STATE OF MICHIGAN

COURT OF APPEALS

HUDSON & MUMA, INC.,

Plaintiff/Counter-Defendant/Appellant,

v

WOLF-HULBERT CO., LLC,

Defendant-Appellee,

and

ANDREW J. MUMA,

Defendant/Counter-Plaintiff.

UNPUBLISHED
April 6, 2010

No. 288346
Oakland Circuit Court
LC No. 2005-068924-NZ

Before: SERVITTO, P.J., AND BANDSTRA, AND FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting a directed verdict in favor of defendant, Wolf-Hulbert Co., LLC (Wolf-Hulbert), regarding plaintiff's claims of misappropriation of trade secrets and unjust enrichment. Because there were no factual questions surrounding these claims, directed verdict in Wolf-Hulbert's favor was appropriate. We affirm.

Plaintiff is an independent, family-owned and operated, insurance agency. Andrew Muma, the son of plaintiff's founder, sold insurance for and was an officer, shareholder, and board member of plaintiff. In the spring of 2005, Mr. Muma left plaintiff's employ and began working for defendant, Wolf-Hulbert, another insurance agency. According to plaintiff, prior to his leaving, Mr. Muma downloaded confidential information from plaintiff's computers and used the same to move plaintiff's customers to Wolf-Hulbert. Plaintiff thus initiated an action against Mr. Muma on various theories (including misappropriation of trade secrets) and against Wolf-Hulbert for, among other things, misappropriation of trade secrets, tortious interference with contractual and business relationships, unjust enrichment, and civil conspiracy.

The matter proceeded to jury trial on January 28, 2008. At the conclusion of plaintiff's evidence, Wolf-Hulbert moved for a directed verdict in its favor, contending that there was no factual proof supporting any of the claims made against Wolf-Hulbert. The trial court granted the motion. The trial court's decision forms the basis of this appeal.

This Court reviews de novo a trial court's decision with regard to a motion for a directed verdict. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). We must view the evidence in the light most favorable to the nonmoving party, *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008) and, "[a] directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts*, 280 Mich App at 401.

A trade secret is defined in the Michigan Uniform Trade Secrets Act (UTSA), MCL 445.1901 *et seq.*, as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
> (*i*) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> (*ii*) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
> MCL 445.1902(d)

The primary item at issue is plaintiff's customer list, containing customer names, expiration dates for their policies, and other information, that Mr. Muma took with him when he began working for Wolf-Hulbert. Assuming, without deciding, that the item was a trade secret, plaintiff's claim that Wolf-Hulbert is liable for its misappropriation fails.

According to plaintiff, to be held liable for misappropriation of a trade secret, Wolf-Hulbert need not have known that Mr. Muma derived the trade secret through improper means. So long as the individual from whom a defendant derived knowledge of the trade secret breached his or her own duty to maintain the secrecy of the trade secret, the defendant can be held liable. We disagree.

"Misappropriation" as it pertains to the Uniform Trade Secrets Act means either of the following:

> (*i*) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
> (*ii*) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
> (A) Used improper means to acquire knowledge of the trade secret.
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
MCL 445.1902(b).

One can be said to have violated the Uniform Trade Secrets Act pursuant to MCL 445.1902(b)(i), if one acquires a trade secret and knows or has reason to know that the trade secret was acquired by improper means. It is undisputed that Mr. Muma took the customer list, and perhaps other items potentially considered to be trade secrets, without permission. However, there was no evidence presented that Wolf-Hulbert knew or should have known that the items were taken through improper means.

One of Wolf-Hulbert's owners, William Hulbert, testified that generally, an agent such as Mr. Muma has his own customer policy expiration list and he is in charge of what he does with it. Both owners of Wolf Hulbert testified that they had discussed Mr. Muma bringing business to Wolf-Hulbert, but it was never asked whether he owned his own book of business. It would appear, then, that Wolf-Hulbert assumed that Mr. Muma had his own book of business. There is no evidence that Wolf-Hulbert knew or had reason to know that Mr. Muma acquired the documents through improper means. There is, in fact, no evidence that Wolf-Hulbert ever saw the documents on which Mr. Muma relied. While employees of Wolf Hulbert assisted Mr. Muma in preparing agent of record letters, only one employee (notably, the assistant that Mr. Muma worked with at plaintiff, and whom was hired by Wolf-Hulbert as Mr. Muma's assistant approximately one month after Mr. Muma began working with Wolf-Hulbert) testified to seeing the customer list Mr. Muma used. Neither of the principals testified to having seen the documents.

Additionally, it is somewhat questionable whether Wolf-Hulbert "acquired" any trade secret. "Acquire" is defined in The American Heritage Dictionary (4th ed.) as "to gain possession of" or "to get by one's own efforts." Wolf-Hulbert's principals testified that Mr. Muma was considered an independent contractor, and that a salesman, such as Mr. Muma, owns his customer list. Thus, there was no indication that any information improperly taken by Mr. Muma was given to Wolf-Hulbert or that Wolf-Hulbert had possession of or obtained the same from Mr. Muma.

Under MCL 445.1902(b)(ii), one can also be found to have misappropriated a trade secret where there is:

(*ii*) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
(A) Used improper means to acquire knowledge of the trade secret.
(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

There is no allegation that Wolf-Hulbert used improper means to acquire knowledge of plaintiff's trade secrets. Because the statute specifically provides that the disclosure or use must be made by one who used improper means to acquire the trade secret knowledge, MCL 445.1902(b)(ii)(A) is inapplicable.

Wolf-Hulbert could be found to have misappropriated plaintiff's trade secrets under MCL 445.1902(b)(ii)(B) if it used or disclosed the trade secrets, and at the time of the use or disclosure knew "that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use." Wolf-Hulbert's principals testified that they never asked Mr. Muma if he was an officer or director of plaintiff, and that he told them he had no contract or non-compete agreement with plaintiff. Although Wolf-Hulbert was aware that plaintiff was a family-run business, and that Mr. Muma was a family member and a producer, there is no indication that it had any further knowledge about Mr. Muma's role with plaintiff.

The principals also testified that they knew Mr. Muma would be bringing business with him to Wolf-Hulbert, but it was never discussed whether he owned his own book of business. Mr. Muma also agreed that Wolf-Hulbert never asked if he was an officer or director of plaintiff. Mr. Muma testified that he told Wolf-Hulbert that he had no contract or non-compete agreement in place with plaintiff. No one testified or provided documentary evidence suggesting that Wolf-Hulbert knew Mr. Muma had obtained plaintiff's trade secret information through improper means or under circumstances giving rise to a duty on Mr. Muma's part to maintain its secrecy, or otherwise owed a duty to maintain its secrecy.

Contrary to plaintiff's assertion otherwise, Wolf-Hulbert's knowledge, or lack thereof, of Mr. Muma's actions is key. When construing a statute, we first examine the plain language of the statute. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). If it is unambiguous, must enforce the statute as written. *Id.*

The express statutory language provides that, if at the time a defendant disclosed or used the trade secret it "knew or had reason to know" that the information was acquired from: (a) a person who had utilized improper means to acquire it; (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (c) derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use, could it be deemed to have misappropriated a trade secret. Here, the phrase "knew or had reason to know" plainly appears before a list of three phrases, necessarily qualifying the three. The statute unambiguously provides, then, that one must know or have reason to know of one of the three circumstances cited in MCL 445.1902(b)(ii)(B) to be held liable for the misappropriation of a trade secret. As previously indicated, there is no evidence of such knowledge on Wolf-Hulbert's part or for it to have had reason to know. MCL 445.1902(b)(ii)(B) is inapplicable. Additionally, there is no assertion that the trade secret was acquired by accident or mistake; thus, MCL 445.1902(b)(ii)(C) is also inapplicable.

We agree with the trial court that there is no evidence establishing that Wolf-Hulbert misappropriated plaintiff's trade secrets under the statutory definition. The directed verdict in Wolf-Hulbert's favor on this claim was appropriate.

Plaintiff also argues that Wolf-Hulbert may be held vicariously liable for Mr. Muma's misappropriation of trade secrets within the scope of his employment with Wolf-Hulbert. However, this theory of recovery does not appear in plaintiff's complaint, no argument on this issue appears to have been made in the trial court, and the trial court did not rule on such an issue. Generally a failure to timely raise an issue in the trial court waives review of that issue on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). We therefore need not consider this argument.

Plaintiff's next argument on appeal is that its claim of unjust enrichment against Wolf-Hulbert should have proceeded. Wolf-Hulbert responds that if a claim of unjust enrichment were permitted to go forward, it would constitute a restraint on trade in violation of MCL 445.772.

Defendant has provided no authority in support of its restraint on trade argument. Defendant simply takes issue with the calculation of damages provided by an expert at trial, and then states that a salesperson may only be restrained from selling to his or her clients by virtue of the terms of a valid covenant not to compete pursuant to MCL 445.774a. However, this statute provides:

> (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

The statute does not read as Wolf-Hulbert claims; i.e., that the only way a salesperson can be restrained from selling to his clients is through a non-compete agreement. There being no authority provided in support of Wolf-Hulbert's restraint on trade theory, we will address plaintiff's assertion that its unjust enrichment claim should have survived the motion for directed verdict.

The equitable doctrine of unjust enrichment is based on the principle that a party should not be allowed to profit at another's expense. *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952). The law will imply a contract to prevent the inequity arising from a defendant's receipt of a benefit from the plaintiff. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). Unjust enrichment occurs, then, where the defendant has received a benefit from the plaintiff, but it would be inequitable to allow the defendant to retain that benefit. *Id.*

Testimony established that Mr. Muma used a customer policy expiration list obtained from plaintiff to solicit, and eventually move, a significant number of plaintiff's clients to Wolf-Hulbert. A jury found that Mr. Muma had misappropriated plaintiff's trade secrets. Testimony also established that Wolf-Hulbert received at least a 50% commission on all of the policies that Mr. Muma obtained, including those he moved from plaintiff to Wolf-Hulbert. The trial court did not explain his reasoning for directing a verdict on the unjust enrichment claim. Instead, the

trial court focused upon Wolf-Hulbert's lack of knowledge regarding Mr. Muma's actions. Unlike the misappropriation of trade secrets claim, however, a claim of unjust enrichment does not require a showing that a defendant knew or should have known that the information used was garnered through improper means. Nevertheless, plaintiff's argument on this issue fails.

Wolf Hulbert undeniably received a benefit from Mr. Muma's actions. It received commissions on additional business. For an unjust enrichment claim to stand, though, the benefit must be received from the plaintiff. Here, plaintiff did not provide a benefit to Wolf-Hulbert. Wolf-Hulbert's's benefit was derived through the actions of Mr. Muma, and benefits from Mr. Muma's actions may only remain with Wolf-Hulbert so long as Mr. Muma is associated with Wolf-Hulbert (given the testimony that Mr. Muma is an independent contractor and independent contractors generally own their books of business). Further, Wolf-Hulbert essentially paid Mr. Muma for its receipt of the benefits (by paying him commissions). Again, there was no testimony that Wolf-Hulbert was aware that Mr. Muma had taken or used plaintiff's customer expiration list without permission. Lacking receipt of a benefit *from* plaintiff, it is questionable whether unjust enrichment is applicable to Wolf-Hulbert. It would appear that plaintiff's recovery would more properly rest with Mr. Muma (which it received)--the one who had an obligation to plaintiff and who caused the benefit to be had.

More importantly, recovery on this claim is appropriate only where an inequity resulted to the plaintiff because of the retention of the benefit by the defendant. Not all enrichment is necessarily unjust in nature. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 196; 729 NW2d 898 (2006). And, in general:

> [a] third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties.... Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. *Id*., quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p. 628.

While there may not have been a specific contract between plaintiff and Mr. Muma, the effect is the same. Benefits were conferred upon Wolf-Hulbert by the performance of one who was found to have had an obligation to plaintiff not to confer the benefit. Wolf-Hulbert appears to have been a third party beneficiary of Mr. Muma's actions, with no apparent knowledge that Mr. Muma's actions were in violation of any obligation he had to plaintiff. Plaintiff did not present any evidence that Wolf-Hulbert requested the benefit from plaintiff or that it misled any of the parties to acquire the benefit. It simply accepted the benefit, apparently understanding that Mr. Muma's bringing clients with him from plaintiff was not unusual for an independent contractor in the insurance industry. Given these particular circumstances, to the extent Wolf-Hulbert received a benefit from or at the expense of plaintiff, its retention of the same was not inequitable or unjust.

Affirmed. Wolf-Hulbert, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood