

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2010

A. John Voelker
Acting 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. 2009AP670

Cir. Ct. No. 2004CV1087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAN SAMP AGENCY, INC.,

PLAINTIFF-RESPONDENT,

v.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY
LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE
COMPANY OF WISCONSIN,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County:
TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. In a prior appeal, we concluded American Family Mutual Insurance Company and American Standard Insurance Company of

Wisconsin (collectively, American Family) breached an agency agreement with Dan Samp Agency, Inc., by wrongfully terminating its president and sole shareholder, Daniel Samp. American Family now appeals a judgment, entered following a jury verdict, awarding Samp \$1,598,171.

¶2 American Family requests that we reverse the judgment or, in the alternative, order a new damages trial, because: (1) the circuit court lacked authority to order a damages trial; (2) the trial court applied an incorrect measure of damages; (3) Samp improperly calculated lost profits; (4) the circuit court erroneously excluded after-acquired evidence of Samp's wrongdoing; (5) American Family's liability ended when it delisted Samp as its agent in Wisconsin; (6) a corporation electing to be taxed as an S corporation under federal law cannot recover lost profits; and (7) the trial court erroneously sustained Samp's objection to questioning about the circumstances of Samp's termination. We affirm.

BACKGROUND

¶3 In 1996, Daniel Samp, through his agency, Dan Samp Agency, Inc., entered into a corporate agent agreement with American Family, under which Samp agreed to exclusively represent American Family. On September 3, 2003, American Family informed Samp it was terminating his contract.

¶4 Samp sued, alleging unlawful termination and breach of contract, and the circuit court granted summary judgment to American Family. On appeal, we reversed and directed the circuit court to enter judgment on liability in Samp's favor. *See Dan Samp Agency, Inc. v. American Family Mut. Ins. Co.*, No. 2005AP1918, unpublished slip op. ¶32 (Wis. Ct. App. Aug. 30, 2007).

¶5 The circuit court ordered a trial on damages, to which American Family objected because our decision did not direct the circuit court to hold further proceedings. We denied American Family's petition for leave to appeal the circuit court's order on July 23, 2008. Following a three-day trial, a jury awarded Samp \$1,598,171.

¶6 Additional facts will be set forth as necessary in the discussion section.

DISCUSSION

1. The Trial Court Properly Ordered a Damages Trial

¶7 American Family first resurrects its claim that the trial court lacked authority to conduct a damages trial because our remand in the earlier appeal did not specifically direct the circuit court to hold further proceedings. We rejected this claim in our July 23, 2008 order, concluding "that the mandate directing the court to grant judgment to the plaintiff was correctly construed to allow a trial on damages after granting summary judgment on liability." We need not address this argument a second time.

2. The Circuit Court Applied a Proper Measure of Damages

¶8 American Family next claims the circuit court applied an incorrect measure of damages. According to the circuit court, neither party disputed lost profits as the measure of damages until shortly before trial. At that time, American Family withdrew its proposed jury instruction on future profits and argued that, because American Family's breach destroyed the business, damages were properly measured by the value of the business at the time of Samp's termination. The circuit court rejected this valuation method, finding the business

was not destroyed because Samp continued to operate as an independent insurance agency after termination.

¶9 “The proper measure of damages applicable to a specific claim presents a question of law.” *Schrubbe v. Peninsula Veterinary Serv., Inc.*, 204 Wis. 2d 37, 41, 552 N.W.2d 634 (Ct. App. 1996). “[T]he elementary rule of contract damages is to restore a party to the position he would have been in but for the breach.” *Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.*, 2005 WI App 217, ¶52, 287 Wis. 2d 560, 706 N.W.2d 667. In addition to compensatory damages, a person damaged by a breach of contract is entitled to recover for all losses that are the natural and probable results of the breach. *Magestro v. North Star Environ. Constr.*, 2002 WI App 182, ¶¶10-11, 256 Wis. 2d 744, 649 N.W.2d 722. “[P]rospective profits are a legitimate item of damages resulting from a breach of contract when the circumstances are such that the future profits may be computed with some reasonable certainty.” *Id.*, ¶14 (quotation omitted).

¶10 American Family argues lost profits are not an appropriate measure of damages in this case because its breach effectively destroyed Samp’s business. Citing *Nelson v. Farmers Mutual Automobile Insurance Co.*, 4 Wis. 2d 36, 90 N.W.2d 123 (1958), and *Richey v. Union Central Life Insurance Co.*, 140 Wis. 486, 122 N.W. 1030 (1909), American Family claims that, under these circumstances, Samp may recover only the fair market value of the business on the date of his termination.

¶11 The circuit court rejected this argument as unsupported by the record, and that finding is not clearly erroneous. While American Family did deprive Samp of his customers, by early 2004 Samp’s agency was operating

independently and was authorized to sell insurance products for at least a dozen insurers.

¶12 In any event, neither *Nelson* nor *Richey* establish a categorical rule that fair market value is the only permissible measure of damages where a business is destroyed. Instead, in each case, the court merely prohibited the defendant from offsetting the damages award by the plaintiff's earnings following breach. *See Nelson*, 4 Wis. 2d at 61-62; *Richey*, 140 Wis. at 491. Neither *Nelson* nor *Richey* abrogate the general rule that the non-breaching party is "entitled to recover ... damages directly and naturally resulting in the ordinary course of events from the breach of contract" *Pressure Cast Prods. Corp. v. Page*, 261 Wis. 197, 205, 51 N.W.2d 898 (1952).

¶13 Moreover, neither *Nelson* nor *Richey* support American Family's claim that Samp can recover only the fair market value of his business on the date he was terminated. The measure of damages in both cases was lost business value—which, unlike fair market value, includes prospective profits. *See Nelson*, 4 Wis. 2d at 61-62; *Richey*, 140 Wis. at 491; *see also Bush v. National Sch. Studios, Inc.*, 131 Wis. 2d 435, 443-44, 389 N.W.2d 49 (Ct. App. 1986), *aff'd*, 139 Wis. 2d 635, 407 N.W.2d 883 (1987) (concluding damage awards that include lost profits and lost business value are impermissibly duplicitous).¹

¹ American Family confuses the fair market value of a business (i.e., what a willing buyer would pay a willing seller in an arms-length transaction), and the value of a business as a going concern (i.e. the difference in business value before and after the breach). *See* Gregory B. Conway, *Loss of Profits*, in 2 THE LAW OF DAMAGES IN WISCONSIN §§ 26.33, 26.35 (Russell M. Ware ed., 5th ed. 2010). The fair market value approach does not include lost profits as a separate element (though prospective profits may be a factor when determining what a willing buyer would pay a willing seller), while the business value is primarily a question of earning power. Although American Family apparently argues for the former valuation method, the availability of lost profits in *Nelson v. Farmers Mutual Automobile Insurance Co.*, 4 Wis. 2d (continued)

3. Alleged Deficiencies in Samp's Lost Profits Calculation Do Not Warrant Reversal

¶14 American Family next argues Samp's valuation expert, Mark Hanson, testified contrary to WIS JI—CIVIL 3725 (2008), which instructs the jury to determine future profits as of the date of the breach. Hanson testified that "the loss of profits is made up of two components. Past profits to the date of trial; future profits from the date of trial discounted back." American Family fails to explain how this classification contravenes the jury instruction. Hanson calculated lost profits from the date of the breach, but simply labeled those profits that would have been earned between breach and trial "past profits," which need not have been discounted to present value.

¶15 American Family also claims Hanson committed numerous methodological errors, requiring a new damages trial. It asserts Hanson's lost profits calculation is improper as a matter of law because he failed to calculate proper variable expenses and failed to deduct fixed expenses. American Family also claims Hanson ignored the corporate form and failed to deduct Samp's salary from gross revenue. Finally, American Family argues Hanson's use of a risk-free discount rate is impermissible.

¶16 Those are not questions of law on which we may exercise independent judgment. "Once the relevancy of evidence is established and the witness qualifies as an expert, whether to credit that expert's testimony and the weight to give it are judgments for the fact finder to make." *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, ¶18, 269 Wis. 2d 339, 675 N.W.2d 487.

36, 90 N.W.2d 123 (1958), and *Richey v. Union Central Life Insurance Co.*, 140 Wis. 486, 122 N.W. 1030 (1909), indicates each business was valued using the latter method.

The jury was presented with competing expert reports, and American Family is not entitled to a new damages trial simply because their expert calculated lost profits differently. In resolving conflicts in expert testimony, the jury must “weigh the different expert opinions against each other and consider the relative qualifications and credibility of the experts and the reasons and facts supporting their opinions.” WIS JI—CIVIL 260 (1991).

4. The Circuit Court Properly Excluded After-Acquired Evidence of Samp’s Wrongdoing

¶17 American Family claims the circuit court erred by prohibiting American Family from presenting after-acquired evidence of Samp’s misconduct. Citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), American Family asserts this evidence was admissible as a matter of law to reduce damages for its breach. If true, this would contravene the general principle that a circuit court has broad discretion to admit or exclude evidence. *See Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶18 *McKennon* involved an alleged violation of the Age Discrimination in Employment Act of 1967, and the issue before the Court was how after-acquired evidence of employee wrongdoing bears on remedies available under that legislation. Giving “proper recognition to the fact that an ADEA violation has occurred which must be deterred and compensated without undue infringement upon the employer’s rights and prerogatives,” the Court held that, in fashioning relief, courts “can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.” *McKennon*, 513 U.S. at 362. Contrary to American Family’s assertion, *McKennon* did not hold that evidence of employee misconduct is per se admissible, nor did it discuss

application of its holding to areas of the law outside the ADEA, like breach of contract.

¶19 Even if *McKennon* was on point, that decision still requires an employer relying on after-acquired evidence of wrongdoing to “first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge.” *Id.* at 362-63. American Family asserts that after Samp’s termination, it discovered “instances in which premium dollars had been mishandled,” but does not claim it would have terminated Samp or any other agent upon discovering such conduct. In fact, American Family claims it warned Samp about similar conduct in 1999 *without* terminating him. We conclude the evidence was properly excluded.

5. Delisting Did Not Affect the Availability of Damages

¶20 American Family next asserts Samp’s lost profits ceased when American Family delisted him as an agent with the Wisconsin Office of the Commissioner of Insurance. According to American Family, Samp should have hired another salesperson to sell American Family products. Because he did not do so, the argument continues, he is not entitled to damages from the time he was delisted as an agent—September 9, 2003.

¶21 This argument has no merit. First, it rests on the faulty assumption that Samp’s agency could continue to sell American Family products even though the agency agreement had been terminated. Second, American Family treats terminating an agent and delisting an agent as independent acts, but they are not.

An insurer must give the commissioner notice within thirty days of terminating an intermediary's appointment. WIS. STAT. § 628.11;² WIS. ADMIN. CODE § INS 6.57(2) (April 2010). Delisting had no effect on Samp's ability to recover damages.

6. Subchapter S Corporations May Recover Lost Profits

¶22 American Family claims Samp's agency could not recover lost profits because it elected to be taxed as an S corporation under 26 U.S.C. §§ 1361-1363 (2006). According to American Family, all corporate income is treated as personal income of the shareholders, and the corporation earns no profits from which to compute lost profits damages. *See* 1 ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS § 6.32E (6th ed. 2005 & Supp. Mar. 2009).

¶23 Though we are skeptical that the treatment of a corporation's income for federal tax purposes affects its ability to recover damages, we need not address this issue because American Family has not provided sufficient authority or analysis. American Family demands we adopt a rule of law limiting the availability of damages for a large class of businesses, but devotes only a paragraph to the issue in its brief-in-chief. As authority for its proposed rule, it cites only a single treatise and two cases from foreign jurisdictions, neither of which involved an S corporation. This court will not develop a party's argument, *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), nor will it address issues that are inadequately briefed, *State v. Flynn*, 190 Wis. 2d 31, 39, n.2, 527 N.W.2d 343 (Ct. App. 1994).

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

7. The Circuit Court Properly Sustained Samp's Objection to Questioning About the Circumstances of His Termination

¶24 Lastly, American Family claims it should have been allowed to question Samp about his termination. In American Family's view, Samp opened the door to such questioning by testifying he was surprised by his termination. The circuit court sustained Samp's objection to this line of questioning, noting the trial was limited to damages arising out of Samp's wrongful termination.

¶25 We review a circuit court's decision to exclude evidence under the erroneous exercise of discretion standard. *State v. Walters*, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778. "An appellate court will uphold an evidentiary ruling if it concludes that the circuit court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *Id.*, ¶14.

¶26 "Evidence which is not relevant is not admissible." WIS. STAT. § 904.02. The circumstances surrounding Samp's termination were simply not relevant in a trial for damages. Testimony regarding Samp's knowledge prior to, and state of mind during, his termination was not probative of any issue before the jury. Our earlier decision established American Family's liability. Accordingly, the circuit court properly limited Samp's testimony.

By the Court.—Judgment affirmed.

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

