

NO. SC91831

MISSOURI SUPREME COURT

WESTERN BLUE PRINT COMPANY, L.L.C.,

Respondent,

vs.

MYRNA ROBERTS, ET AL.,

Appellants.

APPELLANTS' SUBSTITUTE BRIEF

DAVID J. MOEN, #39239
621 E. McCarty Street, Ste. A
Jefferson City, MO 65101
Phone: (573) 636-5997
Fax: (866) 757-8665
ATTORNEY FOR APPELLANTS

ARMSTRONG & TEASDALE
JAMES KENT LOWRY, #26564
SCOTT T. JANSEN, #57393
3405 W. Truman Blvd, Ste 210
Jefferson City, MO 65109
Phone: (573) 636-8395
Fax: (573) 636-8457
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF FACTS..... 2

POINTS RELIED ON..... 11

 POINT I. 13

 STANDARD OF REVIEW 14

 ARGUMENT..... 14

 POINT II. 28

 STANDARD OF REVIEW 28

 ARGUMENT..... 28

 POINT III..... 34

 STANDARD OF REVIEW 34

 ARGUMENT..... 34

 POINT IV..... 35

 STANDARD OF REVIEW 36

 ARGUMENT..... 36

 POINT V..... 38

 STANDARD OF REVIEW 38

 ARGUMENT..... 38

CONCLUSION 41

CERTIFICATE OF SERVICE AND COMPLIANCE..... 43

TABLE OF AUTHORITIES

Cases

Boulicault v. Oriel Glass Co., et al., 223 S.W. 423, 426 (Mo. banc 1920). 15

Cambridge Engineering, Inc., v. Robertshaw Controls Co., 966 F. Supp. 1509, 1521
(Mo. App. E.D. 1997). 40

Community Title Co. v. Roosevelt Federal S&L Assoc., 796 S.W.2d 369, 372 (Mo.
banc. 1990) 31

Continental Research Corp. v. Scholz, 595 S.W.2d 396, 401 (Mo. App. E.D. 1980)... 27

Emerick v. Mutual Benefit Life Insurance Co., 756 S.W.2d 513, 526-527 (Mo. banc
1988). 15

Erdman v. Condaire, Inc., 97 S.W.3d 85, 88 (Mo. App. E.D. 2002); 14, 28, 34, 38

Forinash v. Daugherty, 697 S.W.2d 294, 301 (Mo. App. S.D. 1985)..... 15

H.J., Inc., v. International Telephone and Telegraph Corp., 867 F.2d 1531, 1548 (8th
Cir. 1989) 31

Honigmann v. Hunter Group, Inc., 733 S.W.2d 799, 807 (Mo. App. E.D. 1987)..... 31

Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996) 14, 28, 34, 38

Martin v. Mercantile Trust Co., 293 S.W.2d 319 (Mo. 1956)..... 21

McKeehan v. Wittels, 508 S.W.2d 277, 281 (Mo. App. St.L. 1974). 23

Metal Lubricants Co. v. Engineered Lubricants Co., 284 F. Supp. 483, 488 (E.D. Mo.
1968) 26

Midland-Ross Corporation v. Yokana (D.C. N.J.), 185 F. Supp. 594. 18, 20

National Rejectors, Inc. v. Trieman, 409 S.W.2d 1 (Mo. banc 1966) .. 15, 16, 17, 18, 19,
20, 21, 23, 27

National Welding Equip. Co. v. Hammon Precision Equip. Co., 165 F. Supp. 788 (N.D.
Cal. 1958) 20

O'Brien v. BLC Insurance Co., 768 S.W.2d 64, 71 (Mo. banc 1989) 36

O'Connor v. Shelman, 369 S.W.2d 458, 461 (Mo.App. W.D. 1989) 31

Pony Computer v. Equus Computer Systems of Missouri, 162 F.3d 991 26

Rhodes Engineering Co., v. Public Water Supply Dist. No. 1 of Holt County, 128
S.W.3d 550 (Mo. App. W.D. 2004) 29

Rice v. Hodapp, 919 S.W.2d 240, 245 (Mo. banc 1996) 28, 38

Saey v. Xerox Corporation, 31 F. Supp. 2d 692, 700-701 (E.D. Mo. 1998) 30

Saigh v. Busch, Inc., 396 S.W.2d 922 (Mo. App. E.D. 1965) 15

Sloan v. Bankers Life and Casualty Co., 1 S.W.3d 555, 565 (Mo. App. W.D. 1999) . 29,
30

SSM Health Care, Inc., v. Deen, 890 S.W.2d 343, 346 (Mo. App. E.D. 1994)..... 31, 32

Standard Brands Inc. v. United States Partition & Packaging Corp. (E.D. Wisc.), 199
F. Supp. 161 [1961] 17

Twin Chimneys Homeowners Ass'n. v. J.E. Jones Construction Co., 168 S.W.2d 488,
499 (Mo. App. E.D. 2005). 14, 22, 36

Walter E. Zemitzsch, Inc. v. Harrison, 712 S.W.2d 418, 421 (Mo. App. E.D. 1986).. 21,
24, 25, 26

Statutes

Mo. Rev. Stat. § 347.015(2) (2010) 22, 25

Mo. Rev. Stat. § 347.079 (Supp. 2005)..... 22

Mo. Rev. Stat. § 347.088 (2010)..... 22, 25

Mo. Rev. Stat. § 569.097 (2010)..... 35

JURISDICTIONAL STATEMENT

This action constitutes an appeal from final judgment entered by the circuit court of Boone County, Missouri, in favor of Plaintiff who sued a prior employee and her husband for taking the majority of its business at the Columbia, Missouri, location. The case primarily involves a dispute related to the freedom with which a prior employee can compete with her previous employer. After a ruling by the Court of Appeals, Western District, this Court granted transfer.

STATEMENT OF FACTS

Appellant Myrna Roberts (hereinafter “Ms. Roberts”) began working as a branch manager for Respondent Western Blue Print Company, LLC, (hereinafter “Western Blue”) in February 1999. Western Blue is a document printing and management service company that primarily provides services to architects, engineers and contractors. Its home office is located in Kansas City, Missouri. Western Blue had a branch office in Columbia, Missouri. Ms. Roberts was in charge at the Columbia, Missouri, branch office. There were other Branch Managers besides Ms. Roberts that worked for Western Blue. *Tr. Transcr. vol. 1, 17:12-15* (February 26, 2008). The value of the Columbia, Missouri, location of Western Blue was approximately 5% of Western Blue’s business. *Tr. Transcr. vol. 1, 390:13-24.*

Ms. Roberts did not have a non-compete agreement or any written employment agreement with Western Blue. Ms. Roberts was not listed as an officer of the LLC, which referred to itself as a corporation. Western Blue’s registration with the Missouri Secretary of State indicates that Tom Bircham and Heron Point were the owners and operators of Western Blue LLC. *Tr. Transcr. vol. 1 428:2-11.* Myrna Roberts was never a shareholder, member, or manager in Western Blue, nor did she participate in the board meetings. She did not participate in Western Blue’s annual meetings. *Tr. Transcr. 1196:16-24.*

During Ms. Roberts’ employment with Western Blue, Melvin “Mel” Roberts, her husband, was in the real estate business. *Tr. Transcr. vol. 2, 837:5-21* (February 26, 2006). He set up a C corporation to manage two limited liability companies, one of

which was DocuCopy, LLC. Fifty-one percent of DocuCopy was owned by Mickey Marrero and 49% by Graystone Properties. *Tr. Transcr. vol. 1, 436:18-20; vol. 2, 838:7-18.* Prestige Management owned Graystone. Prestige Management was owned by the Roberts Family Trust (99%), and Mel Roberts (1%). *Tr. Transcrs. vol. 2, 839:4-19.*

DocuCopy later became a subcontractor of Western Blue. *Tr. Transcr. vol. 1, 19:6-7.* DocuCopy was a Minority-Owned Business Enterprise that helped Western Blue qualify for a University of Missouri contract. Under that contract Western Blue provided the University with construction document print distribution services. *Tr. Transcr. vol. 1, 20:8-15.* Western Blue leased a printer to Graystone Properties. *Tr. Transcr. vol. 2, 795:8-11.* Mel Roberts later asked Ms. Roberts what the cost to purchase the machine would be, and she told him that she had to contact Galen Hansen, who's she?, the Western Blue accountant to see what they needed to have for the machine *Tr. Transcr. vol. 2, 797:22-798:3.* Pricing was established at the Kansas City office of Western Blue. Ms. Roberts was told what the price for a product would be and anything over that price would be her commission. *Prelim. Hrg. Transcr. 201:2-202:23.*

Ms. Roberts was in operational control of DocuCopy while she was employed with Western Blue. *Tr. Transcr. vol. 1, 462:1-464:17.* When a Western Blue representative asked Ms. Roberts who owned DocuCopy, Ms. Roberts failed to disclose her husband's interest or her own role in the company. *Tr. Transcr. vol. 1, 23:21-24:18.*

American Reprographics Company, Inc. was purchasing Western Blue in February 2006. *Tr. Transcr. vol. 1, 207:3 – 14.* While Western Blue was changing corporate ownership, Ms. Roberts was offered an employment agreement that included a

non-compete provision. She refused to sign it. *Tr. Transcr. vol. 1, 53:1 – 18.* Ms. Roberts had a conversation with the owner of Western Blue inquiring about her purchasing the central Missouri division. The owner rejected this offer by Ms. Roberts. *Prelim. Hrg. Transcr. 112:10-15.*

In March 2006, after working hours, Ms. Roberts recruited employees from Western Blue's Columbia office to work for DocuCopy. She implied that they could leave without giving notice. *Tr. Transcr. vol. 1, 490:4-491:6.* Later that same month, Myrna Roberts quit Western Blue and began full time operation of DocuCopy. There was no evidence that she directed customers from Western Blue to DocuCopy, while she worked at Western Blue.

The University of Missouri contract was to be rebid June 2006. Western Blue bid on the University of Missouri contract. *Tr. Transcr. vol. 1, 155:22 – 24.* Myrna Roberts, on behalf of DocuCopy, also submitted a bid. The bids were confidentially marked by the University so they would be evaluated without the University knowing which bid belonged to which company. *Tr. Transcr. vol. 1, 350:21-351:10.* There were four bids from businesses seeking the University of Missouri work in June 2006. *Tr. Transcr. vol. 1, 349:2-12.* DocuCopy was judged as presenting the best overall response to the University's Request for Proposals. *Tr. Transcr. vol. 1, 352:12-20.* Western Blue appealed its loss to the University, which was denied. *Tr. Transcr. vol. 1, 171:17 – 22.*

The University made its selection because:

The University desires a contractor who will dedicate experienced and well-qualified staff to manage this contract. That fact justifies awarding the most

points to the best organized staff plan for the Columbia Office, taking into consideration the staff designations and the experience and qualifications of those employees. Western [Blue]'s proposal did not present an operational plan for staffing the Columbia facility, other than listing a project liaison and product manager. In addition, few details regarding the project liaison's experience and qualifications were provided in the proposal.

Appllnt.'s Appx. A55 (*Def.s' Tr. Ex. D*) (Emphasis added in exhibit.)

Vendor B, Western Blue, provided examples of inferior reproductions:

Reproduction from PDF was not to scale and details were too light - Realizing this is a critical part of this contract; the evaluation relied greatly on the University Planning, Design, Construction's quality standards. The same accountability standards were used for previous contract awards, in which Western Blue was the successful respondent....

Id.

Western Blue's "CD-ROM splash page did not run properly"; "Inconsistent quality of printouts between secure items and hard copy items." *Id.*

Western Blue's photos were not provided on the specified paper. Of the three submittals, Western Blue's reproduction was shady and had less than desired clarity. *Id.*

Western Blue's:

Secure document narrative did not clearly address tracking - Western Blue provided a general overview of their tracking procedures. However, throughout the secure

document tracking questions, we asked respondents to explain “and show” how they will identify and track all secure documents. Western [Blue] did not show any patterns or demonstrations of the tracking procedures....

Id.

DocuCopy’s response to the RFP was graded with a score of 95.17. Western Blue’s was graded 77.13. Applnt.’s Appx. A32 (*Def.s’ Tr. Ex. B, p. 5*).

Western Blue had a continuing contractual obligation to complete performance on the prior contract by the end of July 2006. *Tr. Transcr. vol. 2, 960:23-961:1*. After Ms. Roberts left, Western Blue had difficulty performing on the contract. *Tr. Transcr. vol. 2, 931:14-20*. Officials from the University of Missouri met with Western Blue to let Western Blue know that things were falling apart and not happening as they should. “As time went along, things did improve, but they were never really up to par with what we needed to have done. We had a lot of billing problems.” *Tr. Transcr. vol. 2, 935:9-24*. Western Blue did not fulfill its contractual obligation to the University until February 2007. *Tr. Transcr. vol. 2, 990:17-991:1*.

From the University of Missouri’s perspective, Western Blue could not have reasonably expected to be awarded the contract that was to be awarded in June 2006. There was no way that the University would even know which bid was Western Blue’s because the bids were evaluated anonymously. *Tr. Transcr. vol. 2, 938:3-10*.

On March 31, 2006, at approximately 11:00 a.m., Ms. Roberts left the office of Western Blue for the last time and turned in her keys and other office equipment *Tr. Transcr. vol. 2, 1192:4-8*.

On March 31, 2006, at approximately 3:00 p.m., Western Blue obtained the laptop computer used by Ms. Roberts and reset the passwords. *Tr. Transcript vol. 1, 67:17-69:5*. The only thing Ms. Roberts had in her possession after leaving Western Blue were two backup CDs in her garage at home that were made in February 2006. *Tr. Transcr. vol. 1, 106:8 – 107:15*. They contained financial information of Western Blue from 2004 and 2005. *Tr. Transcr. vol. 1, 124:12 – 22*.

Vince Pingel, Ms. Roberts' supervisor, testified as corporate representative at trial. *Tr. Transcr. vol. 188:7-17*. Pingel stated that the two CDs made by Ms. Roberts in February 2006 were records made and kept by Ms. Roberts in the regular course of business. *Tr. Transcr. vol. 1, 315:24-317:7*. The information contained on the two CD's that Ms. Roberts copied in February 2006 had no designation as "confidential" or "secret." None of the documents had any designation that indicated they were not to be disclosed. *Tr. Transcr. vol. 1, 343:21-344:6*.

Western Blue had no written policies or guidelines with respect to confidential or secret information or documents. *Tr. Transcr. vol. 1, 345:3-6*. None of the information or documents at the Columbia location was kept in a safe. Western Blue provided no training to their employees with respect to what constituted confidential information. *Tr. Transcr. vol. 1, 345:7-22*. There was no evidence that Western Blue did anything to protect from disclosure information given to Ms. Roberts. None of the documents or computer files at the Columbia, Missouri, office were marked "confidential" or "secret."

Western Blue's confidential and proprietary information is kept on computer servers at Western Blue's office in Kansas City, Missouri. This information is protected

by standard security protocols. Ms. Roberts did not have access to Western Blue's Kansas City computer servers. Applnt.'s Appx. A58 (*Prelim. Hrg. Transcr. 51:11-52:2* (April 24, 26, 2006) (Def.s' Tr. Ex. J)). There is no evidence that Ms. Roberts accessed or attempted to access this information.

Western Blue could not identify any information Ms. Roberts took or destroyed that would have changed its bid for the University contract. *Tr. Transcr. vol. 1, 157:22-158:11*. Western Blue was unable to identify any information or documents that were missing that caused Western Blue not to be able to perform on the remaining contract with the University of Missouri after Ms. Roberts resigned. *Tr. Transcr. vol. 1, 161:6 – 25*.

Respondent's only evidence of computer tampering consists of the testimony of Respondent's expert, Swailes. Swailes examined the contents of Ms. Roberts' laptop computer in order to determine what the laptop's operating system showed to be deleted from January 1, 2006, through April 3, 2006. He prepared a spread sheet detailing the results in three volumes of documents totaling 858 pages. Applnt.'s Appx. A30 (*Pl.'s Tr. Ex. 25A*).

Swailes was able to determine the last date on which certain files in Ms. Roberts' laptop computer were accessed. These are the dates Swailes claimed that the items were deleted. *Tr. Transcr. vol. 1, 238:10-15*. Files continued to be "last accessed" or deleted as late as April 3, 2006, three days after Ms. Roberts last touched the laptop computer. From 2:21 p.m. on March 31, 2006, through 12:21 p.m. on April 3, 2006, 935 file names were deleted; millions of files were deleted. Applnts.' Appx, A11 *Pl. Ex. 16 (pertinent parts)*.

A virus could also cause files to be deleted, and record of the date deleted would be “last accessed” in the computer file. *Tr. Transcr. vol. 1, 264:15-22.*

Swailles could not tell who had deleted the files. *Tr. Transcr. vol. 1, 265:7-10.* Anyone from the Columbia office or Kansas City office of Western Blue was able to access Ms Roberts’ laptop computer and delete files or change them. *Tr. Transcr. vol. 1, 266:16-23.*

Western Blue lost a key person in Ms. Roberts, in that she had the business and customer relationships, she understood the pricing structures of the business, she had knowledge as to the competitive terrain and personally knew the key contacts at the two major customers in mid-Missouri. Because there were no non-compete agreements with key personnel, Western Blue’s business in the Columbia, Missouri, location was extremely vulnerable. *Tr. Transcr. vol. 1, 414:12-16.*

In April 2006, Plaintiff filed its nine count petition seeking, among other things, a temporary restraining order. The temporary restraining order without notice was granted and a preliminary hearing was held. Plaintiff’s motion for preliminary injunction was denied and the restraining order dissolved. *L.F. 1-2.* The trial on the remaining counts commenced on February 26, 2008. On March 6, 2008, the jury returned a verdict in favor Plaintiff and against Ms. Roberts for breach of fiduciary duty in the amount of \$424,172. The jury also returned a judgment against Ms. Roberts for tortious interference with a valid business expectancy in the amount of \$140,828, and for computer tampering in the amount of \$35,000. The jury also returned a verdict against Mel Roberts for conspiracy in connection with the claim against Myrna Roberts for breach of fiduciary duty and

tortious interference with valid business expectancy. The court subsequently convened a hearing on Plaintiff's request for a payment of its attorney fees on its claim for computer tampering. *Legal File*, 61.

Western Blue filed a motion for *in camera* review of attorneys' fees. Western Blue's claim for attorneys' fees was based upon time expended in the computer tampering case only. *Tr. Transcr. vol. 2, 1277:19-22*. Western Blue was unable to separate its attorneys' fees charged in the case based upon the computer tampering claim. *Tr. Transcr. vol. 2, 1249:20-23*. Appellants' counsel objected to the admission of attorneys' fee records without segregating the amount of time spent for the computer tampering claim.

Western Blue redacted information showing the nature of legal services rendered. Appellants requested unredacted exhibits so that cross examination and argument could be made with respect to Respondent's claims for attorneys' fees and expenses. Said request was effectively denied by the trial court.

Western Blue's local counsel's bill was for approximately \$130,000. The Court asked what percentage of that had to do with computer tampering. *Tr. Transcr. vol. 2, 1293:25-1294:20*. Counsel estimated that 40% of the attorneys' fee bill included work related to computer tampering. "That's an estimate because the court asked me to guess." *Tr. Transcr. vol. 2, 1293:15-20*. Houston, Texas, counsel charged fees of \$247,319 and expenses of \$4,273.74. The trial court asked counsel what percentage of his work was directly on the computer tampering claim. He said it was 70%. *Tr. Transcr. vol. 2, 1310:3-25*. He also claimed that one-third of the expenses were related to the computer

tampering claim. *Tr. Transcr. vol. 2, 1312:12-18.* The trial court entered judgment in favor of Western Blue on its claim for attorneys' fees and expenses, based on the verbal estimates of counsel, in the amount of \$224,489.18. *L.F. 62.*

POINTS RELIED ON

POINT I. The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict because Respondent failed to make a submissible case on its claim for breach of fiduciary duty because under Missouri law, an at-will employee who is neither an owner nor an officer of a company, who has no written contract or non-compete, owes no fiduciary duty to her employer.

National Rejectors, Inc., v. Trieman, 409 S.W.2d 1 (Mo. banc 1966)

Twin Chimneys Homeowners Association v. J.E. Jones Construction Company, 168 S.W.3d 488 (Mo. App. E.D. 2005)

Walter E. Zemitzsch, Inc. v. Harrison, 712 S.W.2d 418 (Mo. App. E.D. 1986)

Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373 (Mo. App. E.D. 2000)

POINT II. The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict on Respondent's claim for tortious interference with contract because Respondent failed to make a submissible case on its claim in that Respondent had no valid business expectancy with respect to its bid on the University of Missouri contract, the award of the contract to DocuCopy was a result of DocuCopy having submitted a superior bid and Ms. Roberts was privileged to bid on the contract.

Community Title Co. v. Roosevelt Federal S&L Assoc., 796 S.W.2d 369 (Mo. banc. 1990)

H.J., Inc., v. Intern'l Telephone and Telegraph Corp., 867 F.2d 1531 (8th Cir. 1989)

Sloan v. Bankers Life and Casualty Co., 1 S.W.3d 555 (Mo. App. W.D. 1999)

SSM Health Care, Inc., v. Deen, 890 S.W.2d 343 (Mo. App. E.D. 1994)

POINT III. The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict on Respondent's claim for computer tampering because Respondent failed to make a submissible case in that Respondent had no evidence that Ms. Roberts, as opposed to some other person or entity, deleted information from her laptop computer, and there was no evidence that Ms. Roberts was not authorized to access, copy, or delete information from her laptop computer.

Erdman v. Condaire, Inc., 97 S.W.3d 85 (Mo. App. E.D. 2002)

Jungerman v. City of Raytown, 925 S.W.2d 202 (Mo. banc 1996)

Mo. Rev. Stat. § 347.071 (2000)

POINT IV. The Trial Court erred in denying Appellants' motion for new trial on the award of attorneys' fees to Respondent on Respondent's claim for computer tampering because the time and expenses awarded by the Trial Court to Respondent were not rationally related to the evidence in that the Trial Court did not base its award of attorneys' fees on the time and expenses expended by

Respondent solely on the computer tampering cause of action, which was the only cause of action justifying an attorneys' fee award.

O'Brien v. BLC Insurance Co., 768 S.W.2d 64 (Mo. banc 1989)

Twin Chimneys Homeowners Association v. J.E. Jones Construction Company, 168 S.W.3d 488 (Mo. App. E.D. 2005)

POINT V. The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding verdict on Respondent's claim for conspiracy against Melvin Roberts, because Respondent failed to make a submissible case, in that Appellant Mel Roberts had no legal duty to Respondent, Respondent had no right to rely on any representation made by Melvin Roberts, and there was no evidence that Mel Roberts acted with any unlawful objective toward Respondent.

Cambridge Engineering, Inc., v. Robertshaw Controls Co., 966 F. Supp. 1509 (Mo. App. E.D. 1997)

Erdman v. Condaire, Inc., 97 S.W.3d 85 (Mo. App. E.D. 2002)

Jungerman v. City of Raytown, 925 S.W.2d 202 (Mo. banc 1996)

POINT I.

The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict because Respondent failed to make a submissible case on its claim for breach of fiduciary duty in that Ms. Roberts was not an officer or director of Western Blue, it is not unlawful for a key employee to

take steps to open a competing business while employed with the employer she plans on competing against, nor is it unlawful to fail to disclose the plan to the employer.

STANDARD OF REVIEW

The Standard of Review for a Trial Court's denial of motions for directed verdict and judgments notwithstanding the verdict is whether the Respondent has made a submissible case. To make a submissible case, Respondent must present substantial evidence for every fact essential to liability. *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo. App. E.D. 2002); *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996). In determining whether a submissible case has been made, this Court views the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence. *Id.*

ARGUMENT

Whether an individual is a fiduciary is a matter of law for the court to decide. *Twin Chimneys Homeowners Ass'n. v. J.E. Jones Construction Co.*, 168 S.W.2d 488, 499 (Mo. App. E.D. 2005). Missouri has followed the well-settled law as to when a fiduciary duty arises:

“(1) [A]s between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions

of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.”

***Emerick v. Mutual Benefit Life Insurance Co.*, 756 S.W.2d 513, 526-527 (Mo. banc 1988).**

An officer or director of a corporation has a fiduciary duty to protect the corporation’s interest. This is true because the fiduciary responsibility of corporate fiduciary is analogous to that of the trustee. ***Boulicault v. Oriel Glass Co., et al.*, 223 S.W. 423, 426 (Mo. banc 1920).** Corporate fiduciaries include directors (*id.*); officers, (***Forinash v. Daugherty*, 697 S.W.2d 294, 301 (Mo. App. S.D. 1985)**); and controlling shareholders, (***Saigh v. Busch, Inc.*, 396 S.W.2d 922 (Mo. App. E.D. 1965)**).

In ***National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1 (Mo. banc 1966)**, the Missouri Supreme Court addressed and settled the extent to which regular employees do, or do not, owe fiduciary duties to their employees. In ***National***, the employer, “National”, claimed that its employees had breached their fiduciary duty by secretly and deceitfully opening a competing business while still employed. ***Id.* at 7, 10.** In ***National Rejectors***, this Court stated there was no fiduciary duty owed by general employees of a corporation, and stated:

“Trieman had the title of sales manager, but apparently had little discretionary authority. ...Handing apparently was a purchasing agent. There is nothing to show that he was in charge of all of National’s purchasing. Pierz was a branch office manager. The use of National’s property and personnel in this case was minimal.”

Id.

Western Blue's theory of liability runs headlong into pronouncements by the Courts of Appeals of the State of Missouri for over 40 years: Employees may agree among themselves to compete with their employer after termination of their employment, and may plan and prepare for their competing enterprise while still employed, and have no duty to reveal their plans to the employer. *National Rejectors, Inc., v. Trieman*, at 26-27. Employees have the right, while employed, to form a company that is to compete with the employer upon the termination of the employee's employment. *Id.* at 51-52.

"If such right is to be in any way meaningful for an employee not under contract for a definite term, it must be exercisable without the necessity of revealing the plans to the employer....We reject National's position that from the inception of the agreement, the signers breached their fiduciary duty to National." *Id.* at 26-27.

The defendants in *National Rejectors* went to great lengths to avoid being discovered by their employer with respect to their plans to compete. "However, the use of dummy incorporators is not necessarily a badge of fraud or bad faith." *National Rejectors*, 409 S.W.2d at 28. The employees of *National Rejectors* actively deceived their employer with respect to who they were going to work for. However, as in this case, there was no evidence that the employer actually lost revenues because of the employees' conduct while employed. *Id.*

National Rejectors made it clear that it is not unlawful for employees, while employed, to set up shop in order to produce items in competition with the employer by purchasing tools and machinery in order to compete upon termination of employment. *National Rejectors*, 409 S.W.2d at 27-28. It is not wrongful, in the absence of a

noncompetitive, restrictive covenant (as in this case) for employees to terminate their employment and operate a business in competition with the prior employer, even when the new business was set up prior to termination of employment. *Id.* at 35.

This Court went on to state:

“In *Standard Brands Inc. v. United States Partition & Packaging Corp.* (E.D. Wisc.), 199 F. Supp. 161 [1961], four individuals who had been the president and general manager, vice-president in charge of production, vice-president in charge of sales and the tool room foreman of the American Partition Company ... undertook, while occupying those positions, to go into competition with Standard Brands in the manufacture of chipboard partitions for containers used in packaging. While retaining their positions with American or Standard Brands Inc., they organized the defendant corporation.”

Id. at 36 (bracketed material added).

The Court went on to describe various ways in which the defendants misused the property and finances of the employer. In *Standard Brands*, the activities of the corporate officers violated their fiduciary duty because they did not inform the employer of their plans to engage in competitive enterprises and the steps taken to accomplish it. *Id.* at 37.

This Court, in *National Rejectors*, stated:

“*Standard Brands* involved wrongful conduct on the part of the highest echelon of the business with which competition eventually resulted. It also resulted in the use of the entire set of the blueprints of the former employer, widespread use of its property and

of its employees. It also involved large expenditures by individual defendants of the plaintiff's money in an effort to further the defendants' enterprise."

Id.

Ms. Roberts was not at the highest echelon of management for Western Blue. She was, at most, mid-level management for Western Blue. As was true with the employees in *National Rejectors*, Myrna Roberts used her employer's property and personnel only minimally. Based on the test set forth in *National Rejectors*, Myrna Roberts would not owe a fiduciary duty to Western Blue.

The issue in this case, as in *National Rejectors*, comes down to how much latitude may be allowed employees who decide to compete with their former employer. There are two conflicting public policies: one favoring free competition; the other favoring the protection of the person's property interest in their business from unfair competition. In *National Rejectors*, the court took the issue in hand and announced the public policy in the State of Missouri. *National Rejectors*, 409 S.W.2d at 38-39. The balance favors competition:

"Each case of this nature must be decided upon its particular facts. However, we do find some significant parallels between the facts of this case and those of *Midland-Ross Corporation v. Yokana* (D.C. N.J.), 185 F. Supp. 594." *National Rejectors*, 409 S.W.2d at 40. Yokana had worked for Hartig Engine and Machine Company, a corporation, for a number of years. *Id.* He was active in all phases of the corporation's activity, and was vice president of the corporation. While he was an officer of the

corporation, he decided to go into business on his own in competition with his employer.

Id.

Yokana hired an attorney to prepare for the formation of a competing organization. While employed with a former employer, Yokana also accepted orders to be filled for his new business after he left. He copied drawings belonging to his employer, and ordered castings and machinery for his new business. Yokana also went to a sales meeting of the employer corporation just before he turned in his resignation. Yokana did all of this while vice president of the corporation. *Id.*

The *National Rejectors* court quoted from *Midland-Ross Corp. v. Yokana*, 293 F.2d 411, 413 (3rd Cir. 1961), stating:

“None of this excites us very much because before leaving employment, a man may make plans for his new enterprise so long as he does not use his employers’ time or any trade secrets in doing so. Restatement of Agency, 2d, § 393, comment e (1958); Restatement of Torts § 757 (1939).” *National Rejectors*, 409 S.W.2d at 41.

The court in *National Rejectors* stated:

However, our analysis of these cases leads us to conclude that the timing of the activity is of minor importance by comparison with the nature of the knowledge and information involved and the nature of the employee’s activity. If neither the nature of the information nor the nature of the activity justifies trade secret relief, the fact that the activity began prior to the termination of prior employment does not require that trade secret relief be granted.

Id. at 42 (citing *Midland-Ross, Corp.*, 293 F.2d at 412-413 and *National Welding Equip. Co. v. Hammon Precision Equip. Co.*, 165 F. Supp. 788 (N.D. Cal. 1958)).

Ms. Roberts never used any trade secrets to compete with Western Blue. Even if Ms. Roberts operated DocuCopy, LLC, secretively, and made plans to operate a competing business when she left Western Blue, according to *National Rejectors*, she had the right to do so. In the business context, our system operates on the assumption that every individual acts in his or her own self interest. This ultimately benefits us all. Western Blue says it trusted Ms. Roberts; however, this “trust” does not justify Western Blue’s argument that Ms. Roberts was restrained from competition. Western Blue alleges that Ms. Roberts deceitfully caused damage to it by taking the knowledge she gained while employed by Western Blue and using it against Western Blue in competition. The problem for Western Blue is that, absent a non-compete agreement with Ms. Roberts, she was free to do just that. DocuCopy owned nothing of any competitive advantage that Ms. Roberts took from Western Blue when she bought DocuCopy in April 2006. The thing of value taken by Ms. Roberts from Western Blue was people and knowledge. There is no rule of law that would support liability on these facts.

Ms. Roberts was an employee. Western Blue had the right to control and did control the way in which she performed her duties. She probably also qualifies as an agent based on MAI 13.03, as apparently every other employee would also. The decision of the Western District could stand for the absurd proposition that every employee has a fiduciary duty to their employer because they are agents. In any event, Plaintiff Western Blue never pled nor proved that Myrna Roberts was an agent. See *Martin v. Mercantile*

Trust Co., 293 S.W.2d 319 (Mo. 1956). An employer and employee relationship is insufficient to cause a confidential relationship to exist as to knowledge naturally acquired during employee's period of employment. *Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421 (Mo. App. E.D. 1986).

The fiduciary agent theory of liability adopted by the Western District in our case was rejected in *National Rejectors*. In *National Rejectors*, the employer argued that the employees breached their duty as agents by failing to inform their principal as to matters relevant to the affairs entrusted to them. *Id.* at 27. In that case, as in ours, there was no express agreement to devote the employee's full time and effort to the employer. The Court in *National Rejectors* concluded:

"The above cases, cited by National, are typical of those in which an agent is held to hold as a trustee *ex maleficio* on behalf of his principal. They are not applicable to this case. We would not conclude, solely on the basis of their employment by National, that National was entitled to the designs arrived at by employees working outside the hours of their employment."

Id.

Western Blue pled that Ms. Roberts owed Western Blue a duty "... as an officer of the corporation." *L.F.* 24. Appellants' counsel objected to the verdict director because it was not in conformity with the pleading or the law. *Supp. R.* 3. *Supp. R.* 4. Appellants' counsel continued his objection with respect to the verdict director tendered by the Court. *Supp. R.* 6. There was no corporation in this lawsuit. Western Blue Print, LLC, as a limited liability company, only exists pursuant to §§ 347.010-347.187, RSMo. (2000). A

limited liability company is managed either by its members or by managers designated by the members. **Mo. Rev. Stat. § 347.079 (Supp. 2005)**. Our statutes state that “authorized persons,” whether members or managers, are the persons responsible for the management of the limited liability company. **Mo. Rev. Stat. § 347.015(2) (2010)**. An authorized person managing a limited liability company has a duty of care to act in good faith and in the best interest of the company. **Mo. Rev. Stat. § 347.088 (2010)**. Ms. Roberts was not an “authorized person” of the LLC, Ms. Roberts owed no statutory duty as a fiduciary to Western Blue.

Myrna Roberts did not have a dominant mind and will over Western Blue. Western Blue never surrendered its independence so as to become a subservient party to Myrna Roberts. As an employee, Myrna Roberts was subservient to Western Blue. As was the case for *National*, Western Blue had the right to expect Ms. Roberts would live up to a duty of loyalty, but she was not a fiduciary.

In *Twin Chimneys*, the court found there was a breach of fiduciary duty by a trustee for violating the indenture and subindenture trust agreements. *Twin chimneys*, *168 S.W3d at 497*. In that case, the trust agreements created a fiduciary duty. The trustee argued that there was an exculpatory clause that relieved it of its fiduciary duty. The court disagreed. *Id. Twin Chimneys* stands for the proposition that a trustee owes a fiduciary duty specifically tied to the duties in the trust agreement.

Appellants are aware of no other court in any jurisdiction that has held that an employee at will in the position similar to Myrna Roberts, without a non-compete agreement, who is neither an officer nor a director of the corporation, nor a member of

the LLC, who has no shares or partnership interest in the business, has a fiduciary duty to the employer.

Is a branch manager with control of approximately 5% of the employer's business a fiduciary? If so, the test then for every employee would be whether they control enough of the employer's business to become a fiduciary. Is 4% enough to constitute what the Western District describes as "considerable control and responsibility for the employer's affairs..."? *Op.* at 13. The judgment in our case stands for the proposition that if an employer trusts an employee enough, the employee becomes a fiduciary or trustee of the employer. Under this one-sided logic, an employer might well be better off not to have any employment contract with an employee because, as the Western District states, when an employee has responsibility for a portion of the employer's business she becomes a fiduciary agent. Accordingly, because they are fiduciaries, virtually every employee in management is obligated "to fully disclose all material facts to the principal, to strictly avoid misrepresentation[,] and in all respects to act with utmost good faith." *McKeehan v. Wittels*, 508 S.W.2d 277, 281 (Mo. App. St.L. 1974).

The decision by the Western District in our case upsets the balance between two conflicting public policies recognized in *National Rejectors*, which, until now, heavily favored the right of the employee to compete with the former employer. *Id.* at 39. If the employer has a certain mind-set that may be completely unknown to the employee, then the employee is deemed to have, in essence, signed the most restrictive covenant not to compete imaginable. Considering that the employer is free to make such an express agreement a condition of employment shouldn't they be encouraged to do so? It's not

only unfair to the employee's rights, but creates nothing but uncertainty in economic transactions. If the parties *can* foresee and agree on an issue, the Court should encourage them to do so and discourage them from simply waiting until after-the-fact and suing.

Under this Court's prior definition it makes sense that corporate officers are fiduciaries because they are the ones responsible for the investment made by shareholders who often are uninvolved in management. It makes little sense for Myrna Roberts to owe a fiduciary duty to the members of an LLC who are by statute the persons charged with management of the enterprise. **Mo. Rev. Stat. § 347.015(2), § 347.088 RSMo (2010).**

Western Blue alleges a fiduciary duty arose because Myrna Roberts was vested with control and responsibility over the Columbia, Missouri, branch of Western Blue, and because she was exposed to strategies, profit and loss statements, and cost information which Western Blue considered confidential. In *Zemitzsch*, the trial court entered judgment against Franklin Harrison for breach of fiduciary duties. Harrison was sales manager and later became an officer of the corporation. While employed by Zemitzsch, Harrison, along with two other individuals, started their own corporation. Harrison was in charge of the major customer account of Zemitzsch (Edison Brothers), and had great discretion in all areas of handling that account. *Zemitzsch*, 712 S.W.2d at 419. After leaving the employment of Zemitzsch, Harrison and his new corporation took over the Edison Brothers account. Zemitzsch argued that the employees took trade secrets, which they used unfairly to compete. The trial court rejected that argument, but nonetheless

found that Harrison breached his confidential relationship with Zemitzsch because he was a corporate officer, and had exclusive access to confidential information. *Id.* at 419.

The Court of Appeals reversed, stating that Harrison was never asked, nor did he ever agree, to keep information secret. The trial court incorrectly based its findings on a confidential relationship resulting from information relating to Zemitzsch's operations, costs, profit, figures, pricing structures, source of raw material, timing of production, identity of personnel at client companies, which was information entrusted solely to Harrison. *Id.* at 420. However, as in our case, the evidence showed that pricing was determined by the company's accountant, who considered the cost of materials, time, and labor when setting the price. *Id.* at 421. The key issue in such a case is, "where the fiduciary obligation ends and where the personal right of independent action begins." *Id.*

It is undisputed that Western Blue had no information indicating that Ms. Roberts took or used Western Blue's secure document process. *Tr. Transcr. vol. 1, 178:12-22, Feb. 26, 2008.* Western Blue was unable to identify any information or documents taken by Myrna Roberts which caused Western Blue a problem in performing on the remaining contract with the University of Missouri after Myrna Roberts resigned. *Tr. Transcr. vol. 1, 161:22-25.* Western Blue could not identify any information from Myrna Roberts' laptop computer that she used to help DocuCopy. *Tr. Transcr. vol. 1, 199:1-5.* The only thing that Ms. Roberts had in her possession after leaving Western Blue that belonged to Western Blue were two backup compact discs that she had in her garage at home that were made in the ordinary course of business in February 2006, and kept in the regular course of business. *Tr. Transcr. vol. 1, 106:8-107:15.* Those two CDs contained

monthly outdated financial information of Western Blue. *Tr. Transcr. vol. 1, 314:18-315:9*. None of the information was designated as “confidential” or “secret,” nor did the financial information contain any designation that it was not to be disclosed. *Tr. Transcr. vol. 1, 343:21-344:6*. There was no evidence that the financial information of Western Blue from 2003 and 2004 was useful to DocuCopy or Myrna Roberts in obtaining the University contract in June 2006. Mere access to otherwise limited computer data is not in and of itself a breach of fiduciary duty. *Pony Computer v. Equus Computer Systems of Missouri, 162 F.3d 991, 997*.

Where a division manager in the sales staff resigns and forms a competing company, the employee’s knowledge of the market and personal contacts may enable them to capture a substantial portion of the prior employer’s business. However, the knowledge the employee possesses is not protected, nor is it generally protectable. The identity of customers is not a trade secret. The individual requirements of particular customers may not be common knowledge, but it is still information obtainable through sources other than the former employer. Under Missouri law it is not unlawful for a division manager to use this information to compete with the former employer. *Metal Lubricants Co. v. Engineered Lubricants Co., 284 F. Supp. 483, 488 (E.D. Mo. 1968)* (affirmed *411 F.2d 426 (8th Cir. 1969)*). Our courts have recognized that there is no fiduciary duty owed the employer simply because the corporate employee has the title vice-president/sales manager. *Zemitzsch, 712 S.W.2d at 422*.

It is undisputed that Western Blue had no confidentiality agreement with Ms. Roberts or any of its subcontractors such as DocuCopy. Subcontractors such as

DocuCopy had information with respect to Western Blue's pricing because they participated with one another in various bidding arrangements and in many cases exchanged the very information Western Blue suggests was a trade secret. Western Blue's pricing was not confidential information. That information is available to any person that wants to check with customers, subcontractors and suppliers of equipment. Western Blue's damages claim rests on its loss of the University contract in 2006. The pricing by Western Blue on the prior contract was public knowledge. Ms. Roberts had no confidential information

Our courts have recognized that in situations such as this case, where a key employee essentially embodies the good will of the employer in the customer's mind, such "customer contacts" are protectable, but not under a theory of a confidential relationship or trade secret. These customer contacts are protectable through a non-competition agreement. *Continental Research Corp. v. Scholz*, 595 S.W.2d 396, 401 (Mo. App. E.D. 1980). In our case, Western Blue chose not to protect itself, and it must suffer the consequences. To punish Ms. Roberts for providing the University with the opportunity to use a superior contractor would be a restraint of trade and would disregard the holding in *National Rejectors*.

Western Blue asked the trial court, and now asks this Court, to fix the mistake it made in not having a non-compete agreement with Myrna Roberts by expanding the law governing fiduciary duties. The key issue in our case is the balance between an employers' security and the right of its employees to engage in competition. The balance heavily favors competition. *National Rejectors*, 409 S.W.2d at 39.

POINT II.

The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict on Respondent's claim for tortious interference with contract because Respondent failed to make a submissible case on its claim in that Respondent had no valid business expectancy with respect to its bid on the University of Missouri contract, the award of the contract to DocuCopy was a result of DocuCopy having submitted a superior bid and Ms. Roberts was privileged to bid on the contract.

STANDARD OF REVIEW

The Standard of Review for a trial court's denial of motions for directed verdict and judgments notwithstanding the verdict is whether the plaintiff has made a submissible case. To make a submissible case, the plaintiff must present substantial evidence for every fact essential to liability. *Erdman*, 97 S.W.3d at 88; *Jungerman*, 925 S.W.2d at 204. In determining whether a submissible case has been made, this Court views the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence. *Id.*

ARGUMENT

A claim for tortious interference requires: "(1) A contract or valid business expectancy, (2) known by the Appellant, (3) a breach induced by the Appellant's intentional interference, (4) without justification, and (5) damages." *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996). All of Western Blue's damages under its claim for tortious interference with business expectancy are the result of Western Blue losing the

University contract through the competitive bidding process. Western Blue had no valid expectation of winning the University of Missouri contract in June 2006. Neither Ms. Roberts nor anyone else knew who would be awarded the University contract. Ms. Roberts submitted a competitive bid without fraud or any other unlawful behavior.

Rhodes Engineering Co., v. Public Water Supply Dist. No. 1 of Holt County*, 128 S.W.3d 550 (Mo. App. W.D. 2004)** involved a claim that Plaintiff had a business expectancy because it had a contract with the public entity prior to the contract at issue. ***Id.* at 566.** The court stated: “Plaintiff could have no reasonable expectation it would also be awarded the permanent contract, at least not the type of expectation that could be tortiously interfered with.” ***Id. As in our case, the public entity accepted bids for the work and four firms applied, including the plaintiff. Another firm was selected. ***Id.* at 557.** The court concluded that, as a matter of law, there was no valid business expectancy under these circumstances. Based on the facts of our case, Western Blue had only a mere hope of being awarded the University of Missouri contract. The University disclaims any reasonable expectation by Western Blue of getting the contract.

Liability for tortious interference with business expectancy cannot be predicated on speculation, conjecture or guesswork, and there must be a substantial evidentiary basis to prove a reasonable expectation of economic advantage for commercial relations. ***Sloan v. Bankers Life and Casualty Co.*, 1 S.W.3d 555, 565 (Mo. App. W.D. 1999).** Western Blue claims to have had a reasonable expectation of winning the University of Missouri contract in June 2006, because its president, Mark Newton, testified that Western Blue had the prior contract and he had a pretty high expectation that they would

win it again. It is unreasonable for Western Blue, in June 2006, to have believed that it would win the University of Missouri contract when there were other contractors bidding for the contract. The bids were evaluated anonymously. The contract at issue was a public, confidential bid for the University of Missouri reprographics work. By its very nature, such a contract is open to the public and provides no reasonable expectation that any particular bidder will be awarded the contract.

In order to establish a tortious interference claim, a plaintiff must show that the work was not “up for grabs.” *Sloan v. Bankers Life and Casualty Co.*, 1 S.W.3d 555, 565 (Mo. App. W.D. 1999). No bidding party could reasonably expect to be awarded the University contract unless it knew in advance that it would submit the best bid. There was no evidence that Western Blue submitted the best bid. As a matter of fact, even if Western Blue had submitted the best bid, it had an additional hurdle to overcome: its failure to perform on the existing contract without Ms. Roberts. Western Blue had no evidence that it had a valid business expectancy of obtaining the University of Missouri contract.

No claimant has a reasonable expectation of business expectancy where it only has potential customers. *Sloan*, 1 S.W.3d at 564. Western Blue did not have an exclusive entitlement to bid on the University of Missouri contract. That work was legally “up for grabs.” *Id.* (see also *Saey v. Xerox Corporation*, 31 F. Supp. 2d 692, 700-701 (E.D. Mo. 1998)). Western Blue could not have had a “reasonable expectation” of winning a public competitive bid, and its claim for intentional interference with contract fails.

Even if Western Blue met the first element of a claim for tortious interference with business expectancy, Western Blue's claim against Ms. Roberts cannot be predicated upon circumstances considered to be part of our competitive free enterprise system. *SSM Health Care, Inc., v. Deen*, 890 S.W.2d 343, 346 (Mo. App. E.D. 1994) (citing *Honigmann v. Hunter Group, Inc.*, 733 S.W.2d 799, 807 (Mo. App. E.D. 1987)).

A claim for tortious interference with contract or business expectancy requires substantial evidence of the absence of justification for defendants' conduct. *Community Title Co. v. Roosevelt Federal S&L Assoc.*, 796 S.W.2d 369, 372 (Mo. banc. 1990). Where the defendant acts in self interest based on a legitimate economic interest in the contract or expectancy, there is no impropriety.

One who has a present existing economic interest, such as a prior contract of his own or a financial interest in the affairs of the person persuaded not to enter into a contract, is privileged to interfere with another's business expectancy to protect one's own economic interest.

Id. (quoting *O'Connor v. Shelman*, 369 S.W.2d 458, 461 (Mo.App. W.D. 1989)).

In situations involving competitors, the plaintiff must show that the defendant's conduct was "without justification" because it involved improper means that standing alone would be capable of forming the basis of liability. *H.J., Inc., v. International Telephone and Telegraph Corp.*, 867 F.2d 1531, 1548 (8th Cir. 1989):

Western Blue's theory of liability (as does its claim for breach of fiduciary duty) rests upon the proposition that an employee may not secretively plan to leave her employer, recruit employees for the new enterprise and later, using knowledge and skills

obtained from the employer, submit a public bid for the work which the employer had under a previous contract. In our case there is no question that Ms. Roberts had an economic motivation to obtain the University of Missouri contract. Therefore, Western Blue must show that Ms. Roberts obtained the University of Missouri contract by improper means. *SSM Health Care*, 890 S.W.2d at 346. Examples of improper means are those acts that are recognized by statute or common law as wrongful, such as misrepresentation, threat, violence, defamation or restraint of trade. *Id.* In our case, Western Blue cannot show that Ms. Roberts used unlawful means to get the University contract. This is yet *another* element of this claim Western Blue cannot prove.

The burden was on Western Blue to plead and prove that Ms. Roberts engaged in some unlawful act that resulted in DocuCopy being awarded the University contract. Western Blue claimed Ms. Roberts acquired confidential information to use against it. Western Blue did not produce any evidence that Ms. Roberts acquired or used any confidential information when she submitted the bid on behalf of DocuCopy for the University contract. The jury was not instructed as to any potential finding of confidential information or trade secrets.

Western Blue also had the burden to prove that Myrna Roberts knew of Western Blue's valid business expectancy. The only evidence at trial showed that Myrna Roberts expected that Western Blue, and perhaps other firms, would bid on the University of Missouri contract in June 2006. Based on her knowledge and experience she appears to have expected that DocuCopy would submit the best the bid for the University work.

Western Blue totally failed to prove the “knowledge” element of a tortious interference with business expectancy claim.

The last element of Western Blue’s claim for tortious interference requires that it prove damages caused by the intentional interference. Western Blue’s evidence of damages for both the breach of fiduciary duty claim and the intentional interference claim were based on the loss of the University of Missouri contract. Western Blue claimed that, because it lost the University of Missouri contract, it also lost the State Missouri work that tagged along with that contract, and without those two clients, there was not enough business in mid-Missouri to keep its office open. Western Blue argued that it closed its office and shut down its operation because it lost the University of Missouri contract. Plaintiff cannot be awarded damages under both counts I and II which are based on the same damage claim, and Defendant’s counsel stated this objection in the instruction conference. *Supp. R. Transcr. 13:7-10, 14:3-8.*

Western Blue lost its business to DocuCopy because Ms. Roberts submitted a superior bid to the University of Missouri that offered better service at a competitive price. There is no causal connection between the non-disclosure of DocuCopy’s ownership and Western Blue’s loss of the University business. There was no evidence to suggest that Ms. Roberts did anything unlawful that caused Western Blue to be unable to compete for the University contract. Without a non-compete agreement with Ms. Roberts, Western Blue was extremely vulnerable to losing its business in the central Missouri area. Without a non-compete agreement, Ms. Roberts was free to accept the University of Missouri’s invitation to participate in the public bid in June 2006.

POINT III.

The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict on Respondent's claim for computer tampering because Respondent failed to make a submissible case in that Respondent had no evidence that Ms. Roberts, as opposed to some other person or entity, deleted information from her laptop computer, and there was no evidence that Ms. Roberts was not authorized to access, copy, or delete information from her laptop computer.

STANDARD OF REVIEW

The Standard of Review for a trial court's denial of motions for directed verdict and judgments notwithstanding the verdict is whether the Respondent has made a submissible case. To make a submissible case, Respondent must present substantial evidence for every fact essential to liability. *Erdman*, 97 S.W.3d at 88; *Jungerman*, 925 S.W.2d at 204. In determining whether a submissible case has been made, this Court views the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence. *Id.*

ARGUMENT

For Western Blue to prevail against Ms. Roberts for deleting files, Respondent would have to prove all the elements of computer tampering. That requires proof that the person knowingly and without authorization modifies, destroys, damages, or takes any computer, computer system, or computer network. Mo. Rev. Stat. § 569.097 (2000).

Respondent did not allege or prove that Ms. Roberts lacked authorization to access her laptop computer.

Respondent's only evidence of Ms Roberts destroying stored computer information consists of the testimony of Respondent's expert, Swailes, who retrieved information that was deleted from her laptop computer from February 17, 2006, through April 3, 2006.

Ms. Roberts last touched the computer at 11:00 a.m. on March 30, 2006. Logically, there must have been someone or some process other than Myrna Roberts' conduct that caused the deletions. Swailes could not tell who had deleted the files. *Tr. Transcr. vol. 1, 265:7-10*. Anyone from the Columbia office or Kansas City office of Western Blue was able to access Ms Roberts' laptop computer and delete files or change them. *Tr. Transcr. vol. 1, 266:16-23*.

Western Blue also claimed in Jury Instruction No. 15 that Ms. Roberts unlawfully copied information from her laptop computer onto two compact disks. Appllnt.'s Appx. A7 (*Jury Inst. No. 15*). Ms. Roberts' supervisor (who testified as a corporate representative at trial) stated that the two disks were made by Ms. Roberts and kept "in the ordinary course of business". Western Blue could not obtain a valid judgment against Ms. Roberts for doing that which she was authorized to do.

POINT IV.

The Trial Court erred in denying Appellants' motion for new trial on the award of attorneys' fees to Respondent on Respondent's claim for computer tampering because the time and expenses awarded by the Trial Court to

Respondent were not rationally related to the evidence in that the Trial Court did not base its award of attorneys' fees on the time and expenses expended by Respondent solely on the computer tampering cause of action, which was the only cause of action justifying an attorneys' fee award.

STANDARD OF REVIEW

The standard of review for the denial of a motion for new trial is abuse of discretion by the trial court. *Twin Chimneys Home Owners Assoc.*, 168 S.W.2d at 495.

ARGUMENT

Western Blue had a claim to attorneys' fees only for those fees incurred in the prosecution of its claim for computer tampering. The trial court was required to segregate the attorneys' fees between Respondent's multiple claims. *O'Brien v. BLC Insurance Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989). Rather than evaluate the time and expense sheets submitted by Respondent's counsel, and rather than allowing Appellants to challenge the hours claimed by Respondent's counsel, the trial court merely asked Respondent's counsel what percentage they thought was related to the computer tampering claim, and awarded Respondent's counsel their self-serving estimate. Appellants are entitled to a new trial on this issue.

The trial court conducted a hearing on Western Blue's request for attorneys' fees and expenses related to its claim against Ms. Roberts for computer tampering. On March 13, 2008, the trial court heard evidence. The trial court did not attempt to segregate Respondent's attorney fees in the computer tampering claim from attorney fees incurred by Western Blue in the other causes of action in the lawsuit. The Respondent's First

Amended Verified Petition for Injunctive and Other Relief is composed of 100 paragraphs and 20 subparagraphs. Allegations in that Petition related to computer tampering are paragraphs 43, 47, 48, 50, 51, 52, 61, and 72-75; eleven allegations out of 120 allegations in the Petition.

Depositions that partially involved the claim for computer tampering were the depositions of Myrna Roberts and Vince Pingel. The two computer experts who testified were Swailes and Taylor. The time and expenses for the other depositions had nothing to do with Respondent's claim under Count IV. Time at trial for computer tampering could have been considered. None of this was done. Appellant was denied access to Western Blue's records showing the work performed for the attorney fees incurred. The Court failed to separate out the attorney fees claimed by Western blue for its unsuccessful Injunction hearing. *Tr. Transcr. vol. 2, 1284:1-1285:8.*

The majority of information disclosed in discovery and the majority of evidence taken at trial had nothing to do with computer tampering. Respondent's claims for breach of fiduciary duty and tortious interference with business expectancy were unrelated factually and legally to Respondent's claim of computer tampering. None of the hours expended on Plaintiff's claims against Mel Roberts, Graystone, and DocuCopy could have been awarded. Appellants were denied due process of law. The award of attorneys' fees by the trial court was arbitrary and unreasonable and indicates indifference and lack of proper judicial consideration.

POINT V.

The Trial Court erred in denying Appellants' motion for directed verdict and judgment notwithstanding verdict on Respondent's claim for conspiracy against Melvin Roberts, because Respondent failed to make a submissible case, in that Appellant Mel Roberts had no legal duty to Respondent, Respondent had no right to rely on any representation made by Melvin Roberts, and there was no evidence that Mel Roberts acted with any unlawful objective toward Respondent.

STANDARD OF REVIEW

The Standard of Review for a trial court's denial of motions for directed verdict and judgments notwithstanding the verdict is whether the Respondent has made a submissible case. To make a submissible case, Respondent must present substantial evidence for every fact essential to liability. *Erdman v. Condaire, Inc.* 97S.W. 3d 85, 88 (Mo. App. E.D. 2002); *Jungerman*, 925 S.W. 2d at 204. In determining whether a submissible case has been made, this Court views the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence. *Id.*

ARGUMENT

To establish a conspiracy under Missouri law, Respondent must show that: "(1) Two or more persons (2) with an unlawful objective, (3) after a meeting of the minds, (4) committed at least one act in furtherance of the conspiracy, and (5) the Plaintiff was thereby damaged." *Rice*, 919 S.W. 2d at 245. Western Blue claims Mel Roberts conspired to breach Ms. Roberts' fiduciary duty to Western Blue, and conspired to

tortiously interfere with the University of Missouri contract. Jury Instruction No. 18 required the jury to find that Mel Roberts knowingly acted out of the unlawful purpose of the conspiracy. *L.F. 55*. There is no evidence that Mr. Roberts ever believed that his wife was a fiduciary of Western Blue. There is no evidence that Mr. Roberts knew that Western Blue claimed to have a valid business expectancy in the new University contract or that he participated in any way in preparing or submitting DocuCopy's bid for the University work. Therefore, Western Blue did not make a submissible case for conspiracy by Mel Roberts.

Western Blue asked the jury, in Jury Instruction No. 19, to return a verdict for civil conspiracy to commit breach of fiduciary duty by Mel Roberts for concealing the true ownership of Graystone and DocuCopy. Appllnt.'s Appx. A9 (*Jury Inst. No. 19*). Western Blue and Mel Roberts had a contractor/subcontractor relationship through DocuCopy and Graystone Properties. Nobody from Western Blue ever asked Mel Roberts about the true ownership of these entities.

Jury Instruction No. 19 required the Jury to find that Mel Roberts concealed the true ownership of Defendant Graystone Properties and Defendant DocuCopy in Response to Western Blue's request for information regarding the ownership of these entities. *L.F. 56*. Neither Graystone nor DocuCopy were defendants when the case was submitted to the jury. At any rate, Western Blue never made any requests for information from Mel Roberts, and the jury could not rightfully have returned a verdict for Western Blue on this claim for conspiracy. Based upon the evidence, Western Blue did not make a submissible case on the second element of Jury Instruction No. 19. At best, Western

Blue had evidence that Ms. Roberts failed to disclose the ownership of Graystone and DocuCopy. Even if this allegation was supported by substantial and competent evidence, the conduct itself is not unlawful under the standard announced by our Supreme Court in *National Rejectors*.

Mel Roberts was not a fiduciary for Western Blue. Respondent did not come forward with any evidence, nor were there any jury instructions, hypothesizing any duty Melvin Roberts owed to Western Blue. Melvin Roberts had no duty to disclose anything to Western Blue. It is essential for Respondent to allege and prove that Melvin Roberts had some duty which he breached in order for Respondent to recover against him. *Cambridge Engineering, Inc., v. Robertshaw Controls Co.*, 966 F. Supp. 1509, 1521 (Mo. App. E.D. 1997). Duty to disclose does not generally arise in a commercial transaction. *Id.*

Western Blue knew that Ms. Roberts was operating DocuCopy and that her husband had some interest in the business. Western Blue was aware that Ms. Roberts was receiving commissions for the printer leased to Graystone as well as commission on the sale to Graystone. Respondent has no factual basis to argue that it was misled by any silence on the part of Mel Roberts. Even if Mel Roberts deceived Respondent by his silence, he had no duty to speak.

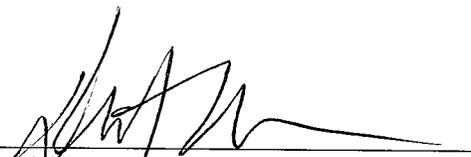
Western Blue alleged that Mel Roberts conspired to interfere with Western Blue's expectation of being awarded the contract in June 2006, because he concealed the true ownership of DocuCopy and Graystone in response to Western Blue's request for information. *Jury Instruction No. 20, L.F. 57*. As discussed above, there was no evidence

that Mr. Roberts was even asked by Western Blue about the ownership of Graystone or DocuCopy. Even if the jury could have found some evidence to support the first element of Jury Instruction No. 20, there was absolutely no evidence that Mel Roberts' failure to disclose the ownership of his business entities had anything to do with the loss of the University of Missouri Contract in June 2006. Loss of the University of Missouri Contract was the sole claim for damages in this case. There is no evidence that Mel Roberts acted to conceal anything from anyone about anything involving DocuCopy after June 2005. All of Western Blue's claims for alleged deceptive conduct by Mr. Roberts in concealing the true ownership of DocuCopy and Graystone occurred prior to July 2005, before there were any inquiries by Western Blue. *Tr. Transcr. vol. 2, 691-693*. Mr. Roberts communicated truthfully to his assistant that Graystone Properties' corporate representative was Michael Potter and the registered agent was Kirsten Craver. *Tr. Transcr. vol. 2, 818:18-819:2*. Even if Ms. Roberts was a fiduciary of Western Blue, which she was not, it was not unlawful for Mel Roberts to compete with Western Blue.

CONCLUSION

Because Ms. Roberts was never in a fiduciary relationship, Plaintiff's claims against her and Mel in tort must fail. The claim for computer tampering is based on speculation and what evidence Plaintiff had contradicts any finding that Ms. Roberts acted without authorization.

Respectfully Submitted,



David J. Moen, #39239
621 E. McCarty Street, Ste A
Jefferson City, MO 65101
Ph: (573) 636-5997
F: (866) 757-8665
davidmoen@moenlawjc.com

Attorney for Appellants

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that he did on the 4th day of October, 2011, serve a copy of the foregoing document upon James Kent Lowry and Scott T. Jansen, attorneys for Respondent, by electronic notification through the electronic filing system, and that the foregoing Appellants' Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains 11,191 words and 955 lines as counted by the word processing software used, Microsoft Office 2007.



David J. Moen