue was not raised in Davenport Health's motion for directed verdict, either at the close of Nautilus' case or at the close of all evidence. Although Davenport Health referred to

Nautilus' failure to prove the market rental value of the premises in its motion for directed verdict, it asserted distinctly separate grounds than those raised here.

IV. Conclusion.

We have considered all of Davenport Health's remaining assignments of error, including its motion for new trial, and find them to be without merit. Accordingly, we affirm on all issues properly raised before the district court.

AFFIRMED.