

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**BROOKS WILLIAMSON & ASSOCIATES, INC.,
a Michigan corporation, and BROOKS B.
WILLIAMSON,**

Plaintiffs,

**Case No. 2019-178641-CB
Hon. Michael Warren**

v

**THOMAS BRAUN, DONALD BERNINGER,
GREG SCHMULT, AARON BROWN and
CHRIS KUNKLE,**

Defendants.

**OPINION AND ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION**

**At a session of said Court, held in the
County of Oakland, State of Michigan
Thomas Jefferson's Birthday (April 13), 2021**

PRESENT: HON. MICHAEL WARREN

OPINION

**I
Overview**

The present cause of action arises out of Thomas Braun, Donald Berninger and Chris Kunkle's (the "Defendants") employment relationship with Brooks Williamson & Associates, Inc., a wetland consulting contractor. Brooks Williamson & Associates, Inc. and its owner, president and sole shareholder Brooks B. Williamson (the "Plaintiffs")

allege that while employees of Brooks Williamson & Associates, Inc., the Defendants absconded with the Plaintiffs' business operations, including invoicing receivables, client database, office laptops, office printers, active work files, general office supplies and corporate intellectual information, and created a new competing entity. In their Amended Complaint, the Plaintiffs allege claims of breach of trust and breach of fiduciary duty (Count I) and common law and statutory conversion (Count II).¹

Before the Court is the Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Oral argument is dispensed as it would not assist the Court in its decision-making process.²

At stake in this Motion is whether the Plaintiffs' remaining claim for breach of trust and breach of fiduciary duty (Count I) should be dismissed pursuant to MCR 2.116(C)(10) when (1) Michigan jurisprudence does not generally recognize a fiduciary relationship between an employee to an employer, and (2) the Plaintiffs have failed to establish the

¹ By way of Order dated November 23, 2020, this Court's predecessor dismissed the Plaintiffs' claim for common law and statutory conversion (Count II) with prejudice.

² MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing - not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

damages element for their claim? Because the answer is “yes,” the Defendants’ Motion for Summary Disposition is granted.

II
The Employment Relationship and the Amended Complaint

The parties agree that the Defendants were former employees of Brooks Williamson & Associates, Inc. The Plaintiffs allege that during the Defendants’ employment, the Defendants were agents of Brooks Williamson & Associates, Inc. and they owe a fiduciary duty by virtue of that agency relationship. The Plaintiffs allege, in pertinent part, as follows:

10. Defendants, Donald Berninger, Thomas Braun, Greg Schmult, Aaron Brown and Chris Kunkle were employees of Plaintiffs, continuously until June 2017, when they did, surreptitiously and without prior notice or approval, conspire and combine to physically relocate Plaintiffs (sic) offices from its principal location in Wixom, Michigan, to Defendant Berninger’s home in Plymouth, Michigan.

11. Plaintiff, Brooks B. Williamson, for all times pertinent to this action, has been founder, President and sole shareholder of Brooks Williamson & Associates, Inc. for the past 30 years. For all times pertinent to this action, Defendants Donald Berninger, Torn Braun, Greg Schmult, Aaron Brown and Chris Kunkle were employees of Plaintiff, Brooks Williamson & Associates, Inc.

* * *

16. Defendants Berninger, Schmult, Braun, Kunkle and Brown were agents for Plaintiff (sic) and a fiduciary of Plaintiff (sic) in connection with access to, management of, and dealings in client wetland consulting projects.

* * *

24. Defendants, as agents of their principal, Brooks, Williamson & Associates, Inc., have undertaken and have owed and continue to owe fiduciary duties to Plaintiff. By virtue of the agency and other special relationship between Plaintiffs on the one hand and Defendants on the other hand, Defendants have owed and continue to owe Plaintiffs fiduciary duties, including but not limited to, the duties: To act with utmost and perfect honesty and good faith, competence, skill and ability necessary to serve the interests of Plaintiffs; or to procure such services for the benefit and satisfaction of Plaintiffs and their privies, and only Plaintiffs and their privies; to perform services and to conduct themselves in the protection and management of the affairs and assets of Plaintiffs with a degree of care and attention that meets or exceeds the degree of care and attention by which they manage or would manage their own affairs, personally, with prudence and perfect good faith; the duty of full candor and the concomitant duty not to conceal matters concerning Plaintiffs, their privies and their affairs; to act always for the account and benefit of Plaintiffs and their privies and only Plaintiffs and their privies, and not to deal on or for their own account; not to usurp or divest corporate assets, opportunities or benefits; the duty to refrain from self-dealing; the duty to protect and not diminish, waste or invade assets or benefits of Plaintiffs; and the duties of utmost honesty and loyalty.

25. By virtue of the special relationship between Plaintiffs and Defendants, Defendants owed and continue to owe Plaintiffs the fiduciary duties described above, including the duty to be honest and candid, the duty not to conceal, and the duty not to deal in assets of Plaintiffs for their own account and benefit and not to engage in other self-dealing.

26. The breaches of trust and fiduciary duties by Defendants Donald Berninger, Tom Braun, Greg Schmult, Aaron Brown and Chris Kunkle include, but are not limited to: Performing their duties involving client environmental consulting projects in a reckless, careless or negligent manner, constituting intentional, purposeful and deliberate misfeasance or nonfeasance; and willfully failing and refusing to hold and account to Plaintiffs for funds, monies, transactions and benefits of Plaintiff and, instead, diverting those funds, monies, transactions and benefits to themselves or their privies, to or for their own account, or to or for the benefit of others and not Plaintiffs or their privies, constituting malfeasance.

27. As a direct and proximate result of Defendants' several breaches of trust and several breaches of fiduciary duties owing to Plaintiffs, Plaintiffs have suffered and continue to suffer injuries, some of which are or may be

redressable in and by damages, and others of which are or may only be redressable in and by equitable relief.

28. By refusing to perform, or by performing in a dishonest, wrongful, unlawful, illegal, criminal or other unsatisfactory manner, Defendants, and each of them, have, in willful breach of their fiduciary duties, received enormous gain, while Plaintiff has suffered enormous detriment, such that it would be unjust for this Court not to intervene and require Defendant to disgorge the wrongful gain and unjust enrichment for the right and benefit of Plaintiff.

[Amended Complaint, ¶¶10-11, 16, 24-28.]

III The Defendants' Arguments for Summary Disposition

The Defendants seek summary disposition pursuant to MCR 2.116(C)(10). The Defendants argue that there was no fiduciary relationship between the Defendants and the Plaintiffs because none of the Defendants were officers, directors or shareholders of Brooks Williamson & Associates, Inc.

The Defendants further argue that the Plaintiffs cannot establish damages they allege were proximately caused by the Defendants.

IV Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions,

admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden*, 461 Mich at 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, *supra* at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto*, 451 Mich at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect

to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.³

V

Because there is no genuine issue of material fact that the Defendants owed no fiduciary duties to the Plaintiffs and that the Plaintiffs cannot prove damages, the Plaintiffs' claim for breach of trust and breach of fiduciary duty is dismissed

To sustain a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) a proximate causal relationship between the breach of such duty and an injury to plaintiff, and (4) damages to the plaintiff. *Teadt v Lutheran Church Mo Synod*, 237 Mich App 567, 580-581 (1990). See also *Delphi Automotive PLC v Absmeier*, 167 F Supp 3d 868, 884 (ED Mich, 2016), citing *Teadt*, 237 Mich App at 580-581.

A

There is no fiduciary duty owed by an employee to an employer

The duty element of a claim for fiduciary duty requires proof of a *fiduciary* relationship. Our Court of Appeals has explained when a fiduciary relationship exists:

A fiduciary relationship exists when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another. *Williams v Griffin*, 35 Mich App 179 (1971). Relief is granted

³ In their Brief Opposing Summary Disposition, the Plaintiffs make passing reference to MCR 2.116(I)(2) and summary disposition being granted in their favor. (Plaintiffs' Brief Opposing Summary Disposition, pp 15, 19-20.) The Plaintiffs' Brief fails to set forth the standard of review for MCR 2.116(I)(2). Notwithstanding that error, the Plaintiffs seek resolution in their favor of claims not pled in the Amended Complaint.

when such position of influence has been acquired and abused, when confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. *Stephenson v Golden*, 279 Mich 710, 739 (1937).

[*Smith v Saginaw Saw & Loan Ass'n*, 94 Mich App 263, 274 (1979).] See also *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 196 (1991).

The Michigan Court of Appeals has further elaborated:

A fiduciary duty arises where there is a fiduciary relationship between the parties. Familiar examples are: trustees to beneficiaries, guardians to wards, attorney to clients, and doctors to patients. The duty arises out of the relation subsisting between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith.

[*Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294 (1981), citing Black's Law Dictionary (4th ed) pp 753-754.]

In all circumstances, a breach of fiduciary duty claim “requires that the plaintiff *reasonably* reposed faith, confidence and trust in the fiduciary.” *Rose v Nat'l Auction Group*, 466 Mich 453, 469 (2002) (citation omitted) (emphasis in original). Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Teadt*, 237 Mich App at 581(citation omitted).

Michigan law is well settled that officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve. *Salvador v Connor*, 87 Mich App 664, 675 (1978) (“[i]t is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation they

serve"); *Production Finishing Corp v Shields*, 158 Mich App 479, 486 (1987); MCL 450.1541a. Michigan courts have been reluctant to extend the cause of action for breach of fiduciary duty beyond the traditional context. See, e.g., *Teadt*, 237 Mich App 567 (declining to recognize a fiduciary relationship).

"Generally, the relationship between an employer and an employee is not regarded as fiduciary in nature." *Utica Steel, Inc v Amormino*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2014 (Docket No. 309112). See also *Bradley v Gleason Works*, 175 Mich App 459, 463 (1989) ("[p]laintiff does not cite any authority for the proposition that an employer-employee relationship is fiduciary in nature"); *Torok v Reliable Architectural Metals*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 1997 (Docket No. 183481) ("there is no support for plaintiff's argument that a fiduciary duty exists between a sole shareholder and the employee of a corporation.")

For example, in *Edwards Publications, Inc v Kasdorf*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 2009 (Docket No. 281499), the Michigan Court of Appeals declined to recognize a fiduciary relationship between plaintiff employer and its former sales representative. The Court of Appeals opined that it "fail[ed] to see how an ordinary employee-employer relationship such that exists here rises to the level of a fiduciary relationship deserving of special protection by the law." *Edwards Publications*, unpub op at 7.

In the instant action, the Plaintiffs have failed to present documentary evidence of a fiduciary relationship to sustain their claim for breach of trust and breach of fiduciary duty. Instead, the evidence presented supports the absence of any fiduciary relationship between the Plaintiffs and the Defendants.

The Plaintiffs' characterization of the Defendants as "key employees" and Defendant Berninger as "tantamount to the company's Chief Operating Officer" or "*de facto* Chief Operating Officer," [Plaintiffs' Brief Opposing Summary Disposition, pp 7, 9], is unavailing. Not only is there is no evidence that Defendant Berninger was an actual officer or director, but Plaintiff Williamson admits that neither Defendant Braun nor Defendant Kunkle were officers or directors of Brooks Williamson & Associates, Inc. and instead that only an employer-employee relationship existed:

Q. Just so we're clear here, all three of the employees that we've discussed were, to my knowledge, all part-time hourly employees, correct? Mr. Kunkle, Mr. Schmult and Mr. Braun?

A. Depending on the time frame, we can say that generally, yes.

Q. And none of them were officers, directors or shareholders of the company, correct?

A. Correct.

Q. None of them had employment or confidentiality agreements, correct?

A. Correct.

Q. None of them had noncomplete agreements, correct?

A. Correct.

Q. You did not have a relationship with any of them other than as employer/employee, correct?

A. Correct.

[Exhibit A to the Defendants' Motion, pp 69-70.]

Further, there is no evidence that the Plaintiffs *reasonably* reposed faith, confidence and trust in Defendant Beringer upon which a fiduciary relationship could arise.

B
The Plaintiffs have failed to establish damages

By way of Order dated September 14, 2020, this Court's predecessor ordered the Plaintiffs to "fully and completely answer damage interrogatories, completely outlining its (sic) damages by November 5, 2020" and if the Plaintiffs failed to do so, "it (sic) will waive its (sic) right to damages."

By way of further Order dated November 23, 2020, this Court's predecessor ordered the Plaintiffs to provide a detailed outline of their damage claim for breach of fiduciary duty by November 23, 2020. [Exhibit F to Defendants' Motion for Summary Disposition.]

Despite this protracted litigation, the Plaintiffs have failed to identify their alleged damages. The Plaintiffs claim that evidence of their substantial damages exist and those proofs abound, yet in response to the Defendants' dispositive motion, the Plaintiffs only rely upon tax returns not produced during the course of discovery, an affidavit of Plaintiff

Williamson, and affidavits of several customers. This Court has recently ordered that no previously undisclosed information shall be permitted at trial and reaffirmed the same in a separate order striking untimely disclosed exhibits attached to the Plaintiffs' Response to the instant Motion. See Opinion and Order Granting Defendants' Motion in Limine to Preclude Introduction of Not Previously Disclosed, Evidence or Witness dated March 17, 2021; Order Granting Defendants' Motion to Strike Certain Exhibits Attached to Plaintiffs' Response to Defendants' Motion for Summary Disposition dated April 12, 2021. Such documents constitute the bulk of the Plaintiff's argument here. Even if those exhibits were properly before the Court, they are simply tax returns - they fail to make the critical connection between the tax and financial status of the Plaintiffs and the alleged misconduct of the Defendants. The Court and the Defendants would have to speculate about what the damages might be. Plus, the Plaintiffs have no expert witness to fill in the gaps. In addition, the customer affidavits which the Plaintiffs rely upon actually quantify no damages whatsoever. Instead, it is painfully obvious that these are nothing more than "form" affidavits sent to several clients, complete with "fill in the blank" dates, which simply state that "I understood that there were some changes in [Plaintiff Brooks Williamson's] operation in the summer of 2017 timeframe and that a different name, BWA Consulting, was being utilized. I was under the impression this was simply a reorganization and that Brooks was still involved with the company. I had no idea that Brooks Williamson was not associated with BWA Consulting." Again, there is absolutely no quantification of the amount of damages here or even evidence that any were incurred

in connection with the several customers. Likewise, the Plaintiff's affidavit is vacuous regarding damages.

Finally, the Plaintiffs' argument that the Defendants have failed to produce business records requested during discovery is inapposite - this attempt at deflection is immaterial in connection with this Motion.

VI

The Plaintiffs must seek leave by separate motion to amend the Amended Complaint

The Plaintiffs devote almost seven pages of their Brief Opposing Summary Disposition to arguments regarding several unpled claims or theories and the claim of common law and statutory conversion that was previously dismissed with prejudice by this Court's predecessor. These arguments go well-beyond the scope of the Defendants' Motion.

The Plaintiffs must seek such leave by separate motion to amend the Amended Complaint or further claims will be deemed abandoned. MCR 2.118.

The Plaintiffs' argument that the purported mention, vague or elliptical reference to claims of (a) unfair competition/trade name infringement/palming off, (b) concert of action/conspiracy and (c) tortious interference in paragraph 15 of their Amended Complaint is alone sufficient to defeat the Motion completely disregards the pleading requirements of the Michigan Court Rules.

ORDER

Based on the foregoing Opinion, the Defendants' Motion for Summary Disposition is GRANTED. THE PLAINTIFFS MUST SEEK LEAVE TO AMEND THE AMENDED COMPLAINT BY SEPARATE MOTION TO BE FILED NO LATER THAN APRIL 28, 2021 OR SUCH AMENDMENT SHALL BE DEEMED ABANDONED. UNLESS SUCH AMENDMENT IS SOUGHT AND APPROVED, THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE