SUPPLEMENTAL MATERIALS

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A SUPPLEMENT TO BU-316

COMPILED BY ROSCOE B. STEPHENSON, III

VIRGINIA MILITARY INSTITUTE

537 S.E.2d 573
260 Va. 533
GINA CHIN & ASSOCIATES, INC.
v.
FIRST UNION BANK.

Record No. 992557.
Supreme Court of Virginia.
November 3, 2000.

Simon M. Osnos, Falls Church, for appellant.

Daniel S. Fiore, Arlington, for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we consider whether the trial court erred in striking the evidence at the conclusion of the plaintiffs case-in-chief by ruling, as a matter of law, that a bank teller who participated in a scheme to deposit forged checks was acting outside the scope of his employment, thus relieving his employer from civil liability for those acts.

BACKGROUND

* * *

In 1994, Henry Steven Cardenas was employed as a teller by First Union Bank. His duties included, among other things, the receiving of cash and checks for deposit into the accounts of the bank's customers. At the beginning of his employment, Cardenas received "about two weeks" of training. During that training, First Union instructed Cardenas not to accept checks made payable to businesses for deposit into personal accounts or to accept checks for more than $7,000 for deposit without a supervisor's approval.

Prior to beginning his employment with First Union, Cardenas was acquainted with Amie Cheryl Lehman, who was dating Cardenas' brother. Shortly after Cardenas began working as a teller, he moved into an apartment with his brother and Lehman. Lehman, who had formerly been a teller at Signet Bank, was employed at that time by Gina Chin & Associates, Inc. (Chin), a food wholesaler, as the firm's accounts payable clerk.

After Cardenas had been working at First Union "a little over a year," Lehman, relying on her knowledge as a former bank teller, requested his assistance in depositing a forged check into her First Union account. The check was drawn on Chin's account at Signet Bank,[1] and was made payable to one of Chin's suppliers. Lehman created the check by entering a false invoice into Chin's accounts payable computer program, which produced the check on a printer. Lehman then forged both the signature of Gina Chin, Chin's president, as drawer and the endorsement of the supplier making the check payable to Lehman.

Cardenas at first refused to assist Lehman, "but then she kept on insisting and insisting and then she convinced me, I guess, by offering me some money on the side." Lehman told Cardenas that "it wouldn't come back to [him] at all" because she reconciled the bank statements for Chin's account and could intercept the statements with the forged checks before they came to the attention of the firm's principals. Cardenas thereafter deposited the check into Lehman's First Union account. The drawer bank paid the check, debiting the amount from Chin's account.

Ultimately, using the forgery scheme outlined above, Lehman and Cardenas succeeded in depositing $270,488.72 in forged checks into Lehman's personal account at First Union.[2] Cardenas received approximately 20 percent of the funds deposited. After Lehman left her employment with Chin, Signet Bank discovered the forgery scheme and reported its findings to Chin and the police. Lehman and Cardenas subsequently were convicted of one count of bank fraud each in federal court.

On June 11, 1996, Chin filed a motion for judgment against First Union seeking $270,488.72 in damages resulting from the forgery scheme of Lehman and Cardenas. Chin alleged that First Union was * * * vicariously liable for Cardenas' criminal acts.

* * *

Upon remand, a jury trial was commenced in the trial court on July 17, 1999. * * * [T]he trial court stated "the primary issue is scope of employment." Chin then proceeded to produce its evidence to the jury.

Cardenas, Lehman, and Donald Chin, Chin's treasurer, were each called as witnesses for Chin. Consistent with the facts previously related herein, Cardenas and Lehman detailed the scheme to forge the checks and to deposit them into Lehman's account. Cardenas further, testified that after he left his employment with First Union, Lehman continued the forgery scheme using her account at another bank where Cardenas' brother worked as a teller. Donald Chin testified concerning the failure of Chin to detect the forgery scheme. At the conclusion of Chin's case-in-chief, the jury was read stipulations of fact, including the stipulation that Cardenas' acts were not known to his supervisors.[3]

First Union moved to strike Chin's evidence, asserting that Chin had failed to establish that Cardenas was acting within the scope of his employment in knowingly accepting the forged checks for deposit. First Union argued that "although taking these checks may have been incidental to First Union's business because it takes checks for deposit, there was no evidence that it was in furtherance of First Union's interest." First Union contended that this was so because Cardenas willfully violated its policies concerning the deposit of commercial checks into personal accounts and accepting certain checks without management approval. Thus, First Union argued that Cardenas was not acting in furtherance of its interest and, hence, not within the scope of his employment.

Chin, citing *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*, 249 Va. 39, 453 S.E.2d 261 (1995), and other cases, responded that the specific wrongful act by the employee need not be in furtherance of the employer's interest so long as the service that the employee was performing at the time was in the course of his employment. Chin asserted that its evidence showed that Cardenas was acting as an employee of First Union when he accepted the forged checks for deposit.

* * * [T]he trial court sustained First Union's motion to strike Chin's evidence. In the final order dismissing the case with prejudice, the trial court ruled as a matter of law that Cardenas' acts "were not within the scope of the employee's authority, being in contravention of First Union's directives, and they were not within the scope of employment as they were shown not to be in furtherance of First Union's interests; and... reasonable persons cannot differ on the conclusion reached herein based on the evidence presented by the Plaintiff, with all inferences most favorable to the Plaintiff." We awarded Chin this appeal.

DISCUSSION

* * *

Here, it may well be reasonable to conclude that a bank teller does not intend to further the interest of his employer bank when he nowingly accepts forged checks for deposit for his own gain. However, that does not resolve the legal issue presented[.]

* * *

Settled principles guide the trial court's considerations. While the plaintiff has the burden of persuasion on the issue whether the employee was acting within the scope of his employment at the time of the act complained of, we have consistently held that proof of the employment relationship creates a prima facie rebuttable presumption of the employer's liability. *McNeill v. Spindler*, 191 Va. 685, 694-95, 62 S.E.2d 13, 17-18 (1950). Thus, "[w]hen an employer-employee relationship has been established, the burden is on the [employer] to prove that the [employee] was not acting within the scope of his employment when he committed the act complained of, and ... if the evidence leaves the question in doubt it becomes an issue to be determined by the jury.'" *[Citations]*

* * *

We emphasize that the employee's improper motive is not irrelevant to the issue whether the act was within the scope of employment. Rather, it is merely a factor to be considered in making that determination, and, unless the deviation from the employer's business is slight on the one hand, or marked and unusual on the other, but falls instead between those two extremes, the question is for the jury. * * *

* * * First Union does not contest that Chin produced clear evidence that established the necessary employment relationship between Cardenas and First Union. Accordingly, Chin's evidence established a *prima facie* case of First Union's liability.

First Union contends, however, that Chin's evidence was also sufficient to meet First Union's burden of production on the issue whether Cardenas' acts were nevertheless outside the scope of that employment and, moreover, that this evidence was sufficient to rebut the presumption of liability as a matter of law. We disagree.

First Union asserts that Chin's evidence establishes " that Cardenas' wrongful acts were not "expressly or impliedly directed by the employer" because he violated directives in accepting commercial checks for deposit into a personal account, in failing to obtain a manager's approval to accept high value checks for deposit, and in knowingly accepting checks for deposit with forged endorsements. This assertion is without merit because the act need not be expressly or impliedly directed by the employer in order for the act to occur within the scope of the employment. Similarly, an act committed in violation of an employer's direction is not always beyond the scope of the employment. Rather, as previously noted, the test is "whether the service itself, in which the tortious act was done, was within the ordinary course of" the employer's business. In this instance, it is clear that accepting checks for deposit by a bank teller is a service within the ordinary course of First Union's banking business.

First Union further asserts that Chin's evidence also establishes that Cardenas was acting exclusively for his own benefit and that of Lehman. Thus, First Union contends that Cardenas was acting outside the scope of his employment because he had an "external, independent, and personal motive" to perform the act.

There can be no doubt that Cardenas was not steadfast in the performance of his duties and obligations to his employer when he chose to participate in a criminal scheme to accept forged checks for deposit. Cardenas was acting out of self-interest in participating in Lehman's scheme, and his conduct was "outrageous and violative of his employer's rules." *Commercial Business Systems*, 249 Va. at 46, 453 S.E.2d at 266. Nonetheless, it is clear that in doing so he was performing a normal function of a bank teller in accepting checks for deposit.

In sum, * * * Chin did not have the burden of presenting evidence that Cardenas' acts were within the scope of his employment. Rather, having established that the employment relationship existed, Chin was entitled to have the case go forward with the burden on First Union to prove that Cardenas acted *outside* the scope of his employment.

* * *

CONCLUSION

For these reasons, we hold that the trial court erred in sustaining First Union's motion to strike Chin's evidence and awarding summary judgment to First Union. Accordingly, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

Notes:

1. During the course of the ensuing forgery scheme conducted by Lehman and Cardenas, Chin moved its account to Citizen's Bank of Washington, D.C. Checks drawn on both accounts were deposited into Lehman's First Union account.

2. The total amount of the forged checks reflected here is taken from Chin's motion for judgment. Chin concedes in that pleading that this amount is subject to amendment because some of the forged checks were apparently deposited in another bank.

3. First Union had been permitted to call its expert witness out of turn at the end of the first day of the trial, but had not formally begun presenting its case when it moved to strike Chin's evidence. Accordingly, we will not consider the evidence received from that witness in reviewing the trial court's ruling.

4. An alternate approach in such circumstances has been to assign liability to the employer not vicariously through respondeat superior, but directly through the torts of negligent hiring and negligent retention. *See, e.g., J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 208-09, 372 S.E.2d 391, 393 (1988)(confirming prior recognition of the tort of negligent hiring); *Philip Morris Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988)(recognizing tort of negligent retention). Chin did not allege either of these torts in its motion for judgment. Chin did allege negligent failure to supervise as a theory of liability in its motion for judgment, but abandoned that claim at the outset of trial on remand. Accordingly, the viability of that claim is not before us in this appeal.

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386 F.3d 623
Kristin D. BLAIR, Plaintiff-Appellant,
v.
DEFENDER SERVICES, INCORPORATED, Defendant-Appellee.
No. 03-1280.
United States Court of Appeals, Fourth Circuit.
Argued: December 3, 2003.
Decided: October 25, 2004.
Appeal from the United States District Court for the Western District of Virginia, James C. Turk, Senior District Judge.
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ARGUED: Monica Taylor Monday, Gentry, Locke, Rakes & Moore, Roanoke, Virginia, for Appellant. John Dickens Eure, Johnson, Ayers & Matthews, Roanoke, Virginia, for Appellee. ON BRIEF: S.D. Roberts Moore, Andrew E. Carpenter, Gentry, Locke, Rakes & Moore, Roanoke, Virginia, for Appellant. Brian J. Brydges, Johnson, Ayers & Matthews, Roanoke, Virginia, for Appellee.
Before WIDENER and KING, Circuit Judges, and Richard D. BENNETT, United States District Judge for the District of Maryland, sitting by designation.
Affirmed in part, reversed in part, and remanded by published opinion. District Judge BENNETT wrote the opinion, in which Judge KING concurred. Judge WIDENER wrote an opinion concurring in part and dissenting in part.
OPINION
BENNETT, District Judge:

Plaintiff Kristin D. Blair, a Virginia resident, brought this action against Defender Services, Inc. ("Defender"), a South Carolina Corporation, for injuries sustained as a result of a violent attack upon her by James Lee Harris, an employee of Defender. Alleging claims against Defender for negligent hiring, retention and supervision and for *respondeat superior* liability, Blair filed a complaint in the Circuit Court for the City of Roanoke, Virginia. The case was duly removed to the United States District Court for the Western District of Virginia on the basis of diversity of citizenship, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446. Subsequently, the District Court granted Defender's motion for dismissal as to the negligent supervision count, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] Upon the conclusion of discovery, Defender moved for summary judgment as to the remaining three claims. The District Court entered summary judgment for Defender on all three counts, and Blair now appeals. We affirm the decision of the District Court as to *respondeat superior* liability, but reverse that court's entry of judgment for Defender on the claims of negligent hiring and negligent retention, and remand this case for further proceedings consistent with this opinion.

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I.

This Court reviews a grant of summary judgment *de novo* and applies the same standard as the District Court. *Temkin v. Frederick County Comm'rs,* 945 F.2d 716, 718 (4th Cir.1991), *cert. denied,* 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Baber v. Hospital Corp. of America*, 977 F.2d 872, 874 (4th Cir.1992). Federal Rule of Civil Procedure 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, interrogatories and affidavits . . . show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." We have previously noted that, when "the moving party has met its responsibility of identifying the basis of its motion, the non-moving party must come forward with `specific facts showing that there is a genuine issue for trial.'" *White v. Rock-ingham*

Radiologists, Ltd., 820 F.2d 98, 101 (4th Cir.1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In its review, this Court must view such facts and all reasonable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "If the evidence is such that a reasonable jury could return a verdict for the non-moving party" then a dispute over a material fact is genuine. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In conducting this analysis, this Court recognizes that the instant action was filed in Virginia state court and removed to federal court based upon diversity of citizenship. Accordingly, the choice of law of Virginia applies. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). In evaluating the facts in the light most favorable to the non-moving party, we will apply Virginia substantive law consistent with Virginia's *lex loci delicti*, the law of the place of the wrong. *See, e.g., Jones v. R.S. Jones & Assocs.*, 246 Va. 3, 431 S.E.2d 33, 34, 9 Va. Law Rep. 1410 (1993); *Buchanan v. Doe*, 246 Va. 67, 431 S.E.2d 289, 291, 9 Va. Law Rep. 1446 (1993).

II.

On the morning of March 26, 2001, at approximately 11:30 a.m., Kristin D. Blair ("Blair"), a 19-year-old college freshman at Virginia Polytechnic Institute and State University ("Virginia Tech"), entered the digital art classroom in Henderson Hall on the Virginia Tech campus to work on a project prior to the commencement of a 2:00 p.m. class session. When Blair arrived, other students were completing a class in the room. By 12:30 p.m., all but a few of these students had departed. Around that time, a man wearing blue jeans and a gray t-shirt with a colorful logo entered the room and soon departed. A few minutes later, that same man returned and asked Blair, who was now alone in the classroom, when the next class started.

At approximately 12:45 p.m., Blair left the classroom and observed the same man standing in the middle of the hallway, with a large gray bucket beside him. After walking to the end of the hallway, Blair entered a unisex bathroom. When she opened the restroom door to leave, the same man was standing in the doorway. Suddenly, this individual grabbed Blair by her neck and pushed her back into the bathroom. While straddling Blair and using both hands to strangle her, the attacker pushed her to the floor. Blair lost consciousness during the attack. She awoke on the bathroom floor, with her face swollen to the extent that she only could

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see out of one eye.[2] Blair then left the bathroom and began screaming for help. A member of the Virginia Tech administrative staff approached her and asked, "who did this?". Blair pointed to the same man whom she had seen earlier, and who was standing in the hallway.

The man identified by Blair was James Lee Harris, an employee of Defender, which, pursuant to a contract, provided janitorial staffing services on Virginia Tech's campus.[3] Eleven months prior to his attack on Blair, a protective order had been issued against Harris in the Giles County Juvenile and Domestic Relations Court.[4] This protective order resulted from a criminal complaint having been filed by a woman who had been physically assaulted by Harris at a restaurant.

Harris previously had worked for Defender during a brief period from November 1998 until January 1999. At that time, Defender required Harris to complete an application that included a question concerning any criminal charges, to which Harris answered that he had no prior criminal convictions. Pursuant to a contract with Virginia Tech, Defender assigned Harris to perform custodial work at Virginia Tech under Virginia Tech's supervision. That contract required Defender to perform criminal background checks on all Defender personnel assigned to the Virginia Tech campus. A criminal background check of Harris was not completed by Defender during this two-month period.

In January of 1999, Harris quit his employment with Defender, and became employed directly by Virginia Tech for approximately one year. Harris returned to the employment of Defender for a brief two weeks in October of 2000. Once again Harris completed another application and indicated no criminal convictions. Defender did not conduct a criminal background check with respect to Harris during this second brief period of employment.

On February 5, 2001, Defender once again hired Harris. Unlike Harris' prior employment with Defender, he was not required to complete any application on this third occasion. As with the previous occasions, Defender did not conduct a criminal background check on Harris prior to his employment. Defender's representatives did, however, contact some of the personal references provided by Harris. While Harris did not have a record of any criminal convictions, he was subject to the aforementioned court protective order in neighboring Giles County.

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At all times, the contract between Defender and Virginia Tech specifically required Defender to perform criminal background checks on all personnel assigned to Virginia Tech property. Expert testimony offered in opposition to Defender's motion for summary judgment presented the view that Defender's pre-employment screening of Harris was inadequate. Specifically, there was evidence that Defender would have discovered that Harris was the subject of a protective order and criminal complaint in the neighboring county if a background investigation had been conducted as required.

III.

A. *The* Respondeat Superior *Claim*

The Supreme Court of Virginia in the cases of *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 537 S.E.2d 573 (Va.2000), and *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 539 S.E.2d 426 (Va.2000), both decided on the same day and authored by Justice Lawrence L. Koontz, Jr., addressed the elements of a claim against an employer for the wrongful acts of an employee based on the doctrine of *respondeat superior*. In *Gina Chin*, the court noted that "(a)lmost from its first consideration by the courts of this Commonwealth. . . the determination of the issue [of] whether the employee's wrongful act was within the scope of his employment under the facts of a particular case has proved `vexatious.'" 537 S.E.2d at 576-577 (citations omitted). In *Majorana*, the court explained that:

When the plaintiff presents evidence sufficient to show the existence of an employer-employee relationship, she has established a *prima facie* case triggering a presumption of liability . . . the burden of production then shifts to the employer, who may rebut that presumption by proving that the employee had departed from the scope of the employment relationship at the time the injurious act was committed.

539 S.E.2d at 429 (citations omitted).

The District Court correctly viewed all facts in the light most favorable to Blair in assuming that Harris was an employee of Defender at the time of the attack on March 26, 2001. This Court concurs that Blair has met her burden in presenting sufficient evidence that Harris was an employee of Defender. However, any presumption of liability may be rebutted by proof that Harris had departed from the scope of that employment.

Even viewing the facts in the light most favorable to Blair on this issue, we find that the District Court correctly concluded that Harris' actions had nothing to do with his performance of janitorial services. The District Judge thoroughly reviewed applicable Virginia law in reaching this conclusion.

It is well established that the simple fact that an employee is at a particular location at a specific time as a result of his employment is not sufficient to impose *respondeat superior* liability on the employer. *Cary v. Hotel Rueger, Inc.*, 195 Va. 980, 81 S.E.2d 421, 424 (Va.1954). However, as the District Court noted, Virginia Courts have not "automatically" placed intentional torts "outside the scope of employment for purposes of vicarious liability." *See, e.g., Davis v. Merrill,* 133 Va. 69, 112 S.E. 628, 630-32 (Va.1922). The District Judge correctly noted that the test set forth in the *Gina Chin* case is whether "the service itself, in which the tortious act was done, was within the ordinary course of the employer's business." *Gina Chin,* 537 S.E. 2nd at 579.

In *Gina Chin, supra,* the Supreme Court of Virginia noted its earlier opinion

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in *Kensington Associates v. West,* 234 Va. 430, 362 S.E.2d 900, 4 Va. Law Rep. 1269 (1987). In that case, the court reversed a jury verdict in favor of a plaintiff-construction worker, and entered final judgment in favor of the employer of an individual who had engaged in "horseplay" in shooting the plaintiff. 362 S.E.2d at 903-04. The court noted that this horseplay was not done to further the employer's interest, and also noted its earlier opinion in *Abernathy v. Romaczyk*, 202 Va. 328, 117 S.E.2d 88 (Va.1960). *Id.* In *Abernathy,* the court reversed a jury verdict and held "as a matter of law" that a delivery man was not acting within the scope of his employment when he participated in a scuffle over who had caused a traffic accident. 117 S.E.2d at 92-93.

The present case falls within the ambit of these Virginia cases. Harris' assault on Blair is clearly distinguishable from situations where the employee's wrongful conduct was related to the nature of the employment. In the *Gina Chin* case, a bank teller embezzled money, while in the *Majorana* case, a gas station employee sexually harassed a customer during payment by the customer. When Harris embarked on independent acts to attack Blair, he clearly acted outside the scope of his employment. We hold that this act was so great a deviation from Defender's business that the District Court correctly granted Defender's motion for summary judgment on the *respondeat superior* liability claim as a matter of law.

B. *The Negligent Hiring and Negligent Retention Claims*

The recognition of claims for negligent hiring and negligent retention can be traced in Virginia case law to the opinion of the Supreme Court of Virginia in *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S.E. 740, 102 Am. St. Rep. 839 (Va. 1903). *See Courtney v. Ross Stores, Inc.,* 1998 Va. Cir. LEXIS 143, 45 Va. Cir. 429, 430 (1998) (tracing history of negligent hiring and retention under Virginia state law). In *Big Stone*, the court recognized a duty of a company to exercise "reasonable care" in a hiring decision, and a distinction between the hiring and the retention of an employee. 45 S.E. at 741. Subsequently, the Supreme Court of Virginia explicitly recognized the independent torts of negligent hiring in *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (Va.1922), and negligent retention in *Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 173 S.E. 363 (Va. 1934).

In *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391, 393, 5 Va. Law Rep. 637 (1988), the Virginia Supreme Court held that allegations of negligent hiring had set forth a cause of action under Virginia law. In that case, the mother of a ten-year-old girl brought suit against a church and its pastor as a result of the rape and sexual assault of the girl by an employee of the church. *Victory Tabernacle,* 372 S.E.2d at 392. It was alleged that when the church hired this employee it "knew, or should have known, that [the employee] had recently been convicted of aggravated sexual assault on a young girl, that he was on probation for the offense, and that a condition of his probation was that he not be involved with children." *Id.*

The defendants filed a *demurrer*, contending that the plaintiff had failed to state a cause of action. *Id.* The Supreme Court of

Virginia specifically addressed "only whether the allegations of negligent hiring. . . state a cause of action in Virginia." *Id.* at 392-393. In reversing the trial court's granting of a *demurrer* on this question, the court held that the plaintiff had asserted a claim of negligent hiring, distinct from a claim for *respondeat superior*

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liability. *Id.* The court discussed at length its earlier opinion in *Davis v. Merrill, supra,* noting that when the wrongdoing employee in that case "was interviewed. . . no one made inquiry concerning his past record, habits, or general fitness," and further commented to the effect that "had [the employer] investigated, it probably would not have offered the assailant the job." *Id.* at 393.

In the instant case, the District Court found that "no reasonable trier of fact" could find that Defender knew or should have known of Harris' criminal problems in the neighboring county some eleven months earlier. We respectfully disagree. There is a genuine issue of material fact with respect to whether Defender should have known of Harris' violent conduct, as the undisputed facts are that Defender never conducted any type of criminal background check on Harris prior to employing him. While Defender can certainly argue that such a background check would not have resulted in the discovery of the protective order issued in April 2000, and a jury could certainly so find, there is expert testimony proffered by Blair that a background check would have indicated the existence of a protective order resulting from a criminal complaint.

The trial court and Defender placed great reliance on the Virginia Supreme Court's opinion in *Southeast Apts. Mgmt., Inc. v. Jackman,* 257 Va. 256, 513 S.E.2d 395 (Va.1999). In that case, a tenant was molested by a maintenance person of the apartment building after his entry into her apartment. The tenant claimed that the owner of the apartment building breached its duty "to exercise reasonable care in the hiring of its employee . . . or . . . in the retention of the employee." 513 S.E.2d at 395-396. The court noted its earlier opinions in *Victory Tabernacle, supra,* and *Davis v. Merrill, supra,* in establishing the tort of negligent hiring. In providing further edification of this tort, the court cited the following summary provided by a Minnesota state court:

> Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Id. at 397 (citing *Ponticas v. K.M.S. Inv.,* 331 N.W.2d 907, 911 (Minn.1983)).

In the *Southeast Apts.* decision, the Virginia Supreme Court further noted its recognition of the tort of negligent retention in its earlier opinion in *Philip Morris, Inc. v. Emerson,* 235 Va. 380, 368 S.E.2d 268, 4 Va. Law Rep. 2568 (1988). The court in *Southeast Apts.* stated that the tort of negligent retention was based "on the principle that an employer owning leased premises is subject to liability for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm tenants." 513 S.E.2d at 397. Similarly, this Court recognized this principle of Virginia law in our opinion in *Barrett v. Applied Radiant Energy Corp.,* 240 F.3d 262, 269 (4th Cir. 2001).

In applying the above principles to the facts before it, the court in *Southeast Apts.* held that the evidence was "insufficient to make out a *prima facie* case of negligent hiring or negligent retention." 513 S.E.2d at 397. The facts presented in *Southeast Apts.* were that the owner had "received a detailed application containing information about [the employee's] personal background, work experience, and behavioral history." *Id.* In responding to

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the application inquiry, the employee denied any engagement in "34 types of criminal behavior, except traffic violations." *Id.* Furthermore, he denied any criminal convictions "in the past seven years." *Id.* In addition to the thorough steps taken by the employer, the evidence in *Southeast Apts.* indicated that the wrongdoing employee had two previous bad-check charges totaling $10.29. *Id.* Importantly, there were no criminal convictions or protective orders involving violent acts perpetrated on women. *Id.*

The facts in the instant case are clearly distinguishable from those found in *Southeast Apts.*, and are much closer to the facts addressed by the Supreme Court of Virginia in *Victory Tabernacle, supra.* In the present case, Defender failed to conduct a background check of Harris on three different occasions. It is undisputed that Defender was contractually obligated to Virginia Tech to conduct a background check of employees such as Harris. Furthermore, the instant record includes the statement of Virginia Tech's Director of Housekeeping, who indicated that he would not have allowed Harris to perform janitorial services at Virginia Tech had he known of Harris' propensity for violence.

With respect to Blair's claim of negligent hiring, we find that there is a genuine issue of material fact concerning whether Harris' violent propensities should have been discovered by Defender prior to Harris being placed into an employment situation in which he posed a threat to Virginia Tech students. Similarly, in addressing Blair's claim of negligent retention, we find that there is a genuine issue of material fact regarding whether Defender, having originally employed Harris, should have known or discovered Harris' dangerous propensities as a result of the protective order issued eleven months earlier. Quite simply, based on the facts of the instant case, these are questions to be resolved by the jury as the finder of fact.

For the foregoing reasons, we affirm the District Court's granting of summary judgment on the *respondeat superior* claim, but vacate the District Court's order granting summary judgment on Blair's claims of negligent hiring and negligent retention, and remand this case for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Notes:

1. The Plaintiff/Appellant has not appealed the District Court's dismissal of the negligent supervision claim.

2. There was no evidence of any sexual assault. Blair suffered broken facial bones and subsequently underwent neck surgery. Since the incident, she has attempted suicide and has been diagnosed with Post Traumatic Stress Disorder.

3. The present record of this case indicates that Harris has denied that he attacked Blair. Defender has not admitted that Harris was the attacker, but has recognized that Blair's evidence on this issue is strong. (Appellee Br. at 2 n.1). In her brief to this Court, Blair has indicated that Harris was criminally charged and entered a plea of "nolo contendere." (Appellant Br. at 5). The Joint Appendix indicates that Harris was charged criminally. (J.A. at 329). As the District Court noted, it assumed for the purposes of summary judgment that such factual disputes are to be resolved in Blair's favor. (J.A. at 331).

4. Giles County is the neighboring county to Montgomery County, in which Virginia Tech is located. The protective order was entered on April 2, 2000, and listed Harris' home address in the town of Narrows, which is located in Giles County. Harris resided in Pembroke, also located in Giles County, at the time of his initial application for employment in 1998 (JA 128). His application for employment in October 2000 (JA 222), listed an address in the town of Ripplemead, which is also located in Giles County.

WIDENER, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent. While I agree with the result reached by the majority which affirms the district court's grant of summary judgment on the *respondeat superior* claim, I am of opinion that the district court's order granting summary judgment to Defender Services on Miss Blair's claims of negligent hiring and negligent retention should be affirmed, as well.

The district court correctly found that,

[g]iven that prevailing Virginia law does not obligate an employer who has asked about criminal history and been told that none exists and who has no reason to suspect a criminal record to investigate prior criminal record "in the exercise of reasonable care," no reasonable trier of fact could hold Defender Services negligent for not making the far more detailed background search that might have brought a temporary restraining order to light.

(quoting *Southeast Apartments Management, Inc. v. Jackman*, 257 Va. 256, 261, 513 S.E.2d 395, 397 (1999)). District Court Slip op. at 7-8. Therefore, I would affirm all the findings of the district court.

The majority relies on "expert testimony proffered by Blair that a background check would have indicated the existence

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of a protective order resulting from a criminal complaint." Slip op. at 629. The expert testified in an affidavit that the emergency protective order "should have been discovered by a reasonable background investigation" and that "[h]ad Defender Services, Inc. performed a criminal background check, they would have discovered the Protective Order and Harris' assignment to Virginia Tech would not have been approved."

Miss Blair's principal argument is that Defender Services failed to conduct a reasonable pre-employment investigation into Harris' criminal background as the contract between Defender Services and Virginia Tech required, and because it did not, it is liable for negligent hiring. The contract between Defender Services and Virginia Tech cannot, however, give rise to a tort duty owed by Defender Services to Miss Blair. An unfulfilled contractual responsibility alone cannot automatically create tort liability. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998) (noting that "the duty tortiously or negligently breached *must* be a common law duty, not one existing between the parties solely by virtue of a contract" (emphasis added)).

The majority concludes that a genuine issue of material fact exists as to whether Defender Services should have known of Harris' propensities because it did not perform a criminal background check. Slip op. at 629. Virginia law, however, does not obligate an employer who has asked about criminal history and been told that none exists, and who has no reason to suspect a criminal record, to investigate a prior criminal record "in the exercise of reasonable care." *Southeast Apartments*, 257 Va. at 261, 513 S.E.2d at 397. Moreover, "proof of the failure to investigate a potential employee's background is not sufficient to establish the employer's liability. Rather, the plaintiff must show that an employee's propensity to cause injury to others was either known or should have been discovered by reasonable investigation." *Majorana v. Crown Central Petroleum Corp.*, 260 Va. 521, 531, 539 S.E.2d 426, 431 (2000).

Even further, and persuasive, Virginia statutory law states that "[t]he issuance of an emergency protective order shall not be considered evidence of any wrongdoing by the respondent." Va.Code § 16.1-253.4(G). Also, "[a]n emergency protective order issued pursuant to this section shall expire seventy-two hours after issuance." It may be extended until 5:00 p.m. the next business day the court is in session, which was done here until April 10, 2000 at 5:00 p.m. Va.Code § 16.1-253.4(C).

The emergency protective order was issued in the interim period between Harris' first and second employment with Defender Services. Harris' application for employment is dated October 4, 2000, and the application for the protective order is dated April 2, 2000, as is the protective order. Even if the protective order has something to do with the case, which is forbidden by Va.Code § 16.1-254(G), it had expired on April 10, 2000, almost six months prior to the time the application for employment was made. Defender Services had no reason to suspect, based on its initial investigation and employment of Harris and his employment with Virginia Tech, which had received a negative criminal background check, that Harris was capable of any violence. Further, there was no evidence presented that an emergency protective order would have been discovered in a criminal background check. *Majorana,* 260 Va. at 532, 539 S.E.2d at 432. In fact, the check run by the investigating officer after the attack on Miss Blair in March 2001 showed no convictions. To discover

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an emergency protective order in a potential employee's history, an additional investigation must be executed. This additional inquiry, when a criminal background check shows no convictions, would require an investigation that goes beyond "the exercise of reasonable care." *Southeast Apartments,* 257 Va. at 261, 513 S.E.2d at 397.

Therefore, even if Defender Services had taken the extra step to examine the records of the court not of record in Harris' county of residence to discover the existence of an emergency protective order, under Virginia law it could not use that information as evidence of any wrongdoing on Harris' part. Holding Defender Services negligent for not making the far more detailed background search that might have brought an emergency protective order to light would be unreasonable and would impose an undue burden on an employer's hiring practice.

The upshot of the majority decision is that we are engrafting on Virginia law a requirement that in each case of employment a prospective employer must search for even unsuccessful misdemeanor prosecutions in the records of the courts not of record of the county of residence of the applicant, here Giles County, although not the same as the place of employment, here Montgomery County. In default of such a search we hold the employer may be found negligent. In my opinion this is an unreasonable burden to place on employers. Far worse is the disqualification from employment placed on youth by our decision.

I am thus of opinion that the judgment of the district court should be affirmed.

984 P.2d 194
1999 OK 50

OSPREY L.L.C., a limited liability company, Plaintiff/Appellant,
v.
KELLY-MOORE PAINT CO. INC., a California corporation, Defendant/Appellee.

No. 90,206.

Supreme Court of Oklahoma.

May 25, 1999.

Anton J. Rupert, Oklahoma City, for Plaintiff/Appellant.

Darian B. Anderson, Edmond, for Defendant/Appellee.

[984 P.2d 195]

¶ 1 KAUGER, J.:

¶ 2 The first impression question presented is whether a faxed or facsimile delivery of a written notice renewing a commercial lease is sufficient to exercise timely the renewal option of the lease. Under the facts presented, we hold that it is.

¶ 3 FACTS

¶ 4 The appellant, Osprey, an Oklahoma limited liability company (Osprey), owns commercial property in Edmond, Oklahoma. On March 18, 1977, the appellee, Kelly-Moore Paint Company (Kelly-Moore), a California corporation, negotiated a fifteen-year lease for its Edmond, Oklahoma, store with Osprey's predecessors James and Victoria Fulmer.[1] The lease contained two five-year renewal options which required that the lessee give notice of its intent to renew the lease at least six months prior to its expiration date. The lease also provided that all notices "shall be given in writing and may be delivered either personally or by depositing the same in United States mail, first class postage prepaid, registered or certified mail, return receipt requested."

¶ 5 It is undisputed that after the first fifteen years, Kelly-Moore timely informed Osprey's predecessors by certified letter of its intent to extend the lease an additional five years. The first five-year extension was due to expire on August 31, 1997. According to the property manager of Kelly-Moore, she telephoned one of the owners of Osprey in January of 1997, to inform him that Kelly-Moore

[984 P.2d 196]

intended to extend its lease for the remaining five-year period. On Friday, February 28, 1997, the last day of the six-month notification deadline, Kelly-Moore faxed a letter of renewal notice to Osprey's office at 5:28 p.m., Oklahoma time. Kelly-Moore also sent a copy of the faxed renewal notice letter by Federal Express the same day.

¶ 6 Although the fax activity report and telephone company records confirm that the fax was transmitted successfully and that it was sent to Osprey's correct facsimile number, Osprey denies ever receiving the fax. The Federal Express copy of the notice was scheduled for delivery on Saturday, March 1, 1997. However, Osprey actually received it on Monday, March 3, 1997. In a letter dated March 6, 1997, Osprey acknowledged that it had received Kelly-Moore's Federal Express notice; denied that the notice was timely according to the terms of the lease; and it rejected the notice as untimely. In July of 1997, Osprey wrote Kelly-Moore reminding it to vacate the premises by August 31, 1997. Kelly-Moore refused to vacate, insisting that it had effectively extended the lease term for the remaining five years.

¶ 7 On September 2, 1997, Osprey filed an action for [eviction] in the district court of Oklahoma County. . . . Kelly-Moore argued that it was entitled to possession of the property because of its timely renewal of the lease. After a trial on the merits, the trial court granted judgment in favor of Kelly-Moore, finding that the faxed notice was effective. Osprey appealed. The Court of Civil Appeals reversed, determining that the plain language of the lease required that it be renewed for an additional term by delivering notice either personally or by mail, and that Kelly-Moore had done neither. We granted certiorari on April 13, 1999, to address the question of first impression.

* * *

¶ 9 The precise issue of whether a faxed or facsimile delivery of a written notice to renew a commercial lease is sufficient to exercise timely the renewal option of the lease is one of first impression in Oklahoma. Neither party has cited to a case from another jurisdiction which has decided this question, or to any case which has specifically defined "personal delivery" as including facsimile delivery.

¶ 10 The contested portions of the lease provide in pertinent part:

> ". . . 20. OPTION TO RENEW . . . . The Lessee must, in order to exercise each such renewal option give to the Lessor at least six (6) months prior to the expiration of the term hereof or the extended term, written notice of the Lessee's intention to renew this lease as by this paragraph provided. . . .
>
> . . .
>
> 26. NOTICES. All notices required to be given hereunder by Lessee or Lessor *shall* be given in writing and *may* be delivered either personally or by depositing the same in the United States mail, first class postage prepaid, registered or certified mail, return receipt requested, addressed to the party to receive the same at that party's address . . .
>
> . . .
>
> 29. TIME. Time is hereby expressly declared to be the essence of this lease and of all the covenants, agreements, terms, conditions, restrictions and obligations herein contained." (Emphasis supplied)

¶ 11 Osprey argues that: 1) the lease specifically prescribed limited means of acceptance of the option, and it required that the notice of renewal be delivered either personally or sent by United States mail, registered or certified; 2) Kelly-Moore failed to follow the contractual requirements of the lease when it delivered its notice by fax; and

[984 P.2d 197]

3) because the terms for extending the lease specified in the contract were not met, the notice was invalid and the lease expired on August 31, 1997. Kelly-Moore counters that: 1) the lease by the use of the word "shall" mandates that the notice be written, but the use of the word "may" is permissive; and 2) although the notice provision of the lease permits delivery personally or by United States mail, it does not exclude other modes of delivery or transmission which would include delivery by facsimile. Kelly-Moore also asserts that the lease specified that time was of the essence and that faxing the notice was the functional equivalent of personal delivery because it provided virtually instantaneous communication.

¶ 12 Although the question tendered is novel in Oklahoma, the sufficiency of the notice given when exercising an option contract or an option to renew or extend a lease has been considered by several jurisdictions.[2] A few have found that delivery of notice by means other than hand delivery or by certified or registered mail was insufficient if the terms of the contract specifically referred to the method of delivery.[3] However, the majority have reached the opposite conclusion.[4]

[984 P.2d 198]

These courts generally recognize that, despite the contention that there must be strict compliance with the notice terms of a lease option agreement, use of an alternative method does not render the notice defective if the substituted method performed the same function or served the same purpose as the authorized method.[5]

* * *

[984 P.2d 199]

¶ 14 . . . The lease does not appear to be ambiguous. "Shall" is ordinarily construed as mandatory and "may" is ordinarily construed as permissive.[12] The contract clearly requires that notice "shall" be in writing. The provision for delivery, either personally or by certified or registered mail, uses the permissive "may" and it does not bar other modes of transmission which are just as effective.

¶ 15 The purpose of providing notice by personal delivery or registered mail is to insure the delivery of the notice, and to settle any dispute which might arise between the parties concerning whether the notice was received.[13] A substituted method of notice which performs the same function and serves the same purpose as an authorized method of notice is not defective.[14] Here, the contract provided that time was of the essence.[15] Although Osprey denies that it ever received the fax, the fax activity report and telephone company records confirm that the fax was transmitted successfully, and that it was sent to Osprey's correct facsimile number on the last day of the deadline to extend the lease. The fax provided immediate written communication similar to personal delivery and, like a telegram, would be timely if it were properly transmitted before the expiration of the deadline to renew.[16]

[984 P.2d 200]

Kelly-Moore's use of the fax served the same function and the same purpose as the two methods suggested by the lease and it was transmitted before the expiration of the deadline to renew. Under these facts, we hold that the faxed or facsimile delivery of the written notice to renew the commercial lease was sufficient to exercise timely the renewal option of the lease.

¶ 16 CONCLUSION

¶ 17 Use of an alternative method of notification of the exercise of a lease option does not render the notice defective if the substituted notice performed the same function or served the same purpose as the authorized method.[17] Here, the lease provision concerned uses the permissive "may" rather than the mandatory "shall" and refers to personal delivery or registered or certified mail, but it does not require these methods of delivery, to the exclusion of other modes of transmission which serve the same purpose.

572 A.2d 113

Harold PEARSALL, Appellant,
v.
Joe ALEXANDER, Appellee.

No. 87-826.

District of Columbia Court of Appeals.

Argued February 28, 1990.

Decided March 22, 1990.

[572 A.2d 114]

Richard L. Fields, Oxon Hill, Md., for appellant.

Joseph Levin, Washington, D.C., for appellee.

Before NEWMAN, FERREN, and FARRELL, Associate Judges.

NEWMAN, Associate Judge:

In what must be a common development wherever there are state-sponsored lotteries, this is the story of two friends who split the price of a ticket only to have the ticket win and split their friendship.

Harold Pearsall appeals from the dismissal of his complaint against Joe Alexander, in which Pearsall claimed breach of an agreement to share the proceeds of a winning D.C. Lottery ticket worth $20,000. The trial court found that such an agreement did, in fact, exist, but determined that the agreement was invalid under § 1 of the Statute of Anne, as enacted in D.C.Code § 16-1701 (1989 Repl.). We conclude that the trial court erred in applying § 16-1701 to the Pearsall-Alexander agreement and, therefore, we reverse and remand with instructions to enter judgment for the appellant.

I.

Harold Pearsall and Joe Alexander were friends for over twenty-five years. About twice a week they would get together after work, when Alexander would meet Pearsall at the Takoma Metro station in his car. The pair would then proceed to a liquor store, where they would purchase what the two liked to refer to as a "package"—a half-pint of vodka, orange juice, two cups, and two lottery tickets—before repairing to Alexander's home. There they would "scratch" the lottery tickets, drink screw-drivers, and watch television. On occasion these lottery tickets would yield modest rewards of two or three dollars, which the pair would then "plow back" into the purchase of additional lottery tickets. According to Pearsall, the two had been sharing D.C. Lottery tickets in this fashion since the Lottery began.

On the evening of December 16, 1982, Pearsall and Alexander visited the liquor store twice, buying their normal "package" on each occasion. The first package was purchased when the pair stopped at the liquor store on the way to Alexander's home from the Metro station. Pearsall went into the store alone, and when he returned to the car, he said to Alexander, in reference to the tickets, "Are you in on it?" Alexander said "Yes." When Pearsall asked Alexander for his half of the purchase price of the tickets, Alexander replied that he had no money. When they reached Alexander's home, Alexander, expressing his anxiety that Pearsall might lose the tickets, demanded that Pearsall produce them, snatched them from Pearsall's hand, and "scratched" them, only to find that both were worthless.

At about 8:00 p.m. that same evening, Alexander, who apparently had come by some funds of his own, returned to the liquor store and bought a second "package". This time Pearsall, who had been offended by Alexander's conduct earlier in taking both tickets, snatched the two tickets from Alexander and announced that he would be the one to "scratch" them. Intending only to bring what he regarded as Alexander's childish behavior to Alexander's attention, Pearsall immediately relented and gave over one of the tickets to Alexander. Each man then "scratched" one of the tickets. Pearsall's ticket proved worthless; Alexander's was a $20,000 winner.

Alexander became very excited about the ticket and began calling friends to announce the good news. Fearing that Alexander might lose the ticket, Pearsall told Alexander to sign his name on the back of

[572 A.2d 115]

the ticket. Subsequently, Alexander cashed in the ticket and received the winnings; but, when Pearsall asked for his share, Alexander refused to give Pearsall anything.

Pearsall brought suit against Alexander, claiming breach of an agreement to share the proceeds of the winning ticket. Alexander denied that there was any agreement between the two to share the winnings of the ticket

* * *

III.

The record supports the trial court's finding that an agreement existed between Pearsall and Alexander to share equally in the proceeds of the winning ticket at issue.

The conduct of the two men on the evening of December 16, 1982, when the ticket was purchased, clearly demonstrates a meeting of the minds. After purchasing the first pair of tickets, Pearsall asked Alexander if he was "in on it." Not only did Alexander give his verbal assent, but later, when the two reached Alexander's home, Alexander, who had contributed nothing to the purchase price of the tickets, snatched *both* tickets from Pearsall and anxiously "scratched" them. It is evident from this that Alexander considered himself "in on" an agreement to share in the fortunes of the tickets purchased by his friend. It is equally clear that in giving over tickets he had purchased, Pearsall gave his assent to the agreement he had proposed earlier in the car. Moreover, this conduct took place within the context of a long-standing pattern of similar conduct, analogous to a "course of conduct" as described in the Uniform Commercial Code,[5] which included their practice of "plowing back" small returns from winning tickets into the purchase of additional tickets.[6]

[572 A.2d 118]

It is also clear to us that, by exchanging mutual promises to share in the proceeds of winning tickets, adequate consideration was given by both parties. An exchange of promises is consideration, so long as it is bargained-for. RESTATEMENT (SECOND) CONTRACTS, § 75 (1932). Moreover, consideration may consist of detriment to the promisee. *Clay v. Chesapeake & Potomac Tel. Co.,* 87 U.S.App.D.C., 284 F.8d 995 (1950). The giving over of onehalf of the proceeds of a winning ticket would be a detriment to either man. Therefore, Pearsall's promise to share, as expressed in his question to Alexander, "Are you in it?" induced a detriment in Alexander. Likewise, Alexander's promise to share, as contained in his assent, induced a detriment in Pearsall.[7]

* * *

IV.

In conclusion, we find that there was a valid, enforceable agreement between Pearsall and Alexander to share in the proceeds of the $20,000 ticket purchased by Alexander on the evening of December 16, 1982. Therefore, we reverse and remand with instructions to enter judgment in favor of the appellant.

Reversed and remanded.

724 N.W.2d 408
2006 WI App 232
William SKEBBA, Plaintiff-Appellant,
v.
Jeffrey C. KASCH, d/b/a M.W. Kasch Co., Defendant-Respondent.†
No. 2005AP2349.
Court of Appeals of Wisconsin.
Submitted on Briefs August 31, 2006.
Opinion Filed October 24, 2006.

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On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Kelly M. Dodd and Daniel J. Miske of Petrie & Stocking, S.C. of Milwaukee.

On behalf of the defendant-respondent, the cause was submitted on the brief of Franklyn M. Gimbel and Kathryn A. Keppel of Gimbel, Reilly, Guerin & Brown of Milwaukee.

Before WEDEMEYER, P.J., KESSLER, BROWN, JJ.

¶ 1 KESSLER, J.

* * *

BACKGROUND

¶ 2 Skebba, a salesman, worked for many years for a company that eventually experienced serious financial difficulties. Kasch, with his brother, owned M.W. Kasch Co. Kasch hired Skebba as a sales representative, and over the years promoted him first to account manager, then to customer service manager, field sales manager, vice president of sales, senior vice president of sales and purchasing and finally to vice president of sales. Kasch's father was the original owner of the business, and had hired Skebba's father. Skebba's father mentored Kasch.

¶ 3 When M.W. Kasch Co. experienced serious financial problems in 1993, Skebba was solicited by another company to leave Kasch and work for them. When Skebba told Kasch he was accepting the new opportunity, Kasch asked what it would take to get him to stay, and noted that Skebba's leaving at this time would be viewed very negatively within the industry. Shortly thereafter, Skebba told Kasch that he needed security for his retirement and family and would stay if Kasch agreed to pay Skebba $250,000 if one of these three conditions occurred: (1) the company was sold; (2) Skebba was lawfully terminated; or (3) Skebba retired. Skebba reports, and the jury apparently found, that Kasch agreed to this proposal and Kasch promised to have the agreement drawn up. Skebba turned down the job opportunity and stayed with Kasch from December 1993 (when this discussion occurred) through 1999 when the company assets were sold.

¶ 4 Over the years, Skebba repeatedly asked Kasch for a written summary of this agreement; however, none was forthcoming. Eventually, Kasch sold the business. Kasch received $5.1 million dollars for his fifty-one percent share of the business when it was sold. Upon the sale of the

Page 410

business, Skebba asked Kasch for the $250,000 Kasch had previously promised to him, but Kasch refused, and denied ever having made such an agreement. Instead, Kasch gave Skebba a severance agreement which had been drafted by Kasch's lawyers in 1993. This agreement promised two years of salary continuation on the sale of the company, but only if Skebba was not hired by the successor company and the severance agreement required a set-off against the salary continuation of any sums Skebba earned from any activity during the two years of the severance agreement. Skebba sued, alleging breach of contract and promissory estoppel.

¶ 5 The jury found there was no contract, but that Kasch had made a promise upon which Skebba relied to his detriment, that the reliance was foreseeable, and that Skebba was damaged in the amount of $250,000. The trial court concluded that, based on its reading of applicable case law, it could not specifically enforce the promise the jury found Kasch made to Skebba because there were other ways to measure damages. In motions after verdict, the trial court struck the jury's answer on damages, concluding that under *Hoffman v. Red Owl Stores,* 26 Wis.2d 683, 133 N.W.2d 267 (1965)*,* because Skebba did not prove what he would have earned had he taken the job with the other company, he could not establish what he had lost by relying on Kasch's promise and, therefore, had not proved his damages. We conclude that the trial court misread *Hoffman*.

STANDARD OF REVIEW

¶ 6 Review of a judgment notwithstanding the verdict is a question of law that is reviewed *de novo*.

* * *

DISCUSSION

¶ 7 Kasch did *not* promise to pay Skebba more than Skebba would have earned at the job Skebba turned down. Kasch did *not* promise that total income to Skebba would be greater than in the turned-down job, no matter how long he remained with Kasch. Kasch *only* promised that if Skebba stayed, Kasch would pay Skebba $250,000 (the sum Skebba wanted for his retirement), at the earliest of (1) Kasch selling the business, (2) Skebba retiring, or (3) Skebba being lawfully terminated. Skebba stayed. Kasch sold the business while Skebba was still employed by Kasch. Kasch refused to pay as promised.

<u>Promissory Estoppel</u>

¶ 8 The purpose of promissory estoppel is to enforce promises where the failure to do so is unjust. *U.S. Oil Co., Inc. v. Midwest Auto Care Servs.,* 150 Wis.2d 80, 91, 440 N.W.2d 825 (Ct.App. 1989). In this case, the trial court specifically relied on parts of *Hoffman* in determining that specific performance of the promise could not be awarded and in concluding that Skebba had not properly established damages. *Hoffman* was the first case in Wisconsin to adopt promissory estoppel.

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* * * [T]he *Hoffman* court explained its adoption of a cause of action based on promissory estoppel as grounded in section 90 of the Restatement of Contracts which:

does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?

Hoffman, 26 Wis.2d at 698, 133 N.W.2d 267.

¶ 9 The *Hoffman* court explains that the first two of these requirements are facts to be found by a jury or other factfinder, while the third is a policy decision to be made by the court. * * * In making this policy decision, a court must consider a number of factors in determining whether injustice can only be avoided by enforcement of the promise. * * * The court in *U.S. Oil* adopted those considerations set forth in the Restatement (Second) of Contracts § 139(2), (1981):

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance; [and]

(e) the extent to which the action or forbearance was foreseeable by the promisor.

U.S. Oil, 150 Wis.2d at 92, 440 N.W.2d 825.

¶ 10 The record does not indicate that the trial court here applied the considerations our supreme court announced in *U.S. Oil.* * * *

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* * *

¶ 12 A court, in fashioning a remedy, can consider any equitable *or* legal remedy which will "prevent injustice." This was recognized by the *Hoffman* court when it stated:

In discussing remedies to be applied by courts in promissory estoppel we quote the following views of writers on the subject:

"Enforcement of a promise does not necessarily mean Specific Performance. It does not necessarily mean Damages for breach. Moreover, the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance.... *In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law.* Its decree should be molded accordingly."

Hoffman, 26 Wis.2d at 701-02, 133 N.W.2d 267 (emphasis added; citation omitted). As later commentators have noted, Wisconsin, with its landmark *Hoffman* decision, is one of a small group of states which recognizes that to fulfill the purpose of promissory estoppel—*i.e.,* prevent injustice—a court must be able to fashion a remedy that restores the promisee to where he or she would be if the promisor had fulfilled the promise.[3] In this case, Skebba performed—he remained at M.W. Kasch—in reliance on Kasch's promise to pay $250,000 to him if one of three conditions occurred. Kasch enjoyed the fruits of Skebba's reliance—he kept on a top salesperson to help the company through tough financial times and he avoided the

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damage that he believed Skebba's leaving could have had on M.W. Kasch's reputation in the industry. Accordingly, to prevent injustice, the equitable remedy for Skebba to receive is Kasch's specific performance promised—payment of the $250,000.

¶ 13 The record in this case, considered in light of the *U.S. Oil* tests and the jury's findings, compels specific performance of the promise because otherwise Kasch will enjoy all of the benefits of induced reliance while Skebba will be deprived of that which he was promised, with no other available remedy to substitute fairly for the promised reward. * * * "[T]he extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence," is established by the jury finding that Kasch made the promise, by no evidence that the promise was made any time other than December 1993 or early in 1994, and it is undisputed that Skebba not only turned down other employment at that time but also remained with Kasch through financially difficult times for the company until the sale of the business in 1999. "[T]he reasonableness of the action or forbearance" and "the extent to which the action or forbearance was foreseeable by the promisor" is supported by the undisputed fact that Kasch knew Skebba had another job opportunity in 1993, that Kasch believed Skebba's leaving would damage the company in the industry, and that Kasch wanted Skebba to stay. Kasch's promise achieved Kasch's objectives: Skebba stayed even though the company was in severe financial difficulties. In short, every factor this court requires to be considered supports enforcement of the promise through promissory estoppel. The trial court submitted the promissory estoppel cause of action to the jury. The jury concluded that the promise had been made, that Skebba relied on the promise to his detriment, and that such reliance was foreseeable by Kasch. The jury also found that Skebba's damages were the amount Skebba testified Kasch promised to pay Skebba if he was still employed when the company was sold, that is, $250,000. The jury heard no evidence of any other damages.

¶ 14 Skebba's loss has nothing to do with what he might have earned on another job. Income from the rejected job was never a part of the calculus of the promise made and relied upon. Kasch never proposed to better the salary or bonus offered. Neither Kasch nor Skebba mention any discussion about a way for Kasch to retain Skebba other than the now disputed payment. Rather, Kasch's promise was to pay Skebba $250,000 if one of three conditions occurred. One triggering condition occurred—the business was sold while Skebba was still employed by Kasch. Hence, the damage calculation required by the trial court, which might be appropriate in other cases, has no reasonable application to the facts here. Rather, as noted by the *Hoffman* court, while "[e]nforcement of a promise does not necessarily mean Specific Performance," *Hoffman,* 26 Wis.2d at 701, 133 N.W.2d 267, specific

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performance is neither precluded nor disfavored as a remedy for promissory estoppel; preventing injustice is the objective.[4] In this case, specific performance *is* the *necessary* enforcement mechanism to prevent injustice for Skebba's reliance on the promise the jury found Kasch had made to him.

¶ 15 Accordingly, we conclude that the trial court erred in holding that specific performance was not available on this promissory estoppel claim. We further conclude that the trial court erred in its application of *Hoffman* to the facts of this case. We reverse and remand for further proceedings consistent with this opinion.

Order reversed and cause remanded.

PRESENT: Goodwyn, Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Russell, S.J.

T. MUSGROVE CONSTRUCTION COMPANY, INC.

v. Record No. 190180

EARL CRAIG YOUNG, D/B/A FOXFIRE TOWING

OPINION BY
JUSTICE STEPHEN R. McCULLOUGH
April 9, 2020

FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
Clyde H. Perdue, Jr., Judge

T. Musgrove Construction Company, Inc., ("Musgrove") appeals from a judgment awarding FoxFire Towing damages in the amount of $56,595.11. The vehicle towed and stored belonged to Musgrove, but it was not engaged in company business when the accident occurred. We conclude that the doctrine of *quantum meruit* is not applicable on these facts, and that established principles governing the unjust enrichment remedy foreclose recovery for some of the charges FoxFire sought to obtain. Accordingly, we affirm in part and reverse in part the judgment below and remand the case for a hearing to determine FoxFire's reduced damages.

BACKGROUND

In 2015, Musgrove was in operation but not profitable.[1] Tommy Musgrove is the majority shareholder. Tommy agreed to let his son Timmy and David Wayne Truman harvest some timber from a property Tommy owned so they could make some money. Tommy could not pay them for removing the trees, but they could sell the logs. With Tommy's permission, Truman and Timmy borrowed a company dump truck to haul the logs.

After Timmy and Truman cut the logs and placed them in the dump truck, they were involved in an accident. The accident occurred on August 24, 2015. The circumstances of the

[1] For the sake of clarity, we will refer to Tommy Musgrove as "Tommy," and Timmy Musgrove, Tommy's son, as "Timmy."

accident are not clear. The dump truck ended up resting on its side with the logs spilled out of the truck. Musgrove's only connection to the accident is that the company owns the truck.

Originally, Ken Morris, with Ken Morris Garage, arrived at the scene. He requested assistance from FoxFire Towing. FoxFire is the only company in Franklin County with the equipment to handle this kind of job. FoxFire responded. To straighten the dump truck, FoxFire employed a rotating style crane and other vehicles. FoxFire also employed an excavator and a skid steer loader to place the spilled logs back in the damaged dump truck. In addition, FoxFire removed a cherry tree, including the stump, that had been knocked over in the accident. Finally, FoxFire collected soil that had been contaminated by fluid leaking from the truck, placed the soil in hazardous material, or "hazmat," barrels, and later paid for the disposal of the barrels. FoxFire then towed the damaged dump truck away using a heavy duty wrecker and stored it in a wooded area behind Craig Young's house. Craig Young is the owner of FoxFire.

FoxFire sent Musgrove a bill for $12,380.11. The charges covered returning the truck to an upright position, towing away the dump truck, cleaning up the scene, and an administrative fee. Young explained that the administrative fee is to "[t]ake care of all the paperwork, clerical work, answer the phone calls, people come get their things, people come in after hours to clean their vehicles out, somebody has got to be there to close the gates, got to meet them there." FoxFire also charged $45 for each day it stored the damaged dump truck. When Musgrove did not pay, FoxFire sued. By the time the suit was filed, in June 2017, the storage fees had risen to $28,980. In response, Musgrove filed counterclaims for fraud and conversion.

At trial, FoxFire presented evidence of the work it performed to right and tow the dump truck, the equipment it used, as well as its remedial work in picking up the logs and cleaning up the accident scene. Young explained the charges, and stated that they were his standard charges.

He offered evidence of services he provided for other accidents which showed comparable charges. The evidence also established that, following the accident, the salvage value of the dump truck was $2,000.

The trial court denied Musgrove's motion to strike. The advisory jury returned a verdict in the amount of $56,595.11.[2] The jury noted on the jury verdict form that it was deducting $2,000 for the salvage value of the truck. The jury rejected Musgrove's counterclaims. Musgrove filed a motion to set the verdict aside, which the trial court denied. The trial court entered judgment in the amount of the advisory verdict and this appeal followed.

ANALYSIS

Musgrove contends that most of the charges FoxFire imposed are unjustified because they constitute a recovery that is not warranted under the doctrine of unjust enrichment. Musgrove contends that it was not unjustly enriched *as a vehicle owner*, except for the towing of the corporation's vehicle. FoxFire responds that the charges it imposed are reasonable and supported by the evidence. FoxFire relies on the test for *quantum meruit*, whereas Musgrove premises its argument on the doctrine of unjust enrichment. To resolve the dispute, we must disentangle the two theories, which can easily be conflated. *See, e.g.*, *Bowden v. Grindle*, 651 A.2d 347, 350 (Me. 1994) (recognizing "that there has been considerable confusion between the terms 'quantum meruit' and 'unjust enrichment'").

[2] The parties in this case agree that the jury verdict was advisory on the claim for FoxFire's towing, remediation and storage services but binding on Musgrove's (rejected) counterclaim. The question of whether a jury trial is available as a matter of right in such cases is not before us and, therefore, we express no opinion on the subject.

I. CHOOSING THE APPLICABLE FRAMEWORK: *QUANTUM MERUIT* VS. UNJUST ENRICHMENT.

Turning first to *quantum meruit*, a Latin phrase meaning "as much as he has deserved," Black's Law Dictionary 1361 (9th ed. 2009), we have addressed the remedy as follows: "[w]here service is performed by one, at the instance and request of another, and . . . nothing is said between the parties as to compensation for such service, the law implies a contract, that the party who performs the service shall be paid a reasonable compensation therefor." *Mongold v. Woods*, 278 Va. 196, 203 (2009) (quoting *Rea v. Trotter*, 67 Va. (26 Gratt.) 585, 592 (1875)).[3] The remedy available to the plaintiff in *quantum meruit* is an award of damages amounting to the reasonable value of the work performed, less the compensation actually received for that work. *Id.*

The cause of action for unjust enrichment, on the other hand, applies as follows: (1) "[plaintiff] conferred a benefit on [defendant]; (2) [defendant] knew of the benefit and should reasonably have expected to repay [plaintiff]; and (3) [defendant] accepted or retained the benefit without paying for its value." *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008) (citing *Nedrich v. Jones*, 245 Va. 465, 476 (1993)).

The measure of recovery for *quantum meruit* for a contract implied in fact is the reasonable value of the services provided. *Mongold*, 278 Va. at 203. The measure of recovery

[3] "A contract implied in fact is a contract, but not an express contract. . . . It is not an express contract because a term has not been discussed. Often it is the price term." Candace Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 Review of Litigation 127, 132-33 (2007). "A contract implied in law, or a quasi-contract, is not a contract, but an action in restitution in which the defendant received a gain at plaintiff's expense under circumstances that make it unjust for the defendant to keep the gain." *Id.*

for unjust enrichment is limited to the benefit realized and retained by the defendant. *Schmidt*, 276 Va. at 116. The measure of damages is thus not necessarily the same.

A plaintiff can seek recovery in *quantum meruit* when the work was done at the instance and request of another. *Mongold*, 278 Va. at 203. *See also Haynes Chemical Corp. v. Staples & Staples*, 133 Va. 82, 87 (1922) ("Where one renders services for another at the latter's request the law, in the absence of an express agreement, implies a promise to pay what those services are reasonably worth, unless it can be inferred from the circumstances that those services were to be rendered without compensation."). For example, *quantum meruit* is available when (1) the parties contract for work to be done, but the parties did not agree on a price, (2) the compensation mentioned is too indefinite, (3) there is a misunderstanding as to the price to be paid, or, (4) in some instances, the contract is void and of no effect. *Marine Dev. Corp. v. Rodak*, 225 Va. 137, 140-41 (1983). When the defendant has not requested the plaintiff's services, a plaintiff's claim is for unjust enrichment. *See* Candace Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 Review of Litigation 127, 132-33 (2007).

Here, Musgrove did not request FoxFire's services. Therefore, a cause of action for *quantum meruit*, i.e., for a contract implied in fact, does not apply. Instead, the well-established doctrines for unjust enrichment provide the rule of decision. FoxFire is entitled to recover from Musgrove to the extent Musgrove benefitted from its actions.

II. FOXFIRE IS ENTITLED TO RELIEF UNDER A THEORY OF UNJUST ENRICHMENT, BUT ONLY TO THE EXTENT THAT MUSGROVE WAS BENEFITTED.

A truck owned by Musgrove crashed and, because it had tipped over onto its side, had to be brought upright and then towed. The law forbids leaving a vehicle immobilized for more than 24 hours on or adjacent to a roadway, Code § 46.2-1209, or leaving vehicles on private property, Code § 46.2-1215.[4] *See also* Franklin County Ordinance § 11-96 (forbidding the abandonment of a vehicle on the public highways of the county or parking the vehicle on the highway more than four days). Musgrove was benefitted by the righting and towing of its truck. Consequently, FoxFire can recover its reasonable charges for work expended in bringing the truck upright and towing it away.

FoxFire's bill reflects a $500 towing charge. FoxFire is entitled to claim this charge for towing Musgrove's dump truck away. Also, although the bill lists certain charges as "for recovery/clean up," the evidence at trial established that some of the vehicles listed, such as the rotating crane, were used to return Musgrove's truck to an upright position so that it could be towed away. Young testified that the rotating crane wrecker was used to pick up the dump truck, which was lying on its side. Morris testified that his wrecker was employed to help get Musgrove's truck upright. The mileage charges may be justified. To the extent charges were generated by the need to return Musgrove's dump truck to an upright position so that it could be hauled away, the charges benefitted Musgrove and, therefore, FoxFire was entitled to recover such items under the standards of unjust enrichment. The record is unclear, however, concerning the extent to which some of the charges listed on the bill are proper under the standards governing unjust enrichment. Consequently, we remand the case for resolution of those charges.

With respect to the fees associated with storing Musgrove's truck, the Restatement (Third) of Restitution and Unjust Enrichment provides as follows:

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[4] Code § 46.2-1212.1(A)(1) allows the State Police or local law enforcement agency to remove "[a] vehicle, cargo, or other personal property that has been (i) damaged or spilled within the right-of-way or any portion of a roadway in the primary state highway system and (ii) is blocking the roadway or may otherwise be endangering public safety." Subsection (C) of this statute further provides that under certain circumstances not present here, the owner may have to reimburse the Department of Transportation, the State Police, and others for costs associated with the removal and subsequent disposition of property.

> (1) A person who takes effective action to protect another's property from threatened harm is entitled to restitution from the other as necessary to prevent unjust enrichment, if the circumstances justify the decision to intervene without request. Unrequested intervention is justified only when it is reasonable to assume the owner would wish the action performed;
>
> (2) Unjust enrichment under this section is measured by the loss avoided or by a reasonable charge for the services provided, whichever is less.

Restatement (Third) of Restitution and Unjust Enrichment § 21 (2011).

An illustration provides as follows:

> Owner's car is stolen, damaged, and abandoned by [a] thief. The car is later found by the police, who direct Garage to tow and store it. Despite appropriate efforts, 10 months pass before Owner is identified by the police. In the interim, Insurer pays Owner's claim for theft loss and takes an assignment of title. Discovering the whereabouts of the car, Insurer reclaims possession. Absent a statute defining Garage's rights in these circumstances, Garage has a claim in restitution against Insurer for its reasonable and customary charges for towing and 10 months' storage, not exceeding the car's value.

Id. cmt. b, illus. 1. An analogous situation exists here. FoxFire's claim for storing Musgrove's dump truck cannot exceed the loss avoided by the service provided, which here equals the truck's salvage value, in this instance, $2,000. Musgrove was not benefitted for any storage fees in excess of that amount. FoxFire's recovery for storage fees, therefore, must be capped at $2,000.

The answer is different, however, for the fees associated with the scene remediation and recovery of the logs. Under settled Virginia law, the owner of a vehicle generally "is not vicariously liable for the negligence of another person simply because the negligent party was operating the vehicle with the owner's permission." *Dreher v. Budget Rent-A-Car System, Inc.*, 272 Va. 390, 395 (2006). The evidence establishes that although Timmy and Truman were driving Musgrove's truck, they were not on company business. Musgrove as the vehicle's owner was not responsible for damage to trees in the area or for cleaning up the spilled logs. Under the test for unjust enrichment, there was no benefit to Musgrove as the vehicle owner from efforts undertaken by the plaintiff to clean up the accident scene and pick up the logs. Consequently, charges associated with those activities cannot be recovered against Musgrove in this lawsuit for the simple reason that the company was not unjustly enriched by the actions that gave rise to those charges. Specifically, FoxFire is not entitled to recover charges for its use of the skid steer loader and the excavator to pick up the logs or for cleaning up the fallen cherry tree. Additionally, under the test for unjust enrichment, FoxFire is not entitled to recover other charges from Musgrove associated with cleaning up the scene. Those charges did not benefit Musgrove. Therefore, FoxFire is not entitled to recover under unjust enrichment principles for the charges for buying or disposing of hazmat barrels, or the use of the hazmat equipment trailer.

Finally, FoxFire cannot claim an administrative fee. That fee was to "[t]ake care of all the paperwork, clerical work, answer the phone calls, people come get their things, people come in after hours to clean their vehicles out, somebody has got to be there to close the gates, got to meet them there." That fee benefits FoxFire, but Musgrove is not unjustly enriched in any way in connection with a charge to cover FoxFire's administrative overhead.

CONCLUSION

For these reasons, we will affirm in part and reverse in part the judgment of the trial court. We remand the case for an assessment of damages not inconsistent with this opinion.

Affirmed in part,
reversed in part,
and remanded.

Iacono v. Lyons

Opinion

MICHOL O'CONNOR, Justice.

Mary Iacono, the plaintiff below and appellant here, appeals from a take-nothing summary judgment rendered in favor of Carolyn Lyons, the defendant below and appellee here. We reverse and remand.

Background

The plaintiff and defendant had been friends for almost 35 years. In late 1996, the defendant invited the plaintiff to join her on a trip to Las Vegas, Nevada. There is no dispute that the defendant paid all the expenses for the trip, including providing money for gambling.

The plaintiff contended she was invited to Las Vegas by the defendant because the defendant thought the plaintiff was lucky. Sometime before the trip, the plaintiff had a dream about winning on a Las Vegas slot machine. The plaintiff's dream convinced her to go to Las Vegas, and she accepted the defendant's offer to split "50-50" any gambling winnings.

In February 1997, the plaintiff and defendant went to Las Vegas. They started playing the slot machines at Caesar's Palace. The plaintiff contends that, after losing $47, the defendant wanted to leave to see a show. The plaintiff begged the defendant to stay, and the defendant agreed on the condition that she (the defendant) put the coins into the machines because doing so took the plaintiff too long. The plaintiff agreed, and took the defendant to a dollar slot machine that looked like the machine in her dream. The machine did not pay on the first try. The plaintiff then said, "Just one more time," and the defendant looked at the plaintiff and said, "This one's for you, Puddin."

The plaintiff, who suffers from advanced rheumatoid arthritis, was in a wheelchair.

The slot machine paid $1,908,064. The defendant refused to share the winnings with the plaintiff, and denied they had an agreement to split any winnings. The defendant told Caesar's Palace she was the sole winner and to pay her all the winnings.

The plaintiff sued the defendant for breach of contract. The defendant moved for summary judgment on the grounds that any oral agreement was unenforceable under the statute of frauds or was voidable for lack of consideration. The trial court rendered summary judgment in favor of the defendant. The trial court did not hold there was no agreement between the parties. Instead, the trial court held that "Plaintiff's cause of action on breach of contract is unenforceable as a matter of law as it violates Texas Business Commerce Code Art. 26.01(a), (b)(6) and/or is lacking in consideration."

In one point of error, the plaintiff asserts the trial court erred in granting the defendant's motion for summary judgment.

*** * ***

Statute of Frauds

The defendant asserted the agreement, if any, was unenforceable under the statute of frauds because it could not be performed within one year. There is no dispute that the winnings were to be paid over a period of 20 years.

The statute of frauds is set forth in Section 26.01 of the Texas Business and Commerce Code and provides, in pertinent part:

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

> (1) in writing; and
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

> . . .
> (6) an agreement which is not to be performed within one year from the date of making the agreement; . . . .

Tex. Bus. Com. Code § 26.01.

Whether a contract falls within the statute of frauds is a question of law. ***[citations]***

Section 26.01(b)(6) does not apply if the contract, from its terms, could possibly be performed within a year — however improbable performance within one year may be. ***[citations]*** Section 26.01(b)(6) bars only oral contracts that cannot be completed within one year. ***Niday v. Niday*** , 643 S.W.2d 919, 920 (Tex. 1982) (if the agreement, either by its terms or by the nature of the required acts, cannot be performed within one year, it falls within the statute of frauds and must be in writing).

* * *

Assuming without deciding that the parties agreed to share their gambling winnings, such an agreement possibly could have been performed within one year. For example, if the plaintiff and defendant had won $200, they probably would have received all the money in one pay-out and could have split the winnings immediately. Therefore, the defendant was not entitled to summary judgment based on her affirmative defense of the statute of frauds.

We sustain the plaintiff's sole point of error.

We reverse the trial court's judgment and remand for further proceedings.

Associated Builders v. Coggins

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MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 1999 ME 12
Docket: Han-98-247
Submitted
on Briefs: November 6, 1998
Decided: January 20, 1999

Panel: WATHEN, C.J., and CLIFFORD, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

ASSOCIATED BUILDERS, INC.

v.

WILLIAM M. COGGINS et al.

DANA, J.

[¶1] Associated Builders, Inc. appeals from a grant of a summary judgment entered in the Superior Court (Hancock County, Marsano, J.) in favor of the defendants William M. Coggins and Benjamin W. Coggins, d/b/a Ben & Bill's Chocolate Emporium. Associated contends that the court erred when it held that despite a late payment by the Cogginses, an accord and satisfaction relieved the Cogginses of a contractual liability. The Cogginses argue that the three-day delay in payment was not a material breach of the accord and, even if the breach was material, Associated waived its right to enforce the forfeiture. We agree with the Cogginses and affirm the judgment.

[¶2] Associated provided labor and materials to the Cogginses to complete a structure on Main Street in Bar Harbor. After a dispute arose regarding compensation, Associated and the Cogginses executed an agreement stating that there existed an outstanding balance of $70,005.54 and setting forth the following terms of repayment:

> It is agreed that, two payments will be made by [the Cogginses] to [Associated] as follows: Twenty Five Thousand Dollars ($25,000.00) on or before June 1, 1996 and Twenty Five Thousand Dollars ($25,000.00) on or before June 1, 1997. No interest will be charged or paid providing payments are made as agreed. If the payments are not made as agreed then interest shall accrue at 10% [ ] per annum figured from the date of default. There will be no prepayment penalties applied. It is further agreed that Associated Builders will forfeit the balance of Twenty Thousand and Five Dollars and Fifty Four Cents ($20,005.54) providing the above payments are made as agreed.

The Cogginses made their first payment in accordance with the agreement. The second payment, however, was delivered three days late on June 4, 1997. Claiming a breach of the contract, Associated filed a complaint demanding the balance of $20,005.54, plus interest and cost. The Cogginses answered the complaint raising the affirmative defense of an accord and satisfaction and waiver. Both parties moved for a summary judgment. The court granted the Cogginses' motion and Associated appealed.

[¶3] The trial court must enter a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by [M.R. Civ. P.] 7(d) show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). "On appeal from a grant of summary judgment, we view the evidence in the light most favorable to the nonprevailing party, and review the trial court decision for errors of law." Greenvall v. Maine Mutual Fire Ins. Co., 1998 ME 204, ¶ 5, 715 A.2d 949, 951.

[¶4] "An accord 'is a contract under which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty.'" E.S. Herrick Co. v. Maine Wild Blueberry Co., 670 A.2d 944, 946 (Me. 1996) (quoting Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 1011 (Me. 1984)). Settlement of a disputed claim is sufficient consideration for an accord and satisfaction. Id. at 947. Here, the court correctly found the June 15, 1995 agreement to be an accord.

[¶5] Satisfaction is the execution or performance of the accord. See Restatement (Second) of Contracts § 281(1) (1981). If the obligor breaches the accord, the obligee may enforce either the original duty or any duty pursuant to the accord. See id. § 281(2) (1981); see also Arthur L. Corbin, 6 Corbin on Contracts § 1271, at 93-94 (1961). The obligor's breach of the accord, however, must be material. See Zenith Drilling Corp. v. Internorth, Inc., 869 F.2d 560, 563-64 (10th Cir. 1989) (applying Oklahoma law); A.E. Giroux, Inc. v. Contract Servs. Assocs., 299 N.W.2d 20, 20-21 (Mich. App. Ct. 1980). The question before the court, therefore, was whether the Cogginses' late payment constituted a material breach of the accord. The court found that it was not.

[¶6] We apply traditional contract principles to determine if a party has committed a material breach. See Down East Energy Corp. v. RMR, Inc., 1997 ME 148, ¶ 10, 697 A.2d 417, 421. A material breach "is a non-performance of a duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end." Id. (quoting Arthur L. Corbin, 4 Corbin on Contracts § 946, at 809 (1951)); see Restatement (Second) of Contracts § 241 (1981).{1} "Time of performance is merely one element in determining whether a defective or incomplete or belated performance is "substantial [performance]." Arthur L. Corbin, 3A Corbin on Contracts § 713, at 355 (1960). Applying these principles, courts have found that a slight delay of payment that causes no detriment or prejudice to the obligee is not a material breach. See, e.g., Jenkins v. U.S.A. Foods, Inc., 912 F. Supp. 969, 974 (E.D. Mich. 1996) (applying Michigan law) (contract payment made two days after expiration of grace period not a material breach where payee suffers little or no prejudice); Edward Waters College, Inc. v. Johnson, 707 So.2d 801, 802 (Fla. Dist. Ct. App. 1998) (one day delay in paying settlement agreement not a material breach where agreement did not state that time is of the essence and payee incurred no hardship because of delay); A.E. Giroux, Inc., 299 N.W.2d at 20-21 (accord satisfied by one-day delay of payment where no material damage to obligee and payment amounted to substantial performance).

[¶7] We discern no error in the Superior Court's finding that the Cogginses' payment to Associated after a three-day delay was not a material breach and, therefore, satisfied the June 15, 1995 accord. See A.E. Giroux, Inc., 299 N.W.2d at 20-21. By receiving the second and final payment of $25,000, Associated was not deprived of the benefit that it reasonably expected. See Restatement (Second) of Contracts § 241(a) (1981). Moreover, Associated has not alleged any prejudice from this three-day delay. See Jenkins, 912 F. Supp. at 974; Edward Waters College, 707 So.2d at 802; A.E. Giroux, Inc., 299 N.W.2d at 20-21. Further, the Cogginses' late payment was not made in bad faith. See Restatement (Second) of Contracts § 241 cmt. f (1981) ("The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing is . . . a significant circumstance in determining whether the failure is material."); cf. Zenith Drilling Corp., 869 F.2d at 563-64 (material breach of accord when party withheld payment to force other party to renegotiate agreement). Finally, neither the purpose of the June 15, 1995 accord nor the language of the accord suggests that time was of the essence. See Baybutt v. Constr. Corp. v. Commercial Union Ins. Co., 455 A.2d 914, 919 (Me. 1983) (court must "give effect to the intention of the parties as gathered from the language of the agreement viewed in the light of all the circumstances under which it was made."). Because the late payment was not a material breach of the June 15, 1995 accord, the Cogginses have complied with the June 15, 1995 agreement relieving them of further liability to Associated.

[¶8] Even if the breach was material and Associated could have enforced the forfeiture, Associated waived that right when it accepted the late payment. A waiver is a voluntary or intentional relinquishment of a known right. See Kirkham v. Hansen, 583 A.2d 1026, 1027 (Me. 1990) (citing Interstate Indus. Unif. Rental Serv., Inc. v. Couri Pontiac, Inc., 355 A.2d 913, 919 (Me. 1976)). If a party in knowing possession of a right does something inconsistent with the right or that party's intention to rely on it, the party is deemed to have waived that right. See id. A party waives a contractual right arising from a breach because of a late payment when that party accepts tender of the late payment. See Northeast Ins. Co. v. Concord Gen. Mutual Ins. Co., 461 A.2d 1056, 1058 (Me. 1983) (insurer waives right to consider policy terminated or canceled for lack of payment if it accepts late payment); Savings & Loan Ass'n. v. Tear, 435 A.2d 1083, 1085 (Me. 1981) (mortgagee waives right to foreclose if it accepts late payment). Here, because Associated accepted the final $25,000 payment, it waived its right to enforce the forfeiture.

[¶9] The trial court, therefore, did not err when it held that a satisfaction of the accord occurred when Associated accepted the final payment.

The entry is:

Judgment affirmed.

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FOOTNOTES******************************** {1} . The Restatement lists five factors as significant in determining if a failure to render performance is material: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform . . . will suffer forfeiture; (d)the likelihood that the party failing to perform . . . will cure his failure . . .; (e)the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Restatement (Second) of Contracts § 241 (1981).

The Duty of Loyalty

in

Employment

***

A Supplement to BU-316

Compiled by Roscoe B. Stephenson, III

Virginia Military Institute

To the class:

The last segment of my course is a custom lesson I put together. The purpose is to give you some tailor-made advice on how you should conduct yourselves in a difficult employment situation. This is the problem of changing jobs or going out on your own.

Even those of you who plan to commission will likely find yourselves in private employment after your military careers.

It would be beneficial to have four or five sessions devoted to this topic. My normal schedule devotes two sessions. This semester we have only two. There's just not enough time.

I am attaching a PDF of all the normal materials. These are the same materials linked to the class website at http://rbsiii.com/BU316

We may not cover all these materials, but let me summarize them for you. I have started out with the important pages from our textbook that expound on the duties an agent owes to the principal. Remember that the employment relationship is agency; the employer the principal, and the employee the agent. Next I follow with a short glossary of terms you might find helpful.

The substantive materials begin with an article written by John Ella in which he outlines the duty of loyalty in employment.

The *Reilly* case.

It's a landmark case the courts still follow. This case is easy to read. I want you to carefully analyze the case by considering every step of Reilly's behavior in the context of his duties as an agent of CCS. These are some questions you should be ready to discuss:

- Was Reilly's employment contract with CCS subject to a non-competition agreement?
- At what date was Reilly free to compete with CCS?
- What facts first indicate a breach of a duty of agency?
- How would you evaluate Reilly's conduct at his meeting with his boss on January 4, 1960?
    - Reilly gave a reason why he was quitting his job. Was he truthful? How do you rate his answer?
    - Did CCS have a right to know that Reilly planned to form his own company to compete with CCS?
    - How does Reilly's desire for his own privacy stand up to the employer's desire to know his intentions?
- In the fall of 1959 Reilly had decided to go out on his own. During that period he was contacted by these three parishes. Was he authorized to tell the priests that he planned to go out on his own?

- It is plain that the various priests specifically wanted Reilly's services and not the services of CCS. Monsignor Brown testified that "he had agreed with Reilly in January that Reilly would conduct the St. Ambrose campaign after the first of February or 'at such time as he would be free to do it,' or 'after he got rid of the contract with the CCS people.'" What difference does the client's preference make in the facts of this case?
- What is the general rule governing an employee's right to compete with the employer, as explained by the court?
- How would you compare Reilly to Argovitz (page 581)?
- After giving full thought to the Reilly case and these issues, what is your overall impression of Reilly's conduct, his attitude, his motivation, and his honesty? On reflection, how do you compare your own character traits to those of Reilly?

The business conspiracy statutes.

You should take note that §18.2-499 is a criminal statute. A violation of the statute is a Class 1 misdemeanor. That's the highest-level misdemeanor in Virginia and carries punishment of confinement in jail for not more than twelve months and a fine of not more than $2,500.00, either or both.

The next section, §18.2-500, provides a civil remedy to the victim of a business conspiracy. Note that the victim is entitled to treble damages, along with full recovery of attorney's fees and costs.

At this point you should be impressed that society strongly condemns behavior of this sort. So what conduct is it?

The *Feddeman* case.

This is a case that happened in Alexandria, Virginia. It involved a certified public accounting firm and efforts by key employees to buy the firm from its founder and primary owner, Kent Feddeman. In the end, eight defendants were held liable for over $10 million. It's important to understand the conduct giving rise to this outcome.

As you read this case, I want you to immerse yourselves into the situation and view it from the eyes of each participant. I want you to consider their motives, their objectives, their reactions to developments, and their overall behavior. I want you also to consider how you might have conducted yourselves in a similar situation. What could have prevented this disaster? What could have led to a successful buyout?

Here are some questions you should be ready to discuss:

- What legal constraint(s) inhibit the Buying Group's ability to negotiate with Feddeman?
- Is it permissible for the lawyer, Jeffrey Tenenbaum, to advise and represent the Buying Group?

- What advice did Tenenbaum give the Buying Group? How do you rate his advice? Was anything overlooked?
- Did the Buying Group follow Tenenbaum's advice?
- Was any employee of Feddeman & Company subject to a non-competition agreement in his/her employment contract?
- Each member of the Buying Group was free to resign his/her employment under the "at-will" employment doctrine. Is it ok if they resign simultaneously?
- What role does John Langan and Langan Associates, P.C. have in this case?
    - What forces affected Langan's decisions?
    - What could he have done to avoid liability?
- What is the significance of concerted action in this case?
- After giving full thought to the Feddeman case and these issues, what is your overall impression of the conduct of members of the Buying Group, considering attitude, motivation, and honesty?
- On reflection, how do you compare your own character traits to those of the Buying Group?
- Did Kent Feddeman make mistakes in the process of negotiation?
    - Could he have exercised better control to guide the buyout process?
- Does a failure of leadership become a factor here:
    - as to Feddeman?
    - as to Kotwicki?
    - as to Langon?
- Were the goals of Kent Feddeman realized?

The *Today Homes, Inc.* case.

Realistically, we may not have time to fully discuss this case, but it is an important case to consider. Timing of events is crucial to understanding the outcome. Do a timeline to help yourself understand.

The opinion is a bit disjointed. The facts are scattered throughout. Unfortunately, the attorneys made a number of errors. Many issues were waived, leaving the Supreme Court bound to decide on issues that were preserved while unable to decide important issues that were waived.

Some questions to discuss:

- Did those in charge of real estate procurement know that the Sinclair property was on the market?
- Does it, or should it make a difference that the Sinclair property was for sale on the open market and was being actively marketed by real estate brokers?
- How would the conspiracy claim play out, had it been preserved? (Note: it was waived. See footnote 5.) What about as to Majestic? (Waived – see last paragraph before "Conclusion.")

- Could Chesapeake demonstrate harm to its business, or was it otherwise fully occupied? Does this matter?
- Was there a scarcity of property to be developed?
- Why did the trial court find the Sinclair property first became important to Chesapeake as of Mar. 13? (See page 14.)
- Compare the shift of the burden of proof with the *Argovitz* case. Why would this be done?
- How would the claim that Williams "aided and assisted Woodhouse" in breaching his fiduciary duties play out? (Note: the claim was waived. See Page 17-18.)
- Identify and discuss conduct by Woodhouse that would be in breach of his fiduciary duties to Chesapeake.

FORMALITIES

As a general rule, a contract of agency requires no particular formality, and usually the contract either may be oral or may be inferred from the conduct of the principal. In some cases, however, the contract must be in writing. For example, the appointment of an agent for a period of more than a year comes within the one-year clause of the statute of frauds and thus must be in writing. In some states, the authority of an agent to sell land must be set down in a writing signed by the principal. Many states have "equal dignity" statutes providing that a principal must grant his agent in a written instrument the authority to enter into any contract required to be in writing. See Chapter 15 for a discussion of state and federal legislation giving electronic records and signatures the legal effect of traditional writings and signatures.

Under Statute Frauds

A power of attorney is an instrument that states an agent's authority. A power of attorney is a formal manifestation from principal to agent, who is known as "an attorney in fact," as well as to third parties, that evidences the agent's appointment and the nature or extent of the agent's authority. Under a power of attorney, a principal may, for example, appoint an agent not only to execute a contract for the sale of the principal's real estate but also to execute the deed conveying title to the real estate to the third party. A number of states have created an optional statutory short-form power of attorney based on the Uniform Statutory Form Power of Attorney Act. In 2006, a new Uniform Power of Attorney Act was promulgated to replace the Uniform Statutory Form Power of Attorney Act. To date, only four states have adopted the 2006 Act.

CAPACITY

The capacity of an individual to be a principal, and thus to act through an agent, depends on the capacity of the principal to do the act. For example, contracts entered into by a minor or an incompetent not under a guardianship are voidable. Consequently, the appointment of an agent by a minor or an incompetent not under a guardianship and any resulting contracts are voidable, regardless of the agent's contractual capacity. The capacity of a person that is not an individual, such as a government or business association, to be a principal is determined by the law governing that entity.

Almost all of the states have adopted the Uniform Durable Power of Attorney Act providing for a durable power of attorney under which an agent's power survives or is triggered by the principal's loss of mental competence. (In 2006, a new Uniform Power of Attorney Act was promulgated to replace Uniform Durable Power of Attorney Act. To date, only four states have adopted the 2006 Act.) A durable power of attorney is a written instrument that expresses the principal's intention that the agent's authority will not be affected by the principal's subsequent incapacity or that the agent's authority will become effective upon the principal's subsequent incapacity.

On the other hand, because the act of the agent is considered the act of the principal, the incapacity of an agent to bind himself by contract does not disqualify him from making a contract that is binding on the principal. Thus, any person able to act, including individuals, corporations, partnerships, and other associations, ordinarily has the capacity to be an agent. The agent's liability, however, depends on the agent's capacity to contract. Therefore, although the contract of agency may be voidable, an authorized contract between the principal and the third person who dealt with the agent is valid.

An "electronic agent" is a computer program or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual. Electronic agents are not persons and, therefore, are not considered agents. In 2000 Congress enacted the Electronic Signatures in Global and National Commerce (E-Sign). The Act makes electronic records and signatures valid and enforceable across the United States for many types of transactions in or affecting interstate or foreign commerce. The Act validates contracts or other records relating to a transaction in or affecting interstate or foreign commerce formed by electronic agents so long as the action of each electronic agent is legally attributable to the person to be bound. E-Sign specifically excludes certain transactions, including (1) wills, codicils, and testamentary trusts; (2) adoptions, divorces, and other matters of family law; and (3) the Uniform Commercial Code other than sales and leases of goods.

Duties of Agent to Principal

The duties of the agent to the principal are determined by the express and implied provisions of any contract between the agent and the principal. In addition to these contractual duties, the agent is subject to various other duties imposed by law, unless the parties agree otherwise. Normally, a principal bases the selection of an agent on the agent's ability, skill, and integrity. Moreover, the principal not only authorizes and empowers the agent to bind her on contracts with third persons but also often places the agent in possession of her money and other property. As a result, the agent is in a position to injure the principal, either through negligence or dishonesty. Accordingly, an agent, as a fiduciary (a person in a position of trust and confidence), owes her principal the duties of obedience, good conduct, diligence, and loyalty; the duty to inform; and the duty to provide an accounting. Moreover, an agent is liable for any loss she causes to the principal through her breach of these duties.

A gratuitous agent is subject to the same duty of loyalty that is imposed on a paid agent and is equally liable to the principal for the harm he causes by his careless performance. Although the lack of consideration usually places a gratuitous agent under no duty to perform for the principal, such an agent may be liable to the principal for failing to perform a promise on which the principal has relied if the agent should have realized that his promise would induce reliance.

> **Practical Advice**
>
> Recognize that even if you agree to serve as an agent without compensation, you owe a fiduciary duty to the principal and are liable to her for your negligence.

Duty of Obedience

The duty of obedience requires the agent to act in the principal's affairs only as actually authorized by the principal and to obey all lawful instructions and directions of the principal. If an agent exceeds her actual authority, she is subject to liability to the principal for loss caused the principal. An agent is also liable to the principal for unauthorized acts that are the result of the agent's unreasonable interpretations of the principal's directions. An agent is not, however, under a duty to follow orders to perform illegal or tortious acts, such as misrepresenting the quality of his principal's goods or those of a competitor. The agent may be subject to liability to her principal for breach of the duty of obedience (1) if she entered into an unauthorized contract for which her principal is now liable; (2) if she has improperly delegated her authority; or (3) if she has committed a tort for which the principal is now liable. Thus, an agent who sells on credit in violation of his principal's explicit instructions has breached the duty of obedience and is liable to the principal for any amounts the purchaser does not pay. Moreover, an agent who violates her duty of obedience materially breaches the agency contract and loses her right to compensation.

Duty of Good Conduct

An agent has a duty, within the scope of the agency relationship, to act reasonably and to avoid conduct that is likely to damage the principal's interests. This duty reflects the fact that the conduct of agents can have a significant effect on the principal's reputation. A breach of this duty makes the agent liable to the principal and subject to rightful discharge or termination.

Duty of Diligence

Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. Moreover, if the agent claims to possess special skill or knowledge, the agent has a duty to act with the care, competence, and diligence normally exercised by agents with such skill or knowledge. An agent who does not exercise the required care, competence, and diligence is liable to his principal for any resulting harm. For example, Peg appoints Alvin as her agent to sell goods in markets where the highest price can be obtained. Although he could have obtained a higher price in a nearby market by carefully obtaining information, Alvin sells goods in a glutted market and obtains a low price. Consequently, he is liable to Peg for breach of the duty of diligence.

compare to tort law

A gratuitous agent owes a standard of care that is reasonable to expect under the circumstances, which include the skill and experience that the agent possesses. Thus, providing a service gratuitously may subject an agent to duties of competence and diligence to the principal that do not differ from the duties owed by a compensated agent.

Duty to Inform

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know if (1) the agent knows, or has reason to know, that the principal would wish to have the facts or (2) the facts are material to the agent's duties to the principal. However, this duty does not apply to facts if providing them to the principal would violate a superior duty owed by the agent to another person. The rule of agency providing that notice to an agent is notice to her principal makes this duty essential. An agent who breaches this duty is subject to liability to the principal for loss caused the principal by the agent's breach and may also be subject to termination of the agency relationship. Moreover, if the agent's breach of this duty constitutes a breach of the contract between the agent and the principal, the agent is also liable for breach of contract.

Examples of information that an agent is under a duty to communicate may include the following: (1) a customer of the principal has become insolvent; (2) a debtor of the principal has become insolvent; (3) a partner of a firm with which the principal has previously dealt, and with which the principal or agent is about to deal, has withdrawn from the firm; or (4) property that the principal has authorized the agent to sell at a specified price can be sold at a higher price.

Duty to Account

Subject to any agreement with the principal, an agent has a duty to keep and render accounts to the principal of money or other property received or paid out on the principal's account. Moreover, the agent may not mingle the principal's property with any other person's property and may not deal with the principal's property so that it appears to be the agent's property.

Fiduciary Duty

A fiduciary duty, arising out of a relationship of trust and confidence, requires the utmost loyalty and good faith. An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. This duty is imposed by law upon the agent and is also owed by an employee to his employer. The principal may agree that conduct by an agent that would otherwise constitute a breach of the fiduciary duty shall not constitute a breach of that duty provided that in obtaining the principal's consent, the agent (1) acts in good faith, (2) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment, and (3) otherwise deals fairly with the principal.

An agent's fiduciary duty to a principal generally begins with the formation of the agency relationship and ends with its termination. However, as discussed below, an agent may be subject to duties after termination with respect to the agent's use of the principal's property and confidential information provided by the principal.

An agent who violates his fiduciary duty is liable to his principal for breach of contract, in tort for losses caused and possibly punitive damages, and in restitution for profits he made or property received in breach of the fiduciary duty. Moreover, he loses the right to compensation. The principal may avoid a transaction in which the agent breached his fiduciary duty, even though the principal suffered no loss. A breach of fiduciary duty may also constitute just cause for discharge of the agent.

The fiduciary duty arises most frequently in the following situations involving principals and their agents, although it is by no means limited to these situations.

Conflicts of Interest An agent has a duty not to deal with the principal as, or on behalf of, an adverse party in a transaction connected with the agency relationship. An agent must act solely in the interest of his principal, not in his own interest or in the interest of another. In addition, an agent may not represent his principal in any transaction in which the agent has a personal interest. Nor may the agent act on behalf of adverse parties to a transaction without both principals' approval to the dual agency. An agent may take a position that conflicts with the interest of his principal only if the principal, with full knowledge of all of the facts, consents. For example, A, an agent of P who desires to purchase land, agrees with C, who represents B, a seller of land, that A and C will endeavor to effect a transaction between their principals and will pool their commissions. A and C have committed a breach of fiduciary duty to P and B.

Self-Dealing An agent has a duty not to deal with the principal as an adverse party in a transaction connected with the agency relationship. The courts closely scrutinize transactions between an agent and her principal. The agent may not deal at arm's length with her principal. The agent thus owes her principal a duty of full disclosure regarding all relevant facts that affect the transaction. Moreover, the transaction must be fair. Thus, Penny employs Albert to purchase for her a site suitable for a shopping center. Albert owns such a site and sells it to Penny at the fair market value but does not disclose to Penny that he had owned the land. Penny may rescind the transaction. The agent's loyalty must be undivided, and he must devote his actions exclusively to the representation and promotion of his principal's interests.

Duty Not to Compete During the agency relationship an agent must not compete with his principal or act on behalf or otherwise assist any of the principal's competitors. After the agency terminates without breach by the agent, however, unless otherwise agreed, the agent may compete with his former principal. The courts will enforce by injunction a contractual agreement by the agent not to compete after termination if the restriction is reasonable as to time and place and necessary to protect the principal's legitimate interest. Contractual agreements not to compete are discussed in Chapter 13 where it is noted that such noncompetition contracts may be subject to different standards for Internet companies and their employees.

> **Practical Advice**
>
> If you are the principal, consider obtaining from your agents a reasonable covenant that they will not compete with you after the agency terminates.

Misappropriation An agent may not use property of the principal for the agent's own purposes or for the benefit of a third party. Unless the principal consents, an agent who has possession of the principal's property has a duty to use it only on the principal's behalf even if the agent's use of the property does not cause harm to the principal. An agent is liable to the principal for any profit the agent made while using the principal's property or for the value of the agent's use of the principal's property. An agent's duties regarding the principal's property continue after the agency terminates, and a former agent has a duty to return any of the principal's property she still possesses.

Confidential Information An agent may not use or disclose confidential information obtained in the course of the agency for her own benefit or the benefit of a third party. Confidential information is information that, if disclosed, would harm the principal's business or that has value because it is not generally known. Confidential information includes unique business methods, trade secrets, business plans, personnel, nonpublic financial results, and customer lists. An agent may, however, reveal confidential information that the principal is committing, or is about to commit, a crime. Many statutes provided protection to employees who "whistle-blow."

Unless otherwise agreed, even after the agency terminates, the agent may not use or disclose to third persons confidential information. The agent may, however, use the generally known skills, knowledge, and information she acquired during the agency relationship.

Duty to Account for Financial Benefits Unless otherwise agreed, an agent has a duty not to acquire any financial or other material benefits in connection with transactions conducted on behalf of the principal. Such benefits would include bribes, kickbacks, and gifts. Moreover, an agent may not make a secret profit from any transaction subject to the agency. All material benefits, including secret profits, belong to the principal, to whom the agent must account. In addition, the principal may recover any damages caused by the agent's breach. Thus, if an agent, authorized to sell certain property of her principal for $1,000 sells it for $1,500, she may not secretly pocket the additional $500.

Practical Advice

Do not agree to become an agent if you are not willing or able to fulfill all of the duties an agent owes unless your agency contract clearly relieves you of those duties you find unacceptable.

DETROIT LIONS, INC. v. ARGOVITZ

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, 1984
580 F.SUPP. 542, *AFFIRMED*, 767 F.2D 919

not fully inform

FACTS Jerry Argovitz was employed as an agent of Billy Sims, a professional football player. Early in 1983, Argovitz informed Sims that he was awaiting the approval of his application for a U.S. Football League franchise in Houston. Sims was unaware, however, of Argovitz's extensive ownership interest in the new Houston Gamblers organization. Meanwhile, during the spring of 1983, Argovitz continued contract negotiations on behalf of Sims with the Detroit Lions of the National Football League. By June 22, Argovitz and the Lions were very close to an agreement, although Argovitz represented to Sims that the negotiations were not proceeding well. Argovitz then sought an offer for Sims's services from the Gamblers. The Gamblers offered Sims a $3.5 million, five-year deal. Argovitz told Sims that he thought the Lions would match this figure; however, he did not seek a final offer from the Lions and then present the terms of both packages to Sims. Sims, convinced that the Lions were not negotiating in good faith, signed with the Gamblers on July 1, 1983. On December 16, 1983, Sims signed a second contract with the Lions. The Lions and Sims brought an action against Argovitz, seeking to invalidate Sims's contract with the Gamblers on the ground that Argovitz breached his fiduciary duty when negotiating the contract with the Gamblers.

misrepresentation

lack of diligence

brought suit to avoid

DECISION Judgment for the Lions and Sims rescinding the Gamblers' contract with Sims.

OPINION DeMascio, J. The relationship between a principal and agent is fiduciary in nature, and as such imposes a duty of loyalty, good faith, and fair and honest dealing on the agent. [Citation.]

A fiduciary relationship arises not only from a formal principal-agent relationship, but also from informal relationships of trust and confidence. [Citations.]

In light of the express agency agreement, and the relationship between Sims and Argovitz, Argovitz clearly owed Sims the fiduciary duties of an agent at all times relevant to this lawsuit.

A compilation of terms – most information from various dictionaries or Wikipedia.

A **fiduciary** is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

A **fiduciary duty** (from Latin fiduciarius, meaning "(holding) in trust"; from fides, meaning "faith", and fiducia, meaning "trust") is a legal or ethical relationship of confidence or trust between two or more parties. Typically, a fiduciary prudently takes care of money for another person. One party, for example a corporate trust company or the trust department of a bank, acts in a fiduciary capacity to the other one, who for example has funds entrusted to it for investment. In a fiduciary relationship, one person, in a position of vulnerability, justifiably vests confidence, good faith, reliance and trust in another whose aid, advice or protection is sought in some matter. In such a relation good conscience requires the fiduciary to act at all times for the sole benefit and interest of the one who trusts.

A fiduciary duty is the highest standard of care at either equity or law. A fiduciary (abbreviation fid) is expected to be extremely loyal to the person to whom he owes the duty (the "principal"): he must not put his personal interests before the duty, and must not profit from his position as a fiduciary, unless the principal consents.

Remedies

The law of **restitution** is the law of gains-based recovery. It is to be contrasted with the law of compensation, which is the law of loss-based recovery. Obligations to make restitution and obligations to pay compensation are each a type of legal response to events in the real world. When a court orders restitution it orders the defendant to give up his gains to the claimant. When a court orders compensation it orders the defendant to compensate the claimant for his or her loss.

This type of damages restores the benefit conferred to the non-breaching party (the plaintiff). Simply, the plaintiff will get the value of whatever was conferred to the defendant when there was a contract. There are two general limits to recovery, which is that a complete breach of contract is needed, and the damages will be capped at the contract price if the restitution damages exceed it.

The orthodox view suggests that there is only one principle on which the law of restitution is dependent, namely the principle of unjust enrichment. However, the view that restitution, like other legal responses, can be triggered by any one of a variety of causative events is increasingly prevalent. These are events in the real world which trigger a legal response. It is beyond doubt that unjust enrichment and wrongs can trigger an obligation to make restitution. Certain commentators propose that there is a third basis for restitution, namely the vindication of property rights with which the defendant has interfered. It is arguable that other types of causative event can also trigger an obligation to make restitution.

Disgorgement is the forced giving up of profits obtained by illegal or unethical acts. A court may order wrongdoers to pay back illegal profits, with interest, to prevent unjust enrichment. Disgorgement is a remedy and not a punishment.

Black's Law Dictionary defines disgorgement as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion".

An **account of profits** is another potential remedy. It is usually used where the breach of duty was ongoing or when the gain is hard to identify. The idea of an account of profits is that the fiduciary profited unconscionably by virtue of the fiduciary position, so any profit made should be transferred to the principal. It may sound like a constructive trust at first, but it is not.

An account for profits is the appropriate remedy when, for example, a senior employee has taken advantage of his fiduciary position by conducting his own company on the side and has run up quite a lot of profits over a period of time, profits which he wouldn't have been able to make without his fiduciary position in the original company. The calculation of profits in this sense can be extremely difficult, because profit due to fiduciary position must be separated from profit due to the fiduciary's own effort and ingenuity.

In conducting an account of profits, the plaintiff is treated as if he were conducting the business of the defendant, and made those profits which were attributable to the defendant's wrongful actions. This can be rather complex in practice, because the defendant's accounting records must be examined (sometimes by a forensic accountant) to determine what portion of his gross profits were derived to the wrongful act in question.

Articles

The Lurking Menance of Duty of Loyalty Claims

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I. The Law of Duty of Loyalty in Minnesota

Introduction

Duty of loyalty issues arise when an employee of a business, while employed, communicates with customers of that business about the possibility of the employee leaving and taking that customer's business with him or her. Often, by the time the employee sees an attorney it is too late to undo what has occurred and the employee may be barred indefinitely from seeking business from those customers. If a client does approach an attorney the possibility of starting his or her own business, therefore, it is critical that the practitioner raise this danger immediately in order to keep the employee's options open. If an employee has a close relationship with one or more customers and is not subject to a noncompete, he or she is usually able to depart employment and then successfully, and legally, solicit those customers for the new business. Unfortunately, many budding entrepreneurs are unaware of the lurking menace of the common law obligation of duty of loyalty and find themselves in a box, having burned their bridges at the old employer and being barred from soliciting their client base.

Two points are important to keep in mind about duty of loyalty: First, the obligation arises whether or not there is a written agreement, such as a noncompete, and regardless of what level or title the employee held at the company. Second, timing and sequence of events are crucial. If the departing employee calls a customer 15 minutes before quitting, he or she faces a big problem. If he or she quits and then calls a customer 15 minutes later, he or she is in the clear. This appears arbitrary, but it is the law.

B. Legal Standard

In Minnesota, the seminal case on duty of loyalty is *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. Ct. App. 1987). In that case, the Court of Appeals held that, "**an employee's duty of loyalty prohibits her from soliciting the employer's customers for herself, or from otherwise competing with her employer, while she is employed.**" *Id.* at 304. (Emphasis added) *See also, Sanitary Farm Dairies, Inc. v. Wolf,* 261 Minn. 166, 112 N.W.2d 42 (1961). In *Rehabilitation Specialists*, an employee of a firm providing physical therapy and other services to health care facilities left to start her own business. Before doing so she informed a major customer of her intention, and the customer told her that there would probably be some new contracting opportunities. Then-Hennepin County District Court Judge Jonathon Lebedoff dismissed the claim because the employee had not actually "solicited" the customer. The appellate court reversed, noting that "even if the characterization of her conduct as passive were accurate, it would not necessarily shield her from liability." *Id.* at 305 (citing *Community Counseling Service, Inc. v. Reilly*, 317 F.2d 239, 244 (4th Cir. 1963) for the proposition that "if prospective customers undertake the opening of negotiations which the employee could not initiate, he must decline to participate in them.") This holding must serve as a warning to employees thinking of leaving who should probably place their hands over their ears if a major customer starts dropping hints that the employee should leave and start his own business, but by then it may already be too late.

The second most important statement from the *Rehabilitation Specialists* case is the corollary statement that, "Employees who wish to change jobs or start their own businesses, however, should not be unduly hindered from doing so. An employee has the right, therefore, while still employed, to **prepare** to enter into competition with her employer." *Rehabilitation Specialists, Inc.,* 404 N.W.2d at 304. *See also Sanitary Farm Dairies,* 261 Minn. at 175-76, 112 N.W.2d at 48-49. This means that an employee may take certain steps prior to leaving employment other than contacting or soliciting customers. For example, an employee may presumably form a corporation, secure lending, or enter into a lease without running afoul of the law, especially if the employee does so on his or her own time and without the use of company resources or connections.

The most famous phrase used to describe these situations is taken from *Sanitary Farm Dairies* wherein the court stated that, "While it is true that an employee may take steps to insure continuity in his livelihood in anticipation of resigning his position, **he cannot feather his own nest** at the expense of his employer while he is still on the payroll." *Id.* at 49 (emphasis added).

C. Legal Background

An implied condition in every employment contract is the employee's duty of honesty and faithfulness to the employer. *Hlubeck v. Beeler*, 214 Minn. 484, 489, 9 N.W.2d 252, 254 (1943). Minnesota Courts recognize at least three claims upon which relief can be granted based on a violation of an employee's fiduciary duty to their employers: "(1) soliciting business of the employer prior to leaving the employment relationship, (2) disclosing or misappropriating information that the employer has treated as a secret, and (3) engaging in serious misconduct such as embezzlement or referring customers to a competitor." *Bellboy Import Corporation v. Baghart*, 2004 WL 2711052 (Minn. Ct. App. 2004).

The duty of loyalty, which is a subset of unfair competition, has been characterized as "a general category of torts recognized by Minnesota courts to protect commercial interests." *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254 (Minn.App.1996), *rev. denied* (Minn. Sept. 20, 1996)(citing *Rehabilitation Specialists*, 404 N.W.2d at 305). The duties of loyalty and unfair competition do not necessarily have specific elements. *Rehabilitation Specialists*, 404 N.W.2d at 305; *see also Prosser & Keeton on Torts* § 130, at 1015 (5th ed. 1984); Restatement, Third, Unfair Competition § 1 and comments (1995). However, employees still retain a "common law duty not to 'wrongfully use confidential information or trade secrets obtained from an employer." *Northwest Airlines v. American Airlines*, 853 F. Supp 1110, 1117-18 (D. Minn. 1994) (quoting *Jostens Inc. v. National Computer Sys. Inc.*, 318 N.W.2d 691, 702 (Minn. 1982)).

The employee's duty of loyalty precludes employees from soliciting a former or current employer's customers prior to resignation and from failing to give sufficient notice of intention to resign. *See Loxtercamp, Inc. v. Belgrade Cooperative Association*, 368 N.W.2d 299, 301 (Minn. Ct. App. 1985), *Rehabilitation Specialists, Inc.*, 404 N.W.2d at 305-06. However, "[t]here is no precise line between acts by an employee which constitute prohibited 'solicitation' and acts which constitute permissible 'preparation.'" *Rehabilitation Specialists, Inc.*, 404 N.W.2d at 305. "Because of the competing interests, the actionable wrong is a matter of degree." *Id* . "Whether an employee's actions constituted a breach of her duty of loyalty is a question of fact to be determined based on all the circumstances of the case." *Id. See also Sanitary Farm Dairies,* 261 Minn. at 175, 112 N.W.2d at 48. "What is required is a balancing of the employer's legitimate interest in having its business advanced by an employee, and the employee's legitimate interest in bettering him or herself in a new business and providing for his or her continuing livelihood." *Signergy Sign Group, Inc. v. Adam*, 2004 WL 2711312, at *1 (Minn. Ct. App. 2004). *See also Sanitary Farm Dairies, Inc. v. Wolf,* 112 N.W.2d 42, 47-48 (Minn. 1961). It is clear, however, that an employee breaches his fiduciary duty to an employer by disclosing confidential information and by competing with his employer. *See Eaton Corp. v. Giere,* 971 F.2d 136, 141 (8th Cir. 1992).

Eaton involved an employee of a large manufacturing corporation who left to attempt to sell a transaxle that he was developing to Toro, a Minnesota corporation that makes lawn mowers. The employee in *Eaton* was found to have violated both his common law duty of confidentiality and his duty of loyalty by approaching Toro, corresponding with Toro, and meeting with representatives of Toro while he was employed by Eaton.

II. Remedies

What are the possible legal remedies for breach of duty of loyalty? This issue creates a surprising amount of confusion.

A. Equitable or Injunctive Relief

At least one Minnesota court has granted injunctive relief for an alleged breach of duty of loyalty. *Workers Compensation Recovery, Inc. v. Marvin*, 2004 WL 1244404 (Minn. Ct. App. 2004). In *Marvin*, the employee (Marvin) left to start her own competing business in the area of worker's compensation loss prevention. Before leaving Marvin had a conversation with one of her employer's most important clients, BHS, during which discussion they talked only about the fact that she would be leaving and starting her own business. The old employer sought and received a temporary restraining order ("TRO") and subsequent temporary injunction enjoining Marvin from conducting business with BHS for six months. *Id.* The injunctive relief was upheld by the Court of Appeals. *Id.* The *Marvin* decision, although unpublished, is a useful template for businesses facing the threat of a departing employee and stands for the proposition that injunctive relief is appropriate and that six months is a reasonable time frame. It is worth noting that proper use of a TRO and Temporary Injunction may moot confusion over the proper measurement of actual damages as discussed below.

B. Restitution.

There are currently no model jury instructions in on damages for breach of duty of loyalty or breach of fiduciary duty. In one recent case, the Eighth Circuit Court of Appeals (interpreting Minnesota law) stated as follows:

An employee who breaches a noncomepetition or nondisclosure covenant can be required to account for his profits. Cherne Indus. v. Inc. v. Grounds & Assoc., Inc. 278 N.W.2d 81, 94-95 (Minn. 1979). The remedy for breach of duty of loyalty is also restitutionary. See Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71, 78 (remedy for breach of fiduciary duty is constructive trust).

Storage Technology Corporation v. Cisco Systems, 395 F.3d 921 (8th Cir. 2005). In *Storage Technology*, the Court upheld dismissal of a duty of loyalty claim where the plaintiff failed to substantiate any amount of damages or restitution. This case suggests that the measure of damages is the same or similar to a case involving breach of a noncompete, which at least in some cases is measured by the lost profits of the injured party[1], but at the same time the case suggests that the measurement is an accounting or disgorgement of the *offender's* profits ("can be required to account for *his* profits.") The key in *Storage Technology*, and the downfall of the plaintiff, was that the actual harm or damages must be proven and cannot be speculative.

In other words, in order to recover on a breach of loyalty claim, an employer must do more than identify acts of improper solicitation of customers. It must also show that the actions of the employee proximately caused an identifiable loss. *See Graphic Directions*, Inc. *v. Bush* 862 P.2d 1020, 1024 (Colo. App. 1993); *Marshfield Mach. Corp. v. Martin*, 246 Wis. 2d 668, 630 N.W.2d 275 (Wisc. Ct. App. 2001) ("to meet the burden of production with respect to causation, plaintiffs must produce some credible evidence that [employees'] alleged breach of fiduciary duty was more probably than not a substantial factor in causing their claimed damages"); *Loundes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (S.C. 1972) (an employer who has sustained its burden of proving breach of an employee's duty of loyalty not to solicit customers is "entitled to collect all damages proximately resulting from the wrongful conduct"). In *Graphic Directions*, the Colorado Court of Appeals reversed the Colorado trial court, and held that although evidence at trial "was sufficient to establish the existence and the breach of a fiduciary duty," the "evidence of damages was insufficient to permit the claim to go to the jury" as a matter of law. *Id.* at 1024.

In one case in which the author was involved prior to *Storage Technology*, the former employer attempted to argue that "disgorgement" of all income earned by the departing employee and his new business was the proper remedy since the claim arguably involved a species of breach of fiduciary duty. The case settled on the eve of trial without a decision by the trial court on this issue, but at the time little or no legal support existed for this theory. In *Talcott Communications Corp. v. Coles*, 1993 U.S. Dist. LEXIS 1983 (N.D. Ill. Feb. 25, 1983), an action based on an alleged breach of duty of loyalty by the employee, a federal district court held that equitable relief in the form of disgorgement is only available when proof of actual damages is shown to be so complicated as to be impossible. Specifically, it stated as follows:

[C]ourts have broad discretion to refuse to award such a remedy to a party who has an adequate remedy at law. [Disgorgement] is proper only when accounts between the parties are so complicated that a special master or jury cannot adequately assess damages. The Supreme Court has set forth the standards for granting an equitable accounting: "The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law . . . the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." [cite omitted] In this case, Talcott fails to show that the accounts are so complicated as to be beyond the comprehension of the fact finder. *Id.* at *5 (emphasis added).

C. Lost Profits.

One means of demonstrating actual proximate injury is to measure lost profits caused by the breach. In *ABC Trans Nat Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App.3d 817, 413 N.E.2d 1299, 1312 (1980), the Illinois appellate court affirmed the trial court's award to a plaintiff employer of lost profits proximately caused by the defendant's fiduciary breaches, as proven through expert testimony. *See also E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 623 N.E.2d 981 (1993) (affirming award of lost profits for breach of employee's fiduciary duty of loyalty and usurpation of corporate opportunity, proven through expert testimony). See also *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo. App. 1993); *Eaves v. Hillard*, 1988 Tenn. App. LEXIS 270 (May 18, 1988)(damages based on proven loss of business, that plaintiff could have handled the additional business without additional expenses, and proven gross profits that plaintiff would have received, but for employee's breach); *Medrehab of Wisconsin, Inc. v. Johnson*, 218 Wis.2d 163, 578 N.W.2d 208 (Wis. App. 1998) (damages awarded upon expert testimony as to lost profits resulting from employee disloyalty).

D. Forfeiture of Wages.

There exists a line of cases standing for the proposition that the proper remedy for breach of fiduciary duty by an employee is forfeiture of payments made to the employee during which time he or she was engaged in the breach of loyalty. One treatise specifically states that, in the event that an employee breaches his or her duty of loyalty, "[a]n employer may recover damages or withhold the payment of wages in the event of a breach of this duty." 17 Minn. Prac., *Employment Law & Practice, Employer Claims: Noncompete Clauses, Trade Secrets and The Duty of Loyalty,* § 13.31 (2d ed.).

If an employee is found to have breached his or her duty of loyalty, the employee is deemed to have never effectively earned the wages that he or she is claiming. *Peterson v. Mayer*, 46 Minn. 468, 49 N.W. 245 (1891). *See also Hlubeck*, 214 Minn. at 486, 9 N.W.2d at 253 (court will examine only conduct that occurred during that portion of employment contract for which employee is seeking wages). Because of the employee's breach of the duty of loyalty, he or she did not satisfy the terms and conditions of the employment contract. *See Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989). Therefore, an employee in breach of the duty of loyalty never effectively earned the wages that he was claiming. But an employer may still be required to show that it has suffered damage as a result of a breach of the duty of loyalty. *E.g. Storage Technology Corp. v. Cisco Systems, Inc.*, 395 F.3d 921 (8th Cir. 2005)

In Minnesota, employers are prohibited from making deductions from an employee's wages for theft, loss or indebtedness without the employee's prior written consent. Minn. Stat. § 181.79 (1993). Arguably, however, this statutory provision does not preclude forfeiture of wages under the implied common law duty of loyalty. The statute is inapplicable because the employee, having breached the duty of loyalty, failed to live up to his or her end of the bargain and did not effectively earn any wages. *See Stiff*, 436 N.W.2d at 780.

It should also be noted that an employer can withhold certain benefits and bonuses if the duty of loyalty is breached. In *Brozo v. Oracle Corp.*, management exercised its rights under an employment contract when it "decided that [the employee] deserved no incentive bonus in a year in which *he breached his duty of loyalty by soliciting employees and customers to join him in a competing venture.*" 324 F.3d 661, 665 (8th Cir. 2003). As the 8th Circuit stated, "[t]hat type of employee misconduct will be penalized almost anywhere." *Id.*

III. Unresolved Issues and Questions for Discussion

A. Is there a Duty of Loyalty owed by a Minority Shareholder in a Corporation after termination of employment?

The question often arises whether an employee who also holds shares in a closely-held corporation is free to compete once he leaves employment but before he has his share ownership redeemed. One means of resolving this is to have the employee/shareholder tender his shares or give them up (without payment) in order to be free and clear, but this means leaving behind the value of those shares. On recent decision reaches the surprising conclusion that a minority shareholder, at least one who does not have voting stock, was never a director and resigned as an officer does not owe a fiduciary duty to the corporation. *See Advanced Communication Design, Inc. v. Follett*, 601 N.W.2d 707 (Minn. Ct. App. 2000), *affirmed*, 615 N.W.2d 285 (Minn. 2000). But beware of relying on this narrow holding: non-voting stock is relatively rare, and shareholders are generally charged with some minimal duty to the corporation.

B. Does Duty of Loyalty Extend to Referral Sources?

No reported cases in Minnesota have addressed whether an employee who discusses plans to compete with a referral source who essentially controls the flow of customers to the employer (a situation faced by the author in one case) could be liable for a breach of duty of loyalty claim. Arguably courts might look at the practical impact of the discussion and the relationship of the parties, but *Rehabilitation Specialists* and its progeny seem to be limited to "customers" on their face. Similar questions arise with regard to vendor relationships, although the Court in *Signergy Sign Group, Inc. v. Adam*, 2004 WL 2711312 (Min. Ct. App. 2004) seemed to be unconcerned about contacts to "two suppliers of equipment and material" by the departing employees of a sign company.

C. Does a Duty of Loyalty Claim arise where an Employee leaves to join a Customer as an "in-house" employee, the effect of which is to divert business from the previous Employer? What if the Employee leaves to become an independent contractor? What if the Employee becomes a part owner in the Customer's business?

It is not uncommon for a major customer or client to ask a key employee of a vendor tojoin it in an "in-house" position. This can have the effect of limiting or eliminating the flow of work to the former employer and could be seen as a breach of duty of loyalty. Where the employee does not start his own business, however, and does not have a noncompete, it would not likely be viewed as such by the courts. The line gets much fuzzier if the customer provides equity in the form of stock. In that case the employee is benefiting from more than a job. The case is arguably more clear cut where the employee becomes an independent contractor of the customer and arranged for that relationship before leaving employment. Few courts have explored this boundary region of the law, however.

IV. Conclusion.

Employees even considering leaving their employment to compete against their employer should be very wary of the harsh consequences of the lurking menace of the Duty of Loyalty.

[1] At least some courts have held that in the case of a breach of a noncompete the measure of damages is plaintiff employer's loss, not defendant employee's gain. *Faust v. Parrott*, 270 N.W.2d 117, 120 (Minn. 1978) ("damages awarded for a breach of a [noncompetition agreement] are measured by the business loss suffered as a consequence of the breach"). *See also B&Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979).

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317 F.2d 239
COMMUNITY COUNSELLING SERVICE, INCORPORATED, Appellant,
v.
Robert Benedict REILLY, Appellee.
No. 8683.
United States Court of Appeals Fourth Circuit.
Argued October 5, 1962.
Decided May 1, 1963.
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Walter J. Bonner, Washington, D. C. (Michael F. X. Dolan, Washington, D. C., and Albert H. Buschmann, Jamaica, N. Y., of counsel, on brief), for appellant.

Raymond W. Bergan, Washington, D. C. (Edward Bennett Williams, Williams & Stein, and Harold Ungar, Washington, D. C., on brief), for appellee.

Before SOPER, HAYNSWORTH and J. SPENCER BELL, Circuit Judges.

HAYNSWORTH, Circuit Judge.

Community Counselling Service, Inc. sought an accounting from a former salesman-employee based upon allegations of disloyal promotion of his conflicting interests prior to the termination of his employment. The defendant, Reilly, filed a counterclaim seeking the recovery of salary and commission payments which the employer had withheld as an offset against its claim.

Tried by the Court without a jury, the Court declined to consider as substantive evidence admissions by Reilly in a pretrial deposition, and concluded that CCS had failed to sustain its burden of proof. We think that Reilly's admissions in his deposition should have been considered as substantive evidence, and, giving consideration to those admissions, that CCS was plainly entitled to judgment.

CCS is a professional fund raising organization, working principally for Catholic parishes and institutions. Reilly,

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without prior experience in this type of professional fund raising, was employed by CCS in March 1957. Assigned as an associate director, he assisted in the conduct of a campaign and later, as a director, conducted campaigns to which he was assigned by CCS. In 1959, Reilly indicated an interest in a transfer from the operations division to the sales division of CCS. The transfer was effected, and, on July 1, 1959, Reilly became regional sales representative of CCS for the area between the northern boundary of Maryland and Georgia. As such, he was expected to seek out likely prospects and to convince them of the desirability of use of the services of CCS. He worked under the direction of CCS's sales manager in New York, to whom he was required to submit daily reports. He was assisted by his employer's distribution in the area of promotional materials and advertisements which featured Reilly as its regional representative who should be contacted by interested persons.

Campaigns for which Reilly secured contracts were not conducted by him or anyone in the sales division, but by the employees in the operations division.

For his services as regional representative, Reilly received a salary of $140 per week, plus commissions on an ascending scale, based upon sales in his area cumulated over the period of each year.

For a period of three weeks in November 1959, Reilly was temporarily assigned to operational work in Florida. Upon his return to the District of Columbia area and his resumption of his duties as Regional Representative, he failed to submit the written daily reports of his activities which were required of him.1 The plaintiff's sales manager requested the resumption of daily reporting, but such reports were not forthcoming.

On January 4, 1960, Reilly presented himself at the New York office of CCS, and there informed the Vice President in charge of sales that he intended to resign.2 As the reason for his resignation, he stated that he wished to earn more money, that he wanted to do less travelling, and that his wife was ill. He stated that he thought he would go back to work for the federal government or into teaching, in which he had experience. The next day he wrote a formal letter of resignation, in which he stated that he was acting because of "urgent personal reasons."

The contract of employment required thirty days' notice of termination, but it was agreed on January 4, 1960 that Reilly's resignation would be effective as of January 29, a Friday.

Before the end of January 1960, a letter from the Archbishop of the Roman Catholic Archdiocese of Washington was received by CCS in its New York office. In this letter, the Archbishop stated that St. Ambrose Parish had already engaged the services of CCS for a campaign, and that two other campaigns were in the offing, and, if those eventuated, they would be in touch with Reilly as Regional Representative of CCS. Because the New York office had heard nothing from Reilly of the St. Ambrose Parish campaign, it asked Reilly to come to New York on January 25.

CCS's Vice President in charge of sales testified that at the conference in New York on January 25, he inquired of Reilly about St. Ambrose Parish. Reilly responded by saying that Monsignor Brown of St. Ambrose did not want the services of CCS but he wished those of Reilly.

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To the suggestion that until the end of the month he was obligated to undertake to sell the services of CCS rather than his own, he responded, according to the Vice President, "Do you expect me to walk out of here next Friday and not have a job?"3

According to the Vice President, during the January 25th conference in New York Reilly also stated that Father Cahill and Monsignor Kennedy, pastors, respectively, of Our Lady of Mercy Parish and the Parish of St. John the Evangelist, wished him to run campaigns for their parishes.4

There is no doubt but that Reilly actually conducted a campaign for Monsignor Brown's St. Ambrose Parish, commencing on February 8, 1960 and lasting into March. Reilly conducted a campaign for Our Lady of Mercy beginning in March 1960 and lasting until April. He conducted a campaign for St. John the Evangelist beginning in May 1960. For these three campaigns, respectively, he received fees of $6,720, $3,840, $6,720.

Though the campaign for St. Ambrose Parish actually began on February 8, 1960, Reilly, at the trial, testified he had not reached an agreement with Monsignor Brown, of St. Ambrose, until sometime after January 30. In his pretrial deposition, he had clearly and unequivocally testified that he had agreed to run the St. Ambrose campaign on some date between January 10 and January 29. Monsignor Brown, as a witness at the trial, testified that he had agreed with Reilly in January that Reilly would conduct the St. Ambrose campaign after the first of February or "at such time as he would be free to do it," or "after he got rid of the contract with the CCS people."

Reilly, as CCS's sales representative, had been in touch with Father Cahill, of Our Lady of Mercy, in October 1959. Father Cahill was undertaking the formation of a new parish and was interested in procuring the services of CCS. Because of conflicting campaigns, however, he did not obtain permission of the Archbishop to actually conduct the campaign until sometime after the end of January 1960. Meanwhile, he remained in touch with Reilly. Father Cahill testified that early in 1960 he learned from

Reilly of Reilly's intention to leave the employ of CCS. He testified that there may have been discussions between him and Reilly regarding Reilly's availability to conduct the campaign for Our Lady of Mercy.

According to the testimony for CCS, Reilly spoke on January 25th of the fact that Father Cahill wished him to conduct the imminent campaign for Our Lady of Mercy.

Reilly had also been in touch with Monsignor Kennedy and Father Gillen, of St. John the Evangelist. The priests had decided upon a campaign which, in October, 1959 was tentatively planned from February 1 to April 8, 1960. Reilly's report of October 6, 1959 indicated that CCS's success in conducting a campaign for Monsignor Russell, at Wheaton, Maryland, had sold the priests upon CCS and upon the effectiveness of its services.

Father Gillen, the Assistant Pastor of St. John's testified that in October of 1959 they had sought to have Reilly, himself, conduct the campaign, Reilly then explained he was exclusively engaged in sales work and could not conduct it himself, but that a good director would be furnished for that purpose. Father Gillen testified that he did not know Reilly had left the employ of CCS until sometime after January 1960, but the Pastor of the Parish, Monsignor Kennedy, did not testify, and there is the actual fact that Reilly did conduct the campaign when the Archbishop authorized

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St. John's to proceed and the testimony of CCS that on January 25, 1960 Reilly stated that Monsignor Kennedy wanted him, not CCS, to conduct the campaign. More importantly, in his deposition Reilly admitted that "it is possible" that prior to January 29, 1960, he entered into a firm agreement with Monsignor Kennedy to run the campaign for St. John's.

I

The District Judge was misled when he excluded Reilly's pretrial deposition and refused to consider, as substantive evidence, the very damaging admissions it contained.5

Unquestionably, the general rule is that the pretrial deposition of a witness on the stand is not admissible as substantive evidence. The pretrial statement is usable on cross-examination, for purposes of impeachment, to present earlier, contradictory statements, but it is not substantive evidence of the truth of the extra-judicial statements.

The pretrial deposition of a party, however, though the party is a witness at the trial, stands upon a different footing. Rule 26(d) (2) of the Federal Rules of Civil Procedure specifically provides that the "deposition of a party * * * may be used by an adverse party for any purpose." It has been consistently held that the Rule permits a party to introduce, as part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there.6 Thus applied, the Rule is a restatement of the long recognized rule of evidence that statements of a party which are inconsistent with his claim in litigation are substantively admissible against him.7

It follows that Reilly's deposition should have been received in evidence when it was offered, and the admissions it contained should have been considered as substantive evidence in the case when the Court performed the process of fact finding.

When the admissions come from the sworn testimony of the party, transcribed by an official reporter, there is little room to question their veracity. There has been no effort to do so here, for there is no suggestion here that Reilly did not testify as reported in the transcript of his deposition testimony. Nor did Reilly offer any acceptable explanation of his deposition admissions. In considering the evidence, therefore, the great weight of Reilly's deposition admissions should have been recognized.

II

skip

Considering Reilly's deposition with all of the other testimony, it is unmistakable that, before termination of his employment by CCS, Reilly not only formed the intention of engaging in fund raising activities on his own account, but he actively sought employment for himself and entered into firm agreements on his own account, with the result that there was no substantial hiatus between the termination of his employment by CCS and the commencement of the first of the three campaigns that he had lined up for himself.

There is no claim here that there was any inhibition upon Reilly's engagement

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in competitive activities after the termination of his employment with CCS. The usual rule is that a former employee, after termination of his employment, may compete with his former employer, the only restraint being that he may not use confidential information or trade secrets obtained from the former employer, appropriating, in effect, to his competitive advantage what rightfully belongs to his employer.8 There is no suggestion here that CCS had any trade secrets which ought not to be utilized by Reilly in competing with it, and, since there was no covenant not to compete, Reilly had a clear and unrestricted right to compete after January 29, 1960.

Though it is plain that Reilly after January 1960 could have solicited for himself the business of St. Ambrose, Our Lady of Mercy and St. John's, he had absolutely no right to do that before January 29, 1960, when he was employed by CCS to solicit the business of those and other parishes for CCS and not for himself. That was the sole purpose of Reilly's employment. His great and primary duty as an employee was to sell the services of CCS and to promote its interest, and, when, during his employment, he solicited the business of the three parishes for himself, he was untrue to his employment obligation and was disloyal to his employer.9

Employment as a sales representative demands of the employee the highest duty of loyalty. It is not without its difficulties when the employment continues after the employee has arrived at a fixed determination to leave his employment, for then his interests and those of his employer have lost their identity and may have become conflicting. Until the employment relationship is finally severed however, the employee must prefer the interests of his employer to his own. During such a period, he cannot solicit for himself future business which his employment requires him to solicit for his employer. If prospective customers undertake the opening of negotiations which the employee could not initiate, he must decline to participate in them. Above all, he should be candid with his employer and should withhold no information which would be useful to the employer in the protection and promotion of its interests.

Reilly's conduct was far short of the standards by which he should have governed himself.

It is quite irrelevant that the three parishes may not have been in position to actually commence their campaigns before the effective date of Reilly's resignation from his employment by CCS. The substantial fees which he collected for the conduct of the three campaigns were not the fruit solely of his efforts in aid of the campaigns after they commenced, but the fruit also of his disloyal conduct during his employment in soliciting the valuable contracts for himself when he owed an unequivocal duty to solicit those contracts for his employer. The fruit of that disloyal conduct Reilly may not retain.

It thus appears that CCS was clearly entitled to the accounting it sought of its former employee and it was improper on this record for the Court to have entered a judgment in Reilly's favor. The judgment

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below is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

The late Judge MORRIS A. SOPER expressed his approval of the result of the foregoing opinion, but died before the opinion was prepared.

Notes:

1. There were some telephone conversations with his superior about his work. His last written report was dated October 30, 1959. While engaged in the conduct of the campaign in Florida during November no reports were required of him. After termination of his employment, Reilly submitted a cumulative sales report containing references to his contacts with St. Ambrose Parish. Before that report was made, however, the defendant had firmly secured the St. Ambrose campaign for himself, as will later appear.

2. Reilly admitted that in November he had given serious consideration to leaving CCS's employ.

3. Reilly testified that it was "possible" he had made such a statement.

4. At this meeting, Reilly delivered to CCS a signed contract for a fund raising campaign for St. Edwards Parish in Baltimore. That he may not have sought that campaign for himself, however, does not dissipate the affirmative evidence, buttressed by his own admissions, that before termination of his employment, he did seek others for himself.

5. The deposition was not only excluded, but in concluding arguments, when counsel sought to refer to one of its most obvious admissions, the Court declared, "Not a part of the record in this case."

When, during a hearing of a motion for judgment notwithstanding the verdict, the question arose again as to whether the Court had considered Reilly's deposition admissions as substantive evidence, the District Judge stated:

"The Court of Appeals is going to have a wonderful opportunity to state specifically depositions are to be used in evidence in this circuit * * *."

6. See Pursche v. Atlas Scraper and Engineering Co., 9 Cir., 300 F.2d 467; Cleary v. Indiana Beach, Inc., 7 Cir., 275 F.2d 543; Merchants Motor Freight v. Downing, 8 Cir., 227 F.2d 247; Barker v. New, D.C.Mun.App., 107 A.2d 779. See also 4 Moore's Federal Practice (2d ed.) § 26.29, p. 1190.

7. See IV Wigmore on Evidence (3d ed.) § 1048 et seq.

8. See, e. g., Safeway Stores, Inc. v. Wilcox, 10 Cir., 220 F.2d 661; Activated Sludge, Inc. v. Sanitary District of Chicago, N.D.Ill., 33 F.Supp. 692, aff'd. sub nom. Guthard v. Sanitary District of Chicago, 7 Cir., 118 F.2d 899; Sarkes Tarzian, Inc. v. Audio Devices, Inc., S.D., Cal., 166 F.Supp. 250. See, generally, 35 Am.Jur., Master and Servant, § 99, p. 527; Restatement (Second), Agency, § 396, p. 223.

9. An agent cannot place himself in a position where his own interests are or may become antagonistic to those of his principal. Keiser v. Walsh, 73 App.D.C. 167, 118 F.2d 13; Commonwealth Finance Corporation v. McHarg, 2 Cir., 282 F. 560; Witmer v. Arkansas Dailies, 202 Ark. 470, 151 S.W.2d 971; Ritterpusch v. Lithographic Plate Service, Inc., 208 Md. 592, 119 A.2d 392; United Board & Carton Corporation v. Britting, 63 N.J. Super. 517, 164 A.2d 824; Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237.

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 12. Miscellaneous

§ 18.2-499. Combinations to injure others in their reputation, trade, business or profession; rights of employees.

A. Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

B. Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection A of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection A.

C. This section shall not affect the right of employees lawfully to organize and bargain concerning wages and conditions of employment, and take other steps to protect their rights as provided under state and federal laws.

Code 1950, § 18.1-74.1:1; 1964, c. 623; 1972, c. 469; 1975, cc. 14, 15; 1994, c. 534.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

5/2/2019

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 12. Miscellaneous

§ 18.2-500. Same; civil relief; damages and counsel fees; injunctions.

A. Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term, "damages" shall include loss of profits.

B. Whenever a person shall duly file a civil action in the circuit court of any county or city against any person alleging violations of the provisions of § 18.2-499 and praying that such party defendant be restrained and enjoined from continuing the acts complained of, such court shall have jurisdiction to hear and determine the issues involved, to issue injunctions pendente lite and permanent injunctions and to decree damages and costs of suit, including reasonable counsel fees to complainants' and defendants' counsel.

Code 1950, § 18.1-74.1:2; 1964, c. 623; 1975, cc. 14, 15; 2003, c. 578; 2005, c. 681.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

5/2/2019

530 S.E.2d 668 (Va. 2000)
FEDDEMAN & COMPANY, C.P.A., P.C.
v.
LANGAN ASSOCIATES, P.C., ET AL.
Record No. 991996
June 9, 2000

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

Alfred D. Swersky, Judge

Present: All the Justices

OPINION BY JUSTICE ELIZABETH B. LACY

Feddeman & Company appeals a judgment setting aside a $3,300,000 jury verdict in its favor against six of its former employees and one of its competitors. Feddeman & Company, the plaintiff below, is a certified public accounting firm that, in 1997, had 31 employees and over $3,000,000 in yearly revenues. W. Kent Feddeman was a 95% shareholder and the president of the company.

The defendants are Langan Associates, a rival accounting firm, John P. Langan, its president, three former directors and employees of Feddeman & Company, Joseph M. Kotwicki, Cheryl L. Jordan, and J. Andrew Smith, and three former employees of Feddeman & Company, Nathaniel T. Bartholomew, Robert A. Casey, and John G. Wooldridge.

The events giving rise to this litigation began in August 1996, when Kent Feddeman initiated discussions with John Langan regarding a possible buyout or merger of the two companies. In early 1997, Feddeman asked Kotwicki to take over the negotiations.

In the summer of 1997, the American Express Company made an offer to purchase both Langan Associates and Feddeman & Company. On August 31, 1997, Langan, Kotwicki, Bartholomew, Smith, Casey, Wooldridge, and Jeffrey S. Tenenbaum, Langan Associates' attorney, met in Tenenbaum's office. At this meeting, the attendees determined that they would refuse the American Express offer, and Kotwicki, Smith, Bartholomew, Casey, and Wooldridge would form a "Buying Group." The Buying Group planned to purchase Feddeman's 95% interest in Feddeman & Company and then merge the company with Langan Associates. The Buying Group also raised the possibility that they might have to resign from Feddeman & Company if the buyout negotiations were unsuccessful. The members of the Buying Group signed a retainer agreement with Tenenbaum authorizing him to represent them. At this meeting, or shortly thereafter, Kotwicki gave sample Feddeman & Company engagement letters and nonsolicitation agreements, along with other corporate and employment documents, to Tenenbaum in preparation for the merger. Feddeman was aware of and did not oppose this two-step merger process.

On September 29, 1997, the Buying Group offered Feddeman $2,000,000 for his interest in Feddeman & Company. In making the offer, Kotwicki reminded Feddeman that the corporate directors were not bound by noncompete agreements and that they were free to leave Feddeman & Company if they wished.

On November 4, 1997, Feddeman made a counteroffer to the Buying Group. Four days later, Kotwicki told Feddeman that the counteroffer nullified the Buying Group's prior offer, and that if the Buying Group were to make another offer, it would be lower than the first.

On November 10, 1997, a second meeting was held at the offices of Langan Associates, again with Langan, Tenenbaum, and the Buying Group. Tenenbaum had been asked to do legal research on any potential liability which could arise if the Buying Group resigned and were subsequently employed by Langan Associates. Based on his research, Tenenbaum advised the Buying Group that to avoid liability, if they ultimately chose to resign, they should not solicit Feddeman & Company clients or employees until after their resignation, not use company resources in the preparation of their resignations, not make negative or adverse statements about Feddeman & Company, and not remove any company property. The Buying Group agreed that they would resign on December 1, 1997 if they "hadn't made a deal" with Feddeman and that the resignations "would be a form of leverage that could be used" in the negotiations.

On November 12, 1997, at 7:00 a.m., Jordan, the members of the Buying Group except Casey, and four other Feddeman & Company senior employees met at Smith's house. At this meeting, the Buying Group reported on the status of the merger negotiations, and indicated that if the negotiations did not improve there was a possibility that the Buying Group would resign on December 1, 1997. The Buying Group indicated that they believed Langan Associates would hire them if they resigned. They also told the senior employees present that they "would take care of them."

On November 19, 1997, Kotwicki again discussed the resignation plan with Jordan. She indicated that she would be on vacation on December 1, so Kotwicki gave her a letter of resignation drafted for her by Tenenbaum, which she signed and gave to her own attorney.

On November 24, Feddeman's attorney presented Kotwicki with a $4,000,000 stock purchase proposal in which Feddeman would be paid over the course of eight years. Two days later, the Buying Group made a counteroffer of $4,000,000 to be paid over a ten year period, with no personal guarantees and a covenant not to compete from Feddeman.

Meanwhile, Feddeman learned of the proposed walkout and contacted Johnson & Lambert, a national accounting firm, to see if it could provide assistance if needed, and additionally to discuss possible merger options.

On December 1, 1997, Feddeman announced to some of his employees that Johnson & Lambert had expressed interest in making a presentation to Feddeman & Company employees on December 3. The Buying Group met with Feddeman immediately after this announcement. Feddeman told them Johnson & Lambert had an interest in acquiring the firm, and that there would be positions for everyone. The Buying Group met with Feddeman a second time in his office, this time without Kotwicki. They questioned the potential merger with Johnson & Lambert and its impact on the planned buyout and merger with Langan Associates. Feddeman told them he just wanted them to hear of another opportunity and he advised them to talk to his lawyer.

Following the meetings with Feddeman, members of the Buying Group met at lunch and decided to resign. They planned to talk to the senior managers after work to inform them of the resignation decision. After lunch, Kotwicki called Langan, informed him that the Buying Group was resigning, and asked if Langan Associates would hire the Buying Group and any others who might resign. Langan agreed.

Kotwicki had letters of resignation prepared for three senior employees, Mary D. Komatsoulis, James B. Kanuch, and Mike A. Benoudiz. That evening, after attending an event with Feddeman, Benoudiz and Kanuch met with Smith and were given the prepared letters of resignation. They were told of the Buying Group's decision to resign and to work for Langan Associates, and that "they could come too." Smith, Benoudiz, and Kanuch returned to the office, and while Smith gathered his personal effects, Benoudiz and Kanuch signed their letters of resignation and gave them to Smith. That evening Komatsoulis, at Bartholomew's request, met with him. After the meeting, Komatsoulis returned to the office and signed her letter of resignation. A fourth employee was told to contact Kotwicki because he had a letter of resignation for her to sign.

That evening, Kotwicki called Jordan, who contacted her attorney and instructed him to release her letter of resignation. Kotwicki also obtained a letter of resignation from his son, Michael Kotwicki, a Feddeman & Company employee.

The next morning, December 2, prior to going to work, Kotwicki went to Smith's house and collected the letters of resignation obtained from various employees. After leaving Smith's house, Kotwicki delivered 11 letters of resignation to Kent Feddeman. Feddeman accepted the resignations.

That evening, Langan Associates held a reception for the Feddeman employees who had not yet resigned. Eventually, 25 of the 31 Feddeman & Company employees resigned and began working for Langan Associates. By December 3, all the Feddeman & Company clients had been contacted by employees of Langan Associates, and 50% of those clients eventually transferred their business to Langan Associates.

On April 9, 1998, Feddeman & Company filed an Amended Motion for Judgment asserting inter alia the following causes of action: Count I - Breach of Fiduciary Duty by Director Defendants, Count II - Usurpation of Corporate Business Opportunity as to Director Defendants and Employee Defendants, Count III - Breach of Fiduciary Duty of Employee Defendants, Count IV - Intentional Interference with Contract and Business Expectancies By All Defendants, and Count VI - Violation of Va. Code 18.2-499 and -500, Conspiracy to Injure Another in Trade or Business, By All Defendants. Count V was dismissed by the trial court upon defendants' Plea in Bar.

The defendants filed a counterclaim which alleged intentional interference with contractual rights and prospective economic advantage, unfair competition, and libel and slander.

Following a seven-day trial, the jury returned a verdict in favor of Feddeman & Company and against the defendants on all remaining counts in the Amended Motion for Judgment, with one exception. Cheryl Jordan was found not to have usurped a corporate business opportunity. The jury awarded damages in the amount of $3,300,000. The jury found in favor of the plaintiff on defendants' counterclaim.

The defendants filed a Motion To Strike and To Set Aside the Verdict and, following further briefing and argument, the trial court granted that motion. Feddeman & Company filed this appeal, and the defendants assigned cross-error.

I.

On appellate review of the trial court's action setting aside the verdict, we consider whether there was sufficient credible evidence to establish the claims against the defendants, and we consider the evidence and reasonable inferences therefrom in the light most favorable to the plaintiff. Nichols v. Kaiser Foundation Health Plan, 257 Va. 491, 494, 514 S.E.2d 608, 609 (1999); Carter v. Lambert, 246 Va. 309, 313-14, 435 S.E.2d 403, 405-06 (1993).

In Counts I and III of the Motion for Judgment, the plaintiff claimed that defendants Kotwicki, Smith, Jordan, Casey, Bartholomew, and Wooldridge breached their fiduciary duties to the corporation. In setting aside the jury's verdicts in favor of the plaintiff on Counts I and III, the trial court concluded that these defendants did not breach their fiduciary duties because they were entitled to engage in "reasonable preparations to compete within certain limitations."

We agree that, prior to resignation, these defendants were entitled to make arrangements to resign, including plans to compete with their employer, and that such conduct would not ordinarily result in liability for breach of fiduciary duty. However, the right to make such arrangements is not absolute. This right, based on a policy of free competition, must be balanced with the importance of the integrity and fairness attaching to the relationship between employer and employee or corporation and corporate director. Science Accessories Corp. v. Summagraphics Corp., 425 A.2d 957, 962-63 (Del. 1980); Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978). Under certain circumstances, the exercise of the right may constitute a breach of fiduciary duty. Restatement (Second) of Agency 393 cmt. 1 (1957).

Liability for breach of fiduciary duty has been imposed when the employees or directors misappropriated trade secrets, misused confidential information, and solicited an employer's clients or other employees prior to termination of employment. See, e.g., Maryland Metals, and cases cited therein. Whether specific conduct taken prior to resignation breaches a fiduciary duty requires a case by case analysis.

In Duane Jones Co. v. Burke, 117 N.E.2d 237 (N.Y. 1954), certain officers, directors, and employees of an advertising agency "met and agreed to take over the business" of their employer "either by purchase of the controlling interest in the corporation or by resignation en masse and the formation of a new agency." Id. at 245. The employees presented a purchase offer for the controlling interest in the agency and told the majority stockholder, who was also president of the agency, that if the offer was not accepted, the employees would resign. The offer was rejected and shortly thereafter the members of the group submitted resignations on the same day in substantially identical form. A new advertising agency was formed and, within a month, the new agency had acquired 9 of the approximately 25 clients formerly serviced by the old company, Duane Jones Co., and had acquired more than 50% of that agency's personnel. The evidence also showed that the new agency acquired certain clients and employees through the action of the defendants while those defendants were completing their duties with their former employer, although the defendants had already stated their intention to resign. Id.

In approving the jury verdict in favor of the plaintiff, the Court of Appeals of New York concluded that each of the defendants was required to " 'exercise the utmost good faith and loyalty in the performance of his duties' " and that their conduct " 'fell below [that] standard.' " Id. at 245.

Similarly in ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc., 413 N.E.2d 1299 (Ill. App. 1980), the court found that the coordinated resignation of key management employees pursuant to their organized plan resulting in "the sudden, potentially crippling loss of half of [the employer's] business and major customers, as well as substantial numbers of its personnel" was an actionable breach of fiduciary duty. Id. at 1306.

The evidence in the instant case is substantially similar to that in the Duane Jones case. Here, the employee and director defendants met and formulated a plan to resign en masse if Kent Feddeman rejected their buyout offer, knowing that a resignation or walk out by all of them would "be devastating to" the corporation. The plan included anticipation of future employment with Langan Associates, a rival business, and such future employment included securing plaintiff's clients and employees as clients and employees of Langan Associates. The record shows that these defendants informed other employees of the plan to resign, supplied resignation letters for use by other employees, and told employees that they were "going to go join John Langan, and they could come too."

A total of 11 resignations were submitted on December 2 and, within four days, a total of 25 of the plaintiff's 31 employees resigned and joined Langan Associates. By December 5, all of the plaintiff's clients had been solicited to join Langan Associates and approximately half of those clients eventually moved their accounts to Langan Associates.

In considering this evidence, the jury was instructed that employees and directors of a corporation are required to "exercise the utmost good faith and loyalty" toward the corporation and may not act "in a manner adverse to the corporation's interest." The jury was also told that corporate directors, while employed by the corporation, could inform other employees of their intent to leave the corporation, but could not solicit such employees to join them in a rival business and could not use confidential or proprietary information.

The evidence shows that these defendants did more than prepare to leave their employment and advise others of their plan. As in Duane Jones, the totality of the defendants' actions provided credible evidence to support a jury determination that their conduct fell below the required standard of good faith and loyalty and constituted a breach of fiduciary duty. Therefore, the judgment of the trial court setting aside the jury verdict in favor of plaintiff on Counts I and III was error.

II.

Count VI of the Motion for Judgment charged that the employee and director defendants, along with Langan Associates and John P. Langan, individually, violated Code 18.2-499 and -500 because these defendants, intentionally and without legal justification, conspired to injure plaintiff's business and, as a result of that conspiracy, plaintiff suffered financial harm. The jury was instructed that to prevail on this count, the plaintiff had to prove by clear and convincing evidence that these defendants combined for the purpose of willfully and maliciously injuring plaintiff's business and that the business was injured as a result of these actions. The jury was further told that

[t]he term 'malice' means that the defendants acted intentionally, purposefully and without legal justification. Without legal justification may include a breach of their fiduciary duty or assisting someone to breach their fiduciary duty. Should corporate officers or directors act in concert to breach their fiduciary duties and cause injury to the corporation, they may be liable for conspiracy. The term 'malice' does not require the plaintiff to prove that a conspirator was motivated by hatred, personal spite, ill will or a desire to injure the plaintiff.

The jury returned a verdict finding that all corporate director and employee defendants as well as John Langan and Langan Associates violated 18.2-499 and -500. The trial court set aside the jury verdict, finding that there was no evidence that these defendants "combined with an intent to injure" plaintiff and that there was no evidence of "unlawful acts in furtherance of the combination."

The plaintiff contends that the jury's finding of conspiracy was supported by evidence that John Langan and the members of the Buying Group met on August 31, November 10, and November 12 and formulated a plan to impose "leverage" on Feddeman to accept the buyout offer. The plan was that the members of the Buying Group would resign en masse if Feddeman refused the buyout offer and, with Langan's agreement, go to work for Langan Associates. Jordan, although not a member of the Buying Group, was told of and agreed to participate in the resignation plan. The plan also included securing the resignations of other senior employees, whom John Langan also agreed to hire.

The plaintiff maintains that Langan Associates' participation in the conspiracy is shown by evidence that its legal counsel represented the Buying Group, advised the Buying Group regarding the resignation and solicitation of other employees and clients of the plaintiff, drafted Jordan's resignation letter, and was paid for these services by Langan Associates.

Establishing a conspiracy in violation of 18.2-499 and -500 does not require proof that the conspirators' "primary and overriding purpose is to injure another." Advanced Marine

Enterprises v. PRC Inc., 256 Va. 106, 117, 501 S.E.2d 148, 154 (1998). As indicated in the instruction given to the jury in this case, the plaintiff was only required to show that the defendants acted "intentionally, purposefully, and without lawful justification." Id., 501 S.E.2d at 154-55.

The trial court concluded that the defendants' actions were undertaken for no other purpose than "to effectuate the planned merger." However, considering the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff, as we must, we find that this conclusion was error.

The evidence is clear that the plan to submit resignations was initiated as a means of exerting leverage against Feddeman to accept the Buying Group's offer and thus facilitate a merger of plaintiff with Langan Associates. This plan was based on the principle that the departure of the defendants and the other employees would so adversely impact the plaintiff that Feddeman would not accept those resignations and let the employees depart. Injury to the plaintiff was a known and intended result of the plan. The employee and director defendants cannot avoid responsibility for their actions because their resignation plan was not their first or preferred choice of action. The evidence in this case is clearly sufficient to support a jury determination, not only that the defendants acted intentionally and purposefully, but that they knew and intended that their resignation plan, if implemented, would injure the plaintiff.

This knowledge was not limited to the employee and director defendants. John Langan and Langan Associates were aware that the resignation plan was considered "leverage" and that, if implemented, would adversely affect the plaintiff. Langan and Langan Associates facilitated development of the plan by providing legal services and agreeing to hire plaintiff's former employees.

The evidence also supports a jury determination that the defendants' actions were without legal justification. The jury was instructed that the failure of legal justification "may include a breach of their fiduciary duty or assisting someone to breach their fiduciary duty." As discussed above, the evidence was sufficient to support a jury finding that the planned resignation en masse from Feddeman & Company was a breach of the director and employee defendants' fiduciary duties. The evidence was also sufficient to show that the conduct of John Langan and Langan Associates assisted the director and employee defendants in the breach of their fiduciary duties. Applying the jury instruction to this evidence, we find there was sufficient credible evidence for the jury to conclude that the defendants' actions were without legal justification.

Accordingly, the trial court erred in setting aside the jury verdict in favor of the plaintiff on Count VI.

III.

The plaintiff sought compensatory damages for a single injury resulting from the various causes of action and the jury awarded a single damage amount of $3,300,000. In light of our holding that the trial court erred in setting aside the jury verdict in favor of the plaintiff on the breach of fiduciary duty counts, and the statutory conspiracy count, it is unnecessary to consider the plaintiff's assignments of error regarding the trial court's action in setting aside the jury's verdicts on the intentional interference with contract and business expectancy and usurpation of corporate opportunity.1 However, the defendants argue that, even if the trial court erred in setting aside the jury verdict, final judgment should not be entered in favor of the plaintiff, because the trial court erred in instructing the jury.

In an assignment of cross-error, the defendants assert that the trial court erred when it refused two jury instructions offered by the defendants concerning breach of fiduciary duty. The trial court stated that it would not give these two instructions because the matters they addressed were covered in other instructions. Additionally, the trial court observed that other instructions adequately set out the elements of the cause of action and that one of the instructions "sounds like [defendants'] closing argument."

We agree that the proposed instructions were cumulative of other instructions given on this issue. While a party is entitled to jury instructions supporting his theory of the case, if supported by adequate evidence, a trial judge is not required to give proffered jury instructions which are cumulative or repeat matters contained in other instructions. Medlar v. Mohan, 242 Va. 162, 168-69, 409 S.E.2d 123, 127 (1991); Adams v. Plaza Theatre, Inc., 186 Va. 403, 409-10, 43 S.E.2d 47, 51 (1947). Therefore, the trial court's refusal to give the defendants' proffered instructions was not error.

IV.

In summary, for the reasons stated, we will reverse the judgment of the trial court and reinstate the verdict of the jury in favor of the plaintiff on Counts I, III, and VI. Because the trial court did not consider entry of an award in accordance with the provisions of 18.2-500, we will remand the case for entry of a judgment consistent with this opinion.2

Reversed and remanded.

Notes:

1. We also note that usurpation of corporate business opportunity is generally considered a breach of fiduciary duty rather than conduct constituting a distinct cause of action. Trayer v. Bristol Parking, Inc., 198 Va. 595, 603-04, 95 S.E.2d 224, 230 (1956); Meiselman v. Meiselman, 309 N.C. 279, 306-08, 307 S.E.2d 551, 567 (N.C. 1983).

2. Section 18.2-500 provides that a person injured in his business through violation of 18.2-499 may recover "three-fold the damages by him sustained" along with costs and attorneys' fees.

PRESENT: Hassell, C.J., Lacy, Koontz, Kinser, Lemons, and Agee, JJ., and Russell, S.J.

TODAY HOMES, INC., t/a CHESAPEAKE HOMES

v. Record No. 052537

OPINION BY JUSTICE G. STEVEN AGEE
September 15, 2006

EMMA WILLIAMS, ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
H. Thomas Padrick, Jr., Judge

Today Homes, Inc., t/a Chesapeake Homes ("Chesapeake"), appeals the judgment of the Circuit Court of the City of Virginia Beach dismissing its amended bill of complaint against Emma Williams, George R. Woodhouse, and Majestic Homes, Inc. For the reasons set forth below, we will affirm the judgment of the trial court in part, reverse the judgment in part, and remand for further proceedings.

I. FACTS AND MATERIAL PROCEEDINGS BELOW

Chesapeake is a property developer and builder of single-family homes. Like other companies in the home building industry, Chesapeake "needed land . . . to build houses on." Williams served as Chesapeake's vice president of operations from June 2001 until March 13, 2003, and Woodhouse was Chesapeake's vice president of production during the same period. Williams and Woodhouse had a close working relationship and referred to themselves as "a team."

In the course of her employment, Williams was "responsible for all purchasing activities and customer service," but not the acquisition of land. Woodhouse supervised the actual construction work of the homes Chesapeake built. Neither person's job description involved finding or purchasing lots for building.[1]

At the beginning of 2003, Frank Grossman, a realtor with Long & Foster Realtors, told Woodhouse about certain property he had listed for sale in Hampton ("the Sinclair Property"). Woodhouse mentioned the Sinclair Property to Williams and showed her a site plan. At that time, the development plan for the Sinclair Property included a "55 and older active adult communit[y]." Woodhouse testified that he did not believe Chesapeake would be interested in the property because Chesapeake "didn't do any 55 and older active adult communities." Williams also believed Chesapeake would not be interested in purchasing the property. Williams and Woodhouse had no further discussions about the property until after Chesapeake terminated Williams' employment on March 13, 2003.[2]

Williams testified without contradiction that prior to her termination, she had no intention of leaving Chesapeake and

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[1] Woodhouse had, however, in the past, identified possible building sites and brought them to Chesapeake's attention. He testified that John Barnes, Chesapeake's president told him that seeking out properties to buy "was not [his] job, that [he] had enough on [his] plate with production and construction." The trial court found this testimony "not believable . . . [but not] important in the scheme of things."

starting her own housing development company, and she had not identified any building sites for purchase. A few days after the termination of her employment by Chesapeake, Scott M. Gandy, a vendor in the building supplies industry, offered Williams financial backing if she started her own housing development company.

Woodhouse prepared a letter resigning from his employment with Chesapeake the day Williams was terminated, but did not submit the letter until April 24, 2003, when he gave his two week's notice. During the month of April, Woodhouse was in salary negotiations with Art Sandler, Chesapeake's owner. On May 9, at the conclusion of the two weeks, John M. Barnes, president of Chesapeake, asked Woodhouse to continue his employment with Chesapeake through at least May 20 because Woodhouse held the company's only North Carolina contractor's license, and Chesapeake's subcontractors were dependent on the license. Barnes and Woodhouse agreed that Chesapeake would pay Woodhouse "for four weeks until someone got their license." That day, Barnes and Woodhouse signed a memorandum, which was sent to Chesapeake's vendors stating that Woodhouse was working on Chesapeake's "North Carolina expansion into the Raleigh and Charlotte markets." Woodhouse did no further work for

[2] The termination of Williams' employment by Chesapeake is not at issue in this appeal.

Chesapeake after May 9, but continued to receive his salary from Chesapeake until the first of June, by which time Barnes had obtained a North Carolina contractor's license.

After Williams' termination, but while Woodhouse remained employed by Chesapeake, the two discussed going into business together and caused Majestic to be incorporated on March 27, 2003. Williams and Woodhouse were listed as president and secretary, respectively, of Majestic. Woodhouse began working for Majestic on May 15, 2003, and drew his first paycheck on June 1, 2003.

After forming Majestic, Williams searched for properties to purchase by contacting real estate companies, including Long & Foster. Near the end of March 2003, Woodhouse put Grossman in contact with Williams, and discussed the Sinclair Property with her. When Grossman showed Williams the Sinclair Property, she recognized it as "the same property that [she] had heard about from [Woodhouse]" earlier in the year when she was working for Chesapeake. Grossman also suggested to Dave Jester, president of Marlyn Development Corporation, which owned the Sinclair Property, that Jester contact Williams as a potential builder and that Williams had a potential partner in Woodhouse. Jester testified that he was willing to deal with Majestic even though it was a new company because of his personal relationship with Scott Gandy.[3]

On April 15, 2003, Majestic entered into a contract with Marlyn to purchase 27 lots on the Sinclair Property.[4] Williams, but not Woodhouse, was a signatory to the agreement on behalf of Majestic. In 2004, Majestic had gross profit from the sale of homes on the Sinclair Property of $4,469,585.00. There is no dispute that neither Williams nor Woodhouse ever disclosed the Sinclair Property to Chesapeake or received Chesapeake's consent to acquire it.

Chesapeake filed a three count amended bill of complaint alleging Williams and Woodhouse, as corporate officers of Chesapeake, breached their common law and contractual fiduciary duty to Chesapeake when they failed to disclose the existence of the Sinclair Property to Chesapeake and later purchased it themselves through Majestic. Chesapeake also alleged that after

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[3] Jester also testified that Chesapeake was "not in the galaxy of consideration" for the contract on the Sinclair Property. He believed that Chesapeake was "not the [right] sized company" and the Sinclair Property development was not in "the nature of their type of work." In evaluating this evidence the trial court found that

> whether Mr. Jester would have done business with Chesapeake Homes or not, is really irrelevant, it comes down to the opportunity and whether or not it was a real opportunity, one that presented itself. So it's a real narrow issue . . . .

[4] This contract was subsequently voided and a new contract executed whereby Marlyn agreed to make Majestic the sole builder

Williams' termination, she "aided and assisted Woodhouse in breaching the fiduciary duties he owed to Chesapeake while still employed by it." In a separate count, Chesapeake further alleged that Williams and Woodhouse conspired to breach their fiduciary duties to Chesapeake. Among other remedies, Chesapeake sought the imposition of a constructive trust on the Sinclair Property owned by Majestic and $5 million in damages to be trebled in accordance with Code § 18.2-499, et seq.

After a one-day bench trial, the trial court dismissed Chesapeake's amended bill of complaint and entered a final decree on September 27, 2005, stating that Chesapeake "failed to meet its burden of proof as to all counts contained in the Amended Bill of Complaint." The trial court found the Sinclair Property was "important to [Chesapeake]," and "that [Chesapeake was] seeking other business opportunities." However, the trial court determined that Chesapeake had not proven that Williams and Woodhouse breached their fiduciary duty to Chesapeake. Specifically, the trial court ruled Chesapeake had presented "no evidence that [Williams] had any . . . relevant enough information to go forward with any actions that would in any way harm [Chesapeake]," nor had Chesapeake proven that Woodhouse did

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for all 77 lots in the development project. Woodhouse was a signatory on the second contract.

anything "that could be construed as a breach of fiduciary duty." We granted Chesapeake this appeal.

Chesapeake makes ten assignments of error which can be condensed to the following four issues: (1) the trial court erred in finding that Williams and Woodhouse (collectively "the Defendants") did not breach a fiduciary duty to Chesapeake when they failed to disclose the existence of the Sinclair Property to Chesapeake while one or both was still employed by Chesapeake, and later purchased the property through Majestic; (2) the trial court erred in not finding that Williams, after her termination, "aided and assisted" Woodhouse so she "could usurp the opportunity with Woodhouse while Woodhouse was still employed by Chesapeake;"[5] (3) the trial court misallocated the burden of proof by placing upon Chesapeake the burden of showing the breach of fiduciary duty rather than requiring the Defendants to show that they did not breach their fiduciary obligations; and (4) the trial court erred in overruling Chesapeake's objection to questions posed to the Defendants about their opinions as to whether the Sinclair Property was something that should have been disclosed to Chesapeake or in which Chesapeake would have been interested.

II. ANALYSIS

Chesapeake argues that it met its burden to prove that the Sinclair Property was a corporate opportunity for Chesapeake and that the Defendants, as corporate officers, were fiduciaries of Chesapeake and took the corporate opportunity for their own benefit without disclosure to Chesapeake or its consent. Chesapeake contends the burden of proof then shifted to the Defendants to prove they did not breach their fiduciary duty to Chesapeake. In that regard, Chesapeake avers the trial court erred in placing the burden of proof for breach of fiduciary duty upon it, instead of the Defendants. When the burden of proof is properly allocated, Chesapeake says the record clearly reflects the Defendants did not meet their burden and the resulting breach of fiduciary duty makes them liable to Chesapeake.

The Defendants argue that Chesapeake's threshold burden was not met because the trial court did not find the Sinclair Property to be a corporate opportunity for Chesapeake. Even if the trial court did reach that conclusion, the Defendants then contend a proper legal analysis based upon Solimine v. Hollander, 16 A.2d 203, 214-15 (N.J. Ch. 1940) and Guth v. Loft, Inc., 5 A.2d 503, 510-11 (Del. 1939), shows the Sinclair Property was not a corporate opportunity of Chesapeake under the

[5] Chesapeake did not assign error to the dismissal of the count alleging conspiracy so that issue is not before us on

facts of this case. In any event, the Defendants argue they learned of the Sinclair Property in their individual capacities, and not in their role as officers of Chesapeake. Thus, they argue there was no duty of disclosure on their part and no corresponding breach of fiduciary duty.

A. CHESAPEAKE'S PRIMA FACIE CASE

We first address the question of whether the Sinclair Property was a corporate opportunity for Chesapeake, because if there was no corporate opportunity, then there was no fiduciary duty to breach in that regard. Contrary to the Defendants' assertion on appeal, the trial court did conclude that the Sinclair Property was a corporate opportunity for Chesapeake: "[I]t's clear to the Court that these lots, any lots, were important to [Chesapeake], that they were, in fact, seeking other business opportunities." No reasonable reading of the trial court's determination could lead to a conclusion other than that it found the Sinclair Property to be a corporate opportunity for Chesapeake.

The Defendants contend, nonetheless, that there could be no corporate opportunity under the facts of this case. However, the Defendants did not assign cross-error to the trial court's finding that the Sinclair Property was a corporate opportunity for Chesapeake. Thus, they cannot now raise that argument on

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appeal.

appeal. Rule 5:18(b); Monahan v. Obici Med. Mgmt. Servs., 271 Va. 621, 637, 628 S.E.2d 330, 339-40 (2006); see also Advanced Marine Enters. v. PRC, Inc., 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998). The unchallenged finding of the trial court is now the law of the case and binding on the parties for purposes of appeal. Board of Supervisors v. Stickley, 263 Va. 1, 6, 556 S.E.2d 748, 751 (2002).

The trial court specifically found Williams to be "an officer of [Chesapeake]." While the trial court did not use the same words regarding Woodhouse, it found he "was the vice president involving production" of Chesapeake, a fact Woodhouse admitted in his Answer. The Defendants do not contest on appeal that they were officers of Chesapeake, and in that capacity, had a fiduciary relationship to Chesapeake. Trayer v. Bristol Parking, Inc., 198 Va. 595, 604, 95 S.E.2d 224, 230 (1956) (citation omitted).

Neither is there any dispute that Woodhouse or Williams did not disclose the Sinclair Property to Chesapeake or seek Chesapeake's consent to take the Sinclair Property. Accordingly, Chesapeake did prove its prima facie case as to the Defendants in that the Sinclair Property was a corporate opportunity for Chesapeake, which Williams and Woodhouse, as corporate officers of Chesapeake, did not disclose to Chesapeake or seek Chesapeake's consent to take for their direct benefit.

B. BREACH OF FIDUCIARY DUTY

Our inquiry now turns to what duty, if any, the Defendants owed Chesapeake regarding the Sinclair Property. It is a fundamental principle that a corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for personal gain because the opportunity is considered the property of the corporation. See Feddeman & Co. v. Langan Assocs., P.C., 260 Va. 35, 46 n.1, 530 S.E.2d 668, 675 n.1 (2000). Underlying this concept is the expectation that officers, as corporate fiduciaries, exercise the "utmost good faith" and loyalty in their dealings with, and on behalf of, the corporation. Feddeman & Co., 260 Va. at 43, 530 S.E.2d at 673. "[T]his good faith forbids [a corporate officer from] placing himself in a position where his individual interest clashes with his duty to his corporation." Rowland v. Kable, 174 Va. 343, 366, 6 S.E.2d 633, 642 (1940). As long as an individual remains a corporate officer, he "owes an undivided duty to [the corporation], and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to [its] best interests." Id. at 367, 6 S.E.2d at 642 (citation omitted).

The "unbending rule" that a fiduciary "entrusted with the business of another cannot be allowed to make that business an object of interest to himself," is abrogated if the fiduciary obtains the "consent of the [corporation]" after "full disclosure." Id. at 366-68, 6 S.E.2d at 642-43. As this Court has observed, "[t]he motive of self-interest is so natural and the danger of temptation to secure private advantage so great," that "good faith alone is not sufficient in the absence of full disclosure and consent of the interested parties . . . to make an exception to the general rule that a [corporate fiduciary] cannot enter into any relation or do any act inconsistent with the interest of the [corporation]." Id. at 369-70, 6 S.E.2d at 643-44.

A "director of a corporation is held chargeable with knowledge of such corporate affairs as it is his duty to know and which he might have known had he diligently discharged his duties." In re Adams Laboratories, Inc., 3 B.R. 495, 499 (Bankr. E.D. Va. 1980). There is no distinguishable difference between a corporate officer and a director in this regard as it relates to their fiduciary duty. His "belief," whether in good faith or bad, cannot negate the clear fiduciary duty to disclose a corporate opportunity before taking it for himself. Rowland, 174 Va. at 369-70, 6 S.E.2d at 643-44. Consequently, it makes no difference whether the corporate opportunity came to the corporate fiduciary in the fiduciary’s capacity as a corporate officer or in some “individual” capacity.

The Defendants argue that this requirement of "full disclosure" is an unworkable burden on a corporation's officers because it "require[s] corporate officers to disclose all business opportunities of which they learn . . . regardless of whether the corporate officer is planning to take advantage of the opportunity personally." This view misconstrues the requirements of disclosure, which become operative and relevant only when an officer receiving information about a potential corporate opportunity then appropriates that opportunity for his own use. See Upton v. Southern Produce Co., 147 Va. 937, 948-49, 133 S.E. 576, 580 (1926) (Directors breached their fiduciary duty to a struggling corporation when they secretly purchased corporation stock on credit and sold it at a profit to an outside company without first disclosing the opportunity to the corporation and other stockholders.). See also Demoulas v. Demoulas Super Mkts., 677 N.E.2d 159, 181 (Mass. 1997) ("[T]o satisfy the duty of loyalty, a fiduciary wishing to engage in a self-dealing transaction must disclose details of the transaction and the conflict of interest to the corporate decisionmakers."). Thus, an officer's desire to take an opportunity as his own, puts him on notice of his fiduciary duty to disclose the opportunity to the corporation before acting upon it for his personal benefit.

The trial court found that "[t]he information [Woodhouse] received [regarding the Sinclair Property] did not become important until . . . March 13," the day Williams' employment with Chesapeake was terminated and Woodhouse first alerted Barnes of his intention to resign. That factual finding by the trial court was not the subject of an assignment of error or cross error and is now the law of the case. Stickley, 263 Va. at 6, 556 S.E.2d at 751. The Defendants' casual knowledge of the Sinclair Property's existence in early 2003 is not, by itself, a basis for requiring disclosure or attaching liability for any of their later actions.

We must initially address, however, Chesapeake's contention that the trial court "misallocated the burden of proof, putting on Chesapeake Homes the burden of showing breach of fiduciary duty rather than requiring Williams and Woodhouse to show that they did not breach their fiduciary obligations." We agree with Chesapeake that the trial court erred in this regard.

Once a plaintiff has shown that a corporate opportunity existed and the corporate fiduciary appropriated it without disclosure and the consent of the corporation, a prima facie case has been shown. Under our jurisprudence, the burden shifts to the defendant fiduciary to show why the taking of the corporate opportunity was not a breach of his fiduciary duty. "[W]hen transactions have occurred between fiduciaries and [the corporation], the burden of proof lies upon the [fiduciary] to show that the transaction has been fair." Giannotti v. Hamway, 239 Va. 14, 24, 387 S.E.2d 725, 731 (1990). "The burden of proof lies, in all cases, upon the party who fills the position of active confidence to show the transaction has been fair." Waddy v. Grimes, 154 Va. 615, 648, 153 S.E. 807, 817 (1930).

The trial court's finding that neither Williams nor Woodhouse breached a fiduciary duty to Chesapeake was thus based on the wrong rule of law as it incorrectly placed the burden of proof on Chesapeake. Accordingly, we will reverse the trial court's judgment and remand the case to the trial court for a determination of whether there was a breach of fiduciary duty upon proper application of the burden of proof. See, e.g., Gibbs v. Gibbs, 239 Va. 197, 201-02, 387 S.E.2d 499, 501-02 (1990) (reversing the judgment of the trial court because the trial court placed the burden of proof on the wrong party, and remanding the case for further proceedings applying the proper burden of proof); McEntire v. Redfearn, 217 Va. 313, 316-17, 227 S.E.2d 741, 744 (1976) (same). However, we will reverse and remand only with respect to Woodhouse because the record is uncontradicted as to Williams regardless of the burden of proof. Even though the trial court erred in allocating to Chesapeake the burden of showing Williams' breach of fiduciary duty, it is clear on this record there could be no breach by Williams.

Chesapeake argues that Williams' fiduciary duty to Chesapeake continued following her termination on March 13 and that her purchase of the Sinclair Property was in violation of that duty. Chesapeake cites a number of foreign cases in support of this argument, but all are distinguishable from the facts of this case, in part, because of the trial court's binding factual finding that only events after Williams' termination on March 13th are relevant.

It is true that "[r]esignation or termination does not automatically free a director or employee from his or her fiduciary obligations." T.A. Pelsue Co. v. Grand Enterprises, Inc., 782 F. Supp. 1476, 1485 (D. Colo. 1991). Liability post-termination continues only for those "transactions completed after termination of the officer's association with the corporation, but which began during the existence of the relationship or that were founded on information gained during the relationship." In re H. King & Assocs., 295 B.R. 246, 274 (Bankr. N.D. Ill. 2003). See also Thompson v. Central Ohio Cellular, Inc., 639 N.E.2d 462, 470 (Ohio Ct. App. 1994). "Whether specific conduct taken prior to resignation breaches a fiduciary duty requires a case by case analysis." Feddeman, 260 Va. at 42, 530 S.E.2d at 672.

The record for purposes of appeal establishes that Williams' purchase of the Sinclair Property through Majestic was not "founded on information gained during" her employment with Chesapeake. Prior to her termination, Williams had no intention of leaving Chesapeake and starting her own development company. There is no evidence in the record that she used any of Chesapeake's resources to establish Majestic or regarding the Sinclair Property. Williams' casual knowledge of the Sinclair Property before her termination triggered no duty to disclose because her relationship with the Sinclair Property as a corporate opportunity occurred only after March 13th. After March 13th, Williams was under no fiduciary duty to Chesapeake because she was no longer an officer.[6]

There was thus no basis for liability on Williams' part after March 13 for breach of a fiduciary duty to Chesapeake as she had no duty. Thus, even though it applied the wrong burden of proof, the trial court did not err in dismissing the amended bill of complaint as to Williams. See Hilb, Rogal & Hamilton Co., 247 Va. at 249, 440 S.E.2d at 923.

C. OTHER CLAIMS

The trial court did not directly address Chesapeake's claim that Williams was liable on the alternative ground that she "aided and assisted Woodhouse in breaching the fiduciary duties he owed to Chesapeake while still employed by it." Chesapeake

[6] In contrast to Williams, Woodhouse did continue as an officer of Chesapeake for at least two months after March 13th

assigned error to the trial court’s failure to find Williams liable on this basis, but Chesapeake’s entire argument on appeal consists of the following statement on brief: “[S]he [Williams] would be liable for aiding and assisting Woodhouse in the breach of his fiduciary duties while he was still employed by Chesapeake Homes.” Because Chesapeake has not adequately briefed or argued this assignment of error, we will not consider this assignment of error. Rule 5:17(c); Rule 5:27; Muhammad v. Commonwealth, 269 Va. 451, 478, 619 S.E.2d 16, 31 (2005); Sheppard v. Commonwealth, 250 Va. 379, 386, 464 S.E.2d 131, 135 (1995).

Finally, Chesapeake has claimed error in the trial court’s failure to find liability to Chesapeake on behalf of Majestic. However, Chesapeake has neither pled nor alleged facts upon which Majestic would be liable to it. Accordingly, the trial court did not err in finding for Majestic.

III. CONCLUSION

For the foregoing reasons we will reverse the trial court's judgment dismissing the amended bill of complaint as to Woodhouse and affirm the trial court's judgment as to Williams and Majestic. We will remand the case to the trial court for further proceedings to determine whether Woodhouse breached a

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and took certain actions in regard to the Sinclair Property.

fiduciary duty to Chesapeake, in conformance with the principles expressed in this opinion.[7]

<u>Affirmed in part,</u>
<u>reversed in part,</u>
<u>and remanded.</u>

[7] In view of our resolution of the issues on appeal, we do not address Chesapeake's assignments of error regarding overruling its objections to certain questions propounded to the Defendants.