S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HUNTINGTON NATIONAL BANK,

Plaintiff-Appellant,

v

GARY R. HICKS, ROBERT DELONGE, and THOMAS CZERWIENSKI,

Defendants-Appellees.

UNPUBLISHED
October 30, 2003

No. 239612
Grand Traverse Circuit Court
LC No. 00-021324-CZ

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for a directed verdict. We reverse and remand.

Defendants were officers of Empire National Bank, working in the trust department. Plaintiff announced its acquisition of Empire in early 2000 and began implementing changes accordingly. Defendants, dissatisfied with these developments, offered their services collectively to a competitor, Northwestern Savings Bank and Trust. Defendants submitted a written proposal to Northwestern that included assertions that their concerted and abrupt departure from plaintiff would leave plaintiff in disarray, and, with some assistance from an effective marketing campaign, would likely cause many of plaintiff's trust customers to transfer their accounts to Northwestern,. Consistent with this proposal, defendants all resigned from plaintiff on December 1, 2000, and contemporaneously sent letters, using Northwestern's letterhead and services, to many of the customers they had serviced through plaintiff, informing them of their new affiliation with Northwestern. In the months that followed, many of plaintiff's trust customers transferred their accounts to Northwestern.

As a result of customers leaving Empire and joining Northwestern, Empire brought suit and alleged misappropriation of trade secrets, breach of fiduciary duty, unjust enrichment, civil conspiracy, and tortious interference with contracts and prospective business relationships. Three days into the jury trial, the trial court granted defendants' motion for a directed verdict, holding that plaintiff (1) failed to provide sufficient evidence of causation to link plaintiff's customers' departures to defendants' alleged misconduct as opposed to benign market forces and (2) failed to present evidence to enable the jury to separate actual losses attributable to the alleged misconduct from losses attributable to ordinary market dynamics.

This Court reviews a trial court's decision on a motion for a directed verdict de novo as a question of law. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Our task is to review the evidence in the light most favorable to the nonmoving party to determine whether a factual question existed over which reasonable minds could differ. *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995).

I. Causation

The question here is whether the trial court should have taken the issue of causation away from the jury. In a products liability case, our Supreme Court stated that it is not sufficient "to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). The Court held that "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. However, the Court additionally stated that a prima facie case requires "proof of a causal connection between an established defect and injury . . . . While the plaintiff bears the burden of proof, the plaintiff is not required to produce evidence that positively eliminates every other potential cause." *Id.* at 159. The Court in *Skinner* stated that "the plaintiff's evidence is sufficient if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Id.* at 159-160 (internal quotation marks and citation omitted).

Here, in granting defendants' motion, the trial court recounted that plaintiff's witness testified that plaintiff normally held approximately eight hundred trust accounts and that a normal rate of attrition for those customers was three percent a year. The court then consulted an exhibit and observed that in the five months immediately preceding defendants' departure for Northwestern, plaintiff was losing trust customers at a rate of approximately ten percent a year. The court then cited an exhibit purporting to summarize seventy-seven accounts transferring to Northwestern during the thirteen-month period immediately following defendants' departure and "annualized" that rate of departure to seventy-one in twelve months. The court concluded that the evidence suggested a rate of transfers to Northwestern immediately following defendants' alleged misconduct that was not sufficiently different from the rate immediately before so as to demonstrate that the alleged misconduct caused the loss of those customers.

The court should have viewed this evidence in the light most favorable to plaintiff, which it did not. Had it done so, the court would have observed that, according to the details presented in a companion exhibit, the seventy-seven trust customers who followed defendants from plaintiff to Northwestern did so between December 12, 2000, and March 1, 2001. Projecting those 2-1/2 months over a year yields a total of nearly 370. Given the working total of eight hundred trust customers, this reflects a loss of customer rate dramatically higher than both the three percent attrition rate in nontransitional times and the ten percent rate observed as Huntington took over Empire in the months preceding defendants' departure. This striking increase in plaintiff's trust customers' defections for Northwestern immediately following defendants' departure is competent circumstantial evidence of cause and effect.

In sum, plaintiff presented competent circumstantial evidence from which the jury could conclude that defendants' alleged misconduct substantially caused many of plaintiff's trust customers to transfer their accounts to Northwestern. Rather than conclude that there may have been other causes for the customers' behavior, the trial court should have put defendants to their proofs and let the jury decide the issue of causation. Therefore, we reverse the trial court's order that granted directed verdict for defendants.

II. Damages

Plaintiff proposed that damages be calculated as a function of lost annual fees on the seventy-seven accounts that transferred to Northwestern, compounded at seven percent annually, over a period of ten years or for a reasonable period as determined by the jury. The trial court ruled that plaintiff had failed to take into account costs saved from not having to service those seventy-seven accounts. Also, the trial court ruled that plaintiff failed to distinguish losses attributable to defendants' alleged misconduct from losses attributable to innocent market forces.

This Court has stated that, in proving contract damages, where the aggrieved party (not the offender) has the information necessary to establish costs saved by the breach, that party must provide the factfinder with the ability to use that information in calculating damages. *Lawton v Gorman Furniture Corp*, 90 Mich App 258, 266-268; 282 NW2d 797 (1979). However, the trial court itself observed that plaintiff provided testimony "that there would be no overhead that would be saved, as a result of not having to service these accounts and no costs saved as a result of having to service these accounts." Crediting plaintiff's position for purposes of defendant's motion for a directed verdict should have led the court to conclude that the departure of all those customers resulted in no significant savings to plaintiff.

The trial court otherwise regarded the question of damages as the parallel of the question of causation, dismissing plaintiff's case because plaintiff declined to recognize and refute several other possible explanations for the decision of many of its customers to take their business to Northwestern. Because we conclude above that the court erred in failing to recognize that causation was properly a question for jury resolution, we conclude here that the court repeated its error by ruling the evidence of damages insufficient for that purpose.

"When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage." *MCI Communications Corp v AT&T*, 708 F2d 1081, 1162 (CA 7, 1983). However, we note that in *Lawton, supra* at 268, the Court stated that "[a]ll that was necessary was for plaintiffs to testify as to plaintiffs' normal operating costs and its normal net profit on sales." In the instant case, plaintiff's exhibit 55 indicated that the seventy-seven accounts that transferred from plaintiff to Northwestern generated annual fees totaling $171,526.27, and the evidence showed that those customers left plaintiff at a much faster aggregated rate shortly after defendants' alleged misconduct occurred than that which had prevailed before then. This evidence provided the jury with a basis for calculating damages, if the jury were to find that defendants engaged in misconduct and that that misconduct substantially induced many of plaintiff's customers to take their business to Northwestern.

Although plaintiff's proposal seems to presume that all seventy-seven accounts that transferred to Northwestern did so because of defendants' alleged misconduct, not all of the imperfections in that formulation work to plaintiff's benefit. With the transferring accounts, plaintiff not only lost annual fees, but also the substantial – though less precisely identifiable – benefits of having on hand the deposits that accompanied those accounts. Further, if defendants did indeed engage in the misconduct that plaintiff alleges, then it seems likely that their misconduct was a factor in causing some of plaintiff's trust customers to leave plaintiff, who nonetheless took their business elsewhere than to Northwestern. Thus, plaintiff's formulation makes rough accommodations in defendants' favor by simply disregarding the value of both holding the lost trust assets and any potential losses associated with departing customers who did not choose to follow defendants to Northwestern. Plaintiff is thus not attributing all losses from its departing customers to misconduct by defendants but is making real efforts to discriminate between various bases for alleging damages and approximating their extent.

> [W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, in the assessment of damages require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable. Particularly is this true where it is defendant's own act or neglect that has caused the imprecision. [*Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 111; 535 NW2d 529 (1995), quoting *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960) (internal quotation marks and citation omitted).]

Again, although one might question plaintiff's decision not to produce as witnesses any trust customers to explain why they chose to transfer from plaintiff to Northwestern, it is not as if plaintiff would in any event have been expected to call all seventy-seven of them. As in attempting to establish causation, plaintiff is at least refraining from seeking damages in connection with any customers who closed their accounts with plaintiff but did not transfer them to Northwestern, despite the possibility that some taking that action may well have acted at least partially in response to defendants' alleged misconduct.

In ruling on damages, the trial court repeated its error of failing to consider that defendants' concerted move from plaintiff to Northwestern and plaintiff's resultant need to hire new trust officers stemmed from defendants' alleged misconduct, and thus that plaintiff's customers' behavior in response to those developments did not constitute normal market machinations, but instead was the result of tortious conduct. It was not for plaintiff to raise and refute various defenses to its theory of damages, but rather for defendants to do so.

For these reasons, we conclude that the trial court erred in concluding that plaintiff failed to provide a sufficient basis for ascertaining damages.

Reversed and remanded.[1] We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette

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[1] In light of our decision to reverse for the reasons discussed above, we need not reach plaintiff's remaining issue on appeal. Lest the issue arises again on retrial, however, we remind plaintiff that a trial court's evidentiary decisions are afforded great deference on appeal, see *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993), and that, accordingly, if plaintiff wishes to present the head of its trust department to testify with regard to the normal migration habits of trust clients, plaintiff must comply with the trial court's pretrial orders concerning expert witnesses.