**IN THE COURT OF APPEALS OF IOWA**

No. 2-996 and 2-1013 / 11-2096 and 12-0784
Filed January 9, 2013

**FECO, LTD., FORCE UNLIMITED, LLC,**
**and STAN DUNCALF,**
Plaintiffs-Appellants,

**vs.**

**HIGHWAY EQUIPMENT CO., INC.,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Fayette County, Richard D. Stochl, Judge.

FECO, Ltd.; Force Unlimited, LLC; and Stan Duncalf appeal from the district court's determination of damages, costs, and attorney fees following a bench trial against Highway Equipment Co., Inc. **AFFIRMED.**

Jeffery S. Faff of Dady & Gardner, P.A., Minneapolis, Minnesota, and R. Ronald Pogge of Hopkins & Huebner, P.C., Des Moines, for appellant.

Stephen J. Holtman and Jason M. Steffens of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellee.

Heard by Potterfield, P.J., and Tabor, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**POTTERFIELD, P.J.**

FECO, LTD. ("FECO"); Force Unlimited, LLC; and Stan Duncalf appeal from the judgment entered after a bench trial to determine damages for the wrongful termination of their contract with Highway Equipment Co., Inc. ("Highway Equipment"). In a consolidated appeal, FECO appeals from the order denying attorney fees and costs.

FECO contends the district court's failure to award damages and its calculations in support of that decision were improper in seven ways: first, the award was based on a clearly erroneous finding of fact; second, the trial court considered improper evidence in its award of damages; third, the trial court improperly placed the burden of proving mitigation on FECO and applied an incorrect methodology; fourth, the trial court erred in failing to apply the methodology used by FECO's expert for calculating damages; fifth, the trial court erred in determining FECO had not established a reasonable basis for its damages; sixth, in failing to make an independent determination of the damages; and seventh, in failing to award FECO its costs of mitigation. In its consolidated appeal, FECO contends the district court erred in failing to award it costs and attorney fees under Iowa Code section 322F.8(1) (2001).[1]

We affirm, finding substantial evidence supports the district court's determination regarding damages and that the district court properly interpreted

[1] Though the damages and the costs and attorney fees issues were appealed and briefed separately, the two were consolidated on appeal by our supreme court, but retained their separate appellate numbers. The issues were argued together at oral argument. We address both appeals in this single opinion.

section 322F.8(1) to require a finding of damages before allowing costs and attorney fees.

## I. Background Facts and Proceedings.

FECO (Fertilizer Equipment Company) located in Oelwein, Iowa, and its owner, Stan Duncalf, entered into an agricultural equipment dealership agreement with Highway Equipment for the sale of its chassis and spreaders, including Highway Equipment's New Leader line of fertilizer spinner spreaders. This dealership agreement was terminated by Highway Equipment, and litigation ensued. This is the second time we have heard this case on appeal. *See FECO v. Highway Equip. Co.*, No. 10-0614, 2010 WL 5394727 (Iowa Ct. App. Dec. 22, 2010).[2] We incorporate the facts as laid forth in that opinion here:

> For many years, FECO was an agricultural equipment dealer for Highway Equipment. The October 1, 1996 agreement between Highway Equipment, as supplier, and FECO, as dealer, constitutes a "dealership agreement" as defined by Iowa Code section 322F.1(3) (2003). . . .
>
> By letter dated September 16, 2002, Highway Equipment cancelled its agricultural dealership agreement with FECO. Highway Equipment admits it did not have good cause, as defined by Chapter 322F, for terminating its dealership agreement with FECO. *See* Iowa Code § 322F.1(5) (2003). Highway Equipment also admits it did not provide FECO with the notice of termination required by Iowa law. *See id.* § 322F.2 (2001).
>
> In December 2006, FECO filed suit against Highway Equipment seeking monetary damages under Chapter 322F for wrongful termination of the dealership agreement. Highway Equipment moved for summary judgment arguing Chapter 322F does not provide for monetary damages as a remedy for termination without proper notice and/or good cause. In March 2007, the district court denied Highway Equipment's motion.
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> After an April 2009 bench trial, in March 2010, the district court noted:
>
> > The legislative purpose of 322F.2 [notice of

[2] In June 2003, Highway Equipment also filed suit against FECO for patent infringement. *See Highway Equip. Co. v. FECO, Ltd.,* 469 F.3d 1027 (Fed. Cir. 2006).

> termination] is clear. . . . [T]he act is intended to protect farm dealers, who are generally small business people, from losing the value of their business if the manufacturer cuts them off for no reason or for a bad reason.
>
> The court, however, ruled "money damages for termination without good cause or termination without proper notice are not available to FECO under Iowa Code Chapter 322F." FECO appeals.

*Id.* at *1 (footnotes omitted). We reversed the district court and remanded for determination of damages based on the record, finding money damages were proper under Iowa Code chapter 322F. *Id.* at *2. This appeal arises out of the proceedings on remand to determine damages.

After the termination of its contract with Highway Equipment, FECO began selling its own proprietary line of spreaders boxes, the Force line, which FECO's owner Stan Duncalf reported were extremely successful, taking over most of the spreader market. It began development of these spreaders during its contract with Highway Equipment.[3]

On November 21, 2011, the district court issued its order declining to award damages as it found FECO had fully mitigated any potential loss incurred by Highway Equipment's improper termination of their agreements. The district court also declined to grant costs and attorney fees to FECO. In determining FECO had not sustained damages, the court considered expert testimony presented by both parties during the original three-day trial in April of 2009, and found FECO's expert to be less credible than the expert opinion presented by Highway Equipment.

[3] FECO's written dealer agreements with Highway Equipment did not prohibit it from carrying competing lines of spinner spreaders.

FECO's expert, Frederick Lieber, used a calculation he described as the "present value of lost cash flow." Highway Equipment's expert, Shannon Shaw, used a calculation described as "before and after." Lieber's calculations led to a conclusion that FECO had sustained $4,768,578 in damages. Shaw's figures found no actual loss was sustained by FECO.

Lieber was subject to examination in court, whereas Shaw did not testify and instead submitted into evidence an expert report pursuant to the agreement of the parties. The district court found Lieber's testimony "speculative and unreliable." In its analysis, the district court noted, "Lieber's calculations ask the court to accept that FECO would have sold 250 Highway Equipment spreaders between 2003 and 2008 *in addition* to the 177 spreaders it manufactured and sold under its own Force line label."

Though the contractual arrangement between FECO and Highway Equipment began in 1996, Lieber's calculations of lost Highway Equipment sales began with a sample of sales from the period of August 1, 2002, through October 15, 2002. This sample showed a sale of two chassis in FECO's original sales territory and eleven spreaders. On cross-examination, however, Lieber admitted only six spreaders should have been part of the sample. The two chassis, eleven spreaders sales figure was the basis for Lieber's loss projections in the original territory from post-termination through 2008.

Lieber also made some projections for sales post-termination in its extended sales territories—sales areas that had been granted to FECO shortly before termination of the contract. FECO had yet to make a sale of Highway Equipment chassis or spreaders in these regions before termination of the

agreement. Ultimately Lieber found that without termination of its Highway Equipment contract, FECO would have sold 259 spreaders and forty-nine chassis. He also analyzed how much each of these would have brought when sold, and the loss of use of FECO's money during this time period, among other calculations relying on his projection data. He calculated the cost of labor to develop FECO's proprietary line, and presented that calculation as an element of FECO's damages.

Highway Equipment's expert, Shaw, reached a very different conclusion. Shaw's calculations noted the decreasing market share of Highway Equipment's New Leader products after 2003. He noted spreaders manufactured by three major agricultural equipment producers—John Deere, Case, and AGCO—had outsold New Leader spreaders since 2004.

Shaw's figures showed FECO's sales of spreaders were decreasing prior to the contract termination with an average of twenty New Leader units sold to an increased post-termination average of thirty Force units sold. He also found based on FECO's tax returns that its post-termination actual taxable income was higher than the four years prior to the contract termination. By comparing the pre- and post-contract termination numbers as well as comparing FECO to a similar dealership, Shaw concluded FECO had fully mitigated its damages.

Ultimately, the district court found Shaw's calculations the more persuasive and awarded FECO no damages. It noted, "FECO appears to be in no worse position than it was before the termination. If anything, it appears to be better off." FECO filed a motion to reconsider or amend this ruling. In its motion, FECO argued the district court had inappropriately shifted the burden of proving

mitigation to it, the court inappropriately adopted the "before and after" methodology put forward by Shaw, the court was not allowed to merely pick the opinion of one expert witness over the other, and the court erred in not awarding the costs of mitigation. This motion to reconsider was denied, as the court found the issues were sufficiently addressed at trial. In its order regarding costs, the trial court ruled that because no actual damages had been proven, these fees and actual costs could not be recovered by FECO. FECO appeals from both the damages determination and the denial of fees.

## II. Damages.

In reviewing a trial court's grant or denial of damages, our decision is for correction of errors at law. *Brokaw v*. *Winfield-Mt*. *Union Cmty*. *Sch*. *Dist*., 788 N.W.2d 386, 388 (Iowa 2010) (citing Iowa R. App. P. 6.907). "Under this scope of review, the trial court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. We view the evidence in the light most favorable to the trial court's judgment." *Id.* (internal citations omitted). Damage awards by a trial court are a fact finding, which must stand unless clearly erroneous. *Greenfield v*. *Cincinnati Ins*. *Co*., 737 N.W.2d 112, 122 (Iowa 2007).

### *A. Award based on clearly erroneous finding of fact*

FECO first argues the district court was clearly erroneous in the following statement in its ruling: "Lieber's calculations ask the court to accept that FECO would have sold 250 Highway Equipment spreaders between 2003 and 2008 *in addition* to the 177 spreaders it manufactured and sold under its own label." It argues such a description is erroneous because it ignores Lieber's other

testimony regarding his designation of the sale of Force spreaders in FECO's original Iowa territory as mitigating.

FECO argues this finding "forms the basis for [the trial court]'s entire decision" and thus we should overturn the district court's damage determination. FECO's argument is unpersuasive; we find the district court's damage determination is supported by substantial evidence.

The district court made many findings of fact underlying its unwillingness to adopt Lieber's projected sales numbers, including the "thorough and damaging cross-examination" of his testimony, his demeanor on the stand, the historical sales data for FECO pre- and post-termination, the non-representative sample data used by Lieber to determine future sales, his admission on the stand that his initial numbers (which formed the basis for his projected data) were wrong, Lieber's lack of a basis for annually doubling his projected sales numbers, his projected increasing market size in spite of contrary sales figures for similar Highway Equipment dealers, the lack of actual sales in the extended territories prior to termination—contrary to Lieber's calculations, and his insufficient data for calculating FECO's profit margin. The court concluded its "reliance upon this data would require considerable speculation as to what could have taken place without a sufficient base of data to support it."

The judge was the fact finder in this case, to whom we give deference; "the credibility of witnesses is peculiarly the responsibility of the fact finder to assess." *Estate of Hagedorn ex rel*. *Hagedorn v*. *Peterson*, 690 N.W.2d 84, 88 (Iowa 2004). It is the role of the fact finder to "discount some testimony and give more credit to other testimony." *Top of Iowa Co-op*. *v*. *Sime Farms*, *Inc*., 608

N.W.2d 454, 468 (Iowa 2000). A fact finder is free to believe or disbelieve the testimony of witnesses as it chooses. *State v*. *Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). It is the role of a fact finder to sort out the evidence and place credibility where it belongs. *Id.* Upon our review of the evidence in the light most favorable to the district court's decision, we find its findings of fact regarding the Lieber's conclusions are supported by substantial evidence. *Brokaw*, 788 N.W.2d at 388.

*B. Failure to plead defense of mitigation*

FECO next argues that Highway Equipment should not have been allowed to present evidence regarding mitigation of damages as it did not specifically plead an affirmative defense of mitigation. However, Iowa law requires the affirmative defense of *failure* to mitigate damages. *Greenwood v*. *Mitchell*, 621 N.W.2d 200, 206 (Iowa 2001); *see also Hunter v*. *Bd*. *of Trustees of Broadlawns Med*. *Ctr*., 481 N.W.2d 510, 517 (Iowa 1992) ("In a breach-of-contract suit, the defendant has the burden of proving that plaintiff could have mitigated her loss through a substitute transaction . . . Since the appellants did not plead any mitigating circumstances, they are limited to circumstances shown or growing out of [appellee's witness] testimony.").

As noted in FECO's earlier argument, whether the trial court believed his testimony or not, FECO presented evidence of limited mitigation by FECO's proprietary sales through Lieber's testimony. Highway Equipment, through Shaw's report, attacked the numbers presented by Lieber and argued more of its proprietary line sales should be treated as mitigating. Highway Equipment's mitigation figures spoke to *actual* mitigation, and came from circumstances

"shown or growing out of" Lieber's testimony. Therefore, the evidence was properly admitted by the district court.

*C. Incorrect placement of burden on FECO*

FECO argues that the trial court taxed it with the burden of proving mitigation, when mitigation is an affirmative defense. Once again, FECO raised this argument solely in its motion to reconsider. The district court considered and discussed the mitigation evidence submitted by both parties, and found the evidence of Highway Equipment's expert more credible for clearly stated reasons regarding the unreliability of the expert opinion presented by FECO. We defer to the fact finder's judgment regarding credibility and reliability. *Peterson*, 690 N.W.2d at 88.

*D. Error in disbelieving FECO's expert*

FECO's next three points of error speak to the district court's unwillingness to adopt the findings of its expert, Lieber. FECO argues three points: that the trial court erred in failing to adopt its expert's calculation of "present value of lost cash flow," in finding the expert provided no reasonable basis for damages, and in adopting the findings of Highway Equipment's expert, Shaw.

Our precedent has long held that "[e]xpert testimony may be used as an aid to the trier of the facts, and may be adopted in whole, in part, or not at all." *Iowa Dev. Co. v. Iowa State Highway Com'n.,* 122 N.W. 2d 323, 328 (Iowa 1963). The district court was the fact finder, and was free to accept the testimony of one expert over another. *Peterson*, 690 N.W.2d at 88; *see also Eickelberg v. Deer & Co.*, 276 N.W.2d 442, 447 (Iowa 1979) ("The trier of fact is

not bound to accept expert testimony, even if uncontradicted, although testimony should not be arbitrarily and capriciously rejected.").

As stated above, the district court carefully considered which expert to believe, noting the numerous times it reviewed the opinions of both experts and its conclusion. It cited the shortcomings of Lieber's calculations, including the non-representative historical sales data, flawed projection estimations, and a damaging cross-examination. In our review of the record, there is nothing to indicate the rejection of Lieber's calculations was arbitrary or capricious. *Eickelberg*, 276 N.W.2d at 447. We will not disturb this fact-finding based on a credibility determination on appeal.

*E. Error in failing to award cost of mitigation*

Finally, FECO contends the district court erred in declining to award it the costs of its mitigation. Iowa precedent regarding damages states that the "injured party is limited to the loss he actually suffers by reason of the breach; he should not be placed in a better position than he would be in if the contract had not been broken." *DeWaay v. Muhr*, 160 N.W.2d 454, 459 (Iowa 1968); *see also Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996) ("The party seeking damages has the burden to prove them").

In its opinion, the district court began with the estimation of costs, and then considered the conflicting evidence presented regarding mitigation of loss by FECO as presented by both parties. Development of the new line by FECO began during its contract with Highway Equipment, and Stan Duncalf stated development of a new spreader would be a "piece of cake." The new line was launched shortly after the contract termination and became wildly successful.

Further, FECO's mitigation cost calculation is not based on what Stan Duncalf received for his work in developing the line, but what a hypothetical typically salaried engineer would have been paid to develop the new line from 2003–2009. Given the district court's previously determined shortcomings with Lieber's calculations, we cannot find the district court's failure to award these costs of mitigation to be clearly erroneous. *Greenfield*, 737 N.W.2d at 122.

*F. Damage Calculation as Matter of Law*

Finally, in its rebuttal oral argument, FECO asserts that as a matter of law, a court cannot use a before and after damage calculation when a dealer loses a line of inventory, but must use the lost cash flow analysis, net of mitigation formula under *Buono Sales*, *Inc*. *v*. *Chrysler Motors Corp*., 449 F.2d 715, 720 (3d Cir. 1971) as the only legal measure of damages. However, the federal court of appeals in *Buono Sales* held that "[t]he law is clear that if a defendant's breach of contract frees the plaintiff to profitably utilize its facilities in some other way, the amount of compensating advantage thus derived must be subtracted from the profit which the plaintiff lost because of the breach." Here, FECO was able to profit from the loss of Highway Equipment inventory to sell by selling more of its proprietary spreaders, and the court properly subtracted the new sales from the profit FECO had been earning from marketing Highway Equipment spreaders.

We therefore affirm the assessment of damages made by the district court.

**III. Attorney Fees**

FECO next appeals the district court's decision not to award it attorney fees or costs of the action. We normally review the district court's grant or denial

of attorney fees for an abuse of discretion. *NevadaCare Inc*. *v*. *Dep't of Human Servs*., 783 N.W.2d 459, 469 (Iowa 2010). However, "[t]o the extent we are required to engage in statutory construction, our review is for correction of errors at law." *State v*. *Dudley*, 766 N.W.2d 606, 612 (Iowa 2009).

> When confronted with the task of statutory interpretation our goal is to determine legislative intent from the words used by the legislature, not from what the legislature should or might have said. We cannot extend, enlarge, or otherwise change the meaning of a statute under the pretense of statutory construction. When we interpret a statute, we are required to assess the statute in its entirety, not just isolated words or phrases. Indeed, "we avoid interpreting a statute in such a way that portions of it become redundant or irrelevant." We look for a reasonable interpretation that best achieves the statute's purpose and avoids absurd results.

*In re Conservatorship of Alessio*, 803 N.W.2d 656, 661 (Iowa 2011) (internal citations omitted).

FECO contends it should be allowed to recover attorney fees and costs, in spite of its failure to recover actual damages, under Iowa Code 322F.8(1), which reads, in relevant part:

> A dealer may bring a legal action against a supplier for damages sustained by the dealer as a consequence of the supplier's violation of this chapter. A supplier violating this chapter shall compensate the dealer for damages sustained by the dealer as a consequence of the supplier's violation, together with the actual costs of the action, including reasonable attorneys' fees.

Highway Equipment argues that attorney fees are contingent upon a finding that FECO sustained damages. It argues the section as a whole, along with the wording "together with," indicates an award of attorney fees must be predicated upon a showing of loss. FECO argues the section as a whole indicates the legislature intended to provide broad avenues of recovery for wrongful

termination under the statute, and thus we should allow attorney fees without a finding of actual damages.

For context, we look further into the fees section, noting section 322F.8(2) allows for accrual of interest to the dealer for the net costs of *equipment*. Iowa Code section 322F.8(2) also allows for an action for the repurchase of equipment, and this remedy is not in lieu of any "*remedies* provided under this chapter." (emphasis added). This section does not contain a separate provision for the recovery of attorney fees, but instead allows the vendor to also bring an action under 322F.8(1). Iowa Code § 322F.8(3).

Thus, the remainder of the section does not provide us with clear guidance regarding when attorney fees are separately recoverable under subsection (1). Instead, we turn to the language of the applicable subsection to determine whether Highway Equipment is correct in its assertion that the words "together with" should be read to require an underlying finding of damages. This portion of the statute reads: "A supplier violating this chapter shall compensate the dealer for damages sustained by the dealer as a consequence of the supplier's violation, *together with* . . . reasonable attorneys' fees." Iowa Code § 322F.8(1).

We will not read a statute in such a manner as to render phrases redundant or irrelevant, nor will we read it in such a way as to produce absurd results. *Alessio*, 803 N.W.2d at 661. We will read it in such a way as to result in a reasonable interpretation. *Id.* Here, to allow an award of attorney fees under Iowa Code 322F.8(1) without a showing of damages would result in an

unreasonable interpretation, as the words "together with" would be rendered irrelevant.

"Together with" is defined in Webster's Third New International Dictionary 2404 (2002) as "in addition to: in association with: as well as." *See Mall Real Estate*, *LLC v*. *City of Hamburg*, 818 N.W.2d 190, 199 (Iowa 2012) (using Merriam-Webster's Collegiate Dictionary to aid in statutory interpretation of legislature's use of the word "material"); *see also State v*. *Jorgensen*, 758 N.W.2d 830, 385 (Iowa 2008) (using Webster's Third New International Dictionary to define "expose"). "Together with" does not mean an item can be broken out, which would be true had the legislature chosen the word "or" or prefaced the list of damages with "one or more of the following." Therefore, we find "damages sustained by the dealer as a consequence of the supplier's violation" is required before the recovery of attorney fees under this statute. We therefore affirm the district court.

**AFFIRMED.**