STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1827

Holb-Gunther, LLC d/b/a Sea Legs,
Respondent,

vs.

Van-Tech Corporation,
defendant and third party plaintiff,
Appellant,

vs.

Hei-Tek Automation, LLC, et al.,
Third Party Defendants.

Filed September 1, 2009
Affirmed
Johnson, Judge

Carver County District Court
File No. 10-CV-07-93

Ryan R. Dreyer, Morrison, Fenske & Sund, P.A., 5125 County Road 101, Suite 202, Minnetonka, MN 55345 (for respondent)

Phillip R. Krass, Molly R. Hamilton, Krass Monroe, P.A., 8000 Norman Center Drive, Suite 1000, Minneapolis, MN 55437-1178 (for appellant)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Holb-Gunther, LLC, doing business as Sea Legs, manufactures power lift systems that are attached to the bottoms of pontoon boats. Between 2004 and 2006, Van-Tech Corporation supplied hydraulic pumps to Sea Legs that were incorporated into the lift systems, including a remote control that allows a user to raise or lower a pontoon boat without being in the boat. In 2006, Sea Legs received numerous complaints that the remote-control feature did not work as intended. Sea Legs determined that the problem was due to Van-Tech's remote-control transmitter, which was not waterproof, as required by the parties' agreement. A Carver County jury found Van-Tech liable for breach of warranty and awarded Sea Legs damages for its lost profits. On appeal, Van-Tech argues that Sea Legs's evidence of damages is insufficient to support the verdict. We affirm.

FACTS

Sea Legs commenced this action in December 2006, alleging several causes of action. The case was tried on five days in June 2008. Two claims were submitted to the jury: breach of contract and breach of warranty. Only the breach-of-warranty claim is relevant to this appeal.

The breach-of-warranty claim was submitted to the jury via a special verdict form. Neither party objected to the jury instructions or special verdict form. After finding that Van-Tech had breached various warranties for the goods it sold to Sea Legs, the jury awarded Sea Legs approximately $365,500 in damages for the breach-of-warranty claim, consisting of $299,600 for its lost profits, $36,800 for the value of the goods it purchased

from Van-Tech, and $29,100 in incidental damages. Van-Tech later brought a post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. Van-Tech argued that the district court should not have submitted the issues of consequential damages or value-of-goods damages to the jury and that the judgment was contrary to the special verdict returned by the jury. The district court denied the motion. Van-Tech appeals.

D E C I S I O N

A motion for judgment as a matter of law may be brought during trial and may be renewed after a verdict is returned. Minn. R. Civ. P. 50.01, 50.02. Judgment as a matter of law is appropriate under Minn. R. Civ. P. 50 if the verdict is "manifestly against the entire evidence" viewed in the light most favorable to the nonmoving party or contrary to law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003); *see also Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, 761 N.W.2d 877, 881 (Minn. 2009). We apply a *de novo* standard of review to a district court's denial of a motion for judgment as a matter of law. *Langeslag*, 664 N.W.2d at 864. We "make an independent determination of the sufficiency of the evidence to present a fact question to the jury." *Lester Bldg. Sys.*, 761 N.W.2d at 881 (quotation omitted). A district court's denial of a motion for judgment as a matter of law after a verdict must be affirmed if, "in considering the evidence in the record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Langeslag*, 664 N.W.2d at 864.

I. Consequential Damages

Van-Tech first argues that the district court erred by submitting Sea Legs's claim for lost profits to the jury because the evidence of lost profits is insufficient as a matter of law to support an award of damages.

A plaintiff may recover lost profits by proving that they are a natural and proximate result of a breach of warranty. *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). A plaintiff bears the burden of proving the existence of lost profits "to a reasonable certainty" and the amount of those damages "to a reasonable probability." *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 920 (Minn. 1990). Thus, the caselaw requires a plaintiff to prove (1) the existence of lost profits, *Hydra-Mac, Inc.*, 450 N.W.2d at 920; (2) that the alleged breach caused the lost profits, *Olson*, 277 N.W.2d at 388; and (3) the amount of the profits lost, *Hydra-Mac, Inc.*, 450 N.W.2d at 920.

A. Existence of Lost Profits

The existence of lost profits must be proved "to a reasonable certainty." *Hydra-Mac, Inc.*, 450 N.W.2d at 920. "[D]amages which are speculative, remote, or conjectural are not recoverable." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) (quotation omitted). However, "[t]he law does not require mathematical precision in proof of loss, but only proof to a reasonable, although not necessarily absolute, certainty." *Id.* (quotation omitted). Possible methods of proving lost profits include "past performance . . . plus subsequent success, subsequent success, other examples of that type of business, and plaintiff's skill and expertise together with proven existence of a market for the product." *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn.

1980) (citations omitted). In this case, the jury instructions defined "consequential damages" as follows:

> 1. Losses resulting from general or particular requirements and needs of the buyer if:
>
> a. The seller had reason to know about these requirements and needs when the contract was made; and
>
> b. The buyer could not reasonably have prevented these damages.
>
> 2. Injury to persons or property as a direct result of any breach of warranty.

See Minn. Stat. § 336.2-715 (2008) (defining consequential damages for purposes of breach of warranty in sale of goods).

Sea Legs introduced into evidence an exhibit, number 171, showing its monthly sales for January 2005 through the time of trial in 2008. Exhibit 171 is in the form of a table, with numbers in rows and columns. The exhibit shows that Sea Legs's monthly sales in June to October 2006 were significantly lower than in the same months of both 2005 and 2007. Specifically, Sea Legs sold 200 units in June to October of 2005 but only 114 units in the same months of 2006, when the remote-control feature was failing. Sea Legs sold 259 units in the same months of 2007, after the problem was resolved. The dip in sales during the summer season of 2006 is particularly noteworthy in light of the fact that sales in the first five months of 2006 exceeded sales in the first five months of 2005.

Thus, the evidence in the trial record proves, to a reasonable certainty, that Sea Legs sustained lost profits. *See Leoni,* 255 N.W.2d at 826.

B. Causation

As a general rule, "[t]he issue of causation is for the jury to decide, and its decision will stand unless manifestly contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *International Fin. Serv., Inc. v. Franz*, 534 N.W.2d 261, 267 (Minn. 1995) (quotation omitted) (concluding that record permitted jury to conclude that breach of an implied warranty caused the damages alleged).

Sea Legs introduced evidence that the decline in its sales between May and November of 2006 was caused by the malfunction of Van-Tech's remote control. Jim Arno, a boating equipment dealer in northern Minnesota, testified that he sold eight Sea Legs units in 2005 but only two in 2006 because customers who had purchased them experienced widespread failure and "[w]ord spreads quickly when something is failing." Arno also testified that when the lifts began to fail, he spent significant time and resources responding to customer complaints and that his sales personnel eventually became unwilling to sell a product that would later require them to spend "three hours out of a day trying to satisfy a customer with a bad product." Similarly, Craig Scheidecker, manager for a boat dealer in Fargo, testified that sales of Sea Legs at his store declined in 2006, after his customers began complaining of malfunctions, because his sales staff was reluctant to "continue to sell the product with the headaches that we were having."

Van-Tech argues that the decline in sales is "likely attributable to factors other than Van-Tech's alleged conduct," such as poor weather, the subprime mortgage crisis, and the termination of a salesperson in April 2006. John Holb, owner and president of Sea Legs, admitted on cross examination that he had terminated one of two salespersons

in April 2006, but he testified that the salesperson was not replaced because the company was having difficulty selling Sea Legs lifts due to customer dissatisfaction. Van-Tech has not cited any evidence capable of negating Sea Legs's evidence, and we are not permitted to weigh the parties' evidence to determine which is more persuasive. Our review is limited to the question whether Sea Legs's evidence is sufficient to support an award of damages.

Viewing the evidence as a whole in the light most favorable to Sea Legs, we conclude that it is sufficient to establish that Sea Legs's lost profits were caused by the failure of the Van-Tech's remote-control components.

C. Amount of Lost Profits

Although a plaintiff must prove the existence of lost profits to a reasonable certainty, a plaintiff must prove the amount of lost profits only to a "reasonable probability." *Hydra-Mac, Inc.*, 450 N.W.2d at 920; *see also Polaris Indus. v. Plastics, Inc.*, 299 N.W.2d 414, 419 (Minn. 1980). "Once the fact of loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount." *Leoni*, 255 N.W.2d at 826; *see also Polaris Indus.*, 299 N.W.2d at 419.

Sea Legs asked the jury to award damages for lost profits by finding that Van-Tech's breach caused its sales to decline by 214 units and that its per-unit profit would have been $1,388. To establish these figures, Sea Legs presented the testimony of Holb, who stated that Sea Legs would have sold 214 additional units between May and November of 2006 but for the malfunction of the Van-Tech remote control. Holb also

stated that the company's net profit on each unit would have been the difference between the $3,400 sale price and $2,012 in costs of production.

Van-Tech contends that a different method should have been used to quantify the decline in Sea Legs's unit sales. Van-Tech offers several alternative methods, including algebraic formulas that calculate the dip in sales for June through December 2006 in proportion to the same months in 2005 and 2007 and a comparison of Sea Legs's sales figures in 2006 to sales figures from other, similar business. But there is no indication that Van-Tech ever presented or attempted to present any of these alternative methods to the jury.

Van-Tech also contends that there is "no basis" for the per-unit profit figure of $1,388. But Holb testified to that figure and how it was calculated. The jury apparently credited Holb's testimony without corroboration by exhibits consisting of business records. Van-Tech has not cited evidence in the record that contradicts Holb's testimony about the per-unit price or the cost of production.

Van-Tech also contends that the $1,388 figure is too high because it does not account for overhead costs that would reduce the per-unit profit. But Holb testified that he did not include the company's overhead costs because the company's total overhead "would not have gone up" with the production of each additional unit. Sea Legs's theory of damages is consistent with the caselaw. *See In re Commodore Hotel Fire & Explosion Cases*, 324 N.W.2d 245, 251 (Minn. 1982) (holding that plaintiff could recover overhead for maintenance of property in suit for lost profits); *Cardinal Consulting Co.*, 297

N.W.2d at 269 ("plaintiff may be awarded damages on the basis of its anticipated gross profits if the breach has not significantly reduced overhead").

Van-Tech has failed to demonstrate that Sea Legs's evidence of the amount of lost profits is not "a reasonable basis upon which to approximate the amount." *Leoni*, 255 N.W.2d at 826; *see also Polaris Indus.*, 299 N.W.2d at 419. Thus, we conclude that Sea Legs introduced evidence sufficient to support the jury's award of $299,600 for consequential damages. *See Langeslag*, 664 N.W.2d at 864.

II. Value-of-Goods Damages

Van-Tech next argues that the district court erred by submitting Sea Legs's claim for value-of-goods damages to the jury because the evidence is insufficient as a matter of law to support an award of damages. One legitimate measure of damages for breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." Minn. Stat. § 336.2-714(2) (2008). The jury instructions restated the standard from section 336.2-714 nearly verbatim.

Van-Tech contends that there is no evidence regarding the difference of the value of the goods as they were warranted and the value of the goods as received. But Sea Legs introduced evidence that it purchased approximately 540 remote-control components from Van-Tech at a cost of $188.89 per unit and that those goods ultimately had no value to Sea Legs. This evidence would have permitted the jury to award value-of-goods damages in an amount as large as approximately $102,000. That the jury chose a lesser amount does not mean that the evidence does not support the verdict. A

factfinder "need not adopt the exact figures of any witness in determining . . . damages . . . and as long as its finding is within the mathematical limitations established by the various witnesses and is otherwise reasonably supported by the evidence as a whole, such finding must be sustained." *Klingelhutz v. Grover*, 306 Minn. 271, 273, 236 N.W.2d 610, 612 (1975) (quotation omitted); *see also Fudally v. Ching Johnson Builders, Inc.*, 360 N.W.2d 436, 439 (Minn. App. 1985) (sustaining jury award that was within "parameters established by the evidence").

Thus, we conclude that Sea Legs introduced evidence sufficient to support the jury's award of $36,800 for value-of-goods damages. *See Lester Bldg. Sys.*, 761 N.W.2d at 881; *Langeslag*, 664 N.W.2d at 864.

III. Verdict Form and Judgment

Van-Tech last argues that the district court erred in the manner in which it interpreted the special verdict form when entering judgment. "[A] special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court's responsibility to harmonize all findings if at all possible." *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 618 (Minn. 2008) (alteration in original) (quotation omitted). If issues of fact are not submitted to the jury on the special verdict form, those issues are left to the district court to decide. Minn. R. Civ. P. 49.01(a); *Milner*, 748 N.W.2d at 618. If a jury's answers to special interrogatories on a special verdict form are inconsistent and irreconcilable, a district court may interpret the answer to conform to the law and to the evidence. *Dunn v. National Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008).

Van-Tech contends that the district court erred by not reducing the awards of value-of-goods damages and incidental damages to account for the jury's finding of comparative fault, despite the fact that the district court reduced the award of consequential damages on that basis. The issue arises because the jury attributed to Sea Legs 35 percent of the responsibility for its damages. In light of that finding, the district court entered a judgment that reflects only 65 percent of the jury's award of consequential damages but 100 percent of the awards of value-of-goods damages and incidental damages. Van-Tech argues that the district court should have applied the comparative-fault finding to all three types of damages rather than only consequential damages, contending that "it is apparent from the broad language of Question 14 that the parties agreed that comparative fault would apply to all damages rather than merely consequential damages."

The district court's interpretation of the special verdict form is consistent with the jury instructions and with the caselaw. The instruction that defines "consequential damages" can reasonably be interpreted to permit the district court to reduce the award of that type of damages in proportion to Van-Tech's responsibility, but the instructions concerning the other types of damages are phrased differently. Furthermore, as the supreme court has explained, when a party seeks damages for a breach of warranty, the comparative fault doctrine is a means of considering the recovering party's unreasonable failure to mitigate damages. *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 & n.7 (Minn. 1983) (citing Minn. Stat. § 604.01, subd. 1a (1980)). In the *Lesmeister* case, the supreme court applied the comparative fault doctrine solely to consequential damages. *Id.* at 100-04.

Van-Tech has not explained how Sea Legs's failure to mitigate had any effect on its value-of-goods damages or its incidental damages. Thus, the district court did not err by applying the jury's findings on comparative fault only to the award of consequential damages.

Affirmed.