

STATE OF MICHIGAN
COURT OF APPEALS

EXCEL INDUSTRIAL ELECTRONICS, INC,

Plaintiff-Appellant,

v

DEBRA BLANCO,

Defendant-Appellee.

UNPUBLISHED

June 30, 1998

No. 196899

Macomb Circuit Court

LC No. 94-005870 CK

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motion for directed verdict on plaintiff's claims of breach of fiduciary duties, fraud, tortious interference with advantageous business transactions, misappropriation of trade secrets and business defamation and the jury's verdict awarding defendant \$3574.11 in unpaid commissions. We affirm.

First, plaintiff challenges the trial court's grant of defendant's directed verdict motion. Plaintiff erroneously claims that the court raised the motion sua sponte. Defendant moved for directed verdict on all of plaintiff's claims, relying in part on earlier motions for summary disposition. By failing to provide authority that the trial court's failure to allow defendant to fully present her motion constitutes reversible error per se, plaintiff has waived this issue on appeal. *Mitchell v Dahlberg*, 215 Mich App 718, 728; 547 NW2d 74 (1996).

The court ordered directed verdict on all of plaintiff's claims. While plaintiff asserts that it presented evidence that defendant made defamatory and slanderous statements against it, plaintiff fails to directly address the trial court's ruling on its business defamation claim. "A mere statement of position is insufficient to bring an issue before this Court." *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997). Plaintiff has not separately or specifically challenged the trial court's ruling with regard to its claim of breach of fiduciary duties, which the court also dismissed on directed verdict. Thus, plaintiff has abandoned this issue. *Id.*

We are left with plaintiff's challenge of the court's ruling regarding its claims of tortious interference with business relations, misappropriation of trade secrets and fraud. The trial court found

that plaintiff failed to adequately prove its damages, noting that it did not establish its loss of net income or a measure of damages. We agree that plaintiff failed to provide adequate proof of the damages caused by defendant.

This Court reviews the trial court's ruling on a motion for directed verdict de novo. *Meagher, supra* at 708. In reviewing a ruling on a motion for directed verdict, this Court considers "the evidence and all legitimate inferences drawn from the evidence in a light most favorable to the nonmoving party." *Mason v Royal Dequindre Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Directed verdict should be granted only when there exists no factual question upon which reasonable minds can differ. *Meagher, supra* at 708.

The party bringing a claim bears the burden of proving damages with reasonable certainty. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Id.*, citations omitted. It is sufficient if there exists a reasonable basis for computing damages, although the result of the computation is approximate. *Id.* Recovery is barred where there exists uncertainty regarding the existence of damages rather than the amount of damages. *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989).

Plaintiff's argument regarding the trial court's erroneous ruling rests in part on its assertion that in a tort action lost profits need not be established as net profits. While the cases instructing that a plaintiff must prove net profits involved breach of contract, *Lawton v Gorman Furniture*, 90 Mich App 258, 267; 282 NW2d 797 (1979), citing *Benfield v HK Porter Co*, 1 Mich App 543, 547; 137 NW2d 273 (1965); *The Vogue v Shopping Centers, Inc*, 402 Mich 546, 550-552; 266 NW2d 148 (1978), plaintiff has provided no reasoning to support its position that, for purposes of lost profits, there is a distinction between damages for a tort and damages in a contract action. Moreover, in that a plaintiff in a tortious interference action may recover "the pecuniary loss of the benefits of the contract or the prospective relation," 4 Restatement Torts, § 774A(1), pp 54-55, it follows that the plaintiff must establish net profits from gross income. Thus, we find that the trial court did not err by concluding that plaintiff provided insufficient proof of damages by failing to present evidence of a loss of net profits.

To prove tortious interference with a business relationship, a plaintiff must provide evidence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. [*BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).]

Where an employee obtains a trade secret by virtue of employment, the employee is not permitted to make use of the secret for her own benefit or disclose the secret to others without the consent of the original possessor of the trade secret. *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 279-280; 286 NW 612 (1939).

Plaintiff presented limited proof of the measure of damages. It presented evidence of a decrease from 1994 to 1995 in total orders from a specific group of customers. It also presented evidence in an overall decrease in the amount of repair work it performed in 1995 as compared to 1994 and attributed this decrease from a lack of work from Chrysler, a customer served by defendant. However, plaintiff left the bulk of the amount of damages attributable to defendant's alleged tortious conduct to juror speculation. Plaintiff did not provide evidence regarding the amount of business generated by the involved customers that was fielded to other sources in lieu of plaintiff due to defendant's alleged conduct and failed to provide evidence of the amount of work those customers would have given plaintiff had it not been for defendant's conduct. Plaintiff produced no admissible evidence to substantiate its claim that its business went to a competitor through defendant. There is no evidence that defendant used any of plaintiff's trade secrets to her advantage.

The nature of this case is such that plaintiff could have provided a more reasonable estimation of its damages. Reviewing the evidence in a light most favorable to plaintiff, it is clear that the jury would have had to speculate as to plaintiff's damages. The trial court did not erroneously grant defendant's motion for directed verdict on plaintiff's claims of tortious interference and misappropriation of trade secrets.

Plaintiff also argues that the trial court erred in granting defendant's motion for directed verdict on its fraud claim. The court concluded that the jury would have to speculate as to plaintiff's damages because plaintiff did not provide evidence distinguishing valid expenditures from fraudulent expenditures. We find no error.

First, plaintiff asserts that the trial court improperly labeled the claim as one for breach of contract, rather than fraud. The record reveals that the court understood the claim as a fraud claim. The elements for proof of fraud or misrepresentation are: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew the representation was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made the representation with the intent that the plaintiff would act on it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff suffered damages. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

Fatal to plaintiff's fraud claim is its failure to present evidence that defendant fraudulently used her company credit card. It provided no admissible evidence that the customers defendant claimed to have entertained in fact did not accompany defendant on the occasions charged to plaintiff. Considering the evidence in a light most favorable to plaintiff, there are no factual questions for the jury. Plaintiff not only failed to prove damages in support of its fraud claim, it also failed to establish the remaining elements of the claim. Therefore, the trial court properly granted defendant's motion for directed verdict on this claim.

Next, plaintiff argues that the trial judge's conduct during the trial, in questioning the witnesses and responding to counsel, created an impression of impartiality. We disagree.

To review this issue, this Court must review the record in its entirety to determine whether plaintiff was denied a fair trial through the trial court's alleged misconduct. *Lamson v Martin (After Remand)*, 216 Mich App 452, 457; 549 NW2d 878 (1996). The trial court possesses broad power of control over the manner in which witnesses are examined. MRE 611; *Lamson, supra* at 458. It also is endowed with the power to interrogate witnesses. MRE 614.

Plaintiff failed to object to many of the instances of alleged improper conduct by the trial court. This failure waives appellate review absent unusual circumstances. *Meagher, supra* at 726. Moreover, to the extent that plaintiff complains of the trial court's conduct and questioning of witnesses on evidence pertaining to its claims rather than defendant's claim for commissions, whether the trial court acted improperly is not relevant because it directed the verdict against plaintiff and the jurors did not consider the issues. *Id.* Plaintiff has not demonstrated that the directed verdict was a product of judicial bias. *Id.*

A review of the challenged instances of remarks and questioning by the trial court reveals that the bulk of them were attempts by the court to clarify the witnesses' testimony. The court's questions and remarks pertained not only to plaintiff's counsel, but defense counsel as well. Plaintiff has failed to establish that the court was biased against it or that bias caused the directed verdict.

With regard to the presentation of defendant's case, which was decided by the jury, we find nothing improper in the court's conduct. Rather than improperly interfering in the case and helping defendant by challenging plaintiff's witnesses, a reading of the record in its entirety reveals that the court often had to exercise a more hands-on approach in this trial. Its control appears even-handed. Moreover, the court instructed the jury to disregard any thought it may have regarding the court's opinion as possibly expressed through the court's rulings, conduct or remarks during trial. It told the jury that it was the sole judges of the facts. This instruction helped to temper any beliefs the jury may have had regarding the trial court's partiality. Overall, the court did not display partiality toward defendant. Plaintiff has failed to demonstrate a denial of a fair trial through the court's conduct.

Finally, plaintiff asserts that the trial court should have granted plaintiff's motion for directed verdict on defendant's claim for unpaid commissions because the only evidence defendant submitted in support of her claim was self-serving and unsubstantiated. It also asserts that the trial court improperly held it to a higher standard of proof than defendant and was one-sided in its rulings.

In reviewing a decision regarding a motion for directed verdict, this court should recognize the opportunity of the judge and jury to observe the witnesses and the factfinder's responsibility to determine witness credibility and weight of the testimony. *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Defendant presented admissible evidence in support of her claim for commissions. Although she drew this evidence from her memory, the acceptance of her testimony was a matter for the jury and dependent on its assessment of her credibility. Thus, considering the evidence in a light most favorable to defendant, defendant presented an issue upon which reasonable minds could differ. Therefore, the trial court properly denied plaintiff's motion for directed verdict on defendant's claim for unpaid commissions.

Plaintiff also argues that the trial court improperly held it to a higher standard of proof regarding its claims than it held defendant to on her claim. This argument is without merit. Plaintiff simply failed to provide evidence in support of its claim, but defendant presented sufficient evidence in support of hers.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski