Rel: April 24, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180808

Jostens, Inc., John Wiggins, and Chris Urnis

v.

Herff Jones, LLC, and Brent Gilbert

Appeal from Mobile Circuit Court
(CV-16-901869)

MENDHEIM, Justice.

Jostens, Inc. ("Jostens"), John Wiggins, and Chris Urnis (hereinafter referred to collectively as "the defendants") appeal from the Mobile Circuit Court's denial of their renewed motions for a judgment as a matter of law following the entry

of a judgment on a jury verdict in favor of Herff Jones, LLC ("Herff Jones"), and Brent Gilbert (hereinafter referred to collectively as "the plaintiffs"). We affirm.

I. Facts

Herff Jones and Jostens are nationwide competitors that manufacture scholastic-recognition products -- items such as class rings, diplomas, caps, gowns, tassels, and graduation announcements -- for high school students.[1] As the plaintiffs explain in their appellate brief:

> "The scholastic achievement market is unlike most other consumer markets because it is entirely dependent on schools. That is, although students and their parents are typically the end consumers, it is the schools who decide which company's products will be offered for sale to the students. Each graduating class in most schools might be offered products from either Herff Jones or Jostens, but not both. School administrators are thus key decision makers, deciding whether Herff Jones or Jostens will have the opportunity to sell to its students. Herff Jones and Jostens compete to 'win' schools."

Plaintiffs' brief, pp. 5-6. Decisions about which manufacturer of scholastic-recognition products to choose are

[1]Herff Jones and Jostens agree that the other major national competitor in this industry is Balfour, which is not a party to this action.

typically made each year before the start of the upcoming academic school year.

The competing manufacturers sell their products to schools through independent-contractor small businesses that are located in the schools' territories. These small businesses purchase from a manufacturer of scholastic-recognition products the exclusive right to sell that manufacturer's products within a certain geographic territory. For example, Brent Gilbert's business is GradPro Recognition Products, Inc. ("GradPro"), and he has worked with Herff Jones for over 30 years, both as a sales representative for his father and as the current owner of GradPro. Gilbert's father purchased from Herff Jones much of the territory in Alabama when Gilbert was a child, and Gilbert purchased his father's territory in July 2004, paying $400,000 over 10 years to acquire it. Gilbert operates primarily out of Dothan for servicing his Alabama territory.

All the parties agree that the scholastic-recognition-products business is highly competitive and that sales representatives ostensibly working for each manufacturer pitch their products to schools in their territories every year in

an effort to "win" schools for their respective manufacturer. The parties also agree that the business is relationship-driven: sales representatives strive to establish cordial and lasting relationships with school administrators in an effort to secure and maintain contracts. One method manufacturers use to increase their market share of schools in a territory is to entice a competitor's sales representatives to switch employers. In order to discourage such switching of employers, it is common practice in the scholastic-recognition-products industry for sales representatives, as a stipulation of employment, to sign noncompetition agreements, agreeing not to compete against their former employers for a specified period and/or in a specified location.

Wiggins worked for an independent distributor of Jostens from 2000 to late 2003, selling Jostens products to schools in southwest Alabama and in the Florida panhandle. Urnis worked for an independent distributor of Jostens from 2001 to 2005, selling Jostens products to schools in central Alabama. In 2004 and 2006, respectively, Gilbert hired Wiggins and Urnis away from Jostens to be sales representatives for GradPro and, ostensibly, for Herff Jones. Before joining Gilbert in

working on behalf of Herff Jones, Wiggins and Urnis each spent one year away from the industry to honor their noncompetition agreements. Wiggins spent his year away fishing and volunteering at his church, and he began selling Herff Jones products to schools in southwest Alabama in August 2004. Urnis spent his year away volunteering in youth sports organizations, and he began selling Herff Jones products to schools in central Alabama in June 2006. It is undisputed that neither Wiggins nor Urnis violated his noncompetition agreement during his respective year after leaving the Jostens distributor and coming to work for GradPro and Herff Jones. Testimony at trial indicated that, during the respective year that each did not work, one school account that had belonged to Wiggins when he worked with Jostens switched to Herff Jones and six school accounts that had belonged to Urnis when he worked with Jostens switched to Herff Jones.

As part of their employment arrangement, Gilbert gave Wiggins and Urnis each part ownership in GradPro and they, in turn, each signed an employment agreement that contained a section providing that they agreed not to compete in the respective territory each was assigned to cover for a period

of one year after leaving employment with GradPro. Those noncompetition agreements provided, in part:

> "Employee covenants and agrees that as long as he is employed by [Gilbert] under the terms of this Agreement and for a period of one year after Employee's relationship with [Gilbert] is terminated and after Employee ceases selling Herff Jones Products, he shall not compete in the Territory, directly or indirectly (nor receive, in any form, benefits from a competitor of [Gilbert] or Herff Jones), with [Gilbert's] Business of soliciting orders for the Products and/or with Herff Jones's business of manufacturing and/or selling the Products. To 'compete' as used herein shall include, among other things, the servicing of customer accounts, soliciting of sales from customers, supervision of such sales, the recommendation of a supplier of Products other than [Gilbert] and/or Herff Jones or conducting himself in such a manner that Representative's and/or Herff Jones's goodwill with customers is diminished.
>
> "Employee acknowledges that, by virtue of his activities for [Gilbert] on behalf of Herff Jones, regardless of any limitations in the assignment of Products or coverage of Territory, he has had contact with or otherwise gained valuable knowledge of school decision makers and the requirements and practices relating to the purchase of Products or similar products by students of all schools within the Territory through which Herff Jones has done or had sought to do business. Employee, therefore, acknowledges that the foregoing covenant is reasonable in time and area and that it is necessary for the reasonable protection of the interests of Herff Jones and [Gilbert].
>
> "Employee further agrees, during his employment and for one year after, not to use or disclose, directly or indirectly, any of [Gilbert]'s and/or

> Herff Jones's price lists, records, customer lists, statistics or other information acquired by him in the course of his employment, nor to aid or be party to any actions which would tend to divert, diminish or prejudice the goodwill of [Gilbert] or Herff Jones. ..."

At trial, the plaintiffs presented testimony and evidence indicating that, before 2014, Jostens's nationwide sales had been in a 10-year decline but that, beginning in that year, under the direction of chief operating officer John Biebault, Jostens engaged in strategies aimed at reversing that decline. The plaintiffs introduced into evidence a Jostens confidential business document produced in December 2015 titled "Scholastic Strategic Plan Summary (2016-2019)." In that document, Jostens listed one of its "Key Growth Initiatives" as being "Rep Acquisition," which included seeking to take advantage of "[i]nterest from strong performing external independent rep groups in joining Jostens (particularly from Herff Jones)." (Emphasis added.) This initiative also noted that those strategies "[m]ay provide access to reps with $20M and $15M accounts" and that there was a "[n]eed to navigate two-year non-compete reps have in their territories." Jostens countered this evidence with testimony from Louis Kruger, Jostens's national sales director at the time the document was

produced, who stated that the "Key Growth Initiatives" specifically mentioned Herff Jones representatives only because several sales representatives from Herff Jones had expressed interest in joining Jostens. He also testified that the money figures referred to "two groups that were with Balfour" in Atlanta and Louisiana and that those two groups had two-year noncompetition agreements "that we have to adhere to."

Sometime in December 2015 or January 2016, Kruger began communicating with Wiggins while Wiggins was still working for GradPro. On January 4, 2016, Wiggins, using his wife's e-mail address, sent an e-mail to Kruger's wife's e-mail address that was intended for Kruger. In the e-mail, Wiggins sought to provide Kruger with

> "the 10 most important items ... I'd like to request in the event of a transition. These are the things that would make me feel as though Jostens is committed to the long-term success and market domination of my current territory. While I'm asking Jostens for 10 essential items below, I'd like to offer Jostens the assurance that I am highly confident in my ability to transition all of my current accounts as well as 4 new target accounts."

Those "essential items" included, among other things:

> "1. Jostens to pay for office to open in Mobile in June 2016 through May of 2017. ...

> "2. Jostens to pay salaries for 12 months beginning June 2016 through May 2017 to my existing 3 employees that will make the transition immediately and run the office for the 12-month non-compete period. ...
>
> "3. Jostens ... to pay me monthly beginning June of 2016 through May of 2017 the amount of $175,000. June of 2017, we will adjust if necessary.
>
> "4. Jostens ... to pay me $100,000 in June 2016 through May 2017 as a territory transition fee.
>
> "5. Jostens to offer a territory (to be discussed later) in central/south Alabama that would, at minimum, include all counties where I have active accounts. Said territory would include immediate equity and at no point cost me to acquire. In short, territory would be mine immediately, free and clear.
>
> "....
>
> "10. While it is my intent to fully comply and not violate my existing 12 month 'covenant not to compete' with my current company, I would ask that Jostens indemnify me against any legal action taken against me."

Jostens responded to Wiggins's demands by having one of its lawyers send an e-mail to Wiggins's attorney on January 21, 2016, that requested that Wiggins provide "additional information and documentation." The requested information included:

> "1. Gross commissions earned in 2014 and 2015.
>
> "2. Charges your client incurred in connection with his employment in 2014 and 2015; and

> "3. Cash payments made by his employer and/or Herff Jones in 2014 and 2015."

Kruger admitted at trial that gross commissions earned would constitute confidential information.

In an e-mail to his attorney on January 26, 2016, Wiggins provided his gross commissions earned. With respect to charges incurred, Wiggins stated:

> "2. I have no knowledge of these charges as I am not a rep for [Herff Jones] but rather an employee of GradPro. Obtaining the info requested would require me to go to my partner and President of GradPro, W. Brent Gilbert. I don't think they [Jostens] want me to do this."

Wiggins also noted that he had never received cash payments from either Herff Jones or GradPro. Gilbert testified that the underlying commission information could have been obtained only from Herff Jones's confidential "Commission County Summary Report." Jostens used this information to generate a model of what it believed Wiggins's territory was currently worth, $1.2 million, and what it anticipated the territory could be worth, $3.81 million. The model projection indicated that it was based on Jostens's expectation of capturing 85 percent of Wiggins's school accounts in the first year after he left Herff Jones.

On February 19, 2016, Jostens, through its attorney, e-mailed Wiggins's attorney an offer of employment for Wiggins which was termed a "Transition Agreement." Jostens acquiesced to Wiggins's request that he be given a geographic territory free and clear, which, Wiggins admitted, "[i]n my nineteen years, I would say that's not standard at all." According to Gilbert, when Wiggins met with Gilbert to inform him that Wiggins was leaving to go to Jostens, Gilbert began to discuss ways he could have another sales representative in Mobile for the next year, but Wiggins cut him off, saying:

> "[Brent,] there's not going to be a next year for you in Mobile.
>
> "And I said, 'What do you mean, John?'
>
> "He said all the schools are going.
>
> "I said, 'What do you mean they're going?'
>
> "He said 'They're gone, Brent. All the schools are already gone. They're going to go to Jostens.'
>
> "I was, like, 'John, so you're saying that all the schools have already made the decision that they're going to Jostens?'
>
> "He went, 'They're all going.'"

Wiggins resigned from GradPro on April 1, 2016. Wiggins testified that he worked as a consultant for Jostens during

the year his noncompetition agreement was in effect and that he became a sales associate for Jostens on July 1, 2017.

Urnis began communicating with Kruger by direct e-mail on January 12, 2016. Subsequently, they also talked by telephone and in person. In the course of this communication, Urnis disclosed the general volume of his sales, as well as the amount of his earned commissions. Jostens used this information to generate a model of what it believed Urnis's territory was currently worth, $950,000, and what it anticipated the territory could be worth, $3 million. The model projection indicated that it was based on the expectation of capturing 100 percent of Urnis's school accounts in the first year after he left Herff Jones.

Shortly after his conversation with Wiggins, Gilbert met with Urnis, who told Gilbert: "Brent, I don't want to work with you. I want out. I'm either going to go to Jostens, and when I go I will take every school that you've got, or you can give me the territory. I'll stay with Herff Jones." Both Gilbert and Herff Jones refused to give Urnis the territory free of charge. Gilbert and Urnis met a few more times, but during their third meeting, on May 31, 2016, Urnis handed

Gilbert his resignation from GradPro, telling Gilbert: "I'm leaving because I'm not going to pay for a territory." Gilbert testified that Urnis also told him: "[Y]ou better not sue me. And I went, 'Why would I sue you? Have you been talking to schools?' And he says, 'They all know the deal and you're losing all of them.'"

Urnis testified that, after he resigned from GradPro, he worked as a consultant for Jostens during the year his noncompetition agreement was effective and that he became a sales associate for Jostens on July 1, 2017.

The parties agree that Jostens selected independent distributor Scott Moore to spearhead its operations in the territories Wiggins and Urnis had worked for GradPro/Herff Jones. Moore had worked with Jostens for 16 years, and his home territory was in the Tuscaloosa area. Some of Moore's territory overlapped with the areas Urnis worked, and at one time Moore had a second office located in Mobile -- Wiggins's home territory -- but Moore closed that office in 2014 because he had been unable to generate enough business to justify keeping it open. Moore testified that, when Wiggins and Urnis left GradPro (and Herff Jones), it presented an opportunity to

gain new school accounts the likes of which he had never seen in all of his years in the scholastic-recognition-products industry. Moore admitted that, before the 2016-2017 school year, the most school accounts he had won in one year was five. In 2016, before Wiggins and Urnis had officially resigned from GradPro, Moore had convinced two schools to switch from GradPro and Herff Jones to Jostens. Moore related that in 2016 he had some members of his sales team take care of his home-territory accounts so that he could concentrate on winning accounts in Wiggins's and Urnis's territories. He further testified that he worked extremely hard that year and that he put over 75,000 miles on his automobile driving to prospective schools.

The trial record indicates that, while he was still working for GradPro and thus Herff Jones, Wiggins began to tell administrators at schools with whom he had accounts that he was leaving Herff Jones to go work for Jostens, and he told at least one of those administrators to "keep quiet" about this change because he had a noncompetition agreement with GradPro and Herff Jones. In some instances, Wiggins put school administrators in contact with Moore. In at least one

case, during the one-year period of his noncompetition agreement, Wiggins made repeated telephone calls to an administrator using his wife's and his daughter's cell phones to introduce the administrator to Moore and then to relate that he would be officially taking over for Moore once the period of his noncompetition agreement had ended. There is also record evidence indicating that Wiggins provided Jostens with specific pricing on Herff Jones products during the period of his noncompetition agreement. In at least one instance, Wiggins gave Jostens pricing on a product and Jostens's regional sales manager Duke Walker e-mailed Wiggins asking him to clarify the price he had provided because Walker "just want[ed] to give Scott [Moore] the best leg up going into this." Wiggins also helped Moore in opening a new Mobile office -- paid for by Jostens per its employment agreement with Wiggins. For example, on May 9, 2016, Wiggins e-mailed Kruger and Walker with a proposed budget for the Mobile office and asked for prompt feedback because "our target open date is June 1[, 2016]." In June 2016, Wiggins sent Walker a list of schools that were doing business with Herff Jones that included their order histories and their order preferences.

Walker admitted at trial that this was very useful information that Jostens used to prepare their own products and forecast sales volumes.[2] Walker also admitted that Moore used the information contained in the list "in the execution of sales in his territory."

Gilbert testified that, after Wiggins and Urnis resigned, he and the remainder of his sales team started contacting schools in Wiggins's and Urnis's former assigned territories, and several of those schools would not provide dates for GradPro to make presentations of Herff Jones products, take orders, and then make deliveries. Gilbert testified that if a school principal or other administrative decision-maker would not give a date, "[t]hat means you don't have business in the school." Gilbert stated that, by the time school started for the 2016-2017 school year, he and his sales team had "a pretty good idea of what we had lost." He testified that "[t]here were forty-seven schools" in the territories formerly serviced by Wiggins and Urnis for GradPro and Herff Jones that switched to Jostens in the 2016-2017 school year.

[2]In his deposition, Walker agreed that the list had come from Wiggins. At trial, he contended that the list came from one of Wiggins's employees, Lib Blossom.

Gilbert stated that 47 schools constituted "a little over half" of GradPro's entire scholastic-recognition-products business (the parties refer to these 47 schools as the "blue list" of schools). In a motion filed in the trial court, the defendants acknowledged that the 47 schools made up "80 [percent] of the sales volume of schools serviced by Wiggins or Urnis while at GradPro." Gilbert testified that it had taken "[t]en or twelve years" to build up the business in those territories and that the business was lost in one cycle. Donald Agin, the general manager of Herff Jones's scholastic division in 2016, testified that Herff Jones "had never had that type of transition" of school accounts going to a competitor "in as short a period of time" "[i]n the thirty-four years that [he had] been in [the] industry."

At trial, the defendants presented testimony from two principals of schools on the "blue list" who stated that their schools did not switch from Herff Jones to Jostens because of any wrongdoing by Jostens, Wiggins, or Urnis. Principal Craig Smith of Baldwin County High School testified that one reason his school switched scholastic-recognition-products suppliers was that there had been some "quality issues" with hoodies his

school had gotten from Herff Jones that had cheap iron-on patches. Smith also stated that he liked Moore and that Jostens's prices were "pretty close" to those of Herff Jones. Principal Alvin Dailey of LeFlore High School testified that the school switched from Herff Jones to Jostens because Jostens's prices were cheaper, particularly the class rings it offered, and because there had been a problem with hoodie orders from Herff Jones and a slight delay in diploma delivery in the 2015-2016 school year.

As part of their presentation of testimony from the principals, as well as through questioning of other witnesses, the defendants also sought to present evidence of other reasons schools may have switched scholastic-recognition-products providers from Herff Jones to Jostens. Those reasons included: changes in administrators at some high schools; problems with some products ordered from Herff Jones, such as hoodies and tassel frames; delayed delivery of some diplomas; and the open competition created by Wiggins's and Urnis's vacating for one year the territories they had serviced. The plaintiffs, in turn, sought to counter some of these proffered reasons through testimony from Gilbert and Agin.

On September 7, 2016, the plaintiffs sued the defendants in the Mobile Circuit Court.[3] They asserted claims of breach of contract against Wiggins and Urnis based on the noncompetition agreements contained in their contracts with GradPro; tortious interference against Jostens; and misappropriation of trade secrets and civil conspiracy against all the defendants. In general, the plaintiffs asserted that, because of the defendants' alleged wrongful conduct, the plaintiffs lost 47 school accounts in territories previously serviced by Wiggins and Urnis.

During the motions-practice phase of the litigation, Jostens filed two summary-judgment motions, the second of which specifically contended, among other things, that the plaintiffs had not presented evidence indicating that any alleged wrongful conduct by the defendants had caused any of the 47 school accounts to switch from Herff Jones to Jostens. Wiggins and Urnis likewise filed separate summary-judgment motions in which they contended that the plaintiffs lacked evidence of causation. The trial court denied the defendants'

[3]The plaintiffs also named Moore as a defendant, but he was voluntarily dismissed as a defendant before trial.

summary-judgment motions with respect to dismissal of claims based on a lack of causation evidence.

As the case proceeded to trial, Jostens filed a motion in limine in which it requested, among other things, that the plaintiffs be prohibited from introducing "[a]ny evidence or testimony related to ... the fact that Plaintiffs lost the business of 47 schools in one year and that such loss in and of itself is evidence that the Defendants committed wrongdoing in this case." The trial court denied the motion.

The case proceeded to trial in April 2019, and the trial lasted almost two weeks. The plaintiffs presented testimony from Wiggins, Gilbert, Moore, Urnis, Jostens area sales manager Al Bunge, GradPro operations manager Lawrence Herring, certified public accountant Jeffrey Windham, Walker, Mobile attorney Ben Rowe, and Agin. The defendants presented testimony from Smith, Kruger, and Dailey. At the close of the plaintiffs' case, the defendants filed separate motions for a judgment as a matter of law in which they again asserted, among other things, that the plaintiffs had not presented evidence that the alleged damages represented by the lost school accounts was caused by the defendants' alleged wrongful

conduct. The trial court denied those motions. The defendants likewise filed separate motions for a judgment as a matter of law at the close of all the evidence; the trial court denied those motions as well, and it submitted the case to the jury.

The jury returned a verdict in favor of the plaintiffs, finding the defendants jointly liable for the damages. Specifically, the jury awarded compensatory damages to Gilbert in the amount of $579,620 and to Herff Jones in the amount of $1,884,960. The jury assessed punitive damages against Jostens in the amount of $650,000, against Wiggins in the amount of $25,000, and against Urnis in the amount of $10,000. The trial court entered a judgment based on the verdict. The defendants filed a joint renewed motion for a judgment as a matter of law in which their sole argument was that the plaintiffs failed to present evidence of causation for the damages claimed based on the defendants' allegedly wrongful conduct, which the trial court denied. The defendants appeal.

II. Standard of Review

> "The standard of review for a ruling on a motion for a judgment as a matter of law ('JML') is as follows:

"'"When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

> "'Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).'
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> "CSX Transp., Inc. v. Miller, 46 So. 3d 434, 450-51 (Ala. 2010)."

DISA Indus., Inc. v. Bell, 272 So. 3d 142, 148 (Ala. 2018).

III. Analysis

The defendants' sole contention in this appeal is that the plaintiffs failed to present any evidence of proximate causation and that, therefore, the case should not have been submitted to the jury.[4] Specifically, the defendants argue:

> "Plaintiffs did not present any testimony at trial establishing why those forty-seven schools took their business elsewhere. Therefore, Plaintiffs did not submit any evidence at trial to prove that any one of the forty-seven schools on their blue list chose to leave for a different competing supplier because of Defendants' alleged wrongful conduct. Plaintiffs did not call even one principal or school official to the stand to testify at trial that the reason for them switching suppliers was Defendants' wrongful conduct."

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[4]In their reply brief, the defendants attempt to argue that the jury's damages calculation was based on "guesswork and speculation." Defendants' reply brief, p. 6. However, the defendants did not challenge the damages calculation in their renewed motion for a judgment as a matter of law in the trial court, nor did they raise the issue in their initial appellate brief. The sole ground for appeal was a lack of causation evidence. Therefore, we will not consider that argument. See, e.g., Melton v. Harbor Pointe, LLC, 57 So. 3d 695, 696 n.1 (Ala. 2010) (noting that "this Court will not consider arguments made for the first time in a reply brief").

Defendants' brief, pp. 13-14. The defendants contend that, instead of presenting concrete evidence of proximate causation, the plaintiffs "elected to throw 47 schools in a basket, wave around alleged bad conduct evidence with their blue list of 'lost' schools and simply say that the bad conduct obviously caused all 47 schools to select a different scholastic products supplier." Defendants' reply brief, p. 1.

The defendants insist that, in lieu of causation evidence, the plaintiffs merely "point to liability evidence as their proof of causation." Defendants' brief, p. 36. The defendants contend that it was incumbent upon the plaintiffs to introduce testimony from decision-makers for each of the 47 schools stating that the school chose to switch scholastic-recognition-products providers because of wrongful conduct by the defendants. See, e.g., Defendants' brief, pp. 26, 29 (complaining that the plaintiffs "failed to introduce any evidence from any customer that the loss was caused by any improper conduct of Defendants" and stating that, "[i]n order to prove causation and damages, Herff Jones and Gilbert were required to prove why each school decided to use Jostens ... as a supplier for the 2016-2017 school year").

In support of their causation argument, the defendants rely on Corson v. Universal Door Systems, Inc., 596 So. 2d 565 (Ala. 1991). Corson involved a former employee of Universal Doors Systems, Inc. ("Universal"), Timothy Corson, whom Universal had accused of violating a nonsolicitation covenant contained in his employment contract with Universal. Corson began working for Universal in August 1985. "At Universal, Corson served as a service and installation technician. ... While he was employed by Universal, the company's customers included Handy Dan, Delchamps, Sam's Wholesale Club, Service Merchandise, St. Vincent's Hospital, Druid City Hospital, and the divisions of Bruno's." Corson, 596 So. 2d at 566-67. The nonsolicitation covenant in the employment agreement Corson signed with Universal prohibited him from soliciting Universal customers within a certain geographic territory for one year following the termination of his employment. In April 1989, Corson resigned from Universal and accepted comparable employment with Alabama Door Systems, Inc. ("Alabama Door"), one of Universal's competitors. Subsequently, "Universal sued Corson, seeking a preliminary and permanent injunction, as well as damages, for his alleged solicitation of Universal's

customers in violation of the nonsolicitation covenant." 596 So. 2d at 567. The trial court ruled in favor of Universal, granting a permanent injunction and awarding Universal damages in the amount of $7,935, and $8,427 in attorney fees. Corson appealed and argued, among other things, that Universal had failed to introduce any evidence supporting a damages award against him.

This Court agreed with the trial court that there was evidence to support a finding that Corson had violated the nonsolicitation covenant in his employment agreement with Universal. However, it concluded that the trial court had placed "the burden of proof as to damages" on Corson, the defendant, rather than upon Universal, the plaintiff. Corson, 596 So. 2d at 570.

> "The covenant at issue prevented Corson only from 'call[ing] upon any customer of [Universal] for the purpose of soliciting sales to such customer [of] any product or services associated [sic] or provided by [the] business of [Universal].' Consequently, Corson was liable only for business that he personally, directly or indirectly, diverted from companies dealing with Universal during the time of his employment. Corson was not liable for business flowing to Alabama Door from Universal's customers because of the efforts of others, or for other reasons unrelated to Corson's efforts.

> "Universal would be entitled to nominal damages for breach of the nonsolicitation covenant upon mere proof that Corson successfully solicited a Universal customer. James S. Kemper & Co. v. Cox & Associates, Inc., 434 So. 2d 1380, 1385 (Ala. 1983). However, in order to collect more than nominal damages, Universal must also prove that it actually lost money because of Corson's breach, that is, that it would have gotten the business that went to Alabama Door. It follows that if Corson could demonstrate other reasons that might have accounted for Universal's alleged loss of business since Corson's termination, Universal's burden of proof on the issues of causation and damages would become more substantial."

Corson, 596 So. 2d at 570 (emphasis added).

The Corson Court went on to explain that the evidence indicated that Universal shared the market for its products and services with several competitors. The Court noted that when Corson's counsel "attempted to establish whether Universal had an exclusive business relationship with any of the companies on its customer list," the trial court prevented the line of questioning. 596 So. 2d at 570. The Court concluded that the trial court had erred in precluding such a line of inquiry:

> "The line of questioning pursued by Corson's counsel was material and highly relevant on the issues of causation and damages, that is, in determining whether Universal actually lost revenue because of Corson's breach of the nonsolicitation covenant. Only if Universal had an exclusive

> relationship with a customer is it reasonably inferable, in the absence of other evidence, that any revenue brought to Alabama Door by Corson would have gone to Universal."

Corson, 596 So. 2d at 570-71 (emphasis added). The Court further explained:

> "Although the record supports a finding that Corson successfully solicited jobs performed by Alabama Door at Handy Dan, [Delchamps], Sam's Wholesale Warehouse, and Foodworld [sic] number 13, Universal produced no evidence that it would have received the revenue for the work done at Handy Dan, [Delchamps], or Sam's Wholesale Warehouse, but for Corson's breach of contract. On the contrary, testimony revealed that they, and nearly all the companies on Universal's customer list, periodically contracted for products and service with Alabama Door and other competitors of Universal before, during, and after Corson's employment with Universal. Indeed, the only company on Universal's customer list whose business was not regularly shared by Alabama Door or its affiliate was Bruno's, of which Food World is a division. ... Because Universal thus failed to meet its burden of proof on the issues of causation and damage, the trial court erred in awarding more than nominal damages for work performed by Alabama Door at Handy Dan, [Delchamps], and Sam's Wholesale Warehouse."

Corson, 596 So. 2d at 571.

The defendants contend that Corson is exactly on point with the situation presented in this case. They say that, even though the plaintiffs introduced evidence indicating that Wiggins and Urnis violated their noncompetition agreements and

that Jostens tortiously interfered with business relations -- just as Universal demonstrated that Corson had violated the nonsolicitation covenant in his employment agreement with Universal -- the plaintiffs had to demonstrate that they would have retained the accounts of all 47 schools on the blue list absent the wrongful conduct. The defendants argue that because Herff Jones/GradPro's contracts with those schools were not exclusive, i.e., schools were free to switch providers each school year, the only way the plaintiffs could demonstrate proximate causation was to present testimony from the decision-makers at each school as to why they switched from Herff Jones to Jostens for the 2016-2017 school year. See, e.g., Defendants' brief, p. 36 (contending that the plaintiffs "were required to introduce evidence that the decision-makers at each school would have chosen to use Herff Jones/Gilbert as their vendor for 2016-2017 if the Defendants had not committed the wrongful acts"). Additionally, the defendants note that they presented evidence of other potential reasons schools switched providers that year, including changes in administrators at some high schools, problems with some products and services provided by Herff

Jones, and the open competition created by Wiggins's and Urnis's vacating for one year the territories they had serviced. The defendants contend that the plaintiffs "submitted no evidence to rebut/controvert" their "affirmative evidence of actual and potential reasons the schools on Plaintiffs' blue list switched suppliers." Defendants' brief, p. 20.

The plaintiffs counter that

> "the totality of the circumstances showed that [defendants'] illegal actions caused Herff Jones' and Gilbert's harm. Such evidence was more than enough to warrant the circuit court's submission of that fact dispute to the jury, and for the jury to reasonably infer from the evidence that [defendants'] actions were the proximate cause."

Plaintiffs' brief, p. 24. The plaintiffs further assert, in contravention of the defendants' reliance on Corson, that "Alabama law is clear that a plaintiff need not produce direct, customer-by-customer evidence of causation in order to prevail on a claim for lost profits." Id.

For support of their contention that direct customer-by-customer evidence was not required to demonstrate proximate causation, the plaintiffs rely upon Intergraph Corp. v. Bentley Systems, Inc., 58 So. 3d 63 (Ala. 2010). Intergraph

concerned a complicated contractual arrangement between Intergraph Corporation ("Intergraph") and Bentley Systems Incorporated and Bentley Systems Europe B.V. (hereinafter referred to collectively as "Bentley"). Intergraph and Bentley were two software-design corporations that produced software products for architects and engineers, which products were dependent upon one another. The contractual arrangement between Intergraph and Bentley involved Bentley's purchasing certain software products from Intergraph and Intergraph's giving Bentley the right to service maintenance contracts connected with those software products. The issue in Intergraph relevant to this case concerned Bentley's counterclaim against Intergraph alleging a breach of the contractual arrangement. Specifically, Bentley alleged that, because Intergraph provided Bentley with bad and late maintenance-agreement data, Bentley was not able to renew a large percentage of customer software-maintenance agreements connected to the software it had purchased from Intergraph. Bentley further alleged that Intergraph's failure had resulted in a large amount of lost profits Bentley had expected to gain through its contractual arrangement with Intergraph. The

trial court -- following a recommendation from a special master -- awarded Bentley over $2 million in lost profits based on Intergraph's breach of its contract with Bentley.

On appeal, Intergraph contended that Bentley had failed to present evidence that Intergraph's provision of bad and late data had been the reason Bentley had lost customer software-maintenance agreements. In assessing this issue, this Court noted the standard for assessing damages in a lost-profits case:

> "'"[T]he loss of profits must be the natural and proximate, or direct result of the breach complained of and they must also be capable of ascertainment with reasonable, or sufficient, certainty, or there must be some basis on which a reasonable estimate of the amount of the profit can be made; absolute certainty is not called for or required."'
>
> "Mason & Dixon Lines[, Inc. v. Byrd,] 601 So. 2d [68,] 70 [(Ala. 1992)] (quoting Paris v. Buckner Feed Mill, Inc., 279 Ala. 148, 149-50, 182 So. 2d 880, 881 (1966))."

Intergraph, 58 So. 3d at 75. The Court further explained that "cases applying the 'reasonable certainty' standard have rejected imposing a burden on the plaintiff in the first

instance to prove negatives, i.e., to exclude every conceivable cause for its lost profits." Intergraph, 58 So. 3d at 76. Instead, it is incumbent upon a defendant in such a scenario "to go forward with evidence" of other reasons for the lost profits, and then the plaintiff has to address those reasons. 58 So. 3d at 77. The Intergraph Court quoted and cited Corson in support of this principle.

The Intergraph Court also directly addressed the issue whether Bentley had established a connection between Intergraph's wrongful conduct and Bentley's loss of customer-maintenance agreements. Discussing an argument presented by Intergraph that echoes the defendants' assertion that the plaintiffs simply assume damages as a result of "liability evidence," the Court explained:

> "Northcut[5] used a 'but for' theory in calculating Bentley's damages, meaning that he assumed Bentley would be able to renew the vast majority of the [purchased software-]maintenance agreements 'but for' Intergraph's breaches of the APA [asset-purchase agreement] relating to the provision of customer data and the renewal of customer contracts. He calculated Bentley's losses during the APA year and the ensuing four years based on Bentley's

[5]Dana Northcut was Bentley's accounting expert who testified as to the calculation of damages that resulted from Bentley's not gaining the renewal of multiple customer software-maintenance agreements.

inability to renew those agreements during the APA year. Intergraph essentially complains that Northcut's methodology assumed damages without any specific customer-by-customer evidence to support such damages.

"We find Intergraph's argument unpersuasive. The fact that Northcut testified that data was 'fundamental' and that damages could be established 'by simple inference' does not mean that damages were assumed. It simply means that damages were an obvious result of Intergraph's behavior because customer data was vital to retaining the [purchased software-]maintenance agreements. As Northcut testified, there is 'a direct link between the information provided through this transaction and Bentley's ability to transition these [purchased software] seats to Bentley maintenance.' Moreover, it is not surprising that Bentley did not base its calculation on actual customer responses because customers were not likely to know the reason behind Bentley's failure to contact them. Furthermore, Intergraph fails to provide any authority stating that customer-by-customer, or transaction-by-transaction, evidence is required to establish damages in a situation involving lost profits, especially on such a large scale. In fact, several cases have held that it is not.

"....

"Greg Bentley, Bentley's president and chief executive officer, specifically testified that Bentley had every confidence that it would 'renew virtually all of the Intergraph maintenance book of business for [the purchased software] under our Bentley Select program' in a seamless fashion but that this did not happen because of the bad and late data provided by Intergraph, as well as Intergraph's improper renewal of some maintenance contracts. He also testified that the delay in renewals was a 'natural consequence' of bad or late data because

> one 'can only sell a maintenance contract for [purchased] software to someone who is a due licensee when I know who he is and where he is, and if I don't know that I can't begin the process of rolling over a maintenance contract.' He stated that there was no other cause for the delay because Bentley 'did not suffer any such problems with renewing and continuing our maintenance coverage on our other products, including those for which the characteristics of the products and the characteristics of the users are as comparable as can be to the [purchased software] products.' Bentley's chief operating officer, Malcolm Walter, testified that Bentley expected to convert all the [purchased software-]maintenance contracts because all the customers for the [purchased software] products were already Bentley customers. He also testified that renewal rates for maintenance contracts drop after the expiration date of the contract, so it is vital to begin the renewal process before the contract expires. He further testified that Intergraph's breaches had a 'significant impact' on Bentley's ability to timely renew the [purchased software-]maintenance contracts. Even one of Intergraph's own witnesses testified that 'it's very important that you not have any interruption in the maintenance renewal process.'
>
> "Through this and other testimony, Bentley established that its MicroStation product was required to run most of the [purchased software] products acquired from Intergraph, that it renewed a high percentage of its own software-maintenance agreements that are similar to the [purchased software-]maintenance agreements, and that, as to the [purchased software-]maintenance agreements Bentley was able to renew in its name, it thereafter retained them at about a 98% annual renewal rate. Bentley also established that Intergraph's errors in providing Bentley with information on the [purchased software-]maintenance agreements were the most

> likely cause of its initial lost profits because it demonstrated that renewal delays were an unexpected occurrence, given the products involved and the history of renewals on such maintenance contracts. ... [T]hese facts concerning past performance and the likelihood of similar future results established with sufficient certainty that [the purchased software-]maintenance agreements would have been renewed but for Intergraph's breaches of the APA, which in turn established the fact of lost profits for Bentley."

Intergraph, 58 So. 3d at 74–75 (emphasis added).

The plaintiffs contend Intergraph demonstrates that customer-by-customer evidence is not required to establish proximate causation in large-scale lost-profits cases such as this one. The plaintiffs emphasize that they presented evidence that usually only a few schools elect to change scholastic-recognition-products providers in a given year and that, during the noncompetition years in which Wiggins and Urnis left Jostens to join Herff Jones, a total of only seven schools switched from Jostens to Herff Jones. They argue that this evidence indicated that the plaintiffs had a strong likelihood of retaining the vast majority of the school accounts formerly serviced by Wiggins and Urnis in their former territories but for wrongful actions taken by Wiggins, Urnis, and Jostens, just as Bentley had demonstrated that it

had a strong likelihood of renewing customer software-maintenance agreements but for Intergraph's wrongful conduct.

The plaintiffs add that they did refute the other potential reasons for switching scholastic-recognition-products providers given by the defendants. Gilbert admitted that Herff Jones had had some problems with hoodies it supplied, but he testified that he offered complete refunds and replacement of the product to customers who were not satisfied. Through cross-examination of Wiggins and Urnis, the plaintiffs showed that some schools were not made aware of Herff Jones's accommodations for the poorly manufactured hoodies because Wiggins and Urnis failed to inform those schools about those accommodations while they were still employed by GradPro and Herff Jones. Gilbert also testified that the diploma issue did not result in any school receiving its diplomas too late for graduation and that no school that he was aware of expressed grave disappointment about the delays in delivery. The plaintiffs also observe that the defendants did not provide a single specific example of a school-administrator change between the 2015-2016 school year and the 2016-2017 school year for any of the 47 schools on the

blue list. They also argued that they presented sufficient evidence to demonstrate that ordinary competition could not have produced such a drastic shift of school accounts in one year.

"The question of proximate causation is ordinarily one for the jury, if reasonable inferences from the evidence support the plaintiff's theory." Garner v. Covington Cty., 624 So. 2d 1346, 1349 (Ala. 1993). Nonetheless, according to the defendants, because there were other potential reasons for the schools to have switched from Herff Jones to Jostens, in order for the plaintiffs to satisfy their burden and to warrant submission of the issue of causation to the jury, the plaintiffs had to introduce evidence from decision-makers at each of the 47 schools on the blue list demonstrating that they would have stayed with Herff Jones but for the wrongful acts committed by the defendants. The plaintiffs failed to provide such direct evidence, and, therefore, the defendants insist, no causal link was made between the defendants' conduct and the plaintiffs' loss of the 47 school accounts. This argument contains at least two underlying assumptions: (1) that the only competent evidence of causation is from

school administrative decision-makers and (2) that a plaintiff must provide customer-by-customer evidence to demonstrate damages. Neither of those assumptions is correct.

There are several problems with the first assumption. First, it deprives the jury of its role to determine the veracity of witness testimony. See, e.g., Scott v. Farnell, 775 So. 2d 789, 793 (Ala. 2000) (observing that "it is within the province of the jury ... to weigh the credibility of witnesses"). As the defendants have noted, they presented testimony from principals at two of the high schools on the blue list that switched from Herff Jones to Jostens during the year Wiggins and Urnis were supposed to be honoring their noncompetition agreements. Those two principals testified that their schools did not switch scholastic-recognition-products providers because of wrongful conduct by the defendants. Under the defendants' argument, their testimony settled the issue with respect to those two schools. However, the jury was free to believe or disbelieve, or assign whatever weight and credibility it chose, to the testimony of those two principals, and the same would have been true for any of the decision-makers at the other 45 schools if they had been

called to testify. For example, it could be inferred from the evidence that at least some school administrators actually switched their schools' accounts from Herff Jones to Jostens because Wiggins gave those administrators a heads-up that he was leaving Herff Jones to go to Jostens and that Wiggins had promised the administrators that he would be the one taking care of their school's account at Jostens. But a reasonable jury could surmise why a school administrator might hesitate to testify that this was the case because of his or her relationship with Wiggins. In short, because direct evidence could not have settled the issue of causation for the jury any more than circumstantial evidence would do so, it is difficult to conclude that the plaintiffs were required to submit direct evidence in order to meet their burden and that the circumstantial evidence should be disregarded.

Second, the defendants' assumption that only school administrative decision-makers could present competent causation testimony presumes that those administrators would have been aware of that the defendants' conduct was wrongful. In Intergraph, the Court noted: "[I]t is not surprising that Bentley did not base its calculation on actual customer

responses because customers were not likely to know the reason behind Bentley's failure to contact them." Intergraph, 58 So. 3d at 74. The same observation holds in this case: much of the wrongful conduct the plaintiffs accused the defendants of committing was "behind the scenes," secretly carried out between Wiggins, Urnis, and Jostens. Because of this, it is quite conceivable, for example, that some schools switched because of product prices offered by Jostens without being aware that Jostens's pricing models were based on confidential information concerning Herff Jones's prices that had been provided by Wiggins and/or Urnis. Thus, testimony from school administrative decision-makers would not necessarily shed light on the causal connection between the defendants' wrongful conduct and the schools switching their scholastic-recognition-products providers. Again, if direct testimony may or may not be helpful in establishing whether there was a causal connection between the defendants' wrongful conduct and the plaintiffs' loss of school accounts, it is difficult to understand why the defendants would be required to present such evidence to meet their burden.

Third, and perhaps most importantly, the defendants' position presumes that causation may be proved only by direct evidence; this is simply not the case.

> "There is nothing wrong with a case built around sufficient circumstantial evidence, provided the circumstances are proved and not merely presumed. Richards v. Eaves, 273 Ala. 120, 135 So. 2d 384 (1961). Any judgment in such a case must necessarily involve some amount of speculation or inference by the jury. There is conjecture only where there are two or more plausible explanations of causation, and the evidence does not logically point to one any more than the other. Where the evidence does logically point in one direction more than another, then a jury can reasonably infer that things occurred in that way."

Folmar v. Montgomery Fair Co., 293 Ala. 686, 690, 309 So. 2d 818, 821 (1975). As this Court has repeatedly emphasized: "'"'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.'"'" Wiggins v. Mobile Greyhound Park, LLP, [Ms. 1170874, May 3, 2019] ___ So. 3d ___, ___ (Ala. 2019) (quoting Edwards v. State, 139 So. 3d 827, 836-37 (Ala. Crim. App. 2013), quoting in turn Hollaway v. State, 979 So. 2d 839, 843 (Ala. Crim. App. 2007), quoting in turn White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989)). As long as the circumstantial evidence

presented by the plaintiffs was sufficient to allow the jury to reasonably infer that wrongful acts by the defendants led to the plaintiffs' loss of the 47 school accounts, direct evidence was not required to submit the issue of causation to the jury. See Bell v. Colony Apartments Co., 568 So. 2d 805, 810-11 (Ala. 1990) ("A fact is established by circumstantial evidence if it can be reasonably inferred from the facts and circumstances adduced.").

It is true that the defendants presented several other potential reasons schools switched their accounts from Herff Jones to Jostens, but, in evaluating the trial court's ruling on a motion for a judgment as a matter of law, we must view the evidence in the light most favorable to the plaintiffs as the nonmovants and entertain any reasonable inferences the jury would be free to draw. See DISA Industries, 272 So. 3d at 148. There was overwhelming evidence that Wiggins and Urnis violated their noncompetition agreements. Evidence also strongly indicated that Jostens used Herff Jones's confidential information that it had obtained from Wiggins and/or Urnis to win school accounts in Wiggins's and Urnis's former territories. There was also evidence indicating that

Wiggins and Urnis knew before they had left their employment with GradPro and Herff Jones that most of the schools they serviced would switch to Jostens during the year of their noncompetition agreements. Internal Jostens documents likewise indicated that Jostens was under the impression it would win the vast majority of Wiggins's and Urnis's former school accounts during Wiggins's and Urnis's noncompetition-agreement year. Finally, there was the undeniable fact that the number of school accounts lost by Herff Jones and acquired by Jostens in one school-year cycle was unprecedented. Normally, only a few schools changed providers in a given territory each year, and the most school accounts Moore had ever previously won for Jostens from another provider in a single year was five. In the years of Wiggins's and Urnis's noncompetition agreements when they left Jostens for employment at Herff Jones, a total of seven schools switched providers. But before the 2016-2017 school year -- the year Wiggins and Urnis were supposed to be honoring their noncompetition agreements with GradPro and Herff Jones before starting to work for Jostens -- Moore won 47 schools for Jostens in the territories formerly serviced by Wiggins and

Urnis for GradPro and Herff Jones, which constituted 80 percent of GradPro's school accounts. Given all the foregoing, we conclude that the evidence was sufficient for a jury to reasonably infer that the defendants' wrongful conduct was the actual reason the schools on the blue list changed scholastic-recognition-products providers.

The defendants second assumption -- that the plaintiffs had to provide customer-by-customer evidence of causation to prove damages -- is also flawed. As we explained earlier, the parties' positions on this issue are framed by their reliance on different cases from this Court: the defendants rely on Corson and the plaintiffs rely on Intergraph. The portions of those cases relied upon by the parties address causation for lost-profits damages. In Corson, the Court faulted Universal for failing to establish that Universal would have received the business of each of the lost customers but for Corson's violation of his nonsolicitation covenant with Universal. In Intergraph, this Court did not require Bentley to introduce evidence demonstrating that each lost customer chose not to renew its software-maintenance contracts with Bentley because of the bad and late data Intergraph provided to Bentley to

establish a causal connection between Intergraph's conduct and the damages requested by Bentley.

Corson is superficially similar to this case in that it involved a former employee's violation of a nonsolicitation covenant. But with respect to the issue whether customer-by-customer evidence is necessary to establish causation, Intergraph presents a closer parallel. It involved customer loss on a large scale, whereas Corson involved the alleged loss of four customers by Universal to Alabama Door as a result of Corson's breach of his nonsolicitation covenant. As the difference in the evidentiary requirements in the two cases no doubt reflects, whether presenting customer-by-customer evidence is practical and feasible plays a role in determining whether it should be part of the plaintiff's burden in establishing damages for lost profits.[6] Furthermore, in Intergraph Bentley presented evidence indicating that it had a high confidence that it would have obtained the software-maintenance contracts that had belonged

[6]In this regard, the plaintiffs assert that putting school administrative decision-makers on the stand from each school potentially could have put more strain on Herff Jones's relationships with those schools, further diminishing any chance the plaintiffs might have in the future of convincing those schools to switch back to Herff Jones.

to Intergraph upon their expiration, just as the plaintiffs presented evidence indicating that most schools did not routinely change scholastic-recognition-products providers after each year and the volume of school accounts lost by Herff Jones in the 2016-2017 school year was disproportionate to the typical number of annual lost accounts. In contrast, in Corson, Universal failed to present any evidence indicating that it would have retained three of the four customers in question. See Corson, 596 So. 2d at 571 (observing that "testimony revealed that [the three customers], and nearly all the companies on Universal's customer list, periodically contracted for products and service with Alabama Door and other competitors of Universal before, during, and after Corson's employment with Universal"). Given the parallels between Intergraph and this case in contrast to Corson in the context of customer-by-customer evidence and the facts that Intergraph is the more recent of the two precedents and that the Intergraph Court acknowledged Corson for a different legal principle, we find the analysis in Intergraph to be more persuasive for the situation presented here. Accordingly, we conclude that the plaintiffs were not required to present

customer-by-customer evidence as to why each of the 47 schools on the blue list switched scholastic-recognition-products providers from Herff Jones to Jostens to establish a causal connection between the defendants' wrongful conduct and the plaintiffs' loss of school accounts before the 2016-2017 school year.

IV. Conclusion

The plaintiffs were not required to present direct, customer-by-customer evidence of the reasons each of the 47 blue-list schools switched from Herff Jones to Jostens in order for the issue of causation to be submitted to the jury. The plaintiffs presented ample circumstantial evidence that would allow the jury to infer that the defendants' wrongful conduct led to the plaintiffs' loss of the school accounts at issue. Accordingly, we affirm the trial court's order denying the defendants' renewed motion for a judgment as a matter of law.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.