

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 20, 2014 Session

**RAM TOOL & SUPPLY CO., INC. ET AL. v. HD SUPPLY
CONSTRUCTION SUPPLY, LTD. d/b/a WHITE CAP CONSTRUCTION
SUPPLY, ROBERT MAPLES AND TIM PRUITT**

**Direct Appeal from the Circuit Court for Davidson County
No. 13C822 Joseph Binkley, Jr., Judge**

No. M2013-02264-COA-R3-CV - Filed August 19, 2014

The parties in this case are competitors. The defendant company opened a branch in Nashville and began competing with the plaintiff; the defendant company hired employees away from the plaintiff and it allegedly worked with a now-former employee of the plaintiff to obtain plaintiff's confidential information. The plaintiff filed suit alleging, among other things, breach of the fiduciary duty of loyalty by unlawfully recruiting, aiding and abetting such breach, and conspiracy to unlawfully recruit. The trial court granted summary judgment in favor of the defendants, finding the plaintiff's claims preempted by the Tennessee Uniform Trade Secrets Act ("TUTSA"). We affirm in part and reverse in part and we remand for further proceedings. Specifically, we find preempted by TUTSA, Ram Tool's common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are based upon the misappropriation of trade secrets. However, we find Ram Tool's common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are not grounded in the misappropriation of trade secrets, are not preempted by TUTSA; summary judgment was improperly granted as to these claims.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Joseph F. Welborn, Jason W. Callen, D. Gil Schuette, Nashville, Tennessee, for the appellant, Ram Tool & Supply Co., Inc.

John W. Smith T, Birmingham, Alabama; Thor Y. Urness, Edmund S. Sauer, Kristi M. Wilcox, Nashville, Tennessee, for the appellees, White Cap Construction Supply and Robert Maples

William S. Rutchow, Jennifer S. Rusie, Nashville, Tennessee, for the appellee, Tim Pruitt

OPINION

I. FACTS & PROCEDURAL HISTORY¹

Ram Tool & Supply Co., Inc. (“Ram Tool”) and HD Construction Supply, Ltd., d/b/a White Cap Construction Supply (“White Cap”) are competitors in the specialized commercial construction supply industry. Ram Tool is a family-owned company based in Birmingham, Alabama, and it has locations throughout the southeast, including a Nashville location which opened in 1992. White Cap is the country’s largest company in the specialized commercial construction supply industry, with over one hundred thirty branch locations nationwide. In 2010, White Cap decided to open a branch office in Nashville.

Robert Maples is a recruiter for White Cap. In July of 2010, Mr. Maples contacted Tim Pruitt, an at-will employee² at Ram Tool’s Nashville location, to gauge Mr. Pruitt’s interest in coming to work for White Cap. Mr. Pruitt indicated that he was interested in working for White Cap and he and Mr. Maples engaged in several conversations.

Mr. Pruitt was selected to serve as branch manager for White Cap’s Nashville location upon its future opening. While still employed by Ram Tool, Mr. Pruitt worked with Robert Maples to establish the Nashville branch. Specifically, Mr. Pruitt spoke with Ram Tool at-will employees Len Maruk, Bill Peach, Jon Morrissey and David Mears³ and asked them whether they were interested in a “better opportunity”; eventually, while still employed by Ram Tool, Mr. Pruitt indicated to these employees that he “thought they could go to White Cap[.]” Mr. Pruitt helped to arrange two dinner meetings in the fall of 2010 attended by

¹Because this case was decided on summary judgment, the facts are taken primarily from the parties’ statements of undisputed facts filed in the trial court. The facts, as opposed to the lengthy procedural history, are limited herein because factual disputes abound in this case.

²The parties dispute the position held by Mr. Pruitt.

³Pruitt, Peach and Morrissey worked in “outside sales” making personal calls on building contractors in the greater Nashville market. Maruk and Mears worked in “inside sales” to support the outside sales team by, among other things, circulating cost information, vendor information, pricing information, customer information, sales data, and job leads to Ram Tool employees authorized to receive such information.

himself and fellow Ram Tool employees Bill Peach, Jon Morrissey, Len Maruk and by White Cap representatives, including recruiter Tim Maples. Maples, however, also contacted Maruk, Peach and Morrissey, outside the presence of Pruitt, to discuss employment with White Cap.

White Cap prepared a pro forma regarding a branch in Nashville. The pro forma summary stated:

We have the opportunity to hire 3 key account manage[r]s and the lead inside salesperson from the RAM Tool location in Nashville, TN. This location for RAM currently has annual revenue of approximately \$15 million. These three account managers represent about 40% of this business.

On December 9, 2010, Nashville branch Ram Tool employees Bill Peach, Jon Morrissey and Len Maruk received letters offering employment at White Cap. David Mears received a similar letter offering employment at White Cap dated December 13, 2010. The unsigned letters indicated that they were sent by Tim Pruitt as White Cap branch manager; Mr. Pruitt was still employed by Ram Tool.⁴

On December 30, 2010, Tim Pruitt, Bill Peach, Jon Morrissey, Len Maruk and David Mears resigned from Ram Tool. Prior to or around the time of his exit from Ram Tool, Pruitt sent Maples information regarding Ram Tool's Nashville branch and its employees including the inventory, vehicles, and personnel White Cap would need to open its Nashville branch. Pruitt, along with Peach and Morrissey, also sent Maples a list of their best customers along with revenues generated by those customers. On December 31, 2010, White Cap Vice President Paul Radomski sent an internal e-mail to several White Cap employees, including Maples, which stated in part:

We dropped the bomb on RAM Tool in Nashville yesterday afternoon. All 5 candidates walked in and resigned. They all start on Monday.

Bob Maples did an outstanding job coordinating all of this and keeping it quite [sic] all this time. RAM Tool was caught completely off guard.

⁴Mr. Maples testified that he instructed that Mr. Pruitt's name be included on the letters. A dispute exists as to whether Tim Pruitt knew his name would be included and as to whether he had authority to hire on behalf of White Cap.

Pruitt, Peach, Morrissey, Maruk and Mears went to work for White Cap at its Nashville location when it opened on January 3, 2011.

On January 14, 2011, Ram Tool filed a “Verified Complaint for Injunctive and Other Relief” (“Verified Complaint”) in the Jefferson County, Alabama, Circuit Court against White Cap, Maples, Mears, Pruitt and Maruk. Ram Tool alleged conversion of confidential customer information, breach of fiduciary duties, unfair competition, and violation of the Alabama Trade Secrets Act (“ATSA”). Specifically, it claimed that Defendants Pruitt, Maruk and Mears had access to confidential and proprietary information and trade secrets including the identity of Ram Tools’s customers, sales, salaries, benefits, inventory, and approach to inventory control. It alleged that Maruk had improperly accessed the computer of a Ram Tool branch manager in order to compile a complete list of items in Ram Tool’s Nashville warehouse and that he had sent the list to Pruitt, who sent the list to Maples. It further alleged that Pruitt had sent to Maples the compensation scale for Ram Tool sales personnel, a description of Ram Tool’s truck fleet and their use, a list of every employee in Ram Tool’s Nashville branch as well as his or her job description and salary. The Verified Complaint claimed that White Cap was “using the confidential information of Ram Tool to aggressively pursue Ram Tool customers” and that it was “using the confidential information improperly obtained from Ram Tool to solicit and make offers to Ram Tool employees in various parts of the Ram Tool footprint.”

It further claimed, regarding the breach of fiduciary duty claim, that Mears, Pruitt and Maruk had breached such duty by “(a) misappropriating Ram Tool’s business records and furnishing those records to White Cap Construction Supply before their resignation from Ram Tool; and (b) while still employed with Ram Tool, arranging for the solicitation (through the use of the purloined Ram Tool secret records) of Ram Tool customers and/or prospects.” Ram Tool contended that “Mears, Pruitt and Maruk also breached their fiduciary duties to Ram Tool by making secret plans with others, while they were still employed by Ram Tool, to deprive Ram Tool of its records, clients, and trade secrets.” Ram Tool claimed that White Cap and Maples had encouraged Mears, Pruitt and Maruk to breach their fiduciary duties owed to Ram Tool and that they had acted in concert with Mears, Pruitt and Maruk in the breaches. Ram Tool sought to restrain and enjoin the defendants from soliciting Ram Tool customers and employees and from using Ram Tool information and it sought the return of Ram Tool’s confidential information.

After the case was removed to the United States District Court for the Northern District of Alabama, Ram Tool filed its “First Amended Complaint” on February 11, 2011. In the complaint, Ram Tool added a claim for intentional interference with business relations, it provided further specific factual allegations to support its previously-asserted claims, and beyond its request for injunctive relief, it sought monetary damages against the defendants.

With regard to its claim for breach of fiduciary duties, Ram Tool alleged that Mears,⁵ Pruitt and Maruk “breached their fiduciary duties and obligations to Ram Tool by, among other things: (a) misappropriating Ram Tool’s business records and furnishing those records to White Cap Construction Supply before their resignation from Ram Tool; and (b) while still employed with Ram Tool, arranging for the solicitation (through the use of the purloined Ram Tool trade secret records) of Ram Tool customers and/or prospects.” It further alleged that Mears, Pruitt and Maruk had breached their fiduciary duties by “making secret plans with others, while they were still employed by Ram Tool, to deprive Ram Tool of its records, clients, and trade secrets[,]” and that White Cap and Maples had encouraged them to do so and had acted in concert therewith.

Following an evidentiary hearing, the federal court in Alabama issued a Memorandum Opinion, on March 21, 2011, dismissing Maples, Pruitt and Maruk for lack of personal jurisdiction. It further denied Ram Tool’s motion for a preliminary injunction because it found Ram Tool had failed to meet its burden to establish a substantial likelihood of success on the merits or that irreparable injury would be suffered unless the injunction issued. Specifically, the federal court found no substantial likelihood of success as to the ATSA claim because it found that Ram Tool had failed to keep its “top” customer list confidential and that it had failed to establish that White Cap had actually *used* Ram Tool’s inventory list.

On March 30, 2011, Ram Tool filed a Complaint in the Davidson County Chancery Court against Robert Maples and former Ram Tool employees Tim Pruitt, Leonard Maruk, Bill Peach, Tim McMaster and John Morrissey. The Complaint asserted the following claims:

- (a) Conversion of Plaintiff’s confidential customer and proprietary business information by Tim Pruitt, Leonard Maruk, Bill Peach, Tim McMaster, and John Morrissey acting in concert with White Cap and Robert Maples;
- (b) Breach of fiduciary duties that Tim Pruitt, Leonard Maruk, Bill Peach, Tim McMaster, and John Morrissey owed to the Plaintiff during their employment with Ram Tool, and White Cap’s and Robert Maples’ inducement of those breaches;
- (c) Violation of the Tennessee Trade Secrets Act;
- (d) Intentional interference with Plaintiff’s business relations; and

⁵Mr. Mears was dismissed as a defendant, by agreement of the parties, on February 22, 2011.

(e) Conspiracy among the Defendants to harm Plaintiff.

The Complaint made factual allegations, in part, as follows:

During their employment with Ram Tool, Defendants Pruitt, Maruk, Peach, McMaster and Morrissey had access to confidential and proprietary information and trade secrets, including the identity of Ram Tool's customers, Ram Tool's sales, salaries, and benefits, the actual inventory of Ram Tool branches, Ram Tool's proprietary system for inventory control developed at a substantial cost to Ram Tool, Ram Tool's preferred vendor list, Ram Tool's customer list and other non-public information vital to the conduct of Ram Tool's business. Ram Tool's computer screens stress the confidential nature of this information every time its employees turn on their computers. The Ram Tool Employee Handbook stresses the confidential nature of these items. The Defendants signed acknowledgments of receiving, reading and understanding these policies.

The success of any entity in the supply business depends largely on the management of its inventory. Ram Tool has for its four decades of existence invested countless dollars in building systems, algorithms and other management tools, making it as efficient as possible in the area of inventory. This investment is important to make sure that the goods needed by a customer are available and also to insure that there is not excessive stock in the warehouse. The investment by Ram Tool in the systems developed by these efforts is proprietary and kept confidential from many employees and is not available in the general marketplace.

Upon information and belief, the Defendants conspired to leave Ram Tool in early August 2010. An e-mail exchange between Defendants Maruk and Pruitt on August 11, 2010 indicates that they were putting their conspiracy plan together.

....

In the over 40 years of existence, Ram Tool has developed a management tool called a "Multi-period Report." This document is a device by which outside salesmen are managed. It includes customer assignments, sales, gross profit margin and other confidential information. On September 16, 2010, Defendant Maruk provided the Multi-period Report to Bill Peach. Defendant Maruk would have no reason to have this report in his job at Ram

Tool.

....

On October 26, 2010, Defendant Maruk sent to Defendant[s] Pruitt and Bill Peach . . . an email . . . [with an attached] list of Ram Tool's preferred vendors with the name of the company, their contact name, their phone number, cost figures, and the type of items they sell. This list has been compiled over a number of years at a great expense to Ram Tool and is confidential and proprietary.

On or about October 26, 2010, Defendant Maruk pulled together a complete customer list of Ram Tool's customers and their jobsites in the Nashville market, sorted by outside salesmen. Mr. Maruk would not have access nor need of this information in his job at Ram Tool.

In October 2010, Defendant Maruk compiled and placed on his desk top computer at Ram Tool a complete detailed list of every sale that had occurred in Ram Tool's Nashville Branch in 2010 back to July 1. This list includes the customer's name, jobsite, what they bought, how much they paid for it and the date of sale. In his job at Ram Tool, Maruk would neither have need for nor access to this information.

Defendant Maruk kept on his computer files at Ram Tool sales summaries by salesman for Ram Tool branches including Pensacola, Austin and Nashville. . . . In his job at Ram Tool, Defendant Maruk would have neither access to nor need for this information.

On November 1, 2010, Defendant Pruitt received an e-mail from Defendant Maples that included as an attachment the compensation scale for a branch like Ram Tool's in Nashville. The document is titled "Confidential - Commission Plan for W.C." It appears to be a document to be used to hire Ram Tool salesmen. . . . One day later, Maruk e-mailed to Pruitt detailed and proprietary information of all Nashville Ram Tool salesmen that included sales and profitability. With this information, Pruitt and Maples could determine how much White Cap would pay anyone White Cap took from Ram Tool.

....

On December 1, 2010, Defendant Maruk sent an e-mail to Defendant

Pruitt[.] . . . Attached to Maruk's e-mail was a 44-page detailed description of items in Ram Tool's Nashville warehouse. This information is confidential and proprietary and a trade secret and can be used to set up a warehouse anywhere in the country. To obtain this information, Maruk improperly accessed data from the computer of the Ram Tool branch manager. He was in no way authorized to do this.

Later in the day on December 1, Defendant Pruitt forwarded the information from Defendant Maruk to Defendant Maples at White Cap. Maples forwarded this detailed and confidential inventory list to two executives at White Cap - Paul Radomski and Craig McCurdy, who was in charge of stocking White Cap's Nashville branch. . . .

On December 1, 2010, Defendant Pruitt sent to Defendant Maples at White Cap via e-mail a description of Ram Tool's truck fleet and their use.

On December 1, 2010, Defendant Pruitt delivered to Defendant Maples via e-mail a list of every employee in Ram Tool's Nashville branch as well as their job description and salary at Ram Tool. A document entitled Sheet 1 also included a column called "Proposed," which appears to be the amount Defendant Pruitt believed it would take in salary for White Cap to recruit these Ram Tool Employees.

. . . .

[O]n Sunday, January 2, 2011, Defendant Pruitt solicited and received confidential information from Tim McMaster, who was still an employee of Ram Tool, including, but not limited to, detailed sales information and account assignments.

. . . .

Defendants are using Ram Tool's confidential information to aggressively pursue Ram Tool's customers. Ram Tool has lost substantial customers and sales in Nashville.

Defendants are also using the confidential information improperly obtained from Ram Tool to solicit and make offers to Ram Tool employees in various parts of the Ram Tool footprint.

The defendants filed answers and Mr. Pruitt filed counterclaims against Ram Tool for violation of the Stored Communications Act, 18 U.S.C. § 2701, et seq., intrusion upon seclusion, and trespass based upon Ram Tool's allegedly unauthorized access of Mr. Pruitt's personal e-mail account.⁶

On May 17, 2011, Ram Tool filed its First Amended Complaint. It filed its Second Amended Complaint on August 7, 2012, adding White Cap as a defendant. On August 31, 2012, White Cap and Robert Maples filed a Motion to Dismiss asserting that all of the claims against them were preempted by the Tennessee Uniform Trade Secrets Act ("TUTSA"), Tenn. Code Ann. § 47-25-1701, et seq. On September 4, 2012, Pruitt, Maruk, Peach, Morrissey and McMaster filed a Motion for Judgment on the Pleadings similarly arguing, among other things, that the claims against them—breach of fiduciary duty, intentional interference with business relations, conversion, trespass and civil conspiracy—were preempted by TUTSA.

Ram Tool stipulated to the dismissal of its conversion and trespass claims and those claims were dismissed with prejudice. On September 28, 2012, the chancery court issued an Order Denying Motion to Dismiss with regard to the breach of fiduciary duty, intentional interference with business relations and civil conspiracy claims.

On February 26, 2013, Ram Tool filed its Third Amended Complaint. The complaint removed Maruk, McMaster, Morrissey and Peach as defendants; White Cap, Maples and Pruitt—the defendants in this appeal—were the only remaining defendants. The complaint also dropped the conversion and TUTSA claims and it reframed the breach of fiduciary duty claim and the intentional interference with business relations claim.

With regard to the breach of fiduciary duty claim, Ram Tool alleged, in part:

With the assistance, encouragement, and instruction of White Cap and Maples, Pruitt intentionally, maliciously, and recklessly breached his fiduciary duties and obligations to Ram Tool by, among other things, orchestrating and engaging in the solicitation and recruitment of several Ram Tool employees by White Cap, including Morrissey, Peach, Maruk, Mears, and McMaster, all while Pruitt was employed by Ram Tool. Pruitt personally and repeatedly solicited and recruited his fellow Ram Tool employees on behalf of White Cap in direct violation of his fiduciary duties. Pruitt also put Maples and White Cap in touch with these employees and, as detailed above, acted as their

⁶These claims remain pending. The trial court's order in this case was made final pursuant to Tennessee Rule of Civil Procedure 54.02.

primary point of contact with White Cap.

In addition, as part of this improper recruitment and assistance to White Cap in the opening of its competing branch in Nashville, Pruitt intentionally, maliciously, and recklessly funneled confidential, proprietary, and trade secret information to Maples and White Cap, all while Pruitt was employed by Ram Tool. All of this information had significant economic value and Ram Tool had employed reasonable efforts to keep it confidential. In that regard, Pruitt knew or should have known that Ram Tool considered all of this information proprietary and confidential and that his disclosure of it was in violation of Ram Tool's Confidentiality Policy.

In each and every one of his breaches, Pruitt was assisted, encouraged, induced and instructed by White Cap and Maples. In short, White Cap and Maples acted in concert with Pruitt in all of the misconduct identified above.

Previously, Ram Tool had alleged that the defendants had interfered with its business relations "with its commercial contract customers[:]" however, in its Third Amended Complaint, it altered the claim to allege interference "with its salesmen and with the customers whose Ram Tool accounts were serviced by the salesmen[.]"

On February 12, 2013, Ram Tool filed a Motion to Transfer, seeking to transfer the case to circuit court based upon the tortious nature of the remaining claims. The motion was granted over the defendants' objections.

On February 27, 2013, Pruitt filed a Motion to Dismiss the civil conspiracy claim against him for failure to state a claim. That same day, White Cap and Maples filed a Motion to Dismiss all claims against them arguing, again, that they were preempted by TUTSA. On May 10, 2013, the circuit court entered an Order directing Ram Tool, because it had dismissed its TUTSA claim, to "replead its complaint, without adding additional factual or legal allegations, [and] to eliminate allegations as to trade secrets and/or confidential information or the misappropriation of the same[.]"

On May 13, 2013, Ram Tool filed its Fourth Amended Complaint. Ram Tool alleged that the defendants solicited and recruited Ram Tool employees, in part, as follows:

White Cap's recruiter, Robert Maples, first contacted Pruitt in late July or early August 2010. Pruitt had been working at Ram Tool's Nashville branch since 2006 and was not only at the time Ram Tool's masonry division sales manager but also one of the branch's more profitable salesmen. . . .

Pruitt and Maples then embarked on a strategy to solicit key Ram Tool sales representatives to leave Ram Tool and join White Cap. . . .

. . . .

While still employed by Ram Tool, Pruitt first asked each salesm[a]n if he would be interested in a new “opportunity” to make more money, without disclosing that the “opportunity” was with White Cap. If he received a positive response, Pruitt then promised to contact them soon about unidentified plans in the works.

Only after determining that he could trust each of his targets, Pruitt disclosed White Cap’s involvement but instructed them to keep it a secret. His more explicit recruitment of these Ram Tool’s employees then began in earnest in the summer of 2010, all while he remained an employee of Ram Tool. At Maples’ request, Pruitt emailed him the names, phone numbers, and positions for Peach, Morrissey, and Maruk on August 23, 2010. As a result, when Maples first reached out to each of these employees, the groundwork had already been laid by Pruitt and Maples knew who each recruit was, where they worked, what they did, their financial expectations, and, most of all, their vulnerability to recruitment.

Subsequent recruitment of Ram Tool’s employees, however, was not limited to outside parties. Maples had numerous conversations with Pruitt about White Cap and the individuals they targeted. With Maples’ encouragement and assistance, Pruitt repeatedly over a five-month span promoted White Cap and attempted to sell his fellow employees on leaving Ram Tool, all while Pruitt was employed by Ram Tool. Indeed, Pruitt was their primary point-of-contact with White Cap and the person they talked with most regarding leaving Ram Tool for White Cap. Outside of two dinner meetings . . . , the Ram Tool employees had only a few conversations with anyone from White Cap and never otherwise met or spoke with the others being recruited.

. . . .

[W]hile employed by Ram Tool, Pruitt pushed hard in his sales pitches to Peach, Morrissey, and Maruk and extolled the virtues and strengths of White Cap. Pruitt explained how he had worked with White Cap before, understood how it operated, and would serve as White Cap’s branch manager

in Nashville. He bragged about how much money he had made with White Cap and told them that they would all become millionaires if they would leave Ram Tool. Pruitt emphasized that White Cap offered good insurance policies and other benefits. In sum, Pruitt strove mightily to tempt his targets and made leaving for White Cap as attractive and appealing as possible.

Pruitt also informed each of his targets that they would need to provide a list of their top customers and monthly revenues for each of those customers to White Cap. In addition, Pruitt ultimately passed on to White Cap Ram Tool's commission schedules and its average annual revenue for the Nashville branch.

As a result, by the fall of 2010, Maples and White Cap had a detailed picture of the amounts paid to Ram Tool's salesmen and the customers and revenues they generated. In an October 28, 2010 email to his superiors, Maples laid out Ram Tool's commission structure and identified the top 10 to 12 customers for each of the targeted salesmen with the monthly revenues for each of those customers.

. . . .

At the conclusion of the November 17th dinner [meeting,] Maples pulled Pruitt aside and asked him to prepare a series of lists that included what they would need in opening inventory, as well [as] vehicles and any additional personnel for the branch. . . . Maples further testified that he therefore asked for a list to educate White Cap's management and ensure that adequate inventory would "be on hand so day one when they came to work they could begin selling to customers."

Pruitt readily agreed to Maples' request and tasked Maruk with putting the inventory list together, all while both Pruitt and Maruk, as well as the other hand picked salesmen remained employed by Ram Tool.

Maruk sent the inventory list to Pruitt . . . on December 1, 2010[.] . . .

Pruitt, while still employed by Ram Tool, promptly forwarded the inventory list to Maples. That same day Pruitt also sent Maples a list of trucks and a target list of certain employees in Ram Tool's Nashville branch. The employee list contained the employee's name, job description and salary. The list also included a column outlining a proposed White Cap salary, which was

the amount Pruitt believed necessary to induce the employees to abandon Ram Tool for White Cap.

A few hours after receiving these three lists from Pruitt, Maples forwarded them to White Cap managers, including McCurdy, who was in charge of stocking White Cap's Nashville branch.

The Fourth Amended Complaint further alleged that Pruitt, while a Ram Tool employee, had recruited David Mears and Tim McMaster. It noted that Pruitt's name appeared on offer letters to Ram Tool employees and it claimed that Pruitt, during his last day at Ram Tool, had diverted a Ram Tool order to White Cap.

As to the count of breach of fiduciary duties, Ram Tool's Fourth Amended Complaint alleged that Pruitt owed a duty of loyalty to Ram Tool to refrain from competing against it and that he had breached such duty by soliciting and recruiting Ram Tool employees for and on behalf of White Cap, while still employed by Ram Tool. The defendants unsuccessfully moved to strike the allegations in the Fourth Amended Complaint related to trade secrets and/or confidential information or the misappropriation thereof.

On July 8, 2013, Ram Tool filed a Motion for Partial Summary Judgment with respect to its claims for breach of fiduciary duty and the duty of loyalty, aiding and abetting that breach, and conspiracy. On July 10, 2013, the remaining defendants, White Cap, Maples and Pruitt, filed motions for summary judgment alleging that all remaining claims—breach of fiduciary duty, intentional interference with business relations and civil conspiracy—were based upon misappropriation of trade secrets and/or proprietary or confidential information, and therefore, were preempted by TUTSA.

A hearing was held on the competing motions for summary judgment on August 14, 2013, after which the circuit court entered a Final Judgment and Order Granting Defendants' Motions for Summary Judgment on September 9, 2013. The circuit court, relying upon *Hauck Manufacturing Company v. Astec Industries, Inc.*, 375 F.Supp.2d 649 (E.D. Tenn. 2004), found that Ram Tool's claims were preempted by TUTSA. Specifically, it ruled, in pertinent part:

Now, even though the complaint alleges breach of fiduciary duty of loyalty to the employer, tortious interference with business relationships, conspiracy, and aiding and abetting, the underlying facts and allegations, including the plaintiff's extensive evidentiary submissions in connection with its own motion for partial summary judgment, demonstrate that the plaintiff's common law claims depend on proof that trade secret, proprietary and/or

confidential information – all of which are synonymous under Tennessee case law – was acquired, disclosed and/or used by the defendants. The plaintiff elected to abandon its TUTSA claim as a basis for its lawsuit, even though the information that forms the basis for the plaintiff’s claims, if proved, would qualify for protection under TUTSA. This information includes the schedules by which the sales commissions were calculated, the list of customers on whom the individuals who left Ram Tool and went to White Cap to work called, and the amounts of sales made by these individuals to those customers when those salespeople were working for Ram Tool.

The circuit court, on other grounds, also granted summary judgment to the defendants on the intentional interference with business relations claim and any such derivative claims.⁷ It further found that “if TUTSA preemption is deemed not to apply to [Ram Tool’s] non-interference claims (i.e., breach of duty of loyalty claim and its derivative claims of aiding and abetting and conspiracy) . . . there are genuine issues of material fact, justifying denial of the plaintiff’s motion for partial summary judgment and the defendant’s motions for summary judgment as to such non-interference claims.” The circuit court certified the order as final pursuant to Rule 54.02.

Ram Tool filed a Motion to Alter or Amend Judgment, which the circuit court denied. Ram Tool timely filed its Notice of Appeal to this Court.

II. ISSUES PRESENTED

Ram Tool presents the following issue, as summarized:

1. Whether the trial court erred in granting summary judgment on its breach of fiduciary duty/loyalty claim⁸ and derivative claims of aiding/abetting and conspiracy.

Additionally, Tim Pruitt presents the following issue:

2. Whether the trial court’s grant of summary judgment can be upheld on alternative grounds.

⁷This ruling has not been appealed.

⁸Ram Tool characterizes the claim as for breach of “fiduciary duty of loyalty.”

For the following reasons, we affirm in part and reverse in part and we remand for further proceedings. Specifically, we find preempted by TUTSA, Ram Tool's common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are based upon the misappropriation of trade secrets. However, we find Ram Tool's common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are not grounded in the misappropriation of trade secrets, are not preempted by TUTSA; summary judgment was improperly granted as to these claims.

III. STANDARD OF REVIEW

A motion for summary judgment should be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” **Tenn. R. Civ. P. 56.04**. “When ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment.” *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009).

“The party seeking the summary judgment has the burden of demonstrating that no genuine disputes of material fact exist and that it is entitled to a judgment as a matter of law.” *Green*, 293 S.W.3d at 513 (citing *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 83 (Tenn. 2008); *Amos v. Metro. Gov't of Nashville & Davidson County*, 259 S.W.3d 705, 710 (Tenn. 2008)). “The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial.” *Martin*, 271 S.W.3d at 83 (citing *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008)).⁹ In order to negate an essential element of the claim, “the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party.” *Id.* at 84 (citing *Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004)). “It is not enough for the moving party to challenge the nonmoving party to ‘put up or shut up’ or even to cast doubt on a party's ability to prove an element at trial.” *Hannan*, 270 S.W.3d at 8. “If the moving party is unable to make the required showing, then its motion for summary judgment will fail.” *Martin*, 271 S.W.3d at 83 (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)).

⁹Recently, the Tennessee General Assembly enacted a law that legislatively reversed the Tennessee Supreme Court's holding in *Hannan*. See Tenn. Code Ann. § 20-16-101. However, the statute applies only to cases filed on or after July 1, 2011. Thus, in this appeal, we apply the summary judgment standard set forth in *Hannan*.

If the moving party does make a properly supported motion, “[t]he non-moving party must then establish the existence of the essential elements of the claim.” *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). The nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *Martin*, 271 S.W.3d at 84 (citing *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215). “The nonmoving party may satisfy its burden of production by: (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.” *Id.* (citing *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.6). “The nonmoving party’s evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party.” *Id.* (citing *McCarley*, 960 S.W.2d at 588). The resolution of a motion for summary judgment is a matter of law, which we review de novo with no presumption of correctness.

IV. DISCUSSION

A. TUTSA Preemption

The seminal issue in this case involves whether Ram Tool’s breach of fiduciary duty/loyalty claim is preempted by the Tennessee Uniform Trade Secrets Act (“TUTSA”), Tenn. Code Ann. § 47-25-1701, et seq. “In 2000, the Tennessee Legislature enacted the Tennessee Uniform Trade Secrets Act[.]” *J.T. Shannon Lumber Co., Inc. v. Barrett*, No. 2:07-cv-2847-JPM-cgc, 2010 WL 3069818, at *3 (W.D. Tenn. 2010) (citing *Hamilton-Ryker Group, LLC v. Keymon*, No. W2008-00936-COA-R3-CV, 2010 WL 323057, at *14 (Tenn. Ct. App. Jan. 28, 2010)). “TUTSA creates a cause of action for the misappropriation of another’s trade secrets.” *Id.* (citing *Hamilton-Ryker*, 2010 WL 323057, at *14). “TUTSA lists three requirements for information to be considered a trade secret: (1) the information must derive independent economic value from not being generally known, (2) others could obtain economic value from its disclosure or use, and (3) efforts have been made to maintain its secrecy.”¹⁰ *Id.* (citing Tenn. Code Ann. § 47-25-1702(4)). “Under Tennessee law, the

¹⁰TUTSA provides the following definition:

(4) “Trade secret” means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process or plan that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper

(continued...)

four elements for misappropriation of a trade secret are: “(1) the existence of a trade secret; (2) communication of the trade secret to the defendant while in a position of trust and confidence; (3) defendant’s use of the communicated information; and (4) resulting detriment to the plaintiff.” *Wyndham Vacation Resorts, Inc. v. Timeshare Advocacy Intern., LLC*, No. 3:10-cv-1028, 2013 WL 139204, at *4 (M.D. Tenn. Jan. 13, 2013) (quoting *Stratienko v. Cordis Corp.*, 429 F.3d 592, 600 (6th Cir. 2005)). “Under TUTSA, a plaintiff who successfully establishes that a defendant misappropriated a trade secret is entitled to injunctive relief and/or an award of damages.” *J.T. Shannon Lumber Co.*, 2010 WL 3069818, at *3(citations omitted).

By its terms, TUTSA “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.” **Tenn. Code Ann. § 47-25-1708(a)**. It does not, however, preempt, among other things, “[o]ther civil remedies that are not based upon misappropriation of a trade secret.” **Tenn. Code Ann. § 47-25-1708(b)(2)**.

The scope of TUTSA’s preemption provision appears to be an issue of first impression. *See ProductiveMD, LLC v. 4UMD, LLC*, 821 F.Supp.2d 955, 962 (M.D. Tenn. 2011) (“To date, the Tennessee courts have not had the opportunity to clarify the scope of TUTSA’s preemption provision.”). However, we find persuasive¹¹ and instructive the thorough and well-reasoned analysis set forth by the United States District Court for the Eastern District of Tennessee in the case of *Hauck Manufacturing Company v. Astec Industries, Inc.*, 375 F.Supp.2d 649 (E.D. Tenn. 2004).

In *Hauck*, the Court considered whether the plaintiff’s claims were preempted by TUTSA. To make such determination, however, it first resolved the parties’ dispute as to the scope of TUTSA’s preemption provision.

The *Hauck* Court noted that TUTSA provides that it is to “be applied and construed to effectuate its general purpose to make consistent the law with respect to the subject of this act among states enacting it[,]” and therefore the Court sought “guidance in case law

¹⁰(...continued)

means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tenn. Code Ann. § 47-25-1702(4).

¹¹The decisions of lower federal courts are only persuasive authority to state courts. *See Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 871 (Tenn. 2010) (citations omitted).

interpreting and applying the law of the 42 other states which have adopted the [Uniform Trade Secrets Act (“UTSA”)].” 375 F.Supp.2d at 654 (quoting Tenn. Code Ann. § 47-25-1709).

The *Hauck* Court explained that “UTSA’s preemption provision has generally been interpreted to abolish all free-standing alternative causes of action for theft or misuse of confidential, proprietary, or otherwise secret information falling short of trade secret status (*e.g.*, idea misappropriation, information piracy, theft of commercial information, etc.). *Id.* at 655 (citations omitted). However, beyond this general consensus, the courts have diverged. *Id.*

[S]ome courts have permitted plaintiffs to protect-non-trade secret information through the use of generally applicable tort claims which are not, by definition, limited to the alleged pilfering of intangible property, but could be made out based on such facts (*e.g.*, unfair competition, conversion, unjust enrichment, breach of confidence, breach of fiduciary duty, fraud, misrepresentation, tortious interference with contract, *etc.*). Some courts have interpreted the UTSA broadly and found preemption of all non-contract state law claims which rely, in some form or fashion, on facts constituting a misappropriation of trade secrets. Other courts have interpreted the UTSA’s preemption provision more narrowly and concluded preemption is only appropriate where claims are nothing more than a verbatim restatement of the same facts which would “plainly and exclusively spell out *only* trade secret misappropriation.” In short, courts unanimously agree that in order for non-UTSA claims to survive they must rely on something more than allegations of misappropriation of trade secrets, but they appear to disagree as to what exactly that “something more” must be.

Id. at 655-56 (internal citations and footnote omitted) (emphasis in original).

The *Hauck* Court rejected the plaintiff’s argument that certain claims should survive because they were based upon the misappropriation of information which did not qualify as a trade secret. *Id.* at 656. The Court stated “[i]t is a legal *non sequitor* to suggest general tort causes may be employed to protect legal rights which otherwise do not exist[:.]”

A claim cannot be preempted or not preempted based entirely upon whether or not the information at issue qualifies as a trade secret. If the information is a trade secret, the plaintiff’s claim is preempted; if not, the plaintiff has no legal interest upon which to base his or her claim. Either way, the claim is not cognizable.

Id. (citations omitted).

The Court went on to explain that a factual analysis must be made in order to determine whether a plaintiff's claims are "based upon misappropriation of a trade secret." *Id.* (quoting Tenn. Code Ann. § 47-25-1708(b)(2)).

Certainly, a claim does not miraculously become "not based upon misappropriation of a trade secret" simply because a plaintiff denotes it by a different label. Similarly, all other counts in a complaint are not displaced simply due to the mere presence of a UTSA trade secret misappropriation claim.

Id. In fashioning a preemption standard, the Court espoused "two primary dangers to be avoided[:]"

First, the law should seek to avoid the confusion, inefficiency, and inconsistency which the UTSA and the various state legislatures have adopted it initially sought to eliminate in the first place. Pure misappropriation of a trade secret should not expose an individual or entity to differing levels of liability across the 43 states which have adopted the UTSA nor should courts be called upon to analyze the same set of operative facts repeatedly under numerous standards of liability. Second, courts should be wary of the possibility of duplicative recoveries for the same injury. Even though a plaintiff might be able (or even required) to prove additional facts in support of alternative claims, he or she would not be entitled to multiple recoveries if the only measurable damages resulted from the trade secret misappropriation. Even if there are multiple wrongs, there can be only one recovery.

After considering the various potential approaches and the dangers associated with each, the *Hauck* Court adopted the "same proof" standard for TUTSA preemption as follows:

[P]erhaps a better formulation of the UTSA preemption standard would be a "same proof" standard under which a claim will be preempted when it necessarily rises or falls based on whether the defendant is found to have "misappropriated" a "trade secret" as those terms are defined in the UTSA. Stated another way, if proof of a non-UTSA claim would also simultaneously establish a claim for misappropriation of trade secrets, it is preempted irrespective of whatever surplus elements or proof were necessary to establish it. *See Smithfield [Ham and Products Co., v. Portion Pac, Inc.,]* 905 F.Supp. [346,] 350 [E.D. Va. 1995] ("The question is . . . whether failure of the

misappropriation claim would doom the remaining counts as well.”). The UTSA defines “misappropriation” broadly enough to cover a wide range of conduct, including the sort of conduct contemplated by the various claims which are often involved in preemption disputes. If a proven claim, whether in whole or part, constitutes misappropriation of trade secret, it is that and that alone.

Id. at 658. (footnote omitted).¹² Ultimately, the Court found that the plaintiff’s civil conspiracy, conversion and unjust enrichment claims were preempted because they involved the defendants’ alleged use of confidential and proprietary information. *Id.* at 660-62. Additionally, it held that the plaintiff’s tortious interference and unlawful procurement claims were preempted to the extent that they relied upon disclosure of secret, confidential and/or proprietary information. *Id.* at 659. However, the Court found the plaintiff’s tortious interference and unlawful procurement claims *were not* preempted to the extent that they were based upon the breach of, and inducement to breach, a conflict of interest agreement. *Id.* at 660.

We find the “same proof” test set forth in *Hauck* provides a workable standard for applying TUTSA’s preemption provision while furthering TUTSA’s stated goals of providing a uniform standard of liability and avoiding duplicative recovery. Accordingly, we hereby adopt the *Hauck* “same proof” standard as the test for TUTSA preemption in this State.

We now turn to the facts of the instant case. Again, the issues at hand are whether the following claims asserted by Ram Tool are preempted by TUTSA: (1) against Pruitt, breach of fiduciary duty/loyalty; (2) against White Cap and Maples, aiding and abetting Pruitt’s breach of fiduciary duty/loyalty; and (3) against Pruitt, White Cap and Maples, conspiracy to unlawfully recruit.

On appeal, the defendants vigorously argue that “Ram Tool’s common law claims are firmly based upon the alleged misappropriation of trade secrets” and that “[t]his [case] began as – and remains– a trade secrets case.” They claim that throughout the lengthy litigation of

¹²The United States District Court for the Western District of Tennessee, citing *Hauck*, has stated, “the Court agrees with the Eastern District of Tennessee that if confronted with the issue of TUTSA preemption, Tennessee courts would apply the “same proof” test.” *J.T. Shannon Lumber Co.*, 2010 WL 3069818, at *11. Similarly, the United States District Court for the Middle District of Tennessee has adopted the *Hauck* “same proof” test, *Cardinal Health 414, Inc. v. Adams*, 582 F.Supp. 2d 967 (M.D. Tenn. 2008), and the Sixth Circuit Court of Appeals has applied *Hauck*, noting that it is “well-reasoned” following an “exhaustive[] survey[] [of] state cases concerning the pre-emptive effects of the Uniform Trade Secrets Act[.]” *PartyLite Gifts, Inc. v. Swiss Colony Occasions*, 246 Fed.Appx. 969, 975 (6th Cir. 2007).

this case, Ram Tool has based its allegations solely upon the alleged misappropriation of trade secrets and/or confidential or proprietary information. They further claim that, notwithstanding the trial court's instruction to Ram Tool to replead its complaint without allegations regarding misappropriation of trade secrets and/or confidential or proprietary information, Ram Tool was unable to do so and that, after abandoning its TUTSA claim, Ram Tool brought common law claims based upon the very same proof.

In support of their argument that Ram Tool's breach of fiduciary duty/loyalty is firmly grounded in the alleged misappropriation and misuse of trade secrets, the defendants cite four key documents. First, they cite Ram Tool's Fourth Amended Complaint which, despite the circuit court's direction to remove allegations of misappropriation, continued to assert factual allegations related to such, as follows:

Only after determining that he could trust each of his targets, Pruitt disclosed White Cap's involvement but instructed them to keep it a secret. His more explicit recruitment of these Ram Tool's employees then began in earnest in the summer of 2010, all while he remained an employee of Ram Tool. At Maples' request, Pruitt emailed him the names, phone numbers, and positions for Peach, Morrissey, and Maruk on August 23, 2010. As a result, when Maples first reached out to each of these employees, the groundwork had already been laid by Pruitt and Maples knew who each recruit was, where they worked, what they did, their financial expectations, and, most of all, their vulnerability to recruitment.

Pruitt also informed each of his targets that they would need to provide a list of their top customers and monthly revenues for each of those customers to White Cap. In addition, Pruitt ultimately passed on to White Cap Ram Tool's commission schedules and its average annual revenue for the Nashville branch.

As a result, by the fall of 2010, Maples and White Cap had a detailed picture of the amounts paid to Ram Tool's salesmen and the customers and revenues they generated. In an October 28, 2010 email to his superiors, Maples laid out Ram Tool's commission structure and identified the top 10 to 12 customers for each of the targeted salesmen with the monthly revenues for each of those customers.

At the conclusion of the November 17th dinner [meeting,] Maples pulled Pruitt aside and asked him to prepare a series of lists that included what they would need in opening inventory, as well [as] vehicles and any additional

personnel for the branch. . . . Maples further testified that he therefore asked for a list to educate White Cap's management and ensure that adequate inventory would "on hand so day one when they came to work they could begin selling to customers."

Pruitt readily agreed to Maples' request and tasked Maruk with putting the inventory list together, all while both Pruitt and Maruk, as well as the other hand picked salesmen remained employed by Ram Tool.

Maruk sent the inventory list to Pruitt . . . on December 1, 2010[.] . . .

Pruitt, while still employed by Ram Tool, promptly forwarded the inventory list to Maples. That same day Pruitt also sent Maples a list of trucks and a target list of certain employees in Ram Tool's Nashville branch. The employee list contained the employee's name, job description and salary. The list also included a column outlining a proposed White Cap salary, which was the amount Pruitt believed necessary to induce the employees to abandon Ram Tool for White Cap.

A few hours after receiving these three lists from Pruitt, Maples forwarded them to White Cap managers, including McCurdy, who was in charge of stocking White Cap's Nashville branch.

Second, the defendants cite the deposition testimony of Ram Tool Chief Financial Officer, Jeff Hicks, wherein Mr. Hicks indicated that Ram Tool considered confidential its customer list, top customer list, monthly revenues for top customers, list of sales by customer, commission schedule, average annual revenues, Ram Tool salesmen list and contact information, Ram Tool employee job descriptions and current salaries, inventory list, and its vehicle and truck fleet list. The defendants specifically highlight Mr. Hicks' statement that "the items [Ram Tool] consider[s] confidential and proprietary were used by Mr. Pruitt and Mr. Maples to unlawfully solicit and recruit our salesmen, former Ram Tool employees on behalf of White Cap."

Third, the defendants cite Ram Tool's April 2013 answer to a propounded interrogatory question:

19. For any item that you claim to have been misappropriated, other than the inventory list or customer lists referenced in your compliant: identify the item; the person you contend misappropriated it; the proof you have that shows misappropriation; and how you contend the item

has been used to your detriment.

RESPONSE: Ram Tool states that Defendants Pruitt, White Cap, and Maples misappropriated and disclosed a variety of confidential and proprietary information that specifically included:

- the inventory list based on current product sales information for Nashville obtained from Ram Tool's computer system;
- Nashville customer lists with monthly revenues;
- employee names, contact information, job descriptions, salaries, sales history and production, benefits, and susceptibility to recruitment;
- Ram Tool's commission structure for its Nashville salesmen;
- the Nashville branch's annual revenues; and
- information on vehicles used by the Nashville branch.

.....

Ram Tool contends that items misappropriated and disclosed by Defendants were used by them as part of their improper and unlawful solicitation of Ram Tool employees and in furtherance of the opening of White Cap's Nashville branch, all of which were to Ram Tool's detriment.

Finally, the defendants cite Ram Tool's Memorandum of Law in support of its Motion for Partial Summary Judgment and its Response to Defendants' Motion for Summary Judgment where Ram Tool continued to make allegations regarding the misappropriation of confidential information. For example, it alleged that Pruitt had sent Maples information regarding Ram Tool employees' contact information, work history, job skills, and sales and that "Maples used the employee contact information Pruitt provided to him to solicit and recruit the former Ram Tool salesmen" and that "Maples and Pruitt worked together to come up with salaries that would be sufficient to lure away to White Cap the former Ram Tool salesmen[.]"

In response, Ram Tool concedes that any claims based upon the alleged misappropriation of trade secrets and/or confidential information are preempted. However, it argues that its common law claim of breach of fiduciary duty/loyalty—and its derivative claims—are not grounded in misappropriation, but instead are based upon unlawful recruitment, untied to receipt of information. Alternatively, it claims that the defendants did not meet their burden, under *Hannan*, so as to shift the burden of production to Ram Tool. Specifically, it argues that the defendants have not shown that Ram Tool cannot prove its breach of fiduciary duty/loyalty claim without reliance upon trade secrets. Alternatively, it contends that if the burden of production was shifted, questions of material fact remain to

preclude summary judgment.

The defendants primarily contend that Ram Tool has, throughout the lengthy course of this litigation, grounded its claims in allegations of misappropriation of trade secrets and/or confidential or proprietary information. The pleadings cited, *ad nauseam*, above support this contention. Despite abandoning its TUTSA claim, Ram Tool has continued to argue that the defendants unlawfully recruited or solicited Ram Tool employees—or conspired and/or aided and abetted in such—by utilizing unlawfully obtained confidential and/or proprietary information. Under *Hauck*, insofar as Ram Tool seeks to rely upon misappropriation of a trade secret as the factual basis for its common law breach of fiduciary duty/loyalty claim, such claim would, obviously, “also simultaneously establish a claim for misappropriation of trade secrets,” 375 F.Supp.2d at 658, and therefore, is preempted by TUTSA. Stated another way, Ram Tool’s common law breach of fiduciary duty/loyalty claim, and its derivative claims, based upon the misappropriation of trade secrets are preempted by TUTSA.

However, our inquiry does not end there. As noted above, Ram Tool argues that the defendants have not demonstrated that it cannot prove its breach of fiduciary duty/loyalty claim absent reliance upon trade secrets. In response, the defendants, again, cite the numerous pleadings and evidentiary materials indicating that, heretofore, Ram Tool’s breach of fiduciary duty/loyalty claim—and derivative claims—have been at least primarily based upon the misappropriation of trade secrets and/or confidentiality or proprietary information which was used to unlawfully solicit Ram Tool employees and customers. The defendants argue that Ram Tool “has had seven opportunities to plead its case” and they contend that “[i]t does not matter what Ram Tool now claims that it *could have* alleged or tried to prove[.]” We disagree. What Ram Tool could prove at trial is precisely the question we are to consider under the *Hannan* summary judgment standard, which is applicable in this case.

As outlined above, a party seeking a grant of summary judgment must affirmatively negate an essential element of the nonmoving party’s claim or show that the nonmoving party cannot prove an essential element of its claim at trial. *Martin*, 271 S.W.3d at 83 (citing *Hannan*, 270 S.W.3d at 5). To negate an essential element of the non-moving party’s claim, the moving party “must point to evidence that tends to disprove an essential factual claim made by the nonmoving party.” *Id.* at 84 (citing *Blair*, 130 S.W.3d at 768). The moving party cannot meet its burden by simply “challenging the nonmoving party to ‘put up or shut up’ or even to cast doubt on a party’s ability to prove an element at trial.” *Hannan*, 270 S.W.3d at 8.

Even if the defendants are correct that Ram Tool has not yet offered evidence to support its breach of fiduciary duty/loyalty claim—aside from evidence related to the

misappropriation of trade secrets—this failure does not entitle the defendants to a wholesale summary dismissal of the claims against them. Clearly, Ram Tool has primarily, if not wholly, relied upon the misappropriation of trade secrets and/or confidential or proprietary information as the factual basis for its allegation of unlawful recruitment and resulting claim of breach of fiduciary duty/loyalty. However, as recently stated by this Court in *White v. Target Corp.*, No. W2010-02372-COA-R3-CV, 2012 WL 6599814, at *7, n.3 (Tenn. Ct. App. Dec. 18, 2012), “[u]nder *Hannan*, we are required to assume that the nonmoving party may still, by the time of trial, somehow come up with evidence to support [its] claim.” We reject the defendants’ argument that this standard is somehow different or non-applicable when preemption is at issue. We must assume that, at trial, Ram Tool may be able to present evidence of unlawful recruitment untied to the misappropriation of trade secrets. Under *Hauck’s* “same proof” standard, a common law breach of fiduciary duty/loyalty claim—and its derivative claims—that are not grounded in the misappropriation of trade secrets are not preempted by TUTSA. Accordingly, we conclude that Ram Tool’s common law breach of fiduciary duty/loyalty claim, and its derivative claims, insofar as they are not grounded in the misappropriation of trade secrets, are not preempted by TUTSA.

B. Alternative Grounds

Finally, we consider whether, notwithstanding our conclusions as to preemption, summary judgment was properly granted on alternative grounds.

On appeal, Tim Pruitt asserts that he worked for Ram Tool as an at-will, non-executive, outside salesman. As such, he claims, he owed no *fiduciary* duty to Ram Tool and that, at most, he owed a duty of *loyalty* to Ram Tool. However, he claims that he did not breach any duty of loyalty owed by simply “recruiting” his at-will co-workers or by “preparing to compete” with Ram Tool. Based upon his contention that the underlying predicate tort of breach of duty is not actionable, Pruitt claims that any derivative conspiracy theory must also fail.

Similarly, White Cap and Robert Maples argue that because Pruitt owed no duty to Ram Tool, they cannot be liable for aiding or abetting the breach of such duty. Further, they argue that they could not have conspired to unlawfully recruit salesmen because conspiracy requires an unlawful purpose and the only unlawful purpose alleged by Ram Tool is the preempted misappropriation of trade secrets.

As noted above, in granting the defendants’ motions for summary judgment based upon preemption, the trial court found that “if TUTSA preemption is deemed not to apply to [Ram Tool’s] non-interference claims (i.e., breach of duty of loyalty claim and its derivative claims of aiding and abetting and conspiracy) . . . there are genuine issues of

material fact, justifying denial of the plaintiff’s motion for partial summary judgment and the defendant’s motions for summary judgment as to such non-interference claims.” We agree.

As we stated above, factual disputes abound in this case, specifically with regard to the defendants’ alternative theories for summary judgment. For example, as relevant to the duty determination, a dispute exists as to Tim Pruitt’s position within Ram Tool, particularly whether he possessed any managerial responsibility. Similarly, disputes exist with regard to whether a breach occurred; the parties dispute Tim Pruitt’s conduct, the timing of such conduct, and the effect, if any, of such conduct. Moreover, even if White Cap and Maples are correct that the only unlawful purpose thus far alleged by Ram Tool concerns misappropriation, for the reasons stated above, the failure, at this juncture, to set forth an unlawful purpose untied to misappropriation does not render summary judgment appropriate under *Hannan*. Because genuine disputes of material fact exist and because White Cap and Maples have merely challenged Ram Tool to “put up or shut up” with regard to the conspiracy claim, summary judgment is inappropriate on the alternative grounds espoused by the defendants.

V. CONCLUSION

For the aforementioned reasons, we affirm in part and reverse in part and we remand for further proceedings. Specifically, we find preempted by TUTSA, Ram Tool’s common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are based upon the misappropriation of trade secrets. However, we find Ram Tool’s common law breach of fiduciary duty/loyalty claim—and its derivative claims—insofar as they are not grounded in the misappropriation of trade secrets, are not preempted by TUTSA; summary judgment was improperly granted as to these claims. Costs of this appeal are taxed equally to Appellant, Ram Tool & Supply Co., Inc., and its surety, and to Appellees, HD Supply Construction Supply, Ltd., d/b/a White Cap Construction Supply, Robert Maples, and Tim Pruitt, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.