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GARY'S IMPLEMENT, INC., APPELLANT AND CROSS-APPELLEE, v. BRIDGEPORT TRACTOR PARTS, INC., FORMERLY KNOWN AS GARY'S TRACTOR PARTS, INC., APPELLEE AND CROSS-APPELLANT.

799 N.W.2d 249

Filed April 1, 2011. No. S-10-122.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **Expert Witnesses: Testimony: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Restitution.** Restitution is not a mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.
5. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
6. ____: ____. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
7. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
8. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
9. **Jury Instructions.** The instructions contained in the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and the evidence call for such an instruction.
10. **Contracts: Damages.** The measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation; however, an injured party will not be precluded from recovering because of that fact.
11. **Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.
12. **Expert Witnesses: Proof: Juries.** When an assumption used by an expert is not proved untrue or to be without any basis in fact, whether the stated grounds for the assumption are credible is a jury question.

13. **Expert Witnesses: Appeal and Error.** An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.
14. **Restitution.** The right of restitution may be enforced by proceedings in the lower court in the same cause, or by an independent action or suit.
15. ____. It is the duty of the court to compel restitution upon the reversal of a judgment which has been executed; however, restitution is not in all cases a matter of absolute right.

Appeal from the District Court for Morrill County: LEO DOBROVOLNY, Judge. Affirmed.

Howard P. Olsen, Jr., Steven W. Olsen, and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellant.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Gary's Implement, Inc., appeals the judgment in favor of Bridgeport Tractor Parts, Inc. (Bridgeport Tractor), in the amount of $1,250,000. Bridgeport Tractor cross-appeals the denial of its motion for restitution. The issues on appeal are whether the district court properly admitted the testimony of a particular expert; whether the court properly instructed the jury on the issue of damages; and whether Bridgeport Tractor is entitled to recover sums allegedly paid in execution of the original judgment, which was subsequently reversed. For the following reasons, we affirm.

II. BACKGROUND

1. PROCEDURAL BACKGROUND

This appeal follows the second trial in this matter. The dispute arose from transactions related to the sale of a business by Gary's Implement to Bridgeport Tractor. On July 15, 1998, Gary's Implement entered into a contract to sell its "salvage and used parts business" to Bridgeport Tractor. The contract was accompanied by a noncompetition agreement. The contract

which embodies this sale is made up of the agreement, the promissory note, the noncompetition agreement, and the bill of sale. Pursuant to the agreement, Bridgeport Tractor purchased the equipment, inventory, and all goodwill and other intangible assets of the business. The agreement called for periodic payments by Bridgeport Tractor over a period of 5 years. The noncompetition agreement provided that Gary's Implement was prohibited from engaging in "the agricultural and machinery salvage and used, new or rebuilt agricultural parts business" within 150 miles of Bridgeport, Nebraska, for a period of 5 years. The noncompetition agreement expired on July 15, 2003.

(a) Original Trial

After executing the contract, Bridgeport Tractor became concerned that Gary's Implement was engaging in competitive activity by salvaging and selling used parts, by competing with Bridgeport Tractor for the supply of salvage tractors and machinery, and by trading on the goodwill that Gary's Implement had sold to Bridgeport Tractor. Bridgeport Tractor demanded this activity cease. After determining that Gary's Implement refused to do so, Bridgeport Tractor deemed the noncompetition agreement and the agreement to sell goodwill breached, and chose to stop payments to Gary's Implement. Gary's Implement ultimately sued for the balance due under the contract, and Bridgeport Tractor counterclaimed, seeking damages for breach of the noncompetition agreement. The jury returned a verdict in favor of Gary's Implement, finding that Bridgeport Tractor, not Gary's Implement, had breached the contract. The district court entered judgment in favor of Gary's Implement and against Bridgeport Tractor pursuant to the remaining amounts due under the contract: $612,225 on the promissory note and $20,000 on the noncompetition agreement.

Bridgeport Tractor appealed. In *Gary's Implement v. Bridgeport Tractor Parts* (*Gary's I*),[1] we reversed, and remanded for a new trial on Bridgeport Tractor's counterclaim for breach

[1] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

of the noncompetition agreement. We concluded that the district court committed prejudicial error when it instructed the jury as to the meaning of certain provisions within the agreement, because the agreement was ambiguous and its interpretation was, accordingly, a question of fact. We further determined the promissory note representing the sale of goodwill to Bridgeport Tractor was inextricably intertwined with Gary's Implement's agreement not to compete. Thus, we also reversed the jury's verdict on Gary's Implement's counterclaim, and the issue of damages under the promissory note was again submitted to the jury upon retrial.

(b) Order in Aid of Execution

Prior to our reversal of the original judgment, while the appeal by Bridgeport Tractor was pending, the district court issued an order granting a motion in aid of execution filed by Gary's Implement. The order imposed sanctions against Bridgeport Tractor for bad faith for having filed a chapter 11 bankruptcy case, which the district court concluded was "for the sole and only purpose of frustrating [the] efforts [of Gary's Implement] to collect and enforce its judgment." The order also directed Bridgeport Tractor to "cease and desist" from making any transfers or sales of personal property from its salvage yard outside the ordinary course of business. After our decision in *Gary's I*, we considered an appeal from the order granting the motion in aid of execution. In *Gary's Implement v. Bridgeport Tractor Parts* (*Gary's II*),[2] we reversed the order, noting that, generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it.

2. Remand

(a) Hearing on Restitution

Upon remand, Bridgeport Tractor filed a motion for restitution in Morrill County District Court on January 17, 2006. In

[2] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 337, 701 N.W.2d 367 (2005) (citing *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994), and *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987)).

its motion, Bridgeport Tractor requested Gary's Implement make restitution of sums paid at a trustee's sale, alleging such sums were paid pursuant to the original judgment in favor of Gary's Implement which was subsequently reversed. This motion was based on events which transpired after the initial judgment was entered, but prior to our decisions in *Gary's I*[3] and *Gary's II*.[4]

On July 15, 1998, David Dyke, then president of Bridgeport Tractor, purchased real estate from Gary's Implement. To secure the purchase price, Dyke gave a deed of trust, wherein Gary's Implement was named as the beneficiary/lender. Neither the deed of trust nor the real estate agreements indicate that Dyke was acting on behalf of Bridgeport Tractor. However, the deed of trust recited that the deed was executed for the purpose of securing the "obligations . . . payable by Borrower to Lender" under a noncompetition agreement and a promissory note of the same date. Bridgeport Tractor and Gary's Implement's agreements, as described above, were executed on July 15, 1998.

The deed of trust included a provision prohibiting the transfer of the real estate without Gary's Implement's written consent. It stated:

> Trustor [Dyke] shall not sell, transfer, or otherwise convey in any manner all or any part of the Trust Estate or interest in it without Lender's [Gary's Implement's] prior written consent. . . . If a sale, transfer or conveyance occurs, Lender [Gary's Implement] may declare all sums secured by this Deed of Trust to be immediately due and payable, and/or cause Trustee to file a notice of default.

Judgment was entered against Bridgeport Tractor in the original trial on July 22, 2003, and Dyke transferred the real estate to Bridgeport Tractor on August 1. Thereafter, Bridgeport Tractor filed a petition for chapter 11 bankruptcy in South Dakota. The South Dakota bankruptcy court determined that the petition was not filed in good faith. The bankruptcy court noted that Dyke acknowledged that he conveyed the real estate

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[3] *Gary's I, supra* note 1.

[4] *Gary's II, supra* note 2.

to Bridgeport Tractor to avoid losing the property to Gary's Implement and that he was aware this was prohibited under the deed of trust. The bankruptcy case was dismissed on April 2, 2004.

In April 2004, Gary's Implement sent Dyke a notice of trustee sale under the July 15, 1998, deed of trust. Gary's Implement held a trustee's sale on May 18, 2004, pursuant to the power of sale in the deed of trust. The only bidders at the sale were Gary's Implement and Dyke. Dyke made the final bid of $476,000, which was accepted. The trustee executed and delivered to Dyke a trustee's deed to the real estate. Gary's Implement retains the funds from the sale.

In its 2006 motion for restitution, Bridgeport Tractor sought $476,000 in restitution, plus interest, and asserted that Gary's Implement was unjustly enriched based on our holdings in *Gary's I*[5] and *Gary's II*.[6] Bridgeport Tractor argued that the funds paid to Gary's Implement were transferred as partial satisfaction of the money judgment ordered at the original trial, as opposed to an independent transaction related to the real estate alone. Because our holdings vacated that original judgment, Bridgeport Tractor argued it was entitled to restitution. Gary's Implement filed a brief in opposition to the motion for restitution and asserted that the sale of the real estate from Dyke to Bridgeport Tractor had violated the terms of the deed of trust under the transfer of property provision. The trustee's sale, Gary's Implement argued, was based on this violation of the deed of trust and was independent of our reversal of the original judgment. Gary's Implement also asserted that Bridgeport Tractor was not entitled to restitution under the maxim of unclean hands, based on the bankruptcy court's determination that Bridgeport Tractor's purchase of the property and its subsequent bankruptcy petition were "primarily motivated by insider . . . Dyke's desire to place the realty under the protection of a bankruptcy stay." The district court overruled Bridgeport Tractor's 2006 motion for restitution. In denying restitution, the court noted that Gary's Implement had the

[5] *Gary's I, supra* note 1.

[6] *Gary's II, supra* note 2.

right to foreclose on the deed of trust because of the improper transfer and that, at that point in time, Bridgeport Tractor "had unclean hands."

Prior to retrial on the contract issues, the case was transferred to another judge of the district court. On July 27, 2009, Bridgeport Tractor again filed a "Motion for Restitution of Sums Paid at Void Execution Sale." A hearing was held on the motion on October 19. At the hearing, Gary's Implement argued that the motion was in essence a motion for reconsideration and could not be considered by the court because it was untimely under Neb. Rev. Stat. § 25-2001(1) (Reissue 2008). Neither party presented facts or arguments contrary or supplemental to those presented with the 2006 motion. The motion was taken under advisement. After retrial, the district court denied restitution. In the court's order, it was noted that no authority was shown to support reconsideration of the previous ruling on the 2006 motion. Further, the court stated that the restitution issue was the subject of a separate lawsuit. The facts surrounding Bridgeport Tractor's motion for restitution will be explored more fully in our analysis below.

(b) Retrial

On retrial, the jury resolved the ambiguities in the contract in favor of Bridgeport Tractor. It rejected Gary's Implement's claim and found in favor of Bridgeport Tractor's counterclaim. The jury awarded Bridgeport Tractor $1,250,000 in damages.

John Wenande, a certified public accountant and financial planner accredited in business valuation, testified at trial that he was employed to determine whether Gary's Implement's competitive activities had damaged Bridgeport Tractor and, if so, to what extent. Wenande described the analytical steps he took to form his opinion: (1) gather financial information, (2) summarize the financial information, (3) consider available methods for analysis that could be applied to determine and calculate an economic loss, (4) apply the methods to determine a range of loss, and (5) calculate the loss.

In analyzing this case, Wenande gathered financial statements and tax returns of both Gary's Implement and Bridgeport Tractor, financial statements of chosen comparable companies,

copies of the underlying agreements, depositions related to the facts of the case, and interviews with Dyke's son, who is the current president of Bridgeport Tractor. Wenande reviewed Bridgeport Tractor's income and expenses over a time period running from 1999 through 2007. Gary's Implement objected numerous times to the admission of Wenande's opinions on the basis of foundation and relevance. Gary's Implement asserted that Wenande's conclusions lacked foundation because they were based on impermissible assumptions and because the comparables utilized in his methodology were not sufficiently comparable. The court initially sustained objections to Wenande's calculation of the amount of loss suffered by Bridgeport Tractor and to his opinion as to the cause of that loss. After further testimony, however, Wenande was ultimately allowed to testify that in his opinion, the range of loss Bridgeport Tractor suffered as a result of Gary's Implement's competition was $1,395,000 to $1,521,000. The details of Wenande's testimony will be discussed in more detail below.

Prior to submitting the case to the jury, the court overruled Gary's Implement's objection to jury instruction No. 7, which pertained to damages. It states:

> If you find in favor of Defendant [Bridgeport Tractor] on Defendant's counterclaim, you must decide how much money will fairly compensate Defendant for the damage which it has sustained. Defendant is entitled to recover the reasonable value of the profits it has lost.
>
> Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

The jury found in favor of Bridgeport Tractor on its counterclaim. Pursuant to the jury's verdict, the court entered judgment in favor of Bridgeport Tractor in the amount of $1,250,000.

III. ASSIGNMENTS OF ERROR

Gary's Implement assigns that the district court erred in (1) giving instruction No. 7 to the jury and (2) receiving the opinion testimony of Wenande. Bridgeport Tractor cross-appeals and assigns that the district court erred in (1) denying

Bridgeport Tractor's motion for restitution and (2) failing to award interest on the amount for which restitution is allegedly proper.

IV. STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[7]

[2,3] An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.[8] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[9]

[4] Restitution is not a mere right.[10] It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.[11]

V. ANALYSIS

1. Damages

[5-7] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.[12] One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.[13] While damages need not be proved with mathematical certainty, neither

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[7] *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[8] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[9] *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[10] *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956).

[11] *Id.*

[12] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[13] *Id.*

can they be established by evidence which is speculative and conjectural.[14]

(a) Jury Instruction No. 7

Gary's Implement assigns that the district court erred in failing to impose a time limit on damages awarded to compensate Bridgeport Tractor for breach of the agreement not to compete. Gary's Implement contends that the jury was entitled to award damages only for the 5-year period contemplated in the agreement, ending July 15, 2003. Because there is no legal basis for such limitation, we find no merit to Gary's Implement's first assignment of error.

[8] Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[15] The instructions in the present case provided that the jury award only those damages proximately caused by the breach complained of. Section 2.03 of jury instruction No. 2 stated Bridgeport Tractor was required to establish the terms of the contracts and agreements and what they meant, that Gary's Implement breached the noncompetition agreement, that this breach was a proximate cause of some damage to Bridgeport Tractor, and the nature and extent of that damage. Proximate cause is defined in jury instruction No. 5.

[9] On the issue of damages, the court instructed the jury, in relevant part: "If you find in favor of Defendant [Bridgeport Tractor] on Defendant's counterclaim, you must decide how much money will fairly compensate Defendant for the damage which it has sustained." Gary's Implement objected to this instruction at trial. The instruction was taken from the Nebraska Jury Instructions.[16] The instructions contained in the Nebraska Jury Instructions are designed to be used when they

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[14] *Aon Consulting v. Midlands Fin. Benefits, supra* note 12; *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002).

[15] *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

[16] NJI2d Civ. 4.51.

reflect the law and the pleadings and the evidence call for such an instruction.[17]

The noncompetition agreement at issue provided that Gary's Implement would not compete with Bridgeport Tractor, directly or indirectly, for a period of 5 years from the closing date. The date of closing was July 15, 1998; therefore, the agreement expired on July 15, 2003. Gary's Implement argues that the jury should have been instructed on this fact and that, without such instruction, instruction No. 7 was misleading.

In contrast, Bridgeport Tractor asserts that because the closing date was recited in the agreement itself and because the jury had access to this agreement, the 5-year term was "overtly included in the instructions given the jury."[18] Bridgeport Tractor argues that instruction No. 7, as set out above, was correct and not misleading, because the jury was told to determine the damages under the contract and the contract stated the time period during which the noncompetition agreement applied. The statement of the case instruction given by the court, jury instruction No. 2, instructed that Bridgeport Tractor claimed it was damaged based on a breach of the noncompetition agreement and sought judgment for those damages. Bridgeport Tractor argues that the noncompetition agreement contained language stating the enforcement period of the contract and that this was sufficient to avoid any confusion or speculation by the jury. Bridgeport Tractor also argues that the jury was instructed to find only those damages which would "fairly compensate" Bridgeport Tractor and that it was reasonable to conclude that Gary's Implement's breach of the covenant not to compete "so retarded [Bridgeport Tractor] in the operation of its business that its entire loss was not fully absorbed by the end of five years, because the competition continued unfairly until the end of the five-year period."[19]

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[17] See, *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000); *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999).

[18] Brief for appellee at 30.

[19] *Id.* at 35.

[10] The measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation; however, an injured party will not be precluded from recovering because of that fact.[20] The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both the loss and the extent thereof.[21] Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not.[22] If sufficient evidence is presented that it clearly appears that a loss of profits was suffered, it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case allows.[23] Our law limits recovery of lost profits only to the extent that they must not be based on mere speculation or conjecture.

Once the issue of damages is properly submitted to a jury, it is within the province of the jury to determine what amount will reasonably compensate the injured party. There is no legal basis for an instruction limiting the award of damages to the time period specified in an agreement not to compete, so long as the evidence provided establishes damages with reasonable certainty. Because the evidence supports instruction No. 7 and because the jury instructions, taken as a whole, indicate that the instructions correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, we find no reversible error.

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[20] *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978). Cf. *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985).

[21] See, *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

[22] *Id.*

[23] See, e.g., *Ferrell Const. Co. v. Russell Creek Coal Co.*, 645 P.2d 1005 (Okla. 1982).

(b) Expert Testimony

The evidence which Bridgeport Tractor presented in support of its claim for damages consisted primarily of the opinion of Wenande. Wenande is a certified public accountant and financial planner accredited in business valuation. Gary's Implement assigns that the district court erred in receiving, over Gary's Implement's foundational objections, Wenande's opinion testimony with regard to lost profits. Gary's Implement argues that the opinion testimony was improperly received, because Wenande's analysis covered the time period through 2007, the comparable businesses used in his analysis were not sufficiently similar, and his conclusions were not adequately justified because they were based on unexplained assumptions. We review for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.[24]

In arriving at his opinion on loss, Wenande testified that he utilized the "yardstick" or "comparison" approach, which compares the company's income to that of a comparable company. Wenande also considered the "but for" approach, which attempts to make a reasonable determination of what a company's profitability would have been but for a certain event.

In applying the yardstick approach, Wenande measured Bridgeport Tractor's business against the business of Bridgeport Tractor's sister stores, Wisconsin Tractor Parts and Downing Tractor Parts, both located in Wisconsin. Based on comparison of these companies, Wenande concluded that the competitive activity engaged in by Gary's Implement led to some loss of income. Wenande testified that the comparisons showed a deficiency of $1,845,000 between Bridgeport Tractor and Wisconsin Tractor Parts, and a deficiency of $1,742,000 between Bridgeport Tractor and Downing Tractor Parts. He explained that these deficiencies were calculated by comparing the companies' historical financial summaries, including gross revenue, costs of sales, operating expenses, and net income.

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[24] *Tolliver v. Visiting Nurse Assn., supra* note 8.

Wenande explained that he analyzed the financial information of the comparable companies, looked at the comparison of the financial results, and assumed the difference was due to the acts of competition. To explain this assumption, Wenande testified that because of the manner in which management conducted operations, similarities in the industry, and expectations for sales, the compared businesses should have performed similarly.

When Wenande was asked to state his ultimate opinion about whether the cause of loss was due to competition, the court sustained Gary's Implement's objection on foundation. After a bench conference, Wenande provided more detail regarding the comparable companies to support his conclusions, including when the companies were acquired and the similar management model and management teams. Wenande also explained that the companies' managers agreed that the operations were reasonably comparable for purposes of his calculation. Following this testimony, Wenande was again asked to state the possible cause of the losses suffered by Bridgeport Tractor; Gary's Implement interposed with an objection on foundation, which the court sustained. Wenande then explained how possible causes other than the acts of competition were ruled out through his analysis. Ultimately, Wenande was allowed to testify, over Gary's Implement's objection, that he "found no evidence of anything else that would have a proximate relationship to the difference other than the issue of competition."

Wenande also testified to his application of the "but for" approach to determine possible loss. His analysis began with a starting point of $1 million because Gary's Implement had generated approximately that amount of revenue in 1996 and 1997. Next, Wenande looked at the average annual growth of Wisconsin Tractor Parts and Downing Tractor Parts, which was approximately 7 percent over the period 1999 to 2002. Wenande then calculated what the revenue for Bridgeport Tractor would have been, assuming an average growth of 7 percent a year. He then did a second calculation, assuming a rate of annual growth at 10 percent. Wenande explained that he used the rate of 10 percent because, through discussions with Bridgeport Tractor's president, he learned that the

company was planning to implement a new business model and that this model "could improve the growth of this store in the future beyond the 7 percent." To reach an ultimate opinion on loss, Wenande testified, he considered the cost of operation to come to a net figure representing the calculated loss. Over Gary's Implement's foundation objection, the court admitted Wenande's conclusion that the range of loss Bridgeport Tractor suffered as a result of Gary's Implement's competition was $1,395,000 to $1,521,000.

[11] Though Gary's Implement asserted numerous objections to Wenande's testimony on the basis of foundation, Gary's Implement does not contend that Wenande does not qualify as an expert in the field or that his methodology is not commonly accepted. Rather, Gary's Implement asserts that Wenande's testimony was not supported by adequate financial data, that the data Wenande analyzed was inappropriate, that the comparables utilized in forming his opinion were not truly comparable, that the conclusions drawn from the comparable analysis were not justified, and that Wenande made assumptions with no proper basis in fact to support his conclusion on damages. These allegations focus on the facts and data relied upon by Wenande, not his qualifications or the methodologies which he employed.

Neb. Rev. Stat. § 27-703 (Reissue 2008) states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In addition, we have said that expert testimony should not be received if it appears the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and that where the opinion is based on facts shown not to be true, the opinion lacks probative value.[25] The opinion

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[25] *Nebraska Nutrients v. Shepherd, supra* note 12; *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

must have a sufficient factual basis so that the opinion is not mere conjecture or guess.[26]

Our cases distinguish between the circumstance in which an expert's opinion on damages is based either upon a misconception of the applicable law or upon factual assumptions shown to be untrue or wholly unsupported by the record and the circumstance where there is a factual weakness in the underpinnings of an opinion.[27] In the former, the opinion is inadmissible, whereas in the latter, the opinion is admissible and the factual weakness goes to the weight and credibility as determined by the trier of fact.[28]

The record does not indicate that Wenande relied upon any factual assumptions that have been shown to be untrue or that are wholly unsupported by the record. It is arguable that factual weaknesses in the underpinnings of the opinion exist insofar as the comparables utilized by Wenande have distinguishing characteristics, and the financial data he considered went outside the time period specified by the noncompetition agreement. But such weaknesses go to the weight of his testimony, not its admissibility. The jury was free to discount Wenande's conclusions if it found that the comparables were not truly comparable or that his analysis did not conform to a specified timeframe. These issues were appropriately examined to allow the jury to make such a determination.

On cross-examination, Wenande acknowledged that the time period covered by his analysis did not directly correspond with the agreement not to compete. Wenande stated that he relied on such data, but did not explain, and was not asked, how this data was utilized. We will not assume Wenande used such data improperly.

[12] Wenande also acknowledged that both comparable companies had greater sales than those of Bridgeport Tractor. On direct examination, he explained that he considered the different markets in which the comparable companies were

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[26] *Id.*

[27] *Nebraska Nutrients v. Shepherd, supra* note 12.

[28] *Id.*

situated. Wisconsin has a larger population and more farms than Nebraska, while Nebraska farms tend to be larger than Wisconsin farms. Gary's Implement argues that Wenande cannot assume that the loss experienced by Bridgeport Tractor is attributable to Gary's Implement, because the comparables were not comparable and the financial data considered was from the wrong timeframe. But when an assumption used by an expert is not proved untrue or to be without any basis in fact, whether the stated grounds for the assumption are credible is a jury question.[29] Wenande's assumptions, reliance on facts, and ultimate conclusions were explored on cross-examination. And Gary's Implement was free to attempt to discredit Wenande's conclusions through presentation of its own expert and argument to the jury. Once Wenande's testimony was properly submitted, the jury was free to give weight to his testimony in determining an appropriate award of damages.

[13] Gary's Implement's objections at trial and arguments on appeal assert a challenge to the factors which Wenande considered in forming his opinions. While recognizing the principle that an expert's opinion must have a sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, we have stated that an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider.[30] Such matters go to the weight and credibility of the opinion itself and not to its admissibility.[31] Based upon our review of the record, it appears that Wenande relied on an adequate factual basis to form his opinion.

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.[32] We conclude that the district court did

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[29] See *Little v. Gillette*, 225 Neb. 70, 402 N.W.2d 852 (1987).

[30] *Nebraska Nutrients v. Shepherd, supra* note 12.

[31] *Id.*

[32] See *id.*

not err in receiving Wenande's opinions regarding lost profits over Gary's Implement's objections.

2. Bridgeport Tractor's Motion for Restitution

Bridgeport Tractor cross-appeals the denial of its motion for restitution. Bridgeport Tractor asserts that denial of the motion for restitution was error because Gary's Implement still holds the financial fruits of execution on a vacated judgment. Because restitution is not appropriate in the present case, we affirm the district court's denial of Bridgeport Tractor's motion for restitution.

[14] The right to restitution as alleged in Bridgeport Tractor's motion was long ago recognized in Nebraska.[33] The right of restitution may be enforced by proceedings in the lower court in the same cause, or by an independent action or suit.[34] While it is true that Bridgeport Tractor could have properly sought restitution in a separate proceeding, the remedy pursued by motion was appropriate. Where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.[35] The relief sought in Bridgeport Tractor's motion for restitution must be addressed on appeal in accordance with the procedure by which it was originally brought. We therefore address the merits of Bridgeport Tractor's motion for restitution.

[15] The Restatement of Restitution defines the general rule of restitution based on judgments subsequently reversed: "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract

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[33] See, *Horton v. Hayden*, 74 Neb. 339, 104 N.W. 757 (1905); *State v. Horton*, 70 Neb. 334, 97 N.W. 434 (1903); *Horton v. State*, 63 Neb. 34, 88 N.W. 146 (1901); *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320, 83 N.W. 77 (1900).

[34] See, *Horton v. Hayden, supra* note 33; *Hier v. Anheuser-Busch Brewing Ass'n, supra* note 33. See, also, 5 C.J.S. *Appeal and Error* § 1162 (2007).

[35] *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

that payment is to be final . . . ."[36] It is the duty of the court to compel restitution upon the reversal of a judgment which has been executed.[37] However, restitution is not in all cases a matter of absolute right.[38] Restitution may be denied where the party in possession of the money or property in question is equitably entitled to retain it[39] or where the money has been paid or property taken otherwise than in pursuance of the judgment or decree which has been reversed.[40] The court indicated that Bridgeport Tractor was not entitled to restitution, because the sums paid were independent of the judgment reversed and because the doctrine of unclean hands precluded recovery.

Bridgeport Tractor contends that our opinion in *Gary's II* controls the issue of restitution, citing the rule that generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it.[41] However, Bridgeport Tractor concedes that our previous opinions regarding the controversy between these parties did not determine the issue of restitution. *Gary's II* therefore is not controlling. For this reason, it was the duty of the district court, on Bridgeport Tractor's motion, to determine whether this was a case in which restitution was a matter of right or whether the case presented an exception to the rule in which the court, in the exercise of sound discretion, would not order restitution.[42] This court has stated that restitution is not a mere right.[43] It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the

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[36] Restatement of Restitution § 74 at 302-03 (1937).

[37] *Horton v. Hayden, supra* note 33.

[38] *Id.*

[39] See, e.g., *Gould v. McFall*, 118 Pa. 455, 12 A. 336 (1888).

[40] See, e.g., *Sanger Lum. Co. v. Western Lum. Exchange*, 128 Wash. 335, 222 P. 609 (1924).

[41] *Gary's II, supra* note 2.

[42] See *State v. Horton, supra* note 33. See, also, *Bank of America, etc., v. McLaughlin*, 37 Cal. App. 2d 415, 99 P.2d 548 (1940); *Healy v. Wostenberg, et al.*, 47 Wyo. 375, 38 P.2d 325 (1934); *Market Nat. Bk. of N. Y. v. Pac. Nat. Bk.*, 102 N.Y. 464, 7 N.E. 302 (1886).

[43] *Johnson v. Ruhl, supra* note 10.

justice of the case does not call for it.[44] We therefore review the district court's denial of Bridgeport Tractor's motion for restitution for an abuse of discretion.

Bridgeport Tractor's claim for restitution is necessarily controlled by a deed of trust executed on July 15, 1998. The deed of trust names Dyke as trustor, an attorney as trustee, and Gary's Implement as beneficiary/lender. At the time of execution, Dyke was a shareholder and president of Bridgeport Tractor. The motion for restitution seeks sums paid by Dyke to Gary's Implement at a trustee's sale of the property described in the deed of trust.

The deed of trust states that it was executed for the purpose of securing "[p]ayment of the following obligations (collectively the 'Obligations') payable by [Bridgeport Tractor] to [Gary's Implement]: A Non-Competition Agreement of this date[, July 15, 1998,] with a balance due of $25,000; and A Promissory Note of this date[, July 15, 1998,] in the principal amount of $500,000 . . . ." It is clear that the above-referenced obligations secured by the deed of trust were the subject of the litigation below, and the original money judgment in favor of Gary's Implement. However, it is not clear whether our reversal of the original judgment defeated any other rights or obligations stipulated in the deed of trust. The deed of trust provides various events of default:

> a. [Bridgeport Tractor's] failure to make a payment of principal or interest or any other amount secured when due.
>
> b. [Gary's Implement's] expenditure of any amounts to protect the Trust Estate.
>
> c. A filing by or against [Dyke] or [Bridgeport Tractor] of an action relating to bankruptcy, insolvency or other relief for debtors, or the appointment of a trustee, receiver, or liquidator for [Bridgeport Tractor] or of the Trust Estate, or if [Dyke] makes any general assignment for the benefit of creditors.
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> d. [Dyke's] failure for 30 days after written notice from [Gary's Implement] to (i) pay delinquent taxes and

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[44] *Id.*

> assessments, (ii) provide insurance as agreed, (iii) keep the real [estate] and improvements in good repair [or] make repairs and restoration caused by previous waste, or (iv) to comply with any other terms of this Deed of Trust or any other Loan Instruments [including the noncompetition agreement and promissory note].

The deed of trust further states:

> [Dyke] shall not sell, transfer, or otherwise convey in any manner all or any part of the Trust Estate or interest in it without [Gary's Implement's] prior written consent. . . . If a sale, transfer, or conveyance occurs, [Gary's Implement] may declare all sums secured by this Deed of Trust to be immediately due and payable, and/or cause Trustee to file a notice of default.

In the event of default, the deed specifies that Gary's Implement may demand that the trustee exercise the power of sale granted in the deed. Under the power of sale provision,

> [i]f [Gary's Implement] elects to foreclose by exercise of the Power of Sale, [Gary's Implement] shall notify Trustee and shall deposit with Trustee this Deed of Trust and the Obligations [on the noncompetition agreement and promissory note] along with any receipts and evidence of expenditures made and secured as Trustee may require.
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> a. Upon receipt of the notice from [Gary's Implement], Trustee shall record, publish, and deliver to [Dyke] the Notice of Default and Notice of Sale as required by law. Trustee shall, after the appropriate time as required by law and after recording the Notice of Default and after giving Notice of Sale as required by law, sell the Trust Estate at the time and place of sale fixed by it in the Notice of Sale, either as a whole, or in separate lots or parcels or items as Trustee shall deem appropriate, and in the order as it may determine, at public auction to the highest bidder for cash payable at the time of sale. Trustee shall deliver to the purchaser or purchasers its deed or deeds conveying the property sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of their

> truthfulness. Any person, including [Dyke], [Bridgeport Tractor], Trustee, or [Gary's Implement], may purchase at the sale and [Dyke] covenants to warrant and defend the title of the purchaser.
>
> b. As may be permitted by law, after deducting all costs, fees, and expenses of Trustee and of this Trust, including costs of evidence of title in connection with the sale, Trustee shall apply the proceeds of sale to payment of (i) all sums expended or advanced under the terms of the Loan Instruments [including the noncompetition agreement and promissory note] which remain unpaid, with accrued interest, (ii) all other sums then secured by this Deed of Trust, and (iii) the remainder, if any, to the person or persons legally entitled to the balance.

Following execution of the deed of trust, the following events took place. As of July 17, 2003, Bridgeport Tractor had refused to make payments on the obligations secured by the deed of trust in the amount of $632,225. These obligations represented deferred payments for the purchase of Gary's Implement by Bridgeport Tractor. The original judgment in favor of Gary's Implement's breach of contract action was entered on July 22 in the amount of $632,225 plus interest. On July 31, a notice of default was filed by the trustee named in the deed, citing Bridgeport Tractor's failure to make payments on the secured obligations. On August 1, Dyke transferred the above-referenced property to Bridgeport Tractor. Immediately thereafter, on August 7, Bridgeport Tractor filed a chapter 11 bankruptcy petition in South Dakota. On April 2, 2004, the case was dismissed on the determination that the petition was filed in bad faith.

Gary's Implement sent a notice of trustee's sale to Dyke on April 15, 2004. The sale was held on May 18, wherein Dyke paid $476,000 to purchase the property via trustee's deed. On June 8, Gary's Implement's attorney sent a letter to Bridgeport Tractor's attorney indicating that the $476,000 paid at the trustee's sale would be applied to the original judgment minus the costs and fees of the transaction. Bridgeport Tractor's attorney responded on June 14, acknowledging the letter and stating there was no objection to the deduction of the fees. The record

reflects that Dyke retains ownership of the property and that Gary's Implement retains the sums paid at the trustee's sale.

Bridgeport Tractor asserts that the sums collected by Gary's Implement at the trustee's sale must be returned to Bridgeport Tractor because "they represent payments on debt the jury below concluded Gary's [Implement] cannot collect due to its own contractual breaches."[45] Gary's Implement argues that restitution is improper because the sums were paid on property sold under the power of sale granted by the deed of trust independent of the subsequently reversed money judgment. The issue presented for our review is limited to whether the district court abused its discretion in overruling Bridgeport Tractor's motion for restitution.

Bridgeport Tractor correctly states that we have recognized that restitution of real estate sold in execution of a judgment is proper after the judgment is set aside.[46] Bridgeport Tractor argues that the trustee's sale in the instant case is analogous to the execution sale in *Coon v. O'Brien*.[47] We disagree. The property sold in *Coon* was sold for the express purpose of executing a judgment. The present case is distinguishable. Here, it is unclear whether the trustee's sale was commenced for the purpose of executing a judgment or for other legally sound reasons.

Where money has been paid or property has been transferred under a judgment subsequently reversed, a court issuing such judgment has power to remedy the consequences of its error and to order restitution.[48] This power is inherent, and should be exercised to remedy a party's wrongful gains on the erroneous judgment.[49] When the district court has jurisdiction over the

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[45] Brief for appellee at 42.

[46] See *Coon v. O'Brien*, 107 Neb. 427, 186 N.W. 340 (1922).

[47] *Id.*

[48] Restatement, *supra* note 36, comment *b*.

[49] See *Hier v. Anheuser-Busch Brewing Ass'n, supra* note 33. See, also, *Rogers v. Bill & Vince's, Inc.*, 219 Cal. App. 2d 322, 33 Cal. Rptr. 129 (1963); *DeMayo v. Lyons*, 360 Mo. 512, 228 S.W.2d 691 (1950); *Turner v. Ewald etc.*, 295 Ky. 764, 174 S.W.2d 431 (1943); *Smith v. Phillips*, 175 La. 198, 143 So. 47 (1932).

parties and the amount of overpayment is readily determinable or conceded, we see no reason why the court should not enter judgment.[50] However, the context of Bridgeport Tractor's motion for restitution did not place the district court, nor does it place this court, in a position where a right to restitution can be readily ascertained. Under the circumstances of the case, a court will not order a return of the money in controversy when it is not a proper case in which to summarily order a return of the money before the rights of the parties have been adjudicated in an action at law.[51]

The respective rights of the parties pursuant to the deed of trust likely govern the issue of who is entitled to retain the sums paid at the trustee's sale. Because the deed of trust was not interpreted below, it cannot be appropriately considered on appeal. Specifically, it has yet to be determined whether Gary's Implement's power of sale under the deed of trust was affected by the reversal of the original judgment. It has also yet to be determined whether Dyke was indeed acting on behalf of Bridgeport Tractor in executing the deed of trust or in purchasing the real estate subject thereto at the trustee's sale. We also do not address whether Dyke is a party necessary to afford relief on this claim. Further, we do not address whether our reversal of the original judgment on the obligations secured by the deed of trust defeated any or all other grounds for default which afforded Gary's Implement the power of sale. To order the relief sought by Bridgeport Tractor—a money judgment in the amount of the sums paid at the trustee's sale—the respective rights of the parties under the deed of trust must first be determined. The foregoing issues need not be determined for the purposes of our review. Such determinations are clearly not contemplated by the general rule of restitution on sums paid pursuant to judgments subsequently reversed. Accordingly, we determine that restitution was properly denied below.

We make no determination as to whether Gary's Implement was unjustly enriched by the sums paid by Dyke at the trustee's sale. This claim was not pleaded or litigated below; we therefore

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[50] See *Schwennen v. Abell*, 471 N.W.2d 880 (Iowa 1991).

[51] See *Horton v. Hayden, supra* note 33.

cannot address it on appeal. We also do not determine whether Gary's Implement is entitled to retain the sums paid at the trustee's sale pursuant to its rights granted by the deed of trust. Such a finding requires inquiry beyond whether Bridgeport Tractor is owed restitution based on reversal of the original judgment. Because these matters have not been fully litigated, we note that our present determination does not preclude the parties from raising such claims in the case currently pending in district court.

The facts underlying Bridgeport Tractor's cross-appeal indicate that this is not a proper case for restitution on the basis of a judgment subsequently reversed as we have recognized it. Therefore, the district court did not abuse its discretion in overruling Bridgeport Tractor's motion for restitution. For the foregoing reasons, we find Bridgeport Tractor's assignments of error on cross-appeal to be without merit.

VI. CONCLUSION

We find that jury instruction No. 7 does not amount to prejudicial error and that Wenande's expert testimony was properly admitted at trial. We also find that the district court did not err in denying Bridgeport Tractor's motion for restitution. Therefore, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONALD L. SIDZYIK, APPELLANT.
795 N.W.2d 281

Filed April 1, 2011. No. S-10-278.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
3. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a