IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGES TANNOURY, MD, PC, A NEVADA PROFESSIONAL CORPORATION D/B/A SPECIALTY MEDICAL CENTER; AND GEORGES TANNOURY, M.D.,
Appellants,
vs.
STACEY KOKOPELLI MEDICAL, P.C., A NEVADA PROFESSIONAL CORPORATION,
Respondent.

No. 58321

ORDER OF REVERSAL

This is an appeal from a district court order granting a new trial as to damages. Fifth Judicial District Court, Nye County; J. Charles Thompson, Judge.

Appellant Georges Tannoury, M.D., P.C., doing business as Specialty Medical Center (SMC), sued respondent Stacey Kokopelli Medical, P.C. (Kokopelli), for breach of contract following Dr. Michelle Stacey's resignation from SMC and opening of a new practice in violation of a covenant not to compete. Following a jury trial awarding SMC $500,000 in damages, the district court granted Kokopelli's motion for a new trial on the issue of damages, finding that the jury manifestly disregarded the court's instruction that damages for breach of a covenant not to compete must be shown with reasonable certainty. On appeal, SMC argues that the district court abused its discretion by granting the motion

for new trial because sufficient evidence of damages was produced at trial. We agree.[1]

This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). NRCP 59(a)(5) provides a district court with the discretion to grant a new trial where there is a "[m]anifest disregard by the jury of the instructions of the court." Thus, this court will affirm a district court's order granting a new trial where it "perceive[s] plain error or a showing of manifest injustice." *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975). Insufficiency of the evidence is not a ground for a new trial. *Id.* at 219-20, 533 P.2d at 467.

In a breach of contract action, "lost profits are generally an appropriate measure of damages so long as the evidence provides a basis for determining, with reasonable certainty, what the profits would have been had the contract not been breached." *Eaton v. J. H., Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978). Accordingly, the appropriate measure of

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[1]Stacey argues that because the trial transcript regarding SMC's estimated lost profits was not included in the record on appeal, but only upon this court's request following oral argument, we should not consider it, citing *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision."). *Cuzze* is not applicable here, where this court, of its own initiative, granted appellants leave to supplement the record with the transcript at issue. *Tannoury v. Kokopelli*, Docket No. 58321 (Order Directing Supplemental Briefing, Nov. 20, 2013). Accordingly, we conclude that this argument lacks merit.

damages for a breach of a covenant not to compete is lost profits. *See Nat'l Bank of Alaska v. J.B.L. & K. of Alaska, Inc.*, 546 P.2d 579, 590 (Alaska 1976); *Robert S. Weiss & Assoc., Inc. v. Wiederlight*, 546 A.2d 216, 226 (Conn. 1988); *TruGreen Cos., L.L.C. v. Mower Bros., Inc.*, 199 P.3d 929, 930 (Utah 2008); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 547 (Wyo. 1993).

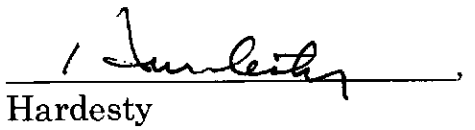
However, "damages need not be proven with mathematical exactitude, and . . . the mere fact that some uncertainty exists as to the actual amount of damages sustained will not preclude recovery." *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000).

In the present case, the evidence presented at trial clearly supports the jury's verdict. Dr. Stacey entered into a contract that required her to work for SMC for three years, but she left after 9.2 months. The amount awarded in damages was less than 20 percent of the $200,000-per-month estimated revenue and less than SMC sought at trial. Furthermore, this estimate did not include revenues SMC expected Dr. Stacey to generate for ancillary services. Because the supplemented record includes evidence of damages that support the jury's award of $500,000, we do not perceive plain error or manifest injustice.[2] *Fox*, 91

[2]Stacey also argues that it was entitled to judgment as a matter of law because SMC did not present sufficient evidence to prove damages, thus SMC did not present a prima facie case for a breach of contract claim. We reject this argument, as a plaintiff is entitled to nominal damages upon a breach of a covenant not to compete even where the plaintiff cannot prove actual damages. *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995).

Nev. at 219-20, 533 P.2d at 467. Accordingly, we

ORDER the judgment of the district court REVERSED.



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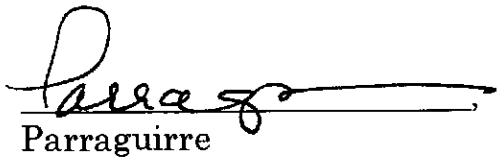

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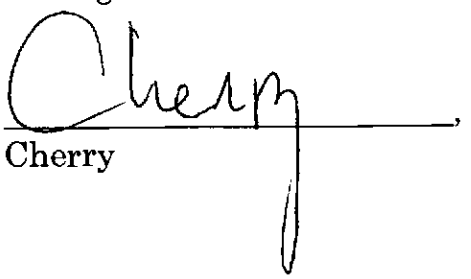

_____, J.
Cherry

cc: Chief Judge, The Fifth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Thomas J. Tanksley, Settlement Judge
Gordon Silver/Reno
Stovall & Associates
Nye County Clerk