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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-420

Filed: 15 January 2019

Wilson County, No. 14CVS1038

VEER RIGHT MANAGEMENT GROUP, INC., Plaintiff,

v.

CZARNOWSKI DISPLAY SERVICE, INC. and TIMOTHY JENKINS, Defendants.

Appeal by Plaintiff from order entered 24 January 2018 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wilson County. Heard in the Court of Appeals 18 October 2018.

Ellis & Winters LLP, by Jonathan D. Sasser and Jeremy Falcone, Connors Morgan PLLC, by C. Scott Meyers, for Veer Right Management Group, Inc., plaintiff-appellants.

Parker Poe Adams & Bernstein, LLP, by Melanie Black Dubis, Catherine R.L. Lawson and Jami J. Farris, Hogan Marren, LTD., by John Michael Tecson, for Czarnowski Display Service, Inc., defendant-appellee.

Harris Sarratt & Hodges, LLP, by John L. Sarratt, for Timothy Jenkins, defendant-appellee.

HUNTER, JR., ROBERT N., Judge.

Plaintiff Veer Right Management Group, Inc. appeals from an order entered 24 January 2018 by Judge Adam M. Conrad, Special Superior Court Judge for

Complex Business Cases, in Superior Court, Wilson County, granting Defendants Czarnowski Display Service, Inc. and Timothy Jenkins' motions for summary judgment and dismissing the case. Plaintiff argues on appeal: (1) the trial court erred by granting summary judgment in favor of Defendants; (2) Veer Right forecast admissible evidence of the elements of its claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy, tortious interference with contract, and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1; and (3) the trial court erred by refusing to draw an adverse inference from Defendant Jenkins' destruction of evidence. After careful review, we affirm in part and reverse in part.

I. Factual and Procedural History

A. Factual Background

The United States Postal Service ("USPS") maintains a large tradeshow program managed by an outside vendor. The USPS selects the vendor through a competitive bidding process. Tonia and Rodney Miller ("Millers") founded Veer Right Management Group, Inc. ("Plaintiff" or "Veer Right") in 2000 to bid on the USPS tradeshow contracts. From 2000 to 2005, Veer Right served as a subcontractor on the tradeshow contract. Veer Right successfully bid to be the primary contractor in 2005, handling logistics and marketing.

<u>Veer Right and Czarnowski</u>

Veer Right contracted with Czarnowski Display Service, Inc. ("Czarnowski") to handle the set-up and breakdown of the tradeshow booths as a subcontractor. In 2010 when the USPS solicited bids for a new contract ("2010 Contract"), Veer Right and Czarnowski partnered again and won. Veer Right did not require Czarnowski to sign a non-disclosure or non-compete agreement. The 2010 Contract period was to run from 6 May 2010 to 30 September 2011, and the USPS could extend the term through the exercise of up to "four one-year renewal options." The USPS exercised its options to renew for 2011 and 2012.

Veer Right and Jenkins

Prior to winning the first contract, Veer Right hired Timothy Jenkins, Tonia Miller's brother-in-law, as its first employee and subsequently promoted him to Vice-President with responsibility for the USPS account. After Jenkins worked for Veer Right for several years, the Millers accused him of misappropriating funds for personal use. Jenkins then agreed with the Millers to pay back the funds in question and sent a company-wide email "to apologize to everyone." Veer Right alleges Jenkins became bitter towards the Millers and Veer Right after the incident. In an affidavit to the trial court, Tonia Miller, CEO of Veer Right, said the following about Jenkins and the deal the Millers made regarding Jenkins' embezzlement:

> 20. Mr. Jenkins agreed to the arrangement, but he was not happy. He sent Rod and I (sic) an email . . . . In the email, he called our offer "blackmail" to keep him at Veer Right, and he complained that continuing working at Veer Right

caused him "misery."

According to Veer Right, Jenkins criticized the Millers in email exchanges to Christopher Karpenko, the USPS's manager of tradeshow events. In 2012, soon after Karpenko was promoted to his position, Jenkins wrote that Tonia Miller rarely came to the office "2 days in a row" and missed "countless deadlines" for Karpenko's predecessor, Joe Porporino. Contrary to the Millers' direction that any USPS communications required their pre-approval, Jenkins continued to report to Karpenko about conversations with the Millers. Jenkins also sent confidential information to Czarnowski. Specifically, Jenkins forwarded the cost-savings proposal between Veer Right and the USPS to Mike Orlosky, Czarnowski's employee in charge of the tradeshow contract. Jenkins told Orlosky via email, "[k]eep this to yourself." Jenkins also knew Karpenko visited Czarnowski, but he did not tell anyone at Veer Right.

USPS Contract Decisions

Veer Right further asserted Karpenko's promotion coincided with management changes in the tradeshow program, whereby the scope of projects changed, and demands on Veer Right's time and resources changed. Karpenko made additional requests of Veer Right, such as asking Tonia Miller to use her personal VIP status to get hotel rooms for USPS executives.

As "standard practice" in an option year, in January 2013 the USPS assessed whether to exercise a third one-year renewal option or rebid the tradeshow contract. USPS employees Jeanne Castellano and Sheryl Gray, who had responsibility for supplier contracts, coordinated with Karpenko and colleague Brian Corley and elected not to renew the contract with Veer Right. In June 2013, the USPS announced the contract was out for re-bid.

Before asking for new bids, the USPS held a supplier workshop where Veer Right and Czarnowski presented separately. Veer Right had applied as a subcontractor, with Freeman Decorating Company ("Freeman Decorating") as the primary contractor. Veer Right inquired as to why Czarnowski was presenting separately at the workshop. Orlosky told Rodney Miller, "I do not know why we were invited by USPS purchasing to present our capabilities separately from VRMG." Gray testified she believed Czarnowski contacted her and asked to present separately from Veer Right.

Castellano testified the USPS expected Veer Right to give the best presentation, but instead it appeared Veer Right did not "put much effort . . . into preparation" and gave a "very disappointing" presentation. After the presentation, the USPS asked Veer Right if it could offer any cost savings under the 2010 Contract. The USPS found Veer Right's cost savings proposal to be "relatively minimal."

After bids were submitted, the USPS arranged a telephone conference with Freeman Decorating to discuss their bid. During the call, the USPS suggested Freeman Decorating raise some prices in its bid such that it would include more items. Freeman Decorating followed this advice. On 25 September 2013, the USPS selected Czarnowski as the primary contractor ("2013 Contract"). The USPS's award letter indicated Freeman Decorating's costs were slightly higher than Czarnowski's costs. Castellano and Gray testified the solicitation, evaluation, and award processes were done fairly.

Jenkins Hired by Czarnowski

After losing the USPS contract, Veer Right laid off Jenkins and encouraged him to apply to work with Czarnowski. On 7 October 2013, Jenkins resigned from Veer Right and began work the next day with Czarnowski. Following his departure, Veer Right discovered Jenkins' computer was wiped clean of the operating system and all software. Prior to returning the computer, Jenkins had copied the hard drive and forwarded some electronic files to his personal email. After beginning his employment with Czarnowski, Jenkins accessed Veer Right's server. Through forensic analysis, Veer Right recovered some of Jenkins' emails, and Veer Right indicated Jenkins had secretly communicated with Orlosky for months.

B. Procedural History

On 11 July 2014, Plaintiff Veer Right filed a complaint in Wilson County Superior Court alleging Jenkins breached fiduciary duties owed to Veer Right by conspiring with Czarnowski to win the tradeshow contract. Veer Right alleged seven causes of action: (1) breach of fiduciary duty against Jenkins; (2) aiding and abetting breach of fiduciary duty against Czarnowski; (3) tortious interference with Jenkins' employment contract against Czarnowski; (4) tortious interference with the tradeshow contract against Jenkins and Czarnowski; (5) misappropriation of trade secrets against Jenkins and Czarnowski; (6) civil conspiracy against Jenkins and Czarnowski; and (7) unfair and deceptive trade practices against Jenkins and Czarnowski. More specifically, Veer Right alleged the following:

> 76. Jenkins breached the fiduciary duties he owed to VRMG in multiple ways:
>
> a) He conspired and acted in concert with Karpenko, Porporino, Corley and Czarnowski to take the USPS Tradeshow Contract from VRMG and award it to Czarnowski.
>
> b) He concealed from VRMG the fact that he was actively working with Czarnowski to prepare their proposal for the USPS Tradeshow Contract at the same time VRMG was preparing its proposal.
>
> c) He shared confidential and proprietary information of VRMG with Czarnowski to give Czarnowski an unfair advantage in the bidding process.
>
> d) He wrongly transferred confidential and proprietary information belonging to VRMG to his personal email account for no legitimate purpose;

e) He conspired and acted in concert with Karpenko, Porporino, and Czarnowski for the wrongful purpose of procuring employment for himself with Czarnowski after VRMG lost the USPS Tradeshow Contract; and

f) He illegally accessed VRMG's computer system and stole information after he was no longer employed.

77. The breaches of fiduciary duty by Jenkins resulted in VRMG losing the USPS Tradeshow Contract, Czarnowski being awarded the USPS Tradeshow Contract, and Jenkins acquiring new employment with Czarnowski.

78. As a direct and proximate result of the breaches of fiduciary duty by Jenkins and his wrongful conduct, VRMG has suffered damages in excess of $10,000 to be proven at trial.

. . .

85. Czarnowski purposefully and wrongfully assisted Jenkins to breach his fiduciary duties to VRMG. Czarnowski promised that if Jenkins used his position and influence to assist Defendants in their scheme to take the USPS Tradeshow Contract from VRMG and award it to Czarnowski, then Jenkins would be employed by Czarnowski.

. . .

94. Czarnowski purposefully and wrongfully interfered with Jenkins' contractual duties to VRMG. Czarnowski promised that if Jenkins used his position and influence to assist Defendants in their scheme to take the USPS Tradeshow Contract from VRMG and award it to Czarnowski, then Jenkins would be employed by Czarnowski.

. . .

100. Czarnowski knew about the USPS Tradeshow Contract and VRMG's status as primary contractor. Czarnowski intentionally induced the USPS to put the Tradeshow Contract up for bid allowing competing proposals for the following year.

101. Jenkins arranged for USPS to audit VRMG when the owners were not present, and manufactured an incorrect invoice and an overpayment from USPS to make VRMG look bad in its audit and sabotage VRMG's chances to keep the USPS Tradeshow Contract.

102. Defendants were not justified in interfering with VRMG's relationship with the USPS. The Defendants conspired together to orchestrate the breach of Jenkins's fiduciary duties to VRMG, to arrange for the USPS Tradeshow Contract to be put out for bids, and to arrange for Jenkins to be employed with Czarnowski once it was awarded the contract.

103. Jenkins and Czarnowski acted with malice and without any legitimate business purpose in interfering with VRMG's relationship with the USPS and bringing about the end of that relationship.

. . .

115. Jenkins and Czarnowski agreed amongst themselves to create the circumstance whereby the USPS Tradeshow Contract would be rebid, Czarnowski would have an unfair advantage competing for the contract, Czarnowski would receive confidential and proprietary information about VRMG from Jenkins, and Jenkins would receive employment with Czarnowski once the contract was awarded to Czarnowski.

[116.] Jenkins and Czarnowski committed multiple overt acts in furtherance of the conspiracy, including:

> (a) Manufacturing an overpayment by USPS to VRMG that could be included on an audit to induce USPS to put the Tradeshow Contract out for bid; and
>
> (b) Creating a proposal for Czarnowski to win the USPS Tradeshow Contract using VRMG's confidential and proprietary information obtained wrongfully from Jenkins.
>
> . . .
>
> 120. The actions of Jenkins and Czarnowski, as alleged above, constitute unfair methods of competition, and unfair and deceptive acts.

On 14 July 2014, the case was designated a mandatory complex business case. On 10 September 2014, Jenkins filed an answer, and on 12 September 2014, Czarnowski filed a motion to dismiss. The trial court entered a Case Management Order on 11 December 2014, setting a discovery schedule and rules for evidence collection. On 4 February 2015, the trial court denied Czarnowski's motion to dismiss. On 8 March 2015, Czarnowski filed an answer to the complaint.

On 30 June 2017, Defendants Jenkins and Czarnowski each filed motions for summary judgment. Veer Right filed a single, combined motion in opposition to summary judgment on 31 July 2017. On 25 October 2017, the trial court held a hearing on Defendants' motions for summary judgment. The trial court then granted summary judgment on 24 January 2018. Veer Right timely filed notice of appeal on 31 January 2018.

II. Jurisdiction

Our jurisdiction over an appeal from a final judgment of a North Carolina Superior Court is appropriate pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat § 1-277(a) (2017).

III. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Fox v. PGML, LLC*, 228 N.C. App. 28, 30, 744 S.E.2d 483, 485 (2013) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "[W]e review the record in a light most favorable to the party against whom the order has been entered . . . ." *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724, *disc. rev. denied*, 359 N.C. 629, 615 S.E.2d 660 (2005). Our Supreme Court has explained "an issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (internal quotations and citation omitted).

IV. Analysis

Plaintiff Veer Right contends the trial court erred by granting summary judgment in favor of Defendants Jenkins and Czarnowski by finding there was no

causal link between Defendants' behavior and Veer Right's injury, and Veer Right suffered no damages by Defendant Czarnowski's actions. On appeal Plaintiff contends it forecast evidence on claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy, tortious interference, and unfair and deceptive trade practices. Plaintiff also contends the trial court refused to draw an adverse inference based on Jenkins' destruction of evidence. We consider each of Plaintiff's claims in turn.

A. Summary Judgment

Breach of Fiduciary Duty

Plaintiff's claims as to Defendant Jenkins' breach of fiduciary duty arise from the alleged agreement between Jenkins and Czarnowski to harm Veer Right's reputation and steer the contract toward Czarnowski. Veer Right claims Jenkins' breach included disparaging the Millers to Karpenko and sharing confidential information with Czarnowski during the 2013 Contract bidding process. Reviewing the evidence in the light most favorable to Plaintiff, Veer Right has met its burden to prove a genuine issue of material fact exists as to Defendant Jenkins' breach of fiduciary duty. *See Bellsouth Telecomms., Inc.*, 168 N.C. App. at 80, 606 S.E.2d at 724.

To state a claim for breach of fiduciary duty there must be a fiduciary relationship between the parties. *White v. Consol. Planning, Inc.*, 166 N.C. App. 283,

293, 603 S.E.2d 147, 155 (2004). North Carolina law recognizes a fiduciary relationship that "exist[s] as a fact, in which there is confidence reposed on one side," and a "resulting superiority and influence on the other." *S.N.R. Mgmt. Corp. v. Danube Partners*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (citation and internal quotations omitted). It must be alleged the fiduciary failed to "act in good faith and with due regard to the interests of the one reposing the confidence." *White*, 166 N.C. App. at 293, 603 S.E.2d at 155 (quoting *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951)). Our Court has held "motive, like intent or other states of mind, is rarely susceptible to direct proof and almost always depends on inferences drawn from circumstantial evidence[,]" and "[c]onsequently, summary judgment should rarely be granted in those cases." *Burrow v. Westinghouse Elec. Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218 (1988) (citation omitted). Further, because "a breach of fiduciary duty is a species of negligence or professional malpractice [. . .] these claims require proof of an injury proximately caused by the breach of duty." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (citations and internal quotations omitted). In establishing the elements of a breach of fiduciary duty,

> the initial burden of proof is on the plaintiff to allege the facts and circumstances (1) which created the relation of trust confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to

> the hurt of plaintiff.

Orr v. Calvert, 212 N.C. App. 254, 268, 713 S.E.2d 39, 49 (2011) (Hunter, J. dissenting in part) (citation and internal quotations omitted), *rev'd per curiam per the dissent*, 365 N.C. 320, 720 S.E.2d 387 (2011).

Here, Jenkins does not dispute he owed a fiduciary duty to Veer Right, due to his status as vice-president of the company. *See Underwood v. Stafford*, 200 N.C. 700, 703, 155 S.E.2d 211, 213 (1967) (stating officers or directors of a corporation generally owe a fiduciary duty to the corporation). Jenkins testified he helped Czarnowski. He wrote in an email his actions "helped [Czarnowski] in an indirect way." While employed as vice-president, Jenkins disparaged Veer Right to the USPS. Jenkins provided information about Veer Right to its eventual successor to the 2010 Contract, Czarnowski. The evidence presented at trial shows Jenkins and Karpenko frequently corresponded. Jenkins also attempted to keep his emails to Karpenko secret from the Millers. In an email to Karpenko, Jenkins said:

> Rod was in here when your email popped up and he saw you sent something so he said I see Chris responded and asked me to open it. I told him I was busy and [will] look at it later.
>
> So he wouldn't know you were emailing just me I forwarded it to Tonia with just the second sentence and told her I am sure it was intended for her.
>
> I just wanted you to know what happened so I wouldn't break your trust, but I couldn't help Rod seeing that you emailed back. Funny the guy is never, ever in my office. I

hope you are cool with what I did?

Karpenko responded shortly thereafter, asking Jenkins, "[h]e did or didn't read it. . .[?]"

We find Plaintiff, through this evidence, has established a *prima facie* case of the existence of a fiduciary duty and its breach. Accordingly, the burden shifts to Defendant Jenkins to prove he acted in an "open, fair and honest manner so that no breach of fiduciary duty occurred." *See Estate of Smith v. Underwood*, 127 N.C. App. 1, 9, 487 S.E.2d 807, 812 (1997) (citation and internal quotations omitted). The trial court did not address whether Jenkins acted in good faith; any such inferences drawn as to Jenkins' fairness and honesty were inappropriate for dismissal on summary judgment. See *Burrow*, 88 N.C. App. at 351, 363 S.E.2d at 218 (1988).

As to the next element, Veer Right must show Jenkins proximately caused the USPS not to exercise its renewal options for the 2010 Contract. Veer Right argues the company was harmed by having to re-bid and ultimately losing the 2010 Contract. The trial court's order dismissing the breach of fiduciary duty claim focused on the causal relationship between Jenkins' conduct and the loss of the 2010 Contract by Veer Right. The trial court cited the testimony of four USPS employees as proving the 2010 Contract was put out and rebid fairly. These witnesses all testified there were legitimate business reasons for the decision to rebid the contract and to award the contract to Czarnowski. The trial court did not address, however, the effect

Jenkins' actions had on the USPS's decision. While Castellano testified the decision to re-bid the Contract was "standard practice," she also testified an "internal client"—Karpenko—made the decision The record reflects the following question and answer with Castellano:

> Q. Do you remember why the decision was made not to exercise the option to renew in 2013 with Veer Right?
>
> A. Essentially, the internal client had reached the decision that they wanted to pursue what else was out there.

Considering the evidence above in the light most favorable to Veer Right, we find the causal link between Jenkins' conduct and Plaintiff's loss presents a genuine issue of material fact. The testimony and emails tend to show Jenkins aided competitor Czarnowski, and further, that one of the causes of Karpenko's decision is plausibly based on evidence that Jenkins' actions could have harmed Veer Right. *See Liberty Mut. Ins. Co.*, 356 N.C. at 579, 573 S.E.2d at 124. Accordingly, we reverse summary judgment on the claim of breach of fiduciary duty.

Aiding and Abetting Jenkins' Breach of Fiduciary Duty

Plaintiff next alleges Czarnowski aided and abetted Jenkins' breach of fiduciary duty. Our Court has recognized a cause of action for aiding and abetting a breach of fiduciary duty in the context of securities law violations. *Blow v. Shaughnessy*, 88 N.C. App. 484, 490, 364 S.E.2d 444, 447 (1988). The court in *Blow* recognized three elements for this claim:

> (1) the existence of a securities law violation by the primary party.
> (2) knowledge of the violation on the part of the aider and abettor; and
> (3) substantial assistance by the aider and abettor in the achievement of the primary violation.

Id. at 490, 364 S.E.2d at 447. The underlying rationale of *Blow* was abrogated, however, by *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439 (1994). Plaintiff urges this Court to recognize this cause of action, as it is recognized in other states regarded as authorities of corporate law. *See, e.g.*, *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006).

Even if we recognized a cause of action for aiding and abetting a breach of fiduciary duty, Veer Right would still have to prove a "genuine issue as to any material fact" exists for this claim. *See Fox*, 228 N.C. App. at 30, 744 S.E.2d at 485 (citation omitted). While a genuine issue of material fact exists as to whether Jenkins' breached his fiduciary duty to Veer Right, Plaintiff does not allege Czarnowski knew of the alleged breach by Jenkins. Plaintiff does contend, however, Czarnowski gave "substantial assistance" to Jenkins in committing the breach. *See Blow*, 88 N.C. App. at 490, 364 S.E.2d at 447. Our Court has not defined "substantial assistance" in the context of aiding and abetting a breach of fiduciary duty. The Supreme Court of North Carolina has explained "substantial assistance" in the context of negligence of joint tortfeasors, stating substantial assistance exists "[i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the

one giving it is himself a tortfeasor[.]" *Boykin v. Bennett*, 253 N.C. 725, 730, 118 S.E.2d 12, 16 (1961) (quoting Restatement, 4 Torts § 876(b), cmt. b).

The record here does not indicate Czarnowski gave "substantial assistance" to Jenkins' alleged breach. Veer Right points to the statement Jenkins made of how he "helped in an indirect way," but this does not prove Czarnowski gave "substantial assistance." Plaintiff asserts Orlosky asking Jenkins to "keep me posted" about Veer Right's readiness presents a genuine issue of material fact. The record does not indicate, however, that Jenkins sent any confidential information to Orlosky. The mere "encouragement" of Jenkins behavior or "accepting" information is not enough to present a genuine issue of material fact. Accordingly, we affirm summary judgment on the claim of aiding and abetting a breach of a fiduciary duty.

Civil Conspiracy

Plaintiff next claims Czarnowski conspired in Jenkins' scheme. A claim for civil conspiracy consists of three elements: "(1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement results in injury to the plaintiff." *Di Frega v. Pugliese*, 164 N.C. App. 499, 505-506, 596 S.E.2d 456, 461 (2004). To sustain a claim of civil conspiracy it must be shown "a conspiracy in fact existed." *Id.* at 506, 596 S.E.2d at 462 (citing *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987)). "Although liability may be established by circumstantial evidence, the evidence of the agreement must be

more than a suspicion or conjecture to justify submission of the issue to the jury." *Id.* at 506, 596 S.E.2d at 461 (citing *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)). "[T]o create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to a common agreement and in furtherance of a common objective." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337.

As established in the record, an agreement between Jenkins and Czarnowski did exist. Jenkins refers in the emails to the fact that he helped Czarnowski "in an indirect way." Orlosky does not refute this assertion and asks Jenkins to call him to discuss Jenkins' employment with Czarnowski. Even so, nothing in these emails suggests Defendants agreed "to do an unlawful act or to do a lawful act in an unlawful way." *See Di Frega*, 164 N.C. App. at 505, 596 S.E.2d at 461. Plaintiff cannot establish Jenkins or Czarnowski committed any overt acts in furtherance of the alleged conspiracy. Plaintiff highlights ten emails sent by Jenkins to Orlosky, yet only one of those emails was sent *before* the USPS made the decision to rebid the contract. Nothing in the email suggests an overt act in furtherance of the alleged conspiracy. The subsequent emails Jenkins sent to Czarnowski provided details on Veer Right's bid for the contract and Veer Right's business details such as warehouse space and cost. The subsequent emails were sent *after* the USPS decision to rebid the contract and thus could not have affected its decision. Plaintiff has not produced

or forecast any evidence that Czarnowski used this information in its bid for the contract. Therefore there is no genuine issue of material fact as to the claim of civil conspiracy. Summary judgment on this claim is affirmed.

Tortious Interference with Employment Contract

Plaintiff next alleges Czarnowski interfered with Jenkins' employment contract. Our Court in *Harty v. Underhill* listed five elements for a claim of tortious interference with a contract:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against third person;
> (2) the defendant knows of the contract;
> (3) the defendant intentionally induces the third person not to perform the contract;
> (4) and in doing so acts without justification;
> (5) resulting in actual damage to plaintiff.

211 N.C. App. 546, 554, 710 S.E.2d 327, 333 (2011) (citations omitted). Tortious interference with a contract "has been found to be applicable to an employment contract that was terminable at will." *Combs v. City Elec. Supply Co.*, 203 N.C. App. 75, 84, 690 S.E.2d 719, 725 (2010) (citations omitted).

Neither party disputes that a valid, at-will employment contract existed between Jenkins and Veer Right. Czarnowski knew of Jenkins' position with Veer Right. Although the record is replete with examples of Jenkins sending information to employees or consultants of Czarnowski, Veer Right does not point to specific record evidence that Czarnowski "intentionally induced" Jenkins not to perform his

contract with Veer Right. The one quote Veer Right attributed to Orlosky about helping Czarnowski "in an indirect way" was actually a statement by Jenkins. The mere sending of information to Orlosky by Jenkins does not create a genuine issue of material fact for a finder-of-fact to decide. Summary judgment with respect to the claim of tortious interference is affirmed.

Unfair and Deceptive Trade Practices

Plaintiff next claims Jenkins and Czernowski's actions, as complained of in the above claims, "would support an unfair and deceptive trade practice claim." Plaintiff further asserts Czarnowski and Jenkins committed independent acts supporting unfair and deceptive trade practice claims, even without the underlying claims. "To set out a claim for unfair and deceptive trade practices, a plaintiff must allege that (1) a defendant has committed unfair or deceptive acts or practices; (2) defendant's conduct was in commerce or affected commerce; (3) defendant's conduct caused injury to plaintiff." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000) (citation omitted). In *Norman*, our Court recognized a claim of breach of fiduciary duty as supporting a claim of unfair or deceptive trade practices. *Id.* at 417, 537 S.E.2d at 266. Veer Right cites to cases in which this Court has allowed claims of unfair trade practices stemming from civil conspiracy and tortious interference claims, respectively. *See Electronic World, Inc. v. Barefoot*, 153

N.C. App. 387, 395, 570 S.E.2d 225, 231 (2002) and *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 41, 392 S.E.2d 663, 670 (1990).

While Veer Right's breach of fiduciary duty claim does present a genuine issue of material fact, it is a claim against Jenkins and not Czarnowski. Veer Right cannot use its claim against Jenkins to then support an unfair trade practices claim against Czarnowski. Lacking proof of a coordinated effort, Veer Right's claims of civil conspiracy and tortious interference present "no genuine issue as to any material fact" and thus cannot support a claim for unfair or deceptive trade practices. *See Fox*, 228 N.C. App. at 30, 744 S.E.2d at 485 (citation omitted).

Veer Right also alleges Czarnowski's independent deceptive acts include lying to Veer Right about their "partnership being intact" and procuring company information for the purpose of competing, using Veer Right's own officer. Czarnowski's interactions with Jenkins were initially as a point of contact for subcontracting work. Czarnowski subsequently competed for the USPS contract in an open bid process. We find Veer Right has failed to show that Czarnowski proximately caused injury to Veer Right.

The independent actions Veer Right complained of in support of a claim against Jenkins include Jenkins' destruction of evidence and "unauthorized accessing of Veer Right's computer system[,]" after he left Veer Right. Veer Right asserts Jenkins may have copied files from his Veer Right computer on 27 September 2013 and accessed

Veer Right's computer system on 8 October 2013. These alleged events occurred after Czarnowski won the USPS contract bid; some of the emails were subsequently recovered. Rodney Miller conceded such actions would not give Czarnowski any unfair advantage during the bidding process. On these claims, we find Veer Right has failed to show Jenkins' actions proximately caused injury to Veer Right.

For the above reasons, we affirm summary judgment on the claim of unfair and deceptive trade practices.

B. Adverse Inference

Plaintiff cites no controlling caselaw in reference to its claim the trial court erred by refusing to draw an adverse inference based on Jenkins' alleged destruction of evidence. "To qualify for the adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction." *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527-28, 613 S.E.2d 274, 281 (2005) (citations and quotations omitted). Assuming Veer Right raised the spoliation argument at trial, it has not demonstrated a genuine issue of material fact as to whether Jenkins was aware of the possibility of future litigation. The portion of the record Veer Right points to as providing evidence of spoliation indicates the company was able to recover evidence from Jenkins' computer. We decline to find error in the trial court's order on this issue.

V. Conclusion

As to Plaintiff's claim of breach of fiduciary duty, we reverse the trial court's grant of summary judgment. We affirm the trial court's grant of summary judgment as to Plaintiff's claims of aiding and abetting breach of fiduciary duty, civil conspiracy, tortious interference with an employment contract, and unfair and deceptive trade practices. We decline to find error in the trial court's order as to Plaintiff's claim of adverse inference.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(f).