

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 6, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2203**

**Cir. Ct. No. 2002CV283**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**EXACTECH, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TEREX CRANES, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
PAUL V. MALLOY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Terex Cranes, Inc. appeals from a judgment entered on the jury's verdict that it breached its contract to purchase from Exactech, Inc. a certain number of superstructure units in a two-year period and subsequent one-year renewals of the contract. Terex claims that the original

contract period did not expire on the two-year anniversary date and that the contract did not unambiguously require a one-year advance termination notice. It seeks to have damages reduced. We affirm the judgment.

¶2 Terex manufactures industrial cranes. It agreed to purchase 480 superstructure units utilized in its rough terrain crane, the RT400, in a two-year period under a contract effective March 9, 1999. The contract provided: “In the event that the RT400 market sales would not permit [Terex] to accept delivery of 480 RT superstructures within the two year period specified above, [Terex] and Exactech will negotiate in good faith a mutually satisfactory extension period.” The contract also included an “evergreen clause”: “This [contract] represents a two year evergreen agreement renewed annually absent 12 months written notice of cancellation.”

¶3 After the initial two-year period, Terex was 165 units short of the required 480 units. Terex did not purchase any units after the fall of 2001. Exactech sent letters inquiring of Terex’s intent to make additional purchases. A letter of June 11, 2002, asked Terex to contact Exactech within two weeks or Exactech would deem the relationship terminated. On June 27, 2002, Exactech commenced this action alleging that Terex breached the contract by failing to purchase the required number of units within the two-year period and under the evergreen and termination provisions of the contract. In response, Terex claimed that Exactech breached the contract by refusing to reduce its price<sup>1</sup> and by delivering defective units.

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<sup>1</sup> The contract provided: “Pricing to be reviewed semi-annually to account for material increases, inflation and/or efficiencies achieved by Exactech.”

¶4 At trial, Exactech sought lost profits for 653 units at \$1737.25 per unit. Its expert calculated that Terex was obligated to purchase 1060 units based on the assumption that the original two-year agreement was not extended, and that two one-year renewals occurred because Terex had not given written notice of cancellation in the one year before Exactech terminated the parties' relationship in June 2002.

¶5 The jury found that Terex materially breached the original contract and awarded damages of \$106,041.26 with respect to the original 480 units. It also found that the original contract was renewed so that Terex was obligated to purchase an additional 560 units, that Terex materially breached the contract as to the additional units, and that Exactech's damages were \$813,467.20. The circuit court denied Terex's motion after verdict to reduce the damages. Judgment was entered on the verdict.

¶6 Terex attempts to make the damages determination a question of contract interpretation. It argues that because the original purchase contract was extended for an indefinite term, the contract is ambiguous as to when the written notice of cancellation must be given. It suggests that the contract should be interpreted to mean that twelve months' notice is only required when there is a readily ascertainable determination date. It discusses in detail the principles of contract interpretation.

¶7 We reject Terex's attempt to characterize the issue as one of contract interpretation. The matter was submitted to a jury and the jury determined the number of units Terex was obligated to buy and failed to buy. This is simply a question of whether any credible evidence supports the jury's verdict. *See Morden v. Cont'l AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (jury's

verdict will be sustained if there is any credible evidence to support it). We review the evidence in a light most favorable to the jury's determination in recognition of the jury's role to determine the credibility of the witnesses and the weight given to their testimony. *Id.*, ¶39. When the circuit court approves the jury's verdict, special deference is afforded to the jury's determination. *Id.*, ¶40. "In such cases, this court will not overturn the jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" *Id.* (citation omitted).

¶8 The jury rejected Terex's position that the original two-year term was extended indefinitely.<sup>2</sup> The correct characterization of Terex's argument is that the jury's conclusion is contrary to the undisputed evidence that the original two-year period was extended indefinitely. But the evidence was not undisputed. There was no direct testimony that an extension of the original two-year term was negotiated or agreed upon. Exactech's president acknowledged that the contract would permit more than two years to purchase the original 480 units. Although Exactech's vice president acknowledged that business was slow for everyone in 2001 and Exactech would "ride it out" to see if business would pick up again, there was no admission that an extension of the original two-year term was discussed and agreed upon. Terex's president indicated that he assumed the evergreen clause did not apply because the original two-year term had passed and there was "some understanding" that the contract would be completed during the

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<sup>2</sup> As Exactech points out, the jury was not directly asked whether the two-year term of the agreement ended on March 8, 2001. However, the jury answered "yes" to the question: "Was there an extension of the 1999 settlement agreement beyond the original 480 units." The jury determined that 560 units were added to the agreement and that reflects a determination that Terex was obligated to purchase through June 2003, or twelve months after Exactech terminated the contract.

next period. A purchasing manager for Terex explained that in reviewing the contract in April 2000, and aware that Terex was not purchasing a sufficient number of units each month, she did not renegotiate the quantity in part because purchases could have increased in the remaining time of the two-year period. She further indicated that after being denied a requested price decrease, she did not contact Exactech again because she did not want the price to go up. In fall 2001, Terex's president advised her not to purchase from Exactech anymore, but Exactech was not contacted about this change and no response was made to Exactech's termination letter. Finally, an expert witness opined that the provision in the contract allowing an extension obligates the manufacturer to work with the purchaser to stretch out the delivery schedule while expecting some reasonable compensation for doing so because "it is generally harmful to the supplier to have to produce it over a longer period rather than over the terms that they have agreed on." He indicated that under industry standards it would not be acceptable to just stretch out the period indefinitely and that negotiating a schedule stretch would include negotiating the economic effect of the change.

¶9 From this evidence the jury could conclude that Terex did not negotiate an extension and that it just quit ordering from Exactech without any further negotiation. There is credible evidence that the original two-year term was not extended. Thus, Terex's claim that damages must be reduced to those due for breach of the original contract fails.

¶10 Exactech contends that Terex's appeal is frivolous and moves for an award of costs and attorney fees. *See* WIS. STAT. RULE 809.25(3) (2003-04).<sup>3</sup>

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Although we have rejected Terex's attempt to make the issue a question of law, we conclude that as a sufficiency of the evidence claim, the issue is not frivolous. We are not persuaded that there is no reasonable basis for arguing the point.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

