5-28-2009

Wesco Autobody Supply, Inc. v. Ernest Respondent's Brief Dckt. 35732

IN THE SUPREME COURT OF THE STATE OF IDAHO

WESCO AUTOBODY SUPPLY, INC., a Washington corporation, Plaintiffs/Appellant, vs. Holly Ernest individually, Paint and Spray Supply, Inc., an Idaho corporation; Automotive Paint Warehouse, a Utah Corporation; Hugh Barkdull, individually; Brady Barkdull, individually; and Mike Cook, individually, Defendants/Respondents.	)	Supreme Court Case No. 35732

RESPONDENTS' BRIEF

On Appeal from the decision of the District Court of the Sixth Judicial District
In and for the County of Bannock
Hon. N. Randy Smith and Don L. Harding, District Judges, presiding

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I. Statement of the Case

A. Nature of the Case

This case arises out of territorial competition in the automotive paint and equipment supply business, which is the industry supplying autobody repair shops. Appellant Wesco expanded into the Eastern Idaho (Twin Falls, Pocatello, Idaho Falls) market by purchasing three stores. Automotive Paint Warehouse ("APW") had long been the wholesale supplier for those stores and APW abruptly lost the market area to Wesco. APW's owners, Ernest and Davis, used their existing Idaho corporation, Paint & Spray Supply, Inc. ("P&S"), which already owned stores in the Boise area, to open new stores in Eastern Idaho in an attempt to keep at least a part of the market.

What made this territorial competition out of the ordinary was the surprising decision by almost all of Wesco's new employees to quit and go to work for P&S. The issue is why these employees were willing to switch to P&S, and more importantly whether any of the employees did anything legally inappropriate in making that switch.

B. Course of Proceedings Below

The Defendants' original motion for summary judgment was heard on July 10, 2006. Partial summary judgment was entered on September 6, 2006 dismissing four of the original ten counts[1] and completely dismissing three defendants.[2] Wesco twice moved for reconsideration, once

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[1]Interference with Contract (Count III), Tortious Interference (Count IV), Violation of Unfair Competition Act (Count VI), and Civil Conspiracy (Count IX).

[2]Automotive Parts Warehouse, Inc. (APW), Holly Ernest and Tom Davis (owners of APW and Paint & Spray Supply, Inc. (P&S).

with Judge Smith and once from Judge Harding. Both judges reaffirmed the summary judgment against Wesco. Recently Wesco dismissed thirteen of the employee defendants with prejudice, leaving only four of the original nineteen defendants. The result of the summary judgmen,t and the recent dismissal of most of the employees, leaves the current status of the Amended Complaint as:

-Dismissed entirely:

Count III (Interference with Contract),
Count IV: (Tortious Interference)
Count VI: (Violation of Unfair Competition Act)
Count IX: (Civil Conspiracy)

-Dismissed as to Ernest, Davis, P&S, APW, and Hugh Barkdull, leaving Brady Barkdull and Mike Cook:

Count I: Interference with prospective economic advantage, and
Count II: Breach of duty of loyalty.

-Dismissed as to Ernest, Davis, APW, but leaving P&S, Brady Barkdull, Hugh Barkdull, and Mike Cook:

Count V: Unfair competition.

-Dismissed as to all defendants, except Mike Cook:

Count VII (Computer Fraud Act)
Count VIII (Misappropriation of Trade Secrets)
Count X (Conversion)

Shortly before the case was to be tried, Wesco made a motion for certification of a final judgment. *Transcript*, March 5, 2008, p. 1. Wesco, in making that motion acknowledged that it only had a "very little case" left because the "very large issues" had all been resolved against Wesco. *Transcript*, March 5, 2008, p. 11. The court then granted the motion for the appeal, on the basis that the summary judgment ruling dealt with "the major part of this case" and that guidance is necessary from the Supreme Court in order to prevent this case having to be tried twice. *Transcript*, March

5, 2008, p. 15-16. The defendants' attorney then requested permission to file a renewed motion for complete summary judgment on the new evidence obtained since the partial summary judgment in 2006, and the court granted permission for an attempt at a complete summary judgment.

The remaining defendants then filed a renewed motion for summary judgment, relying on a much more complete record than the court had in 2006, which included numerous remaining depositions and additional affidavits. The court denied the renewed motion for complete summary judgment. R. Vol. VII, p. 1274- 1446 (Vol. VIII). The denial of this renewed motion forms the basis of the Cross-Appeal.

C. Concise Statement of Facts.

The following chronology of facts are undisputed:

July 29: On a Friday morning a fax was sent to the employees of the three Idaho stores Wesco had just purchased. The fax informed the employees that their stores have been bought and informed them that they now worked for Wesco. This was the first time the employees heard the stores had been purchased by Wesco. R. Vol. IV, p. 602, 605 (Peck, 12:6-25, 21: 8-22:11); R. Vol. IV, p. 639 (Johnston, 11: 11-14:7); R. Vol. IV, p. 657 (Dayley, 20:3-23).

August 9-12: Ernest and Davis learned that Wesco was not going to continue supplying The Eastern Idaho stores with paint from APW, and that Wesco would instead supply paint from its own sources. Ernest and Davis decided to open new stores in Eastern Idaho, so that APW could continue to supply paint to Eastern Idaho. Ernest and Davis already knew most of the customers in the area and had a good reputation. They decided to recruit Wesco's employees, thinking some of the employees would rather continue to be affiliated with them, and with APW, and would be willing

to quit the new comer, Wesco. R. Vol. III, p. 460, (Davis, 20:18- 22:7); R. Vol. III, p. 434-435 (Ernest, 17:18-18:15).

August 11-17: Ernest began recruiting Brady Barkdull and offered him a job at the new stores and told him he wanted him to start on August 22. Barkdull said he would think about it. Barkdull and Ernest met and talked by telephone several times over a period of days while Ernest attempted to persuade Barkdull to make the switch. Barkdull wanted to know what the other employees were going to do before he made up his mind. Ernest did not ask Barkdull to help recruit other employees. R. Vol. III, p. 578 (Barkdull, par. 2-6); R. Vol. III, p. 474, (Barkdull, 87:17); R. Vol. III, p. 437-442 (Ernest, 20:3 - 25:22, esp. 21:3-9). When Barkdull first discusses the possible job switch with other employees, it is after the other employees have already made up their minds to quit. R. Vol. IV. pp. 615 (Cristobal, 18:11-13). During this time Barkdull leaves all of the recruiting up to Ernest and Davis. Not a single employee attributes their recruitment to Barkdull.

August 17 (Wed): Ernest met with Hugh Barkdull in Preston and offered him a job. R. Vol. III, p. 430 (Ernest, 13:1-10). Ernest later met with Mike Cook in Pocatello and offered him a job. R. Vol. III, p. 489 (Cook, 50:25-52:21). That evening Ernest met with Jenny Hancock and offered her a job. Barkdull was present, but Hancock's testimony is very clear that Ernest made the job offer and that her decision to leave was not based on pressure from Barkdull. She has specifically denied that Brady recruited her. R. Vol. V, p. 879; R. Vol. III, p. 494 (Hancock, 22:14-17, 23:8-14).

August 18 (Thur): Ernest met in the evening with the Twin Falls managers and salesmen, including Travis Dayley, David Cristobal, Jeff Peck and Joel Johnston. He first took Cristobal, Johnston, and Dayley out to dinner and offered them jobs. R. Vol. IV, pp. 614 (Cristobal, 16: 5-

17:25). Barkdull was not at the meeting, and the employees did not discuss their decision with Barkdull until after they had made up their minds to quit. R. Vol. IV. pp. 615 (Cristobal, 18:11-13). The employees were curious if other employees were also being recruited and Ernest refused to tell them if this was his plan. R. Vol. IV, p. 642 (Johnston, 23:2-24:13). Ernest made it clear that he was going to open the new store in Twin Falls, with or without them, on Monday morning. R. Vol. IV, p. 643 (Johnston, 25:6-8). After dinner the employees discussed their plans and decided that the three of them would go to work for P&S, specifically because they were more comfortable working with Ernest, whom they already knew, than with Wesco, for whom they had some mistrust as to their job security. R. Vol. IV, p. 643 (Johnston, 26:15-25); R. Vol. IV, pp. 615 (Cristobal, 18:24-19:6).

Ernest and Davis then met separately with Peck in Twin Falls and offered him a job. Peck told Ernest and Davis he wanted to sleep on it, but called Ernest the next morning at 7:30 a.m. and accepted the offer. Barkdull was not involved in this, and Peck did not discuss his decision with Barkdull until after Peck had made up his mind. The first time Peck heard about the job opportunity was on the 18th from Ernest. Peck credits Ernest and Davis entirely with his recruitment. R. Vol. IV, pp. 674-675, 679 (Peck, 32:16-34:24, 50:1-12).

Sometime later that night, the Twin Falls delivery girl, Chantil Dobbs learns that Dayley, Cristobal and Johnston have decided to resign and go to work for Wesco. She decides to quit as she doesn't want to be the only one left at the store. R. Vol. IV, p. 652-653 (Dobbs, 12:7-14:3)

In Idaho Falls, Hancock tells two other employees, Thompson and McClure (counter help and delivery) about her decision to leave Wesco and go to work for P&S. They decide to quit too, although McClure does not actually quit until a week later when she is back from her vacation.

August 19 (Friday): In Pocatello Mike Cook speaks with Reid, Stairs, and Thomson (counter help and delivery) about his decision to quit and go to work for P&S. They decide to quit. This is the first day any of the other Pocatello employees had heard of P&S opening new stores. Brady Barkdull was not part of this conversation. R. Vol. IV, p. 505 (Reid, 6:8-7:9). On this same day Cook finds a resignation form on the internet, and mentions it to other employees, who decide to use the same form, rather than write their own. R. Vol. VII, par. 11. Jenny Hancock drafted her own resignation letter and at least one of the other employees decided to use the same letter. From all three stores resignations are sent by facsimile to Wesco between 4:00 p.m. and 5:00 p.m., which is between 3:00 and 4:00 p.m. in Washington. This is the same manner in which the employees had been informed, on July 29, around 5:00 p.m., that the stores had been bought.

August 19-29: The employees start work at P&S at varying times between 7:00 p.m. on Friday, August 19 and Monday August 29. The employees went to work for P&S at the same pay rate they had been receiving at Wesco. R. Vol. III, p. 492 (Hancock, 7:7-15).

August 22 (Monday): The new P&S stores opened for business in Twin Falls and Pocatello. The Idaho Falls store is not opened until some time later. The salesmen, along with Ernest and Davis, and other employees from Utah, begin contacting customers and delivering letters. R. Vol. V, p. 903-904 (Hansen Affidavit, par. 7-9.)

By Monday August 22 Wesco has organized a response to P&S's new stores and uses a sales force of Wesco employees and factory representatives to begin making calls on all of the autobody paint shops in Eastern Idaho. They contact virtually all customers by Wednesday, August 25. R. Vol. VII, p. 1237 (Evans, 63:5-64:4).

II. Additional Issues Presented on Appeal

5. Whether the District Court erred by failing to grant the Defendant's Renewed Motion for Summary Judgment, granting a full and final judgment dismissing the entire case.

III. Standard of Review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IRCP 56(c). *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000).

Although the initial burden of establishing the absence of a genuine issue of material fact rests with the moving party, once that burden has been met, the burden shifts to the non-moving party to come forward with sufficient evidence to create a genuine issue of fact. *Smith v. Meridian Joint School District #2*, 128 Idaho 714, 918 P.2d 583 (1996); *Tingley v. Harrison*, 125 Idaho 86, 867 P.2d 960 (1994). Importantly, the non-moving party may not simply rest upon the mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue of fact to be resolved at trial. IRCP 56(e), *Baxter v. Craney*, 135 Idaho at 170; *Smith v. Meridian Joint School District #2*, 128 Idaho at 719. If there is an absence of evidence on a dispositive issue for which the nonmoving party bears the burden of proof, that party must "go beyond the pleadings and by ... affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment

is mandated against the nonmoving party who thereafter fails to present sufficient evidence to establish a genuine issue of fact for trial. *Id.* at 322, 324-25.

Further, a non-moving party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is not enough to create a genuine issue of fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App.1986). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50 (citations omitted).

IV. Argument

A. Introduction

Wesco begins its argument at page 13 of Appellant's Brief by stating that "had the Wesco employees simply decided to quit of their own accord, Wesco would have no complaint." Wesco continues, "Had Ernest, Davis, and P&S directly recruited Wesco employees and persuaded them, through higher pay, promotions, or other inducements, to quit Wesco and become P&S employees, Wesco would have no Complaint." This is a fair assessment of the law. More importantly, it is also a fair assessment of the facts: (1) The employees did decide to quit of their own accord, each for his or her own reasons; and (2) Ernest and Davis, on behalf of P&S, did all of the recruiting of Wesco's key employees (managers and sales people) without any help from Barkdull. In deed, Ernest and Davis successfully recruited the key employees, not because of offering higher pay, or promotions, but because of having already having earned the key employee's trust through APW, especially when compared to the distrust created by Wesco in the three weeks the employees worked for Wesco.

The main factual issue in the case is found within Wesco's next statement: "The central fact is that Barkdull, at the behest of Ernest, Davis, and P&S, solicited all of Wesco's Idaho managers and nearly its entire workforce to abruptly quit *en masse* and join P&S in direct competition with Wesco." This bold statement is exactly the required fact that is entirely absent from the record, and it is this absence that justifies this court granting full summary judgment against Wesco. There is no evidence whatsoever that Barkdull solicited even a single employee to quit and work for P&S. Rather, there is an abundance of positive evidence as to how each employee was recruited. There is no question that the recruitment of the managers and sales people was done entirely by Ernest and Davis on behalf of P&S and there is no serious legal dispute as to the right of Ernest, Davis, and P&S to recruit Wesco's employees.

B. General Statement of Facts

Ernest and Davis are the owners of Automotive Paint Warehouse ("APW"), which has wholesaled automotive paint and supplies to retail stores in Utah and Idaho for many years. Specifically, relevant to this case, APW was the primary wholesale supplier for three retail paint stores in Twin Falls, Pocatello, and Idaho Falls.

Wesco purchased the three stores from their prior owner and took control of the stores on July 28, 2005. The employees of the stores learned their stores had been purchased by Wesco when they received a fax from Wesco's headquarters on a Friday morning informing them that they now worked for Wesco. Some of them were ordered to report for duty on Saturday, the next day, for a mandatary all day inventory. R. Vol. IV, p. 602 (Johnston, 11:13).

Wesco is a Washington corporation which owns not only retail stores, but also owns the wholesale supply line to those stores, throughout the Northwest. Wesco's expansion into the Idaho market was accomplished by buying out the three Eastern Idaho stores. Because Wesco's business model is to own both the wholesale and retail supply chain in any area where it competes, Wesco immediately began supplying its new Idaho stores out of Washington, terminating APW's sales to the three stores in Eastern Idaho and taking a serious bite out of APW's revenues and its market territory. R. Vol. III, p. 457 (Ernest, 17:4-15).

Rather than accept the loss of the Eastern Idaho market to Wesco, Ernest and Davis decided to use their existing Idaho corporation, Paint & Spray Supply (P&S), which had been operating retail stores in the Boise area for many years, to open new P&S stores in Twin Falls, Pocatello and Idaho Falls. Ernest and Davis knew the Eastern Idaho market well, and were acquainted with the employees of the three stores Wesco had just purchased. They also knew most of the owners of the autobody shops which are the customers of the stores. Because Ernest and Davis had a long term relationship with both the employees and the customers, they were willing to invest in the new stores, hoping to keep the Eastern Idaho market for APW, rather than see the market area go entirely to Wesco. They correctly perceived that Wesco, as the new comer in the area, may not be as well prepared as it needed to be, if it hoped to capture the Idaho market.

Ernest and Davis moved quickly, realizing that Wesco would only become more entrenched with the passage of time. They opened their new stores on August 22, only 3 weeks after Wesco's move into the area. Part of their strategy was to approach the key employees of Wesco's new stores and offer them jobs. Ernest and Davis met with each of the managers and salesmen on August 17

and 18 (Wednesday and Thursday) and offered them jobs to start immediately. Most of the employees resigned from Wesco on August 19 (Friday) and the new P&S stores opened for business on August 22 (Monday).

A key fact in this case is that it was not "over zealous recruiting" that motivated the employees to leave Wesco; rather, it was Wesco itself. It is well established that some of the employees were concerned about being bought by an out of state corporation. For instance, the Twin Falls employees had been notified of Wesco's purchase of the stores when they came to work one morning and found a fax informing them they had been bought. The fax informed them that they were to cancel their plans and show up for work on Saturday to perform an inventory. R. Vol. IV, p. 639 (Johnston, 11:11-12:13); R. Vol. IV, p. 605 (Peck, 21:2-22); R. Vol. VI, p. 615 (Cristobal, 20:12-17). Others were concerned about the treatment they were receiving from Wesco's managers. Several mentioned trouble getting through with phone calls to Wesco's main office and concern about communication with the new company. R. Vol. IV, p. 602 (Johnston, 12:6-25). Some employees were concerned about Wesco's ability to provide inventory for their customers on a timely basis and that Wesco's support was lacking compared to what they had been used to with APW. R. Vo. III, p. 597 (Hancock, 40:10-23). All of this caused the employees to fear for the stability of their careers. Some wondered if lay offs were eminent or if they would be fired to make room for out of state replacements. R. Vol. IV, p. 657, (Dayley, 19:21-26:22). Finally, Wesco required each employee to sign an "Acknowledgment" form which informed them that the were "at-will," meaning that "either party to the relationship can terminate the employment with or without notice with or without cause." R. Vol. III, p. 519. Many of the employees were nervous when they

learned that they could be fired at any time at Wesco's whim. When Wesco's tactics in taking over the Idaho stores is balanced against the stability promised by Ernest and Davis, it becomes clear that the employees were acting in their own self interest, not out of a malicious intent to put Wesco out of business.

The point is that the employees each made a personal decision to work where they felt most secure. This included a desire to work for Ernest and Davis, to be supplied by APW, and to be part of P&S' new stores. None of the employees expressed any hatred or serious resentment toward Wesco (until Wesco sued them.) R. Vol. IV, p. 682 (Peck, 68:24); p. 664-665 (Dayley, 46:10-47:5, 49:8-19); p. 613-614 (Cristobal, 12:18-15:7); p. 640 (Johnston, 14:1-15:18).

The employees were not offered exorbitant compensation packages. They were promised that their compensation would not decrease and that they would retain the same job title. It is true that Ernest realized his new stores would benefit from hiring the good people that he already knew and had been dealing with for up to twenty years. He set out to see if he could hire some of them and create a new opportunity that was better for himself and for them. To his surprise he ended up with almost all of the employees. The fact that most of the employees made a decision to work for P&S does not make their conduct illegal. These were at-will employees, they were not bound by any covenant not to compete, and they had the right to resign and go to work for P&S.

C. Response to Misstatements of the Record Made by Wesco.

It is much simpler when a motion for summary judgment is brought on a set of stipulated facts, with the court only needing to correctly apply the law to the undisputed facts. This is not such a case. Here it seems the parties generally agree on the law, but differ sharply on what facts are

supported by the record, and specifically on what reasonable inferences can be drawn from the evidence and testimony presented below. The respondents became concerned while reviewing Wesco's brief that some of the statements made in Wesco's brief are not supported by the record. Respondents are quite aware that Wesco, as the party opposing summary judgment, is entitled to every reasonable inference; however, those inferences must be based on the record. Following is a list of Wesco's factual claims which are not reasonably inferred from the record:

"Ernest and Davis boasted to Wesco Vice President Roger Howe that if they could not work out a deal to purchase the Idaho Stores from Paint & Equipment, they would take Paint & Equipment's employees." (Appellant's Brief, p. 6.) Reviewing the cited record makes it clear that Wesco's use of the word "boasted" is an inappropriate characterization. The quoted misstatement ignores the purpose of this meeting, which was Wesco coming to Ernest and Davis and offering to buy out APW and P&S from Ernest and Davis. The response from Ernest and Davis was that they were well established in Idaho and were well equipped to compete in Idaho because, through APW, they knew both the customers and existing employees better than an outsider, such as Wesco. This was proven to be more of a fair warning than a boast. Ernest's statements, however characterized, are irrelevant, of course, because there is no serious question that Ernest and Davis, on behalf of P&S, had the perfect right to compete for the customers and to attempt to recruit at-will employees from their competitors.

"At the time of Wesco's purchase of the Idaho Stores, Barkdull was Paint & Equipment's regional manager . . . Barkdull thus had supervisory responsibility over the Idaho Stores with the managers of those stores reporting to him." (Appellant's Brief, p. 7.) The record is clear that Mr.

Barkdull was not a "regional manager," he was "sales manager." R. Vol III, 578 (Affidavit of Barkdull, par. 2.); R. Vol. III, 468 (31:16). As sales manager he had no direct authority over the store managers or over the other employees; his responsibility was with sales. Likewise, the record does not support the misstatement that the managers of the stores reported to Barkdull. The misstatement illustrates Wesco's attempts to overstate Brady Barkdull's significance in the case, which is a key element of Wesco's appeal.

"Barkdull's brother, defendant Hugh Barkdull, headed outside sales for the Idaho Stores at the time Wesco purchased the Idaho Stores. His job duties included making shop and sales calls to all of the body shops in the area." (Appellant's Brief, p. 7.) At the relevant time in this case, Hugh was the outside salesmen for the Pocatello Store only, not for all of the stores. R. Vol. III, 481 (10:9, 20-22). The record cited is clear that Hugh Barkdull was an outside sales manager years earlier when he worked for Brady Industrial Supply, an unrelated company. Just as with Brady, Wesco is misrepresenting the record to make it appear that Hugh was more significant than he was.

"Over the next few days, Ernest and Davis, on behalf of APW/P&S, formulated a plan to steal as many of Wesco's employees in the Eastern Idaho market as possible and recruited Barkdull as an ally." (Appellant's Brief, p. 8. repeated at p. 29.) To support this statement Wesco cites to R. Vol. III, pp. 460-62, which is a portion of the Davis deposition. A review of that testimony reveals that there is no evidence there that Ernest and Davis "recruited Barkdull as an ally" and that the cited testimony does not support, or even give rise to an inference, that Barkdull was recruited to help "steal" the other employees. The cited portion of the deposition actually makes it clear that the opposite is true: Barkdull would not commit to Ernest/Davis and wanted to wait and see what

other employees would do. That is the only citation to the record Wesco uses to establish that Barkdull was sent to recruit other employees, and it fails entirely to support such an inference that would contradict the remainder of the record, which establishes that Ernest and Davis did not recruit Barkdull to help "steal" the other employees, nor did they ask for his assistance in starting up any new stores. R. Vol. III, p. 435 (18:5-15); R. Vol. III, 578 (Affidavit of Barkdull, par. 3-5).

"While Barkdull was still a Wesco employee, Barkdull, Ernest, and Davis worked together to carry out their plan." (Appellant's Brief, p. 8.) There is no citation for this statement, and the citation above it clearly does not establish that Barkdull was in on a plan to hire other employees. The plan was solely that of Ernest and Davis, and it is beyond dispute that the law allow Ernest and Davis to recruit Wesco's employees. The notion that Barkdull was the one doing the recruiting is purely a work of fiction written, and oft repeated, by Wesco's attorneys.

"On August 13, 2005, Barkdull met with Ernest to scout out potential store sites for P&S/APW." (Appellant's Brief, p. 8.) This statement is misleading. The record is clear that Ernest made a job offer to Barkdull while Barkdull was "riding along" with him. R. Vol. III, 439 (22:3-7) It is no secret that Ernest was attempting to recruit Barkdull. The testimony makes it clear that Ernest was talking to Barkdull while Ernest looked for store sites. The record is also clear that Ernest did not request that Barkdull assist him in recruiting other employees and that Barkdull "put the ball in [Ernest's] court to recruit other employees" before Barkdull would commit to the job offer. R. Vol. III, pp. 441-442 (24:21-25:18). As ruled by the lower court, even if Barkdull was helping to find stores for P&S, this should be of no concern as the law is clear that he could have

even been making preparations to open his own store; it should be considered even less of a problem if he was helping someone else prepare to compete. R. Vol. VIII, p. 1462-1463.

"In fact, Barkdull and Ernest delivered a letter to a Wesco customer prior to August 19, 2005, that identified Barkdull as an employee of P&S; the letter was dated August 16, 2005, three days prior to the effective date of Barkdull's subsequent resignation." (Appellant's Brief, p. 8-9.) This statement is a blatant misrepresentation of fact and of the record. It is a misstatement that Wesco has refused to let go of, even in the face of the lower court's finding that it was not supported by the evidence. The record cited by Wesco does not establish the date, but makes it clear instead that the witness, Harris, did not know what day he received the letter. R. Vol. III, p. 532 (17:1-3). Wesco also chooses to ignore evidence obtained after the summary judgment ruling, which now makes it even more clear and undisputed that this letter was not delivered until August 22, after Barkdull resigned. We now have the affidavit of Cory Hansen, the author of the letter, explaining the August 16 date on the letter, and making it clear that the letter was not delivered to anyone until after Brady had resigned from Wesco. R. Vol. V, pp. 903-904.

"Shortly after scouting locations, Barkdull, Ernest, and Davis then began recruiting Wesco's employees. They started with the managers." (Appellant's Brief, p. 9.) This statement would be true if it did not include Barkdull. Ernest and Davis did <u>all</u> of the recruiting. Barkdull was <u>not</u> involved. There is nothing in the record to raise even an issue of fact as to Barkdull taking part in the recruiting. It is not just an absence of evidence: the record overwhelming establishes that it was Ernest and Davis who recruited each of the key employees. Each employee has been deposed and there is no evidence that Barkdull made any offers to any of them. Wesco attempts to raise an

implication that Barkdull helped recruit Jenny Hancock (Idaho Falls manager) merely because Ernest took both Hancock and Barkdull to dinner at the same time. Hancock makes it clear that it was Ernest, not Barkdull, who recruited her, and that her motives had to do with working for P&S' new stores, not as a result of pressure from Barkdull. R. Vol. VII, p. 1361 (37:5-18). Ernest also clearly did the recruiting of the Twin Falls key employees when he took the store manager and two sales people (Dave Cristobal, Joel Johnston, and Travis Dayley) out to dinner and offered them jobs. R. Vol. IV, pp. 614 (16: 5-17:25). Brady Barkdull was not present. The Twin Falls key employees testified that they did not discuss their decision with Barkdull until after they had made up their minds to quit. R. Vol. IV. pp. 615 (18:11-13). The employees did speak with each other, and their was a general feeling that if others quit, they would also quit. R. Vol. IV. pp. 615 (18:24-19:6). While in Twin Falls, Ernest and Davis also met with Jeffrey Peck, outside sales, and offered him a job. Peck told Ernest and Davis he wanted to sleep on it, but called Ernest the next morning at 7:30 a.m. and accepted the offer. Brady Barkdull was not present. Peck did not discuss his decision with Barkdull until after he had made up his mind to quit. R. Vol. IV, pp. 674-675 (Peck, 32:16-34:24). Peck affirms that while Ernest and Davis did disclose that they were making offers to other employees, they did not disclose whether any of the other employees had accepted their offers. R. Vol. IV, pp. 676 (Peck, 39:17-41:4).

"On August 17, 2005, Howe and Wesco employee Mark Mortensen met in Pocatello to discuss rumors that employees would be leaving en masse and starting work for a competitor. Barkdull, Hugh Barkdull, and Cook attended the meeting. All three lied to Wesco (Howe and Mortensen) and assured them there no substance to the rumors." (Appellant's Brief, p. 9.) The

cited record does not need to be read carefully to see that this is a misrepresentation of the testimony. There was no discussion of employees leaving *en mass*–the discussion was whether Brady Barkdull was going to open his own store in Pocatello. He told Mortensen he was not going to. He did not lie and there is no evidence of a lie. The same testimony also makes it clear that Cook and Hugh Barkdull had not yet been given job offers. They did not lie. R. Vol. V., p. 873-874, par. 4-5. Accusing the Barkdulls and Cook of lying at this meeting is another distortion of the facts; the accusation is not based on a reasonable inference from the evidence, and does not constitute a genuine issue of material fact.

"Barkdull discussed with Peck and Dayley their resignations." (Appellant's Brief, p. 9-10.) This is not so much a misrepresentation of the evidence as it is a blatant out of context statement which omits the crucial fact: The discussions between Barkdull and Peck and Dayley took place after Ernest and Davis had made job offers to Peck and Dayley. R. Vol. III, p. 472 (Barkdull, 79:10-15, 80:16-24). Both Peck and Dayley testified that Barkdull did not speak with them about a job offer and that they had already made up their minds before discussing their decisions with Barkdull. R. Vol. IV, p. 660 (Dayley, 27:25-28, 28:24-29, 32:11-17; R. Vol. IV, p. 659-661; and R. Vol. IV, pp. 674-675, 679 (Peck, 32:16-34:24, 50:1-12).

"With their departure from Wesco, the employees stole Wesco proprietary customer information, computers, paint chip books, files, and Rolodexes." (Appellant's Brief, p. 11.) Examining the record for support for this broad statement makes it clear why the lower court rejected the broad statement and found instead that the only things taken were a "paint book" (essentially a free catalogue supplied by a paint manufacturer), and a few business cards (which Johnston felt were

his own property). These items were taken by two of the employees who Wesco dismissed from the case, making these minor events wholly irrelevant.[3]

"Prior to resigning, the defendant employees faxed from the Idaho Stores information about their new businesses and their locations." (Appellant's Brief, p. 12.) This is one of the most blatant misrepresentations in the record, as proven by the very document Wesco refers the court to. R. Vol. III, p. 426. This document was faxed on August 22, three days after the employees resigned. The other two pages Wesco refers the court to are R. Vol. III, p. 574 and 575, which are not dated, but lack any evidence whatsoever that they were mailed from a Wesco store, or that they were sent before August 22. Thus, the record is undisputed that the letter was faxed on August 22, three days after the resignation. This is similar to the red herring Wesco puts forth in conjunction with Wes Harris, an owner of a body shop in Preston, testifying that he was not able to recall the exact date he received a similar document. The lower court ruled that a lack of recollection cannot be used to raise an issue of fact as to whether the employees began recruiting customers for P&S before they resigned from Wesco. Now, with evidence not available at the time Judge Smith made his ruling, we know from the Affidavit of Cory Hansen that no documents were sent to customers until the new stores opened on August 22. R. Vol. V, pp. 903-904.[4] The bottom line is that there is no evidence that the

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[3]Note that it was Craig Rossum who made these broad accusations, but he did not even work at the stores at the time of the resignation in August 2005, and he had only worked in Idaho Falls. R. Vol. III, p. 514 (Rossum, 93:14-19). Mr. Rossum's broad accusations are not corroborated by any witnesses with actual knowledge or who would actually know if anything was taken.

[4]That the flyers and letters were delivered after August 22 is also made clear by the testimony of Marty Evans, who assisted Wesco between August 22 and 24 in contacting

employees contacted a single customer about their decision to quit prior to their resignation from Wesco.

D. Undisputed Facts Justifying Summary Judgment

Thus, we are left with the following undisputed facts:

1. All of the employees who quit Wesco were at-will employees.
2. None of the employees were bound by non-compete agreements.
3. All eight of the "key" employees[5] who quit their jobs at Wesco, including managers and sales people, were directly recruited by Ernest and Davis.
4. Barkdull did not recruit, or make a job offer, to any other employee, including both "key" and "non-key,"[6] employees.
5. Ernest and Davis did not ask Barkdull to recruit any other employees.
6. Ernest and Davis did not ask any of Wesco's "key" employees to recruit "non-key employees."[7]

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customers and kept running into the P&S people who were also busy contacting customers during the first few days that the P&S stores had opened. R. Vol. VII, p. 1237 (Evans, 63:5-64:4).

[5]These eight "key employees" include Brady Barkdull (outside sales manager), Hugh Barkdull (outside sales in Pocatello), Mike Cook (store manager in Pocatello), Jenny Hancock (store manager in Idaho Falls), Travis (store manager in Twin Falls), Jeffrey Peck (outside sales in Twin Falls), Joel Johnston, (counter in Twin Falls), David Cristobal (counter in Twin Falls).

[6]The five "non-key" employees included Chantil Dobbs (delivery in Twin Falls), Shelby Thomson and Kelly McClure (counter-worker and delivery in Idaho Falls), Jodee Reed and Tiffany Thomsen (counter-worker and delivery in Pocatello).

[7]Each employee who quit Wesco had their own reasons for making the switch to P&S, (and have testified about those reasons in detail). In recounting their reasons for switching to

7. Of the "key" employees who discussed quitting with "non-key employees," only Cook is still a defendant. (Wesco voluntarily dismissed the others from the suit.)

8. None of the employees spoke to customers, or sent documents to customers, about the new P&S stores until after the employees had quit their jobs at Wesco.

9. None of the employees who quit became owners in the new P&S stores; the employees all took essentially the same job, at the same pay.

10. Although Wesco remains suspicion that Cook erased some files off his computer, there is no evidence that Wesco suffered any damage at all from Cook's decision to clean up his computer before he left. All of Wesco's important data was stored on a central computer in Washington, not on Cook's computer.

E. The Law is clear that all allegations against Ernest, Davis, APW and P&S were properly dismissed on summary judgment because they had the right to compete for Wesco's customers and employees and did so in a manner that strictly followed the law.

The lower court correctly ruled that it was not illegal for Ernest, Davis, P&S and APW[8] to open the three new stores; that it was legal for these four defendants to recruit Wesco's employees; and that it was perfectly legal for these defendants to compete for Wesco's customers. Thus, all causes of action against these four defendants were dismissed. The basis for their dismissal is obvious: their conduct in recruiting employees, opening new retail stores and competing to supply

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P&S, none of the employees attributed their decision to Barkdull. A few were disgruntled with Wesco, but most made the switch because they knew and trusted Ernest, Davis, P&S and APW in general. A few of the "non-key" employees quit only to avoid being left behind.

[8]Since APW did not own the three new stores, it is difficult to imagine why Wesco brought suit against APW.

automotive paint and equipment to the Eastern Idaho market is well within the law, and within the policy of the State of Idaho:

> (1) The Idaho legislature finds that fair competition is fundamental to the free market system. The unrestrained interaction of competitive forces will yield the best allocation of Idaho's economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.
>
> (2) The purpose of this chapter is to maintain and promote economic competition in Idaho commerce, to provide the benefits of that competition to consumers and businesses in the state, and to establish efficient and economical procedures to accomplish these purposes and policies.

Idaho Code § 48-102. The three new P&S stores definitely increased competition, which was good for the employees, as well as for the consumers. Wages are up, prices are down and everyone is happy, except Wesco.

In order to find liability against Ernest, Davis, P&S and APW, Wesco asks this court to create new law. That new law would prohibit a company from recruiting at-will employees of other companies. In deed, this new law would create a presumption of an "an improper purpose" and would make it so that successful competition is proof that "wrongful means" had been used. It would be a terrible law, and would contradict the economic policy of the state.

Wesco attempts to use allegations of "interference with contract" to get at its competitors, Ernest, Davis, P&S and APW, and points out that even at-will employees have a contractual relationship–albeit an "at-will" contractual relationship that could be interfered with. Such a rule contradicts the very law cited by Wesco: that to be actionable, offering a job to a competitor's employee must be "wrongful by some measure beyond the fact of interference itself." The rule

could not be more plain, and the facts could not be more plain. Ernest and Davis offered jobs to each of Wesco's key employees. They did so to get them to quit Wesco and come to work for them. The lower court's statement of the law was right, such conduct is legal and is a valid and important aspect of our economy. The lower court was right to dismiss the allegations against Ernest, Davis, P&S and APW.

F. There is no evidence that Brady Barkdull, Hugh Barkdull and Mike Cook were retained to recruit other employees.

Wesco seems to correctly perceive the impossibility of convincing this court that Ernest, Davis, APW and P&S did not have the right to compete. Instead, Wesco focuses its attention on Brady Barkdull, and to a lesser extent his brother Hugh and Mike Cook, attempting to cast these employees as the true bad actors in its loss of its employees. Wesco asks to court to believe that it was really Brady Barkdull who did the recruiting and that he was "aided and abetted" by Ernest and Davis. Thus, Wesco attempts to focus the court's attention on whether Wesco's new employees more or less recruited each other, hoping the court will look past the glaringly obvious missing fact, which is the absence of a motive. None of the employees who quit Wesco became owners in the new stores. Instead their motives are clearly stated in the record: dissatisfaction with being bought out by Wesco; a trusting relationship with Ernest and Davis; and a fear of being left behind.

The real questions on appeal are: Where is the evidence that the Barkdulls or Mike Cook were the guilty parties? Where is the evidence that Ernest and Davis asked the Barkdulls or Cook to recruit other employees? Where is the evidence that any key employees were recruited by anyone

other than Ernest and Davis? Without being able to supply this evidence, Wesco has no justification for its conspiracy theory.

G. Idaho law allows employees to quit their jobs and go to work for competitors or to start their own competing businesses.

Wesco claims P&S should be held liable for Wesco's employees conduct pursuant to a rule of law supposedly found in *Alexander & Alexander Benefits Serv., Inc. v Benefits Brokers Consultants, Inc.*, 756 F. Supp 1408 (D. Or. 1991). There are several problems with plaintiff's reliance on *Alexander.* First, *Alexander* is not an Idaho case and does not represent Idaho law. Second, *Alexander* relied on a comment in Restatement (2nd) of Agency § 393, comment (e), to lend support to a ruling that went against strong legal precedent establishing an employee's right to make preparations to compete. Third, *Alexander* is factually different because in *Alexander* it was a former employee who was setting up the competing business; whereas in our situation the employees had no ownership in the new stores. Fourth, there is zero evidence that Ernest and Davis "encouraged" or "participated" any alleged improper conduct by the employees. Wesco has supplied no evidence that Ernest and Davis told the employees when or how to write their letters of resignation, or that Ernest and Davis sent prospective employees back to recruit other employees.

Wesco asks this court to focus on comment (e) from the Restatement (2nd) of Agency § 393, claiming that the comment "clearly" makes it a breach of duty for an employee to solicit the "best" employees. The Restatement comment does not "clearly" say this at all. It says:

> *e. Preparation for competition after termination of agency.* After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See § 396. Even before the termination of the agency, he is entitled to make arrangements to compete,

> except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.
>
> The limits of proper conduct with reference to securing the services of fellow employees are not well marked. An employee is subject to liability if, before or after leaving the employment, he causes fellow employees to break their contracts with the employer. On the other hand, it is normally permissible for employees of a firm, or for some of its partners, to agree among themselves, while still employed, that they will engage in competition with the firm at the end of the period specified in their employment contracts.... [Underlining not in original.]

Further, it seems there are two facts presumed in comment e that do not exist in the Wesco case. One is that the person soliciting his fellow employees is the one also setting up the competing business. This crucial fact is missing: none of the employees had an ownership or other interest in the new stores and none of them were promised bonuses for hiring other employees, a key element present in every case where employees were found liable for recruiting. Wesco is asking the court to stretch comment (e) into a "clear" rule prohibiting employees from speaking with each other about their plans to quit or seek other employment–a rule that would directly contravene the remaining language in the comment–that it is "normally permissible for employees . . . to agree among themselves . . . that they will engage in competition." These employees were simply choosing to change jobs, at basically the same pay rate and level. They had no motive do to anything but try to switch to an employer they felt more comfortable with. There is no rule making it illegal to tell other employees of a plan to switch jobs.

More recently, in Restatement (3rd) Of Agency § 8.04 (2006) we find the following Reporters Note, explaining a change between the 2nd and 3rd Restatement that backs away from the controversial parts of comment e:

> *a. Relationship to Restatement Second, Agency.* This section is the counterpart of Restatement Second, Agency §§ 393 , 394, and 396(a). Although § 394 is formulated more broadly, requiring that an agent refrain from acting or agreeing to act "during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed," the specific situations discussed in the section involve action taken on behalf of a principal's competitors. The formulation in this Restatement does not encompass an agent's agreement to act on behalf of or to assist a competitor. This is because such a formulation appears to contravene the well-settled right of employees and other agents to make preparations to compete. See Restatement Second, Agency § 393 , Comment, which recognizes that "[e]ven before the termination of the agency," the agent "is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein." Comment *e* continues, "[t]hus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete." This Restatement does not endorse Comment e's categorical assertion that an agent's ownership of a competing business would not breach the agent's duties to the principal.

Restatement (3rd) Of Agency § 8.04 (2006), Reporter's Note (a). Despite the fact that the purpose of the Restatement rule is to solidify an employee's right to quit and find better employment, or to start his own competing business (not an issue in our case), Wesco asks the court to single out a solitary comment in a note, and even claims this comment makes the law "clear" in its favor. What is clear is that employees do have the right to quit their jobs and take better jobs. The fact that this decision is made as part of a group cannot make it wrong. How can the law tell an at-will employee, he has the right to quit without notice or reason, but if more than one of the employee tries to quit at the same time, they're in big trouble? That is not the law. Keep in mind that, under the at-will relationship Wesco had with these employees, Wesco could close its stores and fire all employees

at any time without notice or reason, and it would not have broken any law. Why does Wesco think the at-will doctrine should only work it its favor?

Wesco cites to *R Homes Corp. v. Herr*, 142 Idaho 87 123 P.3d 720 (Idaho App. 2005), which is actually a case in the defendants' favor, wherein the court reaffirmed the same lower court's decision granting summary judgment against an employer who sued its former employee for starting a new company and hiring away many of the former employer's best people. The evidence in this case is even more clear: Each employee has testified about being recruited by Ernest and Davis, not by Barkdull.

Without having much luck finding Idaho cases to support its claims, Wesco turns to cases from other states. In one case, *Gresham & Associates., Inc. v. Strianese*, 595 S.E.2d 82 (GA. Ct. App. 2004), the court describes the facts that it felt could result in liability. These facts included a defendant who specifically met with other employees and gave them job offers, including evidence that he even arranged a loan so one employee could repay a 401(k) loan before quitting. *Gresham,* at 85. There is one very big difference between the facts in *Gresham* and Wesco's facts. In Gresham the court could cite to facts in the records that raised a genuine issue of material fact. Wesco cannot point to any such facts. It attempts to cast Barkdull in the same light as the defendant in*Gresham*, but fails to acknowledge that it was not Barkdull who made the job offers and, further, that there is no evidence that Barkdull recruited the other employees.

Throughout its briefing, Wesco speaks often of the at-will employees having duties of "absolute fidelity" and of a "high fiduciary duty;" however, no law is cited that requires an at-will employee to give notice of his intention to quit his job, or prohibits an employee from discussing his

plans to quit a job or to accept other employment. Likewise, there is no Idaho case requiring that an at will employee warn his employer of his intention to quit, or to "rat out" other employees who are thinking about taking another job, which are the two things Wesco claims Barkdull and Cook should have done, despite their at-will status. In support of its claim that at-will employees have a duty of "absolute fidelity," Wesco relies on *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho, 409, 412, 797 P.2d 117, 120 (1990). A careful review of *R.G. Nelson* (by simply searching the case for the phrase "absolute fidelity") shows that the phrase does not appear anywhere. *R.G. Nelson* does not use that phrase. In fact , *R.G. Nelson* does not even deal with at-will employees, but with an architect's duty to his client. *R.G. Nelson* does not support Wesco's case.

In order to prevail in this case Wesco needs the court to agree to two rules of law that do not exist: (1) That employees do not have the right to discuss with one another a decision to quit and go to work for a different employer; and (2) if more than a few at-will employees quit at the same time (the *en masse* resignation), they have broken a law or been actionably disloyal. Neither of these propositions represent the law in Idaho.

Jenny Hancock, the Idaho Falls manager, best described the conflict she felt in making her decision to quit. She describes trying to decide whether to give the customary two weeks notice, or just to quit. She saw the dilemma. If she quits immediately she leaves Wesco with a problem of replacing her. If she stays for two weeks, she will be accused of soliciting other employees and customers, a problem many modern employers deal with by immediately terminating any employee who gives notice of an intent to quit. She chose to quit immediately. She should not be liable for her decision.

H. There is no evidence to support Wesco's accusations of a Civil Conspiracy between the Defendants.

In a desperate attempt to prove something illegal about Ernest/Davis/P&S's successful recruitment of their former employees, Wesco makes broad allegations based on the simple fact of a lunch meeting between Ernest and Davis and Barkdull. Even though it is known what happened at that meeting, Barkdull was given a job offer which he declined to decide on immediately. He wanted to see what other employees were going to do first. Ignoring this evidence, Wesco asks this court to speculate that they had a far more dark and sinister purpose. Wesco presumes, with no evidence, that all of the testimony about the meeting is a lie and that this was really Barkdull and Ernest and Davis formulating an evil plan to put Wesco out of business in Eastern Idaho. The best Wesco can come up with is an accusation that Ernest and Davis invited Barkdull to be an "ally" in a conspiracy to open new stores and to recruit Wesco's employees. Because Ernest and Davis were successful, the court is asked to speculate that Barkdull was helping with the recruiting. This speculation is requested despite the uncontroverted testimony of each and every employee describing why they chose to work for P&S, without a single employee mentioning Barkdull as a causative factor.

Wesco cites the conspiracy rule, but then forgets the rule. A civil conspiracy must be illegal in some way other than the conspiracy itself. Yet we know that it is appropriate for one business to solicit its competitor's at-will employees, thus what Ernest and Davis did cannot be considered to be a civil conspiracy, since what they did was legal. If Wesco had a fact it could cite from the record establishing that Barkdull agreed to do something illegal to recruit employees, it might have a case,

but there is no such evidence.

The civil conspiracy claim was properly dismissed, as it was in the *McPherson* case (*McPherson v Maile*, 138 Idaho 391, 64 P.3d 317 (2003), which is cited by Wesco, even though it too resulted in the civil conspiracy claim being tossed out on summary judgment.

I. The fact that Wesco paid for "good will" does not mean it is entitled to a protected monopoly, or that it is entitled to have its employees become indentured servants.

On a final note, Wesco makes much of its purchase of, and payment for, good will. The question is, was Wesco victimized by unlawful competition, or was it victimized by its own failure to properly evaluate the market and realize the weak position it would be in if Ernest and Davis, who already had their own extensive good will in the area, refused to accept APW's losses and chose to open new retail stores. Wesco appears to have paid far too much for the good will of a former owner who did not actually have the good will to sell. Much of the good will in the Eastern Idaho market already belonged to APW, Ernest, Davis and P&S. Wesco also claims it paid for employee loyalty, without realizing that employee loyalty cannot be purchased, but must be earned. Wesco also paid for customer loyalty, without realizing that customers prefer to have competition from multiple sellers. Wesco's good will payment bought it only the right to be free from the former owner's competition; Wesco could never purchase the right to enjoy a monopoly or to be free from competition for its employees.

J. Conclusion.

The biggest flaw in Wesco's argument is in the way it puts the cart before the horse. In its anxiousness to prove an actionable case, Wesco attempts to re-characterize the case to make

Barkdull the main character. At one point Wesco goes so far as to claim that Ernest and Davis "aided and abetted" Barkdull in hiring away Wesco's employees. Completely forgetting that it was not Barkdull who was starting a new business, that Barkdull had no motive to recruit anyone, and that not a single employee claims to have been recruited by Barkdull. In Wesco's fictionalized version of the facts, we have Barkdull starting a new business "aided and abetted" by Ernest and Davis. Wesco really needs to prove that Barkdull was asked to help Ernest and Davis, and that Barkdull recruited the other employees for Ernest and Davis. There is no evidence of this. None whatsoever. Wesco repeatedly refers to a "concocted scheme," a "conspiracy," a "secret plan" between Barkdull and Ernest and Davis. Wesco never cites any evidence for this. Lacking any such evidence, Wesco attempts the old trial tactic of repetition, repetition, repetition–believing that if it makes the same false claim often enough, the court will start believing the fiction and not bother to look at the actual evidence in the record.

Cross Appeal

I. The defendant's/respondent's should prevail on their cross-appeal and be granted a complete summary judgment on all allegations because Wesco cannot prove a breach of duty and, additionally, cannot prove any damages caused by any alleged misconduct.

Most of the defendants are already dismissed from this case, either by the court below or by Wesco's voluntary dismissal of the employees. All that remain are Brady Barkdull, Hugh Barkdull and Cook, and possibly P&S in some limited manner for accepting the benefit of anything unlawful that was done. Based on a far more complete record than Judge Smith had when he granted the first

summary judgment opinion in this matter, it is evident that a complete and full summary judgment is warranted on behalf of the remaining defendants.

The lower court cited Restatement 2nd of Agency § 393[9] in its analysis. As discussed above, in 2006, at about the time Judge Smith was writing his decision, the Restatement 3rd of Agency was being published. It replaces § 393 with:

> § 8.04. Competition. Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship. [Emphasis supplied.]

The underlined sentence is new, although the rule about preparing to compete was clearly stated in the notes of the old version. Both legally and factually, the Barkdulls and Cook did not violate the rule as stated in either the 2nd or the 3rd Restatement.

A. Counts I and II (breach of employee duty of loyalty) should be dismissed against the Barkdulls and Cook because there is no evidence that either of them breached their duties.

1. Neither of the Barkdulls recruited any other employees. All key employees were recruited directly by P&S and all non-key employees learned about the jobs from other employees, not from the Barkdulls.

There is no evidence to refute Brady's testimony that he was not asked to recruit other employees, that he did not talk to other employees about resigning until after they had made their decisions to quit, and that he himself was being recruited by Ernest and did not make up his mind

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[9]The Restatement 2nd of Agency § 393 stated simply: "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency."

for sure until after some of the other employees. R. Vol. III, p. 578.[10] None of the key employees claim that Brady recruited them and there is no evidence that he extended job offers to any of the employees. The evidence overwhelmingly establishes that Barkdull was not involved in recruiting. R. Vol. IV, p. 674 (Peck, 32:16-33:11); R. Vol. IV, p. 612 (Dayley, 49:3-7); R. Vol. IV, p. 642-643 (Johnston, p. 22:8-28:20; R. Vol. IV, p. 613-615 (Cristobal, 13:2-19:19); R. Vol. III, p. 489, (Cook, 51:25-52:21).[11] This evidence is undisputed and, even construed fully in favor of Wesco, cannot be characterized as an effort by Barkdull to recruit employees to work for P& S while he was still an employee of Wesco. He breached no duty of loyalty.

Giving Wesco the benefit of all reasonable inferences, the most that can be said is that, after Davis and Ernest offered jobs to Wesco's key employees, including Brady Barkdull, some of the key employees discussed their decisions with each other and with non-key employees, but this clearly did not involve Brady offering jobs to anyone, or even influencing anyone. Without evidence of any recruiting conduct by Brady, the remaining portions of Counts I and II should be dismissed against him.

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[10]The closest thing Wesco can point to is the fact that Barkdull was present at dinner when Ernest made the offer to Hancock. However, her testimony is very clear that she was given the job offer by Ernest and that her decision to leave was not based on pressure from Brady. Her reasons for quitting do not include any evidence that she was influenced at all by Brady. She had known Ernest for 2 years, as the owner of APW, and her decision was a choice to work for him, rather than Wesco. R. Vol. III, p. 494 (Hancock, 24:7-19). She disagreed with Wesco's attorney's assertion that Barkdull had "greased" the situation. R. Vol. III, p. 497 (Hancock, 37:5-18).

[11]Although Brady had a telephone conversation with Dayley, and possibly other employees on Friday, the day of their resignation, it is clear that the others had already made the decision to resign after being recruited by Ernest and Davis. R. Vol. III, p. 472-473 (Barkdull, 78:7-82:17).

As to Hugh Barkdull, there is no evidence of recruiting whatsoever. It appears that Wesco does not really even take the position that Hugh Barkdull did anything improper, as Wesco fails to discuss him in its brief. Thus, Hugh Barkdull should also be dismissed from the suit.

2. Cook's conduct in mentioning his resignation to fellow employees and in drafting a form letter of resignation that was used by other employees is not actionable and caused no damage.

Cook was recruited by Ernest on Wednesday evening, August 17, 2005. After he made up his mind to resign, he downloaded a resignation form letter from the internet that was copied by other employees in Pocatello and Twin Falls. In light of the rule stated in Restatement 3rd of Agency § 8.04, it is clear that Cook's conduct is not actionable and does not amount to a breach of duty. This is because it is undisputed that the letter was given to other employees only after they had already decided to resign. R. Vol. IV, p. 661 (Dayley, 33:1-15); . R. Vol. III, p. 471 (Barkdull, 76:15); R. Vol. IV, p. 645 (Johnston, 33:6-24); R. Vol. VII, par. 11.. The employees have explained that it was more convenient to use the same resignation letter Mike had found on the internet than for each employee to take the time to write their own letters. There is no evidence that Cook did anything to influence the other employees, or that he was asked to influence other employees. Without such evidence, the remaining portions of Counts I and II should be dismissed against Cook

On Friday, August 19, after he decided to switch employers, Cook announced his plan to quit to the two counter-help people working in the same store. They decided to quit as well. What is completely lacking is any evidence that Cook was told to recruit these employees. This was not the unfolding of a secret scheme; it was an employee deciding to quit his job and then inviting two other workers to do the same thing. This case is nothing like the cases cited by Wesco where an employee

decided to copy his employer's business model and begins making plans months in advance to not only copy the business model, but to take the employees and customers with him, and then this employee continues to work as a "wolf in sheep's clothing" to carry out his plan over a period of weeks or months. Without proof of a "conspiracy" or "evil plan" the court should rule as a matter of law that Cook's conduct is not actionable.

B. Counts I and II against Brady and Cook should also be dismissed because Wesco has no proof of any damage caused by their conduct.

An equally compelling reason for dismissing Counts I and II against Brady and Cook is that there is no evidence that their actions in this regard caused any damage to Wesco. Count I, Interference with Prospective Advantage, is a tort, and proof that damages were proximately caused by negligent conduct is an essential element of every tort, including a tortious interference with contract. *Magic Valley Truck Brokers, Inc. vs. Meyer*, 133 Idaho 110, 982 P.2d 945 (1999). Count II, Breach of Contract/Breach of Duties, is arguably a contract action (Judge Smith held that the duty of loyalty is implied in the unwritten contract between every employer and employee), and the law requires that a plaintiff establish, with "reasonable certainty" a causal link between the breach of contract and the damages claimed.

As unfair as it may seem to a disappointed plaintiff in a business loss case where nothing can be recovered, the rule in Idaho is quite clear that proof of damages must be specifically proven and causation for those damages must be shown. Proof of damages is an element of a law suit and no matter how upset the plaintiff may be that he feels a wrong has been done, if he cannot prove his damages, and that a legal wrong caused the damages, his case has no value. *Dunn v. Ward*, 105 Idaho 354, 357, 670 P.2d 59, 62 (1983). There are numerous cases where a business plaintiff's case

has been dealt a fatal blow for failing to have any proof of damages. For instance, in *Dunn* the court found that there was a clear and admitted violation of a non-compete agreement, but ruled that there was not a specific proof of damage and awarded plaintiff nothing. The supreme court affirmed:

> In this case the trial judge found that Dunn failed to prove the amount of his damages with reasonable certainty. First, he presented no evidence at all showing any loss of business, loss of customers or loss of profit to *his own business* attributable to Ward's breach. In addition, although Dunn presented some proof of Ward's profits, he failed to show any relation between those profits and Dunn's losses. Ward testified as to gross sales to particular customers, but failed to provide any figures to indicate how many prohibited items were sold in each group, or how much profit was included on a "per prohibited item" basis. Because of this lack of proof on the part of Dunn, we hold that the trial court was correct in entering judgment for Ward as to the claimed lost profits.

Dunn, at 358, 63. This is very similar to what Wesco is attempting to do in this case. It wishes to tell the jury that it made $4.5 million less than it hoped for, but gives no explanation of what wrongful conduct caused the losses. *Dunn* makes it clear that this is improper and Wesco cannot prove any damages. A failure to establish a causal link between the alleged facts and the claimed damages is fatal to both a tort and a contract action. *Dunn v. Ward*, 105 Idaho 354, 357, 670 P.2d 59, 62 (1983).

A review of the Idaho cases on damages shows that the law distinguishes between the level of proof required to prove the element of the existence of damages caused by the alleged conduct, which requires "reasonable certainty," and the required proof of the amount of damages caused by the alleged conduct, which requires less certainty.

Obviously the amount of damages caused only becomes an issue if the existence of some damages caused by wrongful conduct has first been proven with "reasonable certainly." Wesco's insistence that it need only prove that the remaining Defendants' conduct was a "substantial factor"

in its losses is skipping over the first element. Wesco must first prove that Defendants' caused some damage with "reasonable certainty," and then must also prove the conduct was a "substantial factor" in the cause of the loss. Wesco fails in both respects. Note that the focus on both issues is on causation; it is not enough to prove damages, if there is no causal link between the damages and wrongful conduct. See *Trilogy Networks Systems, Inc. v. Johnson*, 177 P.3d 1119 (Idaho 2007), where the trial court specifically agreed that there had been a breach of a non-compete clause but then entered a judgment for no money. The Idaho Supreme Court affirmed:

> Trilogy failed to persuade the district court of any correspondence between what its profit would have been and Johnson's actual profit, and thus failed to take the measure of its damages out of the realm of speculation. Therefore, the district court did not err when it declined to award damages.

Trilogy, at 1119. Thus, because plaintiff did not make a specific link between the breach of contract and an item of damages, its case failed.

Magic Valley Truck is exactly on point against Wesco's case. The decline in Wesco's profits could have been caused by, among many other possible causes, the at-will employees resigning, the absence of non-compete agreements, and lawful competition from P&S which was going to occur whether the employees left Wesco or not. Wesco has failed entirely to prove a link between their $4.5 million damage claim and any alleged misconduct. Another case, *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho, 409, 412, 797 P.2d 117, 120 (1990), cited by Wesco on a different point also ruled that, regardless of whether there was a breach of duty, or an inference, if there is no proof of damages there is no valid cause of action: *R.G. Nelson*, 411, 119.

This lack of a causal link can exist either: (1) where there is no proof that the conduct caused any harm, or (2) where there is proof that the loss would have occurred anyway, regardless of the

defendant's conduct. IDJI 2.30.2; Restatement of Torts 2d § 432, 433. Both of these defects exist in Wesco's claim for damages.

For example, in a case where an employee was found to have breached his duty of loyalty to his employer by assisting a competitor that he planned to go to work for, the case was dismissed. Despite clear proof of wrongful conduct, the court dismissed the action because of lack of proof of causation of damages. *Cudahy Co. vs. America Laboratories, Inc.*, 313 F.Supp. 1339, 1349 (D. Neb. 1970).[12] This absence of proof of damages has also been the basis for the dismissal of suits against former employees in other cases, as in *Saks Fifth Avenue, Inc. v. James, LTD.*, 630 S.E.2d 304 (Va. 2006).

While the cases cited above were not decided on summary judgment, the law stated in these cases controls the result here and compels summary judgment because there is no evidence in this case to support the link between losses claimed and actionable conduct. For instance starting in *Trugreen Companies, LLC vs. Scotts Lawn Service*, 508 F.Supp.2d 937 (2007), and continuing in *Trugreen v. Mower*, 2007 WL 1696860 (same case), a suit that is amazingly similar to Wesco's, a Utah court relied on Idaho law to grant summary judgment to the Idaho defendants.[13]

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[12]To show how similar Wesco's case is to *Cudahy*, consider the court's next remark, demonstrating that the court had been dealing with the same type of generalization of damages that Wesco is attempting in this case: "The Court would only further add that plaintiff in its arguments, has made claim that all of these actions on the part of all of the defendants are combined in a calculated plan to steal plaintiff's suppliers and customers. If there is no actionable wrong as to any of the parts of what plaintiff terms a calculated plan the sum of the whole can be no different." *Cudahy*, 1349.

[13]As to the Utah claims in *Trugreen*, the judge certified the issue to the Utah Supreme Court to see if Utah would adopt the same law as Idaho had adopted in the *Dunn* case, which it now has in *Trugreen Companies, LLC. vs. Mower Brother Inc.*, 199 P.3d 929 (2008).

This analysis applies to Wesco's case. Essentially, as in *Saks* and *Trugreen*, it is obvious that Wesco's claimed $4.5 million dollar loss was caused by numerous factors unrelated to the remaining allegations in this case. These other factors, which constitute lawful competition include: (1) the existence of the new P&S stores, (2) the lawful recruitment of key employees by Ernest and Davis, (3) lawful competition from former key employees who were lawfully recruited, (4) the employees were at-will employees, (5) competition from employees who were not bound by non-compete agreements, (6) the goodwill that Ernest and Davis already had in Idaho when they opened the stores, with or without the help of the employees, (7) the lawful resignation of non-key employees who were at-will and who had no contact with the remaining Defendants during the time they made the decision to resign, (8) the resignations of at-will employees who could have quit at any time for any reason, (9) the fact that some damages were caused by Wesco's own poor relationship with its employees, (10) the absence of evidence that any employees who were not directly recruited by Ernest or Davis (the "non-key" employees) had any effect on any customers switching their business, (11) the fact that some of Wesco's alleged losses may have been caused by employees whom Wesco recently dismissed from the case, and finally, (12) Wesco's own faults in causing its own losses, such as operating under the misguided belief that it should never have to worry about competition from any source, apparently paying far too much for a vulnerable company, failing to make its employees feel secure, and failing to require non-compete agreements of key employees.

The cause of Wesco's losses are obvious and have nothing to do with wrongful conduct by the Barkdulls or Cook. Without being able to prove this causal link, summary judgment should be granted.

1. There is no evidence that Brady Barkdull's conduct caused any damage to Wesco because all such damage would have occurred anyway due to the lawful competition of others.

Even if it could be shown that Brady wrongfully recruited key employees, (which cannot be shown as outlined above), the damage issue is whether such wrongful recruiting, if it could be proven, caused Wesco a loss. There is no such evidence at all. There is no proof of a link between Brady's conduct and the alleged $4.5 million dollar loss.

In other words, if Wesco's damages are the loss of profits associated with customers going to P&S, Wesco has failed entirely to establish even one of the numerous links that would have to be proven between Brady recruiting a key employee and a customer leaving, keeping in mind that if the customer would have left anyway, damages have not been and cannot be proven.

For instance, once Brady quit, there is no prohibition against him recruiting the employees. Thus, if Brady recruited employees after he quit and persuaded them all to follow him, this would have been perfectly legal, and Wesco's claimed loss of profits would be exactly the same.

The result is the same if Brady had gone away to an isolated island without his cell phone, leaving only Ernest and Davis to recruit, which is about what happened, since Brady did no recruiting. Ernest and Davis would have successfully recruited the same employees without Brady, and Wesco's losses would be the same. Wesco cannot link any conduct by Brady to their claimed losses, and this requires the dismissal of Counts I and II against him.

2. There is no evidence that Cook's downloading a resignation form letter and sharing it with other employees caused any damage to Wesco because all such damage would have occurred anyway since the other employees had already made up their minds about quiting.

The same principles apply to the claims against Mike Cook in Counts I and II. There is no evidence that Cook's drafting a letter of resignation, which was then used by other employees caused Wesco any damage. There is no evidence any employee chose to resign because they were given a resignation form letter prepared by a co-employee. More importantly, there is no evidence a customer left or that Wesco lost a single sale because any employee used Cook's resignation form. Without this link there is no support for Wesco's losses having been caused by any act of Mike Cook.

Another way to look at this issue is that, legally, as at-will employees, the employees did not have to give any notice whatsoever. They could have quit at any time without notice or cause. They could legally have simply walked off the job on Friday or simply not shown up on Monday. Such conduct may have been rude, but not actionable. The point is, there is no proof that the use of Cook's letter caused Wesco any damage. The key employees had already determined to quit before they saw Cook's letter and decided to copy it. Ernest and Davis would have opened the P&S stores anyway and the customers would have left despite what form of resignation letter was used. Cook should be dismissed from Counts I and II for lack of proof of damages. R. Vol. 1238-1244.

C. *Count V against Brady Barkdull, Hugh Barkdull, Mike Cook, and P&S should be dismissed because there is no evidence that Brady, Cook, or Hugh Barkdull caused any damage through customer confusion, or that P&S benefitted wrongfully from any customer confusion caused by its new employees.*

For this issue the court below found that there was an issue of whether the employees caused customer confusion by allegedly wearing P&E clothing after going to work for P&S or by using the same personal cell phones they had used as Wesco employees after going to work for P&S. Judge Smith was not presented with the issue of whether such conduct, if it could be proven, caused any

losses. The proof of loss on this would be simple – show that a single customer accidentally ordered from the wrong store because Brady, Hugh or Mike were using P&E shirts or the same cell phones. There is a glaring absence of any proof in the record that even a single customer was confused into ordering paint or supplies from the wrong store. Without such evidence Count V must be dismissed against all of the remaining Defendants.

The scant evidence Wesco seems to rely on is a vague claim that someone–not a customer–saw a P&S employee wearing a shirt with a Paint & Equipment logo on it, and that someone–not a customer–called a cell phone of a former employee and heard an answering message that still said Paint & Equipment. Within ten days of the new stores opening, the employees changed their cell phone numbers to make sure this was not a problem. The important point though, is that not one single customer has ever claimed to have been confused into making an order with the wrong company. Wesco has no proof whatsoever that any damages were caused by customer confusion. Wesco's suspicion that P&S employees might have done something wrong, or tried to confuse their customers is not evidence. There simply is no proof of any damages caused by customer confusion.

There is no evidence P&S accepted a benefit of any customer confusion, and no evidence that Hugh Barkdull[14], Brady, or Cook, did anything to cause confusion. Count V should be dismissed entirely at this point for lack of proof of wrongful conduct and a complete lack of proof of any damage, based on the law as stated in conjunction with Counts I and II, above. Thus, P&S should be dismissed entirely on summary judgment.

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[14]There is a particular absence of evidence against Hugh Barkdull. It is a mystery to the Defendants why Wesco did not dismiss Hugh with the other employee defendants in February 2008.

D. *Counts VII, VIII and X against Cook should be dismissed because Wesco has no evidence of any losses caused by Cook's deletion of files from the Wesco computer he used.*

Wesco has accused Cook of removing confidential information from its computer for his use at P&S, or of depriving Wesco of the benefit of information by deleting it. The accusations are contained in Count VII (Computer Fraud Act), Count VIII (Misappropriation of Trade Secrets), and Count X (Conversion). Cook denies doing anything harmful to the computer and has testified that on the day he resigned he removed his personal files and programs from the computer at work and reorganized the files on the computer to make it easier for whoever replaced him to use the computer. He admits that his personal file included a list of customers and their phone numbers he had created for his own use. R. Vol. I, p. 128 (Cook, par. 5).

The basis of this renewed motion to dismiss the computer issues focuses on two issues: (A) that 18 USCA § 1030 is inapplicable because the computer was not a "protected computer" under the act and (B) all computer related counts should be dismissed because of the lack of evidence of any damages caused by Cook's actions.

1. 18 USCA § 1030 (Count VII) is not applicable to this computer or to the type of allegations made against Cook.

A civil action under 18 USCA § 1030 "may be brought only if the conduct involves one (1) of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5) (B)." [Emphasis added]. The only section that could be relevant is (iii), which states:

(A) Whoever–

> (5)(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage.

The key terms in this paragraph are "protected computer" and "damage" both of which are defined in the code. Judge Smith focused on the term "damage" but did not (because no one asked him to) focus on the term "protected computer," which is defined:

> (2) The term "protected computer" means a computer--
>
> > (A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or
> >
> > (B) which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

18 USCA § 1030(e)(2). Obviously Cook's work computer was not owned by a financial institution or by the United States Government. Likewise there is no evidence it was used in interstate commerce. This computer was not part of Wesco's computer system, nor was it linked to the computers at Wesco's home offices. It was used by Cook for local tasks only. Thus, 18 USCA 1030 does not apply and Count VII should be dismissed.

2. Counts VII, VIII and X should be dismissed because there is no evidence of any loss or damage caused by Cook's actions as they relate to the computer.

Cook admits deleting certain programs and files from the Wesco computer he used. Specifically, in his Affidavit Cook testifies that he did not take customer lists, or any other business information, but that he did delete his personal files and some programs he had installed. R. Vol. I, p. 128 (Cook Affidavit, par. 5). Cooks deposition supports this. He admits deleting his "work

folder" and his programs. R. Vol. VII, p. 1333, (Cook, 21:9-18). He admits this "work folder" contained a list of customers and their telephone numbers, a spreadsheet that would calculate a percentage of a number (similar to a very simple calculator), and some old letters that had been written to customers. That is all the evidence there is. Wesco cannot dispute this.

The question is, did this deletion of files cause Wesco a loss? It seems apparent that customers and phone numbers were readily available through the other computers, which were hooked up to the main Wesco system where all invoices and billing were kept. The point is, Wesco has failed anywhere to establish a causal link between having any files deleted by Cook, and any damages. Likewise, Cook admits deleting an old letter written to customers. Wesco has failed to make any link between copies of old letters and any ascertainable loss. The truth is that Cook was cleaning up his computer, and left it in a condition ready for Wesco's use by whatever employee replaced Cook. Nothing he did on that computer caused any harm or loss to Wesco and the computer related counts should all be dismissed. There is also no proof that he took any "trade secrets" or used them to compete with Wesco.

CONCLUSION

All of the remaining counts, and all of the remaining Defendants, should be dismissed from this suit in a full and complete summary judgment.

CERTIFICATE OF SERVICE

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Defendants/Respondents, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing Respondents Brief was this 26 day of May, 2009, served upon the following in the manner indicated below:

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