COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04AP1999 **Cir. Ct. No. 03CV2289**

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

MADISON GAS AND ELECTRIC COMPANY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

122 STATE STREET GROUP,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Madison Gas and Electric Company ("MGE") appeals from a trial court order dismissing its complaint against 122 State Street Group ("State Street"). MGE argues that the trial court erred when it: (1) found that MGE had not provided credible evidence to establish its damages; (2) failed

to award MGE less damages than it sought if the trial court believed a lesser amount was appropriate; and (3) denied MGE's motion to reopen its case-in-chief so that it could present additional evidence of its damages.

¶2 State Street cross-appeals from the same order dismissing its counterclaim against MGE. It argues that the trial court incorrectly found that it too had failed to provide credible evidence of its damages. We reject the arguments of both parties and affirm the order.

BACKGROUND

¶3 The background facts that gave rise to both parties' claims for damages are largely undisputed for purposes of this appeal. State Street is a utility customer of MGE. Prior to September 1996, State Street had two electric meters. At that time, the two meters were combined for purposes of billing the actual use of electric energy, as well as "coincident demand." MGE explains:

> Demand is a common representation of an instantaneous demand that MGE bills certain commercial and industrial customers. Coincident demand is the sum of two demands occurring in one fifteen minute interval. MGE's rates are designed to bill an energy component and a demand component. At issue in this action is the demand component.

(Record citations omitted.)

¶4 In September 1996, MGE removed a recorder device that was attached to both meters due to a problem accessing the meters. After MGE removed the recorder, the meters should not have remained combined for billing, but remained combined due to an internal MGE billing error. Without the recorder, MGE did not fully capture the "coincident demand." Thus, MGE only billed State Street for one demand, instead of two demands. As a result, MGE

claimed, State Street received thousands of dollars in services for which it did not pay.

¶5 MGE commenced this action, seeking to recover $14,952.58 for "the unbilled demand."[1] State Street filed an answer and counterclaims against MGE. The counterclaims alleged that State Street was forced to contract with a third party for corrective electrical equipment for itself when MGE refused to provide it, and that numerous bills had been miscalculated. MGE did not timely respond to the counterclaims and State Street moved for default judgment.

¶6 The trial court ultimately granted default judgment in State Street's favor, over MGE's claim of excusable neglect. However, the trial court ruled that although it granted default judgment on liability, State Street would have to prove its damages at a hearing to be held at the same time as the trial on MGE's claim. State Street did not object to this decision, agreeing that "there is a proof question about the damages" that State Street planned to establish "more explicitly" at a hearing.

¶7 At trial, MGE presented its evidence concerning the $14,952.58 owed. After MGE rested, State Street moved to dismiss the complaint on grounds that MGE had not established sufficient credible evidence of the amount allegedly owed. Specifically, State Street argued that the exhibit that MGE offered in support of its claim for damages established only that MGE had business records,

[1] This figure represents the charges for the final two years that MGE failed to bill State Street. Pursuant to WIS. ADMIN. CODE § PSC 113.0924(4) (2004), MGE could seek payment for only the last two years. The complaint also sought payment for current services. That dispute was resolved prior to trial and is not at issue in this appeal.

but not that those records properly calculated what State Street owed. The trial court granted the motion, for reasons outlined in detail below.

¶8 The trial court then proceeded to hear testimony on State Street's counterclaim concerning electrical equipment expenses it incurred.[2] After State Street presented its evidence, the trial court found that State Street had not met its burden of proof with respect to damages, and dismissed the counterclaim. This appeal and cross-appeal followed.

DISCUSSION

¶9 At issue in both the appeal and cross-appeal is the trial court's decision to dismiss both parties' claims on grounds that each party failed to establish sufficient credible evidence of the amount of damages to which it was entitled as a result of the liability assessed. "While the weighing of evidence and the determination of witness credibility are questions within the discretion of the trial court, whether a party has met his or her burden of proof is a question of law we review de novo[.]" ***Korhumel Steel Corp. v. Wandler***, 229 Wis. 2d 395, 402, 600 N.W.2d 592 (Ct. App. 1999) (citations omitted).

I. MGE's appeal

¶10 MGE argues that the trial court erroneously found that it had not met the burden of proof in establishing its damages. As proof of the demands for power that were not billed, MGE provided the trial court with a four-page exhibit ("Exhibit 3") with columns entitled as follows: "Meter, ReadDate, TransDesc,

[2] State Street had already withdrawn its counterclaim with respect to billing errors, having satisfied itself that it was currently paying the correct amount for services.

Units, CTma, Billed Qty E196956, Billed Dollars E196956, Posted, Back Billed Qty E196943, and Amt to be Back Billed E196943." The final column, "Amt to be Back Billed E196943," includes dollar amounts which, on the final page, total $14,952.58.

¶11 Jeffrey Larson, a customer billing manager at MGE, provided testimony concerning the failure to bill State Street for the "coincident demand." With respect to Exhibit 3, Larson testified that it was "a document that we typically prepare to recalculate a bill for a commercial customer where we have to do what I would consider a substantial billing adjustment into the thousands of dollars." He said that MGE had correctly recorded the information on the meter, but had not billed State Street, and that the information concerning the recordings and the amount due was on Exhibit 3. MGE moved to admit Exhibit 3 as a record maintained in the ordinary course of business. State Street did not object and the trial court admitted it.[3]

[3] The Dissent argues that by acknowledging the admissibility of Exhibit 3 as a business record, State Street waives any claim that the record still fails to provide credible (or even comprehensible) evidence of the damages MGE claims are due. If that were a correct analysis, the most meager and obtuse documents, admissible as business records, would shift the burden of persuasion to the other party to prove such records were wrong or unintelligible. We do not understand that to be the law. Nor do the cases cited by the Dissent stand for that proposition.

We understand the purpose of the business record rule to be avoiding the need to present every person who contributes information to the document in order to lay a foundation for admitting the document. *See* ***State v. Olson***, 75 Wis. 2d 575, 596, 250 N.W.2d 12 (1977) (The business records exception to the hearsay rule "was adopted to eliminate the cost and delay involved in producing at trial all persons connected with the record or in proving that they are not available.").

The Dissent notes, but then ignores, the holding of ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 160, 112 N.W.2d 149 (1961), that unobjected-to hearsay evidence may be used to "whatever extent it may have *rational persuasive* power." (Emphasis added.) Here, the trial court effectively found that Exhibit 3, an unobjected-to business record, lacked rational persuasive (continued)

¶12 Later in the trial, Larson was recalled to provide additional testimony on a different exhibit. In the course of giving that testimony, Larson was asked about the data used to calculate the $14,952.58 due. He explained that the data on Exhibit 3 contains metered information that was not previously billed. Larson also attempted to explain the exhibits' data concerning "demand."

¶13 Finally, the trial court asked another witness, Christopher Favia, a marketing representative, about Exhibit 3. Favia said that he did not know how the information was retrieved and placed on Exhibit 3, but that it was his understanding that State Street owed over $14,000.

¶14 After MGE presented its evidence, State Street moved to dismiss the complaint on grounds that MGE had not established a prima facie case for the calculation of the amount owed. Counsel for State Street argued: "I just don't think repeating the number several times actually established that that number is correct and accurate." State Street also indicated that it did not object to the admissibility of Exhibit 3, but instead was contesting that Exhibit 3 was sufficient proof of the amount owed. In response, MGE argued that Exhibit 3 is a regularly kept document that is frequently used to show the needed adjustment for commercial customers.

¶15 The trial court questioned whether evidence had been presented that explained precisely how the dollar amounts owed were calculated. MGE responded that Exhibit 3 was self-evident, listing the demands and the ultimate amount owed. The trial court disagreed, stating that it could not "recall any

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power. Hence, MGE had not rationally and persuasively established its entitlement to any specific amount of money, although it had provided a record maintained in the course of business.

testimony whatsoever" concerning the final column on Exhibit 3, which indicated the amount owed. The trial court indicated some of its difficulty understanding the document:

> I asked the one question that might have come closest to meeting the burden of proof, but I guess at the moment I was just thinking I was lost, but the question I asked was if you added all of the numbers in the second to the right column and applied [the] proper numerical formula to them, would it come to the charges? I didn't ask about the right-hand column because I didn't realize at the time it was relevant. Starting at the top there is a customer charge [of] $18.90, there is a public benefits fee, $1.93. There is a customer DMD $188.91. There is a max monthly DMD $223.40. All of those charges are made before you have any notation in the second[-] to[-]right-hand column and there has been no testimony about what those have to do with anything. There is apparently a customer charge for the first meter. We don't know why there would be a customer charge to the second meter. Why are you entitled to a second public benefits fee which seems to be repeated on each monthly bill? However, the rate determined that you were charging for these 88 units. Why is there an 88 and a 62 in the same month? *I don't think there has been any testimony that connects the mechanics of the metering and the metering problem and Exhibit No. 3 to the amount of the damages that you are claiming.*

(Emphasis added.)

¶16 In finding that MGE had not met its burden of proof, the trial court explained:

> [G]ranted, this document looks official, there are things in columns in regular order, but … there is no explanation as to how the dollar amounts were arrived at and it is not readily apparent what relationship the dollar amounts bear. I think you did prove up to the next to last column…. But you did not connect [the numbers in the other columns] to a dollar amount [of] damages.

¶17 On appeal, MGE does not appear to dispute the lack of testimony about the far right column of Exhibit 3. Rather, MGE disputes the conclusion that testimony was necessary. MGE explains:

> The trial court's indication that it needed a testimonial explanation of the dollar amounts in the far right column in Exhibit 3 is erroneous. Exhibit 3, itself, is evidence of the value of the unbilled demand. It was admitted into evidence without any foundation objection, and it was never disputed by State Street. In addition, Mr. Larson testified that he was familiar with the matters in this case, he explained how the mistake occurred, and testified that MGE is entitled to recover $14,952.58, the same amount indicated on Exhibit 3. Furthermore, Mr. Favia … testified that the unbilled demand reflected in the second column from the right in Exhibit 3, if charged correctly, will add up to "the $14,000 figure" that MGE seeks…. All of this evidence enabled the trial court to make more than a fair and reasonable approximation of MGE's damages, and therefore, MGE satisfied its burden of proof as a matter of law.

We disagree with MGE and agree with the trial court that although there was lengthy testimony concerning how one recorder was removed and why the billing error occurred, no witness ever actually explained how the ultimate amount owed was calculated.

¶18 The missing link in the testimony is how the absence of the recorder translated into the dollar amount owed by State Street. The trial court noted its confusion about the number of units indicated on the form, and about customer charges. Without more explanation, this court, like the trial court, cannot conclude that MGE has sufficiently shown that the $14,952.58 figure on Exhibit 3 is the amount actually owed by State Street. By analogy, if a landlord provides a former tenant with a list of deductions from the tenant's security deposit, the written statement alone is not proof that the deductions were appropriate. At trial, the landlord bears the burden of proving that the damages existed, or that the work

was necessary, and that certain costs were incurred to repair the property. Similarly, MGE was required to provide specific evidence of how the ultimate amount owed was calculated—not simply a chart that requires the trial court to infer how calculations were made.

¶19 In summary, we agree with the trial court that MGE failed to provide sufficient proof of its damages. The next question is whether MGE should have been allowed to reopen its case once the trial court indicated that it did not fully understand Exhibit 3 and that it believed that further testimony was necessary. "The power to reopen a case for additional testimony lies in the sound discretion of the trial court." ***Stivarius v. DiVall***, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984). "This court will not reverse a discretionary decision by a trial court unless there was no reasonable basis for that decision." ***Id.*** Although here the request to reopen the evidence was made at the close of the plaintiff's case, as opposed to after both parties had rested, MGE implies the standard is the same, and we see no reason to conclude otherwise.

¶20 In this case, once the trial court ruled that MGE had failed to meet the burden of proof on damages, MGE asked for the opportunity to reopen its case so that Larson could provide testimony about the final column of Exhibit 3. State Street opposed this request, arguing that it would unfairly prejudice State Street to allow MGE, which now had the benefit of hearing State Street's argument and the trial court's assessment of its case, to provide additional testimony.

¶21 Exercising its discretion, the trial court denied MGE's request to reopen its case. The trial court noted that State Street could have waited until the closing of its case to point out the lack of proof, and concluded that it would be "unfair" to allow MGE another opportunity to satisfy the burden of proof. In

addition, the trial court noted that it was late in the day, and that allowing MGE to reopen its case would prejudice State Street's ability to present its case on the counterclaim. We conclude that the trial court offered a reasonable explanation for its decision: unfair prejudice to State Street and the need to manage the court's calendar. The trial court did not erroneously exercise its discretion.

¶22 MGE's final argument is that even if the evidence of damages was uncertain, the trial court still should not have dismissed its claim. Rather, MGE argues, the trial court should have fixed a reasonable amount of damages. MGE asserts: "[I]t was unjust for the trial court to conclude that MGE should go totally uncompensated. Enough evidence existed in the record for the trial court to fix a reasonable amount of damages." MGE relies on ***Cutler Cranberry Co. v. Oakdale Electric Cooperative***, 78 Wis. 2d 222, 234-35, 254 N.W.2d 234 (1977), which held: "[W]here the fact of damage is clear and certain, but the amount is a matter of uncertainty, the trial court has discretion to fix a reasonable amount."

¶23 Unfortunately for MGE, it did not ask the trial court to exercise its discretion in this manner. The trial court did not specifically determine if the fact of damage was clear, and it did not address whether a reasonable amount should be fixed. "This court will not find an erroneous exercise of discretion when a party has 'failed to ask the trial court to exercise its discretion.'" ***Siker v. Siker***, 225 Wis. 2d 522, 536, 593 N.W.2d 830 (Ct. App. 1999) (citation omitted). Accordingly, we decline to consider reversing on this basis.

II. State Street's cross-appeal

¶24 State Street's cross-appeal concerned its request for damages related to "corrective steps" it undertook to repair its electrical system, which it claims MGE should have done consistent with its statutory duties. The trial court found

liability based on default, but State Street was required to lay a foundation for its requested damages.

¶25 At trial, State Street presented a single witness: Kenneth Kinsley, the bookkeeper for State Street. Kinsley testified that although he was not personally aware that work had been done at State Street's property, he received a bill from DOC Electric and paid $2,500 of the $8,650 sought in the bill. State Street presented no other witnesses.

¶26 The trial court found that State Street had not met its burden of proof with respect to damages. The trial court elaborated:

> [The electrical configuration] was unsatisfactory to the owner of the property because he wished to be able to bill one tenant for that tenant's particular usage of electricity and needed a meter to do so. DOC Electric did some work to correct that. Well, DOC Electric did some work to correct the problem that the owner of the property had. It may have had an incidental benefit to [MGE].… That is logical from the testimony … and I accept that for purposes of this argument.
>
> However, [State Street's] argument is … that [it] volunteered to fix a problem for [MGE] and then bill them for it. In fact, the testimony would tend to show the problem that [MGE had] could have been remedied by replacing the recorder, and I don't know what the cost of that would be, but there certainly is no reason to think the cost of it would have been similar to this $8,000 job. It is true you [State Street] have a default in your favor. However, you have to show actions of [MGE] that caused your damages.

¶27 On appeal, State Street argues that there were sufficient facts to confirm the damages flowing from the liability established by the default order. Specifically, State Street points to the testimony of State Street's bookkeeper, as well as testimony from one of MGE's witnesses, that MGE officials met with DOC Electric to discuss potential work at the property. That same MGE witness

also testified on cross-examination that it was his understanding that DOC did "go forward with the project." The witness explained: "I would have to check records to know if 'they' means DOC Electric did it, but I believe somebody did it."

¶28 We agree with the trial court that State Street's evidence of damages was insufficient. Testimony from a bookkeeper that a bill was received is not sufficient evidence that the work was performed or by whom. Testimony from an MGE official that others told him work was performed is not sufficient evidence that DOC performed work. Moreover, it is certainly not testimony concerning precisely what work was performed, what portion of the work was related to the liability established by the default, and what the work cost. We affirm the trial court's order dismissing State Street's claim for damages.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2004AP1999(D)

¶29 FINE, J. (*dissenting*). After Madison Gas and Electric Company rested its case-in-chief, the trial court granted 122 State Street Group's motion to dismiss. A trial court may grant a motion to dismiss for insufficient evidence at the close of plaintiff's case only if "'the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party.'" ***Kain v. Bluemound E. Indus. Park, Inc.***, 2001 WI App 230, ¶21, 248 Wis. 2d 172, 184, 635 N.W.2d 640, 646 (quoted source omitted). Here, as the Majority recognizes, the trial court received without objection Madison Gas's Exhibit 3, a document, which, as the Majority also recognizes, a Madison Gas "customer billing manager" testified was a regular business document created by Madison Gas and contained, in the Majority's phrase, "the amount due" to Madison Gas from 122 State Street. Majority, ¶11. That is all that Madison Gas needed to survive 122 State Street's motion to dismiss at the end of Madison Gas's case-in-chief.

¶30 Unobjected-to-evidence "becomes part of the evidence of the case and may be used as proof to whatever extent it may have rational persuasive power." ***Schlichting v. Schlichting***, 15 Wis. 2d 147, 160, 112 N.W.2d 149, 156 (1961). Moreover, based on the billing manager's testimony, and as the Majority concedes, Exhibit 3 was a business record under WIS. STAT. RULE 908.03(6) ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances

indicate lack of trustworthiness."). Thus, as soon as Madison Gas's customer billing manager testified that the $14,952.58 at the end of the last column in Exhibit 3 was, again to use the Majority's phrase, "the amount due" to it from 122 State Street, Madison Gas was not only invulnerable to 122 State Street's motion to dismiss at the end of Madison Gas's case-in-chief, but, also, unless the trial court did not believe the witness for some articulable reason beyond mere whim, and there is no such reason in the record, it was entitled to prevail because it proved its point by a preponderance of the evidence (unless, of course, 122 State Street presented evidence to the contrary, which it did not). There are thus two reasons why the trial court should not have granted 122 State Street's motion to dismiss at the end of Madison Gas's case-in-chief.

¶31 First, as we have seen, a trial court is required to look at a plaintiff's evidence "in the light most favorable" to the plaintiff before it may dismiss the plaintiff's complaint at the end of the plaintiff's case-in-chief. ***Kain***, 2001 WI App 230, ¶21, 248 Wis. 2d at 184, 635 N.W.2d at 646. The trial court did not do that here.

¶32 Second, receipt of the "amount due" exhibit, Exhibit 3, meant that it passed (or 122 State Street conceded that it passed by not objecting) *both* aspects of WIS. STAT. RULE 908.03(6): (a) that it was a business record; and (b) that there was nothing that "indicate[d] lack of trustworthiness" of the document's assertions. The burden of proving a "lack of trustworthiness" is on the opponent. *See* ***State v. Brown***, 480 N.W.2d 761, 767 (S.D. 1992). This, of course, not only follows logically from the rule's clear text but is also consistent with the general principle that puts the burden of proof on the party asserting the affirmative of the proposition. *See* ***Anderson v. Anderson***, 147 Wis. 2d 83, 88, 432 N.W.2d 923, 926 (Ct. App. 1988). As the Majority recognizes, "Jeffrey Larson, a customer

billing manager" at Madison Gas testified that Exhibit 3 "had correctly recorded the information on the meter, but had not billed State Street, and that the information concern[ed] the recordings and [set out] the amount due." Majority, ¶11. That is all that Madison Gas needed to survive 122 State Street's motion to dismiss.

¶33 Further, *if* an explanation of the document was needed before it made sense to the trial court (although the "amount due" testimony sufficed, absent 122 State Street's evidence to the contrary), the trial court should have not received the exhibit. *See* ***Pophal v. Siverhus***, 168 Wis. 2d 533, 547, 484 N.W.2d 555, 560 (Ct. App. 1992). But, absent rejecting the document as needing further explanation, as ***Pophal*** recognizes it could have done, that the trial court did not understand how the business-record data was calculated no more defeats Madison Gas's *prima facie* case than would a trial court's inability to follow the statistical underpinnings to a properly admitted actuarial summary, or the solutions to a complex quantum-mechanics problem underlying an exposition by a properly admitted learned treatise. *See* WIS. STAT. RULE 908.03(18).[4]

¶34 Exhibit 3 was also a summary document, as that concept is recognized by WIS. STAT. RULE 910.06. The rule provides:

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[4] All that WIS. STAT. RULE 908.03(18)(a) requires to prove the truth of a statement in a learned treatise is that the author be a recognized authority—not that the fact-finder, be it a judge or a jury, understand the underlying concepts. As material here, RULE 908.03(18) provides:

> A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

122 State Street did not ask to see the underlying data in order to challenge the calculations, although it could have.

¶35 Here, Exhibit 3 was not only admissible as a business-record document and as a summary document, but indeed, as already seen, it was received without objection. As such, the trial court, at the very least, should not have granted 122 State Street's motion to dismiss Madison Gas's complaint at the end of Madison Gas's case-in-chief.

¶36 Although I agree with the Majority's resolution of 122 State Street's cross-appeal for the reasons set out in the second part of the Majority opinion, I respectfully dissent from the decision insofar as it affirms the trial court's dismissal of Madison Gas's complaint at the end of its case-in-chief.