

Summary of SC89576, Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.
Appeal from the Jefferson County circuit court, Judge Gary P. Kramer

Attorneys: Jokerst was represented by Bianca L. Eden and Jessica A. Mikale of Wegmann, Stewart, Dieffenback, Tesreau, Sherman & Eden PC in Hillsboro, (636) 797-2665; and Gateway was represented by Mark A. Kragel and William W. Cheeseman of the Law Office of William W. Cheeseman in Troy, (636) 528-5299.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The owner of a specialized vehicle sued the company whose employee caused a traffic accident in which the specialized vehicle was destroyed. The trial court entered judgment for the vehicle's owner, awarding damages for lost profits, replacement of the vehicle, interest on a loan the owner took out to replace the vehicle, and environmental cleanup costs associated with the accident. In a decision written by Judge Mary R. Russell, the Supreme Court of Missouri reverses the damages award for loan interest and affirms the rest of the judgment. All seven judges agree that the evidence supports the awards of environmental cleanup costs, that the vehicle owner should not have received damages for the loan interest – which already was included in the replacement costs – and that damages for loss of use of the vehicle were available to the vehicle owner. Five judges agree that the awards for lost profits and replacement costs were supported by the evidence and that the vehicle owner did not fail to mitigate its damages.

Chief Justice Stith, who wrote an opinion concurring in part and dissenting in part that is joined by one other judge, would reverse and remand (send back) the judgment as to the damages awards for loss of use and lost profits. She would allow the vehicle owner to show that it had loss-of-use damages in addition to the cost of replacement or repair, but it should be the owner's burden to show that these damages exist and are reasonable. Here, no such proof was offered as to loss of use, and the evidence in support of the lost profits damages award is speculative.

Facts: Gateway Foam Insulators Inc. owned two foam rigs – each equipped with a generator, installation equipment, foam insulation chemicals, and other tools and equipment – that it used together on job sites to expedite completion of its work. A traffic accident caused by an employee of Jokerst Paving & Contracting Inc. destroyed the newer of Gateway's foam rigs, along with most of its tools and equipment on the rig. Gateway also was billed for the environmental cleanup of the hazardous chemicals that spilled from the rig after the accident. After determining it could not afford to replace the rig outright, Gateway borrowed money to buy a used truck and the equipment necessary to convert that used truck into a foam rig. Gateway sued Jokerst, seeking money damages for replacing the foam rig, lost profits for loss of use of the rig, and payment for other costs associated with the rig's destruction. At trial, Gateway's accountant testified that, based on the company's business records and the construction market, she estimated Gateway's lost profits due to the loss of the foam rig ranged from \$120,000 to \$135,000. Jokerst's accounting expert testified that, based on his review of Gateway's tax returns, the company lost profits of approximately \$450 per day until the rig was operational. Jokerst's expert expressed doubt that lost profits could be calculated with a reasonable degree of

certainty given the number of potential variables. The trial court entered judgment in Gateway's favor, awarding \$120,000 in lost profits and \$68,500 for replacement damages for its destroyed rig, equipment and tools. The court also ordered Jokerst to pay more than \$11,700 for the interest on the loan Gateway had to take out to replace the damaged rig and nearly \$12,750 for the cost of the environmental cleanup associated with the collision. Jokerst appeals.

AFFIRMED IN PART AND REVERSED IN PART.

Court en banc holds: (1) The trial court properly awarded Gateway damages for lost profits as compensation for the harm Gateway suffered as a result of the accident.

(a) Traditionally, a plaintiff whose property is damaged and can be repaired can recover either the cost of renting similar property for the period of repairs or, if a rental is not available, lost profits for that repair period. Here, there was no ready replacement for the unique property that was damaged. Contrary to Jokerst's assertions, Gateway has not been awarded a windfall of duplicative damages. Gateway was unable to afford to purchase a ready-to-operate replacement foam rig, nor was such a rig available on the rental market. The replacement costs were awarded to restore Gateway's ability to operate its foam rig, and the lost profits were awarded to acknowledge that its business suffered while it was unable to operate its foam rig. Where, as here, the evidence supports awards for replacement damages and lost profits, there is no prohibition against awarding lost profits simply because property replacement monies also are awarded.

(b) Considering the evidence in the light most favorable to the trial court's determination, there was an adequate basis for the trial court to adopt the Gateway accountant's estimation of \$120,000 in lost profits. In her lengthy testimony, she noted that Gateway's post-collision decline in business came at a time when the construction industry was experiencing a boom; that her calculation factored in likely gross revenue, less various expenses, and considered negative factors impacting the construction industry; and that Gateway had increased its advertising spending before the collision but could not fulfill the demand for its insulation with only one foam rig. Gateway's evidence was not rendered merely speculative because Jokerst's accounting expert disagreed both with the Gateway accountant's calculation and with the idea that lost profits can be calculated with a reasonable degree of certainty. The evidence was sufficient to support the court's award of lost profits to Gateway.

(c) The trial court did not fail to consider whether Gateway acted reasonably to mitigate its damages. The record shows Jokerst failed to plead or preserve its mitigation argument that Gateway could have replaced its damaged foam rig more quickly, thereby waiving this argument. Nonetheless, there was sufficient evidence that Gateway exercised reasonable diligence to replace its foam rig in a reasonable time. Although Jokerst suggested at trial that Gateway's delays were unreasonable, it was in the discretion of the trial court – as the fact finder – to reject this explanation, instead giving credit to the Gateway witnesses' testimony that the delay was precipitated by Gateway's financial difficulties.

(2) The trial court erred in awarding more than \$11,700 in damages for the interest Gateway paid on the loan it took out to build a replacement foam rig. Gateway concedes that, under *Ameristar Jet Charter, Inc. v. Dobson International Parts, Inc.*, 155 S.W.3d 50 (Mo. banc 2005), it impermissibly would collect a double recovery if it were awarded the loan interest in addition to the replacement damages based on the reasonable value of its destroyed foam rig, which encompassed the interest.

(3) There was substantial evidence supporting the trial court's award to Gateway of nearly \$12,750 in cleanup costs for the environmental damage. Because Jokerst did not raise this issue before the trial court, it failed to preserve the issue for this Court's review. The trial court did not commit plain error, as the evidence before it included the court file for the default judgment entered against Gateway and in favor of the environmental cleanup company.

(4) When viewing the record in the light most favorable to the judgment, the trial court did not err in awarding Gateway \$68,500 in damages for replacing the foam rig. Gateway's damages for its destroyed rig are measured by assessing the difference between the rig's fair market value before and after the collision. It was the trial court's task to assess the credibility of all witness testimony. Here, Gateway's evidence showed that the pre-collision value of the rig was between \$75,000 and \$80,000; that \$4,000 worth of equipment and parts were recovered from the damaged rig; and that the damaged rig was sold for a salvage value of \$2,500.

Opinion concurring in part and dissenting in part by Chief Justice Stith: (1) The author concurs that Gateway is entitled to recover damages for loss of use for the reasonable period it would take to replace the foam rig. But because the recovery of loss-of-use damages in addition to replacement value is susceptible to abuse and speculative claims, the burden should shift to the party seeking loss-of-use damages to prove it could not have mitigated its damages further during the period for which it seeks loss-of-use damages. The author would send this case back to the trial court to give Gateway the opportunity to fill in these gaps in evidence.

(2) The author also dissents from the approval of Gateway's award of \$120,000 in lost profits because the record does not support this award. Gateway did not present evidence of specific business it had to turn away because it only had one foam rig or at least show a downturn in business it could attribute to serving fewer customers. The Gateway accountant's testimony simply showed that Gateway would have earned the construction industry average of lost profits less variable expenses, without any showing that its business historically had done so or had a reasonable basis to expect it would do so in the future. This type of speculation does not support the lost profits award.