IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00270 COA

FAYARD MOVING & TRANSPORTATION CORPORATION, A MISSISSIPPI CORPORATION, AND E.E. FAYARD, INDIVIDUALLY	**APPELLANTS**
v.	
C.M. FAYARD AND JOHN R. FAYARD, SR.	**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/13/95
TRIAL JUDGE:	HON. JASON H. FLOYD JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS:	ROBERT H. TYLER
ATTORNEY FOR APPELLEES:	RICHARD B. TUBERTINI
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FOR DEFENDANTS
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	10/24/97
CERTIORARI FILED:	12/31/97
MANDATE ISSUED:	4/15/98

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Chancery Court of Harrison County granted summary judgment to the defendants, C.M. Fayard and John R. Fayard, Sr. in a suit brought by their brother, E.E. Fayard, and his company Fayard Moving & Transportation Corporation. No longer part of this litigation are two other original defendants. Fayard Moving and E.E. Fayard appeal, arguing that disputes of material fact exist regarding the alleged breach of a non-compete agreement. They also argue that the chancellor applied the wrong statute of limitations in dismissing the other eight counts of the complaint. We affirm the granting of summary judgment as to the non-compete agreement and the claim for intentional infliction of emotional distress for the reasons stated by the chancellor. We affirm the remainder of the chancellor's judgment, but for different reasons than those stated in his opinion.

FACTS

The Fayard family owned and operated a freight and household moving and storage company called Fayard Moving & Transportation Company (Fayard Moving). The company had been founded in 1917 by the father of the three brothers in litigation here. In 1982 a grandson of the founder and a son of one of the defendant brothers split away and started his own business. That grandson was John Fayard, Jr., and his business was Fayard Fast Freight. The remaining members of the family continued to disagree over the direction of Fayard Moving. In 1986 two of the brothers, C.M. Fayard and John Fayard, Sr., transferred their interest in Fayard Moving to their brother, E.E. Fayard. At that same time C.M. and John signed non-compete agreements with Fayard Moving.

In 1992 E.E. and Fayard Moving filed suit alleging that C.M. and John breached the non-compete agreement by assisting John Jr. in his moving business. John Jr. and his business, Fayard Fast Freight, were also sued. It was alleged that all of the defendants acted in conspiracy to harm Fayard Moving by 1) unfair competition, 2) misappropriation of trade secrets and other confidential information, 3) tortious interference with contractual relations, 4) intentional interference with prospective business advantage, 5) disparagement of property and title, 6) fraud and misrepresentation, 7) fraudulent inducement to execute a buy/sell agreement, and 8) intentional infliction of emotional distress.

John Jr. and Fayard Fast Freight filed motions for summary judgment, which were granted on all counts in the eleven count complaint with the exception of the unfair competition claim. E.E. and Fayard Moving then settled those claims. Thus John Jr. and Fayard Fast Freight are not involved in this appeal.

C.M. and John also filed summary judgment motions, which are the subject of the appeal. The chancellor granted the motions, concluding that E.E. had no individual claim, that there were no genuine issues of material fact regarding the alleged breach of the non-compete agreement, and that the remaining claims were time barred by the one year statute of limitations for intentional torts.

DISCUSSION

We employ a de novo standard in reviewing a grant of summary judgment. *Short v. Columbus Rubber & Gasket Company, Inc.*, 535 So. 2d 61, 63 (Miss. 1988). We must review all evidentiary matters before us in the record, giving the non-moving party the benefit of every reasonable doubt. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

There is no assignment of error regarding the dismissal of E. E.'s individual claims and thus we need not address the validity of that ruling. None of the claims regarding John F. Fayard, Jr. and Fayard Fast Freight are involved in this appeal. Much of the affidavit information submitted by the plaintiffs supported the claims against those two defendants.

I. Non-Compete Agreement

Fayard Moving relies on the deposition testimony of Oscar Fairley to support the claim that C.M. and John breached the contract provision not to compete. Fayard Moving claims that C.M. and John attempted to get Fairley to quit Fayard Moving and to go to work for Fayard Fast Freight. This is the only evidence on the non-compete claim.

Fairley admitted that he was friends with the defendants C.M. and John, but denied that either of those brothers tried to get him to quit Fayard Moving and go to work for John Jr. Fairley testified that he talked to C.M. and John and told them that if Fayard Moving ever went out of business, then he would like to go to work for John Jr. This was the only evidence. The testimony does not rise to the level of creating a fact question as to whether C.M. and John solicited employees from Fayard Moving and breached the non-compete agreement. The chancellor was correct in holding that no genuine issue of material fact was created by Fayard Moving as to the breach of the agreement.

II. Statute of Limitations

The chancellor found that claims based on the eight torts alleged by the plaintiffs were barred by the one year statute of limitations. None of the torts are named in this statute:

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one year next after cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-35 (Rev. 1995). This section is not an exclusive listing of intentional torts recognized in Mississippi. *Dennis v. Travelers Ins. Co.* 234 So. 2d 624, 626 (Miss. 1970). However, if the intentional tort is not reasonably analogous to those listed, the statute does not cover it. *Nichols v. Tri State Brick and Tile Co.*, 608 So. 2d 324, 333 (Miss. 1992). We must decide whether the chancellor was correct in holding that the statute covers the various tort allegations.

We start our review with the actions for unfair competition and misuse of trade secrets. These claims were properly dismissed, regardless of the statute of limitations, because there was no competition between Fayard Moving and the two brothers. We have already found that no dispute of material fact existed that would support a claim for breach of the non-compete agreement. That means that there was no competition between C. M. and John on the one hand, and E. E. on the other. Consequently, there cannot be unfair competition as the plaintiffs claim. *See Cockrell v. Davis*, 198 Miss. 660, 668, 23 So. 2d 256, 259 (1945). The evidence to support alleged misappropriation of trade secrets all focuses on John, Jr. and Fayard Fast Freight's use of the Fayard name. That evidence actually addresses misuse of trade name and more generally unfair competition. None of those allegations affect the remaining two defendants, John, Sr. and C. M. Fayard, who were never shown to be working with John, Jr. Those torts were properly dismissed.

One tort closely analogous to those listed in the statute of limitations is intentional infliction of emotional distress, which was one of the plaintiffs' claims here. We hold that this claim is subject to the one year statute. *See Wilbourn v. Stennett, Wilkinson, & Ward*, 687 So. 2d 1205 (Miss. 1996).

We now turn to the remaining torts to determine the proper statute of limitation. The defendants in *Nichols* argued that the claims of tortious interference with contractual relations and business advantage, and claims for fraud and misrepresentation were barred by the one year statute of limitations. The court rejected this argument, holding:

Even a casual reading of the statute leads inescapably to the conclusion that it does not cover, and was not intended to cover, all intentional tortious conduct. Actions based on deceit and intentional damage

to property are conspicuously absent. Surely such intentional wrongs were recognized intentional torts. The enumerated torts address damage to persons or their reputations exclusively. Miss. Code Ann. § 15-1-35 (1972). None of them addresses actions causing damage to property, tangible, or intangible.

Nichols, 608 So. 2d at 331. In holding that claims for malicious interference with business relations and fraud are not covered by Section 15-1-35, the court implied that the torts would fit under the general statute of limitations for torts, section 15-1-49 (Rev. 1995). However, the court mentions that "slander of title" might fall within the one year statute. *Nichols,* 608 So. 2d at 331n. 8.

The result of this review is that *Nichols* specifically holds interference with contractual relations or specific business advantage are covered by the general statute of limitations. The court also found that fraud claims, which would include the misrepresentation and fraud alleged here, are not covered by the one year statute of limitations. We would also hold the fraudulent inducement is subject to the general statute of limitations.

Thus the only claim barred by the one year statute of limitation is the intentional infliction of emotional distress. The unfair competition and misuse of trade secrets claims are also barred.

III. *Evidence of damages*

The claims that remain after the statute of limitations and unfair competition claims are dismissed are the following:

1. Interference with contractual relation;

2. Interference with business relations;

3. Fraud and misrepresentation; and

4. Fraudulent inducement.

The defendants argue that no evidence was introduced to create fact questions regarding these claims. We have examined the record and agree that as to some, if not all of these remaining claims, the evidence to support them is quite sparse. However, we start with the obligations of parties under M.R.C.P. 56. The defendants moved for summary judgment based on the following:

1. No personal or individual right of action exists for an alleged wrongful injury to a corporation, and consequently E. E. Fayard has no standing regarding the devaluation of the stock;

2. The allegations based on unfair competition, misappropriation of trade secrets, tortious interference with contractual relations, intentional interference with the prospective business advantage, disparagement of property and title, fraud and misrepresentation, fraudulent inducement to execute the buy-sell agreement, and intentional infliction of emotional distress, were all barred by the statute of limitations;

3. There exists no genuine issue of material fact supporting a breach of the agreement not to compete; and

4. No genuine issue of material fact exists regarding damages, as mismanagement on the part of E. E. Fayard was the sole proximate cause of damage.

Thus these are the issues to which the plaintiff corporation and E. E. Fayard had to respond. The defendants never alleged a lack of evidence to prove the existence of the torts, but did make an issue that regardless of the alleged conduct, no damage occurred. The chancellor never reached that argument, but ruled that E. E. Fayard had no personal right of action for injury to the corporation, that the various intentional tort claims were barred by the one year statute of limitations, and that there was no material issue of fact that would support a breach of the agreement not to compete.

If this court determines that the court was correct in granting summary judgment, but for reasons different than those relied upon by the trial court, we still must affirm. As the supreme court analyzed the issue in the directed verdict context:

Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of a decision, and if it is correct we are not concerned with the route . . . .

Hickox by and through Hickox v. Holleman, 502 So. 2d 626, 635 (Miss. 1987). Relying upon this precedent, the court upheld a summary judgment on grounds never reached by the trial court, after determining that the lower court was in error on the basis upon which it had ruled. *Kirksey v. Dye*, 564 So. 2d 1333, 1336-1337 (Miss. 1990).

The only question for our review as to the claims that are not barred by the statute of limitation nor by the ruling on the covenant not to compete, is whether any damages can be traced to the alleged actions. Thus we are left to decide based on this record whether there is a dispute of material fact as to damages.

There is no affidavit or other evidence submitted by E. E. Fayard that goes beyond the allegations of his complaint on damages. The proof of causation is as essential an element of Fayard's claim as any other element. Relying on the assortment of tort labels given the alleged conduct of the defendants is not enough if the defendants present unrebutted evidence that their alleged actions could not have caused damage. We are cited by the defendants to federal case law on their quite similar Rule 56:

If the movant [the defendants here]. . . does not bear the burden of proof, he should be able to obtain summary judgment simply by disproving the existence of any essential element of the opposing party's claim or affirmative defense. . . . [I]f the moving party can show that there is no evidence whatsoever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, trial would be a bootless exercise. . . .

Fontenot v. Upjohn Company, 780 F.2d 1190, 1194-95 (5th Cir. 1986). There was extensive discovery in this case and a substantial record on appeal. The only evidence of proximate cause and damages arises in the defendants' affidavit by David Newton. Newton had been hired as general

manager of the plaintiff corporation. One of his most significant conclusions was that "the deterioration of the business to this level was the direct result of mismanagement and a 'screw the customer' attitude." Newton saw no evidence of any conduct whereby the defendants C. M. Fayard or John R. Fayard, Sr. solicited customers or employees and thereby contributed to the decline of the plaintiff's business.

We do not need to nor do we accept the statements in Newton's affidavit. Whether he was accurate or not is beside the point; what is determinative is that it was the only evidence. To withstand an attempt by an adversary to receive summary judgment, a party with the burden of proof cannot rely upon its allegations, but must present credible evidence that reveals a dispute of material fact on issues that the motion raises. There is no evidence that any of the broad-brush allegations of misconduct caused the plaintiff any damage. Even if we accept as true that the plaintiff company had not enjoyed success in recent years, the record is silent connecting any actions of these two remaining defendants to that lack of business. A party is not entitled to go to a jury on a damage theory of *post hoc, ergo propter hoc*, that is, since business reverses followed the actions of the defendants, the business problems must have been caused by those actions. Logical fallacies are evidentiary fatalities. The jury must be given a bridge of causation. Summary judgment requires a party to present evidence describing that bridge.

The plaintiff needed to present affidavit testimony or other evidence that in fact the various allegations of wrongful conduct were not only true, but in specific ways had caused damages. There were two affidavits introduced, one by E. E. Fayard and the other by Pamela Fayard. A range of allegations are present regarding conduct by the John, Jr. and Fayard Fast Freight, and almost no information regarding the remaining defendants. Nowhere in E. E. or Pamela Fayard's affidavit is there any attempt to connect the remaining actions to any damage.

There is one claim in E. E. Fayard's affidavit for an alleged act by one of the remaining defendants that caused mental anguish. He claimed that John, Sr. and C. M., after the deposition of an employee of the plaintiff, told the deponent that the real reason for the plaintiff's business problems was that he was a drunk. The affidavit says that the statement was made to Lynda Key, but does not claim that the affiant overheard it. Therefore the "evidence" is hearsay. A summary judgment response requires affidavits "on personal knowledge," and therefore hearsay is no more credible in a Rule 56 proceeding than it would be at trial. M.R.C.P. 56 (e). Even were that not so, a post-complaint statement after a deposition is a slender reed to support even one, much less eight torts.

Summary judgment is a useful tool to uncover whether there are any issues to try. We find that there was no dispute as to material fact regarding causation and damages as no evidence was presented to support that necessary part of the claim.

THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT OF SUMMARY JUDGMENT IS AFFIRMED. THE COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.

THOMAS, P.J. AND DIAZ, J., NOT PARTICIPATING.