[Cite as *Briggs v. GLA Water Mgt.*, 2014-Ohio-1551.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Thomas M. Briggs

Appellant

v.

GLA Water Management, et al.

Appellees

Court of Appeals Nos. WD-12-062
WD-12-063

Trial Court Nos. 2011CV0495
2011CV0434

DECISION AND JUDGMENT

Decided: April 11, 2014

* * * * *

Thomas Dillon and Rebecca E. Shope, for appellant.

Robert J. Bahret, Christine M. Gaynor and Andrew J. Ayers, for appellees.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that denied appellant Thomas Briggs' motion for judgment notwithstanding the verdict or, in the alternative, a new trial. Judgment was entered following a jury trial on appellant's complaint alleging breach of a commercial lease agreement and non-compete

agreement, and on appellees' counterclaim. For the reasons that follow, the judgment of the trial court is reversed.

{¶ 2} The claims in this matter arose out of business transactions surrounding appellee Charles Hamrick's purchase of an industrial water treatment business owned by appellant Thomas Briggs. The undisputed facts relevant to the issues raised on appeal are as follows.

{¶ 3} In 1978, Briggs founded Viking Chemicals of Northwest Ohio, later re-named GLA Water Management, Inc. ("GLA"), to provide industrial water treatment products and services to businesses in the northwest Ohio area. In 1982, Briggs hired Hamrick and in 1998, Hamrick became operating agent for GLA. Shortly thereafter, Briggs and Hamrick began discussing the sale of GLA to Hamrick upon Briggs' retirement. On November 17, 1999, Briggs and Hamrick executed several documents to accomplish the sale of the business, including a commercial lease agreement, a non-compete agreement and a personal guaranty. The 15-year lease agreement was drafted to enable Briggs to remain as owner of the building while GLA continued to operate out of that location. Pursuant to the lease, set to expire in December 2014, GLA would pay rent of $2,750 per month for the first five years and $4,750 each month for the remaining ten years. Pursuant to the non-compete agreement, GLA was to pay Briggs the sum of $3,500 per month for 15 years (from January 2000 through December 2014) in exchange for Briggs' agreement not to engage in any business or activity in competition with GLA within the states of Ohio, Indiana and Michigan for those 15 years. Under the guaranty,

signed by Hamrick in his individual capacity, Hamrick agreed to assume payments under the lease and the non-compete in the event they were not made by GLA.

{¶ 4} On June 8, 2011, Briggs filed a complaint for damages against Hamrick and GLA in which he alleged that GLA breached the commercial lease agreement by failing to timely pay the full amount of rent due, which had accrued to $47,500 as of May 2011. Briggs also alleged that, while he had fulfilled his obligation under the non-compete, GLA had failed to pay him the monthly amount of $3,500 in exchange for his compliance. Further, Briggs alleged that Hamrick breached the terms of the personal guaranty by failing to pay the amounts owed under the lease and the non-compete. Lastly, Briggs alleged that GLA had been unjustly enriched to Briggs' detriment in the amount of $116,000 in past due rent and non-compete payments, plus interest, attorneys' fees and expenses.

{¶ 5} On June 16, 2011, appellees GLA and Hamrick (hereafter, "GLA") responded by denying the allegations and asserting a counterclaim alleging that Briggs breached the terms of the non-compete agreement by secretly competing against the interests of GLA and Hamrick and by assisting others in efforts to compete against them. GLA specifically alleged that Briggs had benefitted financially and was liable to GLA for all amounts wrongfully paid him, and that Briggs had been unjustly enriched in an amount in excess of $300,000.

{¶ 6} On April 30, 2012, Briggs filed a motion for summary judgment on all issues. On May 24, 2012, GLA filed a brief in opposition in which it failed to submit

evidence of lost profits or any other money damages caused by Briggs' alleged breach. In his reply brief, Briggs asserted that lack of evidence of lost profits or any other damages caused by the alleged competition precluded GLA from prevailing as a matter of law.

{¶ 7} On June 6, 2012, the trial court granted partial summary judgment in favor of Briggs, finding that the lease agreement and the guaranty were breached. The trial court found that GLA had admitted that the monthly rent from August 2010 through June 2011 was never paid and that GLA disputed the amount owed, not the existence of a breach. Additionally, the trial court found that triable issues of fact existed on Briggs' remaining claims for breach of the non-compete agreement, breach of the personal guaranty as it related to the non-compete agreement, and unjust enrichment. Trial was further ordered on GLA's counterclaim for Briggs' breach of the non-compete agreement and unjust enrichment. The case proceeded to trial before a jury on the issue of the amount due Briggs under the lease agreement and the personal guaranty as it related to the lease.

{¶ 8} Trial commenced on August 22, 2013. The jury heard two days of testimony from Briggs; Hamrick; Charles Hamrick, Jr.; Tom Kurfis, owner of Clean Water Services ("CWS"), and his son Eric Kurfis; Matt Ross, CWS treasurer; Larry Latra, whose company previously sold chemicals to GLA; and Vicki Bollett, office manager for GLA. At the conclusion of GLA's case, Briggs moved for a directed verdict with respect to the counterclaim, arguing that GLA had not submitted any evidence as to

lost profits or other damages attributed to Briggs' alleged competitive activities and that, without damages, a breach of contract claim fails as a matter of law. The trial court denied the motion for directed verdict and stated that it would allow the matter to go to the jury based on an unjust enrichment theory. Briggs objected to the trial court's reasoning, arguing that the non-compete was an express written agreement which precluded any implied contract/unjust enrichment theory. After hearing arguments as to Briggs' motion for a directed verdict at the close of GLA's case, the trial court emphasized that the question of whether Briggs competed with GLA in violation of the non-compete agreement was a factual issue, and ruled that GLA had presented enough evidence of competing activity by Briggs for the matter to go to the jury.

{¶ 9} The jury returned a verdict of $118,750 in favor of Briggs on the breach of commercial lease and guaranty claims and a verdict of $353,500 in favor of GLA on the breach of the non-compete counterclaim. The jury also returned a verdict for GLA on Briggs' claim for breach of the non-compete agreement. The trial court awarded judgment to GLA in the off-set amount of $234,250.

{¶ 10} On September 5, 2012, Briggs filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. In his motion, Briggs again argued that there was no evidence before the jury that his conduct resulted in any monetary damages to GLA. He further argued once again that GLA was prohibited from proceeding on an alternative claim for unjust enrichment since there was an express contract executed between the parties. GLA did not dispute Briggs' recitation of the evidence, instead

arguing that it was entitled to restitution damages. In its judgment entry filed October 31, 2012, the trial court denied Briggs' motion for judgment notwithstanding the verdict. As to its denial of Briggs' motion for a new trial, the court found that the jury's award was supported by the evidence and that the damages were not excessive because they were based specifically on the monthly payments that were made to Briggs.

{¶ 11} Appellant Briggs sets forth the following assignments of error:

> The trial court committed reversible error in denying Mr. Briggs' motion for directed verdict where GLA failed to present any evidence of lost profits or other damages caused by Mr. Briggs' alleged breach of the noncompetition agreement.
>
> The trial court committed reversible error in ruling that the case was proceeding to the jury on a theory of unjust enrichment with breach of contract jury instructions, but then ruling post-trial that it was actually the contract claim that survived.
>
> The jury award amounts to the remedy of recession [sic] or an illegal forfeiture where there was no factual support or legal basis for the jury to require Mr. Briggs to disgorge all payments received under the noncompetition agreement from January 2002 until May 2010.
>
> The trial court erred in relying on *Yurchak v. Jack Boiman Constr. Co.* in denying Mr. Briggs' Motion for Judgment Notwithstanding the

Verdict or, Alternatively, a New Trial, where *Yurchak* was irrelevant and, even if applicable, was applied incorrectly by the trial court.

{¶ 12} Briggs argues, first, that the trial court erred by denying his motion for directed verdict and, second, that the court erred by denying his subsequent motion for judgment notwithstanding the verdict (JNOV). As to the motion for directed verdict, Briggs asserts in his first assignment of error that GLA failed to present any evidence of lost profits based on the alleged violation of the non-compete agreement. As to his motion for judgment notwithstanding the verdict, Briggs asserts in his fourth assignment of error that the trial court improperly relied on *Yurchak v. Jack Boiman Constr. Co.*, 3 Ohio App.3d 15, 443 N.E.2d 526 (1st Dist.1981), in denying the motion.

{¶ 13} The decision to grant or deny a Civ.R. 50(B) motion for JNOV is reviewed de novo. *Osler v. Lorain*, 28 Ohio St.3d 345, 347, 504 N.E.2d 19 (1986), equating the test regarding review of a JNOV to the test applied to review a directed verdict. A directed verdict is also reviewed de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4 (setting forth the standard for directed verdict).

{¶ 14} A JNOV is proper if, upon reviewing the evidence in a light most favorable to the nonmoving party and presuming any doubt to favor the nonmoving party, reasonable minds could come to but one conclusion, that being in favor of the moving party. Civ.R. 50(B); *Goodyear* at ¶ 3. Such a decision does not determine factual issues, but only questions of law, even though it is necessary to review and consider the evidence

in deciding the motion. *Id*. at ¶ 4. "Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [JNOV]." *Osler, supra,* quoting *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976). Similarly,

> when a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue. Civ.R. 50(A)(4); *Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg. Co.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 29; *Kroh v. Continental Gen. Tire, Inc*., 92 Ohio St.3d 30, 31, 748 N.E.2d 36 (2001).

{¶ 15} With respect to the denial of Briggs' motion for a directed verdict, upon our de novo review we must construe the evidence most strongly in favor of GLA, the party against whom the motion was directed. Upon our review of the evidence presented at trial, we are unable to find that reasonable minds could come to but one conclusion, that being adverse to GLA.

{¶ 16} The trial court heard testimony from several witnesses as to Briggs' actions after the non-compete was executed. In 2003, Briggs sold stock he owned in Great Lakes Associates in Youngstown, which he described as his last contact with the industrial

water treatment business. Then, at some point after Briggs sold GLA, his friend Tom Kurfis, who owned Clean Water Services, approached him and asked if he knew anyone who was experienced in water treatment. Briggs referred Kurfis to Briggs' son-in-law, Chris Henthorn, who had started his own industrial water treatment business, Majestic Water, several years prior in Mt. Vernon, Ohio. Briggs testified that he did not at any time help Henthorn develop clients for Majestic Water to the detriment of GLA's business. Briggs further testified that in July 2002, Henthorn was hired by Tom Kurfis, but denied having any direct involvement with that hiring process.

{¶ 17} In early 2005, Kurfis sought out Briggs' advice regarding communication problems within his company and the two discussed the issue over what was described as a social breakfast meeting. Briggs offered to take a look at CWS to see if he could provide some insight into the problems and did not expect any monetary compensation. Briggs subsequently spent approximately four hours at the business talking to four employees about personnel matters. Later, Briggs met informally with Kurfis and shared his thoughts on general business operations and offered recommendations which Briggs testified were not industry specific.

{¶ 18} Two weeks later, Kurfis asked Briggs to accompany Henthorn on a trip to a local company so that Henthorn could discuss a bid for a job cleaning boilers. Briggs testified he went along only as an observer, thinking it would be a good opportunity to spend the day with his son-in-law. Briggs had no further contact with CWS after 2005, when he began experiencing health problems. Briggs testified he never generated any

business for CWS or referred clients to the business. He did not personally generate any business for any competitor companies after the non-compete was executed and never encouraged clients to leave GLA, he stated. Upon cross-examination, Briggs testified that he did not recall making sales calls to any other businesses with his son-in-law. He also acknowledged that his presence at CWS on several occasions might have been noted in the minutes of the company's sales meetings.

{¶ 19} Tom Kurfis testified that he had a series of meetings with Briggs in which Briggs suggested that CWS expand into industrial water treatment. Kurfis stated that when he told Briggs he knew nothing about industrial water treatment, Briggs suggested bringing Henthorn into the business. When asked, Briggs told Kurfis that Chuck Hamrick would not have a problem with CWS focusing on smaller industrial institutions. Briggs did not produce anything in writing giving him permission to compete in that respect. Several months later, in 2002, Kurfis hired Henthorn and CWS undertook new endeavors in the industrial water treatment business. Kurfis testified that CWS would not have branched into the area of industrial water treatment if not for Briggs' overtures. Kurfis saw Briggs, whom he considered to be a consultant, in the CWS office several times after that, working on pricing and attending sales meetings. Kurfis also stated that Briggs helped save the company's contract with New Mather Metals in 2004. Kurfis further testified to seeing Briggs in the office several times between 2002 and 2005 when Briggs helped Henthorn with various problems and went on sales calls with Henthorn. According to Kurfis, Briggs had no involvement with CWS after 2005.

{¶ 20} Tom Kurfis, Jr., testified that he worked at CWS and was aware of Briggs going on sales or service calls with Henthorn on behalf of CWS on a few occasions. Matt Ross, treasurer and finance officer for CWS, testified that he saw Briggs at the CWS office on occasion working on leadership issues at meetings and was aware of Briggs assisting Henthorn with potential and existing accounts.

{¶ 21} Charles Hamrick, Jr., testified in his capacity as president of GLA Water Management and in his individual capacity. Hamrick testified that he never gave Briggs permission to compete with GLA and Briggs never requested such permission. Hamrick did not know that Briggs had been working with Henthorn and testified that he would not have approved. Hamrick admitted that at the time this case was filed, he was unaware of any written price quotes for goods or services Briggs prepared for any other company and had no firsthand knowledge of any competitive activities by Briggs. He agreed that he did not mention violating the non-compete to Briggs before 2009, by which time GLA was beginning to have financial problems. Hamrick further could not identify any company whose business was taken from GLA by Briggs.

{¶ 22} Based on the foregoing, including the testimony presented at trial and the applicable law, we find that the trial court did not err by denying Briggs' motion for a directed verdict and allowing the matter to go to the jury. Accordingly, Briggs' first assignment of error is not well-taken.

{¶ 23} We next consider Briggs' fourth assignment of error which asserts that the trial court erred by denying his motion for judgment notwithstanding the verdict or,

alternatively, a new trial. We note at the outset that Briggs does not argue against the verdict finding him guilty of violating the non-compete agreement. Instead, Briggs argues that the damages awarded GLA are not supported by law and that the trial court erred by relying on inapplicable case law when it denied his motion for JNOV.

{¶ 24} In its judgment entry denying appellant's motion for JNOV, the trial court found that, while reasonable minds could disagree as to which party breached the non-compete agreement, there was evidence to support the jury's finding that Briggs breached the agreement by setting up his son-in-law to operate a competing business and by visiting existing or potential clients. With respect to damages, the trial court found that, while there is a substantial body of law that restricts damages for breach of a non-compete agreement to lost profits, most of those cases involve contracts where there is a clause prohibiting competition without setting a specific amount to be paid as that part of the contract, as was done in this case. The trial court concluded that, unlike typical non-compete clauses, the agreement in this case provided for monthly payments and that "the measure of damages in this case should not be restricted to loss of profits or expectancy damages." The trial court found that the parties, by the terms of their agreement, designated the value of the non-compete clause through the agreed-upon monthly payments made by GLA to Briggs and that, therefore, GLA should not be restricted to prove damages by lost profits.

{¶ 25} In support of its ruling that GLA should not be restricted to prove damages by lost profits, the trial court cited *Yurchak v. Jack Boiman Constr. Co.*, 3 Ohio App.3d

15, 16, 443 N.E.2d 526 (1981), which held that "[w]hen a contract is breached, the innocent party may recover either his expectancy or the benefits he has conferred upon the breaching party by his performance under the contract." The trial court apparently interpreted *Yurchak* , which did not involve a non-compete agreement, as supporting GLA's argument that it was entitled to receive an amount of damages equal to all payments received by Briggs under the non-compete from January 2002 through May 2010 (the date of GLA's last payment to Briggs), despite testimony showing that the only evidence of Briggs allegedly competing with GLA arguably related to actions that occurred in 2005.

{¶ 26} With respect to the issue of damages, the trial court stated that it "generally agrees with Mr. Briggs" in that the jury's award was improper because the appropriate measure of damages for breach of a non-compete agreement is lost profits. The trial court even acknowledged that "there is a substantial body of law that restricts damages for breach of a non-competition agreement to lost profits." However, the trial court then found that the parties designated the value of the non-compete clause by the terms of their agreement setting forth the monthly payments from GLA to Briggs. The trial court also stated that "the concept of restricting juries to lost profits is to prevent them from speculating or reaching a damages award without proper evidentiary support." A review of the record herein shows, however, that the jury did in fact award damages without proper evidentiary support—that is, without any evidence whatsoever that GLA was harmed financially as a result of Briggs' actions.

{¶ 27} In this case, GLA requested restitution of amounts wrongfully paid to Briggs after Briggs' alleged breach of the non-compete agreement. GLA also states on appeal that it has never attempted to recover damages for any "expectation interest," such as lost profits, as a result of Briggs' breach. Briggs argues that GLA is not entitled to receive restitution, which would place GLA in a better position than it would hold if the agreement had not been breached. GLA disagrees with that argument, asserting that the damages awarded by the jury do not place it in a better position than it would have been had Briggs not breached the agreement. It is difficult for this court, however, to see the damages award in any other light than that offered by Briggs. Pursuant to the terms of the contract Briggs was to be compensated for his agreement not to compete. However, the parties chose not to include a liquidated damage clause in the event of a breach of the covenant not to compete.

{¶ 28} It axiomatic in contract law that in determining damages for a breach of contract, the injured party is entitled to compensation to be placed, insofar as can be done by a monetary award, in the same position as that party would have occupied if the contract had been performed. "Although a party damaged by the acts of another is entitled to be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred." *Triangle Properties, Inc. v. Homewood Corp.*, 10th Dist. Franklin No. 12AP-933, 2013-Ohio-3926, ¶ 52.

{¶ 29} As GLA would not have been entitled to receive the money back that Briggs had been paid for his agreement not to compete if the contract had been performed, the award of damages in this case is improper.

{¶ 30} It has been consistently held in Ohio that in a breach of a covenant not to compete, the usual measure of damages is lost profits. *Burckhardt v. Burckhardt*, 42 Ohio St. 474 (1885); *Yardmaster, Inc. v. Orris*, 11th Dist. Lake No. 9-305, 1984 WL 7415 (June 29, 1984).

{¶ 31} This is the overwhelming rule in a majority of other jurisdictions. *See Coffman v. Olson & Co., P.C.*, 906 N.E.2d 201 (Ind.2009) (In the absence of an enforceable liquidated damages clause, lost profits are an appropriate measure of damages in actions involving noncompetition provisions.); *Earth Alterations, LLC v. Farrell*, 800 N.Y.S.2d 744, 21 A.D.3d 873 (2005) (Proper measure of damages for breach of restrictive covenant not to compete is net profit of which plaintiff was deprived by reason of defendants' improper competition with plaintiff.); *Moses H. Cone Mem. Health Servs. Corp. v. Triplett*, 167 N.C.App. 267, 605 S.E.2d 492 (N.C.App.2004) (Health care provider's lost profits, rather than the bi-weekly payments provider had made to physician as consideration for physician's covenant not to compete, was appropriate measure of damages for physician's breach of covenant not to compete.); *Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc.*, 37 P.3d 458 (Colo.App.2001) (For a breach of an exclusive distributorship agreement, the proper measure of damages is the amount of profits, commissions, or discounts of which the

agent is deprived, excluding profits that are too remote or merely speculative.); *Baker v. Hooper*, 50 S.W.3d 463 (Tenn.App.2001) (Loss of profits which resulted from nail technicians' breach of non-compete clause with salon was proper measure of damages.); *Gen. Auto Parts Co., Inc. v. Genuine Parts Co.,* 132 Idaho 849, 979 P.2d 1207 (1999) (In covenant not to compete cases, the proper measure of damages is the impairment of goodwill and the plaintiff's lost profits.); *Lenco Pro, Inc. v. Guerin,* 1998 Mass.App.Div. 10, 1998 WL 15936 (Jan. 13,1998) (Appropriate damages in action for violation of noncompetition clause were income or profits lost to former employer.); *Corson v. Universal Door Sys., Inc.*, 596 So.2d 565 (Ala.1991) (Correct measure of damages to employer in action for breach of nonsolicitation covenants contained in employment contracts is amount of loss suffered by employer due to former employee's breach; objective is to restore employer to position that it would have occupied had it performed work.); *Camel Invests., Inc. v. Webber*, 468 So.2d 340 (Fla.App.1985) (Measure of damages for breach of noncompetition agreement is actual damages suffered as a result of the breach, which is generally lost profits.); *Hyde v. C M Vending Co., Inc.*, 288 Ark. 218, 703 S.W.2d 862 (1986) (Profits seller of business earned by conducting food vending business in violation of restrictive covenant were irrelevant on question of buyer's damages; buyer was entitled to recover only his own lost profits.); *Gann v. Morris,* 122 Ariz. 517, 596 P.2d 43 (Ariz.App.1979) (Buyer of small silk screening business would be entitled to lost profits for sales made in violation of enforceable covenant not to compete.); *Faust v. Parrott,* 270 N.W.2d 117 (Minn.1978) (Generally,

damages awarded for breach of covenant not to compete are business loss suffered as consequence of such breach; portion of initial purchase price of the business allocated to good will does not normally serve as measure of damages.); *Vermont Elec. Supply Co. v. Andrus*, 135 Vt. 190, 373 A.2d 531 (1977) (Measure of damages for breach of noncompetition agreement was former employer's provable loss and not gain accrued to former employee by reason of breach; and former employer was entitled to recover only those profits lost on sales which he might reasonably have made, but for former employee's breach, and was not entitled to recover profits on all sales by former employee.); *National Bank of Alaska v. J. B. L. & K. of Alaska, Inc.*, 546 P.2d 579 (Aka.1976) (Measure of damages for breach of covenant not to compete is generally not profits earned by breaching party, but rather lost profits of party asserting breach.); *Johnson v. Jones*, 1 Tenn.App. 24 (Tenn.App.1925) (Where a doctor for a valid consideration agrees to refrain from practicing medicine in a given locality he is liable in damages for the breach of his contract and the measure of damages is amount contracting party has actually been damaged.)

{¶ 32} The jury award to GLA of $353,500 is equal to 101 monthly payments to Briggs beginning January 2002 which, based on the relevant interrogatory related to the breach, is the date the jury determined Briggs first failed to perform his duties under the agreement.

{¶ 33} In denying Briggs' motion for JNOV, the trial court inferred that the parties in 1999 determined the value of the non-compete agreement to be reflected by GLA's

monthly payments to Briggs, thereby releasing GLA from any requirement that it prove damages for breach in the form of lost profits. While Briggs did not challenge the jury's finding that he violated the non-compete, he did assert that the breach did not cause GLA any monetary damage. We agree and find that GLA did not offer any evidence of monetary damages. Therefore, while we do not find error in the verdict as to Briggs' violation of the non-compete, we find that the monetary damages awarded by the jury have no basis.

{¶ 34} Briggs' motion for judgment notwithstanding the verdict was made with regard to GLA's counterclaim for breach of the non-compete agreement and the jury's verdict awarding GLA damages in the amount of $353,500 against Briggs. We find that the trial court erred by declining to interfere with the jury's verdict as to monetary damages and denying Briggs' motion as to those damages. Accordingly, the trial court's order journalized November 1, 2012, is reversed as to the denial of Briggs' motion for judgment notwithstanding the verdict or a new trial. Since appellant Briggs did not contest in his motion or on appeal any other aspects of the jury's verdicts, those verdicts stand. Appellant's fourth assignment of error is well-taken.

{¶ 35} Based on the foregoing, appellant Briggs' second assignment of error is moot and his third assignment of error is well-taken.

{¶ 36} Upon consideration whereof, the judgment of the Wood County Court of Common Pleas denying appellant's motion for judgment notwithstanding the verdict is

reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are assessed to appellees pursuant to App.R. 24.

Judgment reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE