IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WESTERN BLUE PRINT COMPANY, LLC,	)	
Respondent,	)	
v.	)	**WD72025**
	)	**OPINION FILED: April 29, 2011**
MYRNA ROBERTS, MEL ROBERTS, DOCUCOPY, LLC, and GRAYSTONE PROPERTIES, LLC,	)	
Appellants.	)	

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Gary M. Oxenhandler, Judge

Before Division II: Karen King Mitchell, Presiding Judge, and Joseph M. Ellis and Victor C. Howard, Judges

This case involves the torts of breach of fiduciary duty and interference with business expectancy. It also involves a statute that prohibits computer tampering. The primary issues are (1) whether the branch manager of a limited liability company owes a fiduciary duty to the company; (2) whether the company's expectation of winning the bid to a contract was a valid business expectancy; and (3) whether the branch manager in this case copied and/or deleted the company's computer files without authorization. We hold that, in the context of this case, (1) the

branch manager owed the company a fiduciary duty; (2) the company's expectation of winning the contract bid was sufficiently definite to justify submission of the tortious interference claim; and (3) a reasonable juror could conclude that the branch manager copied and/or deleted company computer files without authorization. There are various other points relied upon by the appellants, but we reject them all. Accordingly, we affirm.

Facts and Procedural Background[1]

Respondent Western Blue Print Company, LLC ("Western Blue") is a company that specializes in document printing and document management services. Western Blue hired Appellant Myrna Roberts to set up and run a branch office in Columbia, Missouri. Western Blue gave Ms. Roberts the authority to run the Columbia office. That authority included the ability to hire, fire, and manage employees; oversee production; make sales; provide customer service; and develop customer relationships.

Eventually, Western Blue promoted Ms. Roberts from branch manager to division vice-president of Western Blue. As division vice-president, Ms. Roberts attended executive meetings where Western Blue devised its strategic business plans. Ms. Roberts was exposed to virtually every aspect of Western Blue's business, including financial, strategic, and competitive information that Western Blue considered its "secret recipe."

Ms. Roberts succeeded in procuring a contract with the University of Missouri ("University") for Western Blue. Essential to this contract ("the University contract") was Western Blue's employment of a subcontractor that was certified as either a "Minority Business Enterprise" or a "Women's Business Enterprise" ("MBE/WBE"). Ms. Roberts and her husband, Appellant Mel Roberts, decided to create such an entity themselves, but they did not inform

[1] On appeal from a denial of a motion for judgment notwithstanding the verdict, we review the facts in the light most favorable to the verdict. *All Am. Painting, LLC v. Fin. Solutions & Assocs.*, 315 S.W.3d 719, 720 (Mo. banc 2010).

Western Blue that they were doing so. This entity would eventually become known as DocuCopy, LLC ("DocuCopy"). Graystone Properties, LLC ("Graystone"), which was a real estate company owned by Mr. Roberts, would own 49% of DocuCopy, and a woman named Micki Marrero would own 51%. Ms. Roberts would provide DocuCopy with the expertise and knowledge of how to operate a document services company.

Initially, Mr. Roberts was "calling the shots" at DocuCopy. Later, Marrero also followed instructions from Ms. Roberts. Eventually, Mr. Roberts was not actively running DocuCopy at all; rather, he was simply relaying messages to Marrero from Ms. Roberts. Marrero communicated directly with Mr. Roberts as opposed to Ms. Roberts to avoid a conflict of interest with Western Blue. Mr. Roberts told Marrero that, if someone asked who owned DocuCopy and Graystone, she should feign ignorance.

DocuCopy began operating in the building next to Western Blue's office. Mr. Roberts also maintained offices for various other businesses, including Graystone, in the same location. Mr. Roberts met with Ms. Roberts on an almost daily basis to discuss the business of DocuCopy. Ms. Roberts also sent technicians from Western Blue to DocuCopy in order to provide DocuCopy with free services.

DocuCopy's MBE/WBE application was initially denied. Mr. Roberts asked Marrero to lie on the second application, but she refused. As a result, Mr. Roberts terminated Marrero. Mr. Roberts could not explain how it was possible that he "terminated" Marrero, who owned 51% of DocuCopy.

After Marrero's departure from DocuCopy, Mr. Roberts approached Cherri Rutter, who was his assistant at Graystone, and asked her to take over Marrero's "position." Rutter knew nothing about the printing business. When Rutter said she did not want the job, Mr. Roberts told

her he would fire her from Graystone if she did not accept it. Rutter reluctantly accepted. Rutter then acquired 51% of DocuCopy.

Mr. Roberts instructed Rutter to "run everything" through Ms. Roberts. It took several months for DocuCopy's application for MBE/WBE certification to be approved, but, soon after DocuCopy obtained the approval, Mr. Roberts "terminated" Rutter. Mr. Roberts told Rutter that she was not to tell anyone that she was no longer employed by DocuCopy and was to say that she worked for Mr. Roberts from home.

Prior to leaving DocuCopy, Rutter was told to file DocuCopy's tax returns for 2004 showing her as 100% owner because Mr. Roberts did not want Graystone to be reflected as an owner. DocuCopy's 2005 tax returns also falsely listed Rutter as the 100% owner of DocuCopy.

Western Blue's understanding was that DocuCopy was primarily a subcontractor with regard to the University contract. However, shortly after Vince Pingel became managing director of Western Blue, he began to question who owned and managed DocuCopy. When a Western Blue representative asked Ms. Roberts who owned DocuCopy and Graystone, Ms. Roberts failed to disclose her husband's interest—or her own role—in either company.

Pingel was also suspicious of the rate that Western Blue was paying DocuCopy for subcontractor services. In fact, Western Blue paid DocuCopy over 90% of all funds Western Blue received from clients for work subcontracted to DocuCopy, whereas a typical subcontractor would receive approximately 60% of such funds.

Pingel asked Ms. Roberts to meet with him to discuss DocuCopy, its relationship to her, and the work it was performing for Western Blue. Ms. Roberts agreed but asked if Mr. Roberts could also attend. At the meeting, Ms. Roberts assured Pingel that she had no interest in

DocuCopy and that she received no financial benefit from DocuCopy. Mr. Roberts did not disclose his interest in DocuCopy either.

While still division vice-president for Western Blue, Ms. Roberts recruited the employees from Western Blue's Columbia office to begin working for DocuCopy. Ms. Roberts implied that they would need to leave without giving notice. Ms. Roberts gave the employees she recruited the impression that she was confident that DocuCopy would successfully bid on the University contract in 2006.

While still employed by Western Blue, Ms. Roberts spoke with a representative from the University regarding what the specifications would be for bidding on the University contract in 2006. The purpose of the conversations was to gain an advantage in the bidding process. After one such conversation, Ms. Roberts indicated that she had the University contract "locked up."

Around the same time, an employee of Western Blue encountered Ms. Roberts leaving Western Blue at night, after the closing hour, with numerous boxes, which were apparently full of files.

Later, after Ms. Roberts quit Western Blue, Pingel searched Western Blue's Columbia office and found no hard copies of essential sales documents. Pingel testified that the lack of such information essentially prevented Western Blue from serving its customers out of the Columbia office in the near-term.

In March of 2006, Western Blue was purchased by a third party for approximately $7,900,000. An expert testified that the Columbia branch of Western Blue was worth approximately $424,000, just over 5% of the total purchase price.

On March 31, 2006, Ms. Roberts called Pingel and informed him that she would refuse to sign a new employment agreement offered by Western Blue, which included a non-compete

clause. She did not, however, resign. After his conversation with Ms. Roberts, Pingel drove to Columbia to assess the situation. When Pingel arrived, one of the employees handed him the keys to the Columbia office and told him that everyone was "gone."

Ms. Roberts purchased a 100% interest in DocuCopy from her husband for $100. Almost all of the other Western Blue employees in Columbia then joined DocuCopy. Bids for the University contract were due in June of 2006, two months after Ms. Roberts and the other employees left Western Blue.

Western Blue conducted an analysis of Ms. Roberts's company laptop. The analysis revealed that files had been deleted, including Western Blue's database of customer names, contacts, and sales history. Other files that had been deleted included Western Blue's business records containing financial information, strategic planning, profit analysis, and cost analyses. Pingel testified that the files included sensitive competitive information.

An expert testified that files had been deleted from Ms. Roberts's company laptop computer starting in January of 2006 and that the deletions continued until April 3, 2006. Western Blue was able to recover some of these files. Among the deleted and recovered documents was one entitled "Competitive Edge for MU Contract Renewal 2006," which included a strategic discussion of how to renew Western Blue's contract with the University. Other computer files that were deleted and subsequently recovered from Ms. Roberts's laptop included data files associated with Western Blue's provision of services to the University. These documents were not recovered in time to be used in the bid for the University contract. Pingel testified that the loss of these documents, combined with the loss of its key personnel from the Columbia office two months before the bid to renew its contract with the University was due, severely hampered Western Blue's efforts to win the bid for the University contract.

Both Western Blue and DocuCopy presented bids for the University contract. The University awarded DocuCopy the contract. Western Blue's bid ranked second among the four bids presented to the University. In fact, a representative of the University testified that Western Blue's was "very close" to DocuCopy's winning bid. Western Blue had successfully bid on the University contract the previous two times the University had solicited bids. The University contract was by far the largest contract that Western Blue's Columbia branch had. Western Blue's president testified that losing the University contract also meant that Western Blue would lose the State of Missouri contract, which was the second biggest contract that the Columbia branch of Western Blue had. The president testified further that, as a result of losing both the University contract and the State of Missouri contract, Western Blue was forced to close its Columbia branch.

Western Blue sued Ms. Roberts for, among other things, breach of fiduciary duty, tortious interference, and computer tampering. Western Blue also sued Mr. Roberts for civil conspiracy. The case was tried by a jury in the Circuit Court of Boone County, the Honorable Gary Oxenhandler presiding. The Robertses moved for directed verdict on all claims, but the trial court denied the motion. The court also overruled the Robertses' objection to the instruction for breach of fiduciary duty that the trial court submitted to the jury. The jury returned a verdict for Western Blue on each of the claims asserted against the Robertses, and it awarded Western Blue a total of $565,000.[2] Pursuant to section 537.525.2,[3] the circuit court assessed attorneys' fees in the amount of $224,489.18 for the work conducted on the computer tampering claim.

[2] We note that the propriety of this amount is not before us.
[3] Statutory citations are to RSMo 2000, as updated through the 2010 cumulative supplement.

The Robertses moved for judgment notwithstanding the verdict and for a new trial, but the trial court denied the motion. The Robertses appeal.[4]

Standard of Review

> Various standards of review apply to the issues that the Robertses raise on appeal.
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> Because a directed verdict or judgment notwithstanding the verdict should only be granted where the plaintiff fails to make a submissible case, our review is restricted to determining whether the plaintiff made a submissible case. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case. In reviewing for a submissible case, this court must accept all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence. This [c]ourt will not, however, supply missing evidence nor grant the plaintiff the benefit of any unreasonable, speculative, or forced inferences. Furthermore, [i]f the denial of a directed verdict or judgment notwithstanding the verdict is based upon a conclusion of law, we review the trial court's decision *de novo*.

Kelly v. State Farm Mut. Auto. Ins. Co., 218 S.W.3d 517, 520-21 (Mo. App. W.D. 2007) (citations and quotation marks omitted).

Whether a duty exists is a question of law, and we review such questions *de novo*. *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 266 (Mo. App. W.D. 2002). Whether a duty has been breached is generally an issue of fact for the jury, *id*., and we will affirm the jury's decision so long as substantial evidence existed to support the jury's verdict. *See Kelly*, 218 S.W.3d at 520-21. Whether a jury instruction is proper is a question of law, but we will not reverse unless the instruction misled, misdirected, or confused the jury, and there is a substantial

[4] The Robertses ask us to dismiss their own appeal, alleging that not all issues or all parties to this litigation were disposed of; that there is no final judgment; and that therefore this court lacks jurisdiction over the appeal. We have jurisdiction in this case, and therefore we decline to dismiss the appeal. Western Blue has abandoned its claims against DocuCopy and Graystone—the only other parties it initially sued. Western Blue also abandoned certain other claims, including a claim based on an alleged breach of the duty of loyalty, that it had asserted against Ms. Roberts. The only claim Western Blue asserted against Mr. Roberts was civil conspiracy, which the trial court disposed of, along with all the claims Western Blue asserted against Ms. Roberts. Accordingly, all issues and all parties have been disposed of, and therefore the order appealed from was a final judgment, *see Lake v. McCollum*, 324 S.W.3d 481, 487 (Mo. App. W.D. 2010), and appellate jurisdiction has attached. Rule 74.01(a).

showing that prejudice resulted. *Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co.*, 168 S.W.3d 488, 497-98 (Mo. App. E.D. 2005).

Whether a claimed business expectancy is facially reasonable is a question of law; however, once the legal threshold of reasonableness has been passed, whether the expectancy was *valid* is a question for the jury to answer. *Londoff v. Walnut St. Secs., Inc.*, 209 S.W.3d 3, 9-10 (Mo. App. E.D. 2006) (granting summary judgment with respect to some of the plaintiff's claimed expectancies but denying it with respect to others). We will therefore affirm a jury's award unless the plaintiff adduced no probative facts to support the expectation. *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 250 (Mo. banc 2006).

Likewise, whether Ms. Roberts copied and/or deleted computer files without authorization is a question of fact, and we will affirm the jury's decision on that issue provided there was substantial evidence to support it. *See Kelly*, 218 S.W.3d at 520-21.

The appropriateness of an attorneys' fee award made pursuant to a statute is a matter for the trial court's discretion, and we will affirm absent an abuse of that discretion. *Structure & Design Unlimited, Inc. v. Contemporary Concepts Bldg. & Design, Inc.*, 151 S.W.3d 904, 910 (Mo. App. W.D. 2004).

Legal Analysis

I. Fiduciary Duty

The Robertses argue that the trial court erred in denying their motion for judgment notwithstanding the verdict with respect to the fiduciary duty claim in that Ms. Roberts owed no duty to Western Blue. Under the same theory, the Robertses also argue that the trial court erred in submitting a jury instruction that permitted the jury to find that a duty had been breached. We disagree on both points.

A. Whether a fiduciary duty existed

The Robertses argue that Ms. Roberts owed no fiduciary duty to Western Blue. We disagree.

To prevail on a breach of fiduciary duty claim, the plaintiff must prove that such a duty existed, that the defendant breached it, and that the breach proximately caused the plaintiff's damages. *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 381 (Mo. App. E.D. 2000). The Robertses challenge the first element: the existence of a fiduciary duty.

"A fiduciary relationship is created and established where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *McKeehan v. Wittels*, 508 S.W.2d 277, 280 (Mo. App. 1974) (quotation marks omitted). "A confidential relationship is usually found when the person in whom confidence is reposed had either control or influence over at least a portion of the transferor's property, finances[,] or business affairs." *Kay v. Kay*, 763 S.W.2d 712, 714 (Mo. App. E.D. 1989) (citations and quotation marks omitted).

1. Fiduciary duty distinguished from the duty of loyalty

In the context of an employer-employee relationship, the concepts of a "fiduciary duty" and a "duty of loyalty" are distinct, but they also may overlap to some extent. *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. banc 2005). All employees owe their employer a duty of loyalty. *Id.*; *Pollock v. Berlin-Wheeler, Inc.*, 112 S.W.3d 73, 79 (Mo. App. W.D. 2003) ("An employee's fiduciary duty [of loyalty] has nothing to do with the parties' agreement in fact; it is a constructive term of every employment contract, unless waived by the parties."). However, an employee's duty of loyalty must be balanced against the employee's

right to compete with her employer once the employment relationship has ended.[5] *Scanwell*, 162 S.W.3d at 479 (quoting *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 41 (Mo. banc 1966)). Accordingly, an employee has some degree of latitude to plan and prepare to compete with her employer after the employment relationship has ended. *Id.* But that latitude is not unlimited: if the employee, while the employment relationship still exists, goes beyond mere planning and preparation and directly competes with her employer, or solicits her employer's customers, she has breached her duty of loyalty to the employer. *Id.* at 479-80.

While a fiduciary duty *includes* a duty of loyalty, it also requires more: the fiduciary agent is obligated to follow the principal's instructions, "to fully disclose all material facts to the principal, to strictly avoid misrepresentation[,] and in all respects to act with utmost good faith." *McKeehan*, 508 S.W.2d at 281. An agent bound by a fiduciary obligation "'is not allowed to put himself in a position antagonistic to his principal, or speculate in the subject of the agency. The most open, ingenuous, and disinterested dealing is required of him.'" *Utlaut v. Glick Real Estate Co.*, 246 S.W.2d 760, 763 (Mo. 1952) (quoting *Holt v. Joseph F. Dickmann Real Estate Co.*, 140 S.W.2d 59, 64 (Mo. App. 1940)). The fiduciary agent must act with the utmost good faith and fidelity toward the interests of her principal. *Groh v. Shelton*, 428 S.W.2d 911, 916 (Mo. App. 1968). "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). "Thus, the bonds created by a fiduciary relationship are stronger and the obligations are correspondingly more rigorous than those ascribed to the duty of loyalty." *Rash*

[5] We note that such a right exists only if the employee has not entered into a valid covenant not to compete agreement. *See Scanwell*, 162 S.W.3d at 460 (noting that the employee is free to compete with the employer *after* the employment relationship has ended *in the absence* of a restrictive agreement).

v. J.V. Intermediate, LTD., 498 F.3d 1201, 1211 (10th Cir. 2007). In short, the duty of loyalty prevents an employee from competing with the employer while the employment relationship persists; the fiduciary duty requires the agent to be honest and faithful to the principal in all respects associated with the agency.[6]

2. Whether and to what extent a general employee owes her employer a fiduciary duty in addition to a duty of loyalty

In Missouri, an employee's duty of loyalty is well-defined, *see Scanwell*, 162 S.W.3d at 479-80; *Nat'l Rejectors*, 409 S.W.2d at 41; however, the court in *Scanwell* left open the question of whether and to what extent an employee owes the employer a fiduciary duty. *Scanwell*, 162 S.W.3d at 479 ("Although the law is unclear whether or to what degree [fiduciary duty and duty of loyalty] overlap, in this case the question need not be resolved."). We must resolve that issue today, for Western Blue abandoned its claim for the breach of a duty of loyalty but submitted to the jury its claim for the breach of a fiduciary duty.

Agents owe their principals a fiduciary duty. *Groh*, 428 S.W.2d at 916. An agency relationship is created "if there has been a manifestation by the principal to the agent that the agent may act on [its] account, and consent by the agent so to act." *Id*. (quotation marks omitted). An agent is subject to the principal's control[7] with respect to matters within the scope of the agency, but the agent has the power to alter the legal relations between the principal and a third party. *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 60 (Mo. banc 1993).

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[6] As stated *infra*, an employee-agent's fiduciary duty yields to her right to plan and prepare for future competition and her right to keep those plans confidential.

[7] Our courts have stated both that an agent is subject to the principal's control, *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 60 (Mo. banc 1993), and that an agent is one "'who, in attaining the ends for which he is employed, is not subject to his principal's right of control over the manner in which he shall perform the acts that constitute the execution of his agency.'" *State ex rel. Cameron Mut. Ins. Co. v. Reeves*, 727 S.W.2d 916, 918 (Mo. App. S.D. 1987) (quoting *Douglas v. Nat'l Life & Accident Ins. Co.*, 155 S.W.2d 267, 271 (Mo. App. 1941)). To the extent these statements can be harmonized, it appears that an agent is *subject to* the principal's control, but the principal has relinquished control in part so that the agent has latitude to accomplish the goals of the agency in the manner she sees fit.

Missouri courts have analyzed this fiduciary relationship in many contexts. *See, e.g.*, *id.* at 60-61 (holding that independent travel agencies with authority to bind the airline were the agents of the airline and noting that they had fiduciary obligations to it); *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 697 (Mo. App. W.D. 2001) (holding that attorneys owe their clients fiduciary duties); *Zakibe*, 28 S.W.3d at 385 (holding that fiduciary relationship of principal to agent applies to corporate officers); *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 752 (Mo. App. E.D. 1990) (holding that stockbrokers owe their clients a fiduciary duty); *McKeehan*, 508 S.W.2d 280 (holding that a fiduciary relationship existed when agent was hired to manage the plaintiffs' investments); *Groh*, 428 S.W.2d at 916 (holding that a fiduciary relationship applied when the agent was employed to purchase real estate for the plaintiffs). However, as yet we have not spoken regarding whether and to what extent general employees are the fiduciary agents of their employer.

The employer-employee relationship, *without more*, does not create a fiduciary relationship outside the duty of loyalty. *See Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421 (Mo. App. E.D. 1986). However, when there is either an express or implied understanding of confidence, such a relationship can arise in the employer-employee context. *See id*. This case requires us to decide whether a general employee, entrusted with considerable control and responsibility for the employer's affairs but not officially designated as a corporate officer, owes the employer a fiduciary duty, apart from the duty of loyalty. We hold that such an employee owes her employer such a duty.

Other jurisdictions have taken a position similar to the one we now adopt, which is: not all employees owe their employer a fiduciary duty; however, such a duty does apply to those employees with whom the employer has entrusted confidence and control over a significant

portion of the employer's affairs. *See Rash*, 498 F.3d at 1211 ("[T]he fiduciary relationship establishes a distinct and separate obligation than the duty of loyalty . . . . The fiduciary duty exists because of the 'peculiar' trust between the employee-agent and his employer-principal."); *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 503 S.E.2d 278, 281 (Ga. 1998) ("The employee-employer relationship is not one from which the law will necessarily imply fiduciary obligations; however, the facts of a particular case may establish the existence of a confidential relationship between an employer and an employee . . . ."); *Stewart v. Ky. Paving Co.*, 557 S.W.2d 435, 438 (Ky. Ct. App. 1977) (holding that an employee held a fiduciary duty to his employer because the employer had placed special confidence and trust in him). In essence, an employee can become the employer's fiduciary agent when she has become the *de facto* officer or director of a significant portion of the employer's business. *See Kinesis Adver., Inc. v. Hill*, 652 S.E.2d 284, 295 (N.C. Ct. App. 2007) ("[A]n individual may owe a fiduciary duty to the corporation if he is considered to be a *de facto* officer or director, with authority for tasks such as signing tax returns, offering major input as to the company's formation and operation, or managing the company.").

The view of these jurisdictions is consistent with our previous cases, which have found a fiduciary duty in other contexts, when the plaintiff had entrusted the defendant with confidence, responsibility, and/or control over the plaintiff's business affairs. *See Vogel*, 801 S.W.2d at 752 (holding that a broker had a fiduciary duty because he has control over the money and property of the customer); *McKeehan*, 508 S.W.2d at 280 (requiring confidence and trust over handling property and business affairs to establish the existence of a fiduciary duty); *Kay*, 763 S.W.2d at 714 (finding no fiduciary relationship because the defendants had not been entrusted with confidence and control or influence over the decedent's financial affairs).

3. Whether Ms. Roberts owed Western Blue a fiduciary duty

Here, Ms. Roberts had been entrusted with confidence and control over a significant portion of Western Blue's business affairs. It is undisputed that Western Blue entrusted Roberts with control over its entire Columbia branch. She had the authority to hire, fire, and manage employees; oversee production; make sales; provide customer service; and develop customer relationships. There is no question that Western Blue manifested its consent for Ms. Roberts to act on its account and that Ms. Roberts agreed to so act. Nor is there any question that Ms. Roberts had the power to bind the legal relations of Western Blue, at least within the confines of the Columbia branch. The Robertses themselves refer to her as the "key employee" of the Columbia branch. Such a relationship implies an entrustment of confidence.[8] Although she was not an official member or manager of the limited liability company, she was the *de facto* manager in that she was the division vice-president of Western Blue and was the branch manager of the Columbia office, which constituted a significant portion of Western Blue's business. Under these circumstances, we hold that the fiduciary relationship of principal and agent existed between Western Blue and Ms. Roberts.

4. Whether Ms. Roberts's right to plan and prepare to compete with Western Blue protected her conduct

It is important to remember, however, that, absent an agreement to the contrary, an employee has a right to compete with the employer after the employment relationship has ended. *Nat'l Rejectors*, 409 S.W.2d at 26-27. Therefore, an employee-agent's fiduciary duty does not extend so far as to require the employee-agent to disclose her plans and preparations to compete with the employer in the future. *See id*. (Employees "may plan and prepare for their competing

[8] Even if such were not the case, there was ample testimony that the relationship was also a confidential one. Western Blue exposed Ms. Roberts to virtually all aspects of its business, including financial, strategic, and competitive information that it considered its "secret recipe." As addressed *infra*, in section I.B., this alternative basis for finding that a fiduciary duty existed was not submitted to the jury in this case.

enterprises while still employed. If such right is to be in any way meaningful for an employee not under contract for a definite term, it must be exercisable without the necessity of revealing the plans to the employer.") (internal citation omitted).

The Robertses argue that the exception noted in *National Rejectors* covers the entirety of her conduct. We disagree. First, it must be kept in mind that, generally speaking, the duty at issue in *National Rejectors* and clarified in *Scanwell* is an employee's duty of loyalty, not the fiduciary duty of an agent, which is the broader duty at issue here. However, absent a non-compete agreement, employees generally do have a right to plan and prepare to compete with their employer, *see Nat'l Rejectors*, 409 S.W.2d at 26-27, so long as they do not actually compete while the employment relationship persists. *See Scanwell*, 162 S.W.3d at 479. An employee-agent's fiduciary duties, along with her duty of loyalty, must yield to the agent's right to plan and prepare for post-employment competition.[9] *See Dwyer, Costello & Knox, P.C. v. Diak*, 846 S.W.2d 742, 748 (Mo. App. E.D. 1993) (holding that even an officer and director of a corporation has a right to plan and prepare to compete).

However, Ms. Roberts did more than plan and prepare to compete. A reasonable fact-finder could conclude that she: (1) aided her husband in setting up and managing DocuCopy; (2) concealed her husband's interests in DocuCopy and her beneficial interest in and control over DocuCopy; (3) disobeyed Western Blue's implicit instruction to divest herself of any interest in DocuCopy; (4) hired DocuCopy to perform services for Western Blue at an inflated price; (5) directed Western Blue employees to provide DocuCopy with services free of charge; (6) discussed and developed the strategy for bidding on the University contract with a representative of the University while knowing that she would use that strategy on behalf of

[9] We note that our holding on this point is confined to the general employee-agent context. An agent who was employed for a specific, unitary purpose—for example bidding on a tract of real estate—could not, consistent with her fiduciary duty, plan and prepare to terminate the agency relationship and then submit a competing bid.

DocuCopy and not Western Blue; (7) failed to disclose and/or destroyed documents containing the strategy for winning the bid for the University contract; and (8) intentionally sabotaged Western Blue's ability to compete for the University contract by organizing the departure of all key employees at the eleventh hour before the bid was due.

Thus, Ms. Roberts failed to follow instructions, failed to disclose material facts, misrepresented material facts, and otherwise failed to act with the utmost good faith and fidelity toward Western Blue's interests. *See Groh*, 428 S.W.2d at 916. These actions were done *while* the employment-agency relationship persisted, and they *were not* confined to mere planning and preparation to compete. *Cf. Nat'l Rejectors*, 409 S.W.2d at 26-27, 41. This case is therefore distinguishable from *National Rejectors*.

5. Whether Western Blue's status as a limited liability company exempted her from her fiduciary duty

The Robertses argue that, as a limited liability company, Western Blue could only be owed a fiduciary duty by a member or manager[10] of the company and that Ms. Roberts held no such position with the company. It is true that members and managers of a limited liability company owe a *statutory* duty to the company. § 347.088. However, the mere fact that section 347.088 imposes statutory duties on managers and members does not mean that the traditional *common law* duties owed by agents evaporate when the principal is a limited liability company. We see no reason why an agent's fiduciary duty should depend on the organizational character of the principal. *See Frye Tech, Inc. v. Harris*, 46 F. Supp. 2d 1144, 1152 (D. Kan. 1999) ("While most of the cases which have addressed the fiduciary responsibilities of agents under Kansas law

[10] Although Ms. Roberts clearly "managed" the Columbia branch, under the ordinary meaning of that term, we use "manager" in this context pursuant to the definition contained in section 347.015(10). A "manager" of a limited liability company is a person designated, appointed, or elected to that position pursuant to the company's operating agreement. § 347.015(10). There is no evidence that Ms. Roberts was a statutory manager of Western Blue.

have involved corporate directors or officers, there is no basis for concluding these are the only types of agents subject to fiduciary duties."). Indeed, the duties of corporate officers and directors are themselves based on the common law duty of an agent, *Zakibe*, 28 S.W.3d at 385, which is what is at issue here. We therefore reject the Robertses' argument that an agent who is not a manager or a member of a limited liability company can never owe the company a fiduciary duty.

Thus, Ms. Roberts owed Western Blue a fiduciary duty, her conduct went beyond the exception noted by *National Rejectors*, and Western Blue's status as a limited liability company did not exempt her from her fiduciary duty. Point denied.

B. The "fiduciary duty" instruction

The Robertses also argue that the trial court improperly instructed the jury on the issue of Ms. Roberts's fiduciary duty in that whether a fiduciary duty exists is a question of law, not a question of fact.[11]

"An instruction authorizing a verdict must require a finding of all ultimate facts necessary to sustain the verdict except those which have been unmistak[ab]ly conceded by both parties." *Young v. Kan. City Power & Light Co.*, 773 S.W.2d 120, 125 (Mo. App. W.D. 1989).

Assuming that a person has been entrusted with control over and responsibility for another's business, the former owes the latter a fiduciary duty as a matter of law. *Twin Chimneys*, 168 S.W.3d at 499. However, *whether* such control and responsibility has been so entrusted is a question of fact. *See id.* (approving an instruction to find for the plaintiff if the jury found that the defendant was a trustee with control over and responsibility for the plaintiff's

[11] The thrust of the Robertses' argument in this point is that no fiduciary relationship can exist for the branch manager of a limited liability company. We dispose of that argument *supra*. They also argue, with no citation to the record, that Western Blue did not plead a cause of action for the breach of a fiduciary duty. However, since Western Blue did plead such a cause of action, we need not address this argument further.

business); *Vogel*, 801 S.W.2d at 752 ("[A] jury properly instructed on the definition of 'control' . . . necessarily has been instructed on the definition of the fiduciary relationship.").

Here, the trial court instructed the jury as follows:

> On Western Blue's claim for breach of fiduciary duty against Defendant Myrna Roberts, your verdict must be for Western Blue if you believe:
>
> First, Defendant Myrna Roberts had control over and responsibility for directing Western Blue's Columbia, Missouri operation . . . .

As noted above, in the context of this case, control and responsibility over the Columbia branch was sufficient to establish a confidential relationship between Ms. Roberts and Western Blue. Thus, the trial court correctly instructed the jury to find the necessary facts—that Ms. Roberts had control over and responsibility over a significant portion of Western Blue's business—to establish the existence of a fiduciary duty. Point denied.[12]

II. Tortious Interference

The Robertses argue that the trial court erred in denying its motion for judgment notwithstanding the verdict with respect to the tortious interference claim in that Western Blue had no valid business expectancy in retaining the University contract. We disagree.

The elements of a tortious interference claim are as follows:

> (1) a contract or a valid business relationship or expectancy (not necessarily a contract);
>
> (2) the defendant's knowledge of the contract or relationship;
>
> (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship;
>
> (4) the absence of justification; and
>
> (5) damages, resulting from the defendant's conduct.

[12] We agree with the Robertses that, given that it is essentially undisputed that Ms. Roberts had control over and responsibility for the Columbia branch, whether a duty existed could have been decided as a matter of law in this case. However, it could have been decided in Western Blue's favor, not the Robertses'.

Londoff, 209 S.W.3d at 7. The Robertses challenge the first element: the validity of Western Blue's claimed business expectancy.

As noted above, whether a plaintiff's claimed business expectancy is reasonable and valid is a mixed question of law and fact. Some claimed expectancies are so tenuous that judgment as a matter of law can be granted in favor of the defendant on this element. *Londoff*, 209 S.W.3d at 7-9 (granting summary judgment with regard to expectancies that were prohibited by the subject contract); *Stehno*, 186 S.W.3d at 251 (holding that a business expectancy that is contrary to the terms of a contract on which the expectancy depends is facially unreasonable). However, if the expectancy is not facially unreasonable, it is for the jury to decide whether the expectancy was valid—that is, whether, but for the defendant's conduct, the plaintiff was more likely than not to have realized the expectancy. *Londoff*, 209 S.W.3d at 10 (finding certain other expectancies "valid on their face and not prohibited [by the subject contract]," and therefore holding that they were "matters best left for a jury to decide as an issue of fact"). Assuming the plaintiff convinces the court that the expectancy was not facially unreasonable, the plaintiff must still adduce substantial evidence of the expectancy's validity in order for the issue to be properly submitted to the jury. *Id*. at 7. "The valid business expectancy requirement involves more than a mere subjective expectancy—it must be a *reasonable* expectancy . . . ." *Stehno*, 186 S.W.3d at 250 (emphasis added).

Western Blue's expectation of renewing the University contract was not facially unreasonable. A business expectancy need not be based on an existing contract. *Id.* at 251. "[T]he prospect of winning a bid may constitute a reasonable expectancy of commercial relations supporting a tortious interference claim under Missouri law, where the plaintiff's prior relations

with the customer soliciting bids or other circumstances suggest that it could successfully compete." *Am. Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1143 (8th Cir. 1986).

Western Blue was still required to submit substantial evidence that its expectation in winning the bid for the University contract was valid. It did so. Western Blue had won the University contract each of the previous two times it was up for competitive bid. The University ranked Western Blue's bid for the 2006 contract second among the four submitted. Indeed, a representative of the University testified that Western Blue's bid was "very close" to DocuCopy's winning bid. Thus, a reasonable juror could have concluded that, more likely than not, but for Ms. Roberts's conduct, Western Blue would have won the bid. Accordingly, we hold that Western Blue submitted substantial evidence to support the validity of its business expectation.

Thus, Western Blue's business expectation was facially reasonable, and Western Blue adduced substantial evidence of its validity. Point denied.[13]

III. Computer Tampering

The Robertses argue that the trial court erred in denying its motion for judgment notwithstanding the verdict with respect to the computer tampering claim in that there was no evidence that Ms. Roberts improperly accessed, copied, or deleted information from her company laptop computer. We disagree.

Section 569.095 provides that

> [a] person commits the crime of tampering with computer data if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

[13] The Robertses' argument also implies that the fourth element of tortious interference—absence of justification—was lacking. For the purposes of a tortious interference claim, the defendant is not justified in engaging in tortious, illegal, or otherwise actionable conduct. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 192 (Mo. App. E.D. 2007). Since we conclude *supra* that Ms. Roberts breached her fiduciary duty and *infra* that she violated a statute, we deny this aspect of the Robertses' point.

> (1) Modifies or destroys data or programs residing or existing internal to a computer, computer system, or computer network; or
>
> (2) Modifies or destroys data or programs or supporting documentation residing or existing external to a computer, computer system, or computer network; or
>
> (3) Discloses or takes data, programs, or supporting documentation, residing or existing internal or external to a computer, computer system, or computer network[.]

Moreover, "the owner . . . of the computer system . . . may bring a civil action against any person who violates section[ ] 569.095 . . . for compensatory damages," and "the court may award reasonable attorney[s'] fees to a prevailing plaintiff." § 537.525.

Thus, in order to recover under this statute, Western Blue was required to prove that Ms. Roberts, knowingly and without authorization, destroyed, modified, took, or disclosed data from a Western Blue computer. Western Blue submitted expert testimony that thousands of files were deleted from Ms. Roberts's company laptop computer, among them documents that Western Blue viewed as essential to its ability to successfully bid on the University contract. The vast majority of the deletions occurred during the period just before Ms. Roberts left Western Blue. Western Blue also submitted evidence that Ms. Roberts had copied files, among them the strategic outline for obtaining the University contract and other documents containing competitive information. Given that the computer from which these files were deleted and/or copied was the company laptop computer assigned to Ms. Roberts, a reasonable juror could conclude that Ms. Roberts in fact knowingly deleted and/or copied these files. Ms. Roberts was not "authorized" to commit these acts, given that an agent has a duty not to work against her principal's interest in matters connected with the agency, *Scanwell*, 162 S.W.3d at 479; RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006), and, as explained *supra*, there was substantial

evidence that Ms. Roberts, in committing these acts, was subordinating Western Blue's interests to those of DocuCopy.

At oral argument, the Robertses' counsel clarified that the basis of their argument on this point is that the evidence revealed that files were deleted from Ms. Roberts's computer from January 1, 2006, until April 3, 2006, and that, since Ms. Roberts surrendered her laptop to Western Blue on March 31, 2006 (the day she quit), she could not have been responsible for the deletions. At best, however, this argument establishes that Ms. Roberts was not responsible for the deletions that occurred from April 1, 2006, until April 3, 2006.[14] Only a tiny fraction of the deletions occurred in this window.[15] The statute does not require proof that Ms. Roberts was responsible for every deletion that ever occurred on the computer.

Furthermore, it is undisputed that Ms. Roberts copied some files from her Western Blue computer onto CDs and took them with her. The Robertses contend that Ms. Roberts was merely making back-up copies out of a concern for safety. While that may have been a permissible conclusion for the jury to have made, it was not the only permissible conclusion. Instead, the jury could have reasonably inferred that Ms. Roberts knowingly copied these files for the purpose of using them to subvert Western Blue's ability to bid on the University contract—i.e., for an unauthorized purpose.

The Robertses argue that "[t]here is really no dispute that Ms. Roberts was authorized to *access* the laptop computer which [Western Blue] claims was altered by Ms. Roberts." (Emphasis added.) However, the issue is not whether Ms. Roberts *accessed* her computer

[14] The record is conflicting as to whether Ms. Roberts turned in her laptop in the morning or in the afternoon of March 31, 2006. The deletions that occurred on March 31, 2006, occurred at 2:24 p.m. and before. Given that there is evidence that she had her laptop in the afternoon of March 31, 2006, it is reasonable to infer that the laptop was in Ms. Roberts's possession at 2:24 p.m.

[15] There were 47,072 files deleted from Ms. Roberts's laptop from January 1, 2006, until April 3, 2006, and only 34 of those were deleted from April 1, 2006, until April 3, 2006.

without authorization; it is whether she copied and/or deleted files without authorization. Ms. Roberts does not argue that she was authorized to copy and/or delete files from her computer for the purpose of subverting Western Blue's ability to successfully bid on the University contract. Moreover, Pingel testified that Western Blue had a written policy that "all employees should . . . hold the confidential information as confidential and not share it with anybody outside the company" and that Ms. Roberts would have known, through the application of common sense, that Western Blue considered files to be "confidential" if they pertained to the company's costs and pricing schemes. As explained above, there was substantial evidence that Ms. Roberts copied such documents and shared them with DocuCopy; therefore, there was substantial evidence that Western Blue did not "authorize" Ms. Roberts's copying of the relevant data and files.

Accordingly, there was substantial evidence that Ms. Roberts knowingly deleted and/or copied computer data from a Western Blue computer without authorization, and the trial court therefore did not err in submitting the computer tampering claim to the jury.

IV. Attorneys' Fees

The Robertses argue that the trial court erred in awarding Western Blue a percentage of its attorneys' fees based on the percentage of the work that the court determined was related to the computer tampering claim. We disagree.

The trial court is an expert on attorneys' fees, and we give it wide latitude in determining the appropriate amount to be awarded. *Burden v. Burden*, 811 S.W.2d 818, 822 (Mo. App. S.D. 1991). An abuse of discretion occurs only when the ruling "shocks the sense of justice, shows a lack of consideration, and is obviously against the logic of the circumstances." *Wiley v. Homfeld*, 307 S.W.3d 145, 161 (Mo. App. W.D. 2009).

Here, the only claim that supported an attorneys' fee award was the computer tampering claim. *See* § 537.525.2. The trial court stated that much of this case was intertwined with the computer tampering claim, but it also attempted to discount a certain percentage of the work performed as unrelated to computer tampering. It reviewed the bills submitted to Western Blue by its attorneys. It heard testimony from the attorneys regarding what percentage of the work they performed was related to the computer tampering claim. After considering this evidence, the trial court awarded Western Blue a percentage of its attorneys' fees based on the percentage of the work that the court determined was related to the computer tampering claim.

The trial court's actions do not shock our sense of justice. The court's method of calculating attorneys' fees showed consideration in that it reviewed the bills and heard testimony regarding what percentage of the work was related to the computer tampering claim. The court's method was not obviously against the logic of the circumstances in that the computer tampering claim—but not the other claims—justified an attorneys' fee award. Point denied.

V. Conspiracy

The Robertses argue that the trial court erred in denying its motion for judgment notwithstanding the verdict with respect to the conspiracy claim in that Mr. Roberts owed Western Blue no duty, and therefore Mr. Roberts did not "act[ ] with any unlawful objective toward" Western Blue and that there was no evidence that Western Blue requested information from Mr. Roberts[16] regarding ownership of DocuCopy or Graystone Properties. We disagree.

[16] The Robertses' point relied on is slightly different than the text of their argument on this point. Rather than arguing that there was no evidence that Western Blue requested information from Mr. Roberts, in the point relied on, Appellants state that Western Blue had no right to rely on any representation made by Mr. Roberts. The reliance argument seems to be derived from the appellants' argument that Mr. Roberts had no duty to Western Blue, whereas the argument regarding an alleged lack of evidence of conduct by Mr. Roberts seems to be tied to whether Mr. Roberts took steps to further an unlawful objective. Therefore, we will address Appellants' allegations by addressing the existence of the elements of: (1) an unlawful objective; and (2) the commission of at least one act in furtherance of the conspiracy.

"A claim of conspiracy must establish: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and, (5) the plaintiff was thereby damaged." *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996). "Typically, civil conspiracy is not itself actionable; 'some wrongful act must have been done by *one or more* of the alleged conspirators and the fact of a conspiracy merely bears on the liability of the various defendants as joint tortfeasors.'" *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 175 (Mo. App. W.D. 1996) (quoting *Bockover v. Stemmerman*, 708 S.W.2d 179, 182 (Mo. App. W.D. 1986)) (emphasis added).

One of the Robertses' alleged bases for reversal—lack of a duty held by Mr. Roberts—is not an essential element of a civil conspiracy claim. *See Rice*, 919 S.W.2d at 245.

The unlawful objectives supporting Western Blue's civil conspiracy claim were breach of fiduciary duty, tortious interference, and computer tampering. Western Blue was only required to show that one of the alleged conspirators committed acts pursuant to these objectives.[17] *Macke Laundry*, 931 S.W.2d at 175. As explained *supra*, a reasonable juror could have concluded that Ms. Roberts committed numerous acts in furtherance of these objectives. Further, a reasonable juror could also have concluded that Mr. Roberts committed acts in furtherance of these objectives, given that there was evidence that he (1) told Marrero and Rutter to conceal the true ownership of DocuCopy; and (2) remained silent when Pingel asked whether Ms. Roberts had any beneficial interest in DocuCopy at the meeting Mr. Roberts attended.[18]

[17] The Robertses do not argue that there was insufficient evidence that Mr. Roberts and Ms. Roberts had a meeting of the minds regarding the unlawful objectives.

[18] The Robertses appear to believe that, in order to have adduced a submissible claim, Western Blue was required to have proved that it asked him about the true ownership of DocuCopy and Graystone. For the reasons explained *supra*, that was not a necessary element to Western Blue's civil conspiracy claim. However, even if such evidence were necessary, the record is sufficient to establish it. Evidence that Mr. Roberts attended a meeting between Pingel and Ms. Roberts, the purpose of which was for Pingel to inquire about the ownership of DocuCopy, that Pingel did in fact so inquire, and that Mr. Roberts did not disclose the true ownership of DocuCopy, is sufficient

Accordingly, the trial court did not err in submitting the civil conspiracy claim because substantial evidence supported the "unlawful objective" element, and the Robertses have challenged no other valid element of the tort.

VI. Superior Bid/Non-Use of Trade Secrets

The Robertses argue that the trial court erred in denying their motion for a new trial in that the evidence showed that (1) DocuCopy submitted a "vastly superior" bid for the University contract; and (2) DocuCopy used no trade secrets or confidential information in preparing its bid. We disagree.

When appellants fail to cite any relevant authority for their argument, the appellate courts of Missouri deem the point on appeal abandoned. *Huff Equip. Co. v. Jones*, 725 S.W.2d 82, 86 (Mo. App. S.D. 1987). Here, the Robertses cite no authority to support their point on appeal, apart from the authority stating the standard of review. Point denied.

Conclusion

For the reasons stated above, we hold that (1) Ms. Roberts owed Western Blue a fiduciary duty; (2) the trial court did not err in submitting the fiduciary duty claim to the jury; (3) Western Blue's expectation of winning the University contract bid was sufficiently definite to justify submission of the tortious interference claim; (4) a reasonable juror could conclude that Ms. Roberts copied and/or deleted the company's computer files without authorization; and (5) the Robertses' remaining claims of error are meritless. Accordingly, we affirm.

Karen King Mitchell, Presiding Judge

Joseph M. Ellis and Victor C. Howard, Judges, concur.

to support the allegation that Western Blue requested information regarding ownership of DocuCopy from Mr. Roberts.