

STATE OF MICHIGAN
COURT OF APPEALS

PITSCH HOLDING COMPANY, INC.,

Plaintiff-Appellee/Counter-
Defendant-Appellee,

v

PITSCH ENTERPRISES, INC. and GARY L.
PITSCH,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

August 7, 2014

No. 315800

Kent Circuit Court

LC No. 10-009001-CK

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

After a review of the record, I agree with defendants that plaintiff failed to present evidence to demonstrate damages resulting from its breach of the noncompete agreement. Accordingly, I would reverse and remand for relief on this single issue.

As the majority observes, the jury properly concluded that the noncompete agreement barred defendants from entering into certain business activities that would compete with those of plaintiff. Once the meaning of the contract was so determined, there can be little doubt that defendants' conduct was in breach of the agreement. However, noncompete agreements are not exempt from the ordinary contract principle that even where there is a breach of a contract, the aggrieved party must present proof of damages. A plaintiff may not recover damages that are based on speculation or conjecture. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Only those damages that are the direct, natural, and proximate result of defendants' breach may be assessed. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

“The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.” *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). Plaintiff has offered no evidence to show a pecuniary loss linked to defendants' breach. Plaintiff's proofs were limited to tax returns to indicate that its revenues dropped by between \$25,000 and \$50,000 per year during the five-year period when defendants violated the agreement. However, plaintiff introduced no evidence to suggest that defendants' competition was the cause of this drop in

revenue or any drop in profits. Indeed, plaintiff was unable to point to any contracts that it sought but defendants obtained. Plaintiff's principal testified that defendants bid on some of the same contracts as plaintiff, but not that defendants obtained those contracts, let alone the amount of any lost profits.

Certainly, damages need not be proven in a mathematically precise manner. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). Had defendant shown lost profits linked to the breach, it would not have had to prove the amount with exactitude. However, this does not lead to the conclusion that the mere existence of a breach of a noncompete agreement means that the breaching party can be required to pay damages without reasonable proofs of their existence and amount.

This case does not involve a situation where the aggrieved party operated a type of business where damages for the violation of a noncompete agreement would be difficult to estimate or ascertain.¹ Plaintiff and defendants bid for contract jobs. An analysis of the contracts of which plaintiff was deprived and/or the lower prices plaintiff was forced to offer due to defendants' competition would have sufficiently established plaintiff's damages. However, plaintiff failed to present such evidence. Indeed, plaintiff's counsel conceded as much during closing arguments, when he stated, "I can't say we've lost any [money as a result of defendants' breach] because I'm not out there flyspecking because my clients are running a business, but I do know [defendants] competed."

For these reasons, I would conclude that the trial court erred by denying defendants' motion for judgment notwithstanding the verdict as to the \$125,000 in damages assessed by the jury for breach of the noncompete provision and respectfully dissent as to that issue. In all other respects, I agree with the majority and would affirm the trial court's rulings.

/s/ Douglas B. Shapiro

¹ In such situations the parties will often include a liquidated damages clause in the contract. The contract at issue here did not contain such a provision.