IN THE
SUPREME COURT OF MISSOURI

No. 87023

JOHN STEHNO,

Respondent,

v.

SPRINT SPECTRUM, L.P.,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Hon. Frank D. Connett, Jr., Senior Judge

SUBSTITUTE BRIEF OF RESPONDENT

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Id. at 93-94. Richert's e-mail demonstrates that she contacted Ivensky specifically for the purpose of conveying negative information about Stehno. L.F. 406-408. Ivensky testified that Richert brought up Stehno during their phone conversation and made several negative comments about Stehno. L.F. 285-286. Richert also told Ivensky she did not want Stehno on Sprint's system. Tr. 818. Ivensky testified that Amdocs stopped using Stehno as a consultant based solely on information provided by Richert. L. F. 283. Ivensky would not have terminated Amdocs' relationship with Stehno on that day if Richert had not spoken with him. L.F. 294. Stehno's employment with Modis was terminated because his placement at Amdocs was terminated. Tr. 391-392. In addition to the direct evidence that Richert, acting on behalf of Sprint, interfered with Stehno's valid business expectancy causing a breach thereof, there is indirect evidence that Richert intentionally interfered with Stehno's relationship with Amdocs. Stehno had only worked on the project for three to four days at the time Richert contacted Ivensky. 478-479. During that time, the only negative information that Ivensky received about Stehno came from Richert. Tr. 819. Richert's decision to wait until after learning that Stehno had been hired by Amdocs to make derogatory remarks demonstrated her intent. L.F. 406-408. Similarly, Waldman reported that he was not aware of anyone other than Richert complaining about Stehno. L.F. 228. Gary Hood, Stehno's direct manager, protested firing Stehno because he fit in so well, but Ivensky said that Stehno had to be terminated because

Amdocs' client, i.e. Sprint, requested it. L.F. 378. Amdocs replaced Stehno on the Rodeo project. L.F. 276. Stehno's replacement was still working on the project at the time Stehno's direct supervisor left the company. L.F. 383. These facts combined demonstrate that Sprint actively and affirmatively took steps to interfere with Stehno's business expectancy with Amdocs and that the expectancy would have been realized but for Richert's interference. Finally, Stehno submitted substantial evidence indicating that he was damaged as a result of Sprint's and Richert's conduct. It is undisputed that Stehno was unemployed for seven months or more after being let go at Amdocs. Tr. 543. Following that seven month period, Stehno worked for five months at a temporary position in St. Louis. Tr. 544. Stehno opted to commute to that position rather than relocating his family, in part because of the anticipated length of the position. Tr. 543-544, 567-569. Stehno was then out of work for eleven more months before locating a position in Oregon, which required that he move his family. Tr. 544-546. John O. Ward, Ph.D., offered his testimony regarding the economic damages that Stehno suffered. L.F. 354-372. **C. Stehno Presented Substantial Evidence That He Had a Valid Business Relationship or Expectancy With Amdocs.** 36

Wigley v. Capital Bank of Southwest Missouri, 887 S.W.2d 715, 720 (Mo.App. 1994). Sprint asserts that it had two different and inconsistent economic interests it was trying to protect when Richert contacted Ivensky regarding Stehno. In the first instance, Sprint asserts that it had an interest in preventing Stehno specifically from working on this project because of his past history with Sprint. In the second instance, Sprint asserts that it was acting to protect its economic interest in making sure that Amdocs did not employ DBAs on the project. Stehno produced substantial evidence that Sprint was not acting to protect either of these interests. In both instances, Richert is the only person who could competently testify to her intent in contacting Amdocs. Sprint failed to call Richert to testify at trial and her deposition testimony, which was presented, demonstrated that she was not acting to protect an economic interest. With regard to Sprint's first claimed economic interest, i.e., preventing Stehno from working on the project, plaintiff introduced substantial evidence that Richert was not acting to protect this interest when she called Ivensky. Richert testified that she had no concern regarding Amdocs hiring Stehno specifically, as opposed to hiring DBAs in general. L.F. 332. She also testified that she had no problem with Stehno working as an ADBA on the Rodeo project. L.F. 324. Richert's testimony demonstrates that she did not subjectively believe that there was a legitimate economic interest that was threatened by Stehno's relationship with Amdocs. Obviously, she could not have been acting to protect an interest that she did not believe existed. Moreover, Richert testified specifically that she did not call Ivensky to address any problem with Stehno working on the project. Rather, Richert testified that her sole purpose in calling Ivensky was to discuss the DBA/ADBA situation. L.F. 328. In addition to Richert's direct testimony regarding Stehno, there was additional evidence that suggested that Richert did not place her call or send her e-mail to protect Sprint's economic interest in determining who worked on its systems. Stehno had no contact with Sprint employees prior to his termination and would have had little in the future. L.F 383. Hood testified that Stehno did not work with any Sprint employees. L.F. 383. Similarly, Stehno presented evidence that neither Richert nor her team had any significant interaction with Stehno or the Rodeo project. Waldman met with hundreds of people onsite at Sprint, including the primary people responsible for the project in the 1999-2000 time frame. L.F. 225. However, Waldman never met Richert. ***Id.*** Hood, the manager in charge of Stehno's area, never had any interaction with Richert. L.F. 383. Hood testified that Richert was not involved in the project in any way. ***Id***. Ivensky, the project director for Amdocs, did not

remember speaking to Richert before she contacted him regarding Stehno and only recalled speaking with her once or twice after that conversation. L.F. 283. Stehno's replacement never met with Richert either. L.F. 383. Richert also testified that neither she nor her department was directly involved in the project. Richert testified that her department had little to no involvement with third party vendors and none of the people on her team worked directly on the Rodeo project. L.F. 305-306, 316. Richert does not know any of the Amdocs individuals on the project personally. L.F. 319. In fact, while Richert knew that someone on the application side at Sprint was responsible for overall oversight on the Rodeo project, she did not even know who that was. L.F. 320. There was also substantial evidence from which the jury could conclude that Sprint did not have any reason to want to prevent Stehno specifically from working on its systems. Despite the allegations of Stehno's difficulties while in Richert's department, Stehno was able to move to another Sprint department without any trouble. L.F. 315, 321 While he was still in Richert's department, Stehno's contract was renewed twice. L.F. 307. Richert had the power to veto those renewals, but chose to approve them instead. L.F. 308-309. Richert testified that Stehno had no negative interactions with his team while in Richert's department. L.F. 310. In fact, Richert testified that, at the time of his departure from her department, Sprint had just renewed Stehno, which 57

Id. at 96 Stehno presented substantial evidence that Sprint used improper means to interfere with his business relationship. The inconsistencies between Richert's testimony and her written communications with Amdocs demonstrates that Richert misrepresented facts to Amdocs regarding plaintiff. Richert testified that she did not have any more conflicts with plaintiff than with other DBAs under her supervision. L.F. 313. Stehno testified that he got along well with Richert and that she gave him positive feedback. Tr. 528-529. Mike Rivera, who placed Stehno in Richert's department, discussed Stehno with Richert on a regular basis. Tr. 654-655. Rivera spoke with Richert monthly and her feedback about Stehno was always positive. Tr. 655. Richert never mentioned any conflicts between Stehno and others. Tr. 655. Rivera also testified that Stehno's multiple renewals were considered positive feedback in the industry. Tr. 656; L.F. 391. Richert indicated to Rivera that Stehno was an 58

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STATEMENT OF FACTS

Stehno submits the following Statement of Facts pursuant to Rule 84.04(f), Mo.R.Civ.P. because the Statement of Facts contained in the Substitute Brief for Appellant is neither fair as required by Rule 84.04(c)), Mo.R.Civ.P. nor accurate and complete as referred to in Rule 84.04(f), Mo.R.Civ.P.

John Stehno was working as a contract database administrator (DBA) at Sprint Long Distance in September of 2001. Tr. 472. Stehno had been assigned to work at Sprint Long Distance by his employer, a placement agency know as Solutions Point. Tr. 654. Because Solutions Point was not on Sprint Long Distance's preferred vendor list, Solutions Point worked in conjunction with another agency, Modis Inc., that was on the preferred vendor list, to place Stehno at Sprint Long Distance through a process known as "piggy-backing." Tr. 523-524.

Stehno learned that his assignment at Sprint Long Distance would be ending in late September and began to pursue other work. Tr. 472-473. He notified his employer, Solutions Point, and placed his vital information on an on-

line site called Dice.com to announce his availability. Tr. 473. Stehno indicated in his information on Dice.com that he was willing to consider either contract work or full-time employment. Tr. 645. On Dice.com, Stehno selected "Bachelors" under education because the instructions indicated that he should choose the option closest to his educational level and he was only a few hours short of his Bachelors degree. Tr. 644. Stehno's actual resume on Dice.com made no reference to his educational background. Tr. 425.

On his last day of work at Sprint Long Distance, Stehno was contacted by Amber Wright, a recruiter for Modis. Tr. 473. Wright had seen Stehno's information on Dice.com and contacted him about an opening at a company called Amdocs. Tr. 421-422. Although Stehno had been "piggy-backed" with Modis in the past, Wright requested a copy of his resume, which he provided. Tr. 473-474. The resume Stehno provided to Wright clearly shows both his

history of contracting with Sprint and that he does not have a college degree.[1] Tr. 383-384, 644, 645.

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[1]Sprint has modified the false statements regarding Stehno's resume that were included in its brief to the Court of Appeals. However, the statements contained in Sprint's brief before this Court are no more accurate. Stehno testified at trial that defendant's exhibit A4, the resume containing the allegedly false information regarding Stehno's employment history, was not the resume he submitted to Modis. Tr. 600, 638-630. He knows this because before the documents were produced to the defendants they were Bates numbered in order and the Bates number on the resume marked as defendant's A4 indicates that it accompanied a cover letter sent to another party months after Stehno's position at Modis was terminated. Tr. 640-643. Moreover, Stehno testified that none of the hundreds or thousands of resumes he has produced stated that he had a Bachelor's degree and no resume was offered at trial to contradict his testimony. Tr. 644. The "resume" referred to in Sprint's brief as falsely stating his educational level is, in actuality, not a resume, but a summary of Stehno's

As a placement agency, Modis only hires employees for specific assignments with specific clients. Tr. 375-376. Although some might characterize Modis as a temporary agency, Modis sometimes places employees to "go permanent" at the assignment. Tr. 320. In fact, more than one-half of Modis' placements are for more than six months and Modis has placed consultants for up to five years. Tr. 370-371, 407.

Amdocs was a client of Modis. Tr. 371. Modis had placed approximately twenty consultants at Amdocs. Tr. 371. Amdocs' agreement with Modis allowed Amdocs to convert Modis employees to Amdocs employees. Tr. 372-374. Amdocs had frequently utilized this provision, hiring between fifty and seventy-five percent of the consultants placed at Amdocs by Modis as full-time Amdocs employees. Tr. 372. Amdocs usually hired Modis contractors as Amdocs employees after six months or 1 year and, therefore, almost never paid a conversion fee to hire the employees directly. Tr. 374.

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qualifications on Dice.com that includes a link to "view candidate's online resume." L.F. 428. Stehno's testimony regarding that summary is detailed above.

Wright submitted Stehno to Amdocs, along with five or six other candidates submitted by Modis. Tr. 385. Amdocs utilizes a careful recruiting process to make sure that the "talent pool" stays with the company long term. L.F. 223. As a part of that process, Amdocs reviewed many resumes before interviewing Stehno. L.F. 384. Stehno was interviewed by several people at Amdocs, including Igor Ivensky, the Amdocs Director' the Sprint PCS project in Kansas City, Haim Keren, a project leader acting as a project manager, and Josh Reed, a database administrator. Tr. 474-476, 265-268; L.F.269. Keren learned during the interview that Stehno had previously worked at Sprint for two years. Tr. 280. After Keren and Reed completed the technical part of the interview they both were impressed with Stehno's ability as indicated in the written report they completed. Tr. 287; L.F. 446-448, 529.

During the interview process, no one asked Stehno whether he had a college degree. Tr. 638, 816. Likewise, Ivensky did not do a background check on Stehno's education and knew his resume did not indicate that he had a college degree. Tr. 815. Perhaps this was because Ivensky had not indicated that Amdocs was only interested in college graduates for the position. ***Id.***

Similarly, Stehno was never asked about conflicts with his manager at Sprint. Tr. 462-463, 384, 637. Even if he had been asked he would not have believed that there was a problem that needed to disclosed. Tr. 638. Sprint's claim that a conflict existed between Richert and Stehno is apparently based on its claim that "'Richert said no to [Stehno's] offer to return to her department.'" Substitute Brief for Appellant at 11. All Richert said was that Stehno left her department because of the environment and "it hasn't changed." L.F. 393. The Solutions Point manager to whom Richert's comments were directed. indicated that he would have no reluctance to place Stehno at Sprint or with a third party vendor working with Sprint based on Richert's comments. Tr. 671. Moreover, he indicated that he would feel no need to disclose Richert's comments if he was placing Stehno with a third party vendor that would interact with Richert or her group. Tr. 672. Apparently, Stehno felt the same way. Tr. 638.

In addition to interviewing Stehno, Keren checked Stehno's references. Tr. 286-287. Keren spoke with Michael Whitmore at Sprint who indicated that Stehno was "top of the list from a DBA perspective." Tr. 288-290; L.F. 529. Impressed with Stehno's abilities and his references, Keren recommended that

Stehno be brought on at Amdocs as a Team Leader (TL). Tr. 281-282; L.F. 446-448, 529. Keren acknowledged that Amdocs would not benefit from having Stehno onsite as a Team Leader if he was only on the job for a short period of time. Tr. 281.

Because he knew Stehno had previously worked at Sprint and because Stehno would be working with Amdocs onsite at Sprint if he were brought on as a consultant, Ivensky contacted Derek Sherry, his counterpart at Sprint, for approval before hiring Stehno. L.F. 256-257, 277-278, 387-389. It is a usual courtesy for Amdocs to talk to the customer before hiring someone who used to work for the customer. L.F. 229. In this case, Sherry, who was the senior director of the project for Sprint and the focal point for all issues related to the project, was the most logical person to contact. L.F. 280, 254, 265, 229. Sherry gave his approval for Amdocs to bring Stehno on board to work on the project.[2] L.F. 278,

[2]Although Sprint suggests in its brief that Sherry's approval was merely an approval of hiring former Sprint contractors as a general rule, in the testimony

388. Sherry neither checked with anyone else at Sprint before approving Stehno to work on the project nor suggested that Ivensky should check with anyone else at Sprint before hiring Stehno. L.F. 257, 258. When Sherry gave his verbal approval to hire Stehno, Sherry conveyed that Sprint did not feel that bringing Stehno on board would "jeopardize our relationship." L.F. 278.

After Sherry's approval was obtained, Amdocs contacted Modis about hiring Stehno and assigning him as a contractor to work with Amdocs onsite at Sprint. L.F. 277-279. From Modis' perspective, Stehno's placement with Amdocs could initially be for six months or more. Tr. 387. Jake Amir, Wright's manager at Modis, would not have been surprised if Stehno had ultimately become an Amdocs employee. Tr. 387. Likewise, Amdocs did not feel that Stehno's initial hiring as a contractor indicated that his relationship with Amdocs would be short-term. L.F. 232. Stehno was not hired simply to work on a specific project that would have resulted in his termination upon completion of the project and would have been considered for permanent employment with Amdocs. L.F. 383.

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cited, Sherry indicates that Stehno was identified and approved by name. L.F. 257.

Stehno began his work at Amdocs on September 17, 2001. Gary Hood was the Amdocs manager in charge of the area where Stehno was working. L.F. 281. Hood would direct Stehno's assignments and provide input on how Stehno was doing, his contribution to the team, and his value to Amdocs and the teams needs. L.F. 281-282. Hood believed Stehno "displayed leadership qualities and in-depth knowledge of Sprint operations, PCS operations, and was an excellent DBA, and . . . thought that combination and his relationship to the other DBAs during the course of that week indicated that he had the quality of leadership, of a leader." L.F. 388. Hood believed that Stehno would have become a team lead and "in time that team leadership would have become more of a permanent mantel or financial reward." L.F. 388-389. During his time at Amdocs there were no problems with Stehno's work. L.F. 280-281. After only four days on the job at Amdocs, Ivensky could see that Stehno's technical background was considerable. Tr. 816.

During Stehno's first week at Amdocs, Jan Richert, a senior manager in Sprint's data management organization, learned that Stehno was affiliated with Amdocs. L.F. 300, 322. Richert understood that Stehno would not be working

for Amdocs for free, and assumed that Stehno would be compensated for his work at Amdocs. L.F. 326. Stehno was going to be working on a project known as Rodeo or Renaissance, which was a billing systems project that was a joint project between Sprint and Amdocs. Tr. 576, 593-594; L.F. 316.

Although Sprint and Amdocs were jointly working on the project for which Stehno was hired, Richert conceded that no one on her team worked directly on the project. L.F. 316. In fact, Richert's team had little to no involvement with third party vendors like Amdocs. L.F. 305-306. Richert did not know any of the Amdocs personnel working on the project. L.F. 319. Richert did not even know who at Sprint was responsible for the Rodeo project other than it was somebody on the applications side. L.F. 320. Ivensky never spoke to Richert before Stehno was brought on as a consultant. L.F. 283. While Ethan Waldman, whose authority at Amdocs was similar to Ivensky's, had met with hundreds of people onsite at Sprint, including those primarily responsible for the Rodeo project, he had never met with Richert. Tr. 300; L.F. 225. Richert also never had any interaction with Hood. L.F. 383. According to Hood, Richert was

not involved in the project in any way. ***Id.*** Similarly, Stehno did not work with any Sprint employees while at Amdocs. L.F. 383

Even though Richert was not involved with the Rodeo project, she took it upon herself to contact Ivensky about it. L.F. 323. Richert claims she called Ivensky and that her sole purpose in calling Ivensky was to discuss an ongoing dispute between Sprint and Amdocs over the division of labor on the project. L.F. 328. Richert told Ivensky that Sprint had DBAs available to work on the project and that Amdocs did not need to hire others. L.F. 323. Richert insisted that she did not tell Ivensky that Amdocs DBAs had to be removed from the project. L.F. 325. Further, Richert agreed that Stehno was not a security risk because of his prior work on Sprint systems and asserted that she had no concern about Amdocs hiring Stehno specifically, as opposed to hiring DBAs in general. L.F. 332. Richert stated that she had no problem with Stehno working as an Applications DBA at Amdocs on the Rodeo project. L.F. 324.

Amdocs personnel, as well as the e-mail correspondence created contemporaneously with Stehno's time at Amdocs, paint a substantially different picture of what took place than Richert's explanation. Apparently, the first

contact between Richert and anyone at Amdocs was an e-mail she sent to Haim Keren at 5:42 p.m. on Thursday, September 20, 2001, which stated,

> It has come to my attention from my team members that Amdocs is hiring additional DBAs to work on the SPCS[3] Renaissance project. I have four DBAs on my team assigned to the Renaissance project who are available to work. We have had multiple DBA resources assigned to this project from the beginning but we are consistently left out of the loop by Amdocs. I have also heard that you are looking at the resume of John Stehno to hire as an Amdocs DBA. John was a contractor who previously worked on my team. Without going into issues via e-mail, we would not recommend John Stehno returning to work on SPCS systems.

L.F. 407-408. Richert copied Igor Ivensky and Derek Sherry, among others, on the e-mail. ***Id.*** Ivensky responded to Richert's e-mail within an hour and dealt

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[3]SPCS was used in numerous documents admitted at trial and refers to Sprint PCS.

with each of the two separate issues she raised. L.F. 407, Tr. 806-807. Ivensky first discussed the issue related to DBAs, advising Richert that the DBAs at Amdocs are "application DBA - ADBAs" and that the two they currently had were very overworked. ***Id.*** Ivensky responded to the second issue, related to Stehno, by indicating that Stehno was brought on to help with the work load, that Amdocs checked his background with SPCS and got a favorable reference and that he informed SPCS that he was going to bring on a former SPCS contractor. ***Id.*** Ivensky concluded by stating, "Jan, in case that you do not recommend this gentlemen [sic] I would like to talk to you and understand the concern. Definitely we are not going to bring somebody that SPCS doe [sic] not recommend." ***Id.*** Ivensky felt that the "we" referred to in Richert's e-mail was Richert representing the group. Tr. 108.

Later that evening, Ivensky and Richert spoke by phone. L.F. 284. Ivensky indicated that there were again two separate topics of discussion, the division of responsibilities and Stehno. L.F. 285. The discussion regarding roles and responsibilities on the project took place before Stehno was hired and the substance of the conversation did not change. ***Id.*** In fact, it was Ivensky who

"took advantage of this call" to discuss the division of labor issues. ***Id.*** . With respect to Stehno, Richert indicated a preference for not hiring Stehno. Tr. 789-790. She did not indicate that her concern was that Stehno was working as a DBA. L.F. 287; Tr. 818. Richert's concerns had nothing to do with Stehno's job title or duties. Tr. 790. Richert told Ivensky that she did not want Stehno on Sprint systems. Tr. 818.

Richert, apparently unsatisfied with the events of September 20, sent another e-mail to Keren, Ivensky and Sherry on Friday, September 21 at 8:45 a.m. L.F. 406. Richert again mentioned the division of labor and separately discussed Stehno stating in part:

> I spoke at length with Igor last evening regarding John Stehno. Enterprise Data Services management was not contacted for references on John Stehno. From a skill set perspective John would rank as average among my team of 40 DBAs, but John is high maintenance. He is a magnet for conflict. Considering the fact that he has already been hired by Amdocs and has been onsite for four

days, I am not going to make the decision on John's fate. I think that should be Amdocs decision.

Id. Keren viewed this second e-mail as an escalation and felt he needed to take action because somebody relatively high up at Sprint was concerned and he needed to preserve a good working relationship. Tr. 302, 319-321. As a result Keren contacted Ivensky and Waldman about how to respond to Richert. Tr. 299. Ivensky did not indicate that he had decided to let Stehno go or that he had already decided what would happen with Stehno. Tr. 304. Keren sought Waldman's help in drafting the response. Tr. 304. Waldman prepared a draft response and forwarded it to Keren and Ivensky. L.F. 541. Keren cut and pasted the information from Waldman's draft, sending an e-mail to Richert that stated:

Thanks for you [sic] e-mail.

we contacted Enterprise Data Services technical leads is working closely with the Amdocs team to gather feedback at a technical level. [sic] The reason we didn't contact Data Services management is because we knew he is a contractor and we wanted to get a non

> formal feedback on him from somebody who worked with him in the past and know [sic] his technicality.
>
> We did not contact Enterprise Data Service management, and we agree that it was an oversight and that we will gladly follow Jan's advice to do so in the future. [4]
>
> John Stehno was hired only as a contractor at this point and that if we find him to be a management problem we will have ample opportunity to discontinue working with him before converting him to an Amdocs employee. We will, of course, take into account how John is interacting with Jan's group among others at Sprint.

L.F. 532. Ivensky sent two separate e-mails directing Keren to "send it ASAP" without suggesting any changes, but forty minutes after Keren had actually sent the e-mail to Richert, Ivensky sent him an e-mail stating, "Please send it ASAP

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[4]Although Waldman recommended the use of the word "oversight" he did not really believe there had been an oversight, but was offering a concession in an effort to keep the customer happy. L.F. 230.

WITHOUT C. We cannot keep him." Tr. 309-316; L.F. 535, 538, 541. In the meantime, Ivensky had e-mailed Richert directly stating, "Today would be John's last day in our office. It's AMDOCS decision. I do not want to keep people that you are uncomfortable with." L.F. 406.

Ivensky would not have terminated Stehno's assignment absent Richert's comments. L.F. 294. The decision to release Stehno was based solely and entirely on Richert's input. Tr. 801. The only negative information Ivensky received about Stehno came from Richert. Tr. 819. Similarly, Waldman reported that he was not aware of anyone other than Richert complaining about Stehno. L.F. 228. Ivensky felt the need to resolve the situation quickly because a senior manager was complaining and he felt like he was protecting the jobs of all three hundred people working on the project by letting Stehno go. Tr. 790-792, 805. Hood protested Stehno's firing, but Ivensky said it had to be done because the client, Sprint, had requested it. L.F. 378. Ivensky told Hood that someone in the chain of command at Sprint had requested that Stehno's employment be terminated. L.F. 377.

Not only was Sherry copied on much of the e-mail exchanged about Stehno, but he also ratified Richert's conduct after Stehno's termination by telling Ivensky that, "he was happy to work with a good counterpart from Amdocs," after Ivensky told him he had let Stehno go. L.F. 293. Further, Sprint ratified Richert's conduct at trial by offering testimony that not only did Richert do nothing improper by sending her e-mail criticizing Stehno, but that Sprint's policy required that she do so. Tr. 770-771. Interestingly, Sprint took this position even though Richert had no power to fire people on her own team without the approval of a director. L.F. 302. Further, the evidence demonstrated that if Stehno had been a former employee of Sprint, Richert's comments that he was "high maintenance" and a "magnet for conflict" would be a violation of Sprint corporate policy. L.F. 347.

Richert made numerous comments regarding Stehno's performance and ability to work with others while he was in her department both while Stehno worked there and after he left. Stehno and Richert actually got along well and she gave him positive feedback. Tr. 528-529. Mike Rivera was Solutions Point's regional manager while Stehno was employed by Solutions Point and placed at

Sprint. Tr. 650-651, 654. As a result, Rivera regularly discussed Stehno's performance with Richert. Tr. 654-655. Richert's feedback about Stehno was always positive. Tr. 655. While Rivera met with Richert monthly, he testified that she never gave negative feedback about Stehno, never suggested she did not want to renew Stehno, never referred to Stehno as an average DBA, never said anything about conflicts with others, never said Stehno was a magnet for conflict, never said Stehno was high maintenance, never said there were any problems with Stehno's performance and never asked Stehno to leave. Tr. 655, 662-665. Richert indicated that Stehno was an "excellent contributor," an "asset to her team" and that she wanted to "keep John as a part of the team." Tr. 656-658.

Richert's desire to keep Stehno as a part of the team was evidenced by her renewal of his contract on more than one occasion. Tr. 656; L.F. 307. Richert indicated that when Stehno left her department his contract had just been renewed, which "spoke to what they thought of him." L.F. 315. Richert had veto power over Stehno's contract renewals, but chose to renew his contract on each occasion. L.F. 308-309. Rivera indicated that Stehno's multiple renewals were considered positive feedback in the industry. Tr. 656.

Richert indicated that Stehno worked on two primary projects while on her team, Blue Martini and RMS. L.F. 311. Richert testified that there were escalations on both projects. ***Id.*** However, Richert indicated that the escalations on the RMS project weren't really conflicts, that Stehno worked well with his teammates and had a lot of respect for the DBAs on the team. L.F. 311-312. As for Blue Martini, escalations were common and not Stehno's fault. L.F. 313. In fact, a Sprint vice president on the applications side required that **all** of the players on Blue Martini, including Stehno, be replaced. ***Id.***

While Sprint claims it had a right to require Stehno's removal, the evidence indicates otherwise. The Master Service Agreement between Amdocs and Sprint does not define what types of personnel can work for Amdocs onsite at Sprint. L.F. 272. Sprint senior director Sherry acknowledged that Sprint does not have the right to determine who Amdocs hires as long as its staff follows Sprint's procedures. L.F. 262-263. Nothing indicated that Stehno failed to comply with any Sprint policy and no Sprint policy prevents a former contractor from working for a third party vendor like Amdocs after leaving Sprint. L.F. 263, 340. Sherry agreed that he would not make derogatory comments about former

Sprint contractors in vendor labor areas because it is the vendor's responsibility to choose who they need to get the job done. L.F. 263-264. Sherry further acknowledged that Richert's e-mail related to a hiring decision to be made by Amdocs that Sprint should not be influencing and that it was up to Amdocs to determine who they hire to work on the project. L.F. 265-266. Robin Moore, another Sprint employee who testified at trial regarding the propriety of Richert's actions, stated that the decision about what to do with Stehno should be Amdocs' decision because Stehno "was an employee or contractor at Amdocs. We really had no influence on that." Tr. 739. Even Richert agreed that Amdocs could hire whomever it chose so long as it was not a DBA who would do the work her department was to do. L.F. 325. When asked whether Sprint had "an economic interest in telling Amdocs who they could hire for this project," Sherry answered, "Not an economic, no." Tr. 779.

In the end, Stehno was the sole casualty of the situation. The end result of the roles and responsibilities discussion, i.e. the DBA/ADBA issue, did not change the way Amdocs did business with Sprint and did not affect anyone else's employment or consulting status. L.F. 289. There was no change in the

relationship between Sprint and Amdocs after Richert's phone discussion with Ivensky. L.F. 328, 294. Amdocs never had DBAs, as opposed to application DBAs, working on the project at Sprint, before, after or during Stehno's assignment with Amdocs. L.F. 274. Someone else was hired to replace Stehno and the responsibilities of the Amdocs team did not change. L.F. 294. Stehno's replacement at Amdocs never met with Jan Richert and Stehno's replacement was still at Amdocs when Hood left in January of 2002. L.F. 294, 375, 383.

While nothing changed at Sprint or Amdocs following his termination, Stehno was greatly damaged. Stehno's employment with Modis was terminated because his assignment with Amdocs was terminated. Tr. 391-392. Stehno reported to work at Amdocs as usual on Friday, September 21. Tr. 479. Around noon, he received a call from Modis stating that his assignment was being terminated. Tr. 479. He was told by Modis and by Gary Hood that somebody pretty high up at Sprint PCS had called and stated that Amdocs was stealing Sprint resources by hiring Stehno, a former Sprint contractor. Tr. 489. Stehno was confident that the situation was the result of a misunderstanding that could be cleared up. Tr. 492-293. He called his former manager at Sprint Long

Distance who said he had no problem with Stehno being at Amdocs and suggested that Stehno call Sprint's offices in Dallas. Tr. 480. When Stehno called the Sprint office in Dallas he was advised that Sprint did not have a policy that kept former Sprint contractors from working with Amdocs. Tr. 481. Despite the absence of such a policy, Ivensky agreed with Amir at Modis that Modis shouldn't provide former Sprint people to Amdocs for a time and Amir told Wright that Amdocs had been told that they could not bring on any former Sprint employee or contractor until they had been out of Sprint for twelve months. Tr. 389-390.

After Stehno's position at Amdocs was terminated, he was out of work for seven months or more before finding his next position. Tr. 543. Although there was some discussion of a possible opportunity in St. Louis, Stehno was never offered a position in St. Louis by either Amdocs or Modis. Tr. 442-443, 542. When Stehno finally found work again he was employed for only five months at a temporary position in St. Louis. Tr. 543-544. Stehno opted to commute to that position rather than relocating his family, in part because of the anticipated length of the position. Tr. 543-544, 567-569. Stehno was then out of work for

eleven more months before locating a position in Oregon, which required that he move his family. Tr. 544-546. John O. Ward, Ph.D., offered his testimony regarding the economic damages that Stehno suffered. L.F. 354-372.

Stehno filed suit against both Amdocs and Sprint alleging multiple causes of action, including tortious interference with a valid business expectancy. L.F. 1-12. The case was tried to a jury beginning on February 24, 2004. L.F. 114. At both the close of plaintiff's case and the close of all of the evidence, Sprint moved for directed verdict. Tr. 699-700, 829-837, 851-854; L.F. 71-86. In neither instance did Sprint base any part of its motion on a claim that its contract with Amdocs gave it the unqualified legal right to require Stehno's removal from the project. ***Id.*** The case was ultimately submitted to the jury, which returned a verdict in favor of both Sprint and Amdocs. Tr. 1012-1013; L.F. 115-116. Stehno timely filed a Motion for New Trial, which was granted as to Sprint and denied as to Amdocs. L.F. 117-132, 209-210. The trial court granted Stehno's Motion for New Trial against Sprint, on the basis that the jury's verdict was against the weight of the evidence. L.F. 209. Sprint then filed its Notice of Appeal. L.F. 212-217.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING SPRINT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR GRANTING STEHNO'S MOTION FOR NEW TRIAL BECAUSE PLAINTIFF PRESENTED SUBSTANTIAL EVIDENCE OF EACH ELEMENT OF TORTIOUS INTERFERENCE WITH A VALID BUSINESS EXPECTANCY. THIS SECTION RESPONDS TO APPELLANT'S POINTS RELIED ON I & II.

A. Standard of Review

A trial court has "broad discretionary power to grant one new trial on the ground that the verdict is against the weight of the evidence." Fischer v. Famous-Barr Co., 646 S.W.2d 819, 821 (Mo.App. 1982). Similarly, it is "within the exclusive province of the trial court to determine if a verdict is against the weight of the evidence." Wilson v. Missouri-Kansas-Texas R. Co., 595 S.W.2d 41, 48 (Mo.App. 1980). Accordingly, when appellate courts review such orders, the order is considered "presumptively correct" and reviewing courts are "liberal in sustaining an order granting such new trial." ***Davis v. Johnson***, 58 S.W.2d 746

(Mo. 1933)***Christie v. Weber***, 661 S.W.2d 840 (Mo.App. 1983)***Leonard v. Bartimus***, 463 S.W.2d 579 (Mo.App. 1971)***Eagle v. Redmond***, 90 S.W.3d 920 (Mo.App. 2002)***Id.***

The Courts have defined substantial evidence in this context as evidence "which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." Fabricor, Inc. v. E.I. Dupont De Nemours & Co., 24 S.W.3d 82, 93 (Mo. App. 2000). While this Court's review of whether the evidence was substantial and the inferences drawn therefrom are reasonable is *de novo*, the evidence is "viewed in the light most favorable to the plaintiff" and the Court gives the plaintiff "the benefit of all reasonable and favorable inferences to be drawn from the evidence." ***Community Title Co. v. Roosevelt Fed. Savings and Loan Assoc.***,

796 S.W.2d 369 (Mo. banc 1990)***Veach v. Chicago and North Western Transp. Co.***, 719 S.W.2d 767 (Mo. 1986)***Fischer*** at 821. Within this context, Sprint fails to demonstrate that it is entitled to judgment as a matter of law.

B. Sprint Does Not Dispute That Stehno Made a Submissible Case That Sprint Had Knowledge of Stehno's Business Relationship,

That Sprint Intentionally Interfered in That Relationship, Inducing or Causing a Breach of the Relationship or That Stehno Was Thereby Damaged.

To establish a claim for tortious interference with a valid business expectancy or contract, a party must prove the following elements: (1) a contract or valid business relationship or expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages resulting from defendant's conduct. Francisco v. Kansas City Star Co., 629 S.W.2d 524, 529 (Mo.App. 1981). Sprint does not contend that respondent failed to make a submissible case on the second, third and fifth elements of tortious interference. Nonetheless, for the Court's benefit, respondent will briefly summarize the facts in support of those elements here.

All of the evidence admitted in the case regarding Sprint's knowledge of Stehno's contract demonstrates that Sprint had sufficient knowledge to be liable. Amdocs was a vendor providing services to complete a project for Sprint on-site at Sprint facilities. L.F. 289, 323. Derek Sherry is the director at Sprint who was

accountable for the work with respect to Amdocs, the company for whom Stehno was working as a contractor. L.F. 254. As the director, Sherry has direct oversight responsibility for the project with Amdocs. L.F. 265. He was the most important person on the project at Sprint, the primary focal point for all of the customer vendor relationship and the primary focal point for all open issues dealing with the project. Tr. 295; L.F. 280. Igor Ivensky was the Amdocs Director onsite at Sprint. L.F. 270. Ivensky considered Sherry to be his counterpart at Sprint. L.F. 280.

When Amdocs first considered placing Stehno onsite at Sprint, Amdocs was aware of Stehno's past affiliation with Sprint. Haim Keren, an Amdocs employee, contacted Sprint employee Michael Whitmore to check Stehno's references. Tr. 286-288. Ivensky contacted Sherry regarding Stehno because Stehno used to work for Sprint. L.F. 256-257. Sherry testified that there was no need for Ivensky to check with anyone else at Sprint. L.F. 258. Sherry indicated to Ivensky that it was not a problem for Stehno to work at Sprint. L.F. 257.

Because both Sherry and Whitmore were agents of Sprint, Sprint is imputed with their knowledge. "A corporation may acquire knowledge or

notice only through its officers and agents, and is charged with knowledge of all material facts of which they acquire knowledge while acting in the course of their employment and within the scope of their authority, even though they do not in fact communicate it." Medicine Shoppe Int'l., Inc. v. J-Pral Corp., 662 S.W.2d 263, 270 (Mo.App. 1983).

In addition to the corporate knowledge imputed to Sprint by Whitmore and Sherry, Richert, the person who actually placed the call to Amdocs, had specific knowledge of sufficient facts to give rise to liability. "It is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties." Howard v. Youngman, 81 S.W.3d 100, 113 (Mo.App. 2002). Richert testified that she was aware that Stehno was associated with Amdocs. L.F. 322. Richert also understood that Stehno was not working for free and assumed he would be compensated for his work at Amdocs. L.F. 326. Moreover, Richert specifically noted in her e-mail that she was aware that Stehno was onsite at Sprint working for Amdocs. L.F 406. These facts constitute substantial evidence that Sprint had knowledge of Stehno's business expectancy.

Similarly, Stehno demonstrated sufficient facts to support a claim that Sprint intentionally interfered with Stehno's valid business expectancy, thereby inducing or causing a breach of the relationship. In evaluating this element of tortious interference, courts apply a two part "but for" test.

To satisfy the first element of tortious interference with a valid business expectancy, plaintiff must demonstrate that he had a contract or valid business expectancy. ***Hensen v. Truman Med. Ctr., Inc.***, 62 S.W.3d 549, 553 (Mo.App. 2001). This Court has defined "expectancy" as "that which is expected or hoped for." ***Bell v. May Dept. Stores Co.***, 6 S.W.3d 871, 876 (Mo. banc 1999). In determining whether or not a business expectancy is sufficient, "it is not necessary that there be a binding contract in existence, but a probable future business relationship from which there is a reasonable expectancy of financial benefits is enough." ***Id.*** There was no specific project that Stehno was engaged to work on that would mean that he would be terminated when the project was completed. L.F. 383. At the time he took the position with Modis at Amdocs, Stehno was open to full-time employment. Tr. 645.

Stehno's direct manager testified that he believed Stehno was not only likely to have a future business relationship with Amdocs, but that Stehno was also likely to assume more responsibility with the passage of time. Gary Hood was the Amdocs manager in charge of the specific area where Stehno was placed. L.F. 281. As the manager, Hood would provide input on how Stehno was doing, his contribution to the team, whether Stehno was valuable to Amdocs and the team's needs, as well as directing the specifics of Stehno's assignment. ***Id***. Hood was very impressed with Stehno's work and expected him to become a team lead. L.F. 388. Over time, Hood believed the team lead position would become more of a permanent mantel or a financial reward for Stehno. L.F. 389. Ivensky was also impressed with Stehno. After only four days on the assignment, Ivensky could tell that Stehno's technical background was considerable. Tr. 816. There were no problems with Stehno's work during this time frame. L.F. 280.

Sprint argues that Stehno's expectation of a continued relationship with Amdocs was unreasonable because "he knew that Richert had previously rejected his application to work as a contract DBA on the project. Furthermore, it was undisputed that Stehno applied for the assignment with a false resume."

Substitute Brief for Appellant at 29-30. Neither of these statements has a reasonable basis in the evidence presented in this case. The citation for both statements in Sprint's brief is Stehno's testimony, in which he acknowledged that Richert had rejected the idea of Stehno returning to **her department**, not the project with Amdocs. Tr. 594. While Stehno indicated that he did not notify Modis that Richert had rejected the idea of Stehno returning to her department, he also indicated that he did not believe that there was a problem that he needed to disclose. Tr. 595, 638.

Sprint failed to include the other relevant facts related to Richert's communication about Stehno returning to her department. The communication regarding Stehno returning to Richert's department is contained in an e-mail that was admitted as an exhibit in the case. *See*, L.F. 393. The entire text of Richert's e-mail is, "Mike, John admitted to me when leaving SPCS that an environment like ours where you have several projects (multi-tasking) and a [sic] the overall fast pace of SPCS was not for him. It hasn't changed . . . Thanks, Jan." ***Id.***

During the application process for this position, Stehno was never asked about conflicts with his manager at Sprint. Tr. 462-463, 384, 637. The Solutions

Point manager to whom Richert's comments were directed indicated that he would have no reluctance to place Stehno at Sprint or with a third party vendor working with Sprint based on Richert's comments regarding Stehno's potential return to her department. Tr. 671. Moreover, he indicated that he would feel no need to disclose Richert's comments if he was placing Stehno with a third party vendor that would interact with Richert or her group. Tr. 672. Stehno did not perceive any problem between himself and Richert that needed to be disclosed either. Tr. 638. Indeed, as is set forth below in the section addressing improper means, Stehno had a good working relationship with Richert and had every reason too believe that Richert was pleased with his work in her department. Tr. 639. Indeed, his placement at another Sprint department following his departure from Richert's department would seem to confirm that there was no problem with him continuing to work at Sprint. L.F. 315, 321. There was no indication in the e-mail or anyone's testimony that Richert's supposed rejection related to Stehno working on the Amdocs project. Moreover, there was no indication that Richert's supposed rejection of Stehno related in any way to his work habits,

abilities, interactions with other people or anything other than Stehno's election to work in a different environment.

Sprint asserts that it is undisputed that Stehno applied for the assignment with a false resume. To the contrary, the only evidence admitted at trial related to this subject was Stehno's testimony that he did *not* submit a false resume. Stehno testified at trial that defendant's exhibit A4, the exhibit containing the false information, was not the resume he submitted to Modis. Tr. 600, 638-630. He knew this because before the documents were produced to the defendants they were Bates numbered in order and the Bates number on the resume marked as defendant's A4 indicates that it accompanied a cover letter sent to another party months after Stehno's position at Modis was terminated. Tr. 640-643. Stehno testified that it was never sent to Modis. Tr. 643. Although Modis representatives testified at trial, there was no contrary evidence.

Sprint also contends that the Master Service Agreement defeats Stehno's valid business expectancy as a matter of law. The Master Service Agreement is nothing more than a piece of evidence that the jury could consider in determining whether Stehno's valid business expectancy was reasonable. It

neither controlled his relationship with Amdocs nor bound him in any way. The Master Service Agreement is no more compelling or substantive than any other piece of evidence and its existence merely demonstrates that there was disputed issue of fact regarding the reasonableness of Stehno's valid business expectancy. While the Master Service Agreement is one piece of evidence that might relate to the reasonableness of Stehno's expectation, the evidence recited above is also evidence to be considered and precluded directed verdict in Sprint's favor.

In arguing that Stehno does not have a valid business expectancy, Sprint relies heavily on Hartbarger v. Burdeau Real Estate Co., 741 S.W.2d 309 (Mo.App. 1987), and Rhodes Engineering Co., Inc. v. Public Water Supply Dist. No. 1 of Holt Co., 128 S.W.3d 550 (Mo.App. 2004). Neither of these cases is similar to this case. In ***Hartbarger***, defendant had a contract with plaintiff to lease space. Plaintiff, in turn, had a contract with a sub-lessee. ***Id.*** Plaintiff then filed suit alleging tortious interference. The Court concluded that plaintiff did not have a valid business expectancy because plaintiff did not have an enforceable right to renew his lease. The Court held that defendant was entitled to assert the defense that the right was unenforceable because it was a party to

the contract in question. In contrast here, Sprint had a contract with Amdocs. Amdocs, in turn, had a valid business expectancy with Stehno. Sprint did not cancel its contract with Amdocs or change the work to be performed in any way. Rather, Sprint contacted Amdocs regarding Stehno specifically. Stehno's claims are not based on an unenforceable right contained in a contract or lease. Stehno's claims are based on his ongoing business relationship with Amdocs, his valid agreement with Modis, Amdocs' practice of doing business and the specific representations made to him.

Similarly, in ***Rhodes***, 128 S.W.3d at 565. The Court concluded that one contract was actually performed, so defendants could not have interfered with it. ***Id.*** at 566. In finding that plaintiff did not have a valid business expectancy based solely on the contract, the Court stated, "Plaintiff could not, as a matter of law, have a reasonable, valid business expectancy alleged to have arisen out of a contract that is unenforceable, such as we have declared the Permanent Agreement." ***Hensen***, 62 S.W.3d at 551. Through that company, Hensen was assigned to work at Truman. ***Id.*** at 553. Truman also contended that Hensen did not have a valid business expectancy because Hensen was an at-will employee.

Id. Similarly here, Stehno worked for a company known as Modis. Through that company, Stehno was assigned to work at Amdocs. Stehno's assignment at Amdocs was no more temporary than Hensen's assignment at Truman. Stehno, like Hensen, had a probable future business relationship with Amdocs sufficient to preclude judgment as a matter of law.

Considered in the light most favorable to plaintiff, the evidence presented amply demonstrates that Stehno had a reasonable expectation of a future business relationship with Amdocs. Stehno's employer, Modis, not only had a history of placing its employees on long-term assignments, but also had a history with Amdocs of placing consultants long-term and having them ultimately be converted to Amdocs employees. Amdocs, the Modis client to whom Stehno was assigned, had an extensive history of converting consultants to employees. Further, Amdocs was specifically impressed with Stehno. Both Waldman and Keren indicated an intention to convert Stehno to an Amdocs employee, while both Keren and Hood suggested that Stehno should be made a team leader. Stehno was not a mere temporary worker who would only work for a short time. Rather, Stehno was a contractor in an industry that routinely uses contractors

who would have been likely to remain with the project long-term. Based on such evidence, the jury certainly would have had a basis to find in Stehno's favor on this issue.

D. Stehno Presented Substantial Evidence Regarding Sprint's Lack of Justification for Interfering with His Business Relationship.

Numerous courts have addressed the absence of justification element of tortious interference. The absence of justification in this context has been generally defined as "the absence of any legal right on the part of the defendant to take the actions about which a plaintiff complains." SSM Health Care, Inc. v. Deen, 890 S.W.2d 343, 345 (Mo.App. 1994). Thus, the Missouri Supreme Court has concluded that "no liability arises for interfering with a contract or business expectancy if the action complained of was an act which the defendant had a definite legal right to do without any qualification."***Community Title***, 796 S.W.2d at 372. Where, however, the defendant does not have an unqualified legal right to interfere, Missouri courts have recognized that a defendant may be justified in interfering with another's business expectancy for the purpose of protecting his own economic interest as long as the defendant does not employ improper

means. Chandler v. Allen, 108 S.W.3d 756, 760 (Mo.App. 2003). "One is never justified in using improper means to interfere with another's business relations." ***Id.*** at 95. In addition, "false statements tending to prejudice or injure a person in the person's business, by suggesting the person is unreliable, insolvent, or the like, are independently actionable and constitute an improper means."

Missouri law does not hold an actor liable for interfering with a contract or valid business expectancy of another if the action complained of was an act that the defendant had a "definite legal right to do without any qualification." Kruse Concepts, Inc. v. Shelter Mutual Insurance, 16 S.W.3d 734, 738 (Mo.App. 2000). Plaintiff submitted substantial evidence that demonstrated Sprint did not have such an unqualified legal right. Numerous witnesses testified that Sprint did not have a legal right to take action regarding Stehno.

Ivensky, the Amdocs director for the project, testified that the Master Service Agreement defining the relationship between Sprint and Amdocs does not define what types of personnel can work for Amdocs at Sprint. L.F. 272. Moreover, it is a usual courtesy for Amdocs to talk to the customer before hiring someone who used to work for the customer. L.F. 229. In this case, Sherry, the

director of the project for Sprint, was the most logical person to contact and he gave his approval for Stehno to work on the project. ***Id.***; L.F. 257, 278, 388.

Sherry agreed that Sprint did not have the right to determine who Amdocs hired as long as their staff follows Sprint's procedures and nothing indicated that Stehno failed to comply with any Sprint policy. L.F. 262-263. Sherry also testified that it was Amdocs' responsibility to choose who they need to get the job done, that Richert's e-mail related to a hiring decision to be made by Amdocs that Sprint should not be influencing and that it was up to Amdocs to determine who they hire to work on the project. L.F. 263-264, 265-266.

Significantly, Richert agreed, testifying that Amdocs could hire "whoever they want as long as it wasn't DBAs." L.F. 325. Robin Moore, another Sprint employee who testified at trial regarding the propriety of Richert's actions, stated that the decision about what to do with Stehno should be Amdocs' decision because Stehno "was an employee or contractor at Amdocs. We really had no influence on that." Tr. 739. This evidence, taken as a whole and considering all reasonable inferences in the light most favorable to plaintiff, demonstrates that

Sprint did not have a legal right to interfere in Stehno's relationship with Amdocs.

In contrast to the testimony of its witnesses, Sprint argues that it should be entitled to directed verdict on this element based on the specific language in the Master Service Agreement. This argument was not made to the trial court in Sprint's written motion for directed verdict or in the argument thereon and should be disregarded by this Court. It has long been the law in Missouri that an issue that is not raised before the trial court cannot be raised on appeal. Seitz v. Lemay Bank & Trust Co., 959 S.W. 2d 458, 462 (Mo. banc 1998). In ***Id***. Moreover, in this specific instance, Sprint cannot complain that the trial court failed to grant its directed verdict based on a factual argument they did not make.

Even if this Court considers this argument, the contract does not grant Sprint an unqualified legal right to take the action that it did. First, the specific language of the contract is not unqualified. Rather, the contract provides that Sprint had the right to "**reasonably** require removal of a Subcontractor and/or any of a Subcontractor's personnel" from Sprint's software, facility or location. L.F. 479 [emphasis added]. As Sprint has pointed out in its brief, Stehno was

neither a direct subcontractor of Sprint nor an employee of Sprint's subcontractor, Amdocs. Moreover, the contract provided that Amdocs was to receive "reasonable prior notice . . . specifying the reasons for such removal, with an opportunity to cure" the problem before removing any staff. L.F. 479. Rather than being an unqualified legal right, the contract provides a **qualified** legal right. Moreover, itis disingenuous for Sprint to claim Richert complied with this provision when Richert claimed she did not act to require Stehno's removal at all.

In addition, even if the Court considers this to be an unqualified legal right, Sprint is only insulated from liability by this contract if the "action complained of" was the same as the action it had a right to take. ***Aufenkamp v. Grabill***, 112 S.W.2d 455 (Mo.App. 2003)***Aufenkamp***, Stehno does not seek to enforce the agreement. Rather, Sprint has raised the contract as a defense, placing its terms and conditions at issue. It is Sprint, not Stehno, that seeks refuge in the contract here. Where Sprint has asserted that the contract provides an unqualified legal right, Stehno is entitled to challenge that defense by demonstrating that the right provided by the contract is not an unqualified legal

right and that Sprint failed to comply with the terms of the contract. The issue is not, as Sprint suggests, whether Stehno had the right to invoke the cure provision. Instead, the issue is whether Sprint's failure to comply with its own contract grants Sprint immunity for interfering with Stehno's legal rights. It does not. Sprint's legal right under the contract is no greater than the explicit terms of the contract and where Sprint has acted outside of the specific rights provided therein, the contract provides no defense.

In 62 S.W.2d at 558. The Court of Appeals concluded, however, that the question of whether Truman acted without justification was an issue for the jury to determine. ***Hensen*** is distinguishable from this case because the defendant in ***Hensen*** was the fact that the Court held that Hensen had a valid business expectancy, not that he had an employment contract. ***Hensen*** is distinguishable from this case because the defendant in ***Hensen*** knew that plaintiff was promised a specific assignment as part of Hensen's employment relationship, while Amdocs made no such promises to Stehno. Interestingly, the Court's analysis states that "Truman asserts, however, that it did not know about Hensen's employment relationship with REN–only that Hensen was an at-will employee with no exclusive assignment to Truman."
Hensen that the evidence was sufficient to infer that Truman knew about Hensen's employment relationship is based on evidence which is similar to that in this case. ***Id.*** In this case, there was testimony that Sprint knew that Stehno

was working at Sprint in affiliation with Amdocs. In Ivensky's reply to Richert's e-mail, Ivensky notified Richert of Stehno's status with the project, in response to which Richert provided additional negative information regarding Stehno. L.F. 406-407.[5] It can be inferred from these facts that Sprint had sufficient knowledge of the relationship between Stehno and Amdocs. In addition, respondent refers to the section above regarding Sprint's knowledge of the business relationship between Stehno and Amdocs.

Finally, Sprint argues that ***Hensen*** Court concluded that there was sufficient evidence on which the jury could rely in finding that Truman acted with an improper purpose.

If the defendant does not have an unqualified legal right to take the action complained of, the analysis turns to determining whether defendant had an

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[5]The reply to Richert's e-mail is actually on the page preceding the e-mail itself because each reply is placed at the beginning of the text. Thus, to read the e-mail in correct order, one needs to start with the last e-mail on a page or series of pages and work backwards and upwards through each reply.

economic interest in the contract or valid business expectancy. *See, e.g.*, ***Chandler***, 108 S.W.3d at 760. The complete statement of this rule is found in ***Howard***, 81 S.W.3d at 115. In interpreting this rule, the ***Howard*** at 116.

Stehno presented substantial evidence that Sprint did not have an economic interest in interfering with his relationship with Amdocs. Ivensky testified that when Sherry gave his verbal approval to hire Stehno, Sherry conveyed that SPCS did not feel that bringing Stehno on board at Amdocs would "jeopardize our relationship." L.F. 278. When asked whether Sprint had "an economic interest in telling Amdocs who they could hire for this project," Sherry answered, "Not an economic, no." Tr. 779. Not only did Sherry testify directly that Sprint did not have an economic interest in Stehno's relationship with Amdocs, Sprint was unable to produce a single witness to testify that Sprint did have such an economic interest. Furthermore, the jury could rely on Sherry's approval of Stehno to work on the project as an indication that Sprint did not have a legitimate economic interest in preventing Stehno from working on the project.

In addition to this direct evidence, Stehno submitted indirect evidence that Sprint did not have an economic interest in his relationship with Amdocs. Sprint's Regional Manager of Human Relations, John Shannon, testified that it is Sprint's policy to refuse to give out information about former employees to any third party. L.F. 337, 344-345. It is also Sprint's policy not to give out references. L.F. 345. Shannon also testified that it is not appropriate for a Sprint manager to contact a former employee's current employer to give an unsolicited bad reference and that it would be a violation of Sprint policy for someone in his department to say that a former employee was high maintenance or a magnet for conflict. L.F. 346. Sprint does not have a written policy regarding information about former contractors. L.F. 345. However, Sprint also does not maintain files on former contractors to allow it to even verify employment at Sprint, much less the contractor's work performance. L.F. 341. The jury might well have reasonably concluded based on this evidence that Sprint would not have enacted policies that prevented it from protecting a legitimate economic interest and, therefore, that Sprint did not have a legitimate economic interest in Stehno's contract.

Sprint argues that it is "axiomatic that a company has an economic interest in determining who is working for it" and cites cases that relate to tortious interference "in the employment context." Substitute Brief for Appellant at 35. However, as the Court of Appeals noted in ***Hensen***, the plaintiff was an employee of Truman Medical Center. 625 S.W.3d at 551. After working for Truman for a number of years, Hensen opted to accept employment with REN, a third party vendor who provided staffing for Truman's acute dialysis unit. ***Id.*** at 554.

Sprint argues extensively that this Court should reverse the Court of Appeals based on the holding of Eggleston v. Phillips, 838 S.W.2d 80 (Mo.App. 1992). Sprint contends that the Court of Appeals' holding is inconsistent with ***Eggleston*** holding was specifically limited to a situation involving an at-will employee and her employer. The portion of the case quoted by Sprint conspicuously omits the specific limiting language. The entire quote, as noted by the Court of Appeals, states, "To support a cause of action for intentional interference with a contract or business expectancy ***by a supervising employee over an at will employee*** requires evidence eliminating any business justification

at all for the termination–a level of proof close to impossible to achieve." ***Eggleston*** that the employer's actions were justified because a "supervising employee with the power to fire or with the power to recommend that an employee be fired has a legal right to take those actions, with or without cause, unless otherwise restricted by his principal." 838 S.W.2d at 82. Richert did not have the power to fire Amdocs' contractors or the power to recommend that Amdocs' contractors be fired. In contrast to a supervising employee, neither Richert nor Sprint had a legal right to take those actions, thus distinguishing this situation from that in ***Eggleston*** that there was no dispute that the employee's department was performing unsatisfactorily. In contrast here, there was no dispute that Stehno's performance was satisfactory and that Stehno did not violate any Sprint policies or procedures.

The holding of the ***Hensen*** are strikingly similar to this case. As discussed elsewhere in this brief, ***Hensen*** was actually a tortious interference case where a

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[6]While tortious interference is not available to at will employees against their employers, even at will employees retain certain protections from

former employee's relationship with a subsequent employer was disrupted by his former employer.

Again, taken in the light most favorable to Stehno and disregarding all contrary evidence, there is substantial evidence to support Stehno's claim that Sprint did not have an economic interest in Stehno's relationship with Amdocs. Sprint officials testified that it did not have an economic interest in Amdocs' hiring decisions or staff, much less an interest equivalent to an investment in Amdocs. Sprint's policies prevented its employees from taking the very action complained of in this case. In addition, Sprint's policies resulted in a situation where Sprint lacked the information required to protect its alleged interest under most circumstances because it did not maintain files on contractors. These facts

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termination, including those that prevent discriminatory treatment. Extending the rationale of ***Eggleston*** to situations that do not involve employees of the tortfeasor would open the door to the possibility that customers could require the removal of certain individuals from the employment of their vendors for discriminatory purposes without any repercussions for the person engaging in discriminatory conduct.

present substantial evidence on which the jury could have relied in finding in favor of Stehno.

In contrast, Sprint's argument that it had an economic interest it was trying to protect is unsupported by the evidence. While Sprint asserts that it cannot be disputed that Sprint has an economic interest in spending less money on a project, there was no evidence in the case that having DBAs from Amdocs work on the project would cost Sprint more money. Similarly, there was no evidence of an economic interest in determining who worked for Amdocs and there was ample evidence that Sprint did not have such an interest. Sprint invites this Court to conclude that Sprint did have an economic interest to protect by simply disregarding the direct evidence to the contrary. Nonetheless, the legal standard requires Sprint to prove that Stehno did not have substantial evidence to support each element of the claim, not that there was no evidence to the contrary.

3. Sprint was not acting to protect its alleged economic interest when it contacted Amdocs regarding Stehno.

To the extent that Missouri cases recognize a privilege to interfere with another's business expectancy based on an existing economic interest, that

privilege only extends to interference that is undertaken to protect that party's economic interest. "One who has a present 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.**" ***Wigley v. Capital Bank of Southwest Missouri***,

887 S.W.2d 715 (Mo.App. 1994)

Even where a defendant has a legitimate economic interest in a contract and is acting to protect that interest, the defendant is still prohibited from using improper means to interfere in the contract. "One is never justified in using

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[7]Respondent recognizes the apparent discrepancy between Ivensky's testimony that Richert stated that she would prefer Amdocs did not hire Stehno and Richert's testimony that she did not have any concerns regarding Stehno working at Amdocs. Nonetheless, there was testimony to support both allegations. Under the circumstances, this conflicting evidence merely demonstrates that this is a contested issue of fact that should be resolved by a jury.

improper means to interfere with another's business relations." ***Id.*** at 95. In addition, "false statements tending to prejudice or injure a person in the person's business, by suggesting the person is unreliable, insolvent, or the like, are independently actionable and constitute an improper means."

For the reasons set forth above, this Court should affirm Judge Connett's Order granting Stehno a new trial against Sprint. Stehno presented substantial evidence on all elements of tortious interference with a valid business expectancy. Because Stehno made a submissible case, the ruling granting Stehno a new trial on the basis that the verdict was against the weight of the evidence should be upheld on appeal. Similarly, since Stehno made a submissible case, Sprint's Motion for Directed Verdict was properly denied by the trial court. The trial court's rulings should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b). This brief contains 16,018 words.

I further certify that the floppy disk provided to the Court has been scanned for viruses and is virus-free pursuant to Rule 94.06(g).

Dated: October 31, 2005

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief, along with a floppy disk (scanned for viruses pursuant to Rule 86.06(g)) was served by First Class U.S. Mail, postage pre-paid, on this 31st day of October, 2005, upon counsel of record, as follows:

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