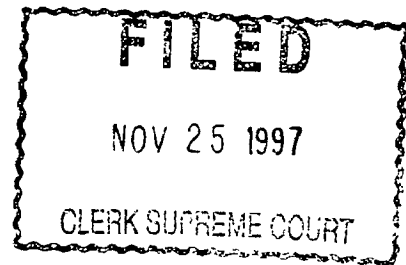


IN THE COURT OF APPEALS OF IOWA

No. 7-355 / 96-1177

000229

**KATHERYN L. PAYTON and PAYTON POWER
TUMBLING, INC.,**
Appellants,



vs.

**BRYCE WHITMORE, TAMARA MOELLER,
DENNIS D. PYLE, AMY PYLE, and
A.P. INC., d/b/a CARDINAL GYMNASTICS ACADEMY,**
Appellees.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Plaintiffs appeal from the district court's judgment dismissing their petition for injunctive relief and damages from the defendants. **AFFIRMED.**

Patrick H. Payton and Ronald G. Cable of Patrick H. Payton & Associates,
P.C., Des Moines, for appellants.

James A. Brewer of Newbrough, Johnston, Brewer, Maddux & Nadler, L.L.P.,
Ames, for appellees.

Heard by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Payton Power Tumbling (Payton) offers recreational and competitive tumbling instruction for children in the Boone County area. Each instructor who worked at Payton was required to sign a contract including this provision:

ASSISTANT INSTRUCTOR shall not, within two (2) years after the termination of such agreement, directly or indirectly, as principal, agent, servant or otherwise, carry on or be concerned or interested in the business of PAYTON within Story County and Boone County, Iowa, or directly or indirectly solicit or endeavor to instruct those students, customers and clients who during the period of this agreement were the students, customers and clients of PAYTON.

Tamara Moeller and Bryce Whitmore worked as instructors at Payton in 1994 and 1995. Each signed a contract with the foregoing provision. Moeller left Payton in August 1994. Whitmore left in April 1995.

At the time this case was filed, Moeller was working as a volunteer coach and Whitmore was working as a part-time instructor at Cardinal Gymnastics Academy (Cardinal) in Ames. Cardinal is a business similar to Payton and is owned by A.P. Inc. Dennis and Amy Pyle are shareholders and officers of A.P. Inc.

Payton sued Cardinal and the Pyles alleging they interfered with Payton's contracts with Moeller and Whitmore. Payton also alleged Cardinal, the Pyles, Moeller, and Whitmore interfered with its prospective business advantage by enticing Payton's students to leave and enroll at Cardinal. Payton also sued Moeller and

Whitmore seeking enforcement of the covenants not to compete by appropriate injunction.

The district court refused to enforce the covenants not to compete citing Payton's failure to prove the covenants were reasonably necessary to protect its business. Payton's tort claims were also rejected because the district court found the underlying contract was not enforceable and Payton failed to prove the defendants were the cause of any damages claimed.

On appeal Payton cites the district court's refusal to compel Cardinal to produce its customer list as error necessitating a new trial. Payton also argues the covenants not to compete should be enforced and it was error for the district court to conclude otherwise. Lastly, Payton claims its evidence was sufficient to sustain its burden of proof on each of its tort claims and this case should be remanded for a new trial on these claims.

II. Standard of Review.

Because this case was tried in equity our scope of review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact but we are not bound by them. *Id.*

III. Motion to Compel.

Prior to trial, Payton's request to examine Cardinal's customer list was denied. During trial, the district court determined the list was relevant and ordered it produced for Payton's examination. Payton's attorney refused, stating: "For the record, we

would waive our right to look at that list.” We find, by taking this position, Payton waived any error resulting from the district court’s original ruling denying their motion to compel production of Cardinal’s customer list.

IV. Covenant Not to Compete.

To obtain enforcement of a covenant not to compete the party seeking enforcement must prove: (1) the covenant is reasonably necessary for the protection of the employer’s business; (2) it must not be unreasonably restrictive of the employee’s rights; and (3) it must not be prejudicial to the public interests. *The Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa App. 1992).

We, like the district court, find Payton has failed to sustain its burden of proof on this issue. The greater weight of the evidence indicates student retention in the context of Payton’s business is influenced more by considerations of parental convenience and student interest rather than loyalty to a particular instructor. Because these factors predominate, the covenants not to compete were without significant consequence or benefit to Payton’s business. There is simply not enough evidence to conclude the covenants not to compete were reasonably necessary to protect Payton’s business. We affirm on this issue.

V. Payton’s Tort Claims.

Payton’s tort claims, intentional interference with existing contract and intentional interference with prospective business advantage, are premised on Payton’s allegations that its sustained damages as a result of Cardinal’s improper

conduct. Damages and proximate cause are essential elements of proof under either theory. *Nesler v. Fisher and Co., Inc.*, 452 N.W.2d 191, 198 (Iowa 1990). The record includes abundant evidence that indicates neither Cardinal's increased enrollment or Payton's loss of students was influenced by the challenged conduct of any named defendant. Parents of students enrolled at Cardinal testified their enrollment decisions were based on considerations of convenience and method of instruction. Payton's contrary claims lack evidentiary support and are fairly characterized as speculative. Payton's failure to prove a causal connection between the defendants' alleged wrongful conduct and the damages it claims justified the district court's dismissal of its tort claims.

We have carefully considered all of Payton's appellate contentions and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.