

NO. SC91831

MISSOURI SUPREME COURT

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

Respondent,

vs.

MYRNA ROBERTS, ET AL.,

Appellants.

APPELLANTS' SUBSTITUTE REPLY BRIEF

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Introduction

Appellants believe that the majority of the issues in this case are addressed in the parties' briefs. It does appear that Western Blue has, for the most part, abandoned the theory of liability for breach of fiduciary duty based upon the agent/employee theory adopted by the Western District Court in this case.

Fiduciary Duty

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 information which Western Blue considered confidential. Western Blue alleges this information was its "secret recipe." Western Blue argued in the preliminary injunction hearing that Myrna Roberts had access to confidential information and trade secrets. That argument was rejected by the trial court when it denied preliminary injunctive relief.

Western Blue's claim for misuse of confidential information and trade secrets by Ms. Roberts was not submitted to the jury. Western Blue's attempt to support its claim for Breach of Fiduciary Duty by arguing that Ms. Roberts misused confidential information or trade secrets only confuses the issue. Western Blue appears to argue that because Ms. Roberts had access to confidential information or trade secrets, she was a fiduciary. Plaintiff pled under Count III of its Petition that Defendants were liable under the Missouri Uniform Trade Secrets Act, Chapter 417 RSMo. Our statutes define a "trade secret" as:

[I]nformation, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that: (a) Derives independent economic value actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The alleged confidential information Plaintiff claims Ms. Roberts took does not have independent economic value because that information is generally known and available to other persons including competitors of Plaintiff. Moreover, Western Blue made no effort to maintain the secrecy of information to which Ms. Roberts had access.

Western Blue claimed that missing e-mails and other important information was deleted from Ms. Roberts' computer which hampered Western Blue from serving clients. The relevant files reside on the company server in Kansas City. If they were gone from the hard drive, they could be retrieved from the backup files. If the company was not backing up its files, this is further evidence that the information lacked the requisite intrinsic value necessary to qualify it for protection under Missouri law.

Knowledge gained through general work experience does not constitute a confidential relationship. *Walter E. Zemitzsch, Inc. v. Harrison*, 712 S.W.2d 418, 421

(Mo.App. E.D. 1986). Western Blue's damages are not the result of Ms. Roberts' use of trade secrets or confidential information, just as Plaintiff's profits, which it enjoyed as a result of Myrna Roberts' employment, were not the result of her utilization of any secrets.

Plaintiff's case essentially boils down to its argument that Ms. Roberts was a fiduciary of Western Blue because she had broad responsibilities and significant discretion with respect to the operation of the Columbia, Missouri, location of Western Blue. It argues that the 13 factors (none of which describe any confidential information or trade secrets) cited by the Western District Court of Appeals in this case show that a fiduciary relationship existed between Western Blue and Ms. Roberts, and cites *Twin Chimneys Association v. JE Jones Construction Company*, 168 SW3d 488 Missouri 2005. As discussed in Appellants' Substitute Brief, that is not the holding of *Twin Chimneys*. Western Blue believes that fiduciary duty is floating around in the air waiting to fall on the unsuspecting employee who is found to have some control of the employer's business. Western Blue's theory runs head on into black-letter law in the State of Missouri for the last 45 years.

In *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1 (Mo. banc 1966), the employer, "National", claimed that its employees had breached their fiduciary duty. *Id.* at 7, 10. Our Supreme Court noted that none of the individual defendant employees had an express agreement to exclusively devote themselves to National. *Id.* at 27, noting that an agent is held to be a trustee *ex maleficio*, on behalf of his principal, which was, "not applicable to this case." *Id.*

It is clear from Western Blue's own argument that Ms. Roberts sought to advance her own interest openly when she asked permission to open her own reprographics business while remaining employed by Western Blue. That permission was denied. **Respondent's Substitute Brief, p. 21-22.** Clearly, Ms. Roberts was considered subservient to Western Blue. She did not have a dominant mind or exercise control over the company. There was no surrender of independence by Western Blue to Ms. Roberts. Ms. Roberts did not automatically or habitually manipulate Western Blue. Under existing law, Ms. Roberts would not be a fiduciary of Western Blue based on *Emerick v. Manual Benefit Life Insurance Co.*, 756 SW2d 513, 526-527 (Mo. banc 1988).

Tortious Interference with Contract

Western Blue claims it had a valid expectancy that it would continue with the University of Missouri contract because Western Blue's president, Mr. Mark Newton, felt there was a pretty high expectation that Western Blue would win the contract again. **Appellants' Substitute Brief, p. 25.** Western Blue also states in its brief that Mr. and Mrs. Roberts expected DocuCopy would win the University of Missouri contract. Mr. Gibony, who left Western Blue to work with DocuCopy, expected that DocuCopy would get the University of Missouri contract. **Respondent's Substitute Brief, p. 11.** It is not unlikely that all four companies that bid on the University of Missouri contract expected that they would get it.

Western Blue: "...expected to receive that cash and that the people in that branch were going to continue to work for them... You are buying the customers, you are buying the people in the branch, and you are buying the future cash. That's what they expected

they would get.” **Respondent’s Substitute Brief, p. 27.** Unfortunately for Western Blue, there were no non-compete agreements with any of its employees at the central Missouri location. Western Blue foolishly expected that it was buying the people in the branch.

As with its claim for breach of fiduciary duty, Western Blue again argues that Myrna Roberts had confidential information or trade secrets that she obtained while employed with Western Blue that assisted her in bidding on the University of Missouri contract. This argument is again without merit. Ms. Roberts took nothing from Western Blue that could reasonably be classified as confidential or a trade secret.

Western Blue argues that Myrna Roberts gave away services to DocuCopy, but this conduct occurred during her employment and does not constitute any portion of Western Blue’s claimed damages. The issue was not submitted to the jury and constitutes, at best, minimal use of the employer’s resources

Western Blue next argues that Myrna Roberts and employees loyal to her harmed Western Blue by failing to properly log or update information while employed by Western Blue. Western Blue seems to be arguing that while employed by Western Blue, Myrna Roberts sabotaged the Columbia office causing Western Blue to lose the University of Missouri contract. This theory was never pled nor submitted to the jury. Moreover, the conduct, for the most part, was allegedly committed by employees of Western Blue other than Ms. Roberts. No evidence indicates that Myrna Roberts ever suggested to any Western Blue employees that they do anything to sabotage the operation.

As Western Blue points out, the common thread of its theory for recovery is that Myrna Roberts' deceit and secret operation of DocuCopy caused all the damages. **Appellants' Substitute Brief, p. 30.** The intentional interference with contract claim is merely a reflection of the breach of fiduciary duty claim. Western Blue says that if they had known what Myrna Roberts was up to, they would have fired her. Western Blue did not have any evidence that Myrna Roberts would have been unsuccessful in obtaining the University of Missouri contract if she had been terminated prior to March 2006. Without Myrna Roberts and Western Blue employees loyal to her, Western Blue was unable to fulfill its obligations under the contract, and Myrna Roberts, or some other business using her help, would have gotten the University contract. Myrna Roberts was the "goose that laid the golden egg," and Western Blue did not own the goose.

Western Blue suggests that it would have won the University of Missouri contract if Myrna Roberts had not deleted information off her laptop. Nonetheless, Western Blue could not identify any missing information that limited its ability to bid on the University contract. **Tr. Transcr. vol. 1, p 161, 183.** The undisputed facts are that the two CDs that contained computer files were given to Western Blue at the Preliminary Injunction hearing in May 2006. Western Blue bid on the University of Missouri contract in June 2006. The supposedly missing e-mails all resided on the servers in Kansas City. Therefore, even if there is proof, which Myrna Roberts denies, that she deleted information from her laptop, there is no causal connection whatsoever with any temporarily missing information from her laptop and the selection of DocuCopy over Western Blue by the University of Missouri. Western Blue had one person testify that

Ms. Roberts took seven boxes out of the office, but Western Blue has no idea what was in the boxes.

Respondent states in its brief that, without Myrna Roberts and the staff which left with her (all of whom were employees-at-will), it was impossible for Western Blue to provide high quality customer service to the University of Missouri. This is another way of saying that Western Blue, having failed to protect itself by non-compete agreements, found itself vulnerable to competition and lost its business. **Tr. Transcr. vol I, 414:12-16.**

Western Blue argues that DocuCopy gained an advantage over other competitors because Myrna Roberts helped the University write the specifications for the new contract. That argument is similar to the argument made by the unsuccessful bidder in *Briner Electric Company v. Sachs Electric Company*, 680 S.W.2d 737 (Mo. App. E.D. 1984). In *Sachs*, the unsuccessful bidder argued that the successful contractor disregarded the bidding documents and conducted private negotiations unknown to any of its competitors. The issue was whether the subcontractor that obtained the contract utilized wrongful means. *Id.* at 743. In the *Sachs* trial, the unsuccessful bidder prevailed on its intentional interference claim. The Eastern District Court of Appeals reversed, stating that compliance with the bidding directions is best left to the parties themselves who stand in the best position to obtain compliance, and who will bear the burden or reap the gain for their decisions. *Id.* At any rate, Western Blue, DocuCopy, and the two other companies that bid on the contract responded to the same "Request for Proposal" issued by the University of Missouri.

Computer Tampering

At the preliminary injunction hearing, Ms. Roberts produced two CDs which she had at home. At trial, Western Blue's corporate representative testified that the two CDs were made and kept in the ordinary course of business. Clearly, the two CDs were made with authorization and were stored with authorization. The possession of those two CDs by Myrna Roberts cannot be a violation of § 569.095 RSMo

Western Blue also alleged that Ms. Roberts was guilty of computer tampering because a large number of file names and pages were deleted from her laptop computer from January 1, 2006, through April 3, 2006. Nonetheless, Plaintiff's trial exhibit 25A clearly shows that millions of file pages were deleted after Ms. Roberts last touched the laptop computer on March 31, 2006. Clearly, some cause other than Ms. Roberts led to the deletions on Ms. Roberts' laptop computer. None of the information was confidential and Western Blue had the information on the two CDs prior to bidding on the University contract in June 2006.

There was no evidence that Ms. Roberts disclosed any of the data on the two CDs to anyone. Therefore, the evidence taken in the light most favorable to Western Blue indicates that Myrna Roberts secretly and deceitfully copied some files that she was authorized to copy, including financial data of Western Blue from 2003 and 2004 onto two CDs and put them in her garage. The information in Ms. Roberts' e-mails was always available to Western Blue on its server in Kansas City. Western Blue did not really lose any information because of anything Myrna Roberts did.

Respondent suggests that Myrna Roberts' status as a "secret competitor" makes the copying of the CDs unlawful. Based on cases such as *National Rejectors*, it would appear that Ms. Roberts' operation of DocuCopy is not relevant. At any rate, the official position of Western Blue is that the CDs were made and kept in the ordinary course of business.

It is unclear whether Western Blue has abandoned its claim that Ms. Roberts destroyed her ACT! database from her laptop computer. Mr. Pingel's testimony in this regard was purely speculative:

"Question: And did you find an ACT! database readily available on the laptop?"

Answer: It appeared—

Question: On the copy?

Answer: It appeared—It appeared that an ACT! database had been deleted.

Question: And what did you base that conclusion on?

Answer: I believe that Charles had run an undelete program and had gotten a preliminary list of files or something of that sort of what may have been deleted.

Question: So did you or did you not find a version of the ACT! resident on the laptop that was ready and—

Answer: We did not find, no.

Tr. Transcr. vol. I, 74:2-18.

"Charles" never testified that Myrna Roberts deleted any ACT! database.

Civil Conspiracy

Mr. Roberts did not act with any unlawful objective. He could not have known until after the decision of the trial court that Ms. Roberts was a fiduciary of Western Blue. Mr. Roberts could not have known until the conclusion of that trial that Western Blue had a valid business expectancy in the new University of Missouri contract. The University of Missouri contract was a lawful objective for Mr. Roberts.

Conclusion

The essence of Western Blue's basis for liability for breach of fiduciary duty and tortious interference with contract are pretty much the same. According to Western Blue, Myrna Roberts was a fiduciary that was saddled with the obligation to put the interests of Western Blue above her own, and was to hold all information gained from Western Blue in the utmost confidence. Western Blue essentially claims that Myrna Roberts owed the same duty to Western that she would have owed had she been an attorney representing her client. On the other hand, Appellants argue that Myrna Roberts was an employee at will, and her responsibilities to Western Blue were commensurate with any other employee at will.

According to the University of Missouri, Myrna Roberts' ability to write the best response to the Request for Proposal was the key to winning the University of Missouri contract. Western Blue believes that Myrna Roberts could not lawfully bid on the University of Missouri contract because she gained familiarity with the University of Missouri and the bidding process while employed by Western Blue. Despite the fact that

there was no agreement not to compete, Western Blue believes Myrna Roberts could not lawfully compete with her previous employer.

If Western Blue is correct, the duty owed by an employee at will to her employer will be greatly enlarged, and an employee will be greatly restricted from competition. No previous case has suggested the expansion of a fiduciary obligation to regular employees.

The conspiracy claim against Mr. Roberts fails because Mr. Roberts was not a fiduciary and was free to compete with Western Blue for the University contract. Western Blue has no legal basis to assert wrongdoing based on Ms. Roberts having the two CDs in her garage because she had authority to do so. The undisputed facts show that deletions on a grand scale occurred on Ms. Roberts' laptop computer after it was in the possession of Western Blue. The alleged computer tampering was in reality information being lost on her computer as the result of some mechanism other than Ms. Roberts.

Respectfully Submitted,



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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that he did on the 23rd day of November, 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 Reply Brief complies with the limitations set forth in Rule 84.06(b), contains 2,840 words and 253 lines as counted by the word processing software used, Microsoft Office 2007.



David J. Moen