

IN THE UTAH COURT OF APPEALS

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Staffing America, Inc.,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20040524-CA
v.	)	
	)	
Advanced Management Concepts,	)	F I L E D
Inc.,	)	(October 14, 2005)
	)	
	)	2005 UT App 437
Defendant and Appellant.	)	

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Third District, Salt Lake Department, 980912587  
The Honorable Glenn K. Iwasaki

Attorneys: Donald Joseph Purser, Salt Lake City, for Appellant  
Matthew C. Barneck, Brian C. Webber, and Michael K.  
Woolley, Salt Lake City, for Appellee

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Before Judges Billings, Bench, and Thorne.

THORNE, Judge:

Advanced Management Concepts, Inc. (AMC) appeals from the trial court's judgment in favor of Staffing America, Inc. (Staffing). We affirm.

AMC first argues that the trial court's award of damages for future lost profits was improper because the damages were speculative. "Damages, to include lost profits, 'must be proven with reasonable certainty and the amount by a reasonable though not necessarily precise estimate.'" Carlson Distrib. Co. v. Salt Lake Brewing Co., 2004 UT App 227, ¶19, 95 P.3d 1171 (quoting Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986)). "The evidence must not be so indefinite as to allow the jury to speculate freely as to the amount of damages or lost profits, but will be deemed sufficient to establish a basis for an award of damages for lost profits where the plaintiff has provided the best evidence available to him under the circumstances." Id. (quotations and citation omitted). "While the evidence must not be so indefinite as to allow the jury to speculate as to their amount, some degree of uncertainty is tolerable." Id. (quoting Acculoq, Inc. v. Peterson, 692 P.2d 728, 732 (Utah 1984)).

Here, Staffing presented testimony from two employees identifying clients that Staffing lost due to AMC's malfeasance. One of the employees also testified as to the amount of profit lost as a result of the clients' departure. Staffing also presented the expert testimony of CPA Paul Shields. Shields testified as to the amount of Staffing's lost profits based on average profits received from the lost clients. Shields applied a discount rate to account for the risks inherent in Staffing's business, and limited his future profit calculations to five years. AMC presented no countervailing evidence, and the trial court found that Staffing had established "the fact, the causation, and the amount of [future] lost profits . . . with reasonable certainty."

We conclude that Staffing's evidence is sufficient to support the trial court's findings and its award of future lost profits to Staffing. Staffing's unrefuted evidence that it lost existing, profitable clients satisfies the greater burden of establishing the existence of future loss. See Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 336 (Utah 1985) ("The level of persuasiveness required to establish the fact of loss is generally higher than that required to establish the amount of a loss."). Staffing established that a loss occurred, and the amount of that loss needs to be determined only with reasonable certainty. See Carlson, 2004 UT App 227 at ¶19. Shields's testimony concerning prior profits from the lost accounts, together with his application of conservative time limitations and discounting, supplied the requisite degree of reasonable certainty in this case.<sup>1</sup>

The remainder of AMC's arguments on appeal pertain to the trial court's award of attorney fees to Staffing. AMC argues that attorney fees are generally awardable in Utah only pursuant to statute or contract, and that no such statute or contractual provision exists in this case. See Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶52, 56 P.3d 524. AMC contests the trial

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<sup>1</sup>AMC asserts that existing caselaw requires specific additional types of evidence, such as evidence of industry norms, economic trends, and actual profits of similar businesses. While such evidence may present additional methods of proving lost profits, it is not a threshold requirement in any particular case so long as reasonable certainty can be attained. See Kraatz v. Heritage Imps., 2003 UT App 201, ¶54, 71 P.3d 188 ("What constitutes [a reasonable] approximation will vary with the circumstances. Greater accuracy is required in cases where highly probative evidence is easy to obtain than in cases where such evidence is unavailable.") (quoting Cook Assocs. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983)).

court's finding that AMC breached a fiduciary duty to Staffing and its subsequent award of attorney fees based on that breach.

We first note that AMC conceded liability in the trial court on both of Staffing's theories of recovery, including its breach of fiduciary duty claim.<sup>2</sup> This concession of liability implicitly conceded the existence of the underlying fiduciary duty. AMC's concession precluded the trial court from ruling on the existence of a fiduciary duty, and thus, this issue was not preserved for appellate review. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶51, 99 P.3d 801.

With AMC's breach of fiduciary duty established by concession, we see no error in the trial court's award of attorney fees as a component of foreseeable damages for that breach. "[B]reach of a fiduciary obligation is a well-established exception to the American rule precluding attorney fees in tort cases generally." Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, ¶122, 65 P.3d 1134, rev'd on other grounds, 538 U.S. 408 (2003). We are unpersuaded by AMC's attempts to limit the fiduciary duty exception to the third-party insurance context. Campbell broadly approved the awarding of attorney fees as damages for the breach of a fiduciary duty and AMC has not presented an adequate reason for us to limit that broad rule in the context of this case.<sup>3</sup> See id.

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<sup>2</sup>After the close of evidence, and as jury instructions were being prepared, the trial court and counsel for AMC had the following exchange:

THE COURT: Okay. Now what about liability as to AMC?

COUNSEL: I'm not going to argue that --

THE COURT: Okay.

COUNSEL: -- because that would not be a good faith argument.

THE COURT: All right. Then liability as to -- okay. Anything more?

COUNSEL: No. I'm waiting for you.

THE COURT: Okay. Liability, then, as to AMC on both counts, as to negligence and breach of fiduciary duty, is granted as to plaintiff in this matter. All right?

Now, let's turn to damages.

<sup>3</sup>We are similarly unpersuaded by AMC's cursory argument that a party's contingency fee agreement cannot form the sole basis for determining the amount of attorney fees awarded. The Utah Supreme Court has generally approved of this practice, see (continued...)

The trial court did not err in its award of future lost profits or attorney fees. Accordingly, we affirm the judgment of the trial court. As requested, we award Staffing its attorney fees on appeal. See Pack v. Case, 2001 UT App 232, ¶39, 30 P.3d 436. We remand to the trial court for a determination of fees reasonably incurred on appeal.

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William A. Thorne Jr., Judge

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WE CONCUR:

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Judith M. Billings,  
Presiding Judge

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Russell W. Bench,  
Associate Presiding Judge

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<sup>3</sup>(...continued)  
Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, ¶¶122-25, 65 P.3d 1134, rev'd on other grounds, 538 U.S. 408 (2003), and AMC has inadequately briefed any argument that this case somehow falls outside of the Campbell rule. See Smith v. Smith, 1999 UT App 370, ¶8, 995 P.2d 14 ("An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" (citation omitted)).