COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1153 **Cir. Ct. No. 02CV001312**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KAY & ANDERSEN, S.C.,

PLAINTIFF-RESPONDENT,

V.

AMERITECH PUBLISHING, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Ameritech Publishing, Inc., appeals a judgment awarding damages to Kay & Andersen, S.C. on its claim for breach of contract. The issues are whether the trial court properly excluded certain evidence from the bench trial, whether Ameritech proved an enforceable contract limitation on

liability and whether the evidence supports the damage award. We affirm on all issues.

¶2 Kay & Andersen is a Madison law firm. Its office manager, Ida Carlin, signed a contract with Ameritech to list the firm and its attorneys in Ameritech's 2001 white pages business listings and its yellow pages, in its Madison area phonebooks. The following language appeared in capital letters just above Carlin's signature on the contract:

> I HAVE READ AND UNDERSTAND THE TERMS AND CONDITIONS ON THE FACE AND REVERSE SIDE, PARTICULARLY THE PARAGRAPH WHICH LIMITS MY REMEDIES AND PUBLISHERS MAXIMUM LIABILITY IN THE EVENT OF ANY ERROR OR OMISSION.

¶3 Ameritech's 2001 phone books did not include the white page listing for the firm or for Randal J. Andersen, one of two partners in the firm. The book also failed to list its one associate in the proper alphabetical place. The firm received fewer than expected new clients and less than expected new client revenue in 2001 and 2002. Its complaint in this proceeding alleged that Ameritech's listing errors were responsible for the clientele and revenue loss. This appeal results from the trial court's decision awarding $183,000 to the firm to compensate for that lost revenue.[1]

¶4 Ameritech's standard contract consists of two pages. Carlin signed the first page of that contract which, in the language quoted above, references a second page on the reverse side. That second page contains a provision limiting

[1] All dollar figures are rounded off in this opinion.

Ameritech's liability for listing errors to a refund or partial refund of the amount paid for the listings, which was $505 in this case.

¶5 At trial, Ameritech sought to introduce the contract into evidence and enforce the second page liability limit. However, there was no direct evidence that the contract Carlin signed on behalf of the firm included the second page. Carlin could not remember if it did or did not. The Ameritech representative who obtained Carlin's signature did not testify although she worked for Ameritech within the State of Wisconsin. Ameritech also failed to produce the original contract or a copy of it. At best, Ameritech proved that, in most cases, perhaps ninety to ninety-five percent of the time, business-listing customers receive the standard two-page contract. Consequently, the trial court refused to consider the second page of the standard contract as evidence and refused to impose its liability limiting clause.

¶6 The firm's evidence on damages included the following. Between 1997 and 2000 it obtained between 99 and 129 new clients annually and received new client revenues between $114,000 and $298,000. During the same period, overall revenues varied between $639,000 and $780,000. In 2001, the firm received 80 new clients and $91,000 in new client revenue and earned $705,000 in overall revenue. In 2002, it received 87 new clients and $122,000 in new client revenue and $658,000 in fee revenue. Based on this financial data, the firm's two partners testified the firm could expect average yearly revenues of $731,000 with $183,000 representing new client revenue. Consequently, they calculated that the firm's $213,000 in new client revenue in 2001 and 2002 fell $152,000 below what they expected. It was also the partners' testimony that the sole reason for this shortfall was the 2001 white page listing errors that prevented potential new clients from contacting them.

¶7 Ameritech presented an expert accounting witness who offered a different method of computing the firm's lost revenue and testified that using his method the losses attributable to the listing errors were far less. However, the trial court concluded his method was unreliable and produced an unreasonably small damage amount. While noting that precise calculations were impossible, the court held Ameritech had not demonstrated a more reasonable or accurate measure of losses than the firm. The court also found the firm's loss of expected clients and revenue was solely due to the listing errors and noted it would be pure speculation to find other reasons for the less than expected number of clients. The court concluded "Ameritech failed to prove any other factors that would explain the loss of revenues attributed to new customers as described in the testimony of the plaintiffs. Therefore, plaintiffs damage numbers are accepted." The resulting damages included the $152,000 the firm calculated for its 2001-02 losses and an additional sum for carryover losses in future years.

¶8 Ameritech first contends the trial court erred by misapplying the best evidence rule, WIS. STAT. § 910.02 (2003-04),[2] to exclude from evidence the second page of its standard listing contract. It argues the page is, in fact, admissible under the rule as a duplicate of its contract with the firm. *See* WIS. STAT. § 910.03. However, Ameritech's argument is misplaced.

¶9 We review a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court has broad discretion in

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

making evidentiary rulings. ***Id***. This discretion includes determining whether evidence meets the authentication requirement of WIS. STAT. § 909.01. *See* ***Nelson v. Zeimetz***, 150 Wis. 2d 785, 797, 442 N.W.2d 530 (Ct. App. 1989). The requirement is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. Section 909.01. We will sustain a discretionary decision to admit or exclude evidence if the court examined the relevant facts, applied a proper legal standard and, using a demonstrated rational process, reached a reasonable conclusion. ***Martindale***, ¶28, 246 Wis. 2d 67. The true question is thus whether Ameritech proved that its contract with the law firm included the second page of the standard contract and therefore was admissible under § 909.01. The trial court declined to infer from the evidence presented that the law firm's listing contract included two pages. We conclude the trial court properly exercised its discretion in excluding the second page of the contract. The fact that most, but not all, listing contracts include the second page, and the presence of boilerplate language on the first page, does not require an inference that the contract included the second page in this particular case.

¶10 There was sufficient evidence to support the trial court's damage award. Ameritech characterizes the firm's computation of its damages as illogical and speculative. However, a business's past performance is admissible to prove the expected return in a given year. *See* ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis. 2d 222, 231, 254 N.W.2d 234 (1977). Consequently, Ameritech's arguments that question the firm's interpretation of its past performance address only the weight and credibility of the testimony. Those are matters which the trial court, and not this court, determines. *See* WIS. STAT. § 805.17(2). In determining the firm provided the more credible calculation of damages, the trial court reasonably applied the following principle.

> In ***Essock v. Mawhinney***, *supra* at 270 [3 Wis. 2d 258, 88 N.W.2d 659 (1985)], the court favorably quoted the following from 15 Am. Jur. *Damages* § 23, at 414:
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> > "[I]t is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not 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. This view has been sustained where, from the nature of the case, the extent of injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances all that can be required is that the evidence with such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of fact to make a fair and reasonable estimate…."

Cutler Cranberry, 78 Wis. 2d at 233-34.

By the Court.—Judgment affirmed.

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