STATE OF MICHIGAN

COURT OF APPEALS

T&S DISTRIBUTORS, L.L.C., ABSOLUTE INTERNET, INC., ARQ, INC., CAC MEDIANET, INC., CUSTOM SOFTWARE, INC., and TELNET WORLDWIDE, INC.,

Plaintiffs,

and

ACD TELECOM, INC.,

Plaintiff-Appellee,

v

MICHIGAN BELL TELEPHONE COMPANY d/b/a AT&T MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
March 20, 2012

No. 296257; 296428
Ingham Circuit Court
LC No. 04-000689-CK

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In this contractual dispute, defendant Michigan Bell Telephone Company (AT&T) appeals as of right the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) and its motion for new trial on damages or, in the alternative, remittitur following a jury trial where the jury found that defendant breached its contract with plaintiff ACD Telecom, Inc. (ACD) and awarded $7,994,590 in damages. We affirm.

AT&T is a telecommunications company that, prior to the events that gave rise to this litigation, had a number of long-term contracts with various business entities to provide telecommunication services for those entities. ACD is a competitor of AT&T. A number of AT&T's customers wished to switch their services to ACD, but they were impeded from doing so by the substantial early termination penalties in their contracts with AT&T. AT&T and ACD entered into a Mutual Waiver of Early Termination Fees Agreement ("MWA") with each other, under which they mutually agreed to waive early termination fees for any of their customers who switched telecommunications services to the other party. Several businesses then proceeded to

switch their telecommunications services from AT&T to ACD, whereupon AT&T refused to waive those businesses' early termination fees. ACD commenced this litigation.

In a prior appeal, this Court addressed AT&T's contention that the specific services transferred and the specific businesses that had transferred those services were definitionally excluded from the terms of the MWA. "The MWA, by its own language, was applicable only to 'telecommunication services . . . which include . . . toll service, local exchange service, and/or associated features.'" *T&S Distrib*, *LLC v Mich Bell Tel Co*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 274767) (*T&S Distrib I*), slip op at p 6. AT&T argued that this excluded the particular kind of services, ISDN Prime and ADTS-E, at issue here; this Court found a genuine question of fact as to what the MWA's scope was. The MWA additionally "applied only to telecommunication services that had been purchased by 'end-user subscribers.'" *Id*. at p 14. AT&T argued that "end-user subscribers" are, in effect, a term of art that excludes the business entities at issue; this Court again found a genuine question of fact. The matter was remanded.

On remand, AT&T sought to exclude certain evidence and testimony generally pertaining to ACD's damages, if any, the details of which we will discuss *infra*. The subsequent jury trial largely focused on what the MWA meant by the terms "end-user" and "local exchange service," and whether the customer business entities were end-users and whether ISDN Prime and ADTS-E were local exchange services.[1] In addition, ACD presented it experts to testify that the amount of profit per line lost was $21,607, with the understanding that the jury would determine how many lines were lost. AT&T presented experts arguing that ACD's computation of its losses, based on a report from QSI Consulting, Inc. (the "QSI report"), was unfounded and overestimated. Pursuant to the verdict form, to which neither party objected, the jury found that AT&T breached the MWA and ACD was harmed thereby in the amount of $7,994,590.[2]

AT&T first argues that ACD failed to establish a breach of contract because ACD had not satisfied conditions precedent. Specifically, the jury verdict was based on profits "lost" from customers that never actually terminated their service with AT&T and for which ACD never submitted waiver requests, as required by the MWA. AT&T did not raise this argument until its motion for judgment notwithstanding the verdict (JNOV), presenting this as a challenge to the sufficiency of the evidence. We disagree. This issue raises the independent substantive issue of condition precedent, and it does so for the first time after the entire matter was submitted to and decided by the jury. Put another way, AT&T now argues a new legal theory for why it should prevail, rather than merely pointing out a factual deficiency in ACD's case.

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[1] The jury's affirmative findings are not at issue in this appeal. Rather, all but one of the issues raised on appeal pertain to evidentiary issues or are legal issues pertaining solely to damages.

[2] We have omitted discussion of much of the procedural background of this matter for clarity. AT&T filed numerous motions at various stages of the proceedings. To the extent they are relevant to the many issues raised on appeal, we will discuss them in context.

An issue not raised at the proper time for an opponent to have a meaningful opportunity to respond is generally not amenable to review. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Although a plaintiff has the burden of proving satisfaction of conditions precedent, failure to satisfy conditions precedent is an affirmative defense that must be properly raised or will be unavailable. MCR 2.112(C); *Valley Nat Bank of Arizona v Kline*, 108 Mich App 133, 137-139; 310 NW2d 301 (1981). AT&T's failure to raise this issue until its JNOV is fatal to it.

AT&T next argues that ACD could not establish a breach of contract because the customer business entities switched their service to ACD.net, a legally distinct corporation from ACD. AT&T argues that its contract was with ACD, not ACD.net, and because any lost profits belonged only to ACD.net, ACD could not establish damages. We review de novo a trial court's decision on a party's motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* (citations omitted).

Our review of the record shows that evidence was presented tending to support both the conclusion that ACD provided the relevant services and that ACD.net provided those services. Service contracts listed the name of ACD.net; however, ACD owned the network equipment itself and listed the services with the Public Service Commission. Significantly, while the fact that ACD and ACD.net shared a bank account and operating expenses might not be sufficient by itself, the two corporations had a contract expressly allowing each of them to sell and represent the other's products as its own. In short, the evidence was equivocal: the services might have been provided by ACD.net, or ACD.net may simply have handled the billing. Whether the services were provided by ACD, rather than ACD.net, was properly submitted to the jury, and because the record contains evidence from which the jury could have concluded that the provider was ACD, the trial court properly denied AT&T's motions for a new trial or JNOV on this basis.[3]

AT&T next argues that the trial court erroneously allowed ACD to ambush it with a last-minute drastic change to ACD's theory of its damages, resulting in an award nearly quadruple that found in ACD's discovery responses. We review for an abuse of discretion a trial court's

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[3] AT&T additionally argues that the operating agreement between ACD and ACD.net had expired by any time relevant to this matter, so neither remained permitted to sell or represent the other's services as their own. However, because AT&T was not a party to that agreement, it lacks standing to assert a breach of that agreement. The alleged expiration of that contract would have been an important fact to present to the jury in support of the argument that ACD had not provided services under the name of ACD.net, or vice versa. Nevertheless, that alleged expiration does not preclude the jury from nevertheless making a factual finding that the parties thereto carried on as if that agreement were still in effect and, therefore, that the services were in fact provided by ACD.

decision on a motion for new trial. *Kelly v Builders Square*, *Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

As noted, ACD's damages were largely based on the QSI report, which was originally produced in 2005. That report estimated that ACD had lost the sale of 91 lines due to AT&T's alleged breach, resulting in an estimated lost profit of $2,034,798. However, the report expressly and unambiguously cautioned that this figure was a conservative estimate based on resolving all assumptions in favor of understatement rather than overstatement. In 2008, AT&T attempted to exclude the QSI report because ACD had not identified any specific customers who had not switched to ACD because of AT&T's refusal to waive early termination charges, thereby allegedly precluding AT&T from investigating how many lines ACD had really lost. AT&T also argued that the number of lost lines was a factual question, not a matter for expert opinion. In response, ACD provided an affidavit from Kevin Schoen, its president, explaining that the estimate of 91 lines was a gross underestimate. AT&T received additional discovery, including Schoen's deposition testimony and a spreadsheet indicating that ACD had lost more than 700 lines. Shortly before trial, in September 2009, AT&T again attempted to exclude the QSI report, this time on the ground that ACD's damages theory had been altered. ACD noted that the number of lines lost would now be established by fact witnesses, and the trial court found that AT&T had known for almost a year that ACD's damages testimony had changed.

We note initially that ACD's *theory* of damages never changed. ACD always intended to, and in fact did, calculate its damages by multiply the number of lines lost by the amount of profit lost per line. ACD did not alter the amount of profit it allegedly lost per line. The QSI report itself indicated that more than 91 lines were probably lost, and AT&T became aware almost a year before trial that ACD believed that *many* more than 91 lines had been lost. We find no ambush, and moreover, we find no indication that any concealment, if any, was intentional. See *Richardson v Ryder Truck Rental*, 213 Mich App 447, 452-453; 540 NW2d 696 (1995). Therefore, the trial court's decision not to exclude it was not an abuse of discretion. See *Harper v Nat'l Shoes*, *Inc*, 98 Mich App 353, 356; 296 NW2d 1 (1979).

AT&T next argues that the trial court made multiple errors regarding ACD's expert testimony. We disagree. The qualification of a witness as an expert and the admissibility of his testimony are within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *Woodward v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id*. Before a trial court may admit expert testimony, it is required by MRE 702 to ensure the reliability of that testimony, including the theories and methodologies relied on by the expert. *Chapin v A & L Parts*, *Inc*, 274 Mich App 122, 126; 732 NW2d 578 (2007). "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id*. (quotation omitted). However, this analysis—which is incumbent upon the trial court—is limited only to evaluating whether the principles and methodology are sound enough to permit the jury to consider the substance and conclusions; the "gatekeeper" role is an exercise in evaluating scientific soundness, not objective truth. See *id*. at 126-127.

AT&T's argues that the trial court improperly assigned to the jury to task of determining whether the proposed testimony met the minimum standards of reliability. The record shows otherwise. The trial court determined that "there is enough evidence to show that they're [ACD and Telnet] similar enough that they could produce reliable data that could be used by QSI to form a comparison, and interpolate, if you will, these numbers that they're done as far as the lost revenues go." It was "anything beyond that" such as "whether it's a sufficient comparison" that was "a matter for the jury." The trial court properly determined that it was for the jury to determine whether ACD was sufficiently similar to Telnet, the company to which ACD compared itself, for ACD's "yardstick" calculation of damages to be appropriate.

AT&T additionally argues that the yardstick approach was inadmissible because no authority justified it. But in fact, ACD provided textbook evidence that the use of a proxy firm was a reasonable basis for calculating lost profit damages for a new business. Additionally, the article that AT&T identifies ACD as having submitted also indicates that the yardstick approach may be appropriate under at least some circumstances. The trial court did not err in finding that QSI's expert testimony based on the yardstick method was admissible. AT&T also argues that QSI's estimated growth rate of 8.5 percent was speculative and unreliable. The figure was based on data provided by Telnet in signed letters, and QSI created a damages report for Telnet when it was still a plaintiff in this litigation. The contents of the letters established that but for AT&T's failure to waive early termination fees, certain customers would have switched services. To the extent Telnet was an appropriate proxy company, ACD suffered similar damages. We find no merit to AT&T's assertion that the trial court erred in permitting the expert testimony.

AT&T next argues that the trial court erroneously allowed Schoen to give impermissible hearsay testimony. This testimony involved potential customers and the number of lines Schoen expected ACD would have acquired but for AT&T's refusal to waive early termination fees and the customers' concerns about early termination charges. AT&T argues that testimony regarding the number of lines and the customers' reasons for not switching to ACD was improperly admitted pursuant to MRE 803(3), the "state of mind" exception to the hearsay evidence rule. We find no error warranting reversal.

Initially, AT&T did not properly preserve its objection to the testimony regarding the number of lines. AT&T filed a motion in limine seeking to exclude, on hearsay grounds, testimony from Schoen regarding potential customers. We do not find that AT&T made an unambiguous reference to testimony pertaining to the number of lines at that time, and in a bench memorandum to the trial court, it argued that a specific document was inadmissible. More importantly, the trial court ruled that a motion in limine was a premature time to object to testimony on hearsay grounds. The court explicitly declined to address the issue of hearsay evidence from Schoen on any topic, and it instructed AT&T to object to any apparent hearsay evidence at trial, at which time it would make a ruling. AT&T objected to testimony about the customers' intent to switch, but it did not object to any testimony about the number of lines.[4]

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[4] Our review of the transcript of Schoen's testimony given on October 8, 2009, shows that AT&T properly objected to testimony pertaining to the reasons why potential customers did not switch their services, but no objection was placed on the record as to the number of lines. One of

"An issue is not properly preserved without a specific and clear objection for stated reasons that enables a trial judge to rule clearly and definitively on an assignment of error." *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). Consequently, AT&T's objections to the former are preserved, and its objections to the latter are not.

For preserved issues, we review the admission of evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." *Id.* at 159. Unpreserved issues are reviewed for plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

We do not find clear error in the trial court's admission of Schoen's testimony regarding the number of lines ACD could have acquired. The record supports the trial court's conclusion that Schoen had an alternate, independent basis upon which he knew how many lines the customers had—his personal contacts with the businesses in other contexts, expertise in the field and his site visits to the companies. Additionally, our review of the actual questions and answers is that nothing about them inherently mandates that the information requested or provided *must* have been hearsay. Schoen's knowledge could have come from, for example, his personal observations made at the customers' sites when he visited them, his history with some of the customers and personal knowledge of their needs and capacities, and his understanding of the market generally. In light of AT&T's failure to object, we find no clear error.

However, AT&T did object to testimony regarding the customers' intentions. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Certain statements, however, are excluded from the hearsay rule. MRE 803. At issue in this case is the state of mind exception, MRE 803(3), which permits the admission of:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will.

There is no real dispute that the objected-to testimony did indeed involve the customers' motives and intentions; and, consequently, their then-existing states of mind. However, AT&T argues that the testimony was actually introduced to prove facts underlying that intent, of which Schoen

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the objections resulted in an off-the-record bench discussion. At the conclusion of the day's testimony, AT&T's counsel made a brief statement to clarify its objection for the record. That statement mentioned the number of lines, seemingly in passing, but we are unable to discern from that statement any clear indication whether AT&T had, in fact, raised that particular objection during the bench discussion. We find from the judge's comments a very strong inference that AT&T did not. In any event, the witness had an independent basis on which to rely regarding the number of lines, so it is irrelevant whether it was preserved.

had no personal knowledge: that the proposed customers had contracts with AT&T that contained early termination provisions; and why the customer would or would not have switched to ACD.

"Before a statement may be admitted under MRE 803(3), the trial court must first determine that the declarant's state of mind is a relevant issue." *Int'l Union*, *United Auto*, *Aerospace & Agricultural Implement Workers of America v Dorsey* (*On Remand*), 273 Mich App 26, 36; 730 NW2d 17 (2006). It was undisputed that none of the customers switched from AT&T, but the reason why they did not do so was a relevant issue: ACD's lost profits must have been traceable to AT&T's failure to honor the MWA. If the customers stayed with AT&T for any reason other than AT&T's breach, then ACD's lost profits could not be attributable to that breach.

The scope of MRE 803(3) is "very narrow and does not allow the admission of any statements explaining the declarant's state of mind." *Dorsey*, 273 Mich App at 38. However, that holding simply means that MRE 803(3) cannot be used to "open the door." In *Dorsey*, this Court held that it was proper to admit portions of various memoranda that contained statements made by the declarant of his mental state, but it was error to admit any other portion of the memoranda under MRE 803(3). *Id*. at 31-32, 36-38. In *Duke v American Olean Tile Co*, 155 Mich App 555, 571; 400 NW2d 677 (1986), a declarant's statement to hospital personnel that he was in pain was admissible under MRE 803(3), but his statements about the accident that caused his pain were not (even though they were independently admissible under a different hearsay exception). This Court has also held that testimony that a decedent had requested a change of beneficiary form, which is not even a statement of mental state per se, was admissible pursuant to the state of mind exception because it was directly indicative of the decedent's mental state (specifically, his intent to change the beneficiary of his policy, irrespective of whether he actually accomplished that goal). *Aetna Life Ins Co v Brooks*, 96 Mich App 310, 313; 292 NW2d 532 (1980).

Here, the testimony was, in one form or another, that the customers wanted to switch but were concerned that they would be severely penalized for doing so; in particular they were concerned that there was a risk that AT&T would inflict early termination fees on them, and ACD could not indemnify them. ACD provided factual testimony from customers that they *did* switch and incurred early termination fees. ACD provided factual testimony from other customers that they had wanted to switch but did not do so because of the early termination fees, and Schoen testified that those companies did not switch. All of the customers testified about the early termination fee provisions in their contracts, and Schoen testified that such things were common and in ACD's contracts as well. We find that Schoen's testimony that some customers were apprehensive of early termination fees if they switched was admitted only to prove those customers' states of mind, not whether they actually had early termination provisions in their contracts, whether AT&T did or would actually impose those fees, or whether ACD provided indemnification.

The situation at bar is perhaps unusual in that the customers' states of mind here is simply not completely severable from why they felt the way they did. As discussed, their states of mind were that they desired to switch their service but believed that they would incur AT&T's penalties if they did so. We do not believe that, under the circumstances of this case, there was

any less-complete way to articulate that state of mind that would make coherent sense. We further note that the United States Supreme Court held long ago that the state of mind exception to the hearsay evidence rule may even allow the admission of statements of future intent to show the declarant's state of mind at the time those statements were made as proof that the declarant actually followed through on that intent. *People v Goddard*, 429 Mich 505, 520 n 18; 418 NW2d 881 (1988), citing *Mut Life Ins Co of New York v Hillmon*, 145 US 285, 295; 12 S Ct 909, 912; 36 L Ed 706 (1892).

While not specifically referring to the state of mind exception by name, other cases from our Supreme Court and from the United States Supreme Court have further held that some explanation of *why* a declarant did or did not do something is admissible under that exception. In a libel case in which a store's sales plummeted when the defendants publicly accused it of selling counterfeit medicine, our Supreme Court held that "if a customer comes to return an article previously bought, that fact is itself significant and his reasons given are a part of the transaction which cannot be regarded as a mere matter of hearsay." *Steketee v Kimm*, 48 Mich 322, 324; 12 NW 177 (1882). In a restraint of commerce suit made by several hat manufacturers who employed nonunion labor against two unions accused of arranging a boycott, the United States Supreme Court held that "[t]he reasons given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible." *Lawlow v Loewe*, 235 US 522, 536; 35 S Ct 170; 59 L Ed 341 (1915), citing 3 Wigmore, Evidence § 1729(2), which explains that the exception permits the admission of a declarant's present motive or reason for an action or inaction. We conclude that although the scope of MRE 803(3) is narrow in concept and focus, it is not necessarily so limited in form.

The trial court properly concluded that the testimony was not used to prove the facts underlying the motive, but simply the intent to switch and the motive (belief in early termination fees and no indemnification) for not doing so. The customers' beliefs constituted state of mind testimony, so the trial court did not err in admitting them under MRE 803(3).

AT&T next contends that the trial court's multiple errors combined to result in its denial of a fair trial. "In order for cumulative evidentiary error to mandate reversal, consequential errors must result in substantial prejudice that denied the aggrieved party a fair trial." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Because we have identified no prejudicial errors, there can be no cumulative effect of errors that requires reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000). Consequently, reversal under a cumulative error theory is unwarranted. *Id*.

AT&T next contends that the trial court should have granted its motion for remittitur, arguing that the award of lost profits was overly speculative and reliant solely on Schoen's self-serving and uncorroborated hearsay testimony. We disagree.

We review for an abuse of discretion a trial court's decision regarding a motion for remittitur, giving deference to the trial court's superior ability to see the evidence and assess witnesses' credibility; the standard is whether the jury award is supported by the evidence. *Unibar Maintenance Servs*, *Inc v Saigh*, 283 Mich App 609, 629-630; 769 NW2d 911 (2009). Damages for lost profits must be amenable to establishment with some amount of certainty beyond pure speculation, but mathematical precision is unnecessary, particularly where such

precision is impossible or where the imprecision was caused by the defendant. *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960); *Bonelli v Volkswagen of America*, *Inc*, 166 Mich App 483, 511-512; 421 NW2d 213 (1988). The kind of uncertainty that would be fatal to an award is uncertainty as to whether damages occurred at all; if that has been reasonably established, the jury may analyze what evidence there is to arrive at an amount to the best of its ability. *Bonelli*, *supra*, citing in part *Allison v Chandler*, 11 Mich 542, 554-555 (1863).

AT&T's first contention is that the lost profits were overly speculative. AT&T cites *Sullivan Indus*, *Inc v Double Seal Glass Co*, 192 Mich App 333, 349-350; 480 NW2d 623 (1991) for the premise that ACD's lost profits were insufficient because it failed to distinguish between lost profits from the breach and lost profits from other sources. However, the trial court in *Sullivan* expressly found the plaintiff's rebuttal testimony inherently incredible and, without that testimony, the plaintiff's proofs were insufficient. *Id.* Here, ACD's lost profits were calculated as a percentage based on the signed letters acquired by TelNet and Schoen's testimony that he contacted the customers and they wanted to switch but believed they would be subject to early termination fees if they did. Thus, ACD provided sufficient evidence that the lost profits were attributable to AT&T's breach and not to some other source.

AT&T contends that the only testimony regarding the number of lines that ACD lost was "Schoen's self-serving hearsay testimony." We have already rejected AT&T's challenge to the admissibility of this testimony, and we perceive no support for AT&T's contention that Schoen's testimony is insufficient. Additionally, witnesses from two customers testified that they actually switched 10 and 11 lines, respectively, which subsequently became lost business to ACD when they were put out of business by AT&T's imposition of early termination fees. Witnesses from two other customers testified that they would have transferred 96 and 63 lines, respectively, to ACD if the early termination fees had not been an issue. Finally, there is nothing inherently wrong with Schoen providing the testimony regarding the number of lines lost, particularly when it is something about which he would be informed. Party testimony is almost always self-serving, and it is for the trier of fact to determine whether it is credible. See *Fortier v Aetna Cas & Surety Co*, 131 Mich App 784, 791-792; 346 NW2d 874 (1984). In addition, AT&T provided no contrary evidence to the effect that these customers did not have as many lines as asserted or that they did not intend to switch—information to which AT&T certainly had access. Accordingly, the trial court properly left the determination to the jury.

AT&T reasserts its argument that ACD did not lose any profits; ACD.net did. However, as discussed above, the evidence permitted the inference that ACD was simply billing under the name ACD.net for services ACD was providing, such that the profits did, in fact, belong to ACD. Therefore, this was a factual question for the jury and there was no basis for the trial court to ignore the jury's determination on this matter.

AT&T finally argues that the jury award was significantly in excess of the proofs at trial. It asserts that the maximum permissible award would have been $1,253,206, representing 58 lines at a cost of $21,607 a line. We disagree. Officers of four business entities alone established that ACD lost profits from 180 lines, including lines from two customers that did switch but were then put out of business—thereby costing ACD profits from their lines—by AT&T dishonoring the MWA. Schoen provided testimony, to which AT&T did not object, about 678 to 683 additional lines from a variety of other would-be customers. Even excluding

from consideration the companies that switched but went out of business, and the company that switched because ACD bought the company, the evidence would have supported more than the 370 lines for which the jury awarded damages. While it is not clear how the jury arrived at that number, the award is supported by the evidence. *Unibar*, 283 Mich App at 629-630. Consequently, the trial court's denial of remittur was not an abuse of discretion.

For the reasons stated above, we find no merit to any of AT&T's asserted claims of error.[5] Affirmed. ACD may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen Fort Hood

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[5] Accordingly, we need not consider ACD's evidentiary claims in its "contingent" cross-appeal.