

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SUMMIT POLYMERS INC.,

Plaintiff/Counter-Defendant-  
Appellant,

UNPUBLISHED

March 23, 2010

v

ATEK THERMOFORMING INC.,

Defendant/Counter-Plaintiff/Third-  
Party-Plaintiff-Appellee,

No. 289596

Wayne Circuit Court

LC No. 05-503433-CK

and

LEON PLASTICS, OWEN T. MAHER and  
VISTEON CORP.,

Third-Party-Defendants.

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Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Summit Polymers, Inc. (“Summit”) appeals as of right the April 4, 2008 judgment entered in favor of defendant Atek Thermoforming, Inc. (Atek), following the jury’s verdict in Atek’s favor in this breach of contract action. We affirm.

This case arises out of a contract between Summit and Atek to manufacture component parts, to be used in production by Summit for supply to Visteon for ultimate inclusion in Nissan Pathfinder/Xterra vehicles, as part of the “QW Nissan program.” Development of the parts for the QW program began in late 2001, with production launch in August 2004. For nearly three years leading up to product launch, Summit worked with Atek to design and develop the parts and the tooling and process for their production. In 2004, Atek began producing sample parts, which were then tested by Summit and Visteon, to ensure that all processes and parts were ready for commencement of production. In May 2004, Summit asserted that it sent Atek a “blanket purchase order” for production of QW program parts. Difficulties arose between the parties, arising from quality and delivery issues, and on July 7, 2004, Atek sent Summit a letter advising that it would not be continuing work on the QW program. Subsequently, Atek and Summit

reached an agreement, memorialized in a July 29, 2004 written contract, under which Atek agreed to continue production of QW parts.

The parties operated under the July 2004 contract for just over six months before Summit terminated the contract by filing the instant breach of contract action against Atek. At that time, Summit obtained a temporary restraining order permitting it to enter Atek's factory and retrieve tooling, completed parts and materials in Atek's possession. Atek filed a counter-complaint, asserting that it was Summit that breached the parties' contract.

At trial, Summit asserted that Atek had difficulty with quality and with timely performance throughout the duration of its production of QW parts. In response, Atek asserted that Summit made changes to parts without giving Atek advanced notice, that it failed to provide Atek with adequate materials and substrates to produce the requested parts, that it rejected parts without notifying Atek or returning the parts to Atek, and that a portion of the rejected parts were damaged by packing provided, or after receipt, by Summit.

At the conclusion of a 12-day trial, the jury found that Summit terminated the parties' contract without cause, that Summit owed Atek \$1,248,158.92 for parts supplied by Atek but not yet paid for by Summit, that Summit was not entitled to recover any claimed debits against Atek's accounts for materials and substrates provided to Atek, and that Summit was liable to Atek for an additional \$6,752,749.32 in lost profits, lost work-in-progress, unpaid inventory, material purchased and trucking charges. Summit moved the trial court for Judgment Notwithstanding the Verdict (JNOV) or, alternatively, for a new trial. The trial court denied that motion, finding the verdict supported by the evidence, and entered judgment against Summit in the amount of \$8,203,448.30<sup>1</sup> plus interest from the date of the verdict.

On appeal, Summit first takes issue with the jury's award of lost profits to Atek, asserting that recovery of those damages was precluded by the terms of the parties' contract<sup>2</sup> and that, even in the absence of such preclusion, Atek did not present sufficient evidence to support the jury's award of lost profits. Therefore, Summit argues that the trial court erred by denying it JNOV on this issue. We disagree.

We review a trial court's decision on a motion for JNOV de novo, viewing the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed for resolution by the jury. *Sniecinski v BCBSM*, 469

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<sup>1</sup> This amount included prejudgment interest in the amount of \$202,540.06. However, the trial court would later grant Summit's request, in its motion for JNOV, to vacate the award of prejudgment interest.

<sup>2</sup> In this regard, in addition to its arguments pertaining to the May 2004 purchase order discussed at length below, Summit also asserts that Atek's claim for lost profits is barred by paragraph 5 of the July 2004 agreement. However, that paragraph provides that Atek need not repay a \$500,000 up-front payment it received from Summit if Summit terminates the agreement without cause; it does not address potential remedies available to Atek upon Summit's breach of the parties' contract.

Mich 124, 131; 666 NW2d 186 (2003); *Prime Financial Serv LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008); *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007); *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004). A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Heaton v Benton Constr Co*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 285805, issued October 27, 2009, pub'd December 22, 2009), slip op p 2. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). It is the role of the jury to determine the credibility of the witnesses and the weight to be given to testimony and evidence presented at trial, and neither the trial court nor this Court will second-guess those determinations. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008); *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

We agree with Summit that, where a contract's language is clear, its construction is a question of law for the court. *Grand Truck WRR, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). In such cases, the court must enforce the agreement, giving contractual language its ordinary and plain meaning. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). However, "[w]hen the terms of a contract are contested, the actual terms of the contract are to be determined by the jury." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 12; 697 NW2d 913 (2005), citing *Guilmet v Campbell*, 385 Mich 57, 69; 188 NW2d 601 (1971). Here, the parties dispute whether the terms and conditions contained on the back of Summit's May 2004 purchase order were part of the contract governing the parties' relationship after July 15, 2004. Therefore, the issue presented was one of fact for resolution by the jury. A jury's verdict will not be disturbed on appeal where it is within the fair range of the testimony. *Merkur*, 261 Mich App at 137-138. When reviewing questions of fact, this Court is to ascertain the presence of evidence that can support the verdict; "[i]t is not within the province of the court on appeal . . . to review questions of fact further than to see that the verdict is supported by the evidence." *Id.*, at 138, citing *Detroit v Sherman*, 68 Mich App 494, 498; 242 NW2d 818 (1976). Thus, the question presented is whether, viewing the evidence and all legitimate inferences in the light most favorable to Atek, there was any evidence presented to support the jury's verdict that Atek was entitled to recover the profits it lost because of Summit's breach of contract.

The July 2004 agreement, negotiated by the parties to govern Atek's production of parts for the QW program "going forward," provides in pertinent part:

6. Atek agrees to make its first shipment under this agreement on July 15, 2004, and, hereafter, shall continue the production and shipping of product as provided hereunder and under any and all purchase orders.

\* \* \*

9. If Atek meets all cost, quality and delivery requirements agreed upon by [Summit] and Atek, then [Summit] agrees to keep all existing programs (including QW) at Atek for the life of the program, provided however, volume of work is not assured. If Atek fails to meet such cost, quality and delivery

requirements, [Summit] may immediately terminate any or all other programs, and Atek shall conduct itself in accordance with the terms of paragraph 5, above. In the event that [Summit] is desourced by its customer, Atek will also be desourced from that same program.

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12. By entering into this Agreement, neither Atek or [Summit] are waiving, modifying or limiting any rights they have under the purchase orders, or price agreements which terms and conditions shall otherwise remain in full force and effect.

Summit argues that paragraph 12 of the July 29, 2004 agreement expressly incorporated the standard terms and conditions set forth on the back of the May 2004 purchase order issued to Atek, and that, as a result, those terms and conditions were part of, and remained unmodified by, that agreement. Paragraph 16, on the back side of that purchase order, provides:

TERMINATION – [Summit] may terminate this PO, in whole or in part, by written notice of termination, whereupon [Atek] will terminate pursuant to the notice all work started under the PO. [Atek] will promptly advise [sic] [Summit] of quantities of applicable product and material on hand or purchased prior to termination and the most favorable disposition that [Atek] can make thereof. Payments made under this clause will constitute [Summit's] only liability in the event that this PO is terminated as provided herein. [Atek's] acceptance of such payment will constitute acknowledgement that [Summit] has fully discharged such liability. In addition to all rights and remedies conferred on [Summit] hereunder, [Summit] shall have all of the rights and remedies provided by the Uniform Commercial Code. The provisions of this clause will not apply to any termination by [Summit] due to default by [Atek] or for any other cause allowed by law under this PO. Upon termination by [Summit] under this Paragraph, [Summit's] obligation to [Atek] will be: (a) the PO price for finished product and completed services which conform to the requirements of the PO; (b) [Atek's] actual cost of the work in process and parts. [Summit's] obligation is limited to the quantity of product specified for fabrication on [Atek's] release and will not exceed the obligation that [Summit] would have had to [Atek] in the absence of termination. Unless otherwise stated in the PO, [Summit] shall have no obligation for and shall not be required to make payments to [Atek], directly or on account of claim by [Atek's] subcontractors, for loss of anticipated profit, unabsorbed overhead, interest on claims, product development and engineering costs, tooling, facilities and equipment rearrangement costs or rental, unamortized depreciation costs, and general and administrative burden charges for termination of this PO.

At the outset, we note that the jury was presented with a nine-question verdict form to resolve this case. The first six questions were addressed to Summit's complaint that Atek breached the parties' contract, while the last three questions were addressed to Atek's counter-complaint that it was Summit that did so. More specifically, the jury was asked to answer the following questions: (1) did Summit terminate the parties' July 29, 2004 agreement "for cause" and if so; (2) what amount of damages is Summit entitled to recover; (3) is Summit entitled to

recover any of its claimed debits against the outstanding Atek invoices, and if so; (4) in what amount; (5) did Atek breach its contract with Summit, and if so; (6) what amount is Summit entitled to recover for cover and/or consequential damages; (7) Atek claims to be owed \$1,248,158.92, and Summit admits to owing at least \$1,206,714.40, for products shipped to Summit, what is the amount Atek is entitled to for these products; (8) did Summit breach its contract with Atek, and if so; (9) what is the amount of damages to which Atek is entitled for work-in-progress, unpaid inventory, material purchased, trucking charges and lost profits? Despite the detailed nature of this verdict form, however, the jury was not asked to indicate whether it found paragraph 16 to be part of the parties' contract and, if so, why it did not preclude the award of lost profits to Atek.

Reiterating the standard of review pertinent here, this Court should not disturb the jury's verdict if it is "within the fair range of testimony." *Merkur Steel*, 261 Mich App at 137-138 (citation omitted). That is, "[t]he rule is that the verdict must stand unless it clearly appears that the jury must have been influenced by passion, prejudice, partiality, corruption, or mistake as to the law or facts." *Lee v McCormick*, 279 Mich 120, 122-123; 271 NW 579 (1937). It is with this in mind that we conclude that there was sufficient evidence presented to permit the jury to find that Atek was entitled to present its claim for lost profits under the parties' contract.

We first observe that Summit points out, correctly, that Atek presented no direct evidence at trial to establish that it did not receive the May 2004 purchase order, including the terms and conditions on the backside. Summit witness Kim Varney testified that the purchase order was mailed to Atek; no Atek witness was asked whether Atek received the May 2004 purchase order or, if so, in what manner it was delivered. Evidence was presented, however, that Summit purchase orders were faxed, not mailed, to another supplier, Leon Plastics. The jury is entitled to believe all, part, or none of the testimony from a witness. See *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346; 212 NW2d 201 (1973). Thus, the jury could have disbelieved Varney's testimony that the purchase order was mailed to Atek, believing instead that it was faxed, especially considering that Summit faxed its purchase orders to Leon Plastics. Even so, there was insufficient evidence to conclude that Atek did not receive the complete purchase order in some fashion.

Nonetheless, the jury could have concluded, as a factual matter, that paragraph 16 of the purchase order's terms and condition was no longer a term of the parties' contract, considering that Summit later awarded Atek the "life of the program" for the QW parts. The July 29, 2004 agreement awarded Atek the right to produce all QW parts<sup>3</sup> it was then producing, as needed by Summit until the end of the QW program. And, it did so pursuant to a different price structure than was set forth in the May purchase order. Atek argues that, by promising Atek the "life of the program," the July Agreement specifically entitled it to lost profits upon a finding that Summit was in breach of the agreement, and that this specific, negotiated provision controls over the standard "boilerplate" language on the back of the purchase order, even considering the

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<sup>3</sup> The agreement actually awarded Atek "life of the program" for all parts it was producing for Summit, not merely the QW parts.

agreement's specific incorporation of the terms and conditions set forth in any purchase orders or pricing agreements. We agree.<sup>4</sup> The testimony and evidence pertaining to the parties' new contract dealings from July 2004 forward was sufficient to permit the jury to conclude that Atek was not precluded from recovering lost profits by the terms and condition of the May 2004 purchase order.

Further, even if the jury determined that the purchase order was binding, it also could have determined that Summit did not comply with the requirement, in paragraph 16, that it terminate the agreement in writing. The testimony was undisputed that Summit did not provide Atek with written notice of termination; rather it filed the instant complaint and obtained a court order, terminating the agreement by removing its tooling, products and materials from Atek's plant.

We again note that "[w]hen the terms of a contract are contested," as they are here, "the actual terms of the contract are to be determined by the jury." *Linsell*, 266 Mich App at 12. Considering the length of the trial and the voluminous testimony presented and viewing the evidence and all legitimate inferences from it in the light most favorable to Atek, we conclude there was sufficient evidence presented to permit the jury to conclude that the standard terms and conditions set forth on the back of the May 2004 purchase order did not preclude Atek from recovering lost profits.

We also conclude that Atek presented sufficient evidence of its lost profits to support the jury's award of damages. "Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact--in this case, the jury." *McManamom v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006). The appropriate measure of damages for breach of a contract is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). Lost profits arising from a breach, if properly proved, are an appropriate element of damages. *Id.* The party asserting a claim has the burden of establishing lost profits, *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175-176; 568 NW2d 365 (1997), and lost profits must be proven with a reasonable degree of certainty, considering the nature of the case, although mathematical precision is not required. *Jim-Bob*, 178 Mich App at 98-99; *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390-391; 385 NW2d 797 (1986). Evidence is sufficient to prove damages if there is a reasonable basis for computing them, even if the amount is only approximate. *McCullagh v Goodyear Tire & Rubber Co*, 342 Mich 244, 254-255; 69 NW2d 731 (1955). It is appropriate to place before the jury all the facts and circumstances that tend to show a probable amount of damages if the nature of the case only

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<sup>4</sup> And, in a similar vein, we note that paragraph 16 of the May 2004 purchase order provides that Summit "may terminate this PO in whole or in part" and that only "in the event this PO is terminated as provided herein" would Summit's liability be limited in the manner described in that paragraph. Considering that the parties negotiated, executed and worked for some time under the subsequent July 2004 agreement, the jury may have determined that Summit did not "terminate the PO" but, instead, that Summit's termination was of the July 2004 agreement

permits an estimation. *Body Rustproofing*, 149 Mich App at 391; see also *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-513; 421 NW2d 213 (1988).

Atek's vice president and chief engineer, Robert Nofz testified in detail regarding the profit per piece Atek expected to earn on the QW work and the method that he used to calculate that figure. Nofz explained that, during the bid process, he "outline[d] every . . . component that goes into" the part, including "machine burden" and equipment costs, operator costs, "floor utilization costs," material costs, and salaries and overhead attributable to the production of each part to determine the cost of production. Then he set the selling price to be offered by Atek, based on considerations including the customer's target price. This approach allowed him to pre-determine, within the pricing parameters provided by the customer, the expected profit per part. Nofz also testified that he routinely tracked the costs of production to be sure that they were in line with Atek's bids. Additionally, he noted that it was typical in the automotive industry for a supplier bid to include a breakdown of material cost, labor cost and profit per part, that Atek would have provided this to Summit in bidding the QW work, and that Summit's exhibit detailing the difference in costs to Summit between Atek and subsequent suppliers, which was submitted by Summit to support its claimed "cover damages," included this information. This testimony was sufficient to provide the jury with a basis for calculation of lost profit damages to a reasonable degree of certainty, considering the nature of the case. Therefore, the trial court did not err by denying Summit's motion for JNOV on this issue.

In support of its argument that Nofz's testimony was insufficient to support an award of lost profits, Summit cites an unpublished opinion, *Murray v Wolverine Pipe Line Co*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2005 (Docket No. 257121), in which this Court held that a CPA's affidavit that its enterprise "would have been profitable," but which was "devoid of any evidence to support such a conclusion," was not sufficient to support a lost profits claim. Summit also points to *Dehna v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989), in which this Court rejected a lost profits claim where "[t]he only evidence offered at trial regarding lost profits was plaintiff's relatively brief testimony," and to *Central Contracting, Inc v JR Heineman Sons, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 247800), in which this Court rejected a lost profits claim where the plaintiff presented nothing other than its own assertion that it enjoyed a 25 percent profit margin on some jobs. Contrary to Summit's argument, however, the cited cases (even if any of them were binding on this Court) do not support the argument that Nofz's testimony was too speculative or "fanciful" to support the jury's award. As this Court explained in *Murray*,

"For a plaintiff to be entitled to damages for lost profits, the losses must be subject to a reasonable degree of certainty and cannot be based solely on mere conjecture or speculation. . . ." *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). However, mathematical certainty is not required; lost profits are recoverable even if the amount is difficult to calculate or is speculative to some degree. *Id.* From its earliest days, this Court has made clear that "'where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.'" *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965), quoting 15 Am Jur, Damages, § 23, 414-416. Rather, "[t]he type of uncertainty which will bar

recovery of damages is uncertainty as to the fact of the damage and not as to its amount.” *Bonelli, supra* (citation and internal quotation marks omitted). [Slip op, p 1.].

And, in *Denha*, 179 Mich App at 550, this Court again explained that “[u]ncertainty as to the existence of damages rather than the amount of damages will bar recovery.” Likewise, in *Central Contracting*, a panel of this Court noted that the plaintiff admittedly was unsure of the amount of its bids for the jobs in questions and was equivocal about the profit margin in those bids. Accordingly, he was unable to offer testimony at trial with respect to the anticipated profit margins for each of the challenged jobs. Therefore, the panel concluded that “[o]n the basis of the evidence and testimony offered, the jury would have had to engage in speculation and guesswork to determine the lost profits for the challenged jobs. Lost profit damages were therefore not recoverable.” *Central Contracting*, unpub op at 3.

Nofz’s testimony here was supported by documentation prepared by Summit, it presented a reasonable basis for calculation, and it was not equivocal. Nofz’s testimony detailed his assertion of lost profits resulting from Summit’s breach of contract, based on the costs of production and the selling price for the parts. Although Nofz’s testimony may not have established the amount of the damages with certainty, unlike in the cases cited by Summit, it was not so minimal as to raise question as to whether damages occurred or to require that the jury engage in speculation and “guesswork.” Nor did Kurt Nofz’s deposition testimony, that “[y]ou can estimate all you want. Until you get into the real world you don’t know,” necessitate a conclusion otherwise. Robert Nofz testified that it was he who prepared Atek’s bids, that this information was not within Kurt’s purview, that when he prepared Atek’s bids, he employed the method detailed above, permitting him to know the profit per piece to be expected, and further, that he tracked those costs on an ongoing basis to be sure they were accurate. The jury was permitted to accept this testimony as truthful, having heard that Kurt was not involved in this process and, thus, not knowledgeable on the topic.

Summit also complains that Nofz’s testimony “simply regurgitated two exhibits that the court had excluded,” as hearsay, which were a narrative statement signed by Nofz explaining how Atek calculated lost profits and a series of quote sheets showing an expected profit on parts produced for Summit. Summit notes further that, when excluding the documents, the trial court asked why “no backup documentation” was provided to substantiate the figures, and Atek responded that the materials no longer existed. However, on the stand, Nofz testified that the figures came from his computer files and the files on each particular part. Summit complains, therefore, that Nofz’s testimony was based on documents that Atek failed to disclose during discovery and which Atek’s counsel represented no longer existed. Summit further complains that Nofz was permitted to “effectively read his profit margin testimony off a spreadsheet . . . that was itself based on the excluded exhibits” and that this spreadsheet was then tendered to the jury as an exhibit.

Treating this issue as one challenging the trial court’s admission of Nofz’s testimony into evidence, we observe that decisions on evidentiary issues are within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). An abuse of discretion exists if the results are outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d

472 (2007). Nofz testified regarding his calculation of lost profits, relying primarily on his experience and on documents prepared by Summit and admitted into evidence. The spreadsheet about which Summit complains was used as a demonstrative exhibit, to provide the jury with the numerical information testified to by Nofz. Under these circumstances, we conclude that the trial court did not abuse its discretion by admitting Nofz's testimony.

Summit next argues that, considering the evidence presented at trial, "the jury had no reasonable choice but to find in Summit's favor" as to Atek's liability for \$639,500.32 for substrates and other raw materials Summit purchased for Atek's use in production of QW parts. However, in light of the evidence and testimony presented regarding Summit's repossession, or decision not to repossess, these materials pursuant to the court order, and testimony regarding the manner in which Summit assessed the charges to Atek's account, we find this argument to be without merit.

As previously noted, the determination of damages is an issue of fact, to be decided by the trier of fact. *McManamom*, 273 Mich App at 141. Summit presented testimony and evidence indicating that Atek owed Summit \$639,500.32 for substrates and other raw materials. Conversely, Atek presented testimony and evidence that Summit repossessed substrates and finished product at the time it executed the court order, and that it could have, but chose not to, repossess other raw materials, work in process and finished material. Further, Atek generally questioned the manner in which Summit charged it for the substrates and materials, indicating that, because such charges were applied immediately, and not as each invoice was received from Atek, it was not possible to determine whether the amounts were accurate, or whether they remained outstanding. This evidence was sufficient to permit the jury to conclude that Summit had not established its claim, with reasonable certainty, for recompense for these materials, especially considering that the jury concluded that it was Summit that breached the parties' contract.

Finally, Summit argues that the trial court erred by directing a verdict against it on the issue of unpaid invoices from Atek, and that this error prejudiced the jury's consideration of other issues presented in the case. Again, we disagree.

We review a trial court's decision on a motion for a directed verdict de novo. *Sniecinski*, 469 Mich at 131; *Silberstein*, 278 Mich App at 455. A directed verdict is appropriate when no factual question exists upon which reasonable minds could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). When deciding whether to grant a motion for a directed verdict, the trial court, and this Court, must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). When the evidence could lead reasonable jurors to disagree, the court may not substitute its judgment for that of the jury. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony. *Id.*

Plainly, there was no dispute that Summit had not paid all of the outstanding invoices for products delivered by Atek; Summit witnesses admitted that \$1.206 million in invoices was outstanding, and Summit's own exhibit indicated that \$1.244 million in outstanding Atek

invoices remained. Rather the question was the total amount of those invoices, and the appropriate amount to be offset, if any, for materials and substrates supplied by Summit to Atek. There being no factual question that invoices were owed, a directed verdict on that issue was permissible. *Michigan Mutual Ins Co v CNA Ins Cos*, 181 Mich App 376, 380; 448 NW2d 854 (1989). Further, the jury's ability – indeed, its duty – to answer the other questions was presented in and preserved by the verdict form. That form asked the jury to determine the amount, if any, of the debits for materials and substrates Summit was entitled to recover, as well as to resolve the parties' factual dispute regarding the amount of the outstanding invoices.

Summit takes issue with the directed verdict on the basis that the court advised the jury that Summit admitted to owing Atek for the invoices, but that Summit was not required to pay those invoices so long as there were sufficient charges owed by Atek to offset them. Therefore, Summit asserts that because “there was sufficient evidentiary support for the jury to find that Atek owed Summit more money than Summit owed Atek,” the trial court erred by granting Atek a directed verdict. However, this argument is, essentially, one of semantics and not substance. Summit's complaint is not really that the trial court erred by determining that Summit owed some amount for invoices. Indeed, Summit admits in its brief to this Court that “[t]here was no dispute that \$1.206 million in Atek invoices were unpaid when Summit terminated the relationship.” Rather, Summit's complaint is that the trial court should not have bifurcated the question of the amount of the outstanding invoices from the question of the amount owed for materials and substrates; rather, the trial court should have left it to the jury to determine the appropriate net amount. Summit suggests that the court's directed verdict prejudiced the jury's consideration of which party breached the contract. However, considering the specific and detailed nature of the verdict form, as well as its structure, presenting Summit's claims first and then Atek's claims, we agree with the trial court that such was not the case. Because Summit admitted that at least \$1.206 million in Atek invoices remained outstanding, the trial court did not err by directing a verdict on that issue in favor of Atek, while preserving the jury's ability to determine the amount of the outstanding invoices, as well as the amount of Summit's claim for materials and substrates, established by the evidence – in effect, to determine the net amount of these competing claims.

Summit also asserts that the jury instructions relating to the directed verdict could have created jury confusion by suggesting that Summit admitted to breaching the contract. Summit takes particular issue with the manner in which the trial court reinstructed the jury after completing its initial instructions. During its initial instructions to the jury, the trial court, without referencing the directed verdict, advised the jury that

The law says that when a person or a company performs a service and/or sells products to another person or company, and an invoice is provided in the ordinary course of business, in the event there are not objections to the invoice, then the account is deemed stated by the partys [sic] and, therefore, the monies are owed.

In this case, Atek Thermoforming contends that it performed services and sold product to Summit Polymers, and further contends that it invoiced Summit Polymers in the ordinary course of business for the services rendered and/or products sold.

Atek Thermoforming further contends that Summit Polymers did not object to the invoices and, therefore, the monies are deemed owing by admission of Summit Polymers.

Summit Polymers contends that it has objected to the invoices, and therefore, that no account has been stated by virtue of any admission on its part

If you find that the account was not stated between Atek Thermoforming and Summit Polymers, you must find in favor of Summit Polymers as to the accounts stated claim, and award zero to Atek Thermoforming for this claim.

After the jury was sent out, however, the court called them back and instructed them as follows:

Very briefly, jury, I should tell you that you should disregard the instruction on “accounts stated” where I talked about an invoice and whether or not there were objections to it and so forth.

And the reason I’m asking you to disregard it is that I’ve directed a verdict in favor of Atek. That means I’ve already determined that Atek is owed \$1,206,714.40.

You decide whether or not Atek is owed any monies in addition to that on its other claims.

You should refer to number - 7 on the Jury Verdict Form, because reference is made to the \$1,206,714.40.

Despite its assertion otherwise, Summit did not object to these instructions. Rather, the record indicates that, after a conference at side bar, the parties agreed that the account stated instruction “must be pulled” from the packet of instructions being given to the jury. Atek’s counsel then asked the court to tell the jury this was being done, so that it was not viewed with confusion or as an inadvertent omission. Summit’s counsel disagreed that the court needed to tell the jury that it had directed a verdict, but ultimately asked the court to “tie [its] comment to that question on the Verdict Form so they know the context of it.” As is evident from the above excerpt from the transcript, the trial court did as Summit’s counsel requested. Therefore, any assertion of instructional error was likely waived. See, *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002); *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001). Further, Summit’s complaint, read fairly, is not that the instruction was incorrect, but rather that the directed verdict prejudiced the jury’s consideration of the other issues in the case. Having concluded that the trial court’s granting of the directed verdict was not erroneous, we conclude that this argument likewise lacks merit.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood