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# No Summary Judgment for You! One State's (Unjustified) Treatment Of Contract Claims for Cost Profits

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# NO SUMMARY JUDGMENT FOR YOU! ONE STATE'S (UNJUSTIFIED) TREATMENT OF CONTRACT CLAIMS FOR LOST PROFITS

ANDREW F. HALABY\*

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## I. INTRODUCTION

Arizona law—like that of most other jurisdictions—requires that a plaintiff prove damages for loss of future profits (hereinafter “lost profits damages”) with “reasonable certainty.” And as in most other jurisdictions, Arizona law also requires entry of summary judgment under certain well-defined circumstances. Yet even though Arizona courts have been deciding lost profits claims in breach of contract cases since before statehood,<sup>1</sup> not one has held in a reported decision that a trial court may enter summary judgment against a plaintiff on such a claim.<sup>2</sup> Moreover, Arizona trial courts are decidedly reluctant to award summary judgment on such claims. That reluctance is not surprising, not only because of the dearth of

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<sup>1</sup> See *Providence Gold Mining Co. v. Thompson*, 60 P. 874, 875 (Ariz. 1900).

<sup>2</sup> Generally, trial courts may enter summary judgment against plaintiff if the damages claimed are too “uncertain, contingent, conjectural, or speculative.” See *Schuldes v. National Surety Corp.*, 557 P.2d 543, 548-49 (Ariz. Ct. App. 1976).

supporting appellate decisions, but also because the cases do not explicitly define the reasonable certainty standard in any functionally meaningful way. And to the extent they define the standard at all, they use trite phrases that tend to discourage summary judgment.

The Arizona trial courts' *de facto* policy of uniformly refusing summary judgment in defendants' favor on lost profits claims is both unwarranted and unsound. Breach of contract plaintiffs now raise lost profits claims as a matter of course. As a result, defendants must spend great sums fighting such claims in discovery and at trial. In addition, defendants run the risk of losing substantial verdicts based not on compensation for harm actually done (to which plaintiff certainly is entitled<sup>3</sup>), but on sympathy alone.<sup>4</sup> The reasonable certainty standard—"probably the most distinctive contribution of the American courts to the common law of damages"<sup>5</sup>—was first introduced to prevent that very phenomenon.<sup>6</sup> The standard's rigor has since diminished,<sup>7</sup> but the lack of Arizona cases approving summary judgment on such claims indicates that perhaps the pendulum has swung too far in plaintiffs' favor.

A closer reading of those cases, however, reveals something different. Even though the Arizona appellate courts have not explicitly approved summary judgment against plaintiffs on breach of contract lost profits claims, they have approved negative disposition of such claims in other procedural contexts: bench trials, motions for directed verdict, and motions for judgment notwithstanding the verdict. In doing so, those courts implicitly have applied certain principles of *insufficiency* with respect to proof of such claims. Those principles should apply equally when plaintiff's proof is examined before trial. If discovery has closed and all available sources of favorable evidence have been exhausted, and plaintiff's proof still violates one or more of them, Arizona's rule of civil procedure 56 may well make summary judgment perfectly appropriate.

Part II of this Article sets forth typical summary judgment and "reasonable certainty" standards as applied by the Arizona courts. After identifying some patterns of proof that the Arizona cases have revealed as

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<sup>3</sup> See, e.g., *A.R.A. Mfg. Co. v. Pierce*, 341 P.2d 928, 932 (Ariz. 1959) ("The familiar aim of compensatory contract damages . . . is to yield the net amount of the losses caused and the gains prevented by the breach of contract . . ."); see also 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1002, at 31 (2d. ed 1963) [hereinafter Corbin].

<sup>4</sup> 5 CORBIN, *supra* note 3, § 1020, at 125 ("The law requires that this evidence [of lost profits] shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone.").

<sup>5</sup> C. MCCORMICK, LAW OF DAMAGES 124 (1935).

<sup>6</sup> E. ALLAN FARNSWORTH, CONTRACTS §12.14, at 873 (1982) [hereinafter Farnsworth].

<sup>7</sup> FARNSWORTH, *supra* note 6, § 12.15, at 881.

sufficient to meet the reasonable certainty standard, Part III presents an inductive analysis that identifies the principles of insufficiency implicitly applied by the Arizona appellate courts—sound principles that should supply useful guidance in analyzing other jurisdictions' law as well. Part III then argues that those principles are worthy of at least equal consideration with the vague and generally plaintiff-biased statements that currently define the reasonable certainty standard under Arizona law. Through a demonstrative hypothetical, Part IV harmonizes the summary judgment standard identified in Part II with the reasonable certainty principles identified in Part III and shows that summary judgment is appropriate, and indeed required, in some cases.

## II. LEGAL STANDARDS

### A. Summary Judgment

Arizona's standard for summary judgment is well-established and typical. Summary judgment is appropriate "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with [the] affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>8</sup>

Motions for summary judgment under Rule 56 serve the purpose of removing from the civil justice system claims that do not warrant a full trial based on the theory that, under the established facts presented by the parties, the movant is entitled to judgment as a matter of law.<sup>9</sup> A summary judgment motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent.<sup>10</sup>

Arizona law clearly imposes an affirmative obligation on trial courts to grant meritorious summary judgment motions. Although the court must view matters of record in the light most favorable to the nonmovant,<sup>11</sup> and must deny summary judgment if there is any genuine issue as to a material

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<sup>8</sup> ARIZ. R. CIV. P. 56.

<sup>9</sup> See *Orme Sch. v. Reeves*, 802 P.2d 1000, 1004 (Ariz. 1990); *Plattner v. State Farm Mut. Auto. Ins. Co.*, 812 P.2d 1129, 1134 (Ariz. Ct. App. 1991); see also Daniel J. McAuliffe, ARIZONA CIVIL RULES HANDBOOK 437 (1997) [hereinafter McAuliffe].

<sup>10</sup> See e.g., *Riley, Hoggatt & Suagee v. English*, 864 P.2d 1042, 1044 (Ariz. 1993); *Wagner v. Rao*, 885 P.2d 174, 175 (Ariz. Ct. App. 1994); see also McAuliffe, *supra* note 9, at 437-38.

<sup>11</sup> See, e.g., *City of Phoenix v. Yarnell (Smith)*, 909 P.2d 377, 379 (Ariz. 1995); *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991); see also McAuliffe, *supra* note 9, at 438.

fact to be resolved,<sup>12</sup> summary judgment should not be denied simply on the speculation that some slight doubt or scintilla of evidence might develop into a real controversy in the midst of trial.<sup>13</sup> Indeed, the Arizona case of *Orme School v. Reeves*<sup>14</sup> makes clear that trial courts should apply the same standards to pre-trial motions for summary judgment as to post-trial motions for judgment as a matter of law.<sup>15</sup> Thus, once discovery has been completed and the nonmovant can do nothing more to prove its case,<sup>16</sup> summary judgment should be granted if the movant has shown there is no material factual issue to be resolved at trial and that the movant is entitled to prevail,<sup>17</sup> even in typically fact-intensive cases such as negligence cases.<sup>18</sup> Under no circumstances is plaintiff automatically entitled to jury consideration of her claim.

### B. The "Reasonable Certainty" Standard for Lost Profits Claims

#### 1. GENERAL

Arizona law, like that of many other states,<sup>19</sup> requires that lost profits claims be proven with "reasonable certainty." Although standards of the same name apply to claims for other types of damages,<sup>20</sup> including contract damages generally<sup>21</sup> and tort damages,<sup>22</sup> the standard is different and at least ostensibly more demanding in the lost profits context.<sup>23</sup> Its primary

<sup>12</sup> See, e.g., *Gatecliff*, 821 P.2d at 728; *Nanini v. Nanini*, 802 P.2d 438, 440 (Ariz. Ct. App. 1990); see also *McAuliffe*, *supra* note 9, at 439.

<sup>13</sup> See *Orme Sch.*, 802 P.2d at 1008; *Shaw v. Petersen*, 821 P.2d 220, 221-22 (Ariz. Ct. App. 1991); see also *McAuliffe*, *supra* note 9, at 439-40.

<sup>14</sup> *Orme Sch.*, 802 P.2d at 1000.

<sup>15</sup> *Id.* at 1008.

<sup>16</sup> See, e.g., *ARIZ. R. CIV. P. 56(f)*; see also *Orme Sch.*, 802 P.2d at 1008 & n.10.

<sup>17</sup> See, e.g., *Nielson v. Savoy*, 464 P.2d 608, 610 (Ariz. 1970); *Kiley v. Jennings, Strouss & Salmon*, 927 P.2d 796, 799 (Ariz. Ct. App. 1996); see also *McAuliffe*, *supra* note 9, at 443.

<sup>18</sup> See, e.g., *Dolezal v. Carbrey*, 778 P.2d 1261, 1264 (Ariz. Ct. App. 1989); see also *McAuliffe*, *supra* note 9, at 443.

<sup>19</sup> See, e.g., *Kerner v. Hughes Tool Co.*, 128 Cal. Rptr. 839, 847 (Cal. Ct. App. 1976); *Pappas v. Zerwoodis*, 153 P.2d 170, 174 (Wash. 1944).

<sup>20</sup> See *Jacobson v. Laurel Canyon Mining Co.*, 234 P. 823, 826 (Ariz. 1925).

<sup>21</sup> See *Rancho Pescado v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1244 (Ariz. Ct. App. 1984) (citing "generally accepted rule of contract law that damages are not recoverable unless they are reasonably certain"); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 352 (1981); *FARNSWORTH*, *supra* note 6, § 12.8, at 841.

<sup>22</sup> See *Corrigan v. City of Scottsdale*, 720 P.2d 513, 519 (Ariz. 1986).

<sup>23</sup> See *Gilmore v. Cohen*, 386 P.2d 81, 82 (Ariz. 1963) ("The requirement of 'reasonable certainty' in establishing the amount of damages applies with added force where a loss of future profits is alleged."); *Andrew Brown Co. v. Painters Warehouse, Inc.*, 531 P.2d 527, 530-31 (Ariz. 1975) (same).

difficulty lies in its nebulosity.<sup>24</sup> The term “reasonable certainty” tells us nothing about what level of proof suffices—we simply know that “[i]t means . . . that the quality of the evidence must be of a higher caliber than is needed to establish most other factual issues in a lawsuit.”<sup>25</sup> The standard’s name provides no more guidance than does, say, “reasonable care” in the negligence context.<sup>26</sup> It is best thought of merely as a convenient term connoting a level of proof sufficient to satisfy the court or jury that the competing interests of providing plaintiff with every reasonable opportunity to prove damages and weeding out illegitimate claims have been served.<sup>27</sup>

## 2. THE FACT/AMOUNT DISTINCTION

While several cases state that the “reasonable certainty” requirement applies to both the fact and amount of lost profits,<sup>28</sup> others do not bother to distinguish between the two.<sup>29</sup> Proof of the fact of damage means proof that but for defendant’s act, profits would have been made.<sup>30</sup> Proof of the amount of damage is self-explanatory.

The requirement that both fact and amount be proven with “reasonable certainty” is somewhat misleading, for it implies an equivalency of analysis that does not exist. For one thing, the Arizona courts uniformly state that amount of damage need not be proven to as high a degree as fact of damage.<sup>31</sup> Accordingly (and unfortunately), the term “reasonable certainty” means different things depending on whether fact or amount is at issue. Moreover, the distinction is meaningless for nearly all practical purposes because a sufficient proof of the fact of lost profits almost always

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<sup>24</sup> JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS*, § 209, at 335 (1970) [hereinafter Calamari & Perillo] (“Although the courts have been using more or less the same language [—“certainty” or “reasonable certainty” —] for well over a century, the stringency of its application has tended to vary in different decades dependent upon the makeup and philosophy of the bench in a particular jurisdiction at a particular time.”).

<sup>25</sup> *See id.* But *see* *Gulf Homes, Inc. v. Bear*, 599 P.2d 831, 834 (Ariz. Ct. App. 1979) (implying identity of “reasonable certainty” and “preponderance of the evidence” standards).

<sup>26</sup> CORBIN, *supra* note 3, § 1020, at 124 (comparing “reasonable man” standard).

<sup>27</sup> *See* *A.R.A. Mfg. Co. v. Pierce*, 341 P.2d 928, 932 (Ariz. 1959) (“The familiar aim of compensatory contract damages . . . is to yield the net amount of the losses caused and the gains prevented by the breach of contract . . .”).

<sup>28</sup> *See, e.g.,* *Andrew Brown Co. v. Painters Warehouse, Inc.*, 531 P.2d 527, 530-31 (Ariz. 1975); *Rancho Pescado v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1245-46 (Ariz. Ct. App. 1984); *see also* Corbin, *supra* note 3, § 1022, at 135.

<sup>29</sup> *See, e.g.,* *Lininger v. Dine Out Corp.*, 639 P.2d 350, 352-53 (Ariz. Ct. App. 1981); *Morton v. Rogers*, 514 P.2d 752, 757 (Ariz. Ct. App. 1973).

<sup>30</sup> *See, e.g.,* CORBIN, *supra* note 3, § 1022, at 142-43; *see id.* § 1023, at 155.

<sup>31</sup> *See infra* Section II.B.3.

yields proof of amount as well. Consider, for example, *Harris Cattle Co. v. Paradise Motors, Inc.*<sup>32</sup> There, Harris Cattle's vehicle smashed into Paradise's automobile dealership and rendered its showroom unusable.<sup>33</sup> Although Paradise could argue that loss of its showroom proved the fact of damages, that proof would, or at least should, fail without further proof that the dealership had been profitable before the accident. And proving those former profits would prove the amount as well as the fact of damages. Conversely, any proof of amount necessarily must either assume the existence of fact or demonstrate that existence inherently. Thus, excepting outlier cases such as *Walter v. Simmons*<sup>34</sup> and *Weiner v. Ash*,<sup>35</sup> it seems sufficient in most instances merely to question whether plaintiff has proved its lost profits with "reasonable certainty" and to make no further distinction.

### 3. THE PROBLEM OF "VAGUE GENERAL STATEMENTS" FAVORING PLAINTIFF

The cases are littered with aphorisms that ostensibly flesh out the exact meaning of "reasonable certainty." In actuality, however, these statements do little more than provide verbiage to support counsel's or a court's desired conclusion. And, in general, they tend to weigh against summary judgment in defendant's favor.

One, "once the fact of damages has been established, the amount of the damage may be established with proof of a lesser degree of certainty than is required to establish the fact of damage."<sup>36</sup> Because it is not clear how

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<sup>32</sup> 448 P.2d 866 (Ariz. 1968).

<sup>33</sup> *Id.* at 866.

<sup>34</sup> In *Walter*, 818 P.2d 214 (Ariz. Ct. App. 1991), the court denied recovery for consequential damages, including "lost time and inconvenience [sic], [and] loss of earning capacity" because "although [the plaintiff] may have presented evidence of the fact that he suffered damage that could be deemed consequential, he presented absolutely no evidence from which a jury could reasonably compute the amount of this damage." *Id.* at 221.

<sup>35</sup> In *Weiner*, 756 P.2d 329 (Ariz. Ct. App. 1988), the court denied recovery of lost profits from real estate speculation for the period in which the plaintiff was incapacitated due to a gunshot wound because "bringing in a list of profitable deals made during the period in question by other people, even when vouched for by a hired economist, is [no] proof that those are the transactions into which plaintiffs would have entered." *Id.* at 332.

<sup>36</sup> See *Earle M. Jorgensen Co. v. Tesmer Mfg. Co.*, 459 P.2d 533, 538 (Ariz. Ct. App. 1969); see also *Coury Bros. Ranches, Inc. v. Ellsworth*, 446 P.2d 458, 464 (Ariz. 1968) ("Some principles are accepted everywhere. Proof of the fact of damages must be of a higher order than proof of the amount of damages."); *Jacobson v. Laurel Canyon Mining Co.*, 234 P. 823, 826 (Ariz. 1925) ("It is now generally held that the uncertainty referred to is the uncertainty as to the fact of damage and not as to its amount, and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery.").

much proof is needed to achieve "reasonable certainty" as to fact of damage, that comparison illuminates nothing. Moreover, the rule's merit is questionable. Unlike, for example, tort damages for pain and suffering, lost profits lend themselves to more concrete quantification.<sup>37</sup> Ledgers are kept; forecasts are made; taxes are paid. It seems reasonable to require something like the same degree of certainty as to amount of profits in the litigation context as is required in the workaday world of business.

Two, a proof is sufficient if the evidence "measure[s] the damages for loss of profits with as much mathematical precision as the nature of the claim and the available evidence c[an] provide."<sup>38</sup> That rule reflects the courts' willingness to give an injured plaintiff every opportunity to prove its damages. But it is uncomfortably circular. And taken to its extreme, it makes no sense: if proof is impossible, plaintiff need make none.<sup>39</sup>

Three, "[t]he evidence required to prove loss of future profits depends on the individual circumstances of each case."<sup>40</sup> Plaintiffs frequently cite such text to argue the impropriety of summary judgment regardless of what actual facts discovery has revealed. But courts always apply law to an individual set of facts by observing how that law has been applied to similar facts. And if the facts of similar cases have tended to yield particular results, the court hearing a lost profits claim is entitled to consider those other cases.

Finally, several different maxims combine to form a rule that the means considered sufficient to prove amount broaden in direct proportion to the extent to which defendant's conduct caused difficulty in proof. For one example, "doubts as to the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer."<sup>41</sup> For another, "'it would be grossly unfair to deny a plaintiff meaningful recovery for lack of a sufficient 'track record' where the plaintiff has been prevented from establishing such a record by defendant's actions.'"<sup>42</sup> This rule presents

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<sup>37</sup> Cf. *Isenberg v. Lemon*, 327 P.2d 1016, 1023, *modified on other grounds*, 329 P.2d 882 (Ariz. 1958) ("Proof of lost profits requires much more definiteness [than proof of damages from loss of good will] because it is capable of proof in many cases with at least an approximation of mathematical precision.").

<sup>38</sup> *Hercules Drayage Co. v. Chanco Leasing Corp.*, 540 P.2d 724, 727 (Ariz. 1975); *see also Grummel v. Hollenstein*, 367 P.2d 960, 963 (Ariz. 1963); Farnsworth, *supra* note 6, § 12.15, at 882.

<sup>39</sup> *See Tucson Fed. Savings & Loan Ass'n v. Aetna Inv. Corp.*, 245 P.2d 423, 429 (Ariz. 1952) ("While the method just described presents only an approximation . . . because it does not prove [the victim]'s damages to a mathematical certainty, we think under the circumstances of this case *it would be impossible to do so* and therefore the means offered was justified." (emphasis added)).

<sup>40</sup> E.g., *Short v. Riley*, 724 P.2d 1252, 1255 (Ariz. Ct. App. 1986).

<sup>41</sup> *Gilmore v. Cohen*, 386 P.2d 81, 82 (Ariz. 1963).

<sup>42</sup> *Rancho Pescado v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1245 (Ariz. Ct. App. 1984) (quoting *Chung v. Kaonohi Car. Co.*, 618 P.2d 283 (Haw. 1980)).



another manifestation of the courts' willingness to afford plaintiff an opportunity to recover. But this rule is of no practical value, especially in the pretrial context, for it does nothing but beg the question. And the rule's corollary suggested by some, that particularly willful or bad faith conduct by defendant warrants relaxation of the reasonable certainty standard,<sup>43</sup> has little practical support in the Arizona cases.<sup>44</sup>

The maxims set forth above might as well be condensed into a single proscription: A trial court shall not grant summary judgment in the defendant's favor on a lost profits claim. As evidenced by the fact that not a single reported Arizona decision affirmatively has upheld summary judgment on such a claim, at least in the breach of contract context, the Arizona trial courts apparently read them that way. That phenomenon is not surprising: beyond statements to the effect that "'conjecture or speculation' cannot provide the basis for an award of damages . . . [and] the evidence must make an 'approximately accurate estimate' possible,"<sup>45</sup> the cases provide defendants with precious little in the way of maxims with which to combat the phalanx of trite phrases favoring plaintiffs. So on a superficial reading, it appears that the pendulum has swung decidedly in plaintiffs' favor with respect to the "reasonable certainty" standard's rigor. Yet this author agrees with Corbin that such a degree of judicial uniformity will be found as to justify us in saying that a rule of law exists. Its real content and meaning must be determined, however, by observing its applications in actual cases, rather than by reading the vague general statements in which it is often worded in . . . opinions.<sup>46</sup>

Observation of the "reasonable certainty" standard's application in the Arizona lost profits cases reveals several principles comprising that "rule of

<sup>43</sup> See FARNSWORTH, *supra* note 6, § 12.15, at 882 ("Courts are therefore less demanding in applying the [reasonable certainty] requirement if the breach was 'willful,' . . ."); CORBIN, *supra* note 3, § 1020, at 126 ("It seems probable also that a lesser degree of certainty will be required as against one whose breach is described as 'wilful' or is motivated by malice or avarice than against one whose breach was due to misfortune and whose efforts to perform were honest and in good faith."); see also Tucson Fed. Savings & Loan Ass'n v. Aetna Inv. Corp., 245 P.2d 423, 430 (Ariz. 1952) ("To hold otherwise would in practical effect let the wrongdoer go free and deny [plaintiff] any relief.").

<sup>44</sup> Cf. Purvis v. Silva, 381 P.2d 596, 598 (Ariz. 1963) (reversing trial court's award of lost profits damages to commercial laundry where defendant had cut off water supply); Weiner v. Ash, 756 P.2d 329, 332 (Ariz. Ct. App. 1988) (affirming trial court's refusal to award lost profits damages allegedly incurred while incapacitated by gunshot wound administered by defendant); Morton v. Rogers, 514 P.2d 752, 757-58 (Ariz. Ct. App. 1973) (reversing trial court's award of lost profits damages where defendant had misappropriated plaintiff's trade secrets).

<sup>45</sup> Gilmore v. Cohen, 386 P.2d 81, 82 (Ariz. 1963) (quoting McNutt Oil & Ref. Co. v. D'Ascoli, 281 P.2d 966 (Ariz. 1955) and Martin v. LaFon, 100 P.2d 182 (Ariz. 1940)); see also Earle M. Jorgensen Co. v. Tesmer Mfg. Co., 459 P.2d 553, 538 (Ariz. Ct. App. 1969) (stating that a plaintiff must "furnish a reasonably certain factual basis for computation of probable losses.").

<sup>46</sup> CORBIN, *supra* note 3, § 1022, at 146.

law” under which plaintiffs are subjected to a more onerous burden of proof than a superficial reading of those cases would otherwise suggest. At a minimum, those principles are worthy of elevation to the same plane as those so frequently invoked by plaintiffs. Moreover, application of those principles allows identification of some lost profits claims as illegitimate *before trial*. In such cases, Rule 56 imposes on the court an affirmative obligation to grant summary judgment in favor of defendant.

### III. ARIZONA LAW PERMITS SUMMARY JUDGMENT ON LOST PROFITS CLAIMS IN BREACH OF CONTRACT CASES

#### A. *Sufficient Proofs of Lost Profits*

The Arizona cases have suggested several methods by which a plaintiff may prove lost profits with reasonable certainty. These include a “history of prior sales of this identical product by a predecessor or even by a competitor,”<sup>47</sup> the “profit history from a similar business operated by the plaintiff at a different location,”<sup>48</sup> or “the profit history from the business in question if it was successfully operated by someone else before the plaintiff took over.”<sup>49</sup> It follows that if plaintiff has developed such evidence by the time discovery has closed, then defendant’s summary judgment motion probably should be denied.

#### B. *Patterns of Insufficient Proof*

Even if plaintiff has not produced evidence of the sort identified in the preceding section, it may well be entitled to present its claim to the jury because, generally speaking, the “evidence required to prove loss of future profits depends on the individual circumstances of each case.”<sup>50</sup> But the Arizona cases demonstrate that plaintiff is not *necessarily* entitled to present its claim to the fact finder, because certain patterns of insufficiency have crystallized—or at least begun to crystallize—through the courts’ analysis of those cases’ individual facts. So although “[t]here is no satisfactory way of defining what is meant by . . . ‘reasonable certainty,’”<sup>51</sup> and although the patterns at their most basic level merely stand for the proposition that a lost profits claim, like any other, must be supported by

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<sup>47</sup> Earle M. Jorgensen Co., 459 P.2d at 539; *see also* Harris Cattle Co. v. Paradise Motors, Inc., 448 P.2d 866, 867 (Ariz. 1968).

<sup>48</sup> Rancho Pescado v. Northwestern Mut. Life Ins. Co., 680 P.2d 1235, 1245 (Ariz. Ct. App. 1984).

<sup>49</sup> *Id.* at 1245.

<sup>50</sup> *E.g.*, Short v. Riley, 724 P.2d 1252, 1255 (Ariz. Ct. App. 1986).

<sup>51</sup> CALAMARI & PERILLO, *supra* note 24, § 209, at 335.

the evidence, the patterns help provide a satisfactory way of determining whether a particular proof suffices. And should a court find plaintiff's case falling into one or more of those patterns, summary judgment for defendant may well be appropriate.

### 1. FAILURE TO MAKE OUT BEST POSSIBLE PROOF

Although the means considered sufficient to prove lost profits broaden as proof becomes more difficult,<sup>52</sup> the Arizona cases consistently require that plaintiff still make out the best proof it can.<sup>53</sup> The principle is sometimes cast in the permissive tone that "plaintiff is required to do *no more* than to supply the 'best evidence available' or the 'best available proof.'"<sup>54</sup> As discussed previously,<sup>55</sup> that principle makes little sense, because it implies that if plaintiff can make no proof at all, it need make none. But if it is to be applied, its logical mandatory component should be as well: where plaintiff has means at its disposal to make out its proof, yet does not utilize them, plaintiff is not entitled to any laxity in the standard of proof. Several cases illustrate.

In *Gilmore v. Cohen*,<sup>56</sup> the Cohens contracted to convey thirteen residential tracts of land to the Gilmores, which the Gilmores intended to develop and resell. After conveying six tracts, which the Gilmores developed and resold, the Cohens refused to convey the remainder, and the Gilmores sued for lost profits.<sup>57</sup> The Arizona Supreme Court affirmed the trial court's directed verdict in favor of the Cohens, noting that the Gilmores had failed to demonstrate that they had proved all they could:

No books of account or other record of the costs of developing the first six tracts and their selling price were introduced. Even if formal accounts had not been kept, *and there was no showing that they were not*, informal memoranda of previous transactions or even past income tax returns showing the profits from the construction and sale of the first six houses, would have given

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<sup>52</sup> See, e.g., *Elar Inv., Inc. v. Southwest Culvert Co.*, 676 P.2d 659, 663 (Ariz. Ct. App. 1983).

<sup>53</sup> See, e.g., *Andrew Brown Co. v. Painters Warehouse, Inc.*, 531 P.2d 527, 531 (Ariz. 1975) ("the evidence must provide a reasonable basis for estimating [plaintiff's] loss *with as much precision as possible*" (emphasis added)); *Gilmore v. Cohen*, 386 P.2d 81, 83 (Ariz. 1963) ("[T]he plaintiff in every case should supply some reasonable basis for computing the amount of damage and *must do so with such precision as, from the nature of his claim and the available evidence, is possible.*" (emphasis added)).

<sup>54</sup> 1 ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR LOST PROFITS* § 5.3C, at 317 (4th ed. 1992) (emphasis added).

<sup>55</sup> See *supra* Part II.B.3.

<sup>56</sup> 386 P.2d 81 (Ariz. 1963).

<sup>57</sup> *Id.* at 81-83.

added weight to [the Gilmores'] claim.<sup>58</sup>

In *Isenberg v. Lemon*,<sup>59</sup> Lemon sued for breach of warranty as to the quality of paint he purchased from the Isenbergs. "[M]ost of [Lemon's] evidence was apparently intended to establish a loss of profit,"<sup>60</sup> as to a number of houses for which he had agreed to supply the paint, but whose painters had backed out of their agreements with him due to the paint's poor quality.<sup>61</sup> A jury awarded Lemon damages of \$31,800,<sup>62</sup> and the Isenbergs appealed on the ground, *inter alia*, of insufficiency of the evidence.<sup>63</sup> The Arizona Supreme Court treated the case as an action for lost profits,<sup>64</sup> and, in addressing Lemon's attempted proof from sales of paint for houses yet to be constructed, disparaged his failure to make the best evidentiary showing possible to prove lost profits:

It is not at all strange however that Lemon did not know precisely how many houses were to be built and would require painting in each of the subdivisions covered by contracts between him and the paint contractors at the time the contract was made. But this information had been available to him for two years at the date of the trial by the testimony of the contractors themselves. Only three of the contractors were called as witnesses. *The contractors could have given that information* and they could also have testified whether Lemon would have continued to get their business if he had continued to supply them with the same quality of paint used in painting the sample and model houses.<sup>65</sup>

In *White River Sheep Co. v. Barkley*,<sup>66</sup> the plaintiffs, cattle farmers, and White River, a sheep farming concern, possessed adjacent lands which they

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<sup>58</sup> *Id.* at 83 (emphasis added).

<sup>59</sup> 327 P.2d 1016, *modified on other grounds*, 329 P.2d 882 (Ariz. 1958).

<sup>60</sup> *Isenberg*, 327 P.2d at 1019.

<sup>61</sup> *See id.* at 1021-22.

<sup>62</sup> *See id.* at 1018.

<sup>63</sup> *See id.* at 1022.

<sup>64</sup> *See Isenberg v. Lemon*, 329 P.2d at 882 (Ariz. 1958).

<sup>65</sup> *Isenberg*, 327 P.2d at 1022 (emphasis added).

<sup>66</sup> 288 P. 1029 (1930). Some might question the propriety of including this 67-year-old case in analyzing the "reasonable certainty" standard, especially since, at least nationwide, "[r]ecent years . . . have seen a relaxation of the requirement. Contemporary statements insist only on 'reasonable certainty' rather than on certainty itself." Farnsworth, *supra* note 6, § 12.15, at 881-82. But there is no hard evidence of any relaxation by the Arizona courts since the court claimed to invoke the "reasonable certainty" standard in *White River Sheep Co.*, 288 P. at 1034. Thus, its inclusion is entirely appropriate.

used to pasture their respective herds and flocks.<sup>67</sup> The sheep wandered onto the plaintiffs' land, damaging it for cattle feeding purposes. The plaintiffs' proof of lost profits damages rested on the theory that normally the entire herd pastured on the land in question would have been raised as "beef" cattle, which would have fetched \$40 per head on the market, but that because of the damage to the pasturage, half or more of the herd did not gain sufficient weight and could only be sold as "feeder" cattle at \$20 per head.<sup>68</sup> The jury awarded the plaintiffs damages of \$2,000.<sup>69</sup> White River appealed on the ground, *inter alia*, that "no damages were proven. By this assertion [the Arizona Supreme Court] underst[oo]d the contention to be that the evidence of damages was so indefinite, uncertain and speculative in its nature as to furnish no reliable or reasonable basis to the jury upon which to make its calculations."<sup>70</sup>

The court reversed and remanded for a new trial on damages alone, holding "that the evidence of loss submitted by the plaintiffs was too indefinite, uncertain, and speculative for the basis of a judgment of damages"<sup>71</sup> and noting that although "[m]ost of the testimony as to the damages or loss to cattle . . . was admitted without objection[, it did not] possess[] the quality of reasonable certainty required by the law."<sup>72</sup> The court derided plaintiffs' failure to do all they could to prove their lost profits claim:

It appears that some of plaintiffs' cattle were sold as feeders . . . , but the number so sold and the price realized are not given. The loss estimated by the different witnesses is not based upon a comparison of the prices actually realized . . . for beef cattle with [that] realized for feeders of the same age, size and kind. *Such comparison might have been made*, for it appears plaintiffs sold that spring from another part of their range some beef of the same stock.<sup>73</sup>

In summary, the Arizona cases stand for the principle that to meet the "reasonable certainty" standard, plaintiff must at least make out the best proof it can. There is an argument that such a rule makes no sense because the objective issue of whether plaintiff's lost profits are "reasonably

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<sup>67</sup> White River Sheep Co., 288 P. at 1030-31.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1030.

<sup>70</sup> *Id.* at 1032.

<sup>71</sup> *Id.* at 1033.

<sup>72</sup> *Id.* at 1034.

<sup>73</sup> *Id.* at 1032-33 (emphasis added).

certain" bears no relation to the subjective issue of whether plaintiff did its best. But that argument is not unique; plaintiff already is permitted to recover upon making the best proof possible, even if that proof fails in some objective sense. It seems only fair to deny plaintiff recovery otherwise.<sup>74</sup>

## 2. UNSOUND UNDERLYING FACTS OR NUMBERS

Estimates of lost profits frequently are derived from other estimates of facts or numbers. For example, a plaintiff restaurateur may estimate total lost profits by subtracting estimated costs per customer from revenues per customer, and multiplying the result by her anticipated number of customers. For the end result to be "reasonably certain," the Arizona cases consistently require soundness in each of those underlying component values.

In *White River Sheep Co. v. Barkley*,<sup>75</sup> for example, the court specifically noted the unsoundness of the values underlying plaintiff's lost profits estimate:

It appears that some of plaintiffs' cattle were sold as feeders . . . , but the number so sold and the price realized are not given. The loss estimated by the different witnesses is not based upon a comparison of the prices actually realized . . . for beef cattle with that realized for feeders of the same age, size and kind. . . . It is very improbable that the loss of each head of the four hundred cattle, yearlings, two year olds, three year olds, and cows, would have been the same or that, as the witnesses state, they would have sold for \$20 as feeders and \$40 as beef. Whether the feed of which the cattle was deprived would have, if eaten by them, put \$10 or \$20 worth of flesh on each one of them is of course problematical. *It is clear that the estimates of damages are not based upon cattle of diversity of age, size and sex as the plaintiffs' were, but upon an ideal or imaginary conception.* The damages, if any, sustained by the cattle would not be any more uniform than the plaintiffs' herd,

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<sup>74</sup> See CORBIN, *supra* note 3, § 1022, at 140 ("A greater amount and a higher degree [of evidence] are required in those cases in which it is usually possible to produce it than in cases where it is usually impossible or difficult and the defendant had reason to know it."); CALAMARI & PERILLO, *supra* note 24, § 209, at 336-37 ("As a rule, established businesses can prove lost profits on transactions of a kind in which the particular business has traditionally engaged with sufficient certainty. Even here, however, a verdict for the plaintiff will be set aside if the court is not convinced that the record contains the best available evidence upon which an informed verdict can be based.").

<sup>75</sup> 288 P. 1029 (Ariz. 1930); see *supra* section III.B.1 for case facts.

which were anything but uniform in size, age, and sex.<sup>76</sup>

In assessing the sufficiency of plaintiff's proof of damages in *Isenberg v. Lemon*,<sup>77</sup> the court noted that his testimony

as to the number of houses covered by his contracts with paint contractors was based on estimates which ranged from 1,800 to 3,000 houses. He testified at the trial he estimated the number of houses covered by his contracts to be 1,800 to 1,900 but admitted he had previously stated the number was 3,000 and could not say which was correct.

Furthermore, he was unable to do more than estimate the average profit per house. He estimated the average profit to be \$15. He stated square footage in the house was immaterial; that he based his estimate upon the number of gallons of paint used and when asked how many gallons would be required for the average house, he testified 10 to 12 gallons, and later in his testimony he said 10 to 20 gallons. He stated that 1,000 to 1,250 square feet would constitute an average of all the houses in Phoenix.<sup>78</sup>

Accordingly, the court reversed and remanded for a new trial on damages alone because

[a]n estimated 1,800 to 3,000 houses at an estimated average profit of \$15 per house based upon an estimated number of gallons of paint used per house varying from 10 to 12 gallons at one time and at an average of 10 to 20 gallons at another is entirely inadequate to prove either loss of profits or damages for loss of good will.<sup>79</sup>

Other cases demonstrate the same principle. In *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*,<sup>80</sup> for example, Rancho Pescado planned to engage in the business of commercial catfish farming in a portion of the Gila Bend Canal leased from Northwestern.<sup>81</sup> Rancho Pescado engaged in "a brief experimental program with mixed results" and eventually obtained an exclusive license to raise fish in a portion of the canal for a period of

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<sup>76</sup> White River Sheep Co., 288 P. at 1032-33 (emphasis added).

<sup>77</sup> 327 P.2d 1016, *modified on other grounds*, 329 P.2d 882 (1958).

<sup>78</sup> *Isenberg*, 327 P.2d at 1022.

<sup>79</sup> *Id.* at 1023.

<sup>80</sup> 680 P.2d 1235 (Ariz. Ct. App. 1984).

<sup>81</sup> *Id.* at 1238.

five years.<sup>82</sup> Northwestern terminated the lease before that period had expired. Rancho Pescado prevailed in its ensuing breach of contract suit and the jury awarded him \$2,500,000.<sup>83</sup> The trial court granted Northwestern's "motion for judgment notwithstanding the verdict and reduced the amount of damages to \$101,510, plus attorney's fees."<sup>84</sup> The reduction in damage award represent[ed] the amount of damages awarded for loss of future profits."<sup>85</sup>

The Arizona Court of Appeals affirmed. With respect to the fact of damage, the court noted several weaknesses in Rancho Pescado's proof. First, "various experts testified that catfish farming is an extremely risky business, even for experienced farmers [which Rancho Pescado was not]. According to the United States Department of Agriculture estimates, the failure rate is approximately ninety-five percent. Of the five percent who succeed in fish farming, most are already experienced aquacultural farmers."<sup>86</sup> Second, "instead of the pond method used by ninety-five percent of all fish farmers, Rancho Pescado utilized a raceway system for raising its fish."<sup>87</sup> Third, Rancho Pescado's

pilot program was inadequate in a number of important respects, including its accuracy in predicting the systems effect on disease propagation, control and mortality rate; growth rate of the fish; conversion ratio of feed to flesh; and stocking density. These factors were all considered important factors by various experts in predicting Rancho Pescado's success or failure.<sup>88</sup>

Fourth, "there was evidence that . . . additional development work had to be completed before Rancho Pescado could successfully raise fish in the canal."<sup>89</sup>

The court also held that Rancho Pescado had not proved the amount of lost profits damages with reasonable certainty, and specifically invoked the unreasonableness of the estimates underlying Rancho Pescado's lost profits claim.<sup>90</sup> Although Rancho Pescado produced evidence that a California fish distributor was willing to purchase its entire production, the court noted

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<sup>82</sup> *Id.* at 1239.

<sup>83</sup> *Id.* at 1238.

<sup>84</sup> *Id.* at 1239.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1246.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1247.



that "the number of fish Rancho Pescado intended to produce and sell was an inordinately high number of catfish each year. For instance, its projection of eight million pounds of catfish per year would be approximately 11.42 percent of the entire crop of catfish harvested nationwide in 1977."<sup>91</sup>

In *Morton v. Rogers*,<sup>92</sup> Morton, an affiliate of Rogers's company, wrongfully obtained and used that company's trade secrets.<sup>93</sup> After a bench trial, the trial court awarded Rogers damages of \$24,000 based solely on evidence that "there was some prior history of sales . . . totaling \$33,000" and Rogers's testimony that "if [the company] were to gross \$33,000 per year from its sales it could anticipate a profit of \$24,000 per year."<sup>94</sup> The Arizona Court of Appeals reversed for a new trial on damages alone because that "profit margin was predicated merely on the difference between the cost of materials and the receipts from the sales. Proof of loss of profits generally requires some degree of definiteness[, but t]he testimony concerning [the company]'s potential profit picture is too speculative to support the judgment in this case."<sup>95</sup>

In *Logan v. Brown*,<sup>96</sup> Logan sued Brown for negligence arising from a drunk driving accident.<sup>97</sup> The Arizona Court of Appeals affirmed the trial court's refusal to allow Logan to testify on the issue of lost profits. The court of appeals held that Logan's proposed testimony on "claimed average income per mile and average expense relating to a new trucking business" lacked foundation, noting that "[e]ven though damages for lost profits may in some instances be shown for a new business venture, they must be proven with reasonable certainty after an appropriate foundation is established. The latter is lacking in this case."<sup>98</sup>

Finally, in *Purvis v. Silva*,<sup>99</sup> the Silvas operated a laundry on property leased from Purvis,<sup>100</sup> and brought suit for wrongful eviction when Purvis

<sup>91</sup> *Id.* at 1246. Also, the California distributor had "typically distributed only one thousand pounds of catfish per week, an amount far below that which Rancho Pescado contemplated producing," generally had trouble selling catfish, had never sold catfish canned (as it planned to sell a portion of plaintiff's production), had been adjudicated bankrupt, and was run by a semi-retiree. *Id.* at 1246.

<sup>92</sup> 514 P.2d 752 (Ariz. Ct. App. 1973).

<sup>93</sup> *Id.* at 753-55.

<sup>94</sup> *Id.* at 757.

<sup>95</sup> *Id.*

<sup>96</sup> 725 P.2d 1130 (Ariz. Ct. App. 1986).

<sup>97</sup> *Id.* at 1132-33.

<sup>98</sup> *Id.* at 1138. Although outside the breach of contract context, *Logan* clearly shows that the trial judge has the power to take a lost profits claim from the jury, for "[f]ailure to instruct the jury on a claim that has been asserted and on which evidence has been presented is tantamount to granting a directed verdict." McAuliffe, *supra* note 9, at 397.

<sup>99</sup> 381 P.2d 596 (Ariz. 1963).

turned off their water supply for the two remaining months on their lease.<sup>101</sup>

The trial court, apparently sitting without a jury, awarded the Silvas \$1,350 in damages which consisted of lost profits calculated in the following manner:

The sum awarded was arrived at by recognizing that [the Silvas], according to their own testimony, had been receiving a total of \$800 per month gross from four sources. With only two months to run on the lease this would amount to \$1600 expected gross income less \$300 rent yet to be paid plus \$50 which represented the value of butane left on the premises by the lessees. This was all the evidence offered with regard to damages.<sup>102</sup>

The Arizona Court of Appeals remanded for reconsideration of the damages question because that evidence

fail[ed] to indicate any expense except rent. This [wa]s unrealistic.

In the usual course of such a business there would be cost to lessees of light and power, water, t[a]xes, advertising, repairs and maintenance, salaries of employees, if any, and other expenses usually associated with a business establishment. Furthermore, no consideration was given to other sources of income than the four testified to. The main question remains unanswered as to whether the business had been carried on at a profit or loss.<sup>103</sup>

In summary, the Arizona cases make clear that where the facts or numbers underlying plaintiff's estimate of lost profits are unsound, the resulting estimate cannot be "reasonably certain." There is, of course, an argument that whether the basis of a lost profits estimate's components is sound presents no less of a jury question than whether the estimate *in toto* proves lost profits with reasonable certainty. But that argument misses the mark, for if one or more components of plaintiff's lost profits estimates is clearly unsupported or unsound, then the end result also must be unsound as a matter of mathematical necessity. Consider again the example of the restaurateur who wishes to calculate her daily profits for purposes of proving a lost profits claim. Suppose she knows she will make \$15 per customer in revenue, and that serving each customer will cost \$10. Suppose

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<sup>100</sup> *Id.* at 597.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 598.

<sup>103</sup> *Id.*

further, however, that she has no idea how many daily customers she will have. If she guesses 100, then she will estimate \$500 in daily profits. If she guesses 200, she will estimate profits of \$1,000. No matter how sure she is of revenues and costs per customer, *the end result can be no more certain than her underlying guess* as to the number of customers.

The requirement of soundness in the facts or numbers underlying plaintiff's lost profits estimate makes a great deal of sense when a jury's susceptibility to complex yet misleading methods of proof is considered. Consider a scenario in which plaintiff projects lost profits from widget sales through the following method:

$$\text{Profit} = (A \text{ purchasers}) \times (B \frac{\text{widgets}}{\text{purchaser}}) \times (C \frac{\$ \text{ revenue}}{\text{widget}}) \times (D \frac{\$ \text{ profit}}{\$ \text{ revenue}})$$

Further suppose that plaintiff derived the value of  $D$ , the profit margin, through the following equation<sup>104</sup>:

$$D = 0.01 \times R \times \left( \frac{S}{\sqrt{T}} \right)^{U-V}$$

$R$ ,  $S$ ,  $U$ , and  $V$  represent constants derived from plaintiff's expert's study of comparable businesses.  $T$  is another such constant, but plaintiff's expert merely guessed as to its value. Mathematically, of course, the end result—plaintiff's estimate of *Profit*—can be no more certain than the component values:  $A$ ,  $B$ ,  $C$ ,  $D$ ,  $R$ ,  $S$ ,  $T$ ,  $U$ , and  $V$ . And because  $T$  is nothing more than a guess, *Profit* is nothing more than a guess no matter how certain the other component values. Yet no matter what steps defendant takes to show that uncertainty in  $T$  necessarily results in uncertainty in *Profit*, the jury is unlikely to grasp that fact. Indeed, the jury may well believe that given all those values, a deficiency in just one simply cannot be that important. But it can, and is. As a matter of law, plaintiff has failed to prove her lost profits with reasonable certainty. She is not entitled to present the claim to a jury in the hope it mistakenly will award her damages anyway.

### 3. SELF-SERVING ASSERTIONS BY PLAINTIFF

In assessing lost profits claims, the Arizona courts frequently examine the source of the evidence presented by the plaintiff. Where attempted proofs have been held inadequate, the evidence has frequently derived from a common source—the plaintiff alone. Taken together, these cases stand

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<sup>104</sup> This equation is fiction created to prove the point; it bears no relation to any actual profit margin formula.

for the principle that, standing alone, self-serving assertions by plaintiff as to lost profits cannot prove those lost profits with "reasonable certainty."

In *Gilmore v. Cohen*,<sup>105</sup> for example, the court cited "the inherent weakness of testimonial evidence in cases such as this" and noted that "[t]he evidence relating to damages was all in the form of testimony by plaintiffs"<sup>106</sup> in holding that plaintiffs had not proved their claimed loss of profits from real estate transactions with "reasonable certainty."

In *Earle M. Jorgensen Co. v. Tesmer Mfg. Co.*,<sup>107</sup> Jorgensen contracted to purchase steel rods of certain qualities from Tesmer for use in manufacturing tillers.<sup>108</sup> The rods proved to lack those qualities and, as a result, broke on several tillers. Tesmer sued when Jorgensen refused to pay for the rods; Jorgensen counterclaimed for breach of warranty. The jury awarded, *inter alia*, a year's lost profits to Jorgensen in the amount of \$15,000.<sup>109</sup> The Arizona Court of Appeals held that Jorgensen had failed to prove either the fact or amount of lost profits with "reasonable certainty," noting that "[a]ll we have [as to the amount of damages] is an estimate made by [Jorgensen]'s president (who had no prior experience in selling agricultural equipment) based upon a few conferences with dealers who were not even willing to give [Jorgensen] a single advance order."<sup>110</sup>

The *Purvis*,<sup>111</sup> *Logan*,<sup>112</sup> and *Morton*<sup>113</sup> cases demonstrate the same principle. In each, plaintiffs' attempted proof was held inadequate. In each, plaintiffs served as the sole source of evidence on which the attempted proof of lost profits rested.

The rule of those cases is sound. Doubtless there are instances in which only plaintiff can supply some of the information necessary to prove its lost profits claim. But there is no reason plaintiff cannot obtain an independent<sup>114</sup> or expert<sup>115</sup> opinion as to lost profits or at least a review of

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<sup>105</sup> 386 P.2d 81 (Ariz. 1963). See *supra* Part III.B.1 for case facts.

<sup>106</sup> *Gilmore*, 386 P.2d at 83.

<sup>107</sup> 459 P.2d 533 (Ariz. Ct. App. 1969).

<sup>108</sup> *Id.* at 534-35.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 539-40.

<sup>111</sup> *Purvis v. Silva*, 381 P.2d 596, 598 (Ariz. 1963). See *supra* Part III.B.2 for case facts.

<sup>112</sup> *Logan v. Brown*, 725 P.2d 1130, 1137-38 (Ariz. Ct. App. 1986). See *supra* Part III.B.2 for case facts.

<sup>113</sup> *Morton v. Rogers*, 514 P.2d 752, 757 (Ariz. 1973). See *supra* Part III.B.2 for case facts.

<sup>114</sup> See, e.g., *Hercules Drayage Co. v. Chanco Leasing Corp.*, 540 P.2d 724, 726 (Ariz. Ct. App. 1975) (holding sufficient plaintiff's lost profits proof, which included plaintiff's president's "examination of the records (invoices) of the past performance of this truck during a comparable period of time, from his own knowledge and experience in the business and industry, and from the testimony of experts in the costs of operating similar equipment.").

<sup>115</sup> See, e.g., *Harris Cattle Co. v. Paradise Motors, Inc.*, 448 P.2d 866, 869 (Ariz. 1968) (affirming jury verdict awarding lost profits based, in part, on defendant's "expert" accountant's estimate based on

plaintiff's own estimates,<sup>116</sup> show that someone besides plaintiff actually relied on estimates in making some type of business decision, elicit testimony from potential customers from whom profits would have derived,<sup>117</sup> or obtain some supporting evidence from the defendant.<sup>118</sup>

Two cases cast some doubt on the principle that so far as Arizona law is concerned, self-serving assertions by plaintiff, taken alone, cannot prove lost profits with reasonable certainty. But both cases are distinguishable. In the first, *Murdock-Bryant Constr., Inc. v. Pearson*,<sup>119</sup> Murdock-Bryant sought and obtained quantum meruit damages from Pearson's company upon rescinding a construction subcontract,<sup>120</sup> including ten percent profit based solely on the testimony of Murdock and Bryant, the company's principals.<sup>121</sup> The Arizona Court of Appeals held that "both Murdock and Bryant were qualified to testify that the fair and reasonable profit margin was ten to fifteen percent, and affirm[ed] the award of ten percent lost profits."<sup>122</sup> But there is no indication that Pearson ever raised the issue of whether such testimony alone could suffice to prove lost profits, let alone under the reasonable certainty standard. Moreover, the trial court calculated lost profits by multiplying that profit margin by Murdock-Bryant's costs, on which "the record contain[ed] extensive documentation."<sup>123</sup> Accordingly, a substantial portion of the calculation was supported by evidence other than Murdock-Bryant's bare assertions. Finally, the lost profits were those anticipated to arise from the transaction

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prior sales). Of course, even hiring an expert does not guarantee that plaintiff can prove lost profits with reasonable certainty. See, e.g., *Weiner v. Ash*, 756 P.2d 329, 332 (Ariz. Ct. App. 1988) ("We do not believe that bringing in a list of profitable deals made during the period in question by other people, even when vouched for by a hired economist, is any proof that those are transactions into which plaintiffs would have entered."); see also *Rancho Pescado v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1246 (Ariz. Ct. App. 1984).

<sup>116</sup> See *Lininger v. Dine Out Corp.*, 639 P.2d 350, 353 (Ariz. Ct. App. 1981) (noting, in affirming trial court's award of lost profits damages, that "there was extensive testimony by an expert witness, a certified public accountant, as to [plaintiff's] method of arriving at the estimate of lost profit.").

<sup>117</sup> See, e.g., *United States Fidelity & Guar. Co. v. Davis*, 413 P.2d 590, 593 (Ariz. Ct. App. 1966) (affirming trial court's award of lost profits damages based, in part, on testimony by prospective purchaser from whom profits would have derived).

<sup>118</sup> See *Martin v. LaFon*, 100 P.2d 182, 184 (Ariz. 1940) (reversing trial court's exclusion of lost profits evidence, which consisted the "books of defendant himself, showing the receipts and expenses of the business during the time the latter operated it.").

<sup>119</sup> 703 P.2d 1206 (Ariz. Ct. App. 1984).

<sup>120</sup> *Id.* at 1208-10.

<sup>121</sup> *Id.* at 1216.

<sup>122</sup> *Id.* Thus, the court of appeals may have, without explicitly saying so, treated Murdock and Bryant as experts, providing another distinction between that case and those in which the lost profit claim is based on self-interested assertion by lay persons.

<sup>123</sup> *Id.* at 1216 n.6

between the parties to the suit, not between plaintiff and third parties. It makes more sense to permit plaintiff's bare assertion to suffice in the former context, where defendant typically will have first-hand knowledge of facts with which to dispute assertions that prove unwarranted, than in the latter, where defendant typically will not.<sup>124</sup>

In the other case, *Nelson v. Cail*,<sup>125</sup> a contractor—Cail—sued Nelson, an architect and agent for Northern Arizona University (“NAU”), for, *inter alia*, interference with Cail's construction subcontract with NAU. The jury returned a verdict for Cail in the amount of \$40,000, \$30,000 of which was supported solely by Cail's statement, when questioned as to his expected profit, “\$30,000 on this contract.”<sup>126</sup> Nelson appealed on the issue of “whether there was sufficient evidence of damages to support the award and whether the amount of the award b[ore] a reasonable relationship to the evidence.”<sup>127</sup> The Arizona Court of Appeals held the evidence sufficient and affirmed.

*Nelson* also is distinguishable from cases establishing the general principle that self-serving assertions by plaintiff cannot prove lost profits with reasonable certainty. First, it essentially presents the same scenario as *Murdock-Bryant*, in which plaintiff sought damages for profits lost on the contract in question, not for profits from transactions with third parties. Second, the *Nelson* court never really reached the issue of whether the plaintiff had proved lost profits with reasonable certainty. Rather, it focused its attention on the defendant's failure to attack the plaintiff's testimony in any way at trial:

Cail testified that his reasonable profit expected from the plumbing subcontract was \$30,000. In our opinion, this was sufficient as *prima facie* proof of the loss. Two weeks of evidence concerning details of the materials supplied and the work performed by Cail provided a foundation for his opinion concerning his anticipated profit from the job. While the dollar sum was his

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<sup>124</sup> Cf. CORBIN, *supra* note 3, § 1022, at 136 (“The determination of th[e] amount [of profits] requires valuation of the two performances to be exchanged[, and is] certain and easy in direct proportion to the simplicity of the transaction by which the profits are to be made. . . . The difficulty rapidly increases when the hypothetical “profits” for which plaintiff asks damages are not merely the difference in market values of the two commodities but are the profits that might have been made in subsequent transactions had the defendant performed his contract as agreed.”); CALAMARI & PERILLO, *supra* note 24, § 209, at 335 (“Courts do not as a rule impose the requirement of certainty except where the damages in issue involve lost profits on transactions other than the transaction on which the breach occurred.”).

<sup>125</sup> 583 P.2d 1384 (Ariz. Ct. App. 1978).

<sup>126</sup> *Id.* at 1387.

<sup>127</sup> *Id.* at 1386.

conclusion obviously drawn from his experience with this and other jobs, it did not fail because there was no documentary evidence supporting it. Nelson made no objection to the foundation for the answer Cail was asked to give. Cail's competency to give it could therefore be assumed. The evidence was adequate for consideration by the jury. There was no challenge to its weight as there was no cross-examination or contradictory proof on the issue offered by Nelson.<sup>128</sup>

Thus, the reasonable certainty standard never came into play. As the court explained,

Our evaluation of this evidence does not conflict with the general principle that damages be proven with "reasonable certainty." The principle relates to the foundation necessary to support damage evidence. *In turn, this requires that a challenge be made to the foundation before the monetary amount is stated by the witness.* Were it otherwise, the party presenting the evidence would not know when he had established a prima facie case and would be placed in the position of presenting time-consuming foundation evidence in many cases when no party to the suit challenges the correctness of the evidence.<sup>129</sup>

Thus, to defeat the rule of *Nelson*, defendant need only challenge plaintiff's proof of damages at some point during trial.

Moreover, *Nelson* was wrongly decided. The real issue in the case was whether plaintiff's testimony proved lost profits with "reasonable certainty." The court shifted the issue to the evidentiary question of whether the plaintiff's testimony had sufficient foundation and held, in essence, that the defendant had not preserved his "objection" for appeal. But the issue of foundation, which addresses whether plaintiff had sufficient knowledge to testify as to lost profits,<sup>130</sup> is different from the issue of that testimony's sufficiency. Contrary to the court's belief, the "reasonable certainty" principle does not necessarily relate to the foundation necessary to support damage evidence. Plaintiff's proof may lack "reasonable certainty" because its evidence lacks foundation, but it may also lack "reasonable certainty" even if sufficient foundation exists for

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<sup>128</sup> *Id.* at 1387.

<sup>129</sup> *Id.* at 1388 (emphasis added).

<sup>130</sup> See 1 MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 111, at 221 (3d ed. 1991).

every bit of evidence plaintiff offers.<sup>131</sup> And when the real issue of the sufficiency of plaintiff's evidence is considered, it is apparent that the court's concern that plaintiff "would not know when he had established a prima facie case"<sup>132</sup> is misplaced. Plaintiff, after all, is not entitled to a "warning" from defendant that its case lacks sufficient evidentiary support.<sup>133</sup>

#### 4. EQUIVOCAL, CONTRADICTORY, OR DISCLAIMED PROOF

A final principle demonstrated by the Arizona lost profits cases, although with somewhat less force than those identified previously, is that plaintiff's proof of lost profits cannot be reasonably certain if that proof is equivocal or contradictory. In *Gilmore v. Cohen*,<sup>134</sup> the court affirmed the trial court's directed verdict in favor of defendant, finding that plaintiffs' "testimony itself was ambiguous and confused. The plaintiffs seemed uncertain that they had ever shown a profit from the operation or that future profits were likely to accrue."<sup>135</sup> And in *Isenberg v. Lemon*,<sup>136</sup> the court emphasized plaintiff's equivocation and contradiction in his estimates of lost profits from contracts to supply paint in holding plaintiff's proof insufficient as a matter of law.<sup>137</sup> The principle that an equivocal or contradictory proof lacks reasonable certainty is a good one, for it seems apparent that if plaintiff or its witnesses lack certainty, the proof must as well.

### IV. A HYPOTHETICAL

As described in the preceding section, the Arizona cases establish four principles that provide guidance in determining the merit of lost profits

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<sup>131</sup> Cf., *Rancho Pescado v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1246 (Ariz. Ct. App. 1984) (describing plaintiff's attempted proof with no reference to any foundational concerns).

<sup>132</sup> *Nelson v. Cail*, 583 P.2d 1384, 1388 (Ariz. Ct. App. 1978).

<sup>133</sup> Defendant cannot move for judgment as a matter of law on the ground that "there [wa]s no legally sufficient evidentiary basis for a reasonable jury to find for" plaintiff, ARIZ. R. CIV. P. 50(a)(1), after the jury returns its verdict unless defendant so moved before submission of the case to the jury, ARIZ. R. CIV. P. 50(a)(2), because "the claimed omission in proof might be cured by a reopening of plaintiff's case." *Standard Chartered PLC v. Price Waterhouse*, 1996 Ariz. App. LEXIS 243, at \*54-55 (1996). But defendant can move for a new trial on the ground that the verdict was not justified by the evidence, see ARIZ. R. CIV. P. 59(8), or obtain remittitur, see ARIZ. R. CIV. P. 59, without any such notice. See *Singleton v. Valianos*, 323 P.2d 697, 698 (Ariz. 1958); see also McAuliffe, *supra* note 9, at 474.

<sup>134</sup> 386 P.2d 81 (Ariz. 1963). See *supra* Part III.B.1 for case facts.

<sup>135</sup> *Gilmore*, 386 P.2d at 83.

<sup>136</sup> 327 P.2d 1016, *modified on other grounds*, 329 P.2d 882 (Ariz. 1958). See *supra* Part III.B.1 for case facts.

<sup>137</sup> *Isenberg*, 327 P.2d at 1022-23.



claims before trial. One, where plaintiff fails to utilize available means to make out its proof of lost profits, plaintiff has not proved those lost profits with "reasonable certainty." Two, an attempted proof of lost profits cannot be "reasonably certain" where it rests on unsound or unsupported component values. Three, standing alone, self-serving assertions by plaintiff as to lost profits cannot prove those lost profits with reasonable certainty. Four, plaintiff's proof of lost profits cannot be reasonably certain if that proof is equivocal or contradictory. Those principles have merit whether applied in Arizona or elsewhere. The following hypothetical demonstrates the propriety of summary judgment when those standards are applied.

Tiny Corp. was formed with a single asset—a patent for the "blunderbat." As envisioned in the patent, the blunderbat was a baseball bat made of revolutionary materials which, if successfully developed and commercialized, could revolutionize the game of baseball. But because of significant safety concerns associated with those materials' use, no one had ever developed a functional blunderbat for anything but demonstration models, let alone commercialized it. And Tiny Corp. had never functioned as a business entity by selling, leasing, or licensing anything to anyone. In short, Tiny Corp. was a start-up company with a product that existed on paper only.

Tiny Corp. entered into a contract with Gigantic Co., a sporting goods research and development company. Under the terms of that contract, Gigantic Co. would attempt to develop a blunderbat prototype, and Tiny Corp. would pay Gigantic Co. for its time and materials up to a given amount. Once the prototype was successfully designed, Tiny Corp. planned to generate revenues by licensing that design to manufacturers of sports equipment.

In the meantime, Tiny Corp. developed a business plan to lure investors. The business plan was created by members of Tiny Corp.'s administrative staff, none of whom had any experience in the sporting goods or professional sports industries generally or with material technology in particular. The business plan included revenue projections calculated by multiplying the authors' guess as to the number of baseball teams that would use the blunderbat each year by several other values. The business plan, however, contained numerous caveats to prevent potential investors from actually relying on the projections. In particular, the plan warned that the projections were subject to a high degree of uncertainty and that there were no guarantees the blunderbat would ever work as Tiny Corp. hoped it would. The business plan also carefully noted that the authors' guess as to the number of baseball teams that would use the blunderbat was "speculative" and "uncertain."

After working on the project for some time, Gigantic Co. realized that technology still did not exist to develop a commercially feasible, safe blunderbat. Relations between Tiny Corp. and Gigantic Co. soured shortly thereafter, and Tiny Corp. sued Gigantic Co. for breach of contract. Among other things, Tiny Corp. claimed that by failing to successfully develop the prototype, Gigantic Co. had caused Tiny Corp. to lose over millions of dollars in profits it would have otherwise made.

By the time discovery was completed, Tiny Corp. had identified no evidence to prove its lost profits damages other than its business plan. Tiny Corp. planned to present its claim to the jury through its damages expert, who had taken the business plan's revenue projections as given and estimated lost profits by applying what he believed were appropriate profit margins, yet the expert himself believed those projections were optimistic. Tiny Corp. had visited with over ten major and minor league baseball teams as potential customers before and during Gigantic Co.'s work on the project. Although each had declined to do business with Tiny Corp., the company had not deposed a single team as to whether, or under what circumstances, they might be interested in purchasing blunderbats. Finally, due to the same technological constraints faced by Gigantic Co., not a single competitor of Tiny Corp.'s had successfully developed or commercialized a blunderbat during the two years since the litigation began.

*Tiny Corp. v. Gigantic Co.* presents a paradigmatic scenario for entry of summary judgment in defendant's favor on a lost profits claim, for plaintiff's proof violated each of the four principles of "reasonable certainty" arising from the Arizona lost profits cases. Because Tiny Corp. had met with several potential customers, it had other means of proof at its disposal. Instead, Tiny Corp. chose to rely exclusively on its business plan. The validity of the business plan's revenue projections rested entirely on guesses by unknowledgeable individuals as to the number of baseball teams that would use the blunderbat each year. The business plan was no more than a self-serving assertion of potential revenues designed by Tiny Corp. to garner investment; neither Tiny Corp.'s damages expert nor anyone else bothered to verify the revenue projections' reasonableness. Finally, the business plan contained numerous disclaimers by which Tiny Corp. hoped to forestall any liability to investors who might rely on its projections. The evidence left no material fact to be resolved at trial, and Gigantic Co. was entitled to judgment as a matter of law. Tiny Corp. was not entitled to the chance that the jury would bail it out.

### V. CONCLUSION

On a superficial level, the Arizona cases “define” the reasonable certainty standard of proof for lost profits claims vaguely, and in plaintiffs’ favor. Yet application of that standard by the courts reveals that when plaintiff fails to utilize available means to make out its proof of lost profits damages, rests its proof on unsound or unsupported component values or on self-serving assertions alone, equivocates or contradicts itself in making out that proof, or some combination of these, there is considerable doubt that plaintiff has proved its lost profits with reasonable certainty—whether in Arizona or elsewhere. When such failure is manifest as of the close of discovery, courts have an affirmative obligation to grant summary judgment. They should not hesitate to do so.