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Wesco Autobody Supply, Inc. v. Ernest Respondent's Reply 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/CROSS APPELLANTS' REPLY 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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Introduction

Respondents filed this cross appeal to bring the Court's attention to the lack of evidence of Brady Barkdull, Hugh Barkdull, Mike Cook and P&S regarding their alleged liability to Wesco. Additionally, there is a lack of evidence to support a claim for damages. The cross-appeal asks this Court to grant a full summary judgment to all defendants on all counts, or alternatively, to expand the trial court's partial summary judgment to include other defendants and other counts as the Court sees fit.

Summary of Facts on Cross Appeal

This case arose out of competition within the Eastern Idaho automobile paint and equipment supply industry. Wesco bought three stores in the region and began supplying the stores from its own sources, cutting off Ernest and Davis' company, APW, which had been the supplier for those stores for many years. Ernest and Davis responded to Wesco's move into the area by using their existing company, P&S, to open three new stores in the same area. Ernest and Davis attempted to recruit Wesco's new employees, who had been working at the stores Wesco had purchased. Ernest and Davis were more successful than they ever hoped and almost all of the employees decided to switch to the new P&S stores. Wesco responded by suing Ernest and Davis, APW, P&S, and all of the employees. The trial court dismissed the case against Ernest, Davis and APW, acknowledging that they had engaged in perfectly lawful competition. The trial court also dismissed many of the counts against P&S and the other employees, as detailed in the trial court's decision and as summarized by both parties in prior briefs. Later, Wesco decided to dismiss all of the other

employees, except the Barkdulls and Cook. The remaining defendants filed a renewed motion for full summary judgment to have the entire case dismissed, but the trial judge denied that motion, letting the previous partial summary judgment stand.

The issues before the Court is whether the remaining defendants were engaged in some type of wrongful conspiracy which caused harm to Wesco (or whether the employees were simply making career decisions, as they had the right to do as at will employees) and whether any of the remaining defendants violated any duty or law during the transition.

I. The Barkdulls and Cook did not illegally recruit other employees, and nothing in their conduct caused any damages to Wesco.

Wesco is unable to point to any evidence that Brady Barkdull engaged in wrongful conduct during the time he was making his decision to switch employers. Instead, Wesco asks that the allegations proceed to trial on Wesco's suspicion that there may have been a "nudge" or a "wink." Note, though, that even the existence of the "nudge" or "wink" relies on speculation; Wesco has no evidence of such behavior. To rely on speculation that there was a conspiracy to "steal" employees through illegal recruiting requires this Court to ignore the deposition testimony of every defendant and to replace the evidence with Wesco suspicion and speculation. The law does not permit a motion for summary judgment to be defeated with mere suspicion or speculation; there must be at least a scintilla of evidence. *Mallonee v. State*, 139 Idaho 615, 620, 84 P.3d 551, 556 (2004). Basing a case on suspicion and speculation is not how the law works, for good reason, and the Court should rule that there is no evidence of wrongful conduct by any of the remaining defendants against Wesco.

Wesco's suspicions are focused on Brady Barkdull. Without being able to show any evidence that Barkdull was involved in illegally recruiting his fellow employees, Wesco asserts instead the legal position that Barkdull had a legal duty to tattle-tale to Wesco about Ernest and Davis giving him an offer of employment, or to inform Wesco that he believed Ernest and Davis would be making similar offers to other employees. Perhaps, after receiving an employment offer from a competitor, some employees would have run back to Wesco to warn them, and to receive brownie points; however, there is no law that imposes a legal duty on an at-will employee to tell his employer that he is considering quitting, or that he knows other employees are being recruited. Because there is no law to support Wesco's position, Wesco relies on general principles of fiduciary duty, and seeks to have this Court impose a higher duty on at-will employees than is appropriate. This Court should not expand an at-will employee's duties by imposing a "tattle-tale" duty on Barkdull or the others. Such a ruling would fly in the face of the clear statements of the law that an employee has the right to make plans to start a new job or to open a competing business, as discussed by the trial judge in his decision and in the prior Brief. The simple logic used by the trial judge in ruling on this issue applies: if an employee has no duty to inform his employer that he is seeking new employment, or of the employee's plan to start a competing business, he also has no duty to tell his employer of the fact that a competitor has made him an offer or is planning to start a competing business. The same applies to any evidence that Barkdull may have assisted Ernest in finding a new store location; if the law allows Barkdull to look for a store for his own competing business, how can he be found liable if he assisted a competitor in the same limited fashion?

Respondents disagree most strongly with Wesco's assertion that Barkdull breached a duty by telling Ernest and Davis that he would only consider working for them if other employees also made the switch. There is no question that Ernest and Davis, as competitors, had the right to open new stores in the area and to compete for Wesco's employees. With no evidence that Barkdull participated in this recruitment, the Court should rule as a matter of law that waiting to make his decision until the others had made their decisions is simply not a breach of the duty owed by an employee to his employer. The ruling requested by Wesco is a dangerous precedent that would severely restrict an employee's ability (and right) to seek better employment.

The law already has in place a system that employers can use to protect themselves from competition from their own employees: non-compete agreements. Wesco chose not to use this protection, apparently because it was not willing to give up its own right to fire any or all of its employees at any time, with or without notice or cause. Given that Wesco, only a few weeks earlier, had made efforts to make sure each employee knew of his or her at will status, it seems strange to hear Wesco now claim these same employees had a high "fiduciary duty" that would prohibit them from quitting if it created a hardship for Wesco.

The deposition testimony of all the employees, as cited in the previous Brief, makes it clear that by Friday, August 22, the employees had made their decisions to quit. They were mindful that their jobs were to begin at the P&S stores immediately, and were also mindful that when P&E had been purchased they had been notified of the sale by fax, and then required to sign agreements acknowledging their at will status. It seemed fair to them that their resignation notice could be sent

in the same manner that they had been notified which was by fax and without advanced warning. As at will employees, they had the right to quit in the manner they saw fit, just as Wesco had the right to fire all of them at any time without notice or reason. The fact that they admit consulting with one another, and using the same form resignation letter, is not evidence of an illegal conspiracy.

An at-will employee's decision to quit on short notice is simply not actionable. This Court should not impose a duty on at-will employees to give notice simply because more than one employee is quitting. Nor should the court create a rule that, if the employees' resignation would be a hardship for the employer, they cannot quit their jobs. Note that such a law would be a clear double standard favoring Wesco: Wesco reserves the right to fire any or all employees without notice or cause; but claims the employees owe a high fiduciary duty to not do the same thing. It is not the law that an at-will employer is prohibited from laying off more than one person per day, nor is an employer prohibited from laying off an at will employee if it would work a hardship on the employee, the employee's family, or on the community when a large group of people are laid off at the same time. Wesco is asking this Court to go far astray from the at-will employment law and impose special work place protections for Wesco's benefit that simply do not exist in the law.

At one point in its reply brief Wesco discusses anti-trust law, admitting that it is only by analogy. The analogy, according to Wesco, is that if an anti-trust case can be brought without proof of an express agreement (to fix prices) and as long as certain "plus-factors" exist, then employers should be allowed to sue their at will employees for quitting, if several of them quit at the same time. Wesco asks essentially that this court establish a legal presumption that if several employees quit at

the same time, they should be liable to the employer and it should be assumed that they engaged in a wrongful conspiracy. The analogy does not work and this court should not expand employment law to include anti-trust principles. The fact is, Wesco lacks the evidence it needs to proceed against the remaining defendants and, without such evidence, all remaining defendants are entitled to summary judgment on Counts I and II.

II Wesco cannot tie any damages to the allegations of wrongful conduct which survived the trial court's summary judgment ruling.

The bottom line in this matter, which is the very reason Wesco wanted to proceed to the appeal rather than try the case, is that Wesco cannot connect its inability to make a profit to any alleged wrongful conduct of any defendant that survived the trial court's partial summary judgment ruling. The law may not require Wesco to precisely prove the amount of damages caused by each alleged misconduct, but Wesco must prove that the alleged misconduct was a substantial factor in causing damages. If it cannot prove this, the case must be dismissed, as in *Dunn*[1], *Trilogy*[2], *Magic Valley Truck*[3], *Trugreen*[4] and *Saks.*[5] These cases serve as examples that it is not enough to merely prove a violation of a duty, but that damages must also be proven with enough specificity to take the

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[1]*Dunn v. Ward*, 105 Idaho 354, *357, 670 P.2d 59, **62 (1983).

[2]*Trilogy Networks Systems, Inc. v. Johnson*, 177 P.3d 1119 (Idaho 2007).

[3]*Magic Valley Truck Brokers, Inc. vs. Meyer*, 133 Idaho 110, 982 P.2d 945 (1999).

[4]*Trugreen Companies, LLC vs. Scotts Lawn Service*, 508 F.Supp.2d 937 (2007); see also *Trugreen Companies, L.L.C. v. Mower Brothers, Inc.*, 2007 WL 1696860 (D. Utah).

[5]*Saks Fifth Avenue, Inc. v. James, LTD.*, 630 S.E.2d 304 (Va. 2006).

damages out of the realm of speculation. In each of these cases plaintiff proved a clear breach, but zero damages were awarded.

Likewise, where the trial court felt there may have been at the time of the first summary judgment ruling, some issues of fact on minor disputes regarding possible liability, Wesco's utter failure to point to any damages flowing from the alleged breaches of duty requires this court to grant full summary judgment on all counts and for all defendants.

III. David Smiths affidavit and opinions do not create an issue of fact as to the causation of damages.

Wesco puts forward the supplemental report of its expert witness, David Smith, as evidence that the alleged misconduct of the defendants caused its failure to make a profit during the years since the new P&S stores started competing with Wesco. Wesco does not mention that the trial judge struck David Smith's first report. R. Vol. VII, p. 1214. The basis for the court's prohibiting David Smith from testifying are contained in the opposing report of the defendants' economist, Tyler Bowles. R. Vol. V, p. 927. Essentially the court agreed that it was improper to allow David Smith to testify to a $4.5 million loss without specifying who and how the loss was caused. Wesco submitted a second report from David Smith, but this report failed to remedy the underlying problem of failing to link an alleged wrong with any damages. Instead the report takes each remaining allegation and makes a general conclusion, repeated over and over, that such allegations are a substantial factor in the $4.5 million loss claimed by Wesco. The defendants quickly filed a motion to strike the second report on the same basis, but the court decided not to rule on or even consider the motion to strike Davis Smith's supplemental report. R. Vol. VII. P. 1218.

Despite the trial judge's decision not to consider whether the Supplemental Report was admissible, this court has Smith's Supplemental report and can see it suffers from severe short comings. It relies on generalities and accusations, many of which have been dismissed on summary judgment, and all of which are unsubstantiated by the record, and then fails to make a causal link between any alleged wrongful conduct by a defendant and any claimed damages. Such a report is not evidence and should not be considered. Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and, therefore, is inadmissible as evidence." *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007); *Perry v. Magic Valley Regional Medical Center,* 134 Idaho 46, 995 P.2d 816, (2000); *Karlson v. Harris,* 140 Idaho 561, 565, 97 P.3d 428, 432 (Idaho,2004). Such a report likewise does not create an issue of fact and should not be used to deny a motion for summary judgment based on failure to have supporting evidence for a damage claim.

In addition to the Idaho cases, there are excellent cases from other jurisdictions which are very close factually and legally to Wesco's case. These cases include *Trugreen*[6] and *Saks*[7], both discussed in the prior brief, which illustrate how Rule 702 operates to bar the type of irrelevant and speculative testimony being offered by Smith. The analysis in *Trugreen*, in particular, is very applicable to the Smith opinion, even in light of Smith's supplemental report. The few areas where

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[6]*Trugreen Companies, LLC vs. Scotts Lawn Service*, 508 F.Supp.2d 937 (2007); see also *Trugreen Companies, L.L.C. v. Mower Brothers, Inc.*, 2007 WL 1696860 (D. Utah).

[7]*Saks Fifth Avenue, Inc. v. James, LTD.*, 630 S.E.2d 304 (Va. 2006).

Wesco's case differs from *Trugreen* actually favor the defendants, making it more obvious that David Smith's opinion should be disallowed. For instance, in *Trugreen* there actually was a noncompetition agreement. This made it tempting to believe there had to be some damages; whereas in Wesco's case there is neither a noncompete agreement or any other type of agreement, making it less likely there are any damages at all. Rather, Wesco has multiple theories, making it even more imperative that an expert be willing and able to sort out the multiple claims and the multiple defendants and establish that specific allegations are a substantial factor in the plaintiff's claim for damages. Smith fails to do that.

In *Trugreen* the expert had at least attempted to estimate the percent of lost revenue that resulted from the loss of the employees who violated the noncompete agreement, as opposed to other causes of losses. He "guesstimated" the amount at 30%. The *Trugreen* court ruled there was no support for the "guesstimate" and excluded the testimony. Smith, in his supplemental report still fails to even make a "guesstimate" as to what portion of the $4.5 million was caused by any alleged wrongful conduct by each defendant, opting instead to lump each employee into the vast bulk of the losses which were obviously caused by other factors. This is exactly what the *Trugreen* court was criticizing when it pointed out the rule that a "court may exclude evidence where it finds an impermissible analytical gap exists between the premises and the conclusion." *Trugreen*, at 958. The David Smith supplemental report does not create an issue of fact on how any remaining alleged misconduct was a substantial factor in Wesco's claimed losses.

Another flaw in Smith's $4.5 million opinion is his failure to deal with the complexities of the facts, particularly the many undisputed reasons why Wesco's losses were actually caused by lawful competition. Wesco makes light of these factors, claiming they are akin to speculating that there might be a meteor strike. However, the multiple other reasons why Wesco lost money, which are listed at page 39 of the Respondents' Brief, are supported by the record and are undisputed. Those factors are undisputed facts. Three P&S stores were opened. Ernest and Davis lawfully recruited employees to staff their new stores. The employees had the right to work for the new stores and to use their knowledge and skills at the new P&S stores. Other factors also included the absence of non-compete agreements that would have helped protect Wesco, the at-will status of the defendant employees, the pre-existing good will of Ernest and Davis, the dismissal of most of the defendants with prejudice by Wesco,[8] and so forth. The point is that these events are undisputed, unlike the

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[8]Smith's failure to address the significance of multiple defendants having been either dismissed from the case on summary judgment or being voluntarily dismissed with prejudice is one of the factors that make this case and *Trugreen* amazingly similar. This was a specific additional and independent reason to disregard the expert testimony in *Trugreen:*

> In addition, a change in the circumstances of this case renders the report speculative. TruGreen has recently stipulated to the dismissal of nine employees. While these were more lower-level employees, surely, if Mr. Elggren's theory is true, they had at least some role in the increased profits. His report indicates that it is based on the damage caused by all eighteen employees originally sued in this case. Therefore, the court lacks admissible evidence of what damage is attributable to the nine employees remaining in this case.

Trugreen, at 961. Thus, if for no other reason, Smiths failure to acknowledge and address that all of the harm alleged against the dismissed defendants should be deducted from the $4.5 million warrants disallowing his testimony because it is speculative, not to mention misleading and inaccurate.

meteor strike. When combined together these factors explain all of Wesco's losses, none of which were proximately caused by any alleged wrongful conduct of the remaining defendants. Just as with the expert's failures in *Trugreen*, Smith's supplemental report fails to address any of these concerns, or to even acknowledge the existence of the confounding variables that must be dealt with in this case. This failure renders his opinion unreliable and flat out misleading, and it should not be relied on to defeat this motion for full summary judgment.

Lest one think *Trugreen* is an odd case, a review of the primary case relied on by the court in *Trugreen* shows a similar result where expert testimony was disallowed because it failed to deal with the true complexities (and realities) of the facts of the case. In *Storage Technology Corporation v. Cisco Systems Inc.*, 2003 WL 22231544, *affirmed* 395F.3d 921 (8th Cir., Minn. 2005), the court explained its reasoning for striking generalized testimony of lump sum damages. It quoted a Federal Seventh Circuit case as follows:

> For years we have been saying, without much visible effect, that people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence. *Post hoc ergo propter hoc* will not do; nor the enduing of simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of expert knowledge. The expert should have tried to separate the damages that resulted from [a competitor's lawful conduct] from the damages that resulted from particular forms of misconduct allegedly committed by that competitor.... No such effort was made. Allowance for uncertainty is one thing, and rank speculation another. (citation omitted).

Both the *Storage Technology* expert and Wesco's expert refused to sort out and establish the actual causes of the losses they wish to testify. Both wish to simply state a large number and then expect

the jury to sort it out, without giving the jury any basis for such a calculation. This is not permissible.

The inadequacies of Smith's supplemental report are discussed in detail by the defendant's expert witness, economist Tyler Bowles, in his opinion letter of March 6, 2008. R. Vol. VIII, p. 1401. Bowles discusses what a valid expert opinion would have to include to be admissible, and compares it to Smith's report. He states that Smith's opinion extremely wanting, pointing out that the supplemental report suffers the same flaws as Smith's original report: its failure to apply a rational, coherent economic damage methodology. Essentially, the report fails to explain how any remaining allegations against any defendant, if proven true could be the proximate cause of the claimed losses.

Wesco has asserted its belief that it only need show that some alleged misconduct by a defendant is a "substantial factor" in its losses. While this may be the rule, the fact is, Wesco has failed to do this. Smith's supplemental report fails to show that the accusations which remain after the partial summary judgment caused any specific type, or amount, of a loss. More importantly, Smith fails to show how it could be that the many obvious causes of Wesco's losses, such as lawful competition, lawful resignation of key employees, customer free choice, the reputation of P&S's owners, and so forth, were not the entire cause of Wesco's failure to meet its profit expectations.

The numerous cases cited where misconduct in competition was found, but where no damages were awarded, make it plain to see that there is frequently no proof of damages in business loss cases. These cases point out the necessity of being able to prove damages. A party hiring an

expert to give a lump sum number, such as Smith has done, without being able to tie the wrongful conduct to the damages, does not remedy the plaintiff's problems in such a case. Despite Smith's supplemental report, Wesco has still failed to demonstrate that any of the remaining allegations against the remaining defendants were a substantial factor in its claimed losses. Smith's report is not sufficient to prevent full summary judgment for all defendants.

IV. Wesco must prove more than a "likelihood of confusion" to survive a summary judgment on damages.

Statements made throughout Wesco's brief make it clear that the parties will have to agree to disagree on some aspects of the law. For instance, on page 19 of its brief, Wesco boldly states that "defendants are wrong" and that Wesco does not need to show "actual confusion" to prove unfair competition, but only a "likelihood of confusion." Wesco cites to *American Home Benefit,* a 1942 case where the plaintiff was not seeking damages at all, but was seeking only an injunction. The court granted the injunction because of the "likelihood of confusion." *American Home Benefit* had nothing to do with damages and the "likelihood of confusion" standard is inapplicable to Wesco's claim for damages. Wesco is seeking monetary damages and must have evidence linking a wrongful act to actual monetary damages. As in other numerous cases, a failure to prove this link is fatal to Wesco's case for monetary damages.

The defendants stand on their original assertion: Wesco must have some proof that confusion as to source was a substantial factor in their losses. Wesco has no proof at all. There is no evidence that a single customer was confused or Wesco lost a single sale to a confused customer. Count V should be dismissed.

V. Wesco does not have evidence that Cook's deletion of files from his local computer caused Wesco any losses.

While Cook admits deleting his own files from his computer, there is no evidence, and not even an accusation, that he damaged or took information off of Wesco's servers in Washington. The record is clear that the computer at issue was his desktop computer, not one of the terminals used to access the computers containing Wesco's customer information in Washington. This particular computer was never used in interstate commerce and nothing Cook did on this computer affected Wesco's out of state servers. This is made clear by a review of their expert's affidavit, Wes Goodwin. He only examined a single hard drive on a single computer in the Pocatello store. Goodwin only opines that files appeared to have been deleted from this single computer. R. Vol. II, P. 307. There is no mention of accessing or damaging Wesco's out of state computers, or of doing anything at all on the internet. Thus, it is inappropriate for Wesco to rely on 18 U.S.C. 1030 as a cause of action against Cook.

More significantly, there is no proof of any damages caused by Cook regardless of whatever Wesco is able to prove Cook did with his work computer before leaving the store on his last day. It is a great exaggeration for Wesco to claim these files caused an interruption in service. Cook's conduct had no effect whatsoever on Wesco's servers or on the three terminals which were actually hooked to Wesco's servers. Wesco's servers still contained all of the invoices, customer accounting, orders and so forth, all of which were unaffected by whatever deletions took place on the C drive of Cook's computer. In fact, the defendant employees did not have access to this information and could

not delete it or copy it from Wesco's servers in Washington. R. Vol. IV, p. 648 (Johnston, 47:16-18).

David Smith's bald assertion without making a causal link that Cook's conduct was a substantial factor in the $4.5 million loss is not enough to defeat summary judgment. Smith in no way explains how having files deleted from the C drive on a local computer caused any of Wesco's losses. Without being able to make that causal connection, summary judgment on Counts VII, VIII and X is also warranted.

Conclusion

It's clear from the record that each of the remaining defendants, and the counts against them, should be dismissed because Wesco has failed to raise a genuine issue of fact on liability or damages.

DATED this 29 day of July, 2009

MERRILL & MERRILL, CHARTERED

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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/Cross Appellants' Reply Brief was this 29 day of July, 2009, served upon the following in the manner indicated below:

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