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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1013**

Joseph D. Roach,
Appellant,

vs.

Lapp, Libra, Thomson, Stoebner & Pusch, Chartered,
Respondent.

**Filed May 24, 2021
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-18-6301

Clifford S. Anderson, Clifflaw, PLLC, Minneapolis, Minnesota; and

Scott Wilson, Scott Wilson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Terrence J. Fleming, Ryan C. Young, Fredrikson & Byron, PA, Minneapolis, Minnesota
(for respondent)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

On appeal challenging the district court's damages award for breach of fiduciary duty and breach of loyalty to his former law firm, appellant argues that the district court (1) made clearly erroneous findings; (2) erred by applying the fee-forfeiture doctrine to

calculate damages not causally related to respondents' counterclaims; (3) erred by dismissing his claims under Minn. Stat. §§ 181.14 (2020) and 181.79 (2020); and (4) abused its discretion by denying his motion to amend its order and judgment. We affirm.

FACTS

In June 2014, respondent Minneapolis law firm Lapp, Libra, Stoenner, & Pusch (Lapp Libra) hired appellant Joseph D. Roach as an at-will employee-shareholder. Roach signed an employment agreement which provided him with a \$160,000 annual salary and stated, “You will also be eligible to receive a *discretionary* bonus to be paid in December, 2014. The bonus is *not guaranteed* and assumes satisfactory performance by you and the firm. *Among other factors*, we will consider your billed and originated collections in determining the amount of any bonus.” (Emphasis added.) Roach also signed a joinder agreement which made him a party to a compensation continuation agreement (CCA) among the shareholders. The CCA included many of the same terms as the employment agreement. Specifically, the CCA referred to a “formula” for calculating bonuses based on the following factors:

(i) each Shareholder's collections, originations and credits for the entire year . . . (ii) 3-year weighted averaging of collections and originations, (iii) discretionary adjustments as determined by the Firm's Board of Directors, (iv) an overhead factor, (v) an ownership factor, and (vi) the overall profitability, financial condition, and prospects of the Firm.

The CCA also stated, “the payment and amount, if any, of all compensation, fringe benefits and year-end bonuses following any termination of employment shall be determined by the Firm *in its sole discretion*.” (Emphasis added.)

On April 11, 2017, the Minnesota Office of Lawyer’s Professional Responsibility (OLPR) issued Roach a notice of investigation indicating that a former client (client 1) had filed an ethics complaint against him and then-junior shareholder A.S. The complaint alleged legal malpractice and overbilling, among other violations.¹

A.S. repeatedly asked Roach to disclose the ethics complaint to all of the shareholders. By April 14, 2017, A.S. had drafted a response to the ethics complaint which she emailed to Roach; A.S.’s later email response to Roach urged him to “advise the shareholders sooner rather than later.” A.S. also sent the draft response and communications between her and Roach to another shareholder, R.T. But R.T. did not disclose the ethics complaint to the other shareholders to give Roach an opportunity to do so. On Roach’s behalf, A.S. responded to the ethics complaint on April 28, 2017, denying the allegations. A.S. continued to urge Roach to disclose the ethics complaint to the shareholders. Finally, on August 23, 2017, A.S. again emailed Roach, “if you don’t disclose [the ethics complaint], I will mention it at tomorrow’s shareholder meeting.” Because Roach failed to tell the other shareholders, A.S. disclosed it. The shareholders appointed D.L. as the ethics partner to follow up with Roach about the ethics complaint.

¹ The ethics complaint also alleged that Roach failed to return the client’s file, improperly threatened to prematurely withdraw from representation over unpaid fees, failed to communicate his fees and rates, and failed to adequately inform the client about the client’s case.

Roach failed to attend that shareholder meeting or any shareholder meetings between May and the end of December.

Roach then retained an attorney to defend the ethics complaint. By September 8, 2017, Lapp Libra received some materials, which Roach's attorney had emailed to A.S., relating to the ethics complaint. Around September 19, 2017, D.L. and Roach met to discuss the ethics complaint, professional liability insurance, and Lapp Libra's reporting obligations for malpractice claims.

As early as the beginning of December, Roach represented client 2, a new client, for which he did not open a client file or report billable hours at Lapp Libra.

On December 14, 2017, R.T. emailed Roach about "Issues," expressing concern that Roach had not been attending monthly shareholder meetings or assisting with the ethics complaint.² Despite being "specifically and repeatedly" asked to attend the December 18, 2017 shareholder meeting, Roach did not attend. At that meeting, the shareholders discussed delaying any decision on the bonuses based on Roach's failure to cooperate and attend meetings, Roach's low billing, his dismissiveness of the ethics complaint, his refusal to sign a joint-defense agreement, potential liability to the firm, and concerns that Roach planned on leaving the firm. Roach and R.T. met that day, and Roach told R.T. that (1) he did not want his attorney to speak with the shareholders even if Lapp Libra paid for his attorney's services; (2) there were no concerns or changes to report regarding the ethics

² R.T.'s "Issues" email, Exhibit 97, appears to be missing from the appellate record, but the parties and the district court reference the email. Neither party disputes the existence or contents of the email.

complaint; and (3) he planned to stay at Lapp Libra. On this same day, Roach also deferred the maximum \$24,000 to his 401(k) from any bonuses.

By December 20, 2017, the shareholders agreed to delay voting on the bonuses unless Roach could address their concerns related to his performance, the ethics complaint, and his plans to stay at the firm, among others.

On December 27, 2017, at the year-end shareholder meeting, the shareholders told Roach they were concerned about liability exposure to Lapp Libra from the ethics complaint and requested he sign an indemnification agreement. Roach refused. The shareholders then voted to approve the shareholder bonuses which included \$24,000 to Roach instead of the \$102,186.00 he had hoped to receive based on his performance for that year.

The next day, Roach unilaterally directed Lapp Libra's bookkeeper to write off a \$124,055.86 unpaid bill from client 1, one of his clients, because "[t]hey have no more money and they are going to probably file for bankruptcy." On this same day, Roach's attorney emailed R.T. and another shareholder, explaining the status of the ethics complaint and dismissing the indemnification proposal without comment on a joint-defense agreement.

On January 4, 2018, Roach resigned from Lapp Libra and began working at a new firm. At the new firm, Roach charged client 1 \$7,550 and collected \$5,000 as a "pre-payment" in January 2018. Roach also charged client 2 \$12,900 in January 2018.

Roach sued Lapp Libra alleging violations of Minn. Stat. §§ 181.79 (count 1); 181.14 (count 2); and 181.03 (2020) (count 3); breach of fiduciary duty (count 4); breach

of contract (count 5); and unjust enrichment (count 6). The district court granted the parties' stipulation to dismiss Roach's count 4. Lapp Libra filed its answer and counterclaims, which included breach of fiduciary duty (count 1); breach of duty of loyalty (count 2); and unfair competition (count 3) against Roach.

After a three-day bench trial, the district court dismissed Roach's complaint with prejudice, finding Lapp Libra not liable on counts 1, 2, 5, and 6 and finding that Roach waived his count 3 for failure to prosecute. The district court also found Roach liable to Lapp Libra for breach of fiduciary duty and breach of duty of loyalty, but that Lapp Libra waived its count 3 for failure to prosecute. The district court awarded Lapp Libra \$20,400 in damages on its prevailing claims. Roach appeals.

DECISION

I. The district court's factual findings are not clearly erroneous.

Roach argues that the district court clearly erred by finding that he breached his fiduciary duty to Lapp Libra by (1) failing to disclose the ethics complaint, failing to cooperate with the firm, and misrepresenting the ethics committee findings; (2) writing off client 1's unpaid bill; and (3) actively working with client 2 but failing to open a client file or submit any billable hours for that client. We are not persuaded.

To prevail on a breach-of-fiduciary-duty claim, the claimant must show (1) duty, (2) breach, (3) causation, and (4) damages. *Lund ex rel. Revocable Tr. of Kim A. Lund v. Lund*, 924 N.W.2d 274, 284 (Minn. App. 2019), *review denied* (Minn. Mar. 27, 2019). "Owing a fiduciary duty includes dealing openly, honestly and fairly with other

shareholders.” *Wenzel v. Mathies*, 542 N.W.2d 634, 641 (Minn. App. 1996), *review denied* (Minn. Mar. 28, 1996) (quotation omitted).

We review a district court’s factual findings for clear error. See Minn. R. Civ. P. 52.01.; *see also Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). “Clearly erroneous means manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Pedro v. Pedro*, 489 N.W.2d 798, 801 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. Oct. 20, 1992). We defer to a district court’s credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

A. The district court did not clearly err by finding that Roach failed to disclose the ethics complaint, failed to cooperate with Lapp Libra, and misrepresented the ethics committee findings.

Roach argues that knowledge of the ethics complaint by some shareholders excused his duty to disclose to all of the shareholders. But Roach does not challenge the district court’s finding that he never affirmatively disclosed the ethics complaint to all of the shareholders. Because Roach makes these arguments without any citation to law, he forfeits them. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), *review denied* (Minn. Apr. 26, 2017).³

³ Nevertheless, his argument is without merit. His duty to disclose extended to all Lapp Libra shareholders as the ethics complaint involved material facts that could affect each shareholder’s interests, including potential damage to their reputations, mandatory reporting requirements to Lapp Libra’s insurer, and repaying \$500,000 in fees to the former clients who filed the ethics complaint. See *Appletree Square I Ltd. P’ship v. Investmark, Inc.*, 494 N.W.2d 889, 892 (Minn. App. 1993) (“Parties in a fiduciary relationship must disclose material facts to each other.”), *review denied* (Minn. Mar. 16, 1993).

Roach argues next that the record does not support the district court's finding that he refused to cooperate after A.S. disclosed the ethics complaint to the other shareholders. The record includes limited instances in which Roach cooperated, and rather shows that Roach refused to sign a joint-representation agreement, refused to sign an indemnity agreement, and did not allow any shareholder to speak with his attorney about the matter even when Lapp Libra offered to pay the costs. Only after the December 27, 2017 shareholder meeting did Roach authorize his attorney to inform the shareholders regarding the ethics complaint. The district court's finding that Roach failed to cooperate with the shareholders is not clearly erroneous.

Roach also contends that he never misrepresented the status of the ethics complaint to the shareholders and that he only communicated the information he believed to be true based on his limited knowledge of the procedure of an ethics complaint and based on his attorney's advice. But the district court expressly found his testimony on these assertions not credible. Not only do we defer to the district court's credibility findings, *Sefkow*, 427 N.W.2d at 210, but they are supported by the record. For example, Roach falsely assured shareholders that the investigator did not recommend that the ethics committee or OLPR take any action and that there were no violations of the professional rules. But the investigator's report clearly recommended private admonition on two rules and further investigation into the fees. Roach also minimized the seriousness of the ethics complaint, stating that there was "nothing to worry about." On this record, the district court did not clearly err when it found Roach misrepresented the status of the ethics complaint.

Roach argues next that there were no damages causally related to these three breaches. The record shows that Roach's breaches with respect to the ethics complaint deprived Lapp Libra of any meaningful chance to defend its interest in the ethics complaint and required Lapp Libra to hire separate ethics counsel by refusing access to his attorney, refusing to sign a joint-representation agreement, and refusing to sign an indemnification agreement. As discussed below, the district court ultimately did not award any damages based on these three breaches. For these reasons, the district court did not clearly err by finding that Roach failed to disclose the ethics complaint, failed to cooperate with Lapp Libra, and misrepresented the ethics committee findings.

B. The district court did not err by finding that Roach breached his fiduciary duty when he wrote off client 1's unpaid bill.

Roach argues that he owed no duty to inform the other shareholders before unilaterally writing off client 1's \$124,000 unpaid bill. The district court found that Roach did not inform the other shareholders, including the other shareholder who billed significantly on the file, of this write-off and rejected his testimony to the contrary as not credible. Because the fiduciary duty includes the duty to deal "openly, honestly and fairly with other shareholders," the district court did not clearly err by determining that Roach owed a duty to inform the other shareholders about the six-figure unpaid bill that he unilaterally wrote off. *Wenzel*, 542 N.W.2d at 641.

As to the element of damages, Roach informed client 1 of the write-off, thereby substantially compromising Lapp Libra's ability to collect on the unpaid bill. The district court found the timing of the write-off cut against Roach's credibility and that he collected

from client 1 at the new firm within a month after telling Lapp Libra's bookkeeper that client 1 was "probably going to file for bankruptcy." Ultimately, the district court made several credibility findings, which we do not disturb, to conclude that Roach wrote off the six-figure unpaid bill "motivated by animus." Roach's bad-faith write-off rendered Lapp Libra unable to collect any amount of the \$124,000 while Roach continued to collect from client 1. The damages here are directly tied to his bad-faith breach. Accordingly, the district court did not clearly err by finding Roach breached his fiduciary duty to Lapp Libra by unilaterally writing off client 1's unpaid bill and collecting from them weeks later at his new firm.

C. The district court did not clearly err by finding that Roach failed to report billable work for client 2 that he performed while still at Lapp Libra.

As an initial matter, Roach contends that the record does not show that he completed any billable work for client 2 while at Lapp Libra. The record does not support his contention. The record contains emails showing Roach held himself out as client 2's attorney, communicated and met with opposing counsel on client 2's behalf, and provided client 2 legal advice before leaving Lapp Libra. Roach offers alternative explanations for these actions, but our inquiry is whether the district court's finding is reasonably supported by the record. We conclude that it is.

Second, Roach contends he could not have intended to transfer client 2's files because he had no offer from the new firm at the time. But the district court explicitly found that Roach misrepresented his intention to leave the firm to the shareholders on several occasions. It is irrelevant whether Roach had an offer from the new firm at the

time of these misrepresentations. It was not necessary that Roach know the specific firm he would join in order for the district court to find that Roach intended to bill those hours elsewhere. Based on this record, the district court did not clearly err by determining that Roach performed billable work in December 2017 that he failed to report to Lapp Libra.

II. The district court did not err in its damages award.

Roach argues that the district court erred (1) as a matter of law by applying fee forfeiture to calculate damages for his breach of fiduciary duty and breach of loyalty and (2) by determining that the damages are causally related to the breaches and are not speculative. We are not persuaded.

“Generally, we will not disturb a damage award unless the ‘failure to do so would be shocking or would result in plain injustice.’” *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quoting *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986)). “There is no general test for speculative or conjectural damages; such matters should usually be left to the judgment of the [district] court.” *Henning Nelson Const. Co. v. Fireman’s Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 653 (Minn. 1986). “The law does not require mathematical precision in proof of loss but only proof to a reasonable, although not necessarily absolute, certainty.” *Duchene v. Wolstan*, 258 N.W.2d 601, 606 (Minn. 1977) (quotation omitted).

Here, the district court determined that Roach’s breaches on the client 1 write-off and the client 2 account caused Lapp Libra’s lost billings. It calculated damages based on the amounts that Roach charged clients at the new firm for work he performed while at Lapp Libra, specifically, \$12,900 and \$7,500 to client 1 and client 2, respectively.

First, Roach asserts that the district court erred by measuring damages based on the amount he collected at the new firm when it elected fee forfeiture as the damages theory. Roach argues this calculation is not supported as actual damages. We need not address Roach's fee-forfeiture argument because the damages are supported as actual damages.

Second, Roach asserts that there is "no evidence that Lapp, Libra lost anything" through his breaches of fiduciary duty and breaches of loyalty. The record belies this assertion. Lapp Libra lost the legal right to collect a six-figure unpaid bill from client 1 when Roach told client 1 about the write-off. Just weeks after misrepresenting that client 1 was "going to probably file for bankruptcy," Roach collected a \$5,000 "pre-payment" from client 1 at the new firm. Similarly, Lapp Libra lost billable hours that Roach failed to report on the client 2 account. Compared to the full amount of client 1's six-figure unpaid bill and the hours Roach collected from client 2, the district court awarded reasonable damages. We discern no error in its determination that the damages are causally related to Roach's breaches regarding the client 1 write-off and the client 2 account.

III. The district court did not err by dismissing Roach's claims under section 181.14 and 181.79.

Roach argues that the district court erred as a matter of law and fact by finding that he did not earn a discretionary bonus under Minn. Stat. § 181.14 of the Payment of Wages Act (PWA) and that Lapp Libra made no "deduction" under Minn. Stat. § 181.79. We disagree.

"In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly

erroneous.” *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) (citing *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999)), *review denied* (Minn. June 26, 2002). And we review questions of statutory interpretation *de novo*. *Krueger v. Zeman Const. Co.*, 781 N.W.2d 858, 861 (Minn. 2010).

We begin with the statutory language. Section 181.79, subdivision 1(a), provides: “No employer shall make any *deduction*, directly or indirectly, from the *wages due or earned* by any employee, who is not an independent contractor . . . to recover any other claimed indebtedness running from employee to employer.” (Emphasis added.)

As an initial matter, the parties focus on whether section 181.79 is part of the PWA. Our caselaw is clear that the PWA does not create an independent legal right and that a party seeking to recover under the PWA must establish a separate substantive legal right to recover wages. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). “Although Minn. Stat. § 181.79 is not technically part of the PWA, it addresses similar concepts regarding deductions to wages.” *Erdman v. Life Time Fitness, Inc.*, 788 N.W.2d 50, 55 (Minn. 2010). The most relevant similarity here is that section 181.79, like the PWA, does not define “wages due or earned.” *Compare* Minn. Stat. § 181.79 *with* Minn. Stat. §§ 181.01-181.1721 *and Caldas*, 820 N.W.2d at 837 (“[The PWA] mandate[es] not *what* an employer must pay a discharged employee, but *when* an employer must pay a discharged employee.”) (quotation omitted)). Therefore, a court must first define “wages due or earned” from a source or sources outside of section 181.79, such as contracts or a course of conduct, to then answer whether there was any “deduction” to those wages. *Cf. Caldas*, 820 N.W.2d at 837 (stating that to prevail under PWA, plaintiff must first establish

legal right to the wage claimed). Because section 181.79 is similar to the PWA in this respect, we conclude that the rule requiring an independent basis for wage entitlement also applies to Roach's claim here.

Roach points to cases in which a section 181.79 claim is not paired with a PWA claim to argue that section 181.79 creates an independent cause of action. See *Karl v. Uptown Drink, LLC*, 835 N.W.2d 14 (Minn. 2013); *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771 (Minn. 2004). But these cases demonstrate that "wages earned" is not defined by section 181.79 and must be defined by an outside source. See, e.g., *Brekke*, 683 N.W.2d at 775 (defining "wages" under the equal-pay statute as "all compensation for performance of services by an employee for an employer"); *Karl*, 835 N.W.2d at 18 (applying same reasoning as *Brekke*). They do not establish when a wage is "earned."

In this case, the outside sources to determine "wages due or earned" are Roach's employment agreement and CCA, both of which describe the bonus as "discretionary . . . not guaranteed and assumes satisfactory performance by you and the firm." The CCA further states that any bonuses "shall be determined by the Firm in its sole discretion" listing several objective and subjective factors for consideration. See *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 127 (Minn. 2007) (recognizing that when discretionary bonus is "earned" is defined by contract). The district court properly defined "wages earned" under the employment agreement and the CCA in reaching its conclusion that the bonus was entirely discretionary and not earned or vested.

Roach attempts to couch his section 181.79 claim in a "course of dealing" theory, arguing that Lapp Libra established a pattern of relying solely on objective measures to

award bonuses. He relies solely on a New York trial court order for legal authority. See *Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 810 N.Y.S.2d 880 (N.Y. Sup. Ct. Feb. 24, 2006). This is neither binding nor persuasive authority because the district court here made express findings of fact showing that the bonus was not earned nor vested through a course of dealing. Specifically, the district court found that the shareholder voting process and the history of shareholders receiving amounts different from the spreadsheet⁴ established a course of dealing contrary to Roach's interpretation. The district court found that Lapp Libra's course of dealing gave equal weight to subjective factors, at the discretion of a shareholder vote, providing Lapp Libra with "the ability to incorporate incalculable factors, like shareholder misbehavior." The district court noted that Lapp Libra did not award the spreadsheet amount on at least two occasions and that on other occasions the shareholders modified the formula for a more fair distribution.

Even if we accept Roach's argument that the bonuses were determined solely on the objective factors, those factors would not support his position given his hours billed. The record shows that Roach billed no hours for December, 30 hours in November, 41 hours in October, and 17 hours in September. Furthermore, the record supports the district court's finding that the bonuses were calculated using the factors in the CCA, after discussing changes to the spreadsheet of hours billed and origination, and subjective factors. Because

⁴ Twice a year, Lapp Libra circulated "runs," which were spreadsheets showing objective measures through each shareholder's collections, revenues from hours billed, and originations, revenues from client billings, which were then discounted by Lapp Libra's overhead and expenses. These spreadsheets stated "the attached numbers are not a prediction or guaranty" and "[f]or review of numbers and formula only."

Lapp Libra, by shareholder vote, must approve any bonuses after considering all factors, no year-end bonuses could have been earned or vested before the shareholder vote on December 27, 2017. And because Roach never earned a bonus beyond the \$24,000 he was awarded, there were no “wages earned” that Lapp Libra withheld or deducted.

Roach argues that Lapp Libra vested his bonus when the shareholders essentially used the bonus to leverage him to cooperate and address their concerns. But this acknowledges that the shareholders had serious concerns about his value and potential liability to the firm and that the shareholders had not yet made a final determination on the bonuses.⁵

Accordingly, the district court did not err as a matter of law by dismissing Roach’s section 181.79 and 181.14 claims and finding that Roach’s discretionary bonuses were not earned or vested until December 27, 2017, in the amount of \$24,000.

IV. The district court did not abuse its discretion by denying Roach’s motion to amend its order.

Roach asks this court to find the district court abused its discretion by denying his motion to amend its order based on the factual and legal errors alleged above. Because we

⁵ Roach states that the shareholders voted to withhold a bonus, but the record does not reflect a vote. Instead, the record shows that the shareholders discussed his bonus but that not all shareholders were prepared to change a bonus prediction. Roach appears to interpret the email exchanges between the shareholders that they “unanimously agreed” as a vote, despite the responses showing some shareholders were still deliberating and that no vote took place.

conclude that the district court's findings of fact were not clearly erroneous and that it did not err in its legal conclusions, we decline to do so.

Affirmed.