

Summary of SC91831, *Western Blue Print Company LLC v. Myrna Roberts, et al.*

Appeal from the Boone County circuit court, Judge Gary M. Oxenhandler
Argued and submitted Nov. 30, 2011 opinion issued April 17, 2012

Attorneys: Roberts was represented by David J. Moen, an attorney in Jefferson City, (573) 636-5997. Western Blue Print was represented by J. Kent Lowry and Scott T. Jansen of Armstrong Teasdale in Jefferson City, (573) 636-8394; and Brent Vannoy and Donald W. Gould II of Johnson DeLuca Kurisky & Gould PC in Houston, Texas, (713) 652-2525.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A former company employee, her husband and her husband's real estate development company appeal the trial court's judgment in favor of the employer and awarding it attorneys' fees. In a 7-0 decision written by Judge George W. Draper III, the Supreme Court of Missouri reverses the portion of the judgment overruling the defendants' motion for a directed verdict or new trial based on the company's claim for breach of fiduciary duty, affirms the rest of the judgment and remands (sends back) the case for further proceedings. As an at-will employee with no contract or non-compete clause, the former employee did not owe a duty of fiduciary responsibility to the company and, therefore, could not breach it. The company did prove its claims regarding tortious interference with a business expectancy and computer tampering, the latter of which entitled the company to attorneys' fees, which the court calculated properly under the statute and the evidence presented by the attorneys for both parties.

Judge Charles E. Atwell, presiding judge of the 16th Judicial Circuit (Jackson County) sat by special designation in place of Judge William Ray Price Jr.

Facts: Document printing and management service company Western Blue Printing Company LLC hired Myrna Roberts in February 1999 to open a branch office in Columbia. She did not sign an employment contract and was not restricted by a non-compete agreement. As branch manager, her duties included hiring, managing and firing personnel, overseeing production, developing customer relationships, and procuring sales. In August 2004, Roberts was promoted to division vice president, and as such, she attended executive meetings at which participants discussed corporate strategy and planning. She also was involved in decisions about matters Western Blue considered proprietary and confidential. As part of her job, Roberts procured and oversaw the branch's largest contract, under which Western Blue provided certain print distribution services for the University of Missouri's renovation projects. A condition of the university contract required Western Blue to hire a subcontractor that was a certified minority business enterprise or a women's business enterprise. In late 2003, Roberts' husband approached Micki Marrero, one of the mortgage specialists at his real estate development company Graystone Properties LLC, about opening a business that would be certified as a women's business enterprise to provide reprographic services, despite Marrero's lack of experience in the reprographics business. The Robertses launched DocuCopy, naming Marrero as a 51-percent owner and Graystone Properties as a 49-percent owner. Acting on behalf of Western Blue, Roberts hired DocuCopy as a subcontractor for the university contract. DocuCopy received its

certification as a women's business enterprise in March 2005. During the same period, Western Blue and the university were working together to develop a secure document process that implemented a bar code system to track documents provided to the university. Roberts worked closely with university personnel to develop this process while she managed the contract. Roberts also controlled the strategic planning for Western Blue to renew its contract with the university in mid-2006. At one point during the bidding process, Roberts told Western Blue employees that she had the university contract "locked up." When Western Blue executives noticed financial irregularities in DocuCopy's billings, they investigated to determine the relationship between the two companies. The Robertses never disclosed their interest in DocuCopy to anyone at Western Blue. In connection with the sale of Western Blue in the spring of 2006 to another company, the Western Blue managing director asked Roberts to sign an employment agreement containing a non-compete clause. Roberts decided not to sign the agreement, and at the end of March 2006, she and all but two employees in the Columbia branch left their employment with Western Blue without notice and began working for DocuCopy. Later that summer, DocuCopy won the university contract partially because Western Blue's branch office was left unable to perform its duties under the contract. Western Blue ultimately was forced to close its Columbia branch. It subsequently sued the Robertses and Graystone (collectively, the Robertses) for breach of fiduciary duties, tortious interference with a valid business expectancy, computer tampering and civil conspiracy. At the close of Western Blue's case, the Robertses moved for a directed verdict on all counts, which the circuit court overruled. The jury returned a verdict in Western Blue's favor on each of its claims and awarded a verdict totaling \$600,000. The court subsequently awarded Western Blue about \$224,500 in attorneys' fees pursuant to section 537.525.2, RSMo. The Robertses moved for a judgment notwithstanding the verdict (JNOV) and for a new trial, which the circuit court overruled. The Robertses appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The circuit court erred in overruling the Robertses' motion for directed verdict or JNOV on Western Blue's claim for fiduciary duty. At trial, Western Blue abandoned its claim of breach of loyalty against Roberts in favor of pursuing its claim for breach of fiduciary duty only.

(a) Roberts was not an officer or director of Western Blue, and, although she had a substantial degree of control over the day-to-day operations of the Columbia branch in her capacity as division vice president, the branch comprised merely 5 percent of Western Blue's total business operations. As such, Roberts was not within the "top echelon of corporate officials," nor was her authority so substantial that she was free to disregard the company's directives as to how she performed her duties. She gained her knowledge and expertise through the general course of her employment, she was not restricted by a non-compete agreement, she was not asked to maintain the alleged confidential nature of the information she obtained through her work at Western Blue, and much of the information entrusted to her also was entrusted to other individuals. Further, Western Blue failed to provide any case law from any jurisdiction that has held that an at-will employee such as Roberts – who is not subject to a non-compete agreement and is neither an officer, director, partner nor member of a limited liability corporation – owes a fiduciary duty to his or her employer. This Court declines to extend the law of fiduciary duty to such an at-will employee.

(b) In *National Rejectors Inc. v. Trieman*, 409 S.W.2d 1, 41 (Mo. banc 1966), and *Scanwell Freight Express STL Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. banc 2005), this Court held that employees, while employed, must not act contrary to the employer's interests, including engaging in direct competition with the employer until their employment is terminated. But an employee may leave employment and establish a new enterprise in connection with the former employer, absent a valid restrictive covenant or a breach of a confidential relationship, and use his or her knowledge, memory, skill and experience gained in former employment. *Trieman*, 409 S.W.2d at 51. A breach arises when the employee goes beyond the mere planning and preparation and actually engages in direct competition to gain advantage over a competitor. *Scanwell*, 162 S.W.3d at 479. Roberts' steps in preparing and planning to compete with Western Blue after her employment ended did not require her to notify Western Blue of her intentions or result in a breach of fiduciary duty.

(2) The circuit court did not err in overruling the Robertses' motion for directed verdict or JNOV on the claim regarding tortious interference with business expectancy. Western Blue presented sufficient evidence that Roberts engaged in improper means to procure the university contract on DocuCopy's behalf and that she tortiously interfered with Western Blue's valid business expectancy in the renewal of the university contract. A business expectancy need not be based on an existing contract, and Missouri courts have recognized that a regular course of prior dealings suggests a valid business expectancy. The record reflects Western Blue successfully bid on the contract the previous two times the university solicited bids and performed well in fulfilling its obligations. Roberts managed the contract on Western Blue's behalf and developed a close working relationship with university officials. She was involved intimately in developing the secure document process to track documents provided to the university and, when she left, she took with her this specialized knowledge and disrupted Western Blue's ability to perform under the existing contract. A university official testified that she would have had grave reservations about Western Blue's ability to perform had it won the contract given the decline in customer service it provided after Roberts left. After Roberts left, it took Western Blue some time to determine what documents she had deleted from her computer, including documents pertinent to the bid and necessary for Western Blue's ability to complete the existing contract.

(3) The circuit court's judgment properly overruled the Robertses' motion for directed verdict or JNOV regarding the claim of computer tampering. There was substantial evidence that Roberts knowingly deleted or copied computer data from Western Blue without authorization. Although the company's forensic computer analyst testified he could not determine with certainty who deleted the files, the jury could make a reasonable inference that Roberts committed computer tampering. The laptop's operating system showed that approximately 47,200 files were deleted, with approximately 9,256 files deleted after March 30, 2006. Among the deleted files were a substantial number of electronic mail files related to Roberts' customers and a contact management database containing customer names, company names, contact persons and information, sales activities, and related notes as well as a document that was key to the bid renewal. Further, it is undisputed that Roberts left her employ with possession of two compact discs containing Western Blue customer and business operation information. A permissible inference is that she retained files after deleting them from her laptop in an effort to undermine

Western Blue's ability to bid successfully on the university contract or to aid DocuCopy in making its bid, either of which would be an unauthorized purpose.

(4) The circuit court did not err in overruling the Robertses' motion for directed verdict or JNOV on the civil conspiracy claim against Roberts' husband. Ample evidence supported Western Blue's civil conspiracy claim based on proof of tortious interference with a valid business expectancy against Roberts, and the husband's conduct in aiding Roberts to achieve this interference supports the civil conspiracy claim against him. The husband committed acts in furtherance of the tortious interference claim by directing employees to conceal DocuCopy's true ownership, remaining silent in the face of Western Blue's questioning about DocuCopy's true ownership and providing his wife with misleading answers about Graystone Properties and DocuCopy's ownership that she gave to a Western Blue executive.

(5) The circuit court did not abuse its discretion in calculating the attorneys' fees award related to the computer tampering claim. Section 537.525.2, RSMo, permits the circuit court to award reasonable attorneys' fees to a prevailing party in a civil action for computer tampering. The circuit court acknowledged it was unlikely the bills offered would identify specific work as it corresponded to the computer tampering claim, and the issues in the case were so intertwined that they could not be segregated. The record reveals this claim was a large part of the underlying case and was the most common issue to all the submitted claims. It awarded in-state counsel 40 percent of the total fees submitted and awarded Texas counsel 70 percent of the total submitted.