COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-2705

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MEDREHAB OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT,

V.

GARY JOHNSON AND PARTNERS IN REHAB, INC.,

DEFENDANTS-APPELLANTS.

GARY JOHNSON,

PLAINTIFF-APPELLANT,

V.

MEDREHAB OF WISCONSIN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Gary Johnson and Partners in Rehab, Inc. (PIR) have appealed from a judgment awarding Medrehab of Wisconsin, Inc. (Medrehab) damages, interest and costs against them jointly and severally in the amount of $712,759. Judgment was entered against Johnson individually for an additional $499,195, including $200,000 in punitive damages and $175,806 in attorney's fees. Judgment was entered following a jury trial on Medrehab's claims that Johnson breached both a covenant not to compete with Medrehab and a fiduciary duty to Medrehab. The jury also found Johnson and PIR liable on Medrehab's claims of conspiracy and tortious interference with contracts. We affirm the judgment.

Johnson and PIR raise numerous issues which will be discussed seriatim. Preliminarily, we note that many of their arguments challenge the sufficiency of the evidence to support the verdict and factual findings made by the jury. The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support it. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). This is particularly true when, as here, the trial court has approved the verdict by denying postverdict motions. *See* ***id.*** The credibility of the witnesses and the weight to be accorded their individual testimony is for the jury to decide. *See* ***id.*** When more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. *See* ***id.*** It is this court's duty to search for credible evidence to sustain a jury's verdict and not to search for evidence to sustain a verdict which the jury could have reached but did not. *See* ***id.***

We apply these standards to Johnson's claim that he never executed the noncompete agreement proposed to him by Medrehab, and that he instead submitted a counterproposal which was never accepted. At trial, Medrehab presented a form containing noncompete language which it contended was like that signed by Johnson. Although a copy of the agreement signed by Johnson was not produced at trial, Johnson's supervisor, Robert Lawrence, testified that in his presence Johnson executed the covenant proposed by Medrehab. Another Medrehab witness, George Hargrave, testified that he received Johnson's executed covenant and that while it contained some handwritten additions from him concerning severance, the noncompete portion of the agreement was unaltered. Other Medrehab employees testified that Johnson conceded to them that he had signed the agreement. Based on this evidence, the jury was clearly entitled to find that the noncompete agreement was in fact executed by Johnson.

Contrary to Johnson's contentions, the evidence also permitted the jury to find that the noncompete agreement was supported by consideration. Lawrence testified that all management personnel who were required to sign the noncompete agreement, including Johnson, were advised that signing the agreement was a condition of their continued at-will employment. Hargrave testified that in exchange for Johnson's promise to execute the noncompete agreement, Medrehab further agreed to pay him more under a bonus plan than he would otherwise have received. He testified that Johnson executed the agreement after being told that he would not receive this increased bonus check unless he signed the noncompete agreement.

Johnson also claims that assuming a noncompete agreement was in existence, it was unreasonable and unenforceable under § 103.465, STATS., and case law discussing restrictive covenants. We disagree.

To be enforceable, a restrictive covenant must: (1) be necessary for the protection of the employer, (2) provide a reasonable time restriction, (3) provide a reasonable territorial restriction, (4) not be harsh or oppressive to the employee, and (5) not be contrary to public policy. *See* ***General Med. Corp. v. Kobs***, 179 Wis.2d 422, 429, 507 N.W.2d 381, 384 (Ct. App. 1993). Whether a covenant is reasonably necessary to protect an employer depends upon the totality of the circumstances. *See* ***NBZ, Inc. v. Pilarski,*** 185 Wis.2d 827, 840, 520 N.W.2d 93, 97 (Ct. App. 1994). The employee must present a substantial risk either to the employer's relationship with his customers or with respect to confidential business information. *See* ***id.***

The record clearly supports a determination that the noncompete agreement was reasonably necessary for the protection of Medrehab. Testimony indicated that Johnson was vice-president for development at Medrehab and was responsible for developing new contracts and maintaining relationships with the administrators of those contracts so that they would be renewed. He was described as the point man in the development and renewal of Medrehab's contract business. Testimony also indicated that Johnson kept all of Medrehab's contracts in his office and received monthly reports on Medrehab's income, expenses and profit for each facility with which it contracted.

Contrary to Johnson's contention, access to confidential business information may entitle an employer to protection regardless of whether the information qualifies as a trade secret. *See* ***Rollins Burdick Hunter, Inc. v. Hamilton***, 101 Wis.2d 460, 469, 304 N.W.2d 752, 756 (1981). In this case, the business information to which Johnson had access, in conjunction with the customer relationships developed and maintained by him, entitled Medrehab to the

protection of a noncompete agreement. *See* ***General Medical,*** 179 Wis.2d at 435-36, 507 N.W.2d at 386-87.

Johnson argues that the restrictive covenant was unreasonable because noncompete agreements were not systematically required of Medrehab's employees, including its vice-presidents. However, evidence in this case indicated that it was Medrehab's intent to have all key employees with significant customer contact sign noncompete agreements, thus revealing its belief that it needed protection, unlike the situation cited by Johnson in ***NBZ***, 185 Wis.2d at 840, 520 N.W.2d at 97.

We also reject Johnson's claim that the language of the agreement was overbroad and so ambiguous as to be unenforceable. The specific portion of the agreement upon which Johnson bases his claim prohibited him from performing any "professional services in any capacity" at a facility where he had previously worked for Medrehab or within two miles of any other facility owned, operated, managed or under contract with Medrehab. We agree with Medrehab that the only reasonable construction of this language in Johnson's case is that the "professional services" referred to are the type of services he performed for Medrehab, and that the agreement does not restrict him from performing professional services of a type and nature different from his former employment. The language thus is not overbroad or ambiguous.

The geographical scope of the agreement is also reasonable. Evidence indicated that Medrehab had only three facilities outside of Wisconsin, rendering specious Johnson's claim that the agreement impaired his ability to work everywhere in this country. Moreover, in light of his significant customer knowledge and contact, restricting Johnson for a period of one year from

performing professional services like those he performed for Medrehab at facilities with whom he worked while a Medrehab employee, or for competitors located within two miles of a Medrehab facility, was eminently reasonable.

Johnson next contends that Medrehab breached the noncompete agreement by failing to pay him severance pay. However, Johnson never made a claim for severance pay in this litigation. Moreover, the jury's verdict constituted a finding that Johnson breached the agreement before his employment with Medrehab terminated. Because he was the first breaching party, Johnson was not entitled to recover severance pay and Medrehab did not breach the agreement by failing to pay it. *See* ***McBride v. Wausau Ins. Cos.***, 176 Wis.2d 382, 388, 500 N.W.2d 387, 390 (Ct. App. 1993).

The next argument raised by Johnson and PIR is that the evidence did not support the findings that they conspired to tortiously interfere with Medrehab's contracts. Johnson also contends that the evidence was insufficient to support the finding that he breached a fiduciary duty to Medrehab.

We discuss these issues together because the same evidence supports the jury's verdict on both of them. Tortious interference with contract occurs when a person intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract. *See* ***Wausau Med. Ctr. v. Asplund***, 182 Wis.2d 274, 297, 514 N.W.2d 34, 44 (Ct. App. 1994). A cause of action for tortious interference with contract may exist even when there has been no breach of contract, provided that the person seeking to maintain the action shows some specific right which has been interfered with. *See* ***Sampson Invs. v. Jondex Corp.***, 176 Wis.2d 55, 72-73, 499 N.W.2d 177, 184 (1993).

It is also well established that a corporate officer is under a fiduciary duty of individual loyalty, good faith and fair dealings in conducting corporate business. *See* ***Racine v. Weisflog***, 165 Wis.2d 184, 190, 477 N.W.2d 326, 329 (Ct. App. 1991). Associated with this general principle is the doctrine of corporate or business opportunity which precludes an officer from exploiting the use of his or her position as a corporate insider for personal gain when the benefit or gain properly belongs to the corporation. *See* ***id.*** One of the factors pertinent to determining whether a corporate opportunity exists is whether the opportunity presented is one in which the complaining corporation has an interest or an expectancy growing out of an existing contractual right. *See* ***id.*** at 194, 477 N.W.2d at 331.

The evidence which supported a finding that Johnson breached a fiduciary duty to Medrehab and in conjunction with PIR conspired to tortiously interfere with Medrehab's contractual relationships is discussed at length at pages seven through seventeen of Medrehab's respondent's brief. We rely upon that discussion here. The evidence indicated that Johnson performed services for PIR both during and after his employment with Medrehab. It supported a finding that while employed by Medrehab, Johnson attempted to solicit employees to terminate their employment with Medrehab so that Medrehab would be unable to perform its contracts and PIR could obtain them, including deleting noncompete agreements from employee contracts to assist them in quitting, stating that his "new company" would do billings for another new company competing with Medrehab, and falsely informing the administrator of another facility that Medrehab was dropping their account.

The evidence also permitted a finding that Medrehab had contracts with the Mequon Care Center, Samaritan Home and a clinic in West Bend, and

that Johnson both directly assisted PIR and used information derived from his employment as an officer of Medrehab to assist PIR in soliciting those accounts, causing Medrehab to lose contracts it had an interest and expectancy in maintaining and renewing. This conduct constituted a breach of Johnson's fiduciary duty to Medrehab and constituted a conspiracy with PIR to interfere with Medrehab's corporate opportunities and existing contracts. The evidence therefore supported the jury's findings that Johnson breached his fiduciary duty to Medrehab and that he and PIR engaged in a conspiracy and tortious interference with contract.

Johnson's next arguments relate to damages. Initially, he objects to the damages award on the grounds that the jury was asked only one damages question without reference to the separate causes of action. However, Johnson stipulated to the special verdict as it related to damages. By failing to object to the form of the special verdict, he waived any objection to it. *See* ***Clark v. Leisure Vehicles, Inc.***, 96 Wis.2d 607, 616, 292 N.W.2d 630, 634-35 (1980).

Johnson also objects that the damages were speculative and unsupported by evidence. Specifically, he contends that most contracts with nursing homes and other rehabilitative facilities are for a period of one year, and that there was no reason to believe that his actions caused Medrehab to lose contracts throughout the period from 1993 to May 1996, when trial occurred. He also objects that Medrehab's claim for lost profits was computed using gross profit without taking into account overhead and other administrative costs associated with the allegedly lost contracts.

The question of what constitutes consequential damages is a question of fact. *See* ***Kersten v. H.C. Prange Co.***, 186 Wis.2d 49, 59, 520 N.W.2d

99, 103 (Ct. App. 1994). This court must sustain a damages award if there is any credible evidence which under any reasonable view supports it and removes the issue from the realm of conjecture. *See* ***id.*** at 59-60, 520 N.W.2d at 103.

At trial, Medrehab presented its damages through Steven Masse, its former controller, and Thomas Komula, the chief financial officer of Medrehab's parent company. These experts testified that Johnson's activities cost Medrehab $1,450,000 in lost profits. Komula testified that the loss of contracts with the Mequon Care Center, Samaritan Home and the facility at which the West Bend Hand Center operated resulted in a loss of $1,116,486 in direct contribution. He defined direct contribution as revenue less direct expenses (e.g., salaries and travel expenses) and testified that because losing three contracts would have no effect on Medrehab's overhead, all of the direct contribution losses were lost net profits to Medrehab.

Medrehab's expert further testified that the most profitable contracts turn over much less frequently than others in the rehabilitation industry and that given its clients' expressed contentment with Medrehab, Medrehab would not have lost those clients if Johnson had not helped a competing enterprise. The jury was entitled to find this evidence to be credible and to award damages accordingly.

Johnson also objects to the punitive damages award, contending that it could have been based upon a jury misassumption that punitive damages were available for the breach of contract action, rather than solely for tort. We reject this argument because the jury instructions correctly explained the law to the jury, and there is no basis to believe that the jury did not understand it.

In a one-sentence argument, Johnson also contends that punitive damages were unwarranted because "there existed no foundation of record evidence permitting the court to insert a question of punitive damages, as no evidence showed that any act of Johnson was malicious, outrageous, or showed wanton disregard of personal rights or were acts committed against human dignity."

This argument contains no citation to the law applicable to the award of punitive damages, and this court will not develop legal argument on behalf of the appellant. *See* ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). Suffice it to say that a jury could reasonably find that Johnson's conduct was outrageous.[1]

Johnson's final objections are to the attorney's fees awarded under the noncompete agreement and to the award of costs. He does not contest Medrehab's right to attorney's fees, but merely contends that the trial court's award of 80% of its fees to Medrehab was arbitrary. We disagree. The trial court exercised its discretion to award Medrehab 80% after determining that 20% of its fees arose from defending Johnson's counterclaim, fees which were not covered by the noncompete agreement. Because Johnson cites to nothing in the record which demonstrates that the trial court's determination was unreasonable, its award will not be disturbed.

[1] Johnson also objects that because the jury found that Medrehab was entitled to punitive damages from Johnson but not from PIR, Linda Johnson's tax returns should not have been introduced to the jury because this constituted an imputation of PIR's income to Johnson through his wife. However, Johnson fails to explain why income reflected in Linda's tax returns is not her personal income as opposed to PIR's income, and why it was improper to present this evidence at the punitive damages phase. We draw no conclusions as to whether this issue could potentially have merit. We decline to address it because it is inadequately briefed. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

In contesting costs, Johnson simply states that the trial court awarded costs "without any compliance with 814.10, Stats.," and that the judgment "is on its face duplicitous as to costs and interest." This argument is supported by no citation to facts of record or law clarifying what Johnson believes was defective about the award.

Citation to facts of record and the law which support a party's claims are required by the rules of appellate procedure. *See* RULE 809.19(1)(d) and (e), STATS. Compliance with these rules is required because a high-volume intermediate appellate court is an error-correcting court which cannot take time to sift the record for facts that might support an appellant's contentions, *see* ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964), or to develop legal argument on behalf of the appellant, s*ee* ***Gulrud,*** 140 Wis.2d at 730, 412 N.W.2d at 142-43. This court will decline to review issues which are inadequately briefed. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). We therefore decline to address Johnson's objection to costs.[2]

[2] We also note that in his reply brief, Johnson sets forth numerous facts which he alleges discredit the testimony relied on by Medrehab in its respondent's brief or disprove Medrehab's statement of facts. However, the majority of the facts and testimony references contained in Johnson's reply brief are unsupported by citation to the record. We will not search out those references or consider facts unsupported by reference to the record, particularly with a record such as this which encompassed an eight-day trial. *See* ***Northwest Wholesale Lumber v. Anderson***, 191 Wis.2d 278, 283-84, 528 N.W.2d 502, 504 (Ct. App. 1995).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.