STATE OF MICHIGAN

COURT OF APPEALS

EDWARDS PUBLICATIONS, INC.,

Plaintiff-Counterdefendant-Appellant,

v

TRACY KASDORF,

Defendant-Appellee,

and

BILBEY PUBLICATIONS, LLC,

Defendant-Counterplaintiff,

UNPUBLISHED
January 20, 2009

No. 281499
Tuscola Circuit Court
LC No. 06-023444-CK

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Plaintiff Edwards Publications, Inc. (Edwards), appeals as of right the trial court's order granting summary disposition in favor of defendant Tracy Kasdorf. The focus of this action involves the enforceability of non-compete and non-disclosure provisions contained in two employment agreements executed by Kasdorf during her 13 years of employment as a sales representative for Edwards. One agreement was signed in 1992, at the beginning of Kasdorf's tenure with Edwards, and the second was signed in 2002, which was three years before Kasdorf quit her job with Edwards and took a similar position with defendant Bilbey Publications, LLC (Bilbey). Edwards and Bilbey both produce and circulate a variety of publications (shoppers) filled with business advertisements and classified ads that are delivered for free to surrounding communities; they compete against each other for the ad dollars paid by businesses for advertising space in the publications, and their revenues are generated by the sale of ads. This case requires interpretation and application of MCL 445.774a. The trial court summarily

dismissed two counts alleging breach of contract,[1] along with dismissing single counts alleging tortious interference with a business relationship or expectancy, breach of fiduciary duty, violation of the Michigan Uniform Trade Secrets Act (UTSA), MCL 445.1901 *et seq.*, and civil conspiracy. We affirm in part and reverse in part and remand.

I. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

II. Summary Disposition Tests under MCR 2.116(C)(10)

Summary disposition was granted pursuant to MCR 2.116(C)(10). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Circumstantial evidence can be evaluated and utilized in regard to determining whether a genuine issue of material fact exists for purposes of summary disposition." *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004). A court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

III. General Contract Interpretation Principles

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory, supra* at 464. "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

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[1] Count I alleged breach of contract with respect to the non-compete provisions, and count II alleged breach of contract in regard to the confidentiality or non-disclosure provisions.

IV. Analysis

A. Breach of Contract Claims

Edwards first argues that questions of fact exist which demonstrate that the 2002 employment agreement was validly entered into by Kasdorf, that the 1992 and 2002 agreements are enforceable under MCL 445.774a and Michigan law as they protect Edwards' reasonable competitive business interests, and that both agreements protect Edwards' confidential and proprietary information.

2002 Employment Agreement and Issues Regarding its Execution

The trial court found the 2002 agreement to be unenforceable due to coercion. "[A]llegations of coercion, like other contract defenses of mistake, duress, and fraud, must be proven by the party seeking to avoid the contract on such grounds." *Morris v Metriyakool*, 418 Mich 423, 440; 344 NW2d 736 (1984)(CAVANAGH, J). Coercion is comparable, in our opinion, to the defense of duress, and the parties do not cite any coercion authorities, opting instead to discuss the law of duress.[2] The contract defense of duress exists when a party, by the unlawful act of another party, is induced to enter into a contract under circumstances that deprived him or her of the exercise of free will. *Apter v Joffo*, 32 Mich App 411, 416; 189 NW2d 7 (1971), quoting *Knight v Brown*, 137 Mich 396, 398; 100 NW 602 (1904). "In order to void a contract on the basis of economic duress, the wrongful act or threat must deprive the victim of his unfettered will." *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991).

There was evidence showing that Kasdorf signed the 2002 employment agreement under economic duress, where the office manager threatened the withholding of her paycheck if the agreement was not executed. However, in light of our ultimate ruling that, under either the 1992 or 2002 employment agreement, the non-compete provisions were violated as a matter of law and that the non-disclosure provisions were not violated, we see no purpose in determining whether duress negated the formation of a valid contract relative to the 2002 agreement.

Kasdorf also points to paragraph 3.7 of the 2002 employment agreement, which provided that "[n]othing in this Agreement is to be understood as [an] Employment Contract between the Company and the Employee." Kasdorf argues that this language effectively nullifies any claim that the non-compete and non-disclosure provisions therein are contractual and binding. Again, it is unnecessary for us to address this issue given our holding. Kasdorf also maintains that the 2002 employment contract, being the most recent pronouncement by the parties regarding the full extent of their agreements and understandings, rendered the 1992 employment agreement meaningless and no longer enforceable. Indeed, paragraph 3.6 of the 2002 agreement stated that the "Agreement shall represent the entire Agreement between the parties concerning the subject

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[2] Kasdorf also cites law concerning false and fraudulent misrepresentations, but we fail to see the relevance of the citations under the circumstances presented.

matter herein." And, according to Kasdorf, the 2002 agreement was not enforceable because of the duress or coercion, thereby leaving no enforceable agreement whatsoever. This argument defies logic. If the 2002 employment agreement is enforceable, it would control over the 1992 agreement. But if the 2002 employment agreement is not enforceable, it cannot be said in the same breathe that it trumps the 1992 agreement. At least one of the employment agreements was controlling, and we need not determine which one controls as it does not affect the outcome of the action.

Enforceability of the Non-Compete Provisions

The Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.*, and specifically MCL 445.772, provides that "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." However, agreements not to compete are authorized by § 4a(1) of the MARA, which provides:

> An employer may obtain from an employee an agreement or covenant *which protects an employer's reasonable competitive business interests* and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [MCL 445.774a(1)(emphasis added).]

The issue here concerns the trial court's ruling that the 1992 non-compete provision did not protect Edwards' reasonable competitive business interests, but merely protected it from competition. Under Michigan law, an agreement by an employee not to compete is permissible if the agreement is reasonable. *Therma-tool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). In *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006), this Court, interpreting MCL 445.774a, observed:

> [A] restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable. Additionally, a restrictive covenant must be reasonable as between the parties, and it must not be specially injurious to the public.
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> Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill. In a medical setting, a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians, protecting an employer's investment

> in specialized training of a physician, or protecting an employer's confidential business information or patient lists. [Citations omitted.]

General knowledge, skill, or facility that is acquired or developed through experience or training during employment does not, by itself, give an employer an interest sufficient to support a restraining covenant. *Id.* at 267. Preventing the anti-competitive use of confidential information constitutes a legitimate business interest. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007).

In *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507-508; 741 NW2d 539 (2007), this Court stated:

> As a general matter, courts presume the legality, validity, and enforceability of contracts. But noncompetition agreements are disfavored as restraints on commerce and are only enforceable to the extent they are reasonable. . . . A court must assess the reasonableness of the noncompetition clause if a party has challenged its enforceability. The burden of demonstrating the validity of the agreement is on the party seeking enforcement. [Citations omitted.]

Under the circumstances of this case, we hold that both non-compete provisions properly protected Edwards' reasonable competitive business interests as they protected Edwards against Kasdorf, and thereby Bilbey, gaining some unfair advantage in competition with Edwards. There is no dispute that Edwards and Bilbey are in direct competition against each other. Over a 13-year period, Kasdorf developed and nurtured close and personal relationships with numerous business customers while working for Edwards, learning much about their operations, tendencies, and leanings. The businesses reached a comfort level with Kasdorf that might not be reached, or might take awhile to reach, with another sales rep. By going to work for Bilbey, where Kasdorf's accounts would be with many of those same customers or where those customers would be subject to not-so-cold cold calls, Kasdorf would be gaining and taking an unfair advantage in competition with Edwards after years of acquiring a unique insight into various business operations thanks to her employment with Edwards. The development and cultivation of close relationships with people is undeniably a driving force in the sales profession and generates revenue; the more reliable, liked, and accountable the rep, the more income that is generated. And Kasdorf's relationship with each contact person at a particular business most certainly is unique. While Kasdorf may have acquired general knowledge, skill, or facility in relation to the mechanical functioning of sales, e.g., how to generally approach a customer, sell ad space, take ad requests and materials, and finalize an ad for publication, she also developed goodwill and strong personal relationships that are invariably different from person to person or business to business and cannot be labeled as generally acquired knowledge.

In *St Clair Medical, supra* at 266, this Court stated that "a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians[.]" The following passage from *St Clair Medical, id.* at 268, is particularly relevant in our opinion:

> We conclude, nevertheless, that the restrictive covenant was protecting plaintiff's competitive business interest in retaining patients, that it provided plaintiff with time to regain goodwill with its patients, and that it prevented

> defendant from using patient contacts gained during the course of his employment to unfair advantage in competition with plaintiff. A physician who establishes patient contacts and relationships as the result of the goodwill of his employer's medical practice is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure.

While we are not dealing with a medical setting, the fundamental principle flowing from *St Clair* is that where an employee establishes unique contacts, relationships, and goodwill through employment, it is reasonable to bar that employee, through use of a sound non-compete agreement, from using those accomplishments to the possible detriment of the past employer and for the benefit of a new employer. Whether it is under the 1992 or the 2002 employment agreement, we conclude that Kasdorf was precluded from taking the sales position with Bilbey.

We note that Kasdorf relies on some unpublished opinions of this Court, but we find them factually distinguishable.

Enforceability of the Non-Disclosure or Confidentiality Provisions

The trial court and the parties spent a great deal of time on addressing whether certain information and materials were truly confidential or were generally known, public, and accessible. However, we find that such analysis misses the mark because of the specific language in the agreements. The provisions in both agreements are best defined as non-disclosure provisions that make it irrelevant whether the information or materials are deemed confidential or public, although the status may be relevant for purposes of establishing causation and damages if those issues needed to be reached. The provisions indicate that the employee *has accepted and agrees* that Edwards' list of customers and its relationships for acquiring advertising revenue are special, valuable, and unique assets of the business, which cannot be disclosed. Thus, even if the customer list is not actually confidential because any person can pick up a publication and find out who advertises with Edwards, the employee is still not at liberty to disclose the list because of his or her specific promise in the employment agreement. Accordingly, Kasdorf was not permitted to disclose Edwards' list of customers, period. However, there was no evidence whatsoever indicating that Kasdorf ever disclosed Edwards' customer list to anyone; therefore, there was no evidence of a breach of contract on this issue. With respect to Edwards' relationships for acquiring advertising revenue, it is not entirely clear what this encompasses, but it is clear on the record presented that Kasdorf did not disclose any information or materials regarding any aspect of her employment with Edwards; therefore, there was no evidence of a breach of contract on this issue. Accordingly, there is no genuine issue of fact showing a breach of the non-disclosure provisions, and the claim fails as a matter of law.

B. Tortious Interference with a Business Relationship or Expectancy

Edwards next argues that the trial court erroneously found that Kadorf did not tortiously interfere with Edwards' several long-standing customer relationships and advertising revenues generating therefrom when she violated the employment agreements and otherwise wrongfully conspired with Bilbey to harm Edwards.

In *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 90; 706 NW2d 843 (2005), this Court, addressing a claim of tortious interference with a business relationship or expectancy, stated:

> The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

A tortious interference claim can only arise out of the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004).

Given our ruling that both of the non-compete provisions precluded Kasdorf from working for Bilbey, there is sufficient evidence on each of the elements of tortious interference to survive summary disposition.

C. Breach of Fiduciary Duty

Edwards next argues that the trial court erred when it ruled that Kasdorf did not breach her fiduciary duties owed to Edwards.

A fiduciary relationship arises from the reposing of faith, confidence, and trust, along with the reliance of one upon the judgment and advice of another. *First Public Corp v Parfet*, 246 Mich App 182, 191; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101; 658 NW2d 477 (2003). A fiduciary is under a duty to act for the benefit of the other person concerning matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). A plaintiff is entitled to relief when a fiduciary relationship arises and the fiduciary's influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A fiduciary owes a duty to his principal to act in good faith and is not permitted to act for himself at the principal's expense. *Central Cartage Co v Fewless*, 232 Mich App 517, 524-525; 591 NW2d 422 (1998). A fiduciary relationship can be founded, in general, on intimate personal or business relations in which trust or confidence is accepted. *Boden v Renihan*, 299 Mich 226, 239; 300 NW 53 (1941). However, it is unreasonable for a person to repose trust and confidence in another individual where the interests of each are adverse. See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997). For example, a fiduciary duty does not generally arise in the context of a lender-borrower relationship. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). Mere allegations of inexperience and reliance are insufficient to establish a fiduciary relationship. *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Whether to recognize a plaintiff's cause of action for breach of fiduciary duty is a question of law that we review de novo. *Teadt, supra* at 574.

We fail to see how an ordinary employee-employer relationship such that exists here rises to the level of a fiduciary relationship deserving of special protection by the law. See *Bradley v Gleason Works*, 175 Mich App 459, 463; 438 NW2d 330 (1989)("Plaintiff does not cite any authority for the proposition that an employer-employee relationship is fiduciary in nature[.]"). Edwards cites no relevant authority to support the recognition of a fiduciary relationship under the circumstances presented. The claim fails as a matter of law.

D. Violation of the UTSA

Edwards next argues that the trial court erred when it found that Kasdorf had not violated the UTSA.

In *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002), this Court explained that under the UTSA a court "can enjoin actual or threatened misappropriation of a trade secret and can also compel affirmative acts necessary to protect a trade secret." The misappropriation of a trade secret includes the use or disclosure of a secret without consent. *Id.*

Here, there is simply no evidence whatsoever that Kasdorf misappropriated or disclosed any information or materials, even assuming that trade secrets were involved. See MCL 445.1902. Accordingly, this claim fails as a matter of law.

E. Civil Conspiracy

Finally, Edwards argues that the trial court erred in summarily dismissing the civil conspiracy claim where there was evidence that Kasdorf and Bilbey conspired to damage Edwards.

In regard to the civil conspiracy claim, the essential elements of a cause of action are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992).

Because both of the non-compete provisions precluded Kasdorf from working for Bilbey, the civil conspiracy claim can proceed where there was evidence that Bilbey and Kasdorf were aware of the non-compete provisions, yet by a concerted effort Bilbey hired Kasdorf, thereby accomplishing the unlawful purpose of employing Kasdorf in a field that violated contractual rights.

V. Conclusion

1. The trial court erred in summarily dismissing the breach of contract claim with respect to Kasdorf's obligation not to compete against Edwards, where Edwards was protecting its reasonable competitive business interests. Edwards was thus entitled to summary disposition with respect to the non-compete issue, given that there is no genuine issue of fact that Kasdorf was precluded from working for Bilbey and that she violated the agreement by so doing. Of

course, matters regarding causation and damages arising out of the breach of contract still need to be litigated.

2. The trial court did not err in summarily dismissing the breach of contract claim with respect to Kasdorf's obligation not to disclose customer lists and customer relationship information, where there was no evidence of disclosure of any information and materials by Kasdorf.

3. The trial court erred in summarily dismissing the claim for tortious interference with a business relationship or expectancy, where there was sufficient evidence on each of the elements of tortious interference to survive summary disposition.

4. The trial court did not err in summarily dismissing the breach of fiduciary duty claim, where there exists no basis under the facts to recognize a fiduciary relationship.

5. The trial court did not err in summarily dismissing the UTSA claim, where there was no evidence of misappropriation or disclosure of any information and materials by Kasdorf, even assuming the involvement of trade secrets.

6. The trial court erred in summarily dismissing the civil conspiracy claim, where there was sufficient evidence on each of the elements of civil conspiracy to survive summary disposition.

We affirm in part and reverse in part and remand for proceedings consistent with this opinion. No costs are awarded under MCR 7.219 because neither party fully prevailed. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio