IN THE COURT OF APPEALS OF IOWA

No. 8-187 / 96-2006
Filed October 29, 1998

V.L.P. CORPORATION, a/k/a VIVA LA PASTA CORPORATION, and VIVA LA PASTA COOKING AND WINE SCHOOL, INC.,
Appellees,

vs.

KYL CABBAGE and THE WINE EXPERIENCE, L.C.,
Appellants.

FILED
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CLERK SUPREME COURT

KYL CABBAGE,
Third-Party Plaintiff,

vs.

V.L.P. CORPORATION, VIVA LA PASTA COOKING AND WINE SCHOOL, INC., RHODA KREAMER, and REBECCA SWARTZ,
Third-Party Defendants.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Defendants appeal from a district court judgment and injunction issued following a jury verdict on their claims defendant violated a confidentiality agreement and a duty of loyalty to plaintiffs, his former employers. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Donald L. Carr II of Sullivan & Ward, P.C., Des Moines, for appellants.

G. Brian Pingel and Brett J. Trout of Shearer, Templer & Pingel, P.C., West Des Moines, for appellees.

Heard by Sackett, P.J., and Huitink and Streit, JJ., but decided by Sackett, P.J., and Huitink and Mahan, JJ. Streit, J., takes no part.

PER CURIAM.

I. Background Facts and Proceedings.

Plaintiff Viva La Pasta Corporation (VLP) operates a gourmet food and wine retail store. Its principal shareholders are Rhoda Kreamer and Rebecca Swartz. In 1991, Kreamer, Swartz, and Kyl Cabbage met to discuss opening a new cooking and wine school. The result was Viva La Pasta Cooking and Wine School, Inc. (the School). Kreamer and Swartz were its principal shareholders; Cabbage had a minority interest and was the School's director and employee.

Cabbage signed an agreement at the parties' first meeting on April 23, 1991, promising not to disclose confidential information. The parties dispute the scope of this agreement, and Cabbage points out it was not signed, as required, by someone from "the company."

Cabbage indicates he met with Kreamer in July of 1994 to advise her he intended to leave the School at the end of the year. According to Cabbage, Kreamer and Swartz then began disbanding the business without his knowledge or permission, and by the end of 1994 it was effectively defunct. Cabbage contends he began making his future business plans in December of 1994. He submitted his resignation in January 1995. He then developed and opened a new business, The Wine Experience (TWE), in March of 1995.

According to plaintiffs, Cabbage first began making plans for a competing business in July of 1994, and formed TWE the day before his resignation from the

School. The plaintiffs assert Cabbage wrongfully provided a copy of their customer list to the Multiple Sclerosis Society without authorization. Plaintiffs additionally contend, after his resignation from the School, Cabbage retrieved a copy of the customer list from the charity for use in his new business.

Upon learning of TWE, VLP and the School filed suit in February 1995. Their amended petition contained eight counts. Only four were submitted to the jury: (1) breach of the employment agreement by Cabbage's failure to provide required notice before he resigned; (2) breach of Cabbage's confidentiality agreement through use of customer lists and other business information; (3) misappropriation of trade secrets and confidential information; and (4) breach of Cabbage's duty of loyalty not to use or disclose confidential information, and TWE's assistance in that breach.

Cabbage responded with a counterclaim, asserting five counts including a claim for breach of contract and failure to pay wages, commissions, and other benefits.

Following trial, the jury returned verdicts in favor of VLP (but not the School) on its claims against Cabbage for breach of the confidentiality agreement and for breach of the duty of loyalty. The jury returned a verdict for Cabbage on his counterclaim for unpaid wages. The jury rejected the other claims submitted. In special interrogatories, the jury was asked to determine separately the amount of damages on VLP's confidentiality claim and duty of loyalty claim. The jury awarded $15,000 on each theory. The jury awarded Cabbage $700 on his wage claim.

The district court entered judgment in favor of VLP for $30,000, finding the two $15,000 sums represented separate awards. The court also granted a permanent injunction prohibiting Cabbage or TWE from using VLP's customer list, or contacting or soliciting customers on the list. The court entered judgment in favor of Cabbage for $2100, which included liquidated damages and attorney fees.

Cabbage and TWE appeal. Appellants assert five bases of error by the district court: (1) denying appellants' motion for directed verdict on the breach of contract and breach of duty of loyalty claims; (2) granting a permanent injunction enjoining appellants from using the VLP customer list; (3) error in computing the amount of damages; (4) error in its award of attorneys fees for Cabbage's successful unpaid wage claim; and (5) by not imposing discovery sanctions upon appellees. We find for appellees on all asserted errors except the district court's grant of permanent injunctive relief and its computation of damages.

II. Trial Court's Denial of Directed Verdict.

Cabbage argues the trial court erred when it denied his motion for directed verdict on the breach of duty of loyalty and breach of contract claims.

A. Standard of Review.

Denial by the trial court of a motion for directed verdict is reviewed for correction of errors of law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). The evidence is viewed in the light most favorable to the nonmovant and it is determined whether sufficient evidence existed to warrant

submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App. 1987). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit the issue to the jury. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict, the plaintiffs must merely show there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Miller v. Young*, 168 N.W.2d 45, 51 (Iowa 1969).

B. Breach of Contract.

Cabbage contends the district court erred by submitting to the jury the issue of the existence and breach of the confidentiality agreement. He argues while the language of the contract itself indicates the agreement is between he and VLP, the testimony of the plaintiffs shows the purpose of the agreement was to protect the School only. He also contends the customer list was the property of VLP only, and hence he could not have breached the agreement between the School and himself by divulging information not owned by the School. Additionally, he asserts the

agreement is invalid because it is not signed by anyone from VLP or the School. We disagree and affirm on this issue.

Generally, there are seven elements a plaintiff must prove to prevail on an action for breach of contract. *See Powell v. McBlain*, 269 N.W. 883, 222 Iowa 799 (1936). Cabbage asserts the trial court erred in submitting the breach of contract issue to the jury in the absence of evidence proving two of these elements: (1) the existence of a contract; and (2) the terms of the contract. *See id.*

With respect to the first element, Cabbage claims the contract is not valid because it was not signed by anyone from VLP or the School. This position is without merit. It is a long-established principle in Iowa law that a contract signed by only one party is binding upon both parties if the agreement has been acted upon by both parties. *Dows v. Morse*, 17 N.W. 495, 495, 62 Iowa 231, 233 (1883); *Ducommun v. Johnson*, 110 N.W.2d 271, 273 (Iowa 1961). Cabbage admittedly signed the agreement, and VLP/the School acted upon the agreement by entrusting him with confidential information and trade secrets. Further, Cabbage testified he understood the dictates of the agreement and fully expected to be bound by its conditions.

Secondly, Cabbage contends the issue should not have been submitted to the jury due to an ambiguity as to who were the actual parties to the agreement. The record indicates the agreement was signed at VLP offices at a point in time prior to the School's existence. The agreement itself indicates the parties are VLP and

Cabbage. The record also reveals the agreement was signed as a prerequisite to the formation of the School. Notwithstanding the testimony elicited at trial, we cannot find, viewing these facts in the light most favorable to the nonmoving party, the evidence is insufficient as a matter of law. We find the breach of contract claim was properly submitted to the jury to decide and accordingly affirm on this issue.

C. Breach of Duty of Loyalty.

Cabbage argues the court erred by submitting the breach of a duty of loyalty claim to the jury. Cabbage suggests no such duty existed and, even if it did, it would be encompassed by the requirements of the Trade Secrets statute, Iowa Code section 550, which the jury rejected as a basis for recovery. We disagree.

Our decisions are often controlled by our standard of review. *Falczynski v. Amoco Oil Co.*, 567 N.W.2d 447, 449 (Iowa App. 1997). Our standard of review here is whether there existed sufficient evidence to warrant submission of the duty of loyalty claim to the jury. *Slocum v. Hammond*, 346 N.W.2d 485, 493 (Iowa 1984). The standard is whether there was sufficient evidence to justify submitting the question to the jury. Under this standard of review, Cabbage's argument is without merit.

Iowa courts recognize a fiduciary duty between employers and former employees. *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 648 (Iowa 1995); *Kendall/Hunt Publishing Co. v. Rowe,* 424 N.W.2d 235, 243 (Iowa 1988); *Norand Corp. v. Parkin*, 785 F. Supp. 1353, 1355 (N.D. Iowa 1990). The

basis for the fiduciary duty is one of a principal-agent relationship. *Economy Roofing*, 538 N.W.2d at 648. This duty prohibits the former employee from "using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment." *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730, 735 (8th Cir. 1965)(applying Iowa law).

In the instant case, there is no dispute Cabbage was an employee of the School. Likewise there is no dispute that he is no longer an employee of the School. He was an employee in a position of trust and confidence as the director of the School. He gained knowledge of the VLP/School customer list through his employment. The facts also indicate he used the customer list after he had left the employ of the School. Finally, the facts indicate Cabbage regarded the customer list to be confidential information. All of this information was properly presented to the jury.

Cabbage contends if a duty does exist in this case, it is based upon the Iowa Trade Secrets statute, Iowa Code section 550. He contends the jury's rejection of the statute as a basis of recovery also forecloses the duty of loyalty claim because they are necessarily interwoven. This argument ignores the applicable standard of review. Our review is based upon the sufficiency of the evidence before it is given to the jury. *Slocum*, 346 N.W.2d at 493. Cabbage is asking us to impose the jury's findings upon a question that necessarily predates those same findings. We reject this argument entirely.

We therefore find it was not error to submit the duty of loyalty claim to the jury, as the claim was supported by sufficient evidence.

III. District Court's Grant of Injunctive Relief.

A. Standard of Review.

A request for an injunction invokes the court's equitable jurisdiction. Iowa R. Civ. P. 320. Because the appeal of the injunction is in equity, our review is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

B. Merits.

Cabbage and TWE maintain the trial court erred by enjoining them from using the VLP customer list. TWE points out that it was not found liable by the jury on any count, and argues the injunction against it was consequently improper. Cabbage asserts the jury declined to award future unjust enrichment damages, and argues the jury's findings show he would not gain any advantage by use of the list. He additionally maintains the injunction is improperly vague and overbroad. We find the parties have adequate remedies available at law, and accordingly dissolve the permanent injunction entered against both Cabbage and TWE.

An injunction is to be granted with caution and only when required to prevent irreparable damage. *Matlock v. Weeks*, 531 N.W.2d 118, 122 (Iowa 1995). An injunction is appropriate only when the party seeking it has no adequate remedy at

law. *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991). Before granting an injunction, the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief. *Id.*

Our review of the entire record convinces us the permanent injunction entered by the district court is not justified. VLP has shown no future propensity of Cabbage and TWE to use the VLP customer list as a marketing tool. Further, we note VLP has adequate remedies at law for any future use of the customer list by TWE or Cabbage. Future usages of the customer list by TWE will give rise to proper actions for civil damages.

Due to the availability of adequate remedies at law, we find it was error to grant permanent injunctive relief. The permanent injunction entered against Cabbage and TWE on September 23, 1996 is hereby dissolved. Because we decide this issue on the grounds of adequate remedies at law, we do not reach whether the injunction was properly entered against TWE, or questions of vagueness and overbreadth.

IV. Damages.

Cabbage argues the trial court erred in submitting the issue of damages to the jury. He also argues the two $15,000 sums awarded by the jury are duplicative and thus the court erred by adding them together in its judgment. We affirm on the submission of the damages issue and reverse and remand on the duplicative damage award issue.

Cabbage challenges the sufficiency of the evidence to support the damage award. Indeed, recovery will be denied when evidence of damages is speculative or uncertain. *205 Corp. v. Brandow*, 517 N.W.2d 548, 552 (Iowa 1994). But if "uncertainty lies only in the amount of damages, some recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated." *Id.*

Evidence of damages came from the testimony of Rebecca Swartz, a minority shareholder in the School. She testified the School experienced a loss of total sales of $116,000 between the 1994 figures and the 1995 figures. She testified the loss in sales was attributed to Cabbage leaving the School and opening The Wine Experience. She additionally testified the School was projected to a have an increase in gross sales of $20,000-$30,000 for the same period. From this testimony the appellees argued, and the jury apparently inferred that some of the lost sales were a result of Cabbage leaving the School, taking the customer list, and starting TWE. We think this evidence was sufficient to submit the issue for the jury's consideration.

Cabbage additionally claims the damage awards of $15,000 granted for both the breach of contract and breach of duty of care counts are duplicative. We agree.

A "successful plaintiff is entitled to one, but only one, full recovery, no matter how many theories support entitlement." *Id.* (quoting *Clark-Peterson Co. v. Independent Ins. Assocs.*, 514 N.W.2d 912, 915 (Iowa 1994)). We find the breach of contract claim and breach of duty of loyalty claim are merely alternative theories for

recovery for the same injury. Identical damages were claimed under each theory. No evidence was offered to demonstrate how each claim resulted in a different injury to VLP.[1] The damage awards on the breach of contract claim and the breach of duty of loyalty claim are clearly duplicative. On remand, the judgment shall be amended so as to allow recovery for the breach of contract claim, but not on the breach of the duty of loyalty claim.

V. Award of Attorneys Fees.

With respect to his recovery on his unpaid wage claim, Cabbage asserts the trial court's award of $700 in attorney fees was inadequate and constituted an abuse of discretion, given the nature of the claims and the complexity of the litigation.

Determination of attorney fees is a matter entrusted to the discretion of the district court. *Bremicker v. MCI Telecommunications Corp.*, 420 N.W.2d 427, 428 (Iowa 1988). This court will reverse for an abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Cabbage's claim for attorney fees must be determined in accordance with Iowa Code section 91A.8 (1995). Section 91A.8 states:

> When it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section

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[1] We note that while both Viva La Pasta Corp. and Viva La Pasta Wine and Cooking School, Inc. were named plaintiffs in this action, the jury returned special interrogatories in which only Viva La Pasta Corp. recovered damages. The existence of two plaintiff entities cannot be the basis justifying a duplicative damage award.

> 91A.3, whether the result of a wage dispute or otherwise, the employer shall be liable to the employee for any wages or expenses that are so intentionally failed to be paid or reimbursed, plus liquidated damages, court costs and any attorney's fees incurred in recovering the unpaid wages and determined to have been usual and necessary. In other instances the employer shall be liable only for unpaid wages or expenses, court costs and usual and necessary attorney's fees incurred in recovering the unpaid wages or expenses.

In the context of Iowa Code section 91A.8, a judge is presumed to be an expert on what are reasonable attorney fees. *Mississippi Valley Broadcasting, Inc. V. Mitchell*, 503 N.W.2d 617, 619 (Iowa App. 1993).

Initially, we note Cabbage claimed astronomical attorney fees of $66,344.62 in the prosecution of a section 91A.8 claim on which he received a $700 judgment. On appeal, Cabbage has amended his claim, asking only that "a fair, usual, and reasonable attorney fee" award be granted. He has given no guidance to this court as to what a reasonable attorney fee should be.

We note previous cases pursuant to Iowa Code section 91A.8 for guidance on what constitutes a fair, usual, and reasonable attorney fee. In *Mississippi Valley*, this court affirmed an award of $692.58 in attorney fees in a case where the recovery was $862.49. *Id.* at 620. In *Halverson v. Lincoln Commodities, Inc.* 297 N.W.2d 518 (Iowa 1980), the court awarded $10,000 in attorney fees and an actual wage recovery of $35,687.43. In *Williams v. Davenport Communications*, 438 N.W.2d 855 (Iowa App. 1989) the court awarded the plaintiff $1736.00 in unpaid wages and $316.40 in attorney fees.

Cabbage asserts an award of $700 is not reasonable given the complexity of the litigation in the instant case. Despite his contention, he provides no basis of how the wage claim itself was so complex as to grant an award of attorney fees in excess of the unpaid wage claim actually recovered. The litigation in the instant case was no doubt complex, lengthy, and fiercely advanced. The complexity of the litigation in the instant case stems, at least in part, from claims independent and distinct from the unpaid wage claim. The trial court took this factor into account. *See Lara v. Thomas*, 512 N.W.2d 777, 786-87 (Iowa 1994)(applying a two-factor test to request for section 91A.8 attorney fees in complex litigation). Accordingly, the trial court did not abuse its discretion in its award of attorney fees, and we affirm on this issue.

VI. Discovery Sanctions.

Cabbage and TWE lastly challenge the trial court's decision not to award sanctions for plaintiffs' failure to adequately respond to discovery requests for financial information.

We review a trial court's decision not to grant discovery sanctions for an abuse of discretion. *Troendle v. Hanson*, 570 N.W.2d 753, 755 (Iowa 1997). An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds. *Id.*

Our review of the record indicates the district court did not abuse its discretion in failing to impose discovery sanctions. The record contains evidence of possible discovery abuses by both appellees and the appellant. It was within the district

court's discretion to view such abuses as offsetting, thus obviating the effectiveness of imposing sanctions. We affirm on this issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.