

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP643

Cir. Ct. No. 2012CV125

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NORTH HIGHLAND INC.,

PLAINTIFF-APPELLANT,

V.

JEFFERSON MACHINE & TOOL INC. AND STEVEN M. HOMANN,

DEFENDANTS,

FREDERICK A. WELLS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. North Highland, Inc., appeals summary judgment in favor of Frederick Wells. North Highland brought suit against Wells, alleging

in part that Wells had conspired to breach a fiduciary duty owed to North Highland by a former employee of North Highland and that Wells has misappropriated a trade secret, in violation of WIS. STAT. § 134.90 (2013-14).¹ The circuit court granted summary judgment in favor of Wells on each of these claims. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In 2012, North Highland brought suit against Wells and Dwain Trewyn.² North Highland, a manufacturing company, alleged that in 2011, Tyson Foods, Inc., accepted confidential bids from manufacturing companies for a project related to its facility in Jefferson, Wisconsin. North Highland alleged that at the time, Trewyn was an employee of North Highland and that one of Trewyn's duties was to formulate North Highland's bid for the Tyson project. North Highland alleged that Trewyn and Wells formed Jefferson Machine & Tool, Inc., a competitor manufacturing company, and that while still employed by North Highland, Trewyn also formulated a bid for the Tyson project on behalf of Jefferson Machine, which was awarded the Tyson project.

¶3 North Highland asserted claims against Trewyn and Wells for trade secret misappropriation, alleging that its bid amount for the Tyson project constituted a trade secret, that Trewyn had disclosed North Highland's bid amount to Wells, and that Wells and Trewyn used that information in order for their

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² North Highland also brought suit against Jefferson Machine & Tool, Inc., and Steven Homann, neither of whom is a party in the present appeal.

company, Jefferson Machine, to present a more favorable bid to Tyson Foods. North Highland also asserted a claim against Trewyn for breach of fiduciary duty, and a claim against Wells for conspiracy to breach a fiduciary duty.³

¶4 The circuit court granted summary judgment in favor of Trewyn and Wells on North Highland's trade secret misappropriation claim, and the case proceeded on only North Highland's claims for breach of fiduciary duty against Trewyn and conspiracy to breach fiduciary duty against Wells.

¶5 Prior to trial on those claims, Trewyn declared Chapter 7 bankruptcy, which resulted in a stay in North Highland's action against Trewyn. North Highland filed an adversary action against Trewyn in the bankruptcy court, and North Highland and Trewyn reached a settlement agreement in which the parties agreed that Trewyn would pay an agreed upon sum to North Highland by a specified date, that the adversary proceeding filed by North Highland against Trewyn in bankruptcy court would be dismissed, that any debt above and beyond what Trewyn agreed to pay North Highland would be discharged, and that North Highland covenanted not to sue Trewyn. Pursuant to North Highland and Trewyn's stipulation, the bankruptcy court entered an order dismissing the adversary proceeding between North Highland and Trewyn.

¶6 Following the dismissal of the bankruptcy action between North Highland and Trewyn, North Highland and Trewyn stipulated in the present case that: North Highland had covenanted not to sue Trewyn but that it had reserved all rights to its claims against Wells; North Highland had received the settlement

³ North Highland also alleged claims for breach of contract, interference with contract, and conversion. Those claims were dismissed by the circuit court and are not at issue on appeal.

payment from Trewyn; and Trewyn could be dismissed as a party to this action. Following the stipulation, the circuit court entered an order dismissing Trewyn as a party in this case.

¶7 Following Trewyn’s dismissal, Wells moved the circuit court for summary judgment on North Highland’s conspiracy claim, arguing that as a result of the dismissal of North Highland’s claim against Trewyn, North Highland’s conspiracy claim against Wells was barred by claim preclusion. The circuit court granted Wells’ motion. North Highland appeals the dismissal of both its trade secret misappropriation claim and its conspiracy claim.

DISCUSSION

¶8 North Highland contends that the circuit court erred in entering summary judgment in favor of Wells on North Highland’s claims for conspiracy to breach fiduciary duty and trade secret misappropriation.

¶9 We review summary judgment de novo. *Mach v. Allison*, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). Summary judgment materials are to be viewed in the light most favorable to the nonmoving party. *Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ’g, Inc.*, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95.

A. Conspiracy to Breach Fiduciary Duty

¶10 Wells contends that the circuit court properly entered judgment in his favor on North Highland’s conspiracy to breach fiduciary duty claim. Wells argues first that as a result of North Highland’s settlement with Trewyn and the subsequent dismissal of North Highland’s adversarial proceedings against Trewyn in the bankruptcy court and in the present case, claim preclusion operates to bar North Highland’s conspiracy claim against Wells. Alternatively, Wells argues that if claim preclusion does not operate to bar North Highland’s conspiracy claim against him, summary judgment is still appropriate because there is not sufficient evidence upon which a jury could find that Trewyn and Wells conspired for Trewyn to breach his fiduciary duty to North Highland.

¶11 For the reasons explained below, we agree with Wells that summary judgment is appropriate because North Highland has failed to establish that there is sufficient evidence to support the claim. Because our decision on this basis is dispositive, we do not address whether the claim is barred by claim preclusion. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

¶12 “A civil conspiracy in Wisconsin is ‘a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful.’” *City of Milwaukee v. NL Indus., Inc.*, 2005 WI App 7, ¶25, 278 Wis. 2d 313, 691 N.W.2d 888 (quoted source omitted). To prove a claim for civil conspiracy, a plaintiff must show: (1) the formation and operation of a conspiracy; (2) a wrongful act or acts done pursuant to the conspiracy; and (3) the damage resulting

from the act or acts. See *Onderdonk v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977).

¶13 “A party against whom a motion for summary judgment has been brought ... must set forth specific evidentiary facts that are admissible in evidence showing that there is a genuine issue for trial.” *Buckett v. Jante*, 2009 WI App 55, ¶29, 316 Wis. 2d 804, 767 N.W.2d 376. In this case, the burden to do so lies with North Highland. We conclude, however, that North Highland has failed to set forth sufficient facts in evidence that show there is a genuine issue as to whether Wells and Trewyn conspired.

¶14 North Highland argues that evidence submitted to the circuit court on summary judgment is sufficient to “allow a reasonable inference” that Wells conspired with Trewyn. North Highland asserts that the summary judgment submissions establish that: (1) Trewyn worked on the Tyson project bid for North Highland; (2) while working on North Highland’s bid, Trewyn and Wells formed Jefferson Machine & Tool, of which Wells owns seventy-five percent; (3) Trewyn prepared and submitted a bid for the Tyson project on behalf of Jefferson Machine & Tool; (4) Wells leased manufacturing space and bought equipment for Jefferson Machine; and (5) “Wells admitted to knowing about Trewyn’s bidding work at North Highland and to being involved in [Jefferson Machine & Tool’s] bidding on the [Tyson] [p]roject.”

¶15 Summary judgment must be based upon the pleadings, affidavits, and other records. WIS. STAT. § 802.08(2). The materials relied upon by North Highland in opposing summary judgment are nearly all portions of a brief

submitted by it to the circuit court.⁴ While that brief may rely on evidence in the record, it is not evidence itself. *See Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976).

¶16 To the extent that North Highland intends to direct this court, through its circuit court brief, to actual evidentiary materials in the record that show there is a genuine issue of material fact, North Highland has failed to do so. The portions of North Highland’s brief that appear to reference the facts identified in ¶14 either do not contain record citations or the citations that are provided are to record numbers that are not part of the record on appeal. Where we were able to locate the referenced document in the record, it was unclear to us where the particular fact or facts are located in the record, if it was there at all.⁵ Erroneous record references place an unwarranted burden on this court in deciding an appeal, and it is not the responsibility of this court to sift through the record to find the evidence on which North Highland relies. *See Jensen v. McPherson*, 2004 WI App 145, ¶6 n.4, 275 Wis. 2d 604, 685 N.W.2d 603.

⁴ In actuality, the record citations provided by North Highland are exclusively to North Highland’s appendices, which contain North Highland’s circuit court brief. WISCONSIN STAT. Rule 809.19 requires that citations be made to the record. The appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

⁵ For example, North Highland asserts that “Wells admitted to knowing about Trewyn’s bidding work at North Highland and to being involved in [Jefferson Machine & Tool’s] bidding on the [Tyson] [p]roject.” The citation provided by North Highland in support of this fact is to item 135 in its appendix. Item 135 in North Highland’s appendix is page seven of a responsive brief filed by it with the circuit court. North Highland states in this brief that “Wells admits much about his knowledge of Trewyn’s bidding work at North Highland ... and about Wells’ own involvement and discussion with Trewyn about [Jefferson Machine’s] bidding on the [Tyson] [p]roject.” The numerous citations provided in support of these assertions are not to the record before this court on appeal, and while we were able to locate the document in the appellate record, it is not clear to us where in this document support is found for North Highland’s assertion on appeal.

¶17 However, even if North Highland’s assertions of fact had been supported with evidence that we were able to locate in the record and upon which summary judgment can be based, summary judgment in favor of Wells would still be appropriate because North Highland has failed to set forth any facts that establish that Wells conspired with Trewyn. All the spare undisputed facts show is that Wells knew that Trewyn was likely in a position to use North Highland’s bid information to formulate Jefferson Machine’s bid. That is a basis for speculation; it is not sufficient to create a genuine issue of material fact. *See Helland v. Kurtis A. Froedtert Mem. Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). Accordingly, we affirm the circuit court’s order of summary judgment, albeit on different grounds.

B. Trade Secret Misappropriation

¶18 Wells contends that summary judgment in his favor on North Highland’s trade secret misappropriation claim was appropriate because the amount of North Highland’s confidential bid does not constitute a trade secret under WIS. STAT. § 134.90, Wisconsin’s version of the Uniform Trade Secrets Act.⁶ *See World Wide Prosthetic Supply, Inc. v. Mikulsky*, 2002 WI 26, ¶9, 251 Wis. 2d 45, 640 N.W.2d 764. To determine whether North Highland established that its confidential bid amount is a trade secret, we must interpret § 134.90(1)(c), which defines a “[t]rade secret” as:

⁶ To the extent that Wells is also contending that summary judgment in his favor was appropriate because the summary judgment submissions are insufficient to support a claim against Wells for trade secret misappropriation or a claim against him for conspiracy to misappropriate a trade secret, we conclude that Wells’ argument is not sufficiently developed to warrant a response. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.

information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

¶19 The interpretation of a statute is a question of law, which we review de novo. *Crisanto v. Heritage Relocation Servs., Inc.*, 2014 WI App 75, ¶13, 355 Wis. 2d 403, 851 N.W.2d 771. The purpose of our analysis is to determine the legislature’s intent in drafting the statute, and we assume that the statutory language expresses that intent. *Beaver Dam Comm. Hosp., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶7, 344 Wis. 2d 278, 822 N.W.2d 491.

¶20 We begin by examining the statutory language, giving words and phrases their common, ordinary, and accepted meaning. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. If the reading of the statutory language “yields a plain, clear statutory meaning,” *id.*, ¶46 (quoted source omitted), the statute is unambiguous and “we must give effect to the words within the statute according to their common meanings.” *Keup v. Wisconsin Dept. of Health & Family Servs.*, 2004 WI 16, ¶17, 269 Wis. 2d 59, 675 N.W.2d 755. If, however, there is ambiguity in the statutory language, meaning the statutory language reasonably gives rise to different meanings, we may review extrinsic sources, including the scope, history, context and subject matter of the statute, to ascertain the legislative intent. *Keup*, 269 Wis. 2d 59, ¶17; *see also Kalal*, 271 Wis. 2d 633, ¶47. In addition, because WIS. STAT. § 134.90 is Wisconsin’s version of the Uniform Trade Secrets Act, we

may look to decisions in other jurisdictions interpreting the Uniform Act for guidance. *Mikulsky*, 251 Wis. 2d 45, ¶9; *see* § 134.90(7).

¶21 The central dispute in this case is whether the amount of North Highland’s confidential bid constitutes “information” under WIS. STAT. § 134.90(1)(c).⁷ Wells argues that the term “information” includes only those items listed in § 134.90(1)(c), and that because a confidential bid amount is not a “formula, pattern, compilation, program, device, method, technique or process,” it does not constitute “information” and is, therefore, not a trade secret. North Highland argues that the list of items identified in paragraph (c) is non-exhaustive and that the term “information” encompasses a confidential bid amount.

¶22 The parties’ differing interpretations of the statute hinge on the effect of the word “including.” Wells essentially argues that “including” should be read as a term of limitation, so that the statute encompasses only those items specifically listed. In *State v. Popenhagen*, 2008 WI 55, ¶43, 309 Wis. 2d 601, 749 N.W.2d 611, our supreme court stated that “includes” may be read as a term of limitation, as opposed to being given “its ordinary, non-exclusive meaning,” but “only when there is some textual evidence that the legislature intended the word ‘includes’ to be interpreted as a term of limitation or enumeration.” The text of WIS. STAT. § 134.90(1)(c) contains no indication that the legislature intended the word “including” as a term of limitation, nor is there any other evidence of such legislative intent. Accordingly, we conclude that the only reasonable

⁷ Wells also argues that North Highland’s bid amount does not constitute a trade secret because it does not have “independent economic value,” as required by WIS. STAT. § 134.90(1)(c)1. However, Wells’ argument is conclusory and undeveloped, and we therefore do not address this argument further. *See Associates Fin. Servs. Co. of Wis., Inc.*, 258 Wis. 2d 915, ¶4 n.3.

interpretation of the term “including” is that it is a term of illustration, or inclusion. *See, e.g., Beaver Dam Comm. Hosp.*, 344 Wis. 2d 278, ¶14-15 (stating that “our supreme court has repeatedly held that ‘include’ is a term of illustration or inclusion, not one of limitation or exclusion,” and concluding that the term “including” in WIS. STAT. § 70.11(4)(a) should be given its general meaning absent any reason to the contrary). Accordingly, we conclude that “including” indicates a partial list of those items that constitute information for purposes of § 134.90(1)(c).

¶23 Having concluded that “information” in WIS. STAT. § 134.90(1)(c) is not limited exclusively to formulas, patterns, compilations, programs, devices, methods, techniques or processes, we must next determine whether the term encompasses the amount of a confidential bid for a particular project. We have explained that “[w]hen a statute defines a term by providing a non-exclusive list of items that meet the definition, we interpret the term as including only items that are of the same type as the listed items.” *Village of Hobart v. Oneida Tribe of Indians of Wis.*, 2007 WI App 180, ¶9, 303 Wis. 2d 761, 736 N.W.2d 896. *See also Popenhagen*, 309 Wis. 2d 601, ¶¶46-48 (stating that when interpreting the word “includes,” when a general word is preceded or followed by list of specific items, the general word “is construed to embrace only items similar in nature to the enumerated items” and that “the items to which the general word is restricted must be germane to the objectives of the enactment.”).

¶24 Accordingly, the next question before us is whether a confidential bid amount is the same type of item as those listed in WIS. STAT. § 134.90(1)(c).

¶25 North Highland devotes a substantial portion of its argument to why this court should not rely upon Wisconsin trade secret cases that were released

prior to the adoption of the Uniform Act, or on any of the non-Wisconsin cases relied upon by Wells in Wells’ responsive brief, which North Highland argues are distinguishable. We need not address whether North Highland is correct because North Highland’s argument suffers a fatal flaw—it fails to explain to this court why its bid amount constitutes “information” as that term is used in WIS. STAT. § 134.90(1)(c). North Highland asserts that because the term “information” is defined “broad[ly]” by online dictionaries, “it is puzzling to see how the [circuit] court held that a bid amount does not fit within [those] definition[s].” However, the question is not whether the bid amount fits the dictionary definition of information, of course it does. But just as obviously, “information” in the context of trade secrets has a more narrow meaning. And, North Highland has not presented this court with any argument explaining why its bid amount is the same type of item as those listed in paragraph (c).

¶26 As the party seeking trade secret protection, it is North Highland’s burden to establish that the amount of its bid for the Tyson project constitutes a trade secret. *See Wisconsin Elec. Power Co. v. PSC*, 106 Wis. 2d 142, 146, 316 N.W.2d 120 (1981). North Highland has not satisfied this burden. Accordingly, we conclude that summary judgment in favor of Wells on this claim was appropriate.

CONCLUSION

¶27 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

