

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EARLY BIRD CAR WASH, INC.,	:	NO. CV-2021-00448
MR. BIRD’S CUSTOM CAR WASH	:	
EQUIPMENT, LLC, and MICHAEL J.	:	
EARLY,	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	CIVIL ACTION - LAW
DEAN PIERMATTEI and RHOADS &	:	
SINON, LLP,	:	
Defendants.	:	Motions in Limine

ORDER ON MOTION IN LIMINE NO. 1 FILED MAY 8, 2026

This matter came before the Court on May 26, 2026, for oral argument on four (4) Motions in Limine filed the Defendants. Although the Complaint was filed more than five (5) years ago, this matter became mired in very contentious discovery proceedings. Discovery disputes culminated in the Opinion and Order of the Honorable Eric R. Linhardt dated September 18, 2023, which contained an accurate description of the early procedural history of this matter. Plaintiffs allege legal malpractice against the Defendants in connection with the representation of the Plaintiffs in a prior contract dispute (hereinafter the “Underlying Action”).

In Motion in Limine No. 1, Defendants seek to preclude from evidence at trial the testimony of Plaintiff expert witness Douglas S. King (hereinafter “King”). Simply stated, Defendants contend that the proposed expert testimony of King regarding Plaintiffs’ lost profits is too speculative to be admitted into evidence.

QUESTION PRESENTED:

WHETHER THE PROPOSED TESTIMONY OF DOUGLAS S. KING, AS REFLECTED IN HIS EXPERT REPORT, SHOULD BE PRECLUDED FROM PLAINTIFFS’ EVIDENCE AT TRIAL.

ANSWER TO QUESTION PRESENTED:

THE PROPOSED TESTIMONY OF DOUGLAS S. KING WILL NOT BE PRECLUDED FROM PLAINTIFFS’ EVIDENCE AT TRIAL, BUT THE COURT RESERVES JUDGMENT ON WHICH ASPECTS OF PLAINTIFFS’ DAMAGE CLAIM, IF ANY, WILL BE SUBMITTED TO THE JURY FOR CONSIDERATION.

DISCUSSION:

Defendants accurately observe that the expert report of Douglas S. King dated August 10, 2026, is rife with assumptions. He assumed the accuracy of a great deal of information provided by the Plaintiffs, without critical investigation. He assumed that Plaintiffs would successfully secure and market a successful self-service car wash payment system known as “Baywatch,” despite the history of problems with the system. He assumed that every one of Plaintiffs’ customers who purchased a competing system of that nature would have chosen to purchase the Baywatch system from Plaintiffs, as opposed to the system which they ultimately chose. He assumed (without stated justification) that 50% of Plaintiff’s other customers would have eventually chosen to purchase a Baywatch system from Plaintiffs.

Since Plaintiffs cannot establish the facts listed above, the Court infers that Plaintiffs will undertake to secure opinion testimony from King based upon one or more hypothetical questions. The settled law of this Commonwealth is that experts are permitted to based their opinions upon such facts as the jury would be warranted in finding, from the evidence. In the matter of *Battistone v. Benedetti*, 385 Pa. 163, 169-170, 122 A.2d 536, 539 (Pa. 1956), our Supreme Court observed as follows:

The defendants complain that some of the assertions in the hypothetical question put to the expert witness Kalinsky were contradicted by testimony presented by the defendants. A hypothetical question rarely encompasses the assertions of both the proposing and the opposing parties. The scope of a hypothetical question was excellently described by Justice Mestrezat in the case of *Gillman v. Media, M., A. & C. Electric R. Co.*, 224 Pa. 267, 274, 73 A. 342, 344, where he said.

‘As, however, it is the province of the jury to determine the facts, an expert cannot be asked his opinion upon the whole evidence in the case where that is conflicting; but a party may state specifically the particular facts he believes to be shown by evidence or such facts as the jury would be warranted in finding from the evidence, and ask the opinion of the expert on such facts, assuming them to be true. The other side may likewise put a hypothetical question based upon such facts as he alleges are shown by the evidence or the jury would be justified in finding from the evidence. Neither side is required in putting the hypothetical question to include therein any other facts than those which he may reasonably deem established by the evidence.’

Defendants correctly cite *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (Pa.Super. 1983), for the proposition that an award of damages for lost profits may not be based upon speculation, particularly in the case of a “new and untried” business.

It is well settled law in Pennsylvania that loss of profits are recoverable upon proper proof both in contract, *See Taylor v. Kaufhold*, 368 Pa. 538, 84 A.2d 347 (1951); *Western Show Co. v. Mix*, 308 Pa. 215, 162 A. 667 (1932), and in tort. *See, Kosco v. Hachmeister, Inc.*, 396 Pa. 288, 152 A.2d 673 (1959); *Ashcraft v. C.G. Hussey & Co.*, 359 Pa. 129, 58 A.2d 170 (1936). The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable. *R.I. Lampus Co. v. Neville Cement Products Corp.*, 474 Pa. 199, 378 A.2d 288 (1977); *Frank B. Bozzo, Inc. v. Electric Weld Division*, 283 Pa.Super. 35, 423 A.2d 702 (1980), allocatur denied; Restatement, 2d, Contracts § 351.

A review of the cases in Pennsylvania involving lost profits shows that the courts are reluctant to award them, except when the business concerned is established and not “new and untried.” Also, this kind of damage is usually seen in the context of a breach of contract. There are no cases in Pennsylvania which deal with the award of damages for anticipated lost profits in a fraud case. Though damages for alleged lost profits can be given, they cannot be recovered where they are merely speculative. What our courts have demanded of the evidence to prove loss of profits was addressed in the recent case of *Pollock v. Morelli*, 245 Pa.Super. 388, 397–98, 369 A.2d 458, 463 (1976):
... Evidence must be introduced which forms a sufficient basis for estimating with reasonable certainty the amount of the lost anticipated profits. *Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1969), *121 cert. denied, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970); *Western Show Co. v. Mix*, 308 Pa. 215, 162 A. 667 (1932); Restatement of Contracts § 331 (1932). Whereas recovery for the lost profits of an established business are considered ascertainable to a reasonable degree of certainty, *Guady v. Seaman*, 188 Pa.Super. 475, 149 A.2d 523 (1959), when a business is new and untried, courts have declared the measure of anticipated profits too speculative to provide a basis for an award of damages. **1259 *Exton Drive-In, Inc. v. Home Indemnity Co.*, supra; *Platou v. Swanton*, 59 N.D. 466, 230 N.W. 725 (1930). See also, *Carpenters' Local 1686 v. Wallis*, 205 Okl. 285, 237 P.2d 905 (1951); *Richker v. Georgandis*, 323 S.W.2d 90 (Tex.Civ.App.1959).

In applying the above established principles of law, the *Pollock* court found that lost profits could not be recovered by a dry-cleaning business which had only been in business for nine months before the landlord breached the contract. Because the business was new and untried, the proof of anticipated lost profits adduced at trial was too weak to support recovery.

The dissent in *Pollock* (written by Spaeth, J.) argued that the business was not “new and untried”: While it is true that appellants had operated the business for only nine months ..., their immediate predecessor had operated it for over a year.... Appellants presented evidence of the monthly receipts during their predecessor's tenure.... The business was therefore not “new and untried”, as the majority suggests it was. The majority seems to reach its conclusion that the business was “new and untried” by a comparison of appellants' business with the business in *Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1969), *cert. denied*, 400 U.S. 819, 91 S.Ct. 36, 27 L.Ed.2d 46 (1970). Such a comparison leads me to an opposite conclusion. In *Exton*, the business had never been in operation before the time of the alleged breach of contract. Thus appellants' business has been operated twenty-three *122 months longer than that in *Exton*; I suggest that is sufficient to remove it from the category of “new and untried”. The majority also cites *Guady v. Seaman*, 188 Pa.Super. 475, 149 A.2d 523 (1959). There we held that testimony as to lost profits was admissible based on three periods of actual operation of the business in question: eight and one-half months at a first location; two weeks and “two or three days” at the location where the defendant-lessor allegedly breached his duty to supply water; and an indefinite period of time (from sometime in 1954 until the time of trial) at a third location. The present case thus falls between the poles of *Exton* and *Guady*. For me, it is closer to *Guady* than to *Exton*. I would therefore hold that appellants presented sufficient proof of lost profits. *Id.* 245 Pa.Super. at 400, 369 A.2d at 464.

The most recent case in Pennsylvania which deals with damages for anticipated loss of profits is *General Dynafab, Inc. v. Chelsea Industries, Inc.*, 301 Pa.Super. 261, 447 A.2d 958 (1982) *Reargument denied* 8/4/82. That case was remanded by our court for a new trial on damages alone because the jury had been improperly instructed on the damages issue. The lower court was to allow evidence of lost profits to be introduced for the jury's consideration. In support of this decision, the court stated: Next, Chelsea asserts that lost profits may not be used as a measure of damages where, as here, a new business with no record of prior profitability exists. Decisions of this court and of our Supreme Court have suggested that damages for lost profits of a new business are too speculative. *Exton Drive-In v. Home Indemnity Co.*, 436 Pa. 480, 261 A.2d 319 (1979), *cert. den.* 400 U.S. 819, 91 S.Ct. 36, 37 L.Ed.2d 46 (1970); *Pines Plaza Bowling, Inc. v. Rossview, Inc.*, 394 Pa. 124, 145 A.2d 672 (1958); *Pollock v. Morelli*, 245 Pa.Super. 388, 369 A.2d 458 (1976). Nevertheless, our courts have held that damages may be assessed for loss of profit where such loss was reasonably

foreseeable to the parties at the time that the *123 contract was entered and where those damages are capable of proof of reasonable certainty. *Taylor v. Kaufhold*, 368 Pa. 538, 84 A.2d 347 (1951); *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 500 F.Supp. 1312 (W.D.Pa.1980); Restatement, Contracts, § 331 (1932).

In applying these controlling principles of law, the court went on to note: While it is arguable here that Dynafab was a newcomer to the business herein, nevertheless, unlike the plaintiffs in *Exton Drive-In*, supra, *Pines Bowling, Inc.*, supra, and *Pollock*, supra, Dynafab was able to show that there was *significant interest* in their product before the contract breach occurred. The record demonstrates that Dynafab had commitments for orders from four sources. That Dynafab could demonstrate a sales record of Fiberweld Products during the previous 1 ½ years. Evidence was submitted also concerning the projected sales, raw material needs and profitability of the Chelsea plant at Jersey Laminating and Finishing Company. Clearly, this evidence is not entirely of an unspeculative nature, however, we believe that if the jury believed it, it could come to a reasonable determination as to damages resulting from loss of future profits. Thus, we hold that the evidence should be submitted to the jury for it to decide its weight in the assessment of damages. See *Kasemer v. National Gas Distribution Corporation*, 279 Pa.Super. 334, 341 n. 1, 421 A.2d 226, 230 n. 1 (Spaeth, J. dissenting, 1980). At 265, 266, 447 A.2d at 960 (emphasis added).

The *Dynafab* court did not award lost profits to the business but held that the evidence of the alleged loss of profits should be introduced to the jury for them to determine if an award was proper. In doing this, the court applied the propositions advocated by Judge Spaeth in a footnote of his dissent in the *Kasemer* case³: 1) a business could be taken out of the “new and untried” category if it could show a “significant interest” in their product or service before the contract breach occurred, and 2) it is better that the jury hear the evidence of future lost profits and decide its weight than allow the court to exclude the evidence entirely. *Dynafab's* adoption of this “significant interest” language in *Kasemer* does not, however, change the law in Pennsylvania that a new business still has a heavier burden in proving that lost profits are sufficiently certain to be recovered. The *Dynafab* court considered the “significant interest” shown in a business as one of many factors which are important in determining if the evidence of lost profits is sufficient to allow it to be submitted to the jury for consideration. *Dynafab* does not hold that proof of a “significant interest,” by itself, is sufficient to support recovery of lost profits damages. The court concluded that the lower courts should liberally allow evidence of alleged lost profits to be submitted to the jury and let them decide if in light of the history of the business whether the amount of such profits could be estimated with reasonable certainty so as to allow recovery.

Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 120-124, 464 A.2d 1243, 1258-1260 (Pa.Super. 1983).

It appears that the Court must strike a balance between the need of the Plaintiffs to prove their damages, and the need to the Defendants to prevent a jury verdict based upon pure speculation. The Court is mindful that “the question of whether the expert's opinion is convincing or credible is a matter for the jury.” *Duquesne Light Co. v. Woodland Hills School District*, 700 A.2d 1038, 1047 (Pa. Cmwlth. 1997). With that principle in mind, the Court will permit the testimony, without prejudice to the Defendants to argue that the testimony was too speculative to permit the Court to submit Defendants’ claimed damages to the jury.

ORDER

And now, this ___ day of June, 2026, for the reasons more fully set forth above, Defendants’ Motion in Limine No. 1, is denied. Plaintiffs will be permitted to introduce at trial the testimony of Douglas S. King. Nothing set forth herein is intended to suggest that any aspect of Plaintiffs’ claimed damages will be submitted to the jury for consideration. The Court reserves that question for the time of trial.

BY THE COURT,

William P. Carlucci, Judge

cc: Court Administrator
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