STATE OF MINNESOTA
IN COURT OF APPEALS
A11-635

Viking Produce, Inc.,
Appellant,

vs.

Northstar Produce, LLC, et al.,
Respondents.

Filed January 23, 2012
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-07-22943

Arlo H. Vande Vegte, Arlo H. Vande Vegte, P.A., Plymouth, Minnesota (for appellant)

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Considered and decided by Wright, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

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

BJORKMAN, Judge

Appellant sued its former broker and his new company for breach of fiduciary duty and tortious interference with contract related to respondents' act of hiring away

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

four of appellant's other brokers. Appellant challenges the jury's verdict in favor of respondents and the district court's indemnification order, arguing that the district court abused its discretion in bifurcating the liability and damages issues for trial and made numerous errors with respect to its evidentiary rulings, jury instructions, posttrial rulings, and order requiring appellant to indemnify respondents for their attorney fees and costs. We conclude that the district court did not abuse its discretion by bifurcating the trial and affirm in part. But because certain jury instructions were erroneous and prejudicial to appellant, we reverse in part and remand for a new trial consistent with this opinion.

FACTS

Appellant Viking Produce, Inc., operated as a fresh produce broker from 1986 through 2006. Viking owner Terry Heitland hired his nephew, respondent Brandon Melz, as a broker in 1988. Melz became vice president of Viking in the late 1990s. By 2006, Viking employed four brokers in addition to Melz.

Over the years, Melz became dissatisfied with Viking's operation and approached Heitland about purchasing the business. Heitland was not interested. In March 2006, Melz formed his own produce company, respondent Northstar Produce, Inc. On June 6, after Heitland again refused to sell Viking, Melz resigned. On June 9, Northstar sent faxes to members of the produce industry, including Viking, announcing that Northstar was open for business. Viking's four remaining brokers resigned that afternoon. The following morning, the brokers became Northstar employees. Heitland was unable to run Viking on his own, and Viking ceased operations in November 2006.

Viking sued Northstar and Melz (collectively, respondents), alleging tortious interference with contract, breach of the duty of loyalty, unfair competition, and, in an amended complaint, breach of fiduciary duties. The district court granted summary judgment dismissing all of Viking's claims. This court reversed, holding that there was a material question of fact underlying each claim: "whether, while he was still a Viking officer and employee, Melz solicited the other Viking brokers to leave Viking and work for him and Northstar." *Viking Produce, Inc. v. Northstar Produce, LLC*, No. A09-377, 2010 WL 695817, at *2 (Minn. App. Mar. 2, 2010). On remand, the district court granted respondents' motion to bifurcate the liability and damages issues for trial. At the liability phase of the trial, the jury found in favor of respondents on all claims. Viking appeals.

D E C I S I O N

I. The district court did not abuse its discretion by bifurcating the trial into a liability phase and a damages phase.

Bifurcation of issues for trial is appropriate when it promotes convenience or avoids prejudice. Minn. R. Civ. P. 42.02. "A district court has wide discretion to grant separate trials, and its decision will not be overturned absent a clear abuse of that discretion." *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007).

Respondents moved the district court to bifurcate the issues of liability and damages to promote efficiency. The district court granted the motion, explaining:

> I believe that it's appropriate, imminently reasonable and not at all prejudicial to bifurcate this trial . . . . [T]he sole issue is whether Melz recruited Viking's brokers while still at Viking? That's the dispositive question; it's the only question

> and takes care of everything else. If it is that Mr. Melz recruited brokers while still at Viking, then we will try damages. If Mr. Melz did not, we will not try damages and the case will be over having been found that there's no liability.

Viking contends that the district court's legal and factual analyses are flawed in three ways. We address each argument in turn.

First, Viking argues that "there should be a truly palpable reason for bifurcation," and such a reason is absent here because trying liability and damages together would not significantly lengthen the trial. We disagree. The Minnesota Rules of Civil Procedure do not require a "palpable" judicial-economy justification for bifurcation. Minn. R. Civ. P. 42.02 provides that the court may bifurcate a trial "when separate trials will be conducive to expedition and economy." Viking's argument is therefore unavailing.

Second, Viking contends that the district court abused its discretion because denial of bifurcation would not have prejudiced Melz and Northstar. We are not persuaded. Bifurcation may be appropriate regardless of whether it serves to avoid prejudice to one party. *Id.* (stating that the court may order separate trials "in furtherance of convenience *or* to avoid prejudice, *or* when separate trials will be conducive to expedition and economy" (emphasis added)). Accordingly, the district court did not commit legal error in focusing on efficiency. And we note bifurcation would indeed save the parties time and judicial resources; if Viking did not prevail during the liability trial, the damages trial would be unnecessary.

Third, Viking argues that bifurcation is improper because the liability and damages issues are interrelated. We disagree. Viking cites no authority for the

proposition that bifurcation of interrelated issues is improper. Moreover, even if interrelatedness may preclude bifurcation, the district court did not abuse its discretion in concluding otherwise here. Viking asserts that it was prejudiced by bifurcation because its expert witness, Joseph D. Kenyon, CPA, was not permitted to testify to Viking's and Northstar's potential profits, which are relevant both to Viking's damages and to Melz's motive to solicit the brokers. But the district court allowed Heitland to testify to the substantial revenue generated by the produce brokerage business and the $4.7 million gross profits that Viking earned the year prior to the brokers' departure. In other words, Viking was able to introduce evidence of the financial impact of Melz's alleged conduct. We discern no abuse of discretion in the district court's bifurcation decision.[1]

II. The tortious-interference-with-contract and competitor's-privilege instructions were erroneous in the context of this case and prejudiced Viking.

"We review a district court's decision on jury instructions for an abuse of discretion." *Engquist v. Loyas*, 803 N.W.2d 400, 403 (Minn. 2011). An instruction is erroneous if it "materially misstates the law," *id.*, or "is so misleading that it renders incorrect the instruction as a whole," *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). We consider the correctness of jury instructions in context and as a whole. *Id.*

[1] Viking also complains that the district court granted the motion for a bifurcated trial even though it was untimely. But nothing in Minn. R. Civ. P. 42.02 prohibits a district court from granting an untimely motion for bifurcation, nor has Viking provided any evidence that the district court abused its discretion in doing so. *See State v. Christian*, 657 N.W.2d 186, 192 (Minn. 2003) (explaining that the district court has discretion to decide whether to consider an untimely motion).

Viking argues that the tortious-interference and competitor's-privilege instructions were erroneous in the context of this case because, while correct statements of the law, they are misleading when the defendant is a fiduciary of the plaintiff. Viking asserts that the erroneous instructions prejudiced its case. We turn first to the correctness of the two instructions.

A. The instructions were erroneous.

Viking challenges the italicized portion of the district court's tortious-interference instruction: "A claim for tortious interference with contract may apply to at-will employment relationships only where the defendant improperly solicits employees away from their employer. *Merely offering a job is not improper interference with an at-will employment contract.*" We agree that the instruction is erroneous in the context of this case. Tortious interference requires "intentional" and "improper" interference with another's contract. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632-33 (Minn. 1982). Although merely offering a job to the employee of another generally does not constitute improper interference with another's contract, *see, e.g.*, *Hough Transit, Ltd. v. Nat'l Farmers Org.*, 472 N.W.2d 358, 361 (Minn. App. 1991), this general rule is inapplicable where, as here, the offeror owes a fiduciary duty to the employer. It is "improper" for a corporate fiduciary to offer the corporation's employees competing jobs. A fiduciary's intentional offer of a competing job constitutes tortious interference with contract. Because the district court's instruction misstated the law, it was erroneous.[2]

[2] We also note that the instruction is flatly contradicted by this court's remand, in which we determined that each of appellant's claims turned on the question of "whether, while

Moreover, the combination of the tortious-interference instruction and the fiduciary-duty instruction wrongly suggests that a fiduciary owes no duty to the corporation to refrain from offering competing jobs to its employees.

Tortious-Interference Instruction	**Fiduciary-Duty Instruction**
A claim for tortious interference with contract may apply to at-will employment relationships only where the defendant *improperly solicits* employees away from their employer. Merely offering a job is not *improper* interference with an at-will employment contract.	It has already been determined that no activity other than *improper solicitation* of [the brokers] can be the basis for finding a breach of fiduciary duty by [Melz].

(Emphasis added.) The repeated use of the word "improper" suggests that the fiduciary-duty instruction incorporates the tortious-interference instruction, particularly given that the district court told the jury to consider all the instructions together. In other words, a jury considering the instructions together would reasonably understand that offering a job is not sufficient to sustain either the tortious-interference or breach-of-fiduciary-duty claims.

Viking's challenge to the competitor's-privilege instruction likewise focuses on the misleading nature of the instruction in the context of this case. The instruction stated:

> Competition is favored in the law. Competition may justify [respondents'] actions.
>
> [Respondents] did not improperly interfere with [the brokers'] at-will employment with [Viking] if:

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he was still a Viking officer and employee, Melz solicited the other Viking brokers to leave Viking and work for him and Northstar." *Viking Produce, Inc.*, 2010 WL 695817, at *2.

> 1. The alleged interference concerned a matter of competition between [respondents] and [Viking];
> 2. [Respondents] did not employ wrongful means in the course of the alleged interference; and
> 3. [Respondents'] purpose was to advance their interest in competing with [Viking].
>
> [Respondents] have the burden to show that their actions were justified.

Viking argues that the instruction is erroneous because Melz was not free to compete with Viking while he was still its employee. We agree. Although this instruction is a correct statement of the law, it is misleading in the context of this case. *See United Wild Rice*, 313 N.W.2d at 633 (applying a substantially similar competitor's privilege to a defendant who was no longer employed by plaintiff and who began to compete after the parties' non-compete agreement had expired). The competitor's-privilege instruction fails to clarify that Melz was only privileged to compete with Viking after he left Viking. Because the surrounding instructions and the closing arguments all focus on what Melz did while he was employed at Viking, the instruction is misleading: it suggests that what would otherwise constitute a breach of fiduciary duty or tortious interference with contract would be justified if Melz was acting in competition with Viking.

B. The erroneous jury instructions prejudiced Viking.

Having determined that the challenged instructions are erroneous, we consider the question of prejudice. We will only order a new trial if "there is a reasonable likelihood that the [instruction] would have had a significant effect on the verdict of the jury." *Domagala v. Rolland*, 787 N.W.2d 662, 673 (Minn. App. 2010) (quotation omitted), *aff'd*, 805 N.W.2d 14 (Minn. 2011).

Viking argues that these erroneous instructions were prejudicial. We agree. It is reasonably likely that the jury believed that Melz offered jobs to the brokers while he still worked for Viking. If so, the instructions given would lead the jury to conclude that (1) because Melz merely offered jobs to the Viking brokers, respondents did not tortiously interfere with any contracts, and (2) because merely offering a job to the Viking brokers is not "improper solicitation," Melz did not breach his fiduciary duties. Additionally or alternatively, the jury may have believed that all of respondents' actions were motivated by competition, in which case, it would conclude that the competitor's privilege shielded respondents from liability on any legal theory.

Moreover, the evidence was not so overwhelmingly in respondents' favor that we can conclude that the erroneous instructions did not prejudice Viking. Although respondents produced direct evidence that supports the jury's verdict, Viking presented significant circumstantial evidence that Melz secured the brokers' agreement to work for him prior to June 6, including evidence that (1) Melz was able to procure a $1 million loan to start his own company; (2) Melz told the bank he would hire six employees, indicating that he had already secured the six employees he eventually hired, including the four brokers; (3) the brokers earned high salaries at Viking and would be unlikely to quit their jobs at Viking without first securing their positions at Northstar; and (4) all of the brokers quit working for Viking within a day of one another, suggesting that they were working in concert to direct Viking's business over to Northstar. In closing argument, Viking's counsel gave the jury reasons to doubt Melz's and the brokers' testimony. He emphasized that they had financial interests in protecting Northstar from a

devastating monetary judgment, they were bitter toward Viking's owner, and inconsistencies in their testimony showed that they were lying. On this record, we conclude that it is reasonably likely that the erroneous instructions had a significant effect on the verdict and prejudiced Viking. Accordingly, we reverse and remand for a new trial.

Because the erroneous jury instructions warrant a new trial, we need not address Viking's other allegations of trial and posttrial errors. Nevertheless, because we remand to the district court for a new trial, we will address Viking's claim of judicial bias.

Viking asserts that the district court was biased against its case, as shown by its many rulings against Viking. We disagree. "[A]dverse rulings by a judge, without more, do not constitute judicial bias." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). The record shows that the district court carefully considered the numerous issues the parties presented and ruled in Viking's favor in several important respects (e.g., denying respondents' motion to dismiss Viking's claims against Northstar and admitting evidence of legal steps that Melz took to start up Northstar). On this record, and in the absence of any evidence of judicial bias, we conclude that Viking is not entitled to relief on this basis.

Affirmed in part, reversed in part, and remanded.