STATE OF MICHIGAN

COURT OF APPEALS

GARY A. MILLER,

Plaintiff–Appellee,

v

LAKE STATES INSURANCE COMPANY,

Defendant–Appellant.

UNPUBLISHED
April 19, 1996

No. 176423
LC No. 92-001893-CK

Before: Hood, P.J., and Young and T.L. Brown,* JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order denying its motions for relief from judgment[1] and remittitur. We reverse and remand.

I

Plaintiff owned a pizza restaurant in Ogemaw County. Fire broke out at the pizzeria. The State Police Fire Marshall's Division determined that the fire was caused by arson. Plaintiff's insurer, defendant Lake States Insurance Company, denied coverage on the basis of arson; plaintiff filed this action.

The case was tried before a jury. Defendant argued that plaintiff had been seen at the restaurant during the early morning hours of the fire and that plaintiff had financial motives for setting fire to his business. The jury disagreed and rendered a verdict for plaintiff for $161,675.

Defendant appealed to this Court. Shortly after the appeal was filed, the prosecutor's office charged plaintiff and four other persons with arson and fraud charges stemming from the fire. The charges were based on the admissions of a man who said plaintiff had hired him to help set the fire. As a result of these charges, defendant moved for relief from the civil judgment on the basis of newly

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*Circuit Judge, sitting on the Court of Appeals by assignment.

discovered evidence and fraud or misrepresentation by an adverse party, MCR 2.612(B)(1)(b) & (c). The circuit judge indicated that he was inclined to deny the motion, although an order was not entered. Defendant also filed a motion for relief from judgment in this Court. We remanded the matter to have the motion heard in the circuit court. The circuit court denied the motion because no one had been convicted of the criminal charges and the civil jury had rejected defendant's theory that plaintiff was tied to the arson.

II

The court did not discuss the elements of newly discovered evidence. See *Parlove v Klein*, 37 Mich App 537; 195 NW2d 3 (1972); *Nickel v Nickel*, 29 Mich App 25; 185 NW2d 200 (1970). The circuit court erred when it based its decision on the lack of a criminal conviction, which may go to the weight of the newly discovered witness's story, but is not conclusive. In addition, the fact that the civil jury had previously rejected defendant's theory begs the question. Had the newly discovered evidence been presented to the jury, a different outcome may have been probable. The court made no findings on that probability. We therefore reverse and remand for further proceedings. On remand, the circuit court shall reconsider defendant's motion under the standards discussed in *Parlove* and *Nickel*.

III

Defendant also argues that the proofs of lost profits were insufficient to support a verdict. Defendant moved, through remittitur, to reduce the verdict by that element. We disagree. Defendant's argument represents a hybrid of reasoning. Defendant argues that lost profits must not be speculative. We do not disagree with this proposition. See *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-513; 421 NW2d 213 (1988). Plaintiff testified to the amount of his lost profits, and said he based his calculations on various expenses his business normally incurred. Defendant argues that lost profits must be based on a track record of earnings, while here (defendant argues) the plaintiff seems to have assumed that his lost profits equaled the expenses he would ordinarily incur. In other words, plaintiff testified that he would have had $2785 in monthly expenses, so he also said he lost an equivalent amount in monthly profits.

Defendant misinterprets plaintiff's testimony. He did not say that he totaled his expenses, that they equaled $2785, and that he considered that to be the amount of his lost profits. Plaintiff's testimony was rather cursory on this point, but he testified that he calculated his monthly sales of $11,000 and considered his monthly expenses in reaching the lost profit figure contained on his proof of loss. He mentioned some components of his expenses: the mortgage payment, a business loan from his mother, electric bills, "Fuelgas," taxes, telephone bills. When his attorney asked "[a]nd that is basically what you asked the insurance company to give you reimbursement for," plaintiff responded "right." We do not read the question and answer to mean that plaintiff sought reimbursement for the elements of expenses. Rather, we read the question and answer to mean that he sought reimbursement for the difference between his monthly sales and the various elements of expense. After all, if plaintiff had meant to say that his expenses totaled only $2785, then his lost profit would have been $8215 (sales less expenses).

It is apparent to us that plaintiff took a shortcut when identifying his elements of damages, and he basically gave bottom-line figures rather than detailed calculations. Defendant seems to be challenging the foundation of the proofs -- that is, defendant argues that lost profits must be based on a different or more precise calculation -- yet defendant did not object at trial to the basis for plaintiff's estimate. While plaintiff's proofs on that element may seem conclusory, had they been challenged at trial the plaintiff could have explained his calculations better. A defense witness testified that he had reviewed plaintiff's tax returns, so we trust that defendant was armed with sufficient information to challenge plaintiff's calculations had it found grounds to do so. A party is not required to determine lost profits with absolute certainty. *Bonelli*, 166 Mich App at 511-512. Plaintiff was entitled to estimate his lost profits for a going concern and, absent a challenge at trial, the record contains no reason to doubt plaintiffs estimate. And once that testimony came into evidence, the jury verdict was entitled to rely upon it.

Remittitur is appropriate only where the verdict exceeds the highest amount supported by the evidence. MCR 2.611(E)(1); *Palenkas v Beaumont Hosp*, 432 Mich 537, 532; 443 NW2d 354 (1989). Here, the verdict was supported by plaintiff's testimony -- even if defendant argues that testimony has a shaky foundation. We will not weigh the strength of the evidence under the guise of remittitur when a direct attack on the evidence has been forfeited. The evidence was sufficient; thus, on this record we find no error in the verdict's component for lost profits. The court did not abuse its discretion by denying defendant's motion for remittitur. *Bonelli, supra*.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Robert P. Young, Jr.
/s/ Thomas L. Brown

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[1] Although defendant's motion sought relief from the judgment, the court's order stated that it was denying a motion for new trial. We are treating defendant's motion as having prayed alternate forms of relief. Defendant may wish to clarify this on remand.