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NO. 4-16-0379

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Carla Bender
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IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KNEBEL AUTOBODY CENTER, INC.; GASS' BODY & CHASSIS SERVICE, INC.; BILL EBERT and WADE EBERT, Individually and d/b/a AMERICAN AUTOBODY, Plaintiffs-Appellants, v. COUNTRY MUTUAL INSURANCE COMPANY, INC.; and COUNTRY PREFERRED INSURANCE COMPANY, Defendants-Appellees.	))))))))))	Appeal from Circuit Court of Sangamon County No. 07L310 Honorable Peter C. Cavanagh, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendants' motion for summary judgment because plaintiffs had no evidence anyone failed to give business to them because of any of defendants' actions.

¶ 2 On April 20, 2016, the trial court granted defendants' motion for partial summary judgment holding defendants' estimates and form letters constituted nonactionable opinions. On April 26, 2016, the court granted defendants' motion to reconsider the court's earlier denial of defendants' motion for summary judgment and the court's denial of defendants' motion to bar the testimony and opinions of plaintiffs' expert, Dr. Stan Smith. The court issued a written order on May 3, 2016, granting defendants' motions for summary judgment and their motion to bar Dr. Smith. Plaintiffs appeal, arguing the court erred in granting defendants' motions for summary judgment and barring Dr. Smith's testimony. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 5, 2015, defendants, Country Mutual Insurance Company, Inc., and Country Preferred Insurance Company (Country), filed a motion for summary judgment, arguing "[p]laintiffs' claims fail as a matter of law because they cannot identify a single piece of lost business due to Defendant's actions." Country attached a memorandum of law in support of its motion. According to Country, plaintiffs' case "rests upon their own unsupported conclusions and suspicions which cannot survive a motion for summary judgment."

¶ 5 On October 8, 2015, plaintiffs, Knebel Autobody Center, Inc.; Gass' Body & Chassis Service, Inc.; and Bill and Wade Ebert, Individually and d/b/a/ American Autobody, filed a motion for leave to file a third amended complaint. According to the motion, all discovery in the case would not close until November 6, 2015. "Discovery has progressed in this case to a point where the parties have obtained, or should have obtained, a sharper and narrower focus on the material facts, circumstances and issues in this case." Plaintiffs argued the third amended complaint brought "the issues into closer focus and renders it easier for the court and jury to understand and decide the facts of the case and the issues to be decided" and would make preparation of jury instructions easier and more understandable. The third amended complaint also added a count seeking punitive damages.

¶ 6 Country opposed the motion for leave to file a third amended complaint. However, the trial court allowed plaintiffs leave to file their amended complaint.

¶ 7 Plaintiffs' third amended complaint against Country included claims for tortious interference with prospective business advantage and violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 to 12 (West 2014)). Plaintiffs also included a common law claim for punitive damages. According to the complaint,

plaintiffs had a long history of dealing with individuals insured by Country and people with claims against individuals insured by Country. Plaintiffs allege their goal is to repair vehicles as closely as possible to pre-loss condition, and Country's goal is to pay as little as possible for vehicle repairs.

¶ 8 Plaintiffs allege Country often intentionally prepares estimates to be insufficient to repair a damaged vehicle but tells the owners of the damaged vehicle Country has "taken great care in preparing a fair estimate of the charges for all parts and services that are needed to properly repair your vehicle." They also allege Country seeks "to drive or steer repair business to cut-quality/cut-rate shops by falsely telling the owners of damaged vehicles that '… most shops agree to complete repairs for the amount of our estimate."

¶ 9 In the mid 1990s, Country began hiring individuals to inspect damaged vehicles and then write estimates for repair costs (as opposed to having customers obtain estimates from body shops). These estimators perform visual inspections wherever the vehicle can be located, typically without "disassembly of the vehicle and sometimes without opening damaged components such as hoods, trunks or doors." Plaintiffs allege the estimates are sometimes prepared without including costs for certain tasks, including removal and installation of trim, blending of paint, double tape, sound-proofing, corrosion protection, and rust-proofing. Plaintiffs allege, "Defendant's estimate is prepared without the necessary care to identify all the parts and services necessary to properly repair the vehicle." Defendants' estimates are often much less than the actual repair costs for a vehicle.

¶ 10 After plaintiffs refused to perform a repair for the amount of Country's estimate, Country "embarked upon a plan or scheme to discourage customers and potential customers from patronizing Plaintiff by directing or steering Plaintiff's existing, active, potential and future

customers to vehicle repair shops other than the Plaintiff's shop." As a result, plaintiffs alleged they lost a substantial amount of business.

¶ 11 Plaintiffs contend Country used both verbal comments and "body shop letters" or "excess letters" to steer customers away from plaintiffs' businesses. According to the complaint, these letters "all include the false statement to Plaintiffs' existing and potential customers that (a) '…we have taken great care in preparing a fair estimate of the charges for all parts and services that are needed to properly repair your vehicle', and (b) '…Most shops agree to complete repairs for the amount of our estimate.' " Plaintiffs allege, "[t]he combination of the false statements *** and the low-ball estimate of Defendants serves to create economic concern with respect to the customer or potential customer about the cost of the repair and cause them to be steered away from Plaintiff's shop to a cut-quality[/]cut-rate shop."

¶ 12 On November 6, 2015, plaintiffs responded to Country's motion for summary judgment.

¶ 13 That same day, Country filed a motion to bar the testimony and opinions of plaintiffs' expert, Dr. Stan Smith. According to Country, Dr. Smith's testimony is speculative, lacks foundation, contains no analysis tying plaintiffs' revenue fluctuations to Country's conduct, and fails to consider numerous factors with no correlation to the allegations against Country that could have impacted plaintiff's revenue. Country also argued:

> "In addition, Dr. Smith's opinions are based upon the very methods he criticizes as being employed by 'pseudo-economists' or 'junk scientists' in his own published articles and his textbook on economic damages. As a result, his testimony is nothing more than mathematical calculations of the difference in Plaintiffs'

> respective profits from one year to another year, and thus not an analysis of damages at all. Dr. Smith's testimony will not only fail to assist the jury in rendering a decision, it will prejudice Country because Dr. Smith's mathematical calculations will bear the imprimatur of 'expert' testimony on damages when it is nothing more than speculation and unsupported conclusions."

¶ 14 On November 13, 2015, Country filed a motion to strike portions of affidavits and other evidence submitted by plaintiffs in opposition to Country's motion for summary judgment. On November 20, 2015, the trial court granted Country's motion to strike but denied Country's motion for summary judgment.

¶ 15 On December 1, 2015, the trial court denied Country's motion to bar the expert testimony of Dr. Smith. According to the court's docket entry:

> "The Court finds: Dr. Smith rendered opinions in his reports in accordance with generally accepted standards in the field of economics and that the opinions expressed are done so with a reasonable degree of economic certainty. The lost revenues are calculated specifically based on loss of revenue from Defendants who allegedly engaged in improper conduct. It is a reasonable inference to be decided by the trier of fact the lost revenue was due to the alleged interference. While the lost revenues opinions seem to ignore other potential intervening or cause(s) of the loss, this does not render the expert opinion unreasonable but potentially subjects the testimony of the expert and his opinions to cross

examination. There is arguable circumstantial evidence of proximate cause which makes the conclusions rendered more probable."

¶ 16 On March 29, 2016, Country filed a motion for partial summary judgment. According to the memorandum of law in support of Country's motion, Country argued:

"The Court should grant judgment in favor of [Country] on Plaintiffs' Third Amended Complaint to the extent it concerns Country's automobile repair estimates and the form letters which accompany those estimates because the estimates and form letters are merely nonactionable opinion. Estimates, by definition, are opinions while Country's form letters simply comment on such opinions and cannot form the basis for Plaintiffs' tortious interference with prospective business advantage and consumer fraud claims."

¶ 17 On April 7, 2016, plaintiffs filed an answer to Country's motion for partial summary judgment with regard to the "opinion" issue.

¶ 18 On April 20, 2016, the trial court entered a docket entry granting Country's partial summary judgment motion on the "opinion" issue.

¶ 19 On April 25, 2016, Country filed a motion asking the trial court to reconsider its prior rulings on Country's motion for summary judgment and motion to bar the testimony and opinions of plaintiffs' expert, Dr. Stan Smith. Each of these motions concerned, in part, Country's argument plaintiffs could not prove causation. According to Country's memorandum of law in support of its motion for reconsideration:

"At the April 20, 2016, hearing on [Country's] Motions in Limine—many of which relate to Plaintiffs' lack of evidentiary support for proximate causation—the Court expressed its concern regarding this lack of evidence and the implication it had on some of the Court's previous rulings in this matter. Now that the entirety of Plaintiffs' proof, or lack thereof, has been laid bare, the Court should reconsider its previous rulings on Defendants' Motion for Summary Judgment and Motion to Bar the Testimony and Opinions of Plaintiffs' Expert Dr. Stan Smith, each of which concerned, in part, Plaintiffs' inability to prove causation. Plaintiffs cannot prove through testimony from customers, themselves, or Dr. Smith that any alleged actions by Country prevented Plaintiffs' legitimate expectancy from ripening into a valid business relationship or proximately caused Plaintiffs' alleged damages.

Plaintiffs' reliance upon speculation and so-called 'circumstantial evidence' is misplaced. Illinois law is clear that where circumstantial evidence makes the 'nonexistence' of a fact *just as probable as its existence*, then the conclusion that it exists is mere speculation and the trier of fact cannot be allowed to draw such conclusion. Plaintiffs' evidence goes beyond making the 'nonexistence' of causation just as probable as the existence of causation. Indeed, Plaintiffs' evidence solely demonstrates the

> nonexistence of causation where: (1) each customer witness will testify that they had their vehicles repaired by Plaintiffs; (2) Plaintiffs cannot identify a single lost customer; and (3) Dr. Smith merely assumes liability as a result of Country's alleged conduct." (Emphasis in original.)

Country noted in a footnote plaintiffs could no longer rely on the estimates and form letters, which the court had found were nonactionable opinions.

¶ 20 On May 3, 2016, the trial court entered a written order granting Country's motion to reconsider the court's November 20, 2015, order denying defendants' motion for summary judgment and the court's December 1, 2015, order denying Country's motion to bar the testimony of plaintiffs' expert, Dr. Smith. According to the court:

> "Plaintiffs cannot show by circumstantial evidence or otherwise that Defendants' alleged purposeful interference prevented any legitimate expectancy from ripening into a valid business relationship nor that Defendants' conduct proximately caused any damages to Plaintiffs. Nor does Dr. Stan Smith's testimony or opinion provide this necessary causal connection. The Court further finds that Dr. Smith's opinion is speculative, lacks foundation, and would not assist the trier of fact."

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Summary judgment is a drastic means of disposing of litigation. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007). For summary judgment

to be appropriate, the movant's right must be clear and free from doubt. *Bagent*, 224 Ill. 2d at 163, 862 N.E.2d at 991. The party moving for summary judgment has the initial burden of production and the burden of persuasion. *Hall v. Flowers*, 343 Ill. App. 3d 462, 469, 798 N.E.2d 757, 762 (2003). Because Country is the movant in this case, we note:

> "Where a defendant is the movant, it is only when the defendant satisfies its initial burden of production that the burden shifts to the plaintiff to present some factual basis that would arguably entitle him to a judgment under the applicable law. [Citations.] A defendant who moves for summary judgment may meet the initial burden of production either: (1) by affirmatively showing that some element of the cause of action must be resolved in defendant's favor; or (2) by demonstrating that plaintiff cannot produce evidence necessary to support the plaintiff's cause of action. [Citation.] Only if defendants satisfy their initial burden of production does the burden shift to plaintiffs to present some factual basis that would arguably entitle them to a favorable judgment. [Citation.]" *Hall*, 343 Ill. App. 3d at 469-70, 798 N.E.2d at 762.

¶ 24 A. Defendants' Form Letters and Estimates

¶ 25 Plaintiffs first argue the trial court erred in holding Country's form letters and estimates constituted mere opinion and not actionable facts. This was a basis for the court's summary judgment ruling. Citing *Sampen v. Dabrowski*, 222 Ill. App. 3d 918, 925, 584 N.E.2d 493, 498 (1991), Country argues an "estimate" is synonymous with an opinion. According to

Country, the trial court did not err in concluding the estimates and form letters were nonactionable opinions. Country points out its "estimates are clearly labeled 'estimates' and the accompanying form letters repeatedly refer to the 'estimate'."

¶ 26 *Sampen* involved an appraisal of the fair market value of an apartment building. *Sampen*, 222 Ill. App. 3d at 925, 584 N.E.2d at 498. Country notes, "[t]he court held that the appraisal report was nonactionable opinion and informed the plaintiff that the valuation was a subjective estimate." See *Sampen*, 222 Ill. App. 3d at 925, 584 N.E.2d at 498. Country also cites *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 878 N.E.2d 171 (2007), as support for its position. However, *Miller* also dealt with a property valuation. *Miller*, 377 Ill. App. 3d at 377, 878 N.E.2d at 179.

¶ 27 We do not find these cases persuasive because the "estimates" in this case were not placing a value on a piece of property or an item. The "estimates" at issue in this case were for repairing a vehicle to its pre-loss condition. The cost of repairing any item to its pre-loss condition contains fewer variables than determining the overall value of the item.

¶ 28 Plaintiffs take issue with two statements in the letters: (1) "We have taken great care in preparing a fair estimate of the charges for all parts and services that are needed to properly repair your vehicle," and (2) "Most shops agree to complete repairs for the amount of our estimate." Citing *Tunca v. Painter*, 2012 IL App (1st) 093384, 965 N.E.2d 1237, and *Rose v. Hollinger International, Inc.*, 383 Ill. App. 3d 8, 889 N.E.2d 644 (2008), plaintiffs argue courts should consider the following in determining whether a statement is fact or opinion: (1) does the statement have a precise and readily understood meaning; (2) does the statement's literary or social context indicate it contains facts; and (3) can the statement be objectively verified as true or false?

¶ 29 We have serious doubts the trial court correctly determined the form letters and estimates were nonactionable opinions. However, we need not decide this issue because Country was entitled to summary judgment in this case on other grounds.

¶ 30 B. Exclusion of Plaintiffs' Expert Witness

¶ 31 Plaintiffs next argue the trial court erred in barring their expert witness, Dr. Stan Smith, from testifying. Our supreme court has stated: "The decision of whether to admit expert testimony is within the sound discretion of the trial court [citation], and a ruling will not be reversed absent an abuse of that discretion [citation]. Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003).

¶ 32 Dr. Smith's qualifications are plaintiffs' primary focus in their briefs to this court. Plaintiffs overlook what help Dr. Smith's testimony would be for the jurors. It appears plaintiffs wanted Dr. Smith to offer testimony regarding how each plaintiff's respective business with Country's insureds and claimants had dropped in relation to each plaintiff's overall business. According to plaintiffs' brief:

> "Dr. Smith's report also contains a conclusion which reflects the loss each shop sustained as a result of the actions of the Defendants. In each case[,] the damage is not calculated by merely a general decline in gross shop revenues. Instead, the specific percentage of business that the shops did with the insureds and claimants of the defendants declined when compared with the total revenue the shops received from all other sources over the years

> during the time of the business interference. In other words, in the present case the lost revenues are calculated specifically based on the loss of revenue only from the defendants who had actually engaged in the improper conduct rather than some general decline in overall revenue not identifiable to the wrongdoer."

¶ 33 Country points out the expert witness is really only doing basic math for the jury. Based on the above quote from plaintiffs' brief, this is correct. If told the amount of gross revenue a company received from a particular client for a particular year and the company's gross revenue for the same year, any layman could determine what percentage of the gross revenue would be attributable to the particular client. The same layman could do the same thing with other years and then compare the percentage attributable to the particular client from year to year. Country argues, "[b]asic math is common knowledge and does not require expert testimony." We agree.

¶ 34 "Expert testimony is proper when the subject matter of the inquiry is such that only a person with skill or experience in that area is capable of forming a judgment." *People v. Leahy*, 168 Ill. App. 3d 643, 649, 522 N.E.2d 892, 896 (1988). Simple arithmetic does not require any special skill or experience jurors do not possess. Further, as Country notes in its brief, Smith did not consider numerous variables which could have driven business from Country down, including weather and large repairs. We also note other possible variables, including a decrease in the number of claims overall, demographic shifts, new body shops opening in the area, or Country deciding to total, rather than repair, more vehicles. Instead of examining possible variables to explain the decrease in business from Country, Smith simply relied on plaintiffs' assumptions that no reasons existed for the percentage of their business from Country

to decline other than Country's alleged bad acts. As a result, we do not find the trial court abused its discretion in barring plaintiffs' expert.

¶ 35 C. Summary Judgment on Tortious Interference Claim

¶ 36 Plaintiffs next argue the trial court erred by granting summary judgment for defendants on the tortious interference claim. Our supreme court has stated:

> "In Illinois, four elements are needed to establish the tort: (i) the plaintiff's reasonable expectation of entering into a valid business relationship, (ii) the defendant's knowledge of the plaintiff's expectancy, (iii) the purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (iv) the damages to the plaintiff resulting from such interference." *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 369, 748 N.E.2d 153, 161 (2001).

At issue in this appeal are the third and fourth elements of the offense.

¶ 37 As we stated earlier, Country, as a defendant moving for summary judgment, may meet its initial burden of production "(1) by affirmatively showing that some element of the cause of action must be resolved in defendant's favor; or (2) by demonstrating that plaintiff cannot produce evidence necessary to support the plaintiff's cause of action." *Hall*, 343 Ill. App. 3d at 469-70, 798 N.E.2d at 762. Citing *Celex Group Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114, 26 n.19 (N.D. Ill. 1995), Country argues a plaintiff must identify a specific third party who chose not to do business with the plaintiff because of the defendant's conduct to survive its motion for summary judgment; otherwise, damages under a theory of tortious

interference would be virtually limitless and impossible to calculate. Country also cites *Uline, Inc., v. JIT Packaging, Inc.*, 437 F. Supp. 2d 793, 802 (2006), as authority for this same proposition. We find the reasoning in these cases persuasive.

¶ 38 Plaintiffs argue their circumstantial evidence is enough to survive defendants' motion for summary judgment on their tortious interference claim. While circumstantial evidence alone may be enough to survive a motion for summary judgment on a tortious interference claim, this does not end our analysis. As stated earlier, once a defendant satisfies his initial burden, a plaintiff, in order to survive summary judgment, must present some factual basis that would arguably entitle him to a judgment. *Hall*, 343 Ill. App. 3d at 469-70, 798 N.E.2d at 762. Here, plaintiffs failed to present evidence, circumstantial or otherwise, to establish they were damaged as a result of Country's alleged interference.

¶ 39 Plaintiffs' reliance on *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 281 N.E.2d 323 (1972), for the proposition a plaintiff need not identify any particular person whose business was lost is misplaced. On appeal, Abbott Laboratories (Abbott) was not arguing the smells from its facility did not damage the plaintiff. The appellate court's opinion noted the parties agreed the odor at issue in the case resulted from Abbott's commercial production of erythromycin. *Schatz v. Abbott Laboratories, Inc.*, 131 Ill. App. 2d 1091, 1093, 269 N.E.2d 308, 309 (1971). The issue in *Schatz* was whether the plaintiffs introduced sufficient evidence to establish the damages awarded. Defendants in the case *sub judice* are arguing their actions did not proximately cause any damage to plaintiffs.

¶ 40 In addition, whether a plaintiff is required to identify any particular person whose business was lost is not discussed in *Schatz*. However, we note the plaintiff in *Schatz* did offer

evidence of the necessity of giving refunds to movie patrons during times when odors from the factory were present in the theatre. *Schatz,* 51 Ill. 2d at 145, 281 N.E.2d at 324.

¶ 41 Plaintiffs also cite other cases to support their argument identifying a specific prospective class of third parties was sufficient to survive Country's motion for summary judgment. See *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 401 N.E.2d 1356 (1980); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 546 N.E.2d 33 (1989); *Crinkley v. Dow Jones & Co.*, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1978). However, as Country points out in its brief, these cases only discuss surviving a motion to dismiss, not a motion for summary judgment.

¶ 42 Finally, we note the parties have been litigating this case for more than a decade. The case was originally filed in Madison County in December 2004. Plaintiffs were not denied an opportunity to discover an individual or individuals who did not conduct business with plaintiffs because of Country's actions. Instead, based on plaintiffs' belief they did not need to identify any specific lost customer or customers, plaintiffs decided as a matter of strategy not to seek out individuals who may have taken their business elsewhere because of Country's actions. Plaintiffs made this clear at a hearing on April 26, 2016.

¶ 43 D. Consumer Fraud Act

¶ 44 Plaintiffs next argue the trial court erred in granting Country's motion for summary judgment with regard to plaintiffs' claims under the Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2014)). With regard to a private cause of action under section 2 of the Consumer Fraud Act, our supreme court has stated:

> "to adequately plead a private cause of action for a violation of section 2 of the [Consumer Fraud] Act, a plaintiff must allege: (1)

> a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149, 776 N.E.2d 151, 160 (2002).

Plaintiffs cite *Downers Grove Volkswagen, Inc.*, 190 Ill. App. 3d at 534, 546 N.E.2d at 40-41, for the proposition the Consumer Fraud Act can apply when a company makes false statements to third parties about another company.

¶ 45 Country states it did not base its motion for summary judgment on the fact plaintiffs are businesses. Instead, Country argues it sought summary judgment on the basis plaintiffs could not prove proximate causation or damages, which are required elements of a Consumer Fraud Act claim. In this section of their brief, plaintiffs did not address what evidence in the record supports these two elements. Instead, plaintiffs simply state, "actions under the [Consumer Fraud Act] are much easier to sustain and in this case summary judgment should not have been granted on those claims."

¶ 46 Even assuming, for the sake of argument, a claim under the Consumer Fraud Act is easier to prove than a tortious interference claim, plaintiffs do not explain why the trial court erred in granting Country's motion for summary judgment on this claim. As a result, we find this argument forfeited.

¶ 47 Regardless of forfeiture, for the same reasons the trial court did not err in granting Country's motion for summary judgment with regard to the tortious interference claims, the trial court did not err in granting Country's motion for summary judgment with regard to the

Consumer Fraud Act claim. Plaintiffs identified no witnesses who would testify they failed to give their business to any of plaintiffs because of Country's actions.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's judgment in this case.

¶ 50 Affirmed.