

IN THE COURT OF APPEALS OF IOWA

No. 5-076 / 93-1924

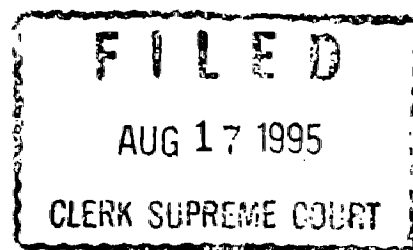
PAUL STANTON TRANSFER,

Plaintiff-Appellant/Cross-Appellee,

vs.

DAVID LEMANSKI,

Defendant-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Dubuque County, Forest Eastman,
Judge.

Paul Stanton Transfer appeals from a district court order of a new trial in its
legal malpractice action. **REVERSED AND DISMISSED.**

Tom Riley, Peter C. Riley and Christopher Bruns of Tom Riley Law Firm,
P.C., Cedar Rapids, for appellant.

Richard G. Hileman Jr. and Gregory M. Lederer of Simmons, Perrine, Albright
& Ellwood, L.L.P., Cedar Rapids, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

PER CURIAM.

Plaintiffs-appellants Paul Stanton and Paul Stanton Transfer appeal from a trial court order granting a new trial after they obtained a judgment against defendant-appellee David Lemanski in a negligence action. Plaintiffs contend (1) the trial court erred in granting the new trial because the jury verdict was supported by the evidence; (2) the trial court erred in not conditioning the granting of a new trial on plaintiffs' failure to accept a remittitur; and (3) the trial court erred in not limiting the new trial only to the issue of damages. Defendant cross-appeals contending the trial court should have sustained his motion for a judgment notwithstanding the verdict because (1) plaintiffs' claim for lost profits was barred by the new business rule; (2) plaintiffs' evidence of lost profits was not sufficient to sustain a jury verdict; and (3) there was not substantial evidence defendant's negligence was a proximate cause of plaintiffs' loss. Defendant contends if the case is re-tried the trial court should be directed to admit evidence of plaintiff Paul Stanton's abuse of valium and cocaine and the proper period of time for loss of profits. We reverse and dismiss.

In March 1991, defendant, an attorney, assisted plaintiff Paul Stanton in setting up a new corporation. In July 1991, plaintiff Paul Stanton contacted defendant about obtaining from the Interstate Commerce Commission authority to operate trucks in the forty-eight continental states. Applications for permanent authority and emergency temporary authority were signed on July 18, 1991, and sent to Washington, D.C., and Chicago, Illinois, on July 20, 1991.

Defendant obtained authority to operate from Jackson County, Iowa, to Webb and Dallas Counties in Texas. Defendant attempted to get authority from Jackson County, Iowa, to South Carolina and Pennsylvania. The authority was not forthcoming. In September, plaintiffs terminated defendant's representation.

Plaintiffs sued defendant claiming defendant submitted an application for permanent operating authority without a correct filing fee and, as a result, it delayed the granting of permanent operating authority and the failure to obtain and quickly register temporary operating authority in twenty-one states where plaintiffs contend they would have operated. Plaintiffs claimed they should have been able to do business by September 1, 1991.

The case was tried to a jury. After plaintiffs introduced their evidence, the trial court directed a verdict against plaintiff Paul Stanton finding no attorney-client relationship. However, the jury returned a verdict in favor of plaintiff Paul Stanton Transfer and awarded damages of \$199,892.87, including \$198,876 for past lost profits. The district court granted defendant's motion for a new trial concluding there was not sufficient evidence to support the award of \$198,876 for lost past profits. The trial court went on to say it was not able to determine what part of the jury verdict represented lost profits. The trial court refused a remittitur and commented defendant could raise objection to testimony under the new business rule in a new trial. The trial court overruled defendant's motion for judgment notwithstanding the verdict.

The focal issue on both the appeal and cross-appeal is what evidence plaintiffs introduced on lost profits. Plaintiffs claim they introduced substantial evidence that supported the jury verdict, and the motion for a new trial should not have been granted. Defendant claims plaintiffs did not introduce substantial evidence of lost profits and the trial court should have found any claim for lost profits barred by the new business rule. Defendant contends his motion for judgment notwithstanding the verdict should have been sustained and we should reverse and sustain on appeal.

Plaintiffs had the burden of proof on this issue.

Iowa recognizes a "new business rule" that says "potential profits from an untried business" are too speculative to be recoverable. *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 797 (Iowa 1984). The underlying rationale is expected profits from a new business are too remote and speculative to warrant judgment for their loss because there is no available information of past business from which anticipated profits could be established. *Id.*; see also *City of Corning v. Iowa-Neb. Light & Power Co.*, 225 Iowa 1380, 1389, 282 N.W. 791, 796 (1938) (profits from a new commercial enterprise are too remote and speculative to allow recovery for their alleged loss because there are no available data of past business from which the fact of anticipated profits could have been established); *Creamery Package Mfg. Co. v. Benton County Creamery Co.*, 120 Iowa 584, 587-88, 95 N.W. 188, 189 (1903) (finding a new enterprise with no experience has no criterion to estimate probable profits); *Connolly v. Bain*, 484 N.W.2d 207, 210-11 (Iowa App. 1992) (court denied

claimed lost profits for a business that operated for eight months at a loss before being dissolved).

The testimony on lost profits came from plaintiff Paul Stanton. He had not conducted a similar business and there was little evidence as to assets and capitalization of the business. There was no record of any actual revenues or expenses. The basic testimony of lost profits was plaintiff Paul Stanton's testimony as to what he planned the corporation would earn if it began operations. Plaintiff Paul Stanton had experience as a truck driver, employed by or leased to other companies. Plaintiff Paul Stanton had no experience in operating a business such as he was intending to set up. We agree with defendant that the evidence introduced was not sufficient to support an award for lost profits. There was no projection of profitability based on industry speculation and plaintiff Paul Stanton had no experience in a similar business. *See Harsh*, 346 N.W.2d at 798-99.

Having found there was not substantial evidence to support the claim of lost profits, we hold the trial court should have sustained defendant's motion for directed verdict on the basis any lost profits were barred by the new business rule. Having so decided, we need not address defendant's other claims for directed verdict on the claim for lost profits.

The next question is whether there was substantial evidence supporting the verdict of \$1016.87 for out-of-pocket expenses.

Plaintiffs contended at trial defendant was negligent in submitting the permanent authority application with the wrong filing fee, which caused a delay in granting of permanent authority, and in failing to obtain temporary authority throughout twenty-one states (more or less) in which plaintiff wanted to operate, and register that authority in those states in a timely manner.

With the sole exception of the delay in returning the permanent authority application with the correct filing fee, the undisputed evidence shows defendant acted within the standard of care as to timeliness. The emergency authority and temporary authority to Texas and back was obtained and registered in Iowa, Texas, Missouri, Oklahoma, and Kansas in a timely fashion. Plaintiffs' complaint with respect to the temporary authority, therefore, is the temporary authority obtained was limited to Texas and back, and did not include the fifteen or so other states in which plaintiffs contend they wanted to operate. Plaintiffs' contention on this point was defendant should have applied for temporary authority to all forty-eight states and was negligent in not doing so.

The regulations of the Interstate Commerce Commission provide applications for temporary authority must be supported by sworn certificates from shippers that they have a need for business in the states sought, which cannot be met by existing shippers. Plaintiffs claimed defendant could have requested temporary operating authority throughout the forty-eight states and the Interstate Commerce Commission

grants such authority. There was evidence the Commission does grant such authority. However, the granting of such authority is in direct contradiction of the regulations.

Section 10928 of the United States Code, in part, provides:

(b)(1) [T]he Commission, pursuant to such regulations as the Commission may issue, may grant a motor carrier temporary authority to provide transportation to a place or in an area having no motor carrier capable of meeting the immediate needs of the place or area.

(c)(1) [T]he Commission, pursuant to such regulations as the Commission may issue, may grant a motor carrier emergency temporary authority to provide transportation to a place or in an area having no motor carrier capable of meeting the immediate needs of the place or area if the Commission determines that, due to emergency conditions, there is not sufficient time to process an application for temporary authority under subsection (b) of this section

49 U.S.C.A. §§ 10928(b)(1), 10928(c)(1) (West Supp. 1993).

Volume 49 of the Code of Federal Regulations, section 1162 contains the rules and procedures for applying for temporary authority and emergency temporary authority. The regulations provide that "[e]ach application shall be accompanied by 'Certificate(s) of Support' designed to establish an immediate need for service which cannot be met by existing carriers." 49 C.F.R. § 1162.2(d) (1994). Section 1162.2(e) provides that emergency temporary authority "shall be applied for only where emergency conditions exist which do not allow sufficient time to process an application for temporary authority."

Section 1162.4(b)(1) prescribes the grounds for approving application for temporary authority (TA) and emergency temporary authority (ETA), providing, in part:

Grants of TA or ETA shall be made upon the establishment of an immediate need for the transportation of passengers, or of particular commodities or classes of commodities, from origins to destinations not having carrier service capable of meeting the need. Requests involving service to or from entire States, counties, or other defined areas warrant approval when supported by evidence that there is a need for service to or from a representative number of points in each such State, county, or area, that there is a reasonable certainty that the service will be used, and that carrier service capable of meeting the need is not available. Lack of opposition to a TA application will be considered as strong indicia of unavailable service, and unopposed applications will normally be granted unless the applicant is unfit.

49 C.F.R. § 1162.4(b)(1) (1994).

It would have been inconsistent with these regulations of the Interstate Commerce Commission for defendant to request emergency temporary or temporary operating authority for the lower forty-eight states for plaintiff Paul Stanton Transfer. Plaintiffs cannot prove defendant was negligent in failing to request emergency temporary or temporary operating authority for the lower forty-eight states. Defendant complied with the Interstate Commerce Commission's own regulations.

We find defendant's motion for directed verdict should have been sustained. We reverse and dismiss.

REVERSED AND DISMISSED.