

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2015

Diane M. Fremgen
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. 2013AP2824

Cir. Ct. No. 2012CV1300

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

YP MIDWEST PUBLISHING, LLC,

PLAINTIFF-RESPONDENT,

v.

**WOLFINGER WATER SERVICE, INC. AND WOLFINGER WATER &
BACKHOE SERVICES, LLC,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Wolfinger Water Service, Inc. and Wolfinger Water & Backhoe Services, LLC appeal a money judgment entered after a court trial in favor of YP Midwest Publishing, LLC, concerning unpaid invoices for

telephone book advertising from 2005 through 2007.¹ The Wolfinger companies contend that: (1) there was no admissible evidence that YP is contractually entitled to collect the debt for the unpaid advertising invoices; (2) if that debt is collectible by YP, then YP's claim is barred by judicial estoppel because its predecessor AT&T was a creditor in Mr. Wolfinger's Chapter 13 bankruptcy case; (3) the circuit court erroneously exercised its discretion by proceeding to trial without allowing additional time for discovery; and (4) the circuit court erroneously concluded that the LLC is liable for the unpaid invoices. We need only address the first argument. We conclude that YP failed to present any admissible evidence that it is entitled to payment of the outstanding debt, and, therefore, we reverse.²

BACKGROUND

¶2 Mr. Wolfinger, as owner of "Wolfinger's Water Service," executed contracts for telephone book advertising, for which invoices were issued showing unpaid balances from 2005 to 2007.³

¹ For ease of reference, and following the lead of the parties, we refer to Wolfinger Water Service, Inc. individually as the Corporation; to Wolfinger Water & Backhoe Services, LLC individually as the LLC; to both together as the Wolfinger companies; to Bradley Wolfinger, who established and operated the Wolfinger companies, as Mr. Wolfinger; and to YP Midwest Publishing, LLC as YP.

² Our reversal is only of the decision appealed, namely, the circuit court's award of \$26,470.91 in favor of YP as damages for breach of contract. The circuit court also awarded \$1,000 in favor of the Wolfinger companies in response to their motion for costs for untimely and unresponsive answers to discovery; because that decision has not been appealed, that award remains in effect.

³ Since 2008, Mr. Wolfinger has continued to contract for telephone book advertising on a prepaid basis.

¶3 In 2012, YP filed a complaint against the Wolfinger companies seeking the final 2007 unpaid balance. The complaint identified the plaintiff as YP, also or formerly doing business as or known as seventeen different names, including, as relevant here, Ameritech Publishing, Inc., SBC Ameritech, AT&T, and AT&T Yellow Pages.

¶4 After a trial to the court, at which a YP customer service collector and Mr. Wolfinger testified, the circuit court awarded damages for breach of contract in the amount of \$26,470.91 against the Wolfinger companies. The court also awarded \$1,000 to the Wolfinger companies on their motion for costs for untimely and unresponsive answers to discovery.

¶5 We refer to additional facts in our discussion.

DISCUSSION

¶6 This case is about the need for actual evidence, even when common sense strongly suggests that a factual inference is true. Like the circuit court, we do not seriously doubt that YP is in fact a successor company entitled to collect the type of debts at issue in this case. However, this common sense inference does not relieve YP of the need to present evidence.

¶7 As noted, the complaint alleges that the plaintiff is YP, also or formerly doing business as or known as seventeen different names, including, as relevant here, Ameritech Publishing, Inc., SBC Ameritech, AT&T, and AT&T Yellow Pages. These are the names of the entities that appear on the 2005-2007 contracts and invoices at issue here. Some of the contracts were with Ameritech Publishing, Inc., with the SBC logo and Ameritech Publishing, Inc. heading; some were with Ameritech Publishing, Inc. with the AT&T logo and heading; and some

were with AT&T Yellow Pages, with the AT&T logo and heading. The invoices were from three companies: SBC (September 2005 to January 2006), AT&T (February 2006 to October 2006), and AT&T Yellow Pages (November 2006 to February 2007). The Wolfinger companies argue that there was no admissible evidence supporting the circuit court's findings that the debt for these unpaid advertising invoices from SBC, AT&T, and AT&T Yellow Pages was assigned to YP, and that YP is therefore a proper plaintiff.

¶8 “Findings of fact by the [circuit] court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence.” *Handicapped Children’s Educ. Bd. v. Lukaszewski*, 112 Wis. 2d 197, 205, 332 N.W.2d 774 (1983) (quoted source omitted). As we explain, the problem here is that YP fails to identify any admissible evidence to support the circuit court’s finding that YP is entitled to collect the outstanding amount due on the invoices from SBC, AT&T, and AT&T Yellow Pages. We first review the pretrial proceedings that provided the context for this evidentiary issue. We then review the evidence that was presented at trial. Finally, we address whether that evidence supports YP’s breach of contract claim with respect to the outstanding amount due on the invoices from SBC, AT&T, and AT&T Yellow Pages.

A. Pretrial Proceedings

¶9 YP’s complaint stated the following allegations relevant to its breach of contract claim as to the outstanding balance for the 2005-2007 invoices:

6. The defendants entered into a contract with the plaintiff for advertising services.
7. At the request of the defendants, the plaintiff provided advertising services to the defendants, for which the defendants agreed to pay.

....

16. There is an outstanding balance of \$26,457.91 owed to the plaintiff by the defendants⁴

¶10 The circuit court issued a scheduling order in February 2013, setting the final pretrial conference and a five-day jury trial for October 2013.

¶11 The Wolfinger companies served interrogatories and requests for the production of documents on YP in March 2013. The interrogatories asked YP to “[i]dentify each and every fact that supports the allegations set forth” in the various paragraphs of the complaint, including paragraphs 6, 7, and 16, as to each of the Wolfinger companies.

¶12 The Wolfinger companies followed up with letters in May, June, and July 2013, asking for responses to the discovery requests. The Wolfinger companies filed a motion to compel discovery responses in August 2013.

¶13 The pretrial conference was held on October 17, 2013, four days before trial was set to begin on October 21, 2013.

¶14 The Wolfinger companies received YP’s answers to their requests for production of documents on October 16, and YP’s answers to their interrogatories on October 17, just before the final pretrial conference.

¶15 The answer to each of the interrogatories referenced above was, “The Complaint was drafted by our attorneys. Also, see the Plaintiff’s Answers to Defendants’ Requests for Production of Documents.”

⁴ The corrected unpaid balance presented at trial, and undisputed by the Wolfinger companies, was \$26,470.91.

¶16 The circuit court heard the Wolfinger companies' motion to compel discovery responses on the morning of trial, and found that YP had violated "the discovery rules and ... the discovery order," and that the appropriate sanction would be to assess costs against YP.

¶17 At that hearing, counsel for the Wolfinger companies, in response to questioning by the court, stated that what was missing from the documents provided in discovery and included in the exhibits prepared for trial, was a "contract between YP and [the Wolfinger companies]" in 2005-2007, or, since YP did not exist until 2012, a document that "says YP has any contractual rights to sue" the Wolfinger companies for the 2005-2007 unpaid invoices or that says that YP was sold or assigned the "contractual rights or the contractual amounts" so as to be entitled to pursue this litigation.

¶18 The court, apparently recognizing the need for evidence, asked YP's counsel whether he could provide such a document by the start of trial that afternoon, and counsel said he could not. The circuit court stated to YP's counsel, "You're going to need to explain to the jury that YP Midwest Publishing, LLC took over the contractual rights" for the breach of contract claim, to "establish that the proper party is YP." YP's counsel then advised the court that his office was trying to contact YP's corporate attorney for the documentation that the court "ordered" him to produce.

¶19 At the conclusion of the circuit court's remarks, counsel for the parties agreed to proceed to a trial to the court.

B. Evidence at Trial

¶20 Two witnesses testified at trial, a customer service collector employed by YP at its Appleton office, and Mr. Wolfinger.

¶21 The YP employee provided the foundation, unchallenged by the Wolfinger companies, for admission of the contracts and invoices referred to above. She referred to YP, Ameritech Publishing, SBC, and AT&T as different “trade names” of the entity that has employed her for twenty-two years, and testified that she has been paid by YP since May 2012. She testified that the recordkeeping practices did not change, and that “[her] accounts never changed,” from what she called “name change to name change” of her employer. As to the change to YP, she testified that she received a corporate email notification that there was a sale or a change pending, and “everything was to be treated business as usual” with respect to positions and benefits.

¶22 The YP employee testified that just before the trial began, a person from the YP corporate legal department in Georgia emailed her documentation marked as Exhibit 10. This documentation comprised two certificates signed by the Delaware Secretary of State and dated May 8, 2012: a Certificate of Formation of YP Midwest Publishing LLC, and a Certificate of Conversion of Ameritech Publishing, Inc. to YP Midwest Publishing LLC. Counsel for the Wolfinger companies objected to admission of Exhibit 10 because it was hearsay and the YP employee “didn’t provide any testimony regarding her knowledge or foundation regarding that document.” The circuit court received the exhibit subject to the objection (and ultimately stated that it did not rely on the exhibit).

¶23 On cross-examination, the YP employee testified that she had not reviewed any documents regarding the sale of Ameritech Publishing, had not

talked to anyone in the company regarding the sale of Ameritech Publishing, and had not seen any documentation about the assignment of the accounts payable from 2005-2007 to YP. She confirmed that the name Ameritech Publishing does not appear on any of the invoices at issue. She testified that she had no personal knowledge regarding how the company transactions were structured.

C. Whether the Evidence Supports YP's Breach of Contract Claim

¶24 As noted above, the circuit court acknowledged that YP's breach of contract claim turned on evidence that YP "took over the contractual rights" to the Wolfinger companies' debt on the unpaid 2005-2007 invoices. The Wolfinger companies argue that YP failed to produce that evidence, and we agree.

¶25 The only evidence that YP provided at trial came through testimony by the YP employee. However, she provided no testimony at all about the nature of the connections between the names on the invoices, SBC, AT&T, and AT&T Yellow Pages, and the plaintiff here, YP. She testified that she had no personal knowledge of the circumstances surrounding the "name change" in 2012 to YP. And, YP did not in the circuit court and does not on appeal adequately respond to the Wolfinger companies' argument that the employee's testimony failed to provide a foundation for admission of the documents in Exhibit 10, which

purported to demonstrate the “merger” of Ameritech Publishing (a name that did not appear on the invoices at issue) with YP.⁵

¶26 We acknowledge that, prior to trial during a hearing, YP’s attorney represented to the circuit court that YP Midwest Publishing, LLC was formed as a result of a merger with Ameritech Publishing, Inc., and YP took over the collection of all the accounts receivable. However, a party’s attorney cannot provide evidence in place of a witness. *See Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976) (“Arguments or statements made by counsel during argument are not to be considered or given weight as evidence.”). The attorney’s credibility is not in question. The problem is that his assertion was not evidence. And, YP fails to point to admissible evidence supporting the attorney’s representations. Accordingly, we conclude that the circuit court’s findings, that “the contracting party in this case Ameritech Publishing has assigned the ability to collect this account and this accounts receivable to YP Midwest Publishing, LLC, and they are a proper plaintiff,” are not supported by any evidence at trial.

CONCLUSION

¶27 For the reasons stated above, we reverse that part of the judgment awarding \$26,470.91 in favor of YP as damages for breach of contract, and we

⁵ Based on the YP employee’s testimony and Exhibit 10, YP argues that the entities merged under the new name and that therefore no assignment of the debts from Ameritech to YP was required for YP to take over the contractual rights to the debts. As we explain in the text, the evidentiary support for the factual part of YP’s proposition is lacking. In addition, YP does not cite any law to support the legal part of its proposition. Therefore, we do not consider this argument further. *See Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments.” (citations omitted)).

remand for entry of judgment that incorporates the award of \$1,000 in favor of the Wolfinger companies as discovery sanctions and any statutory fees and costs as may be appropriate.

By the Court.—Judgment reversed and cause remanded with directions.

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

