STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1317

Hearing Associates, Inc.,
Respondent,

vs.

Dr. Sara Downs, et al.,
Appellants

Filed June 5, 2017
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69DU-CV-12-3547

William F. Mohrman, Vincent J. Fahnlander, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for respondent)

V. John Ella, Craig W. Trepanier, Nathan R. Snyder, Trepanier MacGillis Battina, P.A., Minneapolis, Minnesota; and

Stephanie A. Ball, Eric S. Johnson, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for appellants)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Following a jury verdict finding them liable for breach of contract and breach of the duty of loyalty, appellants challenge the denial of their motion for judgment as a matter of law (JMOL); the jury instructions; and the district court's findings and order requiring them to forfeit wages and commissions. Appellants also assert additional errors and argue that the cumulative effect of these errors entitles them to a new trial. Pursuant to a notice of related appeal (NORA), respondent challenges the amount of the judgment and argues that it is entitled to prejudgment interest. We affirm.

FACTS

Respondent Hearing Associates Inc. is a Duluth audiology clinic owned by Dr. John Voss. A large portion of its revenue comes from selling hearing products. In addition to the Duluth office, Hearing Associates leases space from outreach clinics in other parts of northern Minnesota and sees patients at those locations.

In 2007, Hearing Associates hired appellant Dr. Jonathan Gervais. In an e-mail exchange on July 8, 2007, Dr. Voss indicated that he agreed to Dr. Gervais's requested compensation terms. Dr. Gervais responded, "John lets [sic] type it up and I will sign it next week." According to Dr. Voss, Dr. Gervais was presented with a contract on July 9 and signed it shortly thereafter. The contract notifies Dr. Gervais that he will have access to proprietary information that is not to be distributed outside of the company. The contract also states that patient information is confidential. In addition, the contract limits "Outside Activities," providing: "While you are employed or render services to the Company you

will not assist any person or organization in competing with the Company, or preparing to compete with the Company, or in hiring any employees of the Company."

Appellant Dr. Sara Downs had worked for Hearing Associates for several years when Dr. Gervais was hired. When Dr. Voss hired Dr. Gervais, he offered Dr. Downs a written contract that would raise her commission percentage and lower her salary. The terms were identical to the compensation offered to Dr. Gervais. The new contract contained proprietary-information, patient-information, and outside-activities provisions that were also virtually identical to those in Dr. Gervais's contract. Dr. Downs never signed the contract. But, according to Dr. Voss, Dr. Downs agreed to the terms of the contract and would have been discharged had she not. Both Dr. Downs and Dr. Gervais were paid according to the contract terms from that point on.

In 2011, Hearing Associates adopted a new employee handbook. Dr. Downs and Dr. Gervais were part of the management team that adopted the handbook, which was distributed to all employees. The handbook states that "[t]he confidentiality of patients . . . and organizational information will be maintained at all times." It lists "[p]atient data" and "[f]inancial, marketing, and statistical data" as confidential. It also states that "[p]atient records . . . are not to be used for personal gain or other business interests." And it prohibits employees from using knowledge about the company for personal profit, competing with the company, or "acquiring contracts in which the company may be interested."

In January 2012, after earlier discussions were unsuccessful, Dr. Voss restarted negotiations to sell Hearing Associates to Dr. Downs, Dr. Gervais, and his daughter, who

is Hearing Associates' operations manager. Around the same time, Dr. Downs contacted the Center for Economic Development (CED). Dr. Downs and Dr. Gervais worked with the CED in February and March of 2012 to create a business plan for a new audiology practice. They planned to open appellant Hearing Wellness Center LLC (HWC) in Duluth and compete directly with Hearing Associates. The plan states that HWC will "target[]" "[c]linics where physicians have historically referred to Hearing Associates."

The business plan also references Hearing Associates' financial and patient data. It states the percentage of Hearing Associates' revenue and patients that Dr. Downs and Dr. Gervais account for. It says that in the absence of Dr. Downs and Dr. Gervais "Hearing Associates is unlikely to remain competitive while they search for new professional staff." The plan also talks about the growth in Hearing Associates since Dr. Downs started there and lists the companies' gross revenues in 2011. It further states the exact number of Dr. Downs's active patient files. It lists Hearing Associates' monthly and annual revenue from two outreach clinics: the Cloquet clinic and the Two Harbors clinic. It also states that Dr. Downs has secured a relationship with the Cloquet clinic and that Dr. Gervais has secured a relationship with the Two Harbors clinic. An e-mail from Dr. Downs to a staff member at the CED also lists several numbers related to the hearing aids that Dr. Downs and Dr. Gervais sold while employed at Hearing Associates.

In late February 2012, Dr. Downs formed HWC. Immediately, Dr. Downs and Dr. Gervais began seeking financing for HWC. Dr. Downs sent several e-mails related to setting up HWC during business hours on days she was working at Hearing Associates.

By mid-May, Dr. Downs and Dr. Gervais had also negotiated a lease for HWC's main office and spoken with an architect who developed plans for the office space.

Dr. Gervais and Dr. Downs also made efforts to secure lease agreements with the Cloquet and Two Harbors clinics. In late March and early May 2012, Dr. Downs sent e-mails to potential financiers stating that she and Dr. Gervais had "secured" the Cloquet and Two Harbors clinics. Dr. Downs, while at the Cloquet clinic on behalf of Hearing Associates, said that she and Dr. Gervais might be starting their own practice and asked if they could rent space from the clinic. Dr. Gervais contacted the Two Harbors clinic about leasing space for HWC and received a template for a lease in April.

Negotiations between Dr. Voss, Dr. Downs, and Dr. Gervais for the purchase of Hearing Associates continued until mid-May. On May 17, 2012, Dr. Downs and Dr. Gervais told Dr. Voss that they were done negotiating and were resigning from their positions at Hearing Associates. Both doctors offered to stay on at Hearing Associates until the end of June. On May 21, Dr. Voss informed the staff that Dr. Downs and Dr. Gervais would be leaving. That same day, Dr. Downs appeared to offer employment to a Hearing Associates' employee. She told the employee that she would be hiring for the employee's position at HWC and that the employee should keep that in mind.

On May 22, Dr. Downs and Dr. Gervais came to the office and yelled at both Dr. Voss and his daughter. After this incident, Dr. Voss decided to discharge Dr. Downs and Dr. Gervais as soon as possible. Dr. Voss met with Dr. Downs on May 24 and with Dr. Gervais the next day. Both Dr. Downs and Dr. Gervais signed discharge notices. One of the reasons listed for Dr. Downs's discharge was "[u]se of company time and resources for

personal business, including soliciting other employees for other business ventures." Dr. Gervais's notice listed, among other things, "[u]se of company time and resources to conduct personal business related to your next business venture." Both notices contained acknowledgments that Dr. Downs and Dr. Gervais had access to confidential Hearing Associates' information that they were obligated not to use or disclose.

On May 24, 2012, the day that Dr. Downs was discharged from Hearing Associates, the Cloquet clinic sent Dr. Voss a letter informing him that Hearing Associates' agreement with that clinic was being cancelled. He called the clinic and was told that they had decided to rent space to HWC instead. Dr. Voss received a similar letter from the Two Harbors clinic dated May 29, 2012.

Hearing Associates subsequently sued Dr. Downs, Dr. Gervais, and HWC for breach of contract, tortious interference with contract, violation of the Minnesota Uniform Trade Secrets Act (MUTSA), breach of fiduciary duty, and breach of the duty of loyalty. After the district court granted appellants' motion for summary judgment on the other claims, a jury trial was held on the breach-of-contract and breach-of-loyalty claims. At trial, Hearing Associates presented unsigned contracts that it claimed represented its employment agreements with Dr. Downs and Dr. Gervais. Dr. Downs testified that she was shown the contract but objected to it and refused to sign.

Hearing Associates claimed that Dr. Gervais stole the signed version of his contract from his personnel file shortly before he was discharged. In May 2012, Dr. Voss's daughter got a notification that Dr. Gervais had disarmed the alarm system at Hearing Associates. She notified Dr. Voss who went to the office and found Dr. Gervais cleaning out his office

and removing paperwork. After that, the signed contract that Dr. Voss's daughter had previously seen in Dr. Gervais's personnel file was gone. Dr. Gervais denied taking the contract and claimed that the contract presented at trial was fabricated. The contract was purportedly signed in 2007 but lists the address of a home that Dr. Gervais did not move to until 2008.

The jury found Dr. Downs and Dr. Gervais liable for both breach of contract and breach of the duty of loyalty. It awarded Hearing Associates $31,586.37 for Dr. Downs's breach of contract and $11,000.22 for Dr. Gervais's breach of contract. It awarded Hearing Associates $109,151.18 in lost profits for Dr. Downs's breach of the duty of loyalty and the same amount for Dr. Gervais's breach of that duty.

Appellants moved for JMOL or, in the alternative, a new trial on all issues. The district court denied appellants' motion. In addition to the breach-of-contract damages in the jury verdict, the district court ordered Dr. Downs and Dr. Gervais to forfeit wages and commissions. Furthermore, the district court found Dr. Downs, Dr. Gervais, and HWC jointly and severally liable for a total of $109,151.18 in lost-profits damages for breach of the duty of loyalty. This appeal followed.

D E C I S I O N

JMOL on breach-of-contract claims

Appellants claim that the district court erred by denying their motion for JMOL on the breach-of-contract claims. When a party moves for JMOL after the jury returns a verdict, the district court may "(1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of [JMOL]." Minn. R. Civ. P. 50.02(a). The jury's verdict may not be set

aside if any reasonable theory of the evidence can sustain it. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). "Courts must view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to [JMOL]." *Id*. (quotation omitted). This court reviews the district court's denial of JMOL de novo. *Id*.

Appellants first claim that neither Dr. Downs nor Dr. Gervais accepted the terms of any contract. If the parties dispute whether a contract exists, "the existence and terms of a contract are questions for the fact finder." *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992). "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). "Formation of a contract is judged by the objective conduct of the parties rather than their subjective intent." *Id.*

Dr. Downs was offered a written contract. She never signed the contract and claims that she objected to its terms. Dr. Voss admitted that Dr. Downs never signed the contract but testified that she nevertheless agreed to it, would have been discharged if she had not agreed to it, and never objected to any of the terms in the contract. There is no dispute that after being offered the contract, Dr. Downs continued in her employment at Hearing Associates and was paid according to the contract's terms. Given Dr. Voss's testimony that Dr. Downs accepted the contract orally and the undisputed evidence that she continued to work at Hearing Associates and was paid according to the contract, a finding that Dr.

Downs accepted Hearing Associates' contract offer is not manifestly contrary to the evidence. *See Gorham v. Benson Optical*, 539 N.W.2d 798, 800 (Minn. App. 1995) ("A party may manifest acceptance of an agreement by written or spoken words, or by conduct and actions.").

Appellants argue that, because the contract contemplated acceptance by signature, it could not be accepted orally. The Dr. Downs agreement states, "You may indicate your agreement and accept this offer by signing and dating this letter and returning it to our office." The use of the word "may" indicates that signature is merely a suggested manner of acceptance and that the contract does not require acceptance by signature. *Cf. Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 233 (Minn. App. 2006) (concluding that contract required acceptance in a certain form because it stated: "Please sign and date the original and attached copy of this contract. The original must be returned to Buyer at the above-referenced address."). If an offer limits the manner of acceptance, the acceptance must comply with the terms of the offer. Restatement (Second) of Contracts § 60 (1981). But "[i]f an offer merely suggests a permitted . . . manner of acceptance, another method of acceptance is not precluded." *Id.* Because the contract merely suggested a permitted manner of acceptance, it did not prohibit Dr. Downs from accepting orally. *See id.*, Illustration 4 (explaining that an offeror does not limit the power of acceptance by saying that the offeree "may accept" in a certain manner).

Even if Dr. Downs did not orally agree to the contract, her continued employment constitutes acceptance of the offer of a unilateral contract. The contract stated that Hearing Associates was "pleased to continue [Dr. Downs's] employment on the following terms."

And, as stated above, Dr. Downs was paid under the terms of the contract from that point forward and, according to Dr. Voss, never objected to the terms of the contract. When an employer offers continued employment based on new terms and the "employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626-27 (Minn. 1983). "The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer." *Id.* at 627. Dr. Downs was offered continued employment based on the changes in the contract; she accepted that offer by remaining at Hearing Associates.

There is ample evidence that Dr. Gervais also accepted a contract with the same terms as the contract Hearing Associates submitted at trial. Dr. Voss testified to these facts, and his testimony was supported by an e-mail exchange between himself and Dr. Gervais. Dr. Voss's daughter, who was the operations manager at Hearing Associates, also testified that she saw a contract in Dr. Gervais's personnel file and that the contract resembled the contract introduced at trial.

Appellants argue that Dr. Gervais's contract required that it be accepted by the close of business on July 13, 2007, and that Hearing Associates failed to introduce evidence showing that the contract was signed by that time. The contract provides that "[t]his offer, if not accepted will expire at the close of business on July 13, 2007." Appellants are correct that if an offer specifies a deadline for acceptance, the power of acceptance terminates when that time period expires. *See Starlite Ltd. P'ship v. Landry's Rests., Inc.*, 780 N.W.2d

396, 399 (Minn. App. 2010). But there is evidence that Dr. Gervais signed by July 13, 2007. On Sunday July 8, Dr. Gervais sent the e-mail telling Dr. Voss to "type it up and I will sign it next week." Dr. Voss testified that he personally handed the contract to Dr. Gervais on July 9 and that Dr. Gervais signed it Accordingly, the finding that Dr. Gervais signed the agreement and returned it to Dr. Voss by July 13, 2007, is not manifestly contrary to the evidence.

Appellants also argue that Hearing Associates cannot establish the terms of the Dr. Gervais contract because the unsigned contract introduced at trial was fabricated. Although the contract appears to have the wrong address, this does not prove that the terms of the contract are not the same as the terms of the contract signed by Dr. Gervais. Both Dr. Voss and his daughter testified that the terms of the unsigned contract introduced at trial were the same as the terms of the contract signed by Dr. Gervais. Hearing Associates also introduced evidence that Dr. Gervais stole the signed contract from his personnel file. The jury rejected appellants' fabrication argument and accepted the testimony of Dr. Voss and his daughter. *See Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 485 (Minn. 1989) (stating that determinations of witness credibility are "the sole province of the finder of fact").

Next, appellants argue that the restrictions in the contracts on "preparing to compete" are unenforceable as a matter of public policy. In the absence of a contract provision, "[a]n employee has the right . . . while still employed, to prepare to enter into competition with her employer." *Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987). But appellants cite no authority indicating that a contract that prohibits

a current employee from preparing to compete is void as a matter of public policy. Noncompete agreements that prohibit an employee from competing with the employer after the employment has ended "are looked upon with disfavor, cautiously considered, and carefully scrutinized." *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998) (quotation omitted). Nevertheless, a noncompete provision is enforceable if it serves a legitimate employer interest and is not broader than necessary to protect that interest. *Id.* If a noncompete agreement may limit an employee's right to compete with the employer after the employment has ended, then surely an employment contract may limit the employee's right to prepare to compete during the employment.

The evidence supports the jury's finding that Dr. Downs and Dr. Gervais breached valid and enforceable contracts. The district court did not err by denying appellants' motion for JMOL.[1]

Breach-of-contract jury instructions

Appellants claim that they are entitled to a new trial because the district court abused its discretion by instructing the jury on the circumstances that would make a provision in the employee handbook an enforceable contract and by failing to give appellants' proposed instructions on unsigned contracts.

[1] Appellants also argue that the district court erred by denying their motion for JMOL because the employee handbook did not create a contract. Regardless of whether the employee handbook created a contract, the employment contracts themselves are sufficient to sustain the jury's breach-of-contract findings. We address the employee handbook below as it relates to appellants' challenges to the jury instructions.

This court reviews the district court's jury instruction decisions for an abuse of discretion. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). District courts have "considerable latitude" in selecting jury instructions. *Id.* "Jury instructions are viewed as a whole to determine whether they fairly and adequately explain the law." *Peterson v. BASF Corp.*, 711 N.W.2d 470, 484 (Minn. 2006) (quotation omitted). An instruction that materially misstates the law is erroneous. *Id.* "Where instructions overall fairly and correctly state the applicable law, [a party] is not entitled to a new trial." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

Employee-handbook instruction

As to the employee handbook, the district court gave the following instruction: "A provision in an employee handbook . . . is binding when the provision is part of a contract between the employer and employee. This means the employer offers continued employment with the provision as part of the terms of employment and the employee accepts that offer." The instruction came after more detailed instructions on contract formation.

Appellants argue that because the employee handbook says that it is not an offer for a contract, the district court abused its discretion by giving the instruction. Although appellants objected generally to the handbook instruction, they did not object on this basis. Accordingly, we review only for plain error. *See* Minn. R. Civ. P. 51.04(b) (explaining that a court may review for plain error when the objection to jury instructions has not been properly preserved); *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 626 (Minn. 2012) (stating that when party fails to object to jury instructions this court may review only

for plain error). Under the plain-error test, we review an assertion of error to determine whether (1) there is an error, (2) the error is plain, and (3) the error affects a party's substantial rights. *Id.* If these prongs are established, we determine whether correcting the error is necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 626-27 (quotation omitted).

The handbook states that its terms are "not conditions of employment and are not intended to create, nor shall they be interpreted to create, a contract or to constitute an offer of a contract between the company and any of its staff members." Appellants are correct that a disclaimer such as this generally prevents the provisions of an employee handbook from becoming part of an enforceable contract. *See, e.g.*, *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 660 (Minn. App. 2011) (concluding that similar disclaimer prevented employee handbook from creating an enforceable contract and citing other cases reaching similar conclusions), *review denied* (Minn. Apr. 19, 2011).

Nevertheless, it does not follow that the district court's instruction materially misstated the law. The instruction is taken directly from the jury instruction guide and is consistent with caselaw. *See* 4 *Minnesota Practice*, CIVJIG 55.35 (2016); *Mettille*, 333 N.W.2d at 627 (stating that a unilateral contract is formed when "at-will employee retains employment with knowledge of new or changed conditions" and that "personnel handbook provisions, if they meet the requirements for formation of a unilateral contract may become enforceable as part of the original employment contract"). Moreover, the entire handbook was in evidence and appellants were free to argue that the disclaimer prevented the provisions of the handbook from becoming part of a contract. Nothing in the instruction

contradicts that position. In fact, because the instruction requires the employer to "offer[] continued employment with the provision as part of the terms of employment" and the handbook states that it does not "constitute an offer of a contract" or contain "conditions of employment," the instruction actually supports appellants' position that the handbook provisions did not become part of the contract. Because the instruction does not materially misstate the law, appellants have failed to show error, the first prong of the plain-error test.

Even if the instruction misstated the law, appellants are not entitled to a new trial unless the error affected their substantial rights. *See Frazier*, 811 N.W.2d at 626; *see also Rowe*, 702 N.W.2d at 743 (stating that, even when plain error does not apply, party must show that it was prejudiced by erroneous jury instructions in order to receive a new trial). As stated above, the instruction actually supports appellants' position. If applied properly, the instruction leads to the conclusion that the provisions of the handbook were not part of an enforceable contract. Accordingly, appellants cannot show prejudice.

Unsigned-contract instruction

Appellants argue that the district court abused its discretion by failing to give requested jury instructions regarding unsigned contracts. Specifically, appellants claim that the district court should have given the following instruction: "Where a written contractual offer provides for acceptance by signature, the offer cannot be a binding contract unless signed by the offeree."[2]

[2] Appellants also claim that the district court abused its discretion by failing to give other requested breach-of-contract jury instructions. Appellants, however, fail to cite any legal authority or make any argument to support these claims. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is

The proposed jury instruction is not in the Minnesota jury instruction guide, and the only authority appellants offer in support of the instruction is a federal case applying Ohio law. *See Allen v. Ford Motor Co.*, 8 F. Supp. 2d 702, 705 (N.D. Ohio 1998) ("Where . . . the parties have agreed that a contract shall not be binding until signed by a particular person, party, or official, courts will give effect to that agreement, and thus will not enforce the contract without the requisite signatures."). Cases from other jurisdictions are not binding on this court. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984).

Moreover, the case cited acknowledges that "[s]ignature spaces in the form contract do not in and of themselves require that signatures of the parties are a condition precedent to the agreement's enforceability." *Allen*, 8 F. Supp. 2d at 705 (quotation omitted). A signature is only required if the parties have agreed that the contract is not binding unless signed. *Id.* As explained above, Dr. Downs's contract did not require a signature, and there is ample evidence that Dr. Gervais signed his contract.

The district court did not abuse its discretion by failing to give appellants' requested instruction on unsigned contracts.

JMOL on breach-of-loyalty claims

Appellants argue that the district court abused its discretion by denying their motion for JMOL on Hearing Associates' breach-of-loyalty claims. As stated above, this court

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waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *In re Estate of Rutt*, 824 N.W.2d 641, 648 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Jan. 29, 2013). No error is obvious on inspection.

reviews the district court's decision on a motion for JMOL de novo to "determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to [JMOL]." *Longbehn*, 727 N.W.2d at 159.

The duty of loyalty prohibits an employee from "soliciting the employer's customers" or "otherwise competing with" the employer while employed. *Koering*, 404 N.W.2d at 304. While an employee has a right to "take steps to [ensure] 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 employed." *Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 175, 112 N.W.2d 42, 48 (1961). There is no precise line between impermissible competition and permissible preparation. *Koering*, 404 N.W.2d at 305. Whether an employee's actions constitute a breach of the duty of loyalty is a question of fact to be determined based on the totality of the circumstances. *Id.*

Soliciting customers

First, appellants argue that they did not breach their duty of loyalty because they did not solicit Hearing Associates' customers. But caselaw makes clear that the duty of loyalty may be breached by "soliciting the employer's customers" or by "otherwise competing" with the employer while employed. *Id.* at 304.

Lease agreements

Second, appellants argue that they did not breach their duty of loyalty by having "discussions" with the Two Harbors and Cloquet clinics about renting office space. The evidence indicates that appellants went further than merely having "discussions." An employee who interferes with the employer's business contracts breaches the duty of

loyalty. *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 121-22 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008). Appellants' business plan mentions "target[ing]" "[c]linics where physicians have historically referred to Hearing Associates." E-mails sent by Dr. Downs indicate that appellants had "secured" office space at both clinics as early as March 27, 2012, almost two months before their positions at Hearing Associates were terminated. Moreover, Dr. Downs approached the Cloquet clinic about renting space for HWC while at the clinic in her capacity as a Hearing Associates' employee. And the Cloquet clinic sent Dr. Voss a letter cancelling Hearing Associates' lease on the day that Dr. Downs was discharged and the day before Dr. Gervais was discharged. The Two Harbors clinic notified Dr. Voss that it was cancelling Hearing Associates' lease agreement just five days later. There is ample evidence to support a finding that Dr. Downs and Dr. Gervais interfered with Hearing Associates' lease agreements while employed by Hearing Associates.

Confidential information

Third, appellants argue that they did not breach their duty of loyalty by using Hearing Associates' confidential information to compete with Hearing Associates. "[A] common law duty of confidentiality arises out of the employer-employee relationship . . . as to information which the employer has treated as secret." *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 903 (Minn. 1983). "Confidential information is that which an employee knew or should have known was confidential." *Jostens, Inc. v. Nat'l Comput. Sys., Inc.*, 318 N.W.2d 691, 702 (Minn. 1982). "[K]nowledge gained at an employer's expense, which takes on the characteristics of a

trade secret and which would be unfair for the employee to use elsewhere, is deemed confidential and is not to be disclosed or used." *Id.*

Appellants argue that Hearing Associates did not treat the information appellants used to create their business plan as confidential. But Dr. Downs and Dr. Gervais both had contracts notifying them that they would have access to Hearing Associates' "information that is not to be distributed outside of [Hearing Associates]." The contracts also informed them that "patient information" is confidential. In addition, the employee handbook defined both "[p]atient data" and "[f]inancial, marketing, and statistical data" as confidential. Furthermore, Hearing Associates' financial and patient information was stored on computer programs and portals that were password protected.

Appellants argue that some of the financial information they used in preparing their business plan was not confidential because it was posted on white boards in Hearing Associates' office and was distributed to a third party. Although some of the information was written on white boards in the office for a time, this practice was stopped in 2011. And the third party to whom appellants refer is Audigy, a company that was essentially Hearing Associates' business partner. Much of the information appellants used in their business plan was stored on an Audigy portal that was password protected and that Hearing Associates paid to access.

Appellants also argue that the information was not confidential because they memorized it. Testimony from Dr. Voss's daughter and another Hearing Associates' employee contradicted this claim. Also, Dr. Downs admitted during her deposition that she took patient numbers directly from Hearing Associates' computer system. But even if

Dr. Downs and Dr. Gervais had memorized all of this information, that fact does not change the confidential character of the patient and financial data. *See id.* (stating that even if knowledge is "only in the employee's memory," it may be protectable).

Dr. Downs and Dr. Gervais used information gained at Hearing Associates' expense that they knew or should have known was confidential to create their business plan and to target Hearing Associates' leases. They used the business plan to obtain financing for a company that would be in direct competition with Hearing Associates. There is evidence, therefore, that appellants breached their duty of loyalty by using Hearing Associates' confidential information to compete with Hearing Associates.

Attempt to hire Hearing Associates' employee

In addition to interfering with leases and using confidential information, Hearing Associates presented evidence that, prior to her discharge, Dr. Downs attempted to hire a Hearing Associates' employee to work at HWC. An employee may violate the duty of loyalty by recruiting other employees to work for a competitor. Restatement of Employment Law § 8.04(b) (2017). This evidence also supports the jury's finding that appellants breached their duty of loyalty.

MUTSA preemption

Appellants next argue that any claim that they breached their duty of loyalty by using Hearing Associates' confidential information is preempted by MUTSA. MUTSA contains a provision displacing "conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." Minn. Stat. § 325C.07(a) (2016). The provision does not affect "contractual remedies, whether or not based upon

misappropriation of a trade secret" or "other civil remedies that are not based upon misappropriation of a trade secret." *Id*. (b)(1), (2) (2016).

Minnesota appellate courts have not yet interpreted section 325C.07, but federal district courts applying Minnesota law have held that MUTSA displaces tort claims that contain no more to their factual allegations than the misappropriation of a trade secret. *SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC*, 292 F. Supp. 2d 1173, 1179 (D. Minn. 2003). Here, the district court granted appellants' motion for summary judgment on Hearing Associates' MUTSA claim, which was based on the misappropriation of the same information alleged to be confidential in the breach-of-loyalty claims. The breach-of-loyalty claims, however, are not based on the misappropriation of a trade secret. They encompass use of confidential information to directly compete with Hearing Associates while still employed at Hearing Associates, interference with leases, and Dr. Downs's attempt to hire a Hearing Associates' employee to work at HWC. Therefore, the breach-of-loyalty claims are not preempted.

The district court did not err by denying appellants' motion for JMOL on Hearing Associates' breach-of-loyalty claims.

Breach-of-loyalty jury instructions

Appellants claim that the district court abused its discretion by instructing the jury that "[e]mployees have the duty to refrain from interfering with leases or other business relationships benefitting their employer while employed by the employer." As stated above, district courts have "considerable latitude" in selecting jury instructions, and this

court reviews the district court's jury instructions for an abuse of discretion. *Rowe*, 702 N.W.2d at 735.

First, appellants argue that "no Minnesota appellate court has ever held that employees have a duty to 'refrain from interfering with leases.'" This is incorrect. As stated above, this court has held that an employee breaches the duty of loyalty by interfering with the employer's business contracts. *Marn*, 756 N.W.2d at 121-22.

Second, appellants maintain that the instruction was unfairly tailored to implicate Dr. Downs and Dr. Gervais. In support of this position, appellants cite *Gran v. Gran*. 129 Minn. 531, 532-33, 152 N.W. 269, 270 (1915). In that case, the supreme court reversed a jury verdict based on a supplemental jury instruction that "was a very able and persuasive argument in favor of plaintiff." *Id.* at 532, 152 N.W. at 270. The opinion does not quote the instruction. Here, the district court's accurate summation of what would constitute a breach of the duty of loyalty did not amount to an argument in favor of Hearing Associates. The jury remained free to find that appellants did not interfere with Hearing Associates' leases. And the jury was properly instructed that mere preparation to compete is not a violation of the duty of loyalty and that whether appellants breached the duty of loyalty should be "determined based on all of the circumstances."

Third, appellants claim that the instruction is inconsistent with the district court's summary-judgment determination that Dr. Downs and Dr. Gervais "did not employ wrongful means" in communicating with the Cloquet and Two Harbors clinics. This determination related to the district court's dismissal of Hearing Associates' tortious-interference-with-contract claim. That claim had different elements than the duty-of-

loyalty claims. *See Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241 (Minn. App. 2000) (stating elements of tortious interference with contract). It required a showing that appellants intentionally caused the breach of Hearing Associates' leases and interfered with the leases by means that were "independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law." *Id.* (quotation omitted). The district court's determination that appellants' conduct did not rise to that level is not inconsistent with its duty-of-loyalty jury instruction.

The district court did not abuse its discretion by instructing the jury that interfering with an employer's lease constitutes a breach of the duty of loyalty.[3]

Wage and commission forfeiture

Appellants argue that the district court abused its discretion by ordering wage and commission forfeiture. The district court awarded Hearing Associates $66,582.53 in Dr. Downs's forfeited wages and commissions and $78,580.86 in Dr. Gervais's forfeited wages and commissions. The forfeiture was the result of the district court's finding that Dr. Downs and Dr. Gervais breached the duty of loyalty intentionally and in bad faith.

Forfeiture is an equitable remedy. *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. App. 2006). There is no right to a jury trial for equitable

[3] In their reply brief, appellants raise additional challenges to the district court's breach-of-loyalty jury instructions. Because these issues were not raised in appellants' principal brief, we do not address them. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291 n.3 (Minn. App. 2007) (declining to address issue because it was first mentioned in party's reply brief).

remedies. *Id.* Although it may empanel an advisory jury, the district court acts as the finder of fact. *Id.* While "[m]oney damages are awarded as compensation for actual loss or injury," forfeiture is awarded to vindicate the right to loyalty, regardless of the amount of actual damages sustained. *Id*. This court reviews the district court's determination of the appropriate equitable remedy for an abuse of discretion. *Id.*

Appellants argue that forfeiture of wages and commissions is inappropriate in this case because Dr. Downs and Dr. Gervais owed no fiduciary duties to Hearing Associates. Forfeiture generally is the result of the breach of a fiduciary duty. *E.g.*, *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986) (discussing fee forfeiture in context of attorney's fiduciary duty to client). But wage and commission forfeiture has also been applied to an employee's breach of the duty of loyalty. *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989). "Every employment contract encompasses implied duties of honesty and loyalty, which if breached by the employee, results in the employer owing the employee nothing." *Id.* In cases of "actual fraud or bad faith," full forfeiture is appropriate. *Gilchrist*, 387 N.W.2d at 417. But when there is no actual fraud or bad faith or when no actual harm is sustained, the court may scale the amount of the forfeiture by considering the factors in Minn. Stat. § 549.20, subd. 3 (2016). *Id.*

Appellants attempt to distinguish *Stiff* by arguing that it is limited to cases of "gross misconduct," such as embezzlement. But *Stiff* clearly states that every employment contract contains duties of honesty and loyalty and that if those duties are breached, forfeiture is an appropriate remedy. 436 N.W.2d at 780; *see also Marsh v. Minneapolis Herald, Inc.*, 270 Minn. 443, 447-48, 134 N.W.2d 18, 22 (1965) (stating that employment

contracts contain duty of loyalty and that breach of that duty can result in forfeiture of compensation).

As already discussed, the jury properly found that Dr. Downs and Dr. Gervais breached their duty of loyalty to Hearing Associates. The district court found that the breach was in bad faith and was "intentional, purposeful, willful, duplicitous, concerted, and evinced a joint effort to finance, organize, and launch a business in direct competition with [Hearing Associates] while in the employ of [Hearing Associates] and while being 'on the clock' for [Hearing Associates]." Both the district court and the jury also found that Hearing Associates was damaged by Dr. Downs's and Dr. Gervais's conduct. The evidence supports these findings, and the findings support the equitable remedy of forfeiture. The district court did not abuse its discretion by ordering that remedy.

Findings of fact

Appellants argue that the following district court finding of fact addressing the forfeiture remedy is clearly erroneous: "With respect to the individual [d]efendants[']breach of their contractual duty of loyalty to [p]laintiff, said breaches were, as shown by the trial evidence and *found by the jury, intentional, purposeful, willful, duplicitous, [and] concerted* . . . ." (Emphasis added.) Appellants do not argue that the evidence fails to support a finding that their breach of the duty of loyalty was "intentional, purposeful, willful, duplicitous, [and] concerted." They take issue only with the district court's characterization of the jury verdict.

This court reviews the district court's factual findings for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). A finding will stand if there

is "reasonable evidence" in the record to support it. *Id.* (quotation omitted). A finding is clearly erroneous when this court is "left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

The special verdict form did not ask the jury to determine whether appellants' breach of the duty of loyalty was "intentional, purposeful, willful, duplicitous, [or] concerted." The jury merely found that Dr. Downs and Dr. Gervais breached their duties and caused Hearing Associates harm. The jury also was not instructed that to find a breach of the duty of loyalty it needed to find that Dr. Downs and Dr. Gervais acted intentionally, purposefully, willfully, duplicitously, or concertedly. Accordingly, the jury did not explicitly find that the breach was "intentional, purposeful, willful, duplicitous, [or] concerted."

Nevertheless, the district court's finding is a fair interpretation of the evidence as a whole. The evidence shows that, while working at Hearing Associates and supposedly negotiating to buy Hearing Associates from Dr. Voss, appellants were secretly setting up a rival audiology clinic that would compete directly with Hearing Associates. They used Hearing Associates' confidential financial and patient information to create a business plan. The business plan even states that HWC will "target[]" "[c]linics where physicians have historically referred to Hearing Associates." And indeed, appellants negotiated leases with the Two Harbors and Cloquet clinics that resulted in the termination of Hearing Associates' long-standing agreements with those clinics.

Although the jury did not explicitly find that appellants' breach of the duty of loyalty was "intentional, purposeful, willful, duplicitous, [and] concerted," given the evidence, the

district court's finding of fact is a reasonable interpretation of the jury's verdict. The district court's finding is not clearly erroneous.

Cumulative error

In their final claim, appellants maintain that they are entitled to a new trial based on several alleged evidentiary errors and the district court's finding that HWC is jointly and severally liable for breach-of-loyalty damages. Appellants fail to cite any legal authority or facts to support these claims. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Rutt*, 824 N.W.2d at 648 (quotation omitted). We have examined the record and appellants' claims and see no obvious prejudicial error. Accordingly, we do not address these claims.

Amount of lost-profits damages

Pursuant to its NORA, Hearing Associates argues that the jury verdict entitles it to recover $218,302.36 in lost profits for its breach-of-loyalty claim. The jury found that $109,151.18 was necessary to compensate Hearing Associates for Dr. Downs's breach of the duty of loyalty and that the same amount was necessary to compensate Hearing Associates for Dr. Gervais's breach of that duty. Based on this verdict, the district court determined that Dr. Downs, Dr. Gervais, and HWC are jointly and severally liable for $109,151.18. The district court denied Hearing Associates' motion to double this amount. The district court found that Hearing Associates agreed that the award would not be doubled if the jury found Dr. Downs and Dr. Gervais liable for the same amount of lost

profits. As stated above, this court reviews the district court's findings of fact for clear error. *Rasmussen*, 832 N.W.2d at 797.

The record supports the district court's finding. Prior to jury instructions, the parties discussed the potential problems with allowing the jury to specify a damages amount for both Dr. Downs and Dr. Gervais. The parties agreed that if the jury returned the same lost-profits award for both doctors, the amount would not be doubled. Accordingly, the district court's finding is not clearly erroneous, and the district court did not err by denying Hearing Associates' request to double the award.

Prejudgment interest

Also pursuant to their NORA, Hearing Associates argues that the district court erred by failing to award prejudgment interest. At the time this appeal was filed, Hearing Associates' motion for prejudgment interest was pending before the district court. Presumably because of this appeal, the district court has yet to take action on the motion.

We need only consider issues that were presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because the issue of prejudgment interest is pending before the district court and has not been decided, we do not address it.

Affirmed.