IN THE COURT OF APPEALS OF IOWA

No. 1-664 / 10-1608
Filed November 9, 2011

PAUL GREENE and BRIGHT SIDE LIGHTING, INC.,
Plaintiffs-Appellants,

vs.

BRIAN HEITHOFF, Individually, BRIAN HEITHOFF, as Director and Officer of Bright Side Lighting, Inc., and CONSUMERS ENERGY, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

The plaintiffs appeal the district court's decision granting the defendants' motion for judgment notwithstanding the verdict. **AFFIRMED.**

Darrell G. Meyer, Marshalltown, and Deborah M. Tharnish and Michele Warnock of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellants.

Jason James O'Rourke and Douglas Robert Lindstrom Jr. of Lane & Waterman, L.L.P., Davenport, for appellee Consumers Energy, Inc.

Paul C. Peglow of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellee Brian Heithoff.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

A jury awarded Paul Greene $812,388.98 and Bright Side Lighting, Inc. $6,362,788.98 in a breach of contract dispute with Brian Heithoff and Consumers Energy, Inc. The district court granted a motion for judgment notwithstanding the verdict filed by Heithoff and Consumers Energy. Greene and Bright Side Lighting appeal. We affirm.

I. Background Facts.

Because this case comes to us on review from the granting of a motion for judgment notwithstanding the verdict, we construe the facts presented at trial in the light most favorable to the plaintiffs. In early 2000, Paul Greene was hired as the vice president of sales and marketing for an Oklahoma company called Bright Side Lighting, Inc., which manufactured retrofit energy efficient lighting products and fixtures. Greene worked for Bright Side Lighting for about one year. Several months after he left the company, a bank in Oklahoma contacted Greene and informed him Bright Side Lighting had gone out of business. The bank asked Greene if he would be interested in buying the assets of the company.

Greene began researching the energy efficient lighting market in Iowa, where he was originally from, and discovered it was “even more lucrative . . . than in Oklahoma.” He accordingly began searching in Iowa for investors in the company. In November 2001, Greene contacted Brian Heithoff, the chief executive officer and general manager of Consumers Energy, Inc., an electrical service cooperative in Marshalltown.

A. Preliminary Negotiations.

Greene showed Heithoff his business plan, which was based off the financials from Bright Side Lighting in Oklahoma during its successful years. Heithoff was interested in Greene's proposal, as Consumers Energy was looking to expand the services offered to its customers to include more energy efficient options. Greene presented his business plan to the board of directors for Consumers Energy at the end of November 2001. He estimated the company, which he also planned to call Bright Side Lighting, Inc., would need $600,000 in funding at the outset. The board was intrigued with the concept but was not interested in a high-risk investment.

In order to minimize Consumers Energy's financial risk, Heithoff and Greene developed a "term sheet" in February 2002 that proposed Consumers Energy would purchase the assets of the failed business in Oklahoma for $150,000. No payment would be made to the bank holding those assets until Greene obtained a $400,000 loan from the Small Business Association (SBA). Upon receiving the loan proceeds from the SBA, Bright Side Lighting would purchase the inventory and equipment from Consumers Energy for $400,000—$150,000 of that amount would be used by Consumers Energy to recover its purchase price for the inventory and equipment; $225,000 would be invested in Bright Side Lighting, for which Consumers Energy would receive a fifteen percent interest in the company. The remaining $25,000 would be retained by Consumers Energy.

To meet the $600,000 capitalization requirement, the term sheet provided Consumers Energy would temporarily deposit $200,000 in bank accounts for

Greene and Bright Side Lighting, accessible only by Consumers Energy. After the SBA loan closing, that money would be immediately withdrawn by Consumers Energy. The end result being that Consumers Energy would not actually invest any money into Bright Side Lighting, and the company would be underfunded by $200,000. In order to offset this underfunding, Greene stated Consumers Energy agreed to sell a minimum of $40,000 of Bright Side Lighting's products per month. The term sheet, however, provided that "CE will not have to meet minimum annual sales volumes for the term(s) of the agreement."

B. March 2002 Contract.

The parties reached a final agreement in March 2002. That contract, entitled "Agreement to Organize Company," was entered into by Consumers Energy, Greene, and Greene's partner, Ron Hawn. It provided, in relevant part, as follows:

> SECTION 1. SCOPE AND DESCRIPTION
>
> A. The Parties hereby agree to form a corporation under the Iowa Business Corporation Act. . . . *This agreement contains the entire agreement between the parties with respect to its subject matter, and no waiver, modification or change will be valid unless contained in a writing signed by the parties to be bound*.
>
> . . . .
>
> SECTION 2. CONTRIBUTIONS
>
> A. By March 8, 2002, CE will deposit a total of $140,000 into a Wells Fargo Bank interest-bearing account. Said funds shall remain with Wells Fargo Bank until the SBA loan is approved. Upon approval and disbursement of SBA loan proceeds, ownership of account shall be transferred to the Corporation. . . .
>
> B. Ron Hawn and Paul Greene shall contribute $60,000 to the Corporation. Ron Hawn shall be entitled to 30,000 shares and Paul Greene shall be entitled to 30,000 shares of the Corporation and secure a $400,000.00 SBA Loan.
>
> C. Upon completion of Section A above, CE shall be entitled to 10,588 shares, which shall be equal to 15% of the authorized shares of the Corporation.
>
> . . . .

> SECTION 5. CE NON-EXCLUSIVE DISTRIBUTORSHIP
>
> Upon satisfaction of Sections 1 through 4 above, CE shall purchase from the Corporation for the price of $35,000.00, a non-exclusive nationwide distributorship right to market the lighting system/process of the Corporation for a term of five (5) years. . . . Additional terms include the following:
>
> . . . .
>
> 2. *CE shall not be subject to a minimum sales volume during the term of distributorship*.

(Emphasis added.)

As is apparent from the foregoing, several of the financing terms proposed in the February 2002 term sheet were not incorporated into this contract. Consumers Energy nevertheless purchased the inventory and equipment of the failed Oklahoma company in March 2002 for $150,000, as agreed during the parties' preliminary negotiations. Bright Side Lighting was incorporated that same month. In May 2002, the company applied for a SBA loan. Either the SBA or the bank that was processing the loan required Consumers Energy to guarantee fifteen percent of the loan. Consumers Energy agreed to do so, and the loan was finalized.

Upon receiving the loan proceeds, Bright Side Lighting repaid Consumers Energy the $150,000 it had fronted for the purchase of the inventory and equipment. Consumers Energy then withdrew the money it had placed into the bank account for Bright Side Lighting and Greene. Bright Side Lighting began operating in August 2002. Heithoff was subsequently elected to the board of directors for Bright Side Lighting, as was Greene.

C. May 2003 Contract.

In May 2003, Greene met with Heithoff and informed him that unless Consumers Energy was willing to put capital into Bright Side Lighting, it was going to go out of business at the end of the month. Heithoff accordingly called a special meeting of Consumers Energy's board of directors on May 13.

Heithoff, who was not a member of the Consumers Energy board, put together a memorandum for the board detailing the financial situation of Bright Side Lighting. The memorandum began with a list of positives for the company, including the fact that although the company would lose money in May, it expected to have a positive month in June. Heithoff then listed the negatives for the company, such as its lagging sales over the past several months and delinquent payments on rent, the SBA loan, payroll taxes, and vendor bills.

Based on Greene's financial projections, Heithoff's memorandum informed the board Bright Side Lighting would need $100,000 in order to stay in business. But Heithoff cautioned that

> [i]f we are only going to invest $50,000 we are going to starve the company, and therefore we might as well not contribute anything. If we believe in the company, we must invest enough money to make it work, which is probably closer to $100,000 if not more.

The minutes of the board meeting stated, "After a long discussion and with some reservation, the Board directed Manager Heithoff to take the approach of helping BSL in this time of difficulty." Consumers Energy accordingly entered into the following contract with Bright Side Lighting:

> 1. <u>Wholesale Market.</u> BSL will proceed with developing the wholesale market, but not until at least June 15th. . . .
>
> a. Consumers is willing to contribute $28,500 of additional capital for this expansion *assuming a high satisfaction level of the progress made by BSL* in the retail market from May 1st to June 15th. The terms of this contribution are negotiable at the time of the contribution, and could be combination of debt and equity.
>
> . . . .

> 2. <u>Material Purchase.</u> Consumers will immediately purchase rollform material and CFL product for $12,500 and will sell it to BSL at the time BSL makes a sale requiring the use of it. . . .
>
> 3. <u>Loan.</u> Consumers Energy will make a $30,000 unsecured loan to BSL.
>
> . . . .
>
> 4. <u>Additional Capital.</u> *Assuming BSL is on the right track as determined by Consumers*, Consumers is prepared to contribute an amount not to exceed $30,000 to BSL in June and/or July to cover short-term cash flow needs of the company. . . .

(Emphasis added.)

Shortly after this contract was executed, Consumers Energy purchased the materials detailed in section two of the contract and loaned Bright Side Lighting the $30,000 referenced in section three. Following this infusion of capital into Bright Side Lighting, Greene reported a banner month for June, during which the company realized its largest sales revenues ever. Despite those large sales, the company merely broke even with its expenses. Greene accordingly approached Heithoff at the end of June, requesting the additional $58,000[1] set forth the contract.

On July 26, Greene informed Hiethoff at a board meeting for Bright Side Lighting that he had hired three additional salespeople, who would start at the beginning of August. He also stated the company now needed additional financing of $250,000 in order to stay in business. The sales for the months of July and August were lower than expected, and Bright Side Lighting was again behind in rent, loan and vendor payments, and payroll taxes.

[1] The contract actually provided for an additional $58,500 in financing from Consumers Energy, but both parties referred to the amount available as $58,000.

A special meeting of the board of directors for Consumers Energy was scheduled for August 4, 2003, in order to discuss the financial future of Bright Side Lighting. In a July 30 email to the board, Heithoff stated, "I spoke to Paul Greene this morning and he is active visiting with potential investors. . . . [T]he BSL Board authorized Paul to aggressively seek financing in the amount of $250,000." The email went on to relate that Greene no longer had

> the cash in the bank to keep the business operational. Therefore, he approached me about Consumers Energy contributing some amount up to $58,000 in order to give him time to secure the $250,000. . . . Just as in May, the prospects for BSL appear to be bright, but in looking at the operating statement, the condition has not improved much (June was a breakeven month, but July has fallen below June).

Attached to the email were financial projections for Bright Side Lighting for the next twelve months, a "lead-tracking" report that listed the company's current sales leads and the potential for closing them, the May 2003 contract between Bright Side Lighting and Consumers Energy, a status report of various projects, and a copy of the May 2003 memorandum to the board. Heithoff forwarded this email to the members of his management team later that day, flagging it as highly confidential.

Greene addressed the board at its meeting on August 4. He informed the directors that without a co-signor, Bright Side Lighting would be unable to secure the $250,000 in financing needed to continue the business. He requested $58,000 from Consumers Energy under the May 2003 contract in order to meet the company's short-term cash needs while he continued to look into long-term financing options. Following Greene's presentation, the board voted to lend

Bright Side Lighting $58,000 "contingent upon Bright Side Lighting obtaining a third party Letter of Commitment for $250,000."

Two days later, Heithoff sent Greene a letter stating, "In a recent conversation, you mentioned that many of your accounts payable, including that to federal and state taxing authorities, were in arrears." He requested Greene provide him with a status report of the amounts due. The following week, on August 12, 2003, Heithoff sent Greene another letter notifying him Consumers Energy did not "have a high satisfaction level with the progress made by BSL in the retail market from May 1 to June 15, 2003," nor did it believe Bright Side Lighting was "on the right track." The letter notified Greene that Bright Side Lighting was in default of its May 2003 agreement with Consumers Energy as, among other things, no payments had been made on the $30,000 loan.

After sending those letters to Greene, Heithoff led a monthly Consumers Energy employee meeting at which he informed those present that Bright Side Lighting was in "severe financial trouble." A statement was made at the meeting that the company could be purchased for "pennies on the dollar." Greene learned of those statements and called Heithoff, seeking reassurances the $58,000 would be coming from Consumers Energy. Heithoff assured him it would.

A board of directors meeting for Bright Side Lighting was scheduled for August 26, 2003. Greene called Heithoff before the meeting and asked him not to attend. Heithoff nevertheless attended the meeting, as he was still a director of the corporation. Greene confronted Heithoff about his suspicions Consumers Energy was angling to take over Bright Side Lighting. Heithoff told Greene he had been misinformed. Before leaving the meeting, Heithoff also said to Greene "that his [Heithoff's] responsibility on our board of directors was to look out for the best interests of Consumers Energy." Heithoff resigned from his position on Bright Side Lighting's board of directors on August 28. The company went out of business in late September or early October 2003.

II. Procedural History.

Greene and Bright Side Lighting filed a thirty-two count lawsuit against Heithoff, Consumers Energy, and others in May 2008.[2] An eight-day jury trial began in September 2009. Following the close of the evidence, the district court granted in part and denied in part a motion for directed verdict by Heithoff and Consumers Energy. As a result of the court's ruling, only five of Greene and Bright Side Lighting's claims were submitted to the jury: (1) Greene's breach of contract action against Consumers Energy for the company's failure to meet the $40,000 sales minimum allegedly required under the March 2002 contract; (2) Bright Side Lighting's breach of contract action against Consumers Energy for its failure to advance Bright Side Lighting $58,000 under the May 2003 contract; (3) a breach of fiduciary duty claim against Heithoff; (4) punitive damages claim against Heithoff; and (5) punitive damages claim against Consumers Energy.

The jury returned verdicts in favor of Greene and Bright Side Lighting on the first four claims, but found in Consumers Energy's favor on the punitive damages claim. Greene was awarded $812,338.98 in damages against

[2] Three individuals, who had served on both Consumers Energy's board of directors as well as the board for Bright Side Lighting, were included in the suit. However, the claims against them were dismissed by the trial court before submission of the case to the jury. Bright Side Lighting does not challenge dismissal of those claims on appeal.

Consumers Energy on the March 2002 breach of contract claim, and Bright Side Lighting was awarded $1,555,774 against Consumers Energy on the May 2003 breach of contract claim. As for the claims against Heithoff individually, the jury found he breached his fiduciary duties to Bright Side Lighting and awarded the company $2,733,851.98 in actual damages and $2,073,163 in punitive damages.

Heithoff and Consumers Energy filed a combined motion for judgment notwithstanding the verdict and motion for new trial. The district court entered a ruling granting the motion for judgment notwithstanding the verdict and setting aside the jury's awards in their entirety. The court later conditionally granted Heithoff's and Consumers Energy's alternative motion for a new trial under Iowa Rule of Civil Procedure 1.1008(3). Greene and Bright Side Lighting filed a petition to vacate the court's rulings on the basis of an indemnity agreement between Heithoff and Consumers Energy that had been discovered after the trial. The court denied the petition, finding the existence of any such indemnity agreement was irrelevant to its ruling.

Greene and Bright Side Lighting filed an appeal from the district court's ruling on the motion for judgment notwithstanding the verdict and a later appeal from the court's ruling on their petition to vacate that judgment. The appeals were consolidated by our supreme court and transferred to this court.

III. Scope and Standards of Review.

The district court's grant of a motion for judgment notwithstanding the verdict is reviewed for correction of errors at law. *Doe v. Cent. Iowa Health Syst.*, 766 N.W.2d 787, 790 (Iowa 2009).

> Our task is to determine whether substantial evidence exists to support the elements of the plaintiff's claim, justifying the court to submit the case to the jury. In doing so, we review the evidence in the light most favorable to the nonmoving party. Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings.

Id. (internal citations omitted). "Likewise, to the extent this appeal concerns the construction or interpretation of a contract, our review is generally at law." *Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 900 (Iowa 2005).

IV. Analysis.

A. March 2002 Breach of Contract.

According to Greene, the "fighting issue with respect to the breach of contract claim on the 2002 contract is whether CE had an obligation to sell $40,000 per month in retrofit sales." The district court rejected that claim, finding the contract "clearly states that Consumers Energy was not subject to sales minimums. . . . The March 2002 agreement is clear, complete and final, and Greene's comments to the contrary do not make the contract language ambiguous."

Greene argues the district court erred in "rejecting Greene's testimony that explained the terms of the contract" and in "giving favorable inferences to CE." He asserts the contract was not the parties' entire agreement and can only be understood by reference to the business plan, which was incorporated into the contract. In the alternative, Greene argues the contract is ambiguous; thus, its interpretation "is for the trier of fact to determine." Finally, Greene contends the "jury's verdict on the 2002 contract was supported by CE's oral agreement to make $40,000 per month in sales." We reject these arguments and affirm the court's ruling on the March 2002 breach of contract claim for the reasons that follow.

1. Extrinsic evidence and claimed ambiguity. Greene is correct that "[l]ong ago we abandoned the rule that extrinsic evidence cannot change the plain meaning of a contract." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008). We recognize the rule in Restatement (Second) of Contracts section 212 (1979) "that states the meaning of a contract 'can almost never be plain except in a context.'" *Id.* (citations omitted). Thus,

> "[a]ny determination of meaning or ambiguity should only be made in the light of relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. *But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.*"

Id. (citations omitted). In other words, although extrinsic evidence is allowed to aid in the process of interpretation, "the words of the agreement are still the most important evidence of the party's intentions at the time they entered the contract." *Id*.

Here, Greene is attempting to use extrinsic evidence not to interpret the language actually used by the parties in the March 2002 but rather "to vary or alter language in the written agreement." *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 276 (Iowa 1982). Extrinsic evidence may not be used in such a manner. *See id.* ("Extrinsic evidence offered to show 'what the parties meant to say' instead of 'what was meant by what they said' is not admissible. . . ." (citation omitted)). As our supreme court stated in *Hamilton v. Wosepka*, 261 Iowa 299, 309, 154 N.W.2d 164, 169 (1967),

> The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. *So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.* The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

(Emphasis added.)

Turning then to the language of the parties' contract, we observe nowhere in the contract is a $40,000 sales minimum mentioned, referred to, or implied, despite the fact such a requirement was discussed during contract negotiations. In fact, section five of the contract states, "CE shall not be subject to a minimum sales volume during the term of distributorship." While Greene argues this provision related only to Consumers Energy's distributorship, not its retail sales obligation, we agree with the district court this is a distinction without merit "since all sales Consumers Energy made would have been through the distributorship it acquired under the March 2002 agreement."

Greene's attempt to insert a $40,000 sales minimum into the contract where the contract expressly states no sales minimum is required flies in the face of contract law.

> Since time immemorial, the law of contracts provides that parties are entitled to bargain freely and that their agreements will be enforced in a court of law. Subject to narrow exceptions . . . courts do not modify the terms of the contract or use judicial creativity to supply terms that are absent from the written agreement. Courts generally enforce contracts as written, plain and simple.
>
> . . . .

> . . . If the words of a contract are to have any meaning, such silence is a barrier, and not a springboard, for insertion by a court of new, unstated contractual terms.

Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651, 667 (Iowa 2008) (Appel, J., specially concurring).

For many of the same reasons, we reject Greene's argument that the contract is ambiguous. Greene does not point to any provision in the contract where more than one meaning is reasonably possible. *See Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("[A]n ambiguity occurs in a contract when a genuine uncertainty exists concerning which of two reasonable interpretations is proper."). "[A] contract is not ambiguous merely because the parties disagree over its meaning." *Id.* We accordingly find no error in the district court's interpretation of the contract.

***2. Incorporation by reference*.** Greene next argues "the 2002 contract is only understood by reference to the business plan." He bases this argument on the testimony of his partner, Ron Hawn, "that the 2002 contract necessarily incorporates the business plan." There are several problems with this argument.

First, the business plan prepared by Greene to secure investors and financing is not mentioned anywhere in the March 2002 contract. *See Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001) (stating in order for one document to become part of another separate document under the doctrine of incorporation, the reference to that document must be "clear and specific"). Second, the contract itself expressly states, "This agreement contains the entire agreement between the parties with respect to its subject matter, and no waiver, modification or change will be valid unless contained in a writing signed by the parties to be bound." And third, despite Hawn's testimony that the business plan required a $40,000 monthly sales minimum from Consumers Energy, we are unable to find such a requirement in the business plan. Nor is such an agreement found in the February 2002 term sheet that preceded the March 2002 contract. In fact, the term sheet contained the same clause as the contract stating that no sales minimum was required of Consumers Energy.

3. Oral agreement. Finally, we agree with Consumers Energy that Greene is precluded from arguing on appeal that the $40,000 sales minimum was an oral agreement between the parties. The petition filed by Greene and Bright Side Lighting alleges Consumers Energy breached a written contract. This is consistent with the following testimony by Greene at trial:

> Q. The promise of providing $40,000 in sales, are you saying that is an agreement or a promise made outside Exhibit K? A. No, I believe that that's part of section five. Section five is all about them buying a distributorship. . . . So this whole agreement is for them to be out selling. . . . which they didn't do.
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> . . . .
>
> Q. But this section five doesn't say anything about selling $40,000 a month, does it? A. No, it does not.
>
> Q. And so that's my question. Is this agreement, promise, commitment, of $40,000 a commitment made outside this agreement, Exhibit K? A. No. That's part of this.
>
> Q. You're saying it's part of it? A. It's inclusive.

Greene "may not raise a new theory of liability after trial." *Feld v. Borkowski*, 790 N.W.2d 72, 84 (Iowa 2010) (Appel, J., concurring in part and dissenting in part). "The theory under which a case was tried in the trial court will be the theory upon which an appeal is based." *Shill v. Careage Corp.*, 353

N.W.2d 416, 420 (Iowa 1984). This case was tried to the jury as a breach of a written, not oral, contract, and the jury was instructed as such.[3]

B. May 2003 Contract.

We next consider Bright Side Lighting's claim the district court erred in setting aside the jury's verdict on the May 2003 breach of contract claim. The district court found Consumers Energy's motion for judgment notwithstanding the verdict on this claim should be granted for the following reasons: (1) Bright Side Lighting did not satisfy the conditions precedent required by the contract for the receipt of additional money from Consumers Energy; (2) assuming Consumers Energy had given Bright Side Lighting the additional money, it would not have kept the company from becoming insolvent; (3) the limitation of liability clause in the contract prohibited Bright Side Lighting from recovering any lost profits;[4] and (4) Bright Side Lighting's evidence of damages based on lost profits was too speculative and barred by the new business rule. We agree with the second ground on which the court granted Consumers Energy's motion and therefore need not and do not address the rest.

In order to succeed on its breach of contract claim, Bright Side Lighting was required to prove the damages it claimed resulted from Consumers Energy's

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[3] Although the district court initially rejected an oral-contract theory on statute-of-limitations grounds in its judgment notwithstanding the verdict ruling, the court later corrected that ruling, recognizing the issue had not been raised by the parties.

[4] The contract provided:

> Neither Consumers nor BSL shall be responsible to the other party for damage to or loss of any person or property, wherever located, unless that damage or loss is caused by its own negligence or intentional conduct or by the negligence or intentional conduct of that party's officers, employees or agents, in which case the damage or loss shall be borne by the responsible party. Neither party shall be responsible or liable to the other party or any other party for any indirect, special, punitive or consequential damages or for loss of revenues from any cause.

supposed breach. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 847 (Iowa 2010). This requirement flows from the rule that when a contract has been breached, the nonbreaching party is generally entitled to only be placed in "as good a position as he or she would have occupied had the contract been performed." *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). Under this theory of damages, sometimes referred to as "benefit of the bargain" damages,

> the nonbreaching party's recovery "is limited to the loss he has *actually suffered by reason of the breach*; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken."

Id. (citation omitted).

Like the district court, we conclude the jury's award of damages in the amount of $1,555,774 for Bright Side Lighting's lost profits was not supported by substantial evidence under the principles cited above. Bright Side Lighting claims that had Consumers Energy advanced it the $58,000 requested under the May 2003 contract, it would not have gone out of business and would have realized over a million dollars in profits in the ensuing years. The record provides no support for this argument.

Greene informed Heithoff in May 2003 that unless Consumers Energy was willing to advance Bright Side Lighting money, the company would not survive past the end of the month. He estimated Bright Side Lighting would need at least $100,000 in order to stay in business. By late July, that amount had increased to $250,000. Although the company had realized its largest amount of sales ever during the month of June, it still did not make a profit that month. The months of

July and August were worse despite the many favorable projects Greene had in the works. The $58,000 requested by Greene under the May 2003 contract was admittedly a stop-gap measure, necessary to meet Bright Side Lighting's short-term cash needs.[5] To survive long-term, the business needed $250,000. Greene was unable to secure a loan for that amount without a co-signor.

It is clear from the foregoing that Bright Side Lighting's lost profits damages did not result from Consumers Energy's claimed breach, as the company needed $250,000 in order to stay in business. There is no evidence in the record that had the $58,000 been given to Bright Side Lighting, Greene would have been able to find a co-signor for the loan. And, in fact, Consumers Energy agreed to advance the $58,000 to Bright Side Lighting in the event Greene was able to secure the $250,000 loan. As the district court determined, it was Bright Side Lighting's "inability to obtain that [$250,000] loan that caused its failure, not the denial of the $58,000 loan."

C. Breach of Fiduciary Duty and Punitive Damages.

The jury was instructed Bright Side Lighting needed to prove the following occurred after May 29, 2003,[6] in order to prove its breach of fiduciary duty claim against Heithoff:

> 1. A fiduciary relationship existed between Bright Side Lighting and Brian Heithoff.
> 2. Brian Heithoff breached a fiduciary duty by either
>   (a) intentional misconduct; or

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[5] The district court found Bright Side Lighting's bank account was overdrawn by $2680.30 as of July 31, 2003. The company had accounts payable of $179,781.05, of which $38,023.94 was owed for federal and state taxes.

[6] The district court limited Bright Side Lighting's breach of fiduciary duty claim to events occurring after May 29, 2003, under the five-year statute of limitations in Iowa Code section 614.1(4) (2007) because the petition was not filed until May 29, 2008.

> (b) fraud, as explained in Instruction No. 23.
>
> 3. The breach of fiduciary duty was a proximate cause of damage to Bright Side Lighting.
>
> 4. The amount of damage.

See also Iowa Code § 490.831.[7]

Bright Side Lighting argued at trial, as it does on appeal, that Heithoff breached his fiduciary duties as a director of Bright Side Lighting by orchestrating the company's demise in pursuit of a take-over by Consumers Energy. In support of this argument, Bright Side Lighting points to the following acts by Heithoff as evidence of intentional misconduct or fraud: (1) Heithoff's statement in a May 2003 memorandum to the board of directors for Consumers Energy that "[i]f we are only going to invest $50,000 we are going to starve the company"; (2) his statement at an August 2003 meeting for Consumers Energy's employees that Bright Side Lighting could be purchased for "pennies on the dollar" upon its foreclosure; (3) a statement by Heithoff at an August 26, 2003 Bright Side Lighting board meeting that "his responsibility on our board of directors was to look out for the best interests of Consumers Energy"; (4) Heithoff's false assurances that misled Bright Side Lighting "into believing the additional disbursements under the 2003 agreement were in the pipeline for August"; and (5) Consumers Energy's refusal, "through Heithoff," to release those additional

[7] Although a corporate director normally owes broader fiduciary duties to the corporation than simply refraining from committing intentional misconduct or fraud, *see Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451-52 (Iowa 1988), the articles of incorporation for Bright Side Lighting limited the liability of its directors and officers to those grounds, *see* Iowa Code § 490.202(2)(d), stating:

> A director or officer of the corporation shall not be personally liable to this corporation or its stockholders for damages for breach of fiduciary duty as a director or officer, but this Article shall not eliminate or limit the liability of a director or officer for (a) acts or omissions which involve intentional misconduct, fraud or a knowing violation of law or (b) the unlawful payment of dividends.

funds.[8] Assuming the foregoing establishes intentional misconduct or fraud on Heithoff's part, which we question, we find no evidence in the record any of those acts were a proximate cause of damage to Bright Side Lighting.

Bright Side Lighting essentially argues it would not have continued in business past May 2003 absent Heithoff's assurances that Consumers Energy would provide additional funding for the company. However, as we discussed in the preceding section, the infusion of $58,000 into Bright Side Lighting under the May 2003 contract would not have saved the company from insolvency. *See, e.g.*, *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 742 (Iowa 2009) ("[L]egal causation in fraudulent-representation cases requires, at a minimum, that the tortious aspect of the conduct increased the risk of damages claimed."). Furthermore, Consumers Energy did loan Bright Side Lighting money at the beginning of June 2003. Bright Side Lighting's argument that loan was made with the purpose to "starve" the company so it could be purchased by Consumers Energy for a cheaper price at a later date is unsupported by the evidence.

The starving reference comes from the May 2003 memorandum Heithoff authored and presented to the board of directors for Consumers Energy. In discussing the board's options regarding Bright Side Lighting's request for funding, Heithoff concludes:

> If we are only going to invest $50,000 we are going to starve the company, and therefore we might as well not contribute anything. If

[8] The district court also considered Heithoff's July 30, 2003 email to his management team that included several documents regarding Bright Side Lighting's finances in determining whether substantial evidence of intentional misconduct or fraud was presented to the jury. Bright Side Lighting argued at trial those documents were confidential and should not have been shown to anyone outside of Consumers Energy's board of directors. It does not make that same argument on appeal.

> we believe in the company, we must invest enough money to make it work, which is probably closer to $100,000 if not more.

Bright Side Lighting ignores all but the first clause of this statement. It also ignores the fact that under the May 2003 contract, a total of $100,000 in financing was envisioned, though in separate stages.

Two other additional and essential facts, which were undisputed at trial, are overlooked by Bright Side Lighting. One, Heithoff was not a member of the board of directors for Consumers Energy. Greene was fully aware of this, as he presented all of his requests for additional funding to the Consumers Energy board. Heithoff had no part in voting on Greene's requests, aside from his role in advising the board about its available options. The memorandums prepared by Heithoff, as well as the minutes from the board meetings, reflect Heithoff presented both the positives and negatives of Consumers Energy's continued investment in Bright Side Lighting. It was the board's decision whether to provide Bright Side Lighting with additional money, not Heithoff's. Two, Consumers Energy did not, in fact, buy Bright Side Lighting for "pennies on the dollar" after its demise. Instead, the company was purchased by another buyer, and Consumers Energy lost its investment in Bright Side Lighting.

In light of the foregoing, we fail to see how any of Heithoff's actions contributed to the failure of Bright Side Lighting or caused it damage. We therefore affirm the district court's grant of Heithoff's motion for judgment notwithstanding the verdict on Bright Side Lighting's breach of fiduciary duty claim. The court was thus also correct in granting Heithoff's motion on the punitive damages claim, as compensatory damages must be established before punitive damages may be awarded. *Spreitzer*, 779 N.W.2d at 746 n.10.

We reject Bright Side Lighting's related claim that the district court abused its discretion in denying its petition to vacate the judgment notwithstanding the verdict under Iowa Rule of Civil Procedure 1.1012(2) and (6) based on an indemnity agreement between Heithoff and Consumers Energy that was discovered by Bright Side Lighting after the trial. Bright Side Lighting has not shown any fraud on the part of Heithoff or that this evidence "could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial," *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995), as the indemnity provision was set forth in the publicly available articles of incorporation for Consumers Energy. Furthermore, the district court found the existence of such a provision was irrelevant to its ruling granting Heithoff a judgment notwithstanding the verdict on the punitive damages claim. The district court is given "wide discretion" in ruling on a petition to correct, vacate or modify a final judgment or order, "and an abuse of discretion is needed for reversal." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 109 (Iowa 2011). We find no abuse of discretion.

V. Conclusion.

We conclude the district court did not err in granting the motion for judgment notwithstanding the verdict and setting aside the jury verdicts in favor of Greene and Bright Side Lighting. Our holding renders it unnecessary for us to address the propriety of the court's grant of a conditional new trial. *See Holdsworth v. Nissly*, 520 N.W.2d 332, 336-37 (Iowa Ct. App. 1994). We affirm.

AFFIRMED.