NO. COA11-176
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

EDGEWATER SERVICES, INC., and
LUCINDA DOSHER,
Plaintiffs,

v.

Wake County
No. 05 CVS 1971

EPIC LOGISTICS, INC., DON and
BARBARA SHERILL, and JOLI(E) ANNE
OSGOOD,
Defendants.

Appeal by plaintiffs and defendants from orders entered 11 August 2009, 26 May 2010, 28 July 2010, and 12 August 2010 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 September 2011.

J.W. Bryant, Law Firm, PLLC, by John Walter Bryant, for plaintiffs.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Stephanie A. Gaston, for defendants Epic Logistics, Inc. and Don and Barbara Sherrill.

Bailey & Dixon, L.L.P., by Dayatra T. Matthews, G. Lawrence Reeves, and J.T. Crook, for defendant Joli Anne Osgood.

HUNTER, Robert C., Judge.

Plaintiffs Edgewater Services, Inc. and Lucinda Dosher (collectively referred to as "ESI") appeal from: (1) the trial court's 26 May 2010 order granting in part defendant Joli Anne Osgood's ("Osgood") motion ***in limine***, and (2) the trial court's orally entered 9 June 2010 order granting defendants Epic Logistics, Inc. and Don and Barbara Sherrill's (collectively referred to as "Epic") motion for a directed verdict as to all remaining claims against it, and denying in part ESI's motion for a directed verdict as to the remaining claims against it.[1] Osgood appeals from: (1) the trial court's 26 May 2010 order denying in part her motion ***in limine***; (2) the trial court's orally entered 9 June 2010 order denying in part her motion for a directed verdict; and (3) the trial court's 12 August 2010 order denying her motion for judgment notwithstanding the verdict. Epic appeals from the trial court's 11 August 2009 order denying in part Epic's motion for summary judgment. After careful review, we affirm the trial court's orders.

Background

At the time this action was instituted, ESI and Epic were third party logistics companies in the transportation industry.

[1] This order was reduced to writing after trial and entered on 28 July 2010.

ESI primarily specialized in shipping goods for one customer at a time, a practice known as truck load ("TL") shipping. Epic specialized in shipping goods for more than one customer at a time, a practice known as less than truck load ("LTL") shipping. ESI's and Epic's customers were not under contract; each customer was free to use any logistics company it chose for any given shipment.

In 2001, Joe Dosher, founder and president of ESI, and Don Sherrill, founder and president of Epic, agreed that Epic would pay ESI a 30% commission for all LTL freight referrals. This agreement was not reduced to writing; however, it remained effective until Mr. Dosher's death in 2004. After Mr. Dosher's death, his wife began to operate ESI. It is clear from the record that Mrs. Dosher did not have a good relationship with her stepdaughter, Osgood, who had been working for ESI since 1999 as a sales representative. At that time, Osgood was acting vice president of ESI.

In April 2004, Mrs. Dosher accused Osgood of misusing a company vehicle and company credit cards. Shortly thereafter, Osgood began seeking alternative employment. She was interviewed and subsequently hired by Epic in May 2004. It is undisputed that Osgood contacted the companies that had

previously used ESI for their shipping needs to inform them that she had left ESI and was working for Epic. On 28 July 2004, Mrs. Dosher sent Epic a letter stating that Epic was no longer using its "'[b]est [e]fforts'" to "provid[e] the contractually agreed freight services to [ESI] clients . . . ." Mrs. Dosher "formally terminat[ed]" the agreement that was reached by Mr. Dosher and Mr. Sherrill in 2001. On 14 August 2004, Epic's legal counsel sent Ms. Dosher a letter claiming that while Epic and ESI referred customers to each other, there was never a "formal agreement between the parties."

On 14 February 2005, ESI filed a complaint against Epic and Osgood. ESI alleged in its complaint that Osgood had signed an "Employment and Non-Competition Agreement" while employed by ESI and that Osgood had violated the "Non-disclosure Obligation" clause as well as the "Non-competition Covenant[.]" ESI also accused Osgood of removing ESI documents, deleting ESI files from the office computers, and changing passwords required to access ESI files "so that ESI could no longer access those files." ESI further alleged that Osgood was making defamatory remarks to ESI clients, stating that ESI was "going out of business." ESI claimed that Epic conspired with Osgood to

commit these acts. Based on these allegations, among others, ESI brought the following claims against Epic: (1) violation of the Trade Secrets Protection Act; (2) misappropriation of proprietary confidential information; (3) breach of employment contract (non-compete and non-disclosure clauses); (4) breach of a joint venture agreement; (5) tortious interference with contract; (6) tortious interference with employment contract; (7) interference with prospective economic advantage; (8) defamation; (9) civil conspiracy; (10) unfair and deceptive acts or practices; and (11) punitive damages. ESI brought the same claims against Osgood with the exception of the tortious interference with employment contract claim. ESI also sued Osgood for: (1) conversion; (2) breach of fiduciary duty; and (3) constructive fraud.

All of ESI's claims against Epic were dismissed either at summary judgment or by directed verdict. Many of the claims against Osgood were likewise dismissed by the trial court. The only claims presented to the jury were ESI's claims against Osgood for misappropriation of proprietary confidential information, breach of employment contract (non-disclosure clause), breach of a duty as a corporate officer, and defamation/slander. The jury found Osgood liable for

misappropriation of proprietary confidential information and awarded ESI $70,000.00; breach of a non-disclosure agreement and awarded ESI an additional $70,000.00; and breach of a duty as a corporate officer and awarded ESI $1.00. The jury found that Osgood was not liable for defamation/slander. The trial court determined that ESI could only recover "once for the economic loss" and entered a judgment ordering Osgood to pay ESI $70,001.00. The parties timely appealed to this Court.

Analysis

I. Osgood's Appeal

A. Directed Verdict and Judgment Notwithstanding the Verdict

Osgood argues that the trial court erred by failing to grant her motion for a directed verdict and judgment notwithstanding the verdict as to ESI's claims for misappropriation of proprietary confidential information and breach of employment contract (non-disclosure clause). Osgood specifically claims that: (1) the evidence presented at trial failed to establish a causal link between Osgood's misappropriation of confidential information from ESI and the subsequent decline in ESI's profits, and (2) the evidence of damages was entirely speculative, and, therefore, insufficient to serve as the basis for a jury award.

> When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (internal citations omitted).

We first address Osgood's argument concerning causation.[2] Osgood does not deny that she took carrier files, TL and LTL

[2] As a preliminary matter, the parties have not cited, nor have we found, a case in which misappropriation of proprietary confidential information is discussed outside of the context of the Trade Secrets Protection Act or a breach of contract claim. In other words, our appellate courts have not set forth the elements of this claim as a separate and distinct cause of action. The misappropriation of proprietary confidential information claim in this case clearly stems from Osgood's alleged misappropriation of carrier files, TL and LTL rate information, and customer files; however, these same actions by Osgood served as the basis for the Trade Secrets Protection Act claim and the breach of a non-disclosure agreement claim. The non-disclosure clause of the employment contract specified that Osgood was not permitted to disclose trade secrets *or* confidential information. The trial court determined that the information taken by Osgood did not constitute trade secrets and dismissed that claim at summary judgment. The jury was presented with, and found Osgood liable for, both misappropriation of proprietary confidential information and breach of the non-disclosure clause.

rate information, and customer files from ESI when she left the company in 2004. ESI's Exhibit 52A, which was presented at trial, established a decline in ESI's profits in 2004 and 2005 after Osgood left ESI and began working for Epic, and a concurrent increase in Epic's profits during those two years. The Exhibit reflected this decrease and concurrent increase with regard to 10 customers that were shared by ESI and Epic. Osgood claims that this evidence was insufficient to establish that her removal of confidential proprietary information and breach of the non-disclosure clause of her contract caused this decrease in profits. Osgood argues that there were many reasons why Epic's profits rose while ESI's fell after Osgood began working for Epic, such as the fact that Joe Dosher had passed away and his wife, who had little business experience, began running the company. Moreover, many of ESI's clients began hiring Epic because they had a previous relationship with Osgood and wanted to continue working with her.[3] Osgood is correct; the evidence

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Osgood does not argue that misappropriation of proprietary confidential information is not a valid cause of action, nor does she argue that she did not commit the acts underlying this claim. Her argument is confined to causation and damages; therefore, our holding is limited to those issues.

[3] The trial court determined that Osgood did not violate the non-compete clause in her contract when she solicited clients who had previously worked with her. The trial court dismissed that

at trial established several plausible reasons why ESI experienced a loss in profits. However, we hold that the evidence was sufficient for the jury to determine that ESI's lost profits directly stemmed from Osgood's taking of proprietary confidential information from ESI and her breach of the non-disclosure agreement.[4]

This Court has previously held that evidence of a company's economic loss was sufficient to support a determination that the defendants' actions caused that loss. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 62, 620 S.E.2d 222, 231-32 (2005). In *Sunbelt*, the plaintiff's damages expert measured damages "on the basis of (1) lost profit and (2) lost market share resulting from defendants' accelerated market entry . . . ." *Id.* at 62, 620 S.E.2d at 231. In reaching its holding, the Court relied on *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 40, 392 S.E.2d 663, 669-70 (1990), where this Court held that the plaintiff's evidence of

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claim at summary judgment.

[4] As stated *supra*, we are unaware of any case in North Carolina dealing with misappropriation of proprietary confidential information; however, we note that the trial court instructed the jury that it could find Osgood liable for this tort if it found that Osgood's actions were *a* cause, but not necessarily the *only cause*, of ESI's economic loss. Osgood does not contest the trial court's instructions on appeal.

lost profits resulting from the loss of a salesman to the defendant was sufficient to take the issue of causation to the jury. Similarly, in *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658, 670 S.E.2d 321, 329 (2009), the defendant argued that the plaintiff "failed to prove it was damaged by . . . the alleged misappropriation" of staffing information, business strategies, and marketing plans. This Court held that "evidence of a substantial turnaround in [the defendant]'s business, as well as a concurrent, substantial decrease in [the plaintiff]'s business in the same market, during the same time period" was sufficient to support the trial court's determination that defendant was liable under the Trade Secrets Protection Act. *Id.* at 659, 670 S.E.2d at 329. Based on the foregoing caselaw, we hold that ESI's evidence of lost profits was sufficient to support a jury determination that Osgood's actions were the cause of those losses.

We now consider whether ESI's evidence of lost profits was sufficient to support a damages award in this case. It is well established that "[p]laintiffs must prove damages to a reasonable certainty. In cases where a claim for damages from a defendant's misconduct are shown to a reasonable certainty, the plaintiff should not be required to show an exact dollar amount

with mathematical precision." *Sunbelt*, 174 N.C. App. at 61, 620 S.E.2d at 232 (internal citation omitted). "This Court has chosen to evaluate the quality of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with reasonable certainty." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 501, 610 S.E.2d 416, 420, *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005) (citation and quotation marks omitted).

Here, ESI established lost profits with regard to 10 customers shared by ESI and Epic for the two years after Osgood left ESI. Epic argues that this evidence was speculative and cites *Medical Staffing*, 194 N.C. App. at 660-61, 670 S.E.2d at 330, where we determined that the evidence of lost profits was sufficient to establish causation; however, that same evidence was insufficient to establish damages to a reasonable certainty. The Court reasoned that "a more reasonably certain measure of the economic loss" would be the profit that the defendant gained from the employees it "acquired" from the plaintiff through misappropriation of trade secrets. *Id.* at 661, 679 S.E.2d at 330. In other words, merely stating a total revenue loss was too speculative; the plaintiff should have pinpointed what part of its profit loss was caused by the defendant's misconduct. In

the present case, ESI did pinpoint the profit loss with regard to the 10 customers that typically worked with both ESI and Epic. ESI claimed that this profit loss was due to Osgood's misappropriation of ESI's proprietary confidential information and the jury agreed.

Osgood also cites *Castle McCulloch*, 169 N.C. App. at 502, 610 S.E.2d at 420-21, where we held that the plaintiff's evidence of what it *would have made* in profits but for the defendant's conduct was too speculative to support the damages awarded. ESI's evidence was far more concrete than that seen in *Castle McCulloch*. Here, the evidence established the exact losses ESI suffered with regard to those 10 customers shared by ESI and Epic. The jury clearly believed that those losses were attributable to Osgood's actions. We hold that Exhibit 52A was sufficient to aid the jury in making its damages determination.

In sum, we hold that the evidence in this case was sufficient to establish that Osgood's actions were the cause of ESI's damages and that the evidence of such damages was not speculative. Consequently, we hold that the trial court did not err in denying Osgood's motion for a directed verdict and motion for judgment notwithstanding the verdict as to ESI's claims for misappropriation of proprietary confidential information and

breach of the non-disclosure clause of Osgood's employment contract.

B. Damages Evidence

Osgood argues that "at no time . . . prior to trial, did the Plaintiffs provide . . . any forecast of the evidence they intended to produce at trial to prove either causation or damages." Osgood claims that all evidence pertaining to damages — Exhibits 48A-C, 49A-C, and 52A — should have been excluded due to ESI's failure to produce this evidence pursuant to Rule 26(e)(2)(ii) of the North Carolina Rules of Civil Procedure.[5]

Rule 26(e)(2)(ii) provides that a party is under a continuing duty to amend a prior discovery response "if he obtains information upon the basis of which . . . he knows that the [previous] response[,] though correct when made[,] is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." N.C. Gen. Stat. § 1A-1, Rule 26(e)(2)(ii) (2009). "A party's failure to comply with the limited duty imposed by Rule 26(e) is a ground for the trial court to impose such sanctions as exclusion of evidence, continuance, or other appropriate measures on the

[5] It appears that Exhibits 48A-C were entered without objection; however, we will address this issue assuming, *arguendo*, that it was properly preserved.

defaulting party" pursuant to Rule 37. *Bumgarner v. Reneau*, 332 N.C. 624, 630, 422 S.E.2d 686, 689-90 (1992). "The imposition of sanctions under Rule 37 for failure to comply with Rule 26(e) is within the sound discretion of the trial judge." *Id.* at 630, 422 S.E.2d at 690.

Here, ESI originally sought to introduce the testimony and report of Gary R. Albrecht, Ph.D. to establish ESI's damages. Dr. Albrecht prepared a report in July 2005, which was provided to Osgood and Epic during discovery along with all of the data he used as a basis for his report. Dr. Albrecht subsequently amended his report in April 2010. On 18 May 2010, Osgood and Epic filed motions *in limine* asking the trial court to exclude the April 2010 report and any testimony from Dr. Albrecht concerning that report. Specifically, Osgood claimed that ESI had failed to supplement its discovery responses as required by Rule 26(e). The trial court granted Osgood's and Epic's motions as to the 2010 report and related testimony. ESI chose not to call Dr. Albrecht at trial or submit his July 2005 report, which had not been excluded. To establish its alleged damages, ESI opted to submit "Wolfbyte reports" of truckload shipments brokered by ESI and Epic during 2004 and 2005, which were designated as Exhibits 48A-C and 49A-C, as well as Exhibit 52A,

which compiled the Wolfbyte reports and showed ESI's lost profits and Epic's concurrent increase in profits during that time period. At trial, Osgood and Epic claimed that this information was not provided to them prior to trial and requested that the exhibits be excluded due to a discovery violation. The trial court chose, in its discretion, not to exclude the documents.

We find no abuse of discretion in the trial court's determination. It appears from the record that ESI provided the Wolfbyte reports to Osgood during discovery, which served as the basis for Exhibits 48A-C and 49A-C. Exhibit 52A was merely a compilation of this previously provided information and did not constitute a new theory of damages. Moreover, "'[t]he purpose of discovery is to remove surprise from trial preparation and enable the parties to obtain evidence necessary to evaluate and resolve their dispute . . . .'" *Dove v. Harvey*, 168 N.C. App. 687, 693, 608 S.E.2d 798, 802 (2005) (quoting 23 Am.Jur.2d Depositions and Discovery § 1 (2002)). Osgood has failed to establish to our satisfaction that she was surprised or prejudiced by the presentation of this evidence. Osgood was first informed in August 2005 through a supplemental discovery response that ESI planned to produce evidence of lost profits

due to "diminished truck loads." ESI consistently alleged that its lost profits constituted its damages in this action and provided Osgood with the data it relied on to support its lost profits estimation. In sum, we hold that the trial court did not abuse its discretion in allowing ESI to submit its evidence of damages at trial.

C. Osgood's Employment Contract

Next, Osgood argues that the trial court erred by denying her motion ***in limine*** and allowing ESI to present a copy of her employment contract at trial. "'We review a trial court's rulings on motions ***in limine*** and on the admission of evidence for an abuse of discretion.'" ***United Leasing Corp. v. Guthrie***, 192 N.C. App. 623, 628, 666 S.E.2d 504, 507 (2008) (quoting ***State v. Hernendez***, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007)).

Rule 1002, The Best Evidence Rule, provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2009). "The Best Evidence Rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself

is available." *Investors Title Insurance Co. v. Herzig*, 330 N.C. 681, 693, 413 S.E.2d 268, 274 (1992). Rule 1004 states in pertinent part:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) Originals Lost or Destroyed.--All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original Not Obtainable.--No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in Possession of Opponent.--At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing[.]

N.C. Gen. Stat. § 8C-1, Rule 1004 (1)-(3) (2009).

Here, Osgood's original employment contract containing the non-disclosure clause was lost or destroyed. ESI claims that Osgood took the original contract along with the other confidential documents that she misappropriated. At trial, Bruce Holston, ESI's management consultant, testified that in 2001 he met with all employees concerning a new employment contract that each employee was asked to sign. Mr. Holston claimed that he personally saw Osgood's employment contract

shortly after she signed it, but he did not personally see her sign it. Chip Jones, an operations employee at ESI, testified that he remembered meeting with Mr. Holston, Wilson Ferrell, and Osgood about signing the employment contract. He signed the contract the same day it was offered to him. Mrs. Dosher testified that after Osgood notified her that she was going to work for Epic in 2004, Mrs. Dosher attempted to locate Osgood's employment contract, but it was not in her file. All of the other employees' contracts were still in their respective files. Mrs. Dosher obtained a copy of the contract from Mr. Holston. Osgood testified at her deposition and at trial that, while the signature looked like her signature, she did not sign the document.

Osgood argues that the copy was not admissible because Rule 1003 states that a "duplicate" is admissible only if no "genuine question is raised as to the authenticity of the original." N.C. Gen. Stat. § 8C-1, Rule 1003 (2009). Osgood claims that she did not sign the original contract, and, therefore, the authenticity of the original was in dispute. She further claims that if the copy was not admissible under Rule 1003, it should not come in under Rule 1004. Osgood's argument is without merit. The contents of the contract itself were not in dispute.

All employees signed the same contract containing the non-disclosure clause. Multiple individuals testified to the contents of the contract and that the original contract bore Osgood's signature. *See State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (holding that a copy of a motel registration card that contained defendant's signature did not violate the Best Evidence Rule where the motel owner testified that the duplicate card was an "exact copy" of the original card and defendant did not raise any issue regarding the authenticity of original card), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Whether Osgood executed the document was an issue for jury determination. *Population Planning Associates, Inc. v. Mews*, 65 N.C. App. 96, 99, 308 S.E.2d 739, 741 (1983) (stating that "the credibility of testimony is for the jury, not the trial judge").

In sum, all of the evidence indicates that the original employment contract containing the non-disclosure clause did, in fact, exist, but was inadvertently lost by ESI or deliberately destroyed by Osgood in bad faith. ESI made a good faith effort to locate the original, but was forced to present a copy at trial. We hold that because the contract at issue was lost or destroyed, the testimony of the witnesses and the copy of the

document were admissible secondary evidence to prove the content of the contract pursuant to Rule 1004. *See Investors Title Insurance Co.*, 330 N.C. at 693-94, 413 S.E.2d at 274-75 (holding that copy of trust agreement was admissible pursuant to Rule 1004 where original was either lost, destroyed, or in the possession of defendant and plaintiff made a good faith effort to obtain the original).

D. Statements Made by Joe Dosher to Osgood

Finally, Osgood argues that the trial court erred in excluding statements made by Mr. Dosher to Osgood concerning Mrs. Dosher's lack of business skills. Assuming, *arguendo*, that the trial court erred in excluding this testimony, we hold that any such error was harmless and would not have affected the outcome of the trial. *See Starco, Inc. v. AMG Bonding & Ins. Serv., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) ("[T]o obtain relief on appeal, an appellant must not only show error, . . . appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action.").

II. ESI's Appeal

A. Summary Judgment — Trade Secrets Protection Act

ESI argues that the trial court erred in granting Osgood and Epic's motion for directed verdict as to the claim for *misappropriation of proprietary confidential information*. First, we point out that the trial court did not dismiss this claim as to Osgood. The jury found Osgood liable. Second, ESI's entire argument actually pertains to the Trade Secrets Protection Act, not the separate claim for misappropriation of proprietary confidential information.[6]

ESI's claim for violation of the Trade Secrets Protection Act was dismissed at summary judgment, not directed verdict. ESI has not appealed from the trial court's summary judgment order. Pursuant to Rule 3 of the Rules of Appellate Procedure, an appellant must "designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d). The requirements of Rule 3 are "jurisdictional in nature." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 158, 392 S.E.2d 422, 425 (1990). "Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied in part*, 339 N.C. 609, 454

[6] At oral arguments, counsel for ESI admitted that ESI's argument pertained to the Trade Secrets Protection Act.

S.E.2d 246, *aff'd in part*, 341 N.C. 702, 462 S.E.2d 219 (1995). Consequently, we will not address any argument pertaining to the Trade Secrets Protection Act.

B. Directed Verdict — Breach of a Joint Venture Agreement

Next, ESI argues that the trial court erred in granting Epic's motion for a directed verdict as to the claim for breach of a joint venture agreement. We disagree.

> [T]he essential elements of a joint venture are (1) an agreement to engage in a single business venture with the joint sharing of profits, (2) with each party to the joint venture having a right in some measure to direct the conduct of the other through a necessary fiduciary relationship. The second element requires that the parties to the agreement stand in the relation of principal, as well as agent, as to one another.

Southeastern Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 327, 572 S.E.2d 200, 204 (2002) (internal citations, quotation marks, and emphasis omitted). A fiduciary relationship exists when

> 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 confidence. . . . [I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks omitted).

We hold that there was no evidence that the parties were engaged in a joint venture agreement. The evidence established that ESI and Epic were completely independent entities with no fiduciary obligations to the other, and that the parties had an informal agreement by which Epic would pay ESI a commission for ESI's referral of LTL business. Consequently, the trial court did not err in granting Epic's motion for a directed verdict as to this claim.

C. Directed Verdict — Constructive Fraud

ESI argues that the trial court erred in granting Osgood's motion for a directed verdict as to the claim for constructive fraud.

> In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a "relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). A plaintiff bringing a constructive

fraud claim must establish that the defendant actually gained a benefit from the transaction. *Id.* at 667, 488 S.E.2d at 224.

Here, there was evidence that Osgood was in a position of trust and confidence as vice president of ESI. Nevertheless, we fail to see how she took advantage of the parties' relationship to the hurt of plaintiff. Osgood's misappropriation of confidential information and breaching the non-disclosure clause of her employment contract were separate causes of action that did not require Osgood to be in a position of trust or confidence. Any employee could be found liable for those claims under the same circumstances. ESI failed to show how Osgood specifically used her fiduciary relationship with ESI to harm the company. In its brief, ESI merely claims that Osgood "took advantage of her fiduciary relationship," but fails to point out how she took advantage of the relationship and how ESI was harmed by such actions. We hold that, based on the evidence presented at trial, the trial court did not err in granting Epic's motion for a directed verdict as to the claim for constructive fraud.

D. Directed Verdict — Civil Conspiracy

ESI argues that the trial court erred in granting Osgood's and Epic's motion for a directed verdict as to the claim for civil conspiracy.

> The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.

Privette v. University of North Carolina, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989). ESI did not present any evidence at trial that would have established that Osgood and Epic conspired in any way to perform an unlawful act that caused injury to plaintiff. It appears clear from the record that Epic had no involvement in Osgood's misappropriation of proprietary confidential information, breach of her employment contract, or alleged use of the misappropriated information to ESI's detriment. We hold that the trial court did not err in granting Epic's and Osgood's motion for a directed verdict as to this claim.

E. Directed Verdict — Unfair and Deceptive Acts or Practices

ESI argues that the trial court erred in granting Osgood's and Epic's motion for a directed verdict as to the claim for unfair and deceptive acts or practices. We disagree.

N.C. Gen. Stat. § 75-1.1(a) (2009) states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." "In order to establish a ***prima facie*** claim for unfair [or deceptive acts or] practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." ***Dalton v. Camp***, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); N.C. Gen. Stat. § 75-1.1.

ESI points to the fact that Osgood took confidential information from ESI and used it to her advantage at Epic. ESI claims that Osgood's actions were tantamount to taking trade secrets. This Court has held that "[a] violation of the Trade Secrets Protection Act constitutes an unfair act or practice . . . ." ***Medical Staffing***, 194 N.C. App. at 659, 670 S.E.2d at 329. However, in this case the trial court determined at summary judgment that the information taken by Osgood did not constitute trade secrets as a matter of law. This argument is without merit.

It is clear that ESI's misappropriation claim stemmed from Osgood's breach of the non-disclosure clause of her contract. "[I]t is well recognized that actions for unfair or deceptive

[acts or] practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (citation, internal quotation marks, and ellipses omitted), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). A "plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act[.]" *Id.* at 368, 533 S.E.2d at 833 (citation and internal quotation marks omitted). While Osgood's taking of confidential information was a violation of her contract, ESI has not alleged any aggravating circumstances such that Osgood's actions would qualify as a deceptive act or practice as a matter of law. *See Nucor Corp. v. Prudential Equity Group, LLC*, 189 N.C. App. 731, 659 S.E.2d 483 (2008) (holding that employee's taking of confidential information was in violation of her employment contract, but did not constitute an unfair or deceptive act or practice). Furthermore, as stated *supra*, there was no evidence presented at trial that would indicate that Epic conspired with Osgood to take and utilize any information from ESI.

Consequently, we hold that the trial court did not err in dismissing this claim.

F. Evidence Excluded Pursuant to Motion in Limine

Finally, ESI argues that the trial court erred in excluding: (1) evidence pertaining to Osgood's criminal record; (2) Osgood's psychiatric treatment records; and (3) the portion of Osgood's deposition where she discussed shooting her abusive husband. Assuming, *arguendo*, that the trial court erred in excluding this evidence, we hold that any such error was harmless and would not have affected the outcome of the trial. *See Starco*, 124 N.C. App. at 335, 477 S.E.2d at 214.

III. Epic's Appeal

Epic strictly argues that the claims against it should have been dismissed at summary judgment. We need not address Epic's arguments since we hold that all remaining claims were properly dismissed at the close of evidence pursuant to Epic's motion for a directed verdict.

Conclusion

Based on the foregoing, we hold that the trial court did not err in: (1) granting in part and denying in part Osgood's motion for a directed verdict and denying Osgood's motion for judgment notwithstanding the verdict; (2) allowing ESI to

present evidence of damages and Osgood's employment contract at trial; and (3) granting Epic's motion for a directed verdict as to all remaining claims against it. Additionally, assuming, *arguendo*, that the trial court erred in denying in part ESI's and Osgood's respective motions *in limine*, we hold that any such error was harmless.

Affirmed.

Judges STEELMAN and MCCULLOUGH concur.

Report per Rule 30(e).