REVERSE and REMAND and Opinion Filed September 8, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00896-CV

BRIAN HARTSFIELD AND JORGE GARCIA, Appellants
V.
HARTSFIELD CABINET LLC AND STEVE KENNEDY, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-04419

MEMORANDUM OPINION

Before Justices Myers, Pedersen, III, and Garcia
Opinion by Justice Garcia

This is a summary judgment case in which the trial court granted Hartsfield Cabinet LLC's and Steve Kennedy's traditional motion for summary judgment against Brian Hartsfield and Jorge Garcia and entered a final judgment awarding appellees over a million dollars in actual and exemplary damages, interest, costs, and attorney's fees. Because we conclude the evidence is insufficient to support the trial court's judgment, we reverse the judgment and remand to the trial court for further proceedings.

I. Background

Brian Hartsfield ("Hartsfield) was employed by Hartsfield Cabinet, LLC, ("Cabinet") a Texas corporation. Steve Kennedy is an owner of the business.

Hartsfield left Cabinet, and is alleged to have taken Cabinet's files, tools, computers, and other materials to start a competing business with Jorge Garcia.

Cabinet initiated this lawsuit against Hartsfield and Garcia. After several supplemental petitions, the causes of action asserted by Cabinet against Hartsfield and Garcia included: fraud, conversion, money had and received, misappropriation of trade secrets, tortious interference with a contract and with prospective business relations, breach of fiduciary duty, business disparagement, defamation, aiding and abetting, and conspiracy. Hartsfield and Garcia answered by general denial.

Although nothing in our record reflects that Steve Kennedy was a named plaintiff or otherwise properly joined as a party to the suit in any capacity, Kennedy filed a "cross-claim" against Hartsfield.[1] Hartsfield answered, generally denying the allegations and noting that a cross-claim was not the appropriate mechanism for asserting the claims alleged.[2]

Subsequently, Kennedy and Cabinet filed a traditional motion for summary judgment entitled "Plaintiffs' Motion for Summary Judgment" against Hartsfield

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[1] A cross-claim is a claim litigated by parties on the same side of the suit. *Edwards & Assoc. v. Wirtz*, No. 07-94-0492-CV, 2000 WL 514131, at *6 (Tex. App.—Amarillo Apr. 25, 2000, no pet.) (mem. op.).

[2] Kennedy is listed as a plaintiff in the caption of all subsequent pleadings. We recognize that we do not appear to have the entire clerk's record but note that the court's docket sheet does not reference any pleading making Kennedy a party and lists only Cabinet as the plaintiff.

and Garcia. The motion was supported by Kennedy's affidavit and an attorney's fees affidavit. Garcia and Hartsfield responded and each attached his affidavit in support.

The parties each objected to the opposing party's affidavits but failed to obtain a ruling on their objections.

The trial court conducted a hearing and granted summary judgment in favor of Cabinet and Kennedy against Garcia and Hartsfield. The final judgment awards damages to both Kennedy and Cabinet (together, "appellees") for $981,388.60 in actual damages, $100,000 in exemplary damages, $66,450 in attorney's fees, plus costs and interest. Garcia and Hartsfield (together, "appellants") subsequently initiated this timely appeal.

II. Analysis

The Arguments on Appeal

Neither party has adequately briefed the issues. *See* TEX. R. APP. P. 38.1. Although appellants' briefing provides general citations to legal authority, there is little or no analysis. *See Burton v. Prince*, 577 S.W.3d 280, 292 (Tex. App.—Houston [14th Dist.] 2019, no pet) (a party must provide substantive legal analysis). Appellees' brief primarily consists of a single-spaced chart restating an affidavit filed in support of summary judgment. *See Canton-Carter v. Baylor Coll, of Med*., 271 S.W.3d 928, 931 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("briefing requirements not satisfied by merely uttering brief conclusory statements unsupported by legal citations.").

Nonetheless, appellate courts are required to reasonably but liberally construe the briefing rules to avoid waiver of appellate review. *Horton v. Stovall*, 591 S.W.3d 567, 569 (Tex. 2019) (per curiam). Guided by this principle, we generously apply our rules to avoid briefing waiver here. We construe appellants' briefing to argue that the evidence is insufficient to support the summary judgment and appellees' briefing to argue that they established they were entitled to judgment as a matter of law.[3]

Summary Judgment and Standard of Review

Appellees moved for summary judgment on the following causes of action: common law fraud, fraud by nondisclosure, conversion, money had and received, statutory and common law misappropriation of trade secrets, business disparagement, tortious interference with prospective business relations and with an existing contract, breach of fiduciary duty, defamation, conspiracy, and aiding and abetting.

The court's judgment defines Hartsfield Cabinet and Steve Kennedy collectively as "Plaintiffs" and then grants summary judgment on "all of Plaintiffs causes of action . . . including based on the money and/or value of the business stolen by Defendant Brian Hartsfield . . . in the amount of $28,169.00 . . . ."[4] When the trial

[3] To the extent the parties intended to argue otherwise, the issue(s) are waived as inadequately briefed. *See* TEX. R. APP. P. 38.1.

[4] Appellants do not challenge any errors or characterizations in the judgment.

court does not specify the grounds for its summary judgment, we must affirm the summary judgment "if any of the theories presented to the trial court and preserved for appellate review are meritorious." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

When a plaintiff moves for traditional summary judgment, it has the burden to conclusively establish all elements of its claim. *Affordable Motor Co. v. LNA, LLC*, 351 S.W.3d 515, 519 (Tex. App.—Dallas 2011, pet. denied). A matter is conclusively established if the evidence leaves "no room for ordinary minds to differ as to the conclusion to be drawn from it." *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC,* 573 S.W.3d 224, 235 (Tex. 2019). If the movant satisfies its burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc*., 555 S.W.3d 79, 84 (Tex. 2018). But the burden does not shift if the movant does not establish his burden as a matter of law. *See Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 287 (Tex. App.—Dallas 2013, pet. denied).

"We review summary judgments de novo, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor." *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 509 (Tex. 2022).

The Summary Judgment Evidence

We begin by identifying the summary judgment evidence properly considered in our review. Both parties challenge the competency of the summary judgment

evidence, including the conclusory nature of the affidavits, but neither address whether the alleged defects are matters of substance or form.

For preservation purposes, objections to "form" and "substance" are treated differently. *See Stewart v. Sanmina Texas L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet). Objections to the form of summary judgment evidence are preserved for appellate review only if such objections are made and ruled on in the trial court. *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 783 (Tex. App.—Dallas 2013, no pet.); *see also Colvin v. Texas Dow Emps. Credit Union*, No. 01–11–00342–CV, 2012 WL 5544950, at *4 (Tex. App.—Houston [1st Dist.] Nov. 15, 2012, no pet.) (mem. op.) (requiring ruling on objections to form of affidavit to preserve complaint on appeal and noting that objections of lack of personal knowledge, hearsay, and best-evidence are objections to form of affidavit); *Ekpe v. CACH, LLC*, No. 03–10–00274–CV, 2011 WL 1005379, at *6 n.1 (Tex. App.—Austin Mar. 16, 2011, no pet.) (mem. op.) (concluding that complaints that accompanying business-records affidavits were defective or insufficient were not preserved because no express ruling in record).

On the other hand, defects in the substance of the evidence do not require a written ruling, and such objections may be raised for the first time on appeal. *Stewart*, 156 S.W.3d at 207; *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.—Dallas 2004, no pet.). Substantive defects are those that leave the evidence legally insufficient and include affidavits which are nothing more than legal or factual

conclusions. *Stewart*, 156 S.W.3d at 207; *Hou–Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

In the court below, appellees objected to appellants' affidavits as not based on personal knowledge, conclusory, and as testimony of an interested witness that did not comport with TEX. R. CIV. P. 166a(C).[5] An objection to the testimony of an interested witness is an objection to a defect of form. *See S&I Mgmt. Inc. v Sungju Choi*, 331 S.W.3d 849, 855 (Tex. App.—Dallas 2011, no pet.). Likewise, the absence of personal knowledge is a form defect. *Grand Prairie Indep. Sch. Dist. v. Vaughn*, 792 S.W.2d 944, 945 (Tex. 1990) (per curiam). Appellants also objected to the form of appellees' affidavits. Neither party obtained a ruling on their objections. Accordingly, any challenge to form defects was not preserved for our review, and we consider only whether the affidavits were incompetent summary judgment evidence because they were conclusory. *See Stewart*, 156 S.W.3d at 207.

A conclusory statement is one that does not provide the underlying facts to support the conclusion. *Eberstein v. Hunter*, 260 S.W.3d 626, 630 (Tex. App.—Dallas 2008, no pet.). Conclusory statements in affidavits are not competent evidence to support summary judgment because they are not credible or susceptible

[5] Summary judgment may be based on an affidavit that is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been easily controverted." *See* TEX. R. CIV. P. 166a(c).

to being readily controverted. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex.1996).

Appellees' Causes of Action

A. The Tort, Misappropriation of Trade Secrets, and Breach of Fiduciary Duty Claims

Applying the foregoing principles and standard of review, we consider the sufficiency of the evidence to support summary judgment on appellees' claims. The Kennedy affidavit filed in support of appellee's summary judgment motion consists of unsubstantiated allegations and conclusions. But we need not parse through these allegations or endeavor to apply them to the elements of every claim, because almost all of appellee's claims have one element in common—damages. *See Twister B.V. v. Newton Research Partners, LP,* 364 S.W.3d 428, 437 (Tex. App.—Dallas 2012, no pet.) (damages misappropriation of trade secrets); *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc*., 29 S.W.3d 74, 77 (Tex. 2000) (tortious interference requires proof that interference was proximate cause of damages); *Anderson v. Cawley*, 378 S.W.3d 38, 51 (Tex. App.—Dallas 2012, no pet.) (breach of fiduciary duty); *Aquaplex v. Rancho La Valencia, Inc*., 297 S.W.3d 768, 774 (Tex. 2009) (per curiam) (fraud); *D Mag. Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (damages defamation); *Hurlbut v. Gulf Atlantic Life Ins. Co*., 749 S.W.2d 762, 766 (Tex. 1987) (business disparagement requires proof of special damages); *United Mobile Networks v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997) (plaintiff must prove

damages to recover for conversion). Appellees' proof of alleged damages does not support recovery for any of these claims.

Appellees' proof consists of a chart in the Kennedy affidavit stating, "Plaintiff is entitled to damages in the amount of $1,081,388.60 (or whatever amount this Court may determine is just and proper), which includes damages outlined, described, discussed and attested to in the following table." The table then itemizes the alleged damages as follows:

Files stolen by B. Hartsfield (paper files)	Priceless: $200,000
Customer lists and files stolen by B. Hartsfield (paper)	Priceless: $200,000
Desktop computer stolen by B. Hartsfield and never returned including software and computer programs contained	$3,500
FIRST laptop computer stolen by B. Hartsfield when he quit, and partially destroyed and sabotaged before being returned the day after he quit (a Tuesday)	$2,000
SECOND laptop computer stolen by B. Hartsfield, also when he quit, and returned approximately two days after he quit (a Wednesday)	$100
Special expensive proprietary software for operating cabinet making machines/equipment which was on FIRST laptop computer that B. Hartsfield destroyed and/or made unusable when he stole the laptop	$10,000 cost of software to buy and replace, $15,000 cost of programming re-programming related to newly installed software
Tools stolen by B. Hartsfield when he quit	$8,028
Costs to fix damage to special cabinet making machines when B. Hartsfield intentionally damaged and sabotaged such the FIRST time	$4,044.28
Costs to fix damage to special cabinet making machines when B. Hartsfield intentionally damaged and sabotaged them the SECOND time	$2,016.32
Money and/or value of business stolen from plaintiff by B. Hartsfield from plaintiff's client Frank Kobyluch	$6,200

Money and/or value of business stolen from plaintiff by B. Hartsfield from plaintiff's client Bert Smith	$21,969
Stolen tools given by Brian to Daniel Ramirez $531	$531
Subtotal: Actual Damages (for sure, but not necessarily all)	$471,388.60
Loss of joint venture including the opportunity to pursue	$100,000
loss of value of business	$300,000
Loss of reputation	$100,000
Mental anguish	$10,000
Subtotal: Additional Damages	$510,000
Exemplary damages	$100,000
Grand Total	$1,081,388.60

There is no further support or explanation for any of the line items in the chart nor is there anything to connect these dollar amounts to any of the alleged facts in the preceding paragraphs or to any of the causes of action alleged.

It is well established that damages must always be proved with reasonable certainty. *Perthuis v. Baylor Miraca Genetics Laboratories, LLC*, 645 S.W.3d 228, 243 (Tex. 2022). Courts do not "award speculative damages for any claim that is too remote and depend[ent] upon too many contingencies." *Signature Indus. Sevs., L.L.C. v. Int'l Paper Co*., 638 S.W.3d 179, 186 (Tex. 2022).

Here, there is no specificity or supporting documentation. The affiant fails to specify the owner of the tools, files, and computers, which files and tools were allegedly stolen and given away, or the software that was allegedly destroyed or made unstable on the laptops that were allegedly taken and returned. Although the affiant avers that he consulted with an unidentified forensic expert who concluded

that software had been destroyed, the expert is not identified, nor is the cost of replacing and re-programming the software explained or substantiated.

Moreover, elsewhere in the affidavit, Kennedy states that "plaintiff's insurer has paid claims for Brian's sabotage of the machines." But there is no accounting for this recovery in the damage calculation. "Mere allegations of expenses without objective facts, figures, or data does not amount to any evidence of out-of-pocket damages." *James L. Gang & Assoc. Inc. v. Abbott Labs, Inc.,* 198 S.W.3d 434, 443 (Tex. App.—Dallas 2006, no pet.).

The affiant also provides several other figures for damages. None include any objective evidence of injury, explanation, back-up documentation as to calculation, or the metrics used in arriving at the estimates. In short, the evidence concerning alleged actual damages is speculative and conclusory and does not constitute competent summary judgment evidence. *See Ryland*, 924 S.W.2d at 122; *see also Arkoma Basin Expl. Co. v. FMF Assoc. 1990-A Ltd*., 249 S.W.3d 380, 389 n.32 (Tex. 2008).

Appellees further claim to have suffered $510,000 in additional damages resulting from a lost joint venture opportunity, loss of business value, and mental anguish. There is nothing in the damages chart or elsewhere in the affidavit to establish that one or both appellees suffered mental anguish. *See Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) ("Not only must there be evidence of the existence of compensable mental anguish there must also be some

evidence to justify the amount awarded).").[6] In addition, damages for lost reputation cannot be based on mere speculation that the plaintiff's reputation suffered. *Burbage v. Burbage*, 447 S.W.3d 249, 259 (Tex. 2014). The lost business value and opportunity damages also require more specificity than affiant's unsubstantiated conclusion that the losses occurred. *See Plotkin v. Joekel*, 304 S.W.3d 455, 487 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (conclusory statements in affidavit concerning lost profits); *Total Clean, LLC v. Cox Smith Matthews, Inc.*, 330 S.W.3d 657, 667 (Tex. App.—San Antonio, 2010 pet. denied) (estimates not based on objective facts, figures, or data were purely speculative and conclusory).

The affidavit also claims that appellees suffered $100,000 in exemplary damages. To be entitled to exemplary damages, the injured party must show that the tort-feasor's act warranted actual damages and was of a wanton and malicious nature. *Southwest Inv. Co. v. Alvarez*, 453 S.W.2d 138, 141 (Tex.1970); *see also First Nat'l Bank v. Gittelman*, 788 S.W.2d 165, 170 (Tex. App.—Houston [14th Dist.] 1990, writ denied). There is no evidence to support the recovery of such damages here. *See Twin City Fire Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995) (actual damages from a tort must be proved before punitive damages are available).

In addition to the conclusory nature of the damages evidence, there is no evidence concerning whether Kennedy, Cabinet, or both of them allegedly suffered

[6] Appellees did not plead or prove defamation per se, so lost reputation and mental anguish damages are not presumed. *See Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013).

damages. Kennedy avers in his affidavit that he is the agent and owner of Hartsfield Cabinet LLC, and that both are parties in this case. He does not state, however, that he is making the affidavit on Cabinet's behalf. The trial court awarded damages to "plaintiffs." But the affidavit avers that only a single, unidentified plaintiff suffered damages, and the record is not entirely clear that Kennedy was even a plaintiff. Under these circumstances, the evidence is insufficient to support an award of damages to both Kennedy and Cabinet.

Because there is no competent summary judgment evidence to establish the damages element of appellees' tort, misappropriation of trade secrets, and breach of fiduciary duty claims, the trial court's summary judgment on these claims was erroneous.

B. Civil Conspiracy and Aiding and Abetting

The trial court also awarded summary judgment on appellees' civil conspiracy and aiding and abetting claims. To establish a claim for civil conspiracy, a plaintiff must show that: (1) a combination of two or more persons, (2) seeking to accomplish an object or course of action, (3) reach a meeting of the minds, (4) and commit one or more unlawful acts, (5) which is the proximate cause of damages. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). Civil conspiracy is a derivative tort. *See Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008). Thus, to prevail on a civil conspiracy claim, a plaintiff must show that the defendant was liable for some underlying tort. *Four Bros. Boat Works Inc. v. Tejoro Petrol.*

Cos., Inc., 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Similarly, aiding and abetting, like civil conspiracy, is also a derivative tort, and the disposition of the tort claim also determines the disposition of the underlying tort claim. *See Brumfield v. Williamson*, 634 S.W.3d 170, 208 (Tex. App.—Houston [1st Dist.] 2021, pet. denied). We have concluded that the trial court erred in granting summary judgment on the tort claims. In the absence of a supporting tort, the court's summary judgment on civil conspiracy and aiding and abetting is also erroneous.

C. Money Had and Received

To prove a claim for money had and received, a plaintiff must show that (1) a defendant holds money (2) which in equity and good conscience belongs to the plaintiff. *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 814 (Tex. App.—Dallas 2012, no pet.). The central question in such an action is to which party the money belongs, in equity, justice, and law. *See id*. It is an equitable doctrine applied to prevent unjust enrichment. *Id.*

Appellees' affidavit does not establish the elements of a money had and received claim. Instead, the affidavit simply avers:

> 1. The defendants hold money, including money they received from Plaintiffs' customers that was for plaintiff but defendants stole by having checks written directly to them. 2. The money belongs to the Plaintiff in equity and good conscience.

These are conclusory allegations. *See Eberstein*, 260 S.W.3d at 630. Although there are other references in the affidavit to "diverting/stealing" funds by having clients write checks to Hartsfield, there is nothing to identify the clients, the

checks, or to establish the allegations as fact. Moreover, the affidavit fails to indicate whether Kennedy or Cabinet claim to be entitled to the money, or the dollar amount appellees claim that one or both of them are equitably entitled to receive. These conclusory statements are not competent summary judgment evidence. *See Ryland*, 924 S.W.2d at 122. Because there is no competent summary judgment evidence, the trial court erred in granting summary judgment on appellees' claim for money had and received.

D. Attorney's Fees

Appellants argue the trial court erred in awarding attorney's fees. We agree.

Appellees contend the award was proper under TEX. CIV. PRAC. & REM. CODE ANN. § 38.01 and for misappropriation of trade secrets. We have concluded that the summary judgment evidence does not establish a claim for misappropriation of trade secrets. Therefore, this cause of action will not support an attorney's fees award.

Attorney's fees under §38.01 are available when a party recovers damages for breach of contract. *See Green Intern., Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). There was no claim for breach of contract here, nor was relief granted on such a claim. Accordingly, the trial court erred in awarding attorney's fees.

III. Conclusion

The evidence is insufficient to support the trial court's summary judgment on any of appellees' claims.

We therefore reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRIAN HARTSFIELD AND JORGE GARCIA, Appellants

No. 05-21-00896-CV V.

HARTSFIELD CABINET LLC AND STEVE KENNEDY, Appellees

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-20-04419.
Opinion delivered by Justice Garcia.
Justices Myers and Pedersen, III participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered September 8, 2022.