NOT DESIGNATED FOR PUBLICATION

THOMAS M. IRWIN, JR., JOHN G. KIMBLE AND DRS. IRWIN & KIMBLE, A.P.M.C.	*	**NO. 2004-CA-1601**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE BERRY COMPANY, TONI HOLDER AND BELL SOUTH ADVERTISING & PUBLISHING CORPORATION	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-6554, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

Steven J. Lane
Soren E. Gisleson
HERMAN, HERMAN, KATZ & COTLAR, L.L.P.
820 O'Keefe Avenue
New Orleans, LA 70113-1116
COUNSEL FOR PLAINTIFFS/APPELLANTS

David F. Bienvenu
Shawn L. Holahan
SIMON, PERAGINE, SMITH & REDFEARN, LLP
1100 Poydras Street

Suite 3000, Energy Centre
New Orleans, LA 70163-3000
COUNSEL FOR DEFENDANTS/APPELLEES

AFFIRMED

This is a Yellow Pages advertisement omission case. Enforcing standard limitation of liability provisions contained in written Advertising Orders, the trial court granted the defendants' summary judgment motion. The plaintiffs appeal that judgment. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs are ear, nose, and throat surgeons, Dr. Thomas M. Irwin, and Dr. John G. Kimble, and their professional medical corporation, Drs. Irwin & Kimble, A.P.M.C. (hereinafter collectively referred to as the "Doctors"). The defendants are The Berry Company, a BellSouth Corporation wholly owned sales agent subsidiary; BellSouth Advertising & Publishing Corporation; and Toni Holder, the salesperson that handled the Doctors' Advertising Orders in question (hereinafter collectively referred to as "BellSouth").

In August 2001, Linda Irby, the Doctors' office manager, telephoned BellSouth regarding expanding the Doctors' existing Yellow Pages advertisement. Ms. Irby spoke with BellSouth's agent, Ms. Holder. In that telephone conversation, Ms. Holder recognized the Doctors' on-going, long-

standing business relationship with BellSouth. Also in that telephone conversation, Ms. Holder and Ms. Irby agreed on the following: (i) the format of the expanded advertisement that would appear in the 2002 Yellow Pages for the New Orleans area; (ii) the price for the expanded advertisement, which was an additional advertisement expense of $232; and (iii) the method of payment, which was to add this additional cost to the Doctors' telephone bill. It is undisputed that during that telephone conversation Ms. Holder did not inform Ms. Irby of any limitation on liability that would apply to the advertising contract.

In November 2001, BellSouth mailed the Doctors the Advertisement Order. The front of the Advertising Order contained a "print customer signature" and a "customer signature" line. Ms. Holder printed "Linda Irby" on the former line and "Per Tel." on the latter line (meaning "by telephone conversation"). On the front of the Advertising Order were the specifics of the advertisement; on the back were the terms and conditions of the contract. In two places on the Advertising Order appear notifications to the customer in bold, block letters that BellSouth's liability was limited for any errors and omissions. The first notification appears on the front of the document, which is a notice referring the customer to the back of the document and a declaration that BellSouth's liability for errors, omissions, or both was

limited. The front of the document also contains an express offer to the customer to cancel the advertising order. Particularly, the entire notice on the front of the document reads:

> Applicant, personally, or as authorized representative, applies to BellSouth Advertising & Publishing Corporation ("BAPCO") for the advertising described above and on any associated printing orders, and for the continuance of any existing advertising not discontinued above. By signing this Order, or receipt of a copy without cancellation, Applicant acknowledges having read, understood, and agreed to the Terms & Conditions on the reverse. **LIABILITY FOR ERRORS AND/OR OMISSION IS LIMITED.**

The back of the document contains the following limitation of liability provision:

> **10. LIMITATION OF LIABILITY.** You acknowledge that (1) this is a commercial business transaction; (2) alternative and competing advertising media are available to you; (3) occasional errors, omissions and misplacements may occur in our directories and cannot be corrected until the next issue; (4) any potential harm from an error, omission or misplacement is speculative in nature; (5) we cannot offer advertising at rates which reflect the revenue and profit you may obtain from that advertising, and (6) we assume no responsibility other than as contained in these terms and conditions.
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> **THEREFORE, FOR MUTUAL CONSIDERATION YOU AGREE THAT ANY LIABILITY WHICH WE MAY HAVE DUE TO ERRORS, OMISSIONS OR MISTATEMENTS IN YOUR ADVERTISING SHALL NOT EXCEED THE AMOUNT OF CHARGES FOR ANY COMPLETE OMISSION, OR BY REDUCTION OF YOUR CHARGES FOR ANY ERROR OR MISPLACEMENT IN PROPORTION TO ANY REDUCTION OF THE VALUE OF THE ADVERTISING DUE TO THE ERROR OR MISPLACEMENT.**

> THIS LIMITATION OF LIABILITY APPLIES TO ANY AUTHORIZED SALES AGENT, BELLSOUTH TELECOMMUNICATIONS, INC., ANY EMPLOYEES AND ANY OF OUR AFFILIATED COMPANIES. IT APPLIES TO CLAIMS IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE AND TO ANY LOSS OF BUSINESS, PROFITS, OR ADDITIONAL ADVERTISING COSTS WHICH YOU INCUR. IT ALSO APPLIES TO ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES AND TO ANY CLAIM AGAINST YOU BY ANY THIRD PARTY REGARDING YOUR ADVERTISING. IT IS AGREED THAT YOUR ADVERTISING IS INTENDED ONLY FOR YOUR OWN BENEFIT AND ANY BENEFIT TO OTHERS IS MERELY INCIDENTAL.

The Doctors did not communicate with BellSouth again regarding this matter until after the 2002 Yellow Pages was published without the Doctors' advertisement. The Doctors did not pay BellSouth for the advertisement costs, and BellSouth did not pursue the Doctors for those costs. Thereafter, the Doctors filed the instant damage suit asserting both breach of contract and negligent misrepresentation claims based on the allegation that they lost clients and revenue due to BellSouth's failure to print their Yellow Pages advertisement. The parties filed cross-motions for summary judgment. The trial court denied the Doctors' motion and granted BellSouth's motion. The instant appeal followed.

DISCUSSION

"Favored in Louisiana, the summary judgment procedure 'is designed to secure the just, speedy, and inexpensive determination of every action' and shall be construed to accomplish these ends." *King v. Parish National Bank*, 2004-0337, p. 7 (La. 10/19/04), 885 So. 2d 540, 545 (quoting La. C.C.P. art. 966(A)(2)). Appellate courts review grants of summary judgment *de novo* using the same standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez*, 2000-2456, p.4 (La. App. 4 Cir. 1/10/01), 778 So. 2d 668, 670. According to this standard, a summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Schmidt*, 2000-2456 at p.3, 778 So. 2d at 670.

The party seeking the summary judgment has the burden of affirmatively showing the absence of a genuine issue of material fact. *Allen v. Integrated Health Services, Inc*., 32,196, p.3 (La. App. 2 Cir. 9/22/99), 743 So. 2d 804, 806. A genuine issue of material fact refers to an issue that would matter on trial of the merits; such an issue exists if there is a dispute of fact whose existence or nonexistence may be essential to plaintiff's cause

of action under the applicable theory of recovery. *Schmidt*, 2000-2456 at p.3, 778 So.2d at 670 (citing *Moyles v. Cruz*, 96-0307 (La. App. 4 Cir. 10/16/96), 682 So.2d 326). Simply stated, a "material" fact is "one that would matter on the trial on the merits." *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751.

Since the movant (BellSouth) will not bear the burden of proof at trial, it is not necessary that it negate all elements of the opponent's (the Doctors') claims. Rather, the movant need only point out to the court the absence of factual support for one or more elements essential to the opponent's claims. Once the movant meet this initial burden, the burden shifts to the opponent to present factual support sufficient to establish his or her ability to satisfy the evidentiary burden at trial. If opponent then fails to satisfy this burden, there is no genuine issue of material fact and the mover is entitled to summary judgment. *King*, 2004-0337 at p. 8, 885 So. 2d at 545-46. Stated otherwise, the opponent to a properly supported motion for summary judgment may not rest on the mere allegations or denials of his or her pleadings, but must respond by affidavits or as otherwise provided by law setting forth specific facts showing that there exists a genuine issue of material fact for trial. *Coates v. Anco Insulations, Inc.*, 2000-1331,

p.5 (La. App. 4 Cir. 3/21/01), 786 So. 2d 749, 753.

On appeal, the Doctors argue that the trial court erred in finding the limitation of liability provision in the Advertising Order binding. The Doctors argue that the limitation of liability provision was not binding for several reasons; to-wit:

1 The Doctors' August 2001 contract over the phone was a binding oral contract without liability restrictions;

2 BellSouth's agent, Ms. Holder, made no mention of the liability limitations;

3 The limitations attached to the written Advertising Order arrived over three months after the contract was reached over the phone;

4 The Doctors never signed the Advertising Order;

5 BellSouth's agent, Ms. Holder, represented to the Doctors that the only purpose of the Advertising Order was to simply confirm and double-check the form of the advertisement as it was to appear in the Yellow Pages; and

6 BellSouth is estopped from unilaterally imposing limitations on liability without specific, written consent from the contracting party.

The Doctors emphasize that BellSouth's discovery responses define "Advertising Orders" as follows:

> Advertising Orders serve as written confirmation of the verbal order for advertising taken by a telephone sales representative and serve to convey the terms and conditions of the sale, cost of the advertising, and items ordered. Advertising Orders on telephone sales accounts are system generated and mailed to the customer when an account is closed in the system by the sales representative.

The Doctors further emphasize that the above definition characterizes an Advertising Order as a "confirmation." The Doctors contend that given the Advertising Order is not sent until the account is closed, it cannot, as a matter of law, be a counter offer.

BellSouth counters that the trial court correctly found the limitation of liability provision in its advertising contract with its long-standing customer, the Doctors, was binding. BellSouth further counters that its agent was not required to read the liability limitation over the phone to the Doctors, who are sophisticated businessmen and who admit receiving and reviewing the Advertising Order. BellSouth still further counters that simply because the Doctors never formally accepted the terms of the Advertising Order does not necessarily render it unenforceable because Louisiana jurisprudence recognizes the concept of an implied acceptance. We agree.

The concept of an implied acceptance--silence or inaction constituting consent in certain circumstances--is recognized in the Civil Code, which provides that "acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent." La. C.C. art. 1927. Commenting on the civilian recognition of inaction constituting consent, a commentator notes that a series of transactions between the same parties may justify the offeror taking the offeree's

acceptance for granted and impose a duty on the offeree to communicate his or her rejection to the offeror. Saul Litvinoff, *Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part II Acceptance*, 28 La. L. Rev. 153, 199 (1967). Although the general rule is that silence does not signify consent, "where, because of the party's relationship or the nature of the transaction silence is to be reasonably understood as an assent, it will be given that effect." 2 Richard A. Lord, *Williston on Contracts*, § 6:53 (4th ed. 1991). Such is the case here.

The Doctors and BellSouth had a long-standing, ongoing business relationship spanning over two decades. This was not a new BellSouth account; rather, this was an expansion of an existing account. The Doctors acknowledged receiving and reviewing the Advertising Order, which in two places conspicuously referred to BellSouth's limitation of liability. Moreover, on the front of the Advertising Order appears the following notification: "[b]y signing this Order, *or receipt of a copy without cancellation*, Applicant acknowledges having read, understood, and agreed to the Terms & Conditions on the reverse. LIABILITY FOR ERRORS AND/OR OMISSIONS IS LIMITED." In light of these circumstances, we find no error in the trial court's conclusion, as a matter of law, that the contract between the parties was set forth in the written Advertising Order,

which contained the limitation of liability provision.

Having found the terms and conditions set forth in the Advertising Order constituted the contractual agreement between the parties, we turn to the issue of whether the limitation of liability provision is valid and enforceable. It is a well-settled principle that Yellow Page advertisement limitation of liability provisions, virtually verbatim to the one in the contract at issue, are valid and not against public policy. *See Soileau & Coreil v. Trans-Western Publ'g*, 542 So. 2d 198 (La. App. 3 Cir. 1989); *Louisiana Shoes, Inc. v. South Cent. Bell Tel. Co.*, 445 So. 2d 1304 (La. App. 5 Cir. 1984); *Roll-Up Shutters, Inc. v. South Cent. Bell Tel. Co.*, 394 So. 2d 796 (La. App. 4 Cir. 1981); *Marino v. South Cent. Bell Tel. Co.*, 376 So. 2d 1311 (La. App. 1 Cir. 1979). Citing this principle, the trial court concluded that "the parties entered into a valid advertising contract that limited damages sustained as a result of any errors or omissions on the part of defendants to the cost of the advertisement itself" and thus granted summary judgment in BellSouth's favor.

The Doctors do not contest the well-settled principle that limitation of liability provisions are valid. Rather, they contend that under the unique circumstances presented in this case the limitation of liability provision should not be applied. Those unique circumstances, according to the

Doctors, are that BellSouth's representative, Ms. Holder, not only failed to call the limitation of liability provision to the Doctors' attention, but also misrepresented that the Advertising Order was being sent solely to confirm the look of the advertisement. According to Ms. Irby, Ms. Holder represented to her that the sole purpose for sending the Advertising Order was to allow her to check the content of the expanded advertisement. Although the Doctors acknowledge that they received and reviewed the Advertising Order, they contend that they limited their review of it to ensuring that the expanded advertisement was as intended. Given those facts, the Doctors argue that at a minimum there is a genuine issue of material fact as to the reasonableness of their failure to read the entire limitation of liability provision. We find this attempt to circumvent the limitation of liability provision unpersuasive.

As BellSouth contends, similar attempts to circumvent such provisions have been rejected. For instance, in *Hussey v. South Cent. Bell Tel. Co.*, 926 F.Supp. 89, 92 (W.D. La. 1996), the plaintiff argued that although she had been advertising for years in the Yellow Pages, no one had ever explained to her the limitation of liability provision. Rejecting the plaintiff's argument that the provision thus should not apply, the court stressed that immediately above the signature line on the agreement

appeared a statement that "Applicant acknowledges having read, understood and agreed to the Terms & Conditions on the reverse," one of which was the limitation of liability provision. *Hussey*, 926 F.Supp. at 92-93. Likewise, in *Marino*, the plaintiff argued that due to defendant's failure to call the limitation of liability provision to her attention coupled with the hurried signing of the contract, the provision should not be applied. Rejecting that argument, the court in *Marino* noted that it had examined the contract and found it not to be misleading because it contained a reference on the front of the document immediately above the signature line to the "terms and conditions set forth on the reverse side hereof," one of which was the limitation of liability provision. *Marino,* 376 So. 2d at 1312.

The Doctors' final assignment of error is that the trial court failed to address their negligent misrepresentation claim. Their negligent misrepresentation claim is premised on Ms. Holder's statement that the Advertising Order was being sent solely to confirm the appearance of the advertisement. As to that claim, the Doctors allege that BellSouth's duty encompassed the risk that the Doctors, as prospective buyers of advertising would rely on Ms. Holder's misrepresentation provided to Ms. Irby and suffer economic loss. That claim, however, is merely a restatement of the Doctors' claim that the contract between the parties was the oral one reached

in the telephone conversation. As discussed above, that claim is unpersuasive. The written Advertising Order is the contract between the parties. The standard limitation of liability provision in that written contract bars all the claims the Doctors assert in this case, both the contractual and negligence claims. We thus find this argument unpersuasive.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED