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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

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Engineered Cooling Services, Inc.

v.

Star Service, Inc. of Mobile

**Appeal from Mobile Circuit Court
(CV-09-901577)**

BRYAN, Judge.

Engineered Cooling Services, Inc. ("ECS"), appeals from a judgment in favor of Star Service, Inc. of Mobile ("Star"). We affirm in part and remand with instructions.

Factual Background

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Star specializes in contracting to provide maintenance service for commercial heating, ventilation, and air-conditioning ("HVAC") equipment for a fixed price. In January 2005, Star employed Mark Davis as a salesman. When Star employed Davis, he had had no previous experience in the HVAC business, and Star trained and developed Davis as a salesman of HVAC-maintenance service.

When he began his employment with Star, Davis signed a written contract titled "Employee Confidentiality Agreement" ("the confidentiality agreement") in which he agreed, among other things, that he would not remove Star's confidential information from its premises or disclose it to others during or after his employment with Star unless authorized to do so by Star and that, for a year after his employment with Star ended, he would not contact Star's customers for the purpose of offering services from a competitor of Star.

In December 2008, ECS, one of Star's competitors, offered Davis a job as a salesman at a base salary that was almost twice his base salary at Star. Pete Doyle, ECS's president, told Davis that ECS wanted to hire Davis in order to increase its HVAC-maintenance business. On January 6, 2009, Davis

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accepted ECS's job offer.

When Davis informed Shaun Mayeux, Star's president, that he was leaving Star to accept a job with ECS, Mayeux reminded Davis of his obligations under the confidentiality agreement. On January 9, 2009, Star sent a letter to Davis reminding him of his obligations under the confidentiality agreement and sent ECS a letter informing it of Davis's obligations under the confidentiality agreement. Star subsequently discovered that Davis had e-mailed three of Star's confidential documents from his Star e-mail account to his personal e-mail account, which was a violation of the confidentiality agreement. On January 16, 2009, Star's attorney sent Davis a letter demanding that he return Star's confidential documents and sent ECS a letter informing it that Davis had violated the confidentiality agreement and warning ECS that it would be tortiously interfering with Star's contractual relations with Davis if it induced him to violate the confidentiality agreement. Davis returned two of the three confidential documents to Star on a compact disk and deleted the third from his personal e-mail account.

Within a few months of Davis's leaving Star, Ray

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Rodriguez, ECS's vice president, asked Davis to accompany him on a visit to Mobile Gas, one of Star's customers. While he was working at Star, Davis had prepared the proposal that had resulted in Mobile Gas's awarding Star the contract to maintain Mobile Gas's HVAC equipment. Davis testified that Rodriguez probably knew that he had prepared Star's proposal and that he accompanied Rodriguez to Mobile Gas because Rodriguez was his boss and had asked him to do so. At Mobile Gas, Rodriguez and Davis met with Daniel Caylor, the Mobile Gas employee with the authority to decide which company should be awarded the contract to maintain Mobile Gas's HVAC equipment. The evidence was in conflict regarding whether Rodriguez and Davis solicited the contract to maintain Mobile Gas's HVAC equipment at the meeting with Caylor. Davis testified that he and Rodriguez did not solicit it; however, Caylor testified that they did. Caylor further testified that he declined to switch the contract to maintain Mobile Gas's HVAC equipment from Star to ECS.

Also within a few months of Davis's leaving Star, Joel Beckham, an ECS employee, asked Davis to accompany him to a meeting with John Harnish, an employee of the Mississippi

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National Guard Readiness Center ("Readiness Center") in Gulfport, Mississippi. Readiness Center was one of Star's customers, and Harnish was responsible for deciding which company should be awarded the contract to maintain Readiness Center's HVAC equipment. Davis testified that he knew that Readiness Center was a customer of Star, that Beckham wanted Davis to accompany him to the meeting with Harnish because Davis had worked for Star, and that he and Beckham had solicited the contract to maintain Readiness Center's HVAC equipment at the meeting with Harnish. Harnish testified that Beckham and Davis told him that they thought ECS could do the work that Star was doing better and cheaper than Star. However, the undisputed evidence indicates that Readiness Center did not switch the contract to maintain its HVAC equipment from Star to ECS.

Davis also contacted Dauphin Way United Methodist Church ("Dauphin Way") and Holiday Inn Downtown ("Holiday Inn") in Mobile, who were customers of Star, and solicited the contracts to maintain their HVAC equipment on behalf of ECS. ECS terminated Davis's employment in January 2010.

In 2009, Star had a contract to maintain the mechanical

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HVAC equipment of Little Sisters of the Poor ("Little Sisters"), while ECS had the contract to maintain the chiller equipment of Little Sisters. By letter dated January 29, 2010, Little Sisters informed Star that it would not be renewing Star's contract. Mayeux testified that Little Sisters' administrator, Sister Paul Mary, told him that ECS knew that Star's price for maintaining Little Sisters' mechanical HVAC equipment was \$12,000 and that ECS was offering to maintain it for \$2,000 less. Although Little Sisters subsequently agreed to continue using Star to maintain its mechanical HVAC equipment through September 30, 2010, it contracted for ECS to begin maintaining its mechanical HVAC equipment on October 1, 2010. Mayeux testified that Star had derived a profit from its contract with Little Sisters and that it lost that profit when it lost its contract with Little Sisters; however, he testified that, because its contract with Little Sisters was a fixed-price contract and Star's cost for the labor and parts necessary to maintain Little Sisters' mechanical HVAC equipment varied from year to year, the amount of its profit varied from year to year.

Drew Adams, ECS's chief financial officer, testified that

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Little Sisters asked ECS to quote a price for maintaining its mechanical HVAC equipment, that ECS quoted a price, and that Little Sisters awarded ECS the contract to maintain the mechanical HVAC equipment. Adams testified that he never instructed Davis to go to Little Sisters and that, to his knowledge, Davis never went to Little Sisters on behalf of ECS. Adams admitted that ECS would have an advantage in competing with a competitor for a customer's business if it knew the competitor's price for doing that customer's work.

Procedural History

On August 14, 2009, Star sued Davis, ECS, and Doyle, alleging that Davis had breached the confidentiality agreement and that ECS and Doyle had tortiously interfered with Star's contractual relationship with Davis by inducing him to breach the confidentiality agreement. Answering, Davis denied breaching the confidentiality agreement, and ECS and Doyle denied tortiously interfering with Star's contractual relationship with Davis. After a number of continuances, the trial court held a bench trial at which it received evidence ore tenus on July 20, 2011. On August 22, 2011, the trial court entered the following judgment:

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"Upon consideration of the testimony and evidence submitted by the parties during the trial of this matter on July 20, 2011, the Court enters judgment in favor of Plaintiff [Star] and against Defendants Mark Davis and Engineered Cooling Services, Inc. in the amount of \$1 in nominal damages and \$30,000.00 in punitive damages, for a total judgment of \$30,001.00. Judgment is rendered in favor of Pete Doyle. Costs are taxed against Defendants Mark Davis and Engineered Cooling Services, Inc."

On September 19, 2011, ECS filed a Rule 59(e), Ala. R. Civ. P., motion to alter, amend, or vacate the judgment. The motion specifically requested that the trial court alter, amend, or vacate the punitive-damages award on the ground that it was excessive. After hearing ECS's motion, the trial court entered an order denying ECS's motion on September 30, 2011, without stating its reasons for determining that the punitive-damages award was not excessive. ECS then timely appealed to this court.¹

Analysis

I. Liability and Nominal Damages

ECS first argues that the trial court erred in finding in favor of Star with respect to the issue of liability and in awarding Star nominal damages because, ECS says, Star failed

¹Davis did not file a notice of appeal.

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to prove (1) that ECS had interfered with Star's contractual relationship with Davis and (2) that Star was damaged as a result. Because the trial court made no specific findings of fact, this court must assume that it made those findings necessary to support its judgment. Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992). The ore tenus rule applies to those implicit findings, and, therefore, we must presume that those implicit findings are correct unless they are plainly and palpably wrong. Id.

"In ore tenus proceedings, the trial court is the sole judge of the facts and of the credibility of witnesses, and the trial court should accept only that testimony it considers to be worthy of belief. Ostrander v. Ostrander, 517 So. 2d 3 (Ala. Civ. App. 1987). Further, in determining the weight to be accorded to the testimony of any witness, the trial court may consider the demeanor of the witness and the witness's apparent candor or evasiveness. Ostrander, supra. ... It is not the province of this court to override the trial court's observations. Brown v. Brown, 586 So. 2d 919 (Ala. Civ. App. 1991)]."

Woods v. Woods, 653 So. 2d 312, 314 (Ala. Civ. App. 1994). A de novo standard of review applies to the trial court's conclusions of law and its application of the law to the facts. See Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007).

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The essential elements of the tort of intentional interference with contractual or business relations are: "(1) the existence of a protectible business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage." White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5, 14 (Ala. 2009).

"The damages recoverable for intentional interference with a contractual relationship include:

"(1) the pecuniary loss of the benefits of the ... relation; (2) consequential losses for which the interference is a legal cause; ... (3) emotional distress or actual harm to reputation if either is reasonably to be expected to result from the interference," KW Plastics v. United States Can Co., 131 F. Supp. 2d 1265, 1268 (M.D. Ala. 2001); and (4) punitive damages.'

"White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5, 17 (Ala. 2009)."

Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 477 (Ala. Civ. App. 2010).

In the present case, ECS does not challenge the existence of the first three essential elements of the tort of intentional interference with contractual or business

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relations. Consequently, it has waived the issue whether those three essential elements existed. See Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."). Therefore, in reviewing the trial court's judgment, we must presume (1) that Star had a protectible business relationship with Davis, (2) that ECS knew of it, and (3) that ECS was a stranger to it.

With respect to the issue whether ECS intentionally interfered with Star's contractual relationship with Davis, the trial court had before it undisputed evidence that would support a finding that, within a few months after Davis left Star, Rodriguez asked Davis to accompany him to the meeting with Caylor at Mobile Gas. The trial court also had before it evidence that would support a finding that, when he asked Davis to accompany him to the meeting with Caylor, Rodriguez knew that Davis had prepared Star's proposal that had resulted in Mobile Gas's awarding Star the contract to maintain Mobile Gas's HVAC equipment. Although Davis testified that he and Rodriguez did not solicit the contract to maintain Mobile Gas's HVAC equipment at the meeting with Caylor, Caylor testified that they did. The trial court, as the judge of the

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facts and the credibility of the witnesses, could have accepted Caylor's testimony that Rodriguez and Davis solicited the contract to maintain Mobile Gas's HVAC equipment at that meeting and rejected Davis's conflicting testimony. Davis's soliciting the contract to maintain Mobile Gas's HVAC equipment on behalf of ECS within one year of his leaving Star constituted a violation of the confidentiality agreement. Thus, the evidence before the trial court would support a finding that ECS, through its agent Rodriguez, intentionally interfered with Star's contractual relationship with Davis by inducing Davis to breach the confidentiality agreement by meeting with Caylor and soliciting the contract to maintain Mobile Gas's HVAC equipment on behalf of ECS.

Moreover, the trial court had before it undisputed evidence establishing that, within a few months after Davis left Star, Beckham, who was an agent of ECS, asked Davis to go to the meeting with Harnish and that Beckham and Davis solicited the contract to maintain Readiness Center's HVAC equipment on behalf of ECS at that meeting. Davis's solicitation of the contract to maintain Readiness Center's HVAC equipment on behalf of ECS within one year of his leaving

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Star constituted a violation of the confidentiality agreement. Thus, the trial court had evidence before it that would support a finding that ECS, through its agent Beckham, intentionally interfered with Star's contractual relationship with Davis by inducing Davis to breach the confidentiality agreement by meeting with Harnish and soliciting the contract to maintain Readiness Center's HVAC equipment on behalf of ECS.

The evidence was in conflict regarding Little Sisters' switching the contract to maintain its mechanical HVAC equipment from Star to ECS. However, the trial court, as the judge of the facts and the credibility of the witnesses, could have accepted Mayeux's testimony that Sister Paul Mary had told him that ECS knew that Star was charging Little Sisters \$12,000 for maintaining its mechanical HVAC equipment and that ECS was offering to do that work for \$2,000 less. The trial court could have inferred from the evidence indicating that ECS knew that Star's price for maintaining Little Sisters' mechanical HVAC equipment was \$12,000 and that ECS had induced Davis to breach the confidentiality agreement by soliciting Mobile Gas and Readiness Center within one year of his leaving

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Star that ECS had also induced Davis to breach the confidentiality agreement by disclosing Star's price for maintaining Little Sisters' mechanical HVAC equipment to ECS. Thus, the trial court had evidence before it that would support a finding that ECS intentionally interfered with the contractual relationship between Star and Davis by inducing Davis to breach the confidentiality agreement by disclosing Star's price for maintaining Little Sisters' mechanical HVAC equipment to ECS.

The trial court also could have inferred from the evidence indicating that Davis had solicited Dauphin Way and Holiday Inn on behalf of ECS within one year of his leaving Star and that ECS had induced Davis to breach the confidentiality agreement by soliciting Mobile Gas and Readiness Center on behalf of ECS within one year of his leaving Star that ECS had also induced Davis to breach the confidentiality agreement by soliciting Dauphin Way and Holiday Inn on behalf of ECS within one year of his leaving Star. Thus, the trial court had before it evidence that would support a finding that ECS had intentionally interfered with the contractual relationship between Star and Davis by

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inducing Davis to breach the confidentiality agreement by soliciting Dauphin Way and Holiday Inn within one year of his leaving Star. Accordingly, we find no merit in ECS's argument that the trial court erred in finding in favor of Star with respect to the issue of liability and in awarding Star nominal damages on the ground that Star failed to prove that ECS had interfered with Star's contractual relationship with Davis.

With respect to the issue whether Star suffered damage as a result of ECS's intentional interference with Star's contractual relationship with Davis, the trial court had before it undisputed evidence indicating that Star had lost profits as a result of losing its contract with Little Sisters. As explained above, the trial court could have inferred from the evidence before it that ECS learned that Star was charging \$12,000 to maintain Little Sisters' mechanical HVAC equipment by inducing Davis to disclose that information in violation of the confidentiality agreement. Adams admitted that ECS's knowledge of the price a competitor was charging a customer would give ECS an advantage in competing for that customer's business. The trial court could have found that ECS used its knowledge of Star's price to

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secure the contract to maintain Little Sisters' mechanical HVAC equipment by offering to do it for \$2,000 less than Star was charging. Thus, the trial court could have found from the evidence before it that Star had been damaged by the loss of the profit from its contract with Little Sisters as a consequence of ECS's intentional interference with Star's contractual relationship with Davis. Although the evidence did not indicate the specific amount of profit Star had lost, a plaintiff is entitled to an award of nominal damages when he or she proves that he or she was damaged by a defendant's intentional interference with the plaintiff's contractual relations but cannot prove the specific amount of his or her damage. See Roberson v. C.P. Allen Constr. Co., 50 So. 3d at 477-78. Accordingly, we find no merit in ECS's argument that the trial court erred in finding in favor of Star with respect to the issue of liability and in awarding Star nominal damages on the ground that Star failed to prove it was damaged by ECS's intentional interference with Star's contractual relationship with Davis.

Because we find no merit in ECS's arguments challenging the trial court's finding in favor of Star with respect to the

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issue of liability and its awarding Star nominal damages, we affirm the trial court's judgment insofar as it found in favor of Star with respect to the issue of liability and awarded Star nominal damages.

II. Punitive Damages

ECS also challenges the trial court's award of punitive damages on several grounds. One of those grounds is that the trial court erred in failing to state its reasons for determining that the punitive-damages award was not excessive in its order denying ECS's postjudgment motion. Because we conclude that the trial court should have stated its reasons for determining that the punitive-damages award was not excessive, see, e.g., Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986), we remand the cause with instructions for the trial court to enter an order stating its reasons for determining that the punitive-damages award was not excessive. We further instruct the trial court to make a return to remand within 42 days.

AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ.,
concur.