This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1019

CH Bus Sales, Inc. f/k/a CH Trading Company, and its subsidiaries
CH Bus Holdings, LLC, and CH Bus Sales, LLC,
Appellants,

vs.

Edward T. Guldin a/k/a Tim Guldin, et al.,
Respondents.

Filed May 31, 2022
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-20-2617

James A. Godwin, Rick A. Dold, Christopher K. White, Godwin Dold, Rochester, Minnesota (for appellants)

Christopher A. DeLong, James K. Langdon, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

CH Bus Sales, Inc., lost its sole supplier, gradually reduced the size of its workforce, and eventually ceased operations. One year later, the company sued two of its former employees, who had resigned and accepted employment with the company's former sole

supplier. The company alleged claims of breach of contract, breach of duty of loyalty, and misappropriation of trade secrets. The district court granted the former employees' motion for summary judgment on all three claims, primarily on the ground that the company did not have evidence sufficient to create a genuine issue of material fact with respect to damages. We conclude that the district court did not err and, therefore, affirm.

FACTS

This action was commenced by CH Bus Sales, Inc., a Delaware corporation with its principal place of business in the city of Faribault, and two wholly owned subsidiaries, CH Bus Holdings, LLC, and CH Bus Sales, LLC. For purposes of this opinion, we will refer to the three companies collectively as CH.

In 2012, CH entered into an agreement with a Turkish manufacturer of luxury motor coaches, Termomekanik Sanayi ve Ticaret A.Ş. (TEMSA), to be its exclusive North American distributor. For six years, the sale and servicing of new TEMSA motor coaches was CH's sole business.

Approximately five years later, CH's business relationship with TEMSA began to deteriorate. In mid-2017, TEMSA informed CH that TEMSA would stop shipping new motor coaches to CH. In March 2018, TEMSA gave CH a 90-day notice of TEMSA's intent to terminate the parties' exclusive distributorship agreement. In June 2018, the agreement formally was terminated. At the same time, TEMSA announced the formation of a new subsidiary, TEMSA North America (TEMSA-NA), for the purpose of distributing its motor coaches directly to North American customers.

TEMSA then took various steps to transition the sale of its motor coaches from CH to TEMSA-NA. In early 2018, CH had 44 or 45 new TEMSA motor coaches in its inventory, approximately 41 of which were owned by TEMSA and three or four of which were owned by the Export-Import Bank of the United States. The motor coaches owned by the bank were sold in 2018. The motor coaches owned by TEMSA later were transferred to TEMSA as part of a settlement agreement that resolved litigation between TEMSA and CH.

The deteriorating business relationship with TEMSA caused CH to reduce the scope of its operations. In late 2017, two chief executive officers (CEOs) resigned in quick succession. Michael Haggerty, who had been chair of the board, assumed the duties of CEO. At that time, CH had approximately 70 employees. By July 2018, CH's workforce had shrunk to approximately 28 employees, and by September 2018 the company had only 10 employees. CH closed its New Jersey facility in February 2018 and closed its Florida and Minnesota facilities in September 2018. CH eventually ceased operations.

Edward (Tim) Guldin and Randy Angell were employed by CH during the period in which CH was the exclusive distributor of TEMSA motor coaches. Guldin was hired in 2012 to be regional vice president of sales and customer care for CH's Southeast region. Angell was hired in 2012 to be the senior account executive of sales and customer care for CH's Midwest region. Angell later was promoted to vice president of sales and customer care for the Midwest and West Coast regions. Both Guldin and Angell had experience in the motor-coach business before joining CH. Both signed employment agreements with confidentiality, non-competition, and non-solicitation provisions.

Guldin and Angell were well aware of the deteriorating business relationship between CH and TEMSA in 2017 and 2018. Both were aware of TEMSA's termination of the exclusive distributorship agreement in June 2018. Both believed that the loss of the TEMSA business would put CH and their positions at risk. TEMSA reached out to Guldin and Angell to gauge their interest in working for TEMSA-NA. Angell decided on June 8, 2018, to resign from CH and go to work for TEMSA-NA. Angell signed an offer letter from TEMSA-NA on July 25, 2018. His last day of employment with CH was August 24, 2018. Guldin received an offer from TEMSA-NA in July 2018, signed an offer letter on August 16, 2018, and began employment with TEMSA-NA on September 3, 2018. Haggerty became aware of Guldin's and Angell's employment with TEMSA-NA within weeks of their departures from CH. But CH did not seek to enjoin Guldin or Angell from violating their respective employment agreements with CH.

Approximately one year later, in September 2019, CH commenced this action against Guldin and Angell. CH's complaint alleges three causes of action: (1) breach of contract, (2) breach of duty of loyalty, and (3) misappropriation of trade secrets. In February 2021, Guldin and Angell moved for summary judgment on all of CH's claims. In June 2021, the district court filed an order in which it granted the motion. CH appeals.

DECISION

CH argues that the district court erred by granting Guldin and Angell's motion for summary judgment. A district court must grant a motion for summary judgment "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. A genuine issue of

material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to the district court's legal conclusions on summary judgment and view the evidence in the light most favorable to the party against whom the motion was granted. *Commerce Bank v. West Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

I. Breach-of-Contract Claim

CH first argues that the district court erred by granting Guldin and Angell's motion with respect to CH's claim of breach of contract.

In their motion for summary judgment, Guldin and Angell limited their argument concerning the breach-of-contract claim to the issue of damages. They argued that CH did not submit sufficient evidence of damages because CH did not suffer any lost profits due to the conduct of Guldin and Angell because CH already had lost its status as TEMSA's exclusive North American distributor by the time of the alleged breaches.

The district court agreed with Guldin and Angell's argument, reasoning that CH does not have evidence sufficient to prove that it lost any sales to TEMSA-NA after June 2018, to prove that any such loss was caused by Guldin or Angell, or to prove the amount of CH's losses with sufficient specificity. On appeal, CH contends that the district court erred for three reasons.

A.

CH first contends that it may recover damages in the amount of Guldin's and Angell's gains arising from their alleged breaches of their employment agreements, and it contends that Guldin's and Angell's gains are reflected in their salaries at TEMSA-NA.

The supreme court has summarized the applicable law as follows:

> Damages do not flow from the breach of a covenant not to compete as a matter of course. They must be proved. To establish damages, plaintiff must establish by a preponderance of the evidence that (a) profits were lost, (b) the loss was directly caused by the breach of the covenant not to compete, and (c) the amount of such causally related loss is capable of calculation with reasonable certainty rather than benevolent speculation.

B&Y Metal Painting, Inc. v. Ball, 279 N.W.2d 813, 816 (Minn. 1979). The supreme court elaborated by stating that, despite a "general rule" that "damages for the breach of a covenant not to compete are to be measured by the plaintiff's loss, not by the defendant's gain, . . . there are circumstances in which the defendant's gain may be useful in determining the loss sustained by plaintiff." *Id.*

CH relies on the supreme court's opinion in *Cherne Industrial, Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81 (Minn. 1979), which states, "Although damages for breach of contract are traditionally measured by the nonbreaching party's loss of expected benefits under the contract, . . . where an employee wrongfully profits from the use of information obtained from his employer, the measure of damages may be the employee's gain." *Id.* at 94 (citing Dobbs, *Remedies* § 12.1). The *Cherne* court also stated that a person who violates a covenant not to compete "may be required to account for his profits, and such

illegal profits may properly measure the damages." *Id.* at 95. For this proposition, the *Cherne* court cited *Peterson v. Johnson Nut Co.*, 297 N.W. 178 (Minn. 1941). In both *Cherne* and *Peterson*, the plaintiffs sought to enjoin the defendants from breaching covenants not to compete and also sought damages. *Cherne*, 278 N.W.2d at 87-96; *Peterson*, 297 N.W. at 181-82. In *Peterson*, the supreme court concluded that damages were appropriate because the defendant admitted to the exact amount of revenue derived from violating the non-compete agreement and admitted to his company's profit margin. 297 N.W. at 181. In *Cherne*, the supreme court affirmed "the awarding of damages in addition to the injunction" on the ground that the matter "was within the trial court's discretion and appropriate to compensate the plaintiff for past injury." 278 N.W.2d at 95.

The supreme court later held in *B&Y* that damages for a breach of a non-compete agreement must be determined by the plaintiff's losses and "not by the defendant's gain." 279 N.W.2d at 816. The *B&Y* court stated that a "defendant's gain" may be relevant but only "in determining the loss sustained by plaintiff." *Id.* The plaintiff in *B&Y* sued only for damages. *See id.* at 814-15. But the plaintiffs in *Cherne* and *Peterson* sought both injunctions and damages. *Cherne*, 278 N.W.2d at 87-96; *Peterson*, 297 N.W. at 179, 181. In that situation, there is a good reason for the district court to resolve all issues between the parties, rather than to reserve the issue of damages for another, later action. But the *B&Y* opinion governs this case because CH seeks only damages.

In any event, CH does not have sufficient evidence to prove that Guldin and Angell received any financial gain from the alleged breaches of their employment agreements. CH's only evidence on this point is the fact that Guldin and Angell received annual salaries

of $175,000 and $225,000, respectively, from TEMSA-NA. CH describes these salaries as "plush" and suggests that TEMSA-NA provided excessive compensation to Guldin and Angell as a "reward" for their breaching their employment agreements. Even if we were to assume that *Cherne* authorizes damages measured by a defendant's gains (which we do not), we would not read *Cherne* so broadly as to recognize a gain merely because of an employee's base salary, without any evidence that the employee could increase his or her compensation by committing a breach of contract. The individual defendants in *Cherne* were co-owners of the business that competed with the plaintiff, so they presumably received shares of the business's increased profits. *Cherne*, 278 N.W.2d at 87. The defendant in *Peterson* was a business that competed with the plaintiff. *Peterson*, 297 N.W. at 180. But there is no evidence in this case that Guldin and Angell could have received increased compensation as a result of the alleged breaches of their employment agreements. In fact, the record indicates that CH paid Angell compensation of more than $200,000 between January and early August 2018, which is comparable to the rate at which CH alleges Angell was paid at the beginning of his employment by TEMSA-NA.

Thus, CH is not entitled to damages that are measured by Guldin and Angell's alleged gains from their alleged breaches of their employment agreements.

B.

CH also contends that its lost profits are proved by its bank statements. CH refers to 120 pages of bank statements from the period of January to December of 2018. CH claims that its bank statements "show a large drop in revenue and receipts." Our review of the bank statements reveals that they show nothing more than thousands of individual

deposits to and withdrawals from a bank account. The bank statements do not identify which deposits indicate revenue as opposed to some other type of deposit. Much more information is necessary to establish lost profits. It is conspicuous that CH did not submit any financial statements showing its profits and losses, which would be more meaningful to a factfinder. And even if CH could establish the existence of lost profits, it could not prove that the lost profits were caused by Guldin and Angell's alleged breaches of their employment agreements rather than TEMSA's termination of CH's exclusive distributorship agreement. Thus, CH's bank statements do not create a genuine issue of material fact concerning damages.

C.

CH contends further it sustained damages when it disposed of its inventory of used motor coaches because it was forced to sell them in block at auction rather than in the usual manner, which CH does not describe. CH does not explain how these alleged losses were caused by Guldin's and Angell's alleged breaches of their employment agreements. Furthermore, CH has not introduced any detailed evidence about the used motor coaches, their values, or the amounts for which they were sold. CH's contention is based on sweeping statements in Haggerty's deposition and affidavit, which do not contain the specificity required to calculate damages to a reasonable certainty.

In sum, the district court did not err by granting Guldin and Angell's motion for summary judgment with respect to CH's breach-of-contract claim.

II. Duty-of-Loyalty Claim

CH next argues that the district court erred by granting Guldin and Angell's motion with respect to CH's claim of breach of the duty of loyalty.

In their motion for summary judgment, Guldin and Angell again limited their argument concerning the breach-of-duty-of-loyalty claim to the issue of damages. They argued that CH does not have evidence that Guldin and Angell took any action that interfered with CH's then-existing customer relationships or that caused CH to lose a sale to TEMSA-NA. The district court agreed with Guldin and Angell's argument. On appeal, CH contends that the district court erred for two reasons.

First, CH argues that it may recover damages equal to the compensation that CH paid to Guldin and Angell after they allegedly breached their duties of loyalty. CH relies on *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777 (Minn. 1989), in which the supreme court held that two employees forfeited their right to recover unpaid commissions because they had breached their duties of honesty and loyalty to their employer. *Id.* at 778, 780. The supreme court reasoned that an employee's breach of duties toward his employer "results in the employer owing the employee nothing." *Id.* at 780. The *Stiff* opinion is distinguishable because it provides that a disloyal former employee may forfeit *unpaid* compensation. *See id.* But Guldin and Angell do not seek unpaid compensation from CH. Rather, CH is the plaintiff, and it has alleged a free-standing claim of breach of duty of loyalty against Guldin and Angell. CH has not cited any authority for the proposition that, in an action against a former employee, an employer may recover damages in an amount equal to the compensation that already has been paid to the former employee.

Second, CH contends that it sustained lost profits because Angell allegedly diverted two sales from CH to TEMSA. The first alleged breach concerns the Canadian government, which CH states was interested in purchasing 30 motor coaches. But the undisputed evidence is that TEMSA did not make the sale. The second alleged breach concerns a large U.S. corporation that had previously purchased motor coaches from CH. But there is no evidence that the large corporation purchased any motor coaches, parts, or services from TEMSA or TEMSA-NA after TEMSA terminated CH's exclusive distributorship agreement.

Thus, the district court did not err by granting Guldin and Angell's motion for summary judgment with respect to CH's breach-of-duty-of-loyalty claim.

III. Trade-Secrets Claim

CH last argues that the district court erred by granting Guldin and Angell's motion with respect to CH's claim of misappropriation of trade secrets.

In their motion for summary judgment, Guldin and Angell argued that CH does not have evidence of damages on its trade-secrets claim because the information that Guldin and Angell allegedly misappropriated does not contain any trade secrets. The district court agreed with Guldin and Angell's argument.

On appeal, CH attempts to show that Guldin and Angell misappropriated trade secrets on only one occasion: when Guldin accessed his CH e-mail account after his employment with CH and obtained an e-mail message containing information relating to a potential customer. But CH has not submitted any evidence that the potential customer purchased any motor coaches from TEMSA-NA. Without such evidence, CH cannot prove

either "actual loss" or "unjust enrichment" "caused by" the alleged misappropriation. *See* Minn. Stat. § 325C.03(a) (2020) Thus, CH cannot prove that it is entitled to damages arising from Guldin's accessing his CH e-mail account after his employment with CH.

Thus, the district court did not err by granting Guldin and Angell's motion for summary judgment with respect to CH's trade-secrets claim.

In sum, the district court did not err by granting Guldin and Angell's motion for summary judgment.

Affirmed.