STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2284

Wayne J. Kratzer,
Appellant,

vs.

Welsh Companies, LLC,
Respondent.

Filed April 15, 2008
Reversed and remanded
Poritsky, Judge*

Hennepin County District Court
File No. EM 04-015855

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Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Poritsky, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

PORITSKY, Judge

Appellant Wayne J. Kratzer challenges the district court order granting summary judgment in favor of respondent Welsh Companies, LLC (Welsh) and dismissing his whistleblower claim. Kratzer argues that: (1) his reports implicated a violation of a rule adopted pursuant to state law, (2) there was a causal connection between his reports and his termination, and (3) Welsh's reason for terminating him was pretextual. Welsh cross-appeals the district court order granting summary judgment in favor of Kratzer on its counterclaim of misappropriation of trade secrets. We reverse and remand on both claims.

FACTS

In 1997, Kratzer began working as a real estate agent at Welsh pursuant to an independent contractor agreement. In early 2000, Welsh offered Kratzer a permanent broker position, which effectively terminated Kratzer's independent contractor status. Kratzer's primary duty as a Welsh broker was to "source transactions" for Welsh's subsidiary, WelshInvest. "Sourcing transactions" included looking for properties for WelshInvest to purchase and working with the broker on those deals. Kratzer was also responsible for assisting Peter Rand, senior vice president and director of investment services at Welsh. Kratzer's salary was $65,000 in addition to commissions and fees.

In February 2000, Welsh agreed to broker the sale of Park Square Shopping Center (the "2000 transaction") for John Hancock Realty Income Fund-II Limited Partnership (John Hancock). Rand represented John Hancock in the transaction and originally listed the property at $10 million. Rand also represented WelshInvest in its capacity as a potential buyer of Park Square. Kratzer's role in the 2000 transaction was limited to representing WelshInvest.

After some discussion, John Hancock authorized Rand to offer the property to WelshInvest. Rand claims that he informed John Hancock that as a dual representative, he would be receiving commissions from both John Hancock and WelshInvest if the sale were concluded. Rand did not disclose the amount of commission he would receive.

WelshInvest submitted a bid of $8.025 million, which John Hancock accepted. In May 2000, the parties entered into formal negotiations and the purchase agreement, executed in June 2000, reflected the accepted bid of $8.025 million. However, in August 2000, WelshInvest abandoned the sale because of problems with the anchor tenant, which affected the value of the property.

John Hancock urged Rand to persuade WelshInvest to resume negotiations because John Hancock needed to sell the property by the end of the year. John Hancock approved a $1 million price reduction, apparently in an effort to motivate WelshInvest to purchase the property. Rand communicated this information to WelshInvest. At some point well before closing, according to Rand, WelshInvest and Rand negotiated a fee arrangement whereby Rand would be receiving "an additional 1% acquisition fee" for securing an additional $500,000 reduction in John Hancock's selling price. Rand did not inform John Hancock of WelshInvest's offer of additional compensation for securing the additional price reduction. In the end, WelshInvest purchased Park Square from John

Hancock for $6.5 million. Thus, John Hancock reduced its price, and Rand received the additional compensation.

In early 2002, WelshInvest decided to sell Park Square (the "2002 transaction"), and Welsh agreed to broker the transaction. Before marketing materials were sent to prospective buyers, Rand instructed Kratzer not to send marketing materials to John Hancock because John Hancock was no longer investing in real estate. Rand also explained that at the time of the 2000 transaction, John Hancock was under pressure to sell its real estate holdings in an unfavorable market and that sending John Hancock marketing material listing the current, substantially higher sale price would be an unnecessary reminder of the unpleasant 2000 transaction.

Surprised at Rand's instruction not to send marketing materials to John Hancock, Kratzer asked Rand whether John Hancock was aware of the additional compensation paid by WelshInvest in the 2000 transaction. Rand said that John Hancock was not aware of the additional compensation. Kratzer informed Rand that he believed the failure to disclose the additional compensation was illegal, to which Rand allegedly stated, "[g]o to management if you disagree with me, but if you do, this will be your last deal at Welsh." Rand subsequently told Kratzer to stop working on the 2002 transaction and removed Kratzer's name and contact information from the marketing material. Kratzer sent the marketing materials to John Hancock despite Rand's orders.

Kratzer claims that around this same time, he informed Robert Angleson, president of Welsh, that he believed the 2000 transaction was illegal. Shortly thereafter, in May 2002, Angleson informed Kratzer that his compensation package was going to be adjusted because of major changes at Welsh. Specifically, Kratzer would not receive a salary, but would receive straight commissions, and his company car and health insurance would be cancelled. Additionally, Kratzer would no longer be working with Rand.

In early September 2002, Kratzer claims he spoke to Dennis Doyle, Welsh's CEO, regarding the 2000 transaction and his belief that Rand had engaged in illegal activity. Doyle told Kratzer he would "get to the bottom of it," but also stated that he needed to protect his "long[-]term relationship with Rand." In mid-September 2002, Kratzer claims he wrote a letter to Doyle stating that he was concerned about Rand's illegal actions and that Rand was impermissibly withholding Kratzer's commissions. In response, Doyle allegedly stated that he needed to protect his relationship with Rand and that the matter should be handled internally.

In October 2002, Angleson terminated Kratzer's employment. Following his termination, Kratzer claims he went to breakfast with Doyle and that Doyle informed him that one of the reasons he was terminated was because of his complaints regarding Rand's handling of the 2000 transaction.

In September 2004, Kratzer commenced this lawsuit against Welsh, alleging, among other things, a violation of Minnesota's whistleblower statute. Welsh filed its answer and asserted counterclaims against Kratzer for breach of contract, specific performance, and misappropriation of trade secrets. Welsh filed a motion for summary judgment on Kratzer's claims, and the motion was granted. Subsequently, Kratzer filed a motion for summary judgment on Welsh's counterclaims, and the motion was granted. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court determines: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court must view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact must be more than evidence that "merely creates a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

Kratzer argues that the district court erred in granting summary judgment on his whistleblower claim. The Minnesota Whistleblower Act provides:

> An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (a) the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.

Minn. Stat. § 181.932, subd. 1 (2002). Minnesota courts apply the *McDonnell Douglas* burden-shifting analysis in retaliatory discharge claims. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). The employee has the initial burden of demonstrating a prima facie case of retaliatory discharge, which requires proof of: (1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two.[1] *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). If the employee successfully establishes a prima facie case, the burden shifts to the employer "to articulate a legitimate, non-retaliatory reason for its action, after which the employee may demonstrate that the employer's articulated reasons are pretextual." *Cokley*, 623 N.W.2d at 630. "At all times the employee has the burden to prove by a preponderance of evidence that the employer's action was for an impermissible reason." *Id.*

A. Statutorily-Protected Conduct

Kratzer claims that because he reported suspected illegal activity surrounding the 2000 transaction, he is protected by the whistleblower statute. In order to establish statutorily-protected conduct, the employee must establish the following:

> A whistleblower claim need not identify the specific law or rule that the employee suspects has been violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.

Abraham v. County of Hennepin, 639 N.W.2d 342, 354-55 (Minn. 2002). To establish that the report was made in good faith, the plaintiff must show that "the report[] [was] made for the purpose of blowing the whistle, i.e., to expose an illegality." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). Kratzer argues that there were two illegal acts that he reported: (1) Rand's failure to disclose his dual representation of John

[1] Here, Kratzer clearly satisfies the second element of the prima facie case—adverse employment action—because he was fired by Welsh. Therefore, we will not analyze the second element but will instead focus on the first and third elements.

Hancock and WelshInvest; and (2) Rand's failure to disclose the additional fee WelshInvest paid him to secure a lower asking price.

1. Dual Representation

In his reply brief, Kratzer asserts that Rand did not disclose his dual representation, i.e., that he was representing both John Hancock and WelshInvest in the 2000 transaction, and that such nondisclosure was illegal. As a preliminary matter, we observe that issues not raised in appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Even if we were to address Kratzer's untimely assertion, nothing in Kratzer's complaint, deposition or affidavit indicates that his reports to Angleson or Doyle included an allegation that Rand did not disclose the dual representation. To defeat a motion for summary judgment, a party "must do more than rest on mere averments." *DLH, Inc.*, 566 N.W.2d at 71. Here, Kratzer's assertion in his reply brief that Rand did not disclose the dual representation is nothing more than an unsubstantiated "mere averment" that does not survive summary judgment.

2. Fee Agreement

Kratzer also alleges that his reports included allegations that Rand's failure to disclose the WelshInvest fee agreement, under which WelshInvest would pay Rand additional compensation if he secured a lower sales price, was illegal. The record reflects that Kratzer did make reports expressing his concern about the fee arrangement. Kratzer contends that Rand violated Minn. R. 2805.2000, subp. 1 (1999), which provided: "[T]he following acts and practices constitute fraudulent, deceptive, or dishonest practices [in real estate transactions]: A. act on behalf of more than one party to a transaction without the knowledge and consent of all parties; . . ."[2] Citing Minn. R. 2805.2000, subp. 1(A), Kratzer claims that because John Hancock was not aware of the additional fee Rand received in return for procuring a lower asking price, John Hancock could not knowingly consent to Rand's representation of both parties. The district court rejected Kratzer's argument, ruling that Minn. R. 2805.2000, subp. 1(A) was inconsistent with a statute and therefore invalid.

In ruling that Minn. R. 2805.2000, subp. 1(A) was invalid, the district court relied on the premise that an administrative agency cannot adopt rules that conflict with legislative statutes. *Flores v. Dep't of Jobs & Training*, 411 N.W.2d 499, 504 (Minn. 1987). The district court reasoned that Minn. Stat. § 82.197 (2000), which provided heightened disclosure requirements for dual representation in *residential* real estate transactions,[3] conflicted with the disclosure requirement in Minn. R. 2805.2000, subp.

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[2] Unless otherwise noted, the references to statutes and rules are those which were in effect in 2000 (the year in which Rand's actions occurred) and 2002 (the year in which Kratzer reported those actions).

[3] Minn. Stat. § 82.197 (2000), later revised and renumbered at Minn. Stat. § 82.22 (2004), provides:

> Subdivision 1. **Agency disclosure.** A real estate broker or salesperson shall provide to a consumer in a *residential* real property transaction at the first substantive contact with the consumer an agency disclosure form in substantially the form set forth in subdivision 4 . . . .
>
> . . . .
>
> Subd. 4. **Agency disclosure form.** The agency disclosure form shall be in substantially the form set forth below:
>
> . . . .

1(A). The district court concluded that this conflict "effectively render[ed] the explicit and limited disclosure provision of Minn. Stat. § 82.[197] [2000][4] meaningless," and therefore the rule was invalid.

We disagree with the district court's reasoning and conclusion. Minn. R. 2805.2000 applies to all real estate transactions, whereas Minn. Stat. § 82.197, with its heightened disclosure requirements, applies only to residential sales. By enacting the heightened disclosure requirements in Minn. Stat. § 82.197, the legislature evidently took the view that the participants would most likely not be as sophisticated as those in commercial sales. The general disclosure requirements in Minn. R. 2805.2000, subp.

> III. **Dual Agency-Broker Representing both Seller and Buyer**: Dual agency occurs when one broker or salesperson represents both parties to a transaction, or when two salespersons licensed to the same broker each represent a party to the transaction. Dual agency requires the informed consent of all parties, and means that the broker and salesperson owe the same duties to the Seller and the Buyer. This role limits the level of representation the broker and salespersons can provide, and prohibits them from acting exclusively for either party. In a dual agency, confidential information about price, terms, and motivation for pursuing a transaction will be kept confidential unless one party instructs the broker or salesperson in writing to disclose specific information about the party writing. Other information will be shared. Dual agents may not advocate for one party to the detriment of the other.

[4] The district court's order states the rule "would effectively render the explicit and limited disclosure provision of Minn. Stat. § 82.2**8** meaningless," however, Minn. Stat. § 82.28 does not contain any disclosure requirements (emphasis added). Presumably, this is a typographical error and the district court meant to reference Minn. Stat. § 82.22 (2004) which contains disclosure requirements in residential transactions similar to those in Minn. Stat. § 82.197 (2000).

1(A) and the more specific disclosure requirements for residential transactions in Minn. Stat. § 82.197 are directed at different types of sales. There is, therefore, no reason to conclude that the statute and the rule cannot be read consistently with each other. If the sale is residential, the statute governs; if it is not, the rule governs. We note that in 2004 the legislature enacted the substance of Rule 2805.2000 into statutory form, where it is now codified at Minn. Stat. § 82.41, subd. 13 (2006). 2004 Minn. Laws ch. 203, art. 2, § 18, at 491. As a result, the residential disclosure requirements of Minn. Stat. § 82.22 and the substance of Minn. R. 2805.2000, subp. 1(A) now exist in the same statutory chapter. Obviously the legislature has taken the view that the two disclosure requirements are not in conflict with each other. We conclude that Minn. R. 2805.2000, subp. 1(A) is valid and that the district court erred in concluding otherwise.

Having concluded that Minn. R. 2805.2000, subpart 1(A) is valid, we next determine whether Rand violated that rule when he failed to disclose to John Hancock his additional fee arrangement with WelshInvest. Neither party has cited, nor have we found, any cases construing the “knowledge and consent” requirement. But because the rule borrows terminology from the common law, it is appropriate to refer to the common law when interpreting the rule. *In re License of Perron*, 437 N.W.2d 92, 96 (Minn. App. 1989) (applying elements of common-law fraud to interpret statute providing for suspension of real estate license for "fraudulent, deceptive or dishonest practice").

Under the common law, a real estate broker has a fiduciary duty toward the principal. *White v. Boucher*, 322 N.W.2d 560, 564-66 (Minn. 1982); *Jensen v. Peterson*, 264 N.W.2d 139, 142 (Minn. 1978). A party with a fiduciary duty has a duty to disclose material facts to the persons to whom the duty is owed. *Klein v. First Edina Nat'I Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972).

"An agent cannot profit from the subject of the agency without the principal's consent, freely given after full disclosure of any facts that might influence the principal's judgment." *Carlson v. Carlson*, 363 N.W.2d 803, 805 (Minn. App. 1985). "In assessing whether an agent has obtained valid consent from the principal to the agent's acquisition of a material benefit, . . . it is necessary for the agent to make 'full and fair' disclosure to the principal. . . . The rule entitles the principal to assume that the agent will make the disclosures requisite to effective consent by the principal." Restatement (Third) of Agency § 8.06 cmt.c (2006).

Welsh argues that Rand did not have a duty to disclose the specifics of the Rand-Welshlnvest compensation arrangement because, Welsh contends, a dual agent is prohibited by statute from disclosing "confidential information about price, terms, and motivation for pursuing a transaction." This language is taken from paragraph IV of the disclosure form required by Minn. Stat. § 82.22, subd. 4 (2004), and from the acknowledgment required by subdivision 5. But those statutory provisions are inapplicable to this case because they refer to the "terms" of the agreement or proposed agreement between buyer and seller, not the terms of an agreement between one party and the agent. There is no language in chapter 82 that forbids a dual agent from making the disclosure that Rand was obligated to make under the common law.

On the basis of the above analysis, we conclude that Rand had an obligation to disclose his fee arrangement to John Hancock. It was especially important in this case because under this fee arrangement, Rand's interests were directly contrary to John Hancock's: Rand's commission increased if John Hancock's sale proceeds decreased. Thus, the agent was to gain if the principal was to lose. Without that knowledge, John Hancock could not give a knowing consent to the dual representation. Because Rand had failed to disclose the fee arrangement to John Hancock, we conclude that Rand "act[ed] on behalf of more than one party to [the] transaction without the knowledge and consent of" John Hancock in violation of rule 2805.2000, subpart 1(A).

In addition, Kratzer has made a showing that he reported Rand's actions in good faith, i.e., for the purpose of exposing an illegality. Thus, we conclude that Kratzer's report was statutorily-protected because it was made in good faith and implicated the violation of a valid rule adopted pursuant to law, *Obst*, 614 N.W.2d at 200, and included factual allegations that, if proven, would constitute a violation of that rule, *Abraham*, 639 N.W.2d at 354-55.[5]

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[5] We also observe that Rand, in his deposition, admitted that the additional fee arrangement should have been disclosed to John Hancock:

A (Rand): No, I did not tell [Kelly, a John Hancock employee] that I was compensated for the price reduction.

Q (Deposing Attorney): Don't you think that's some kind of problem?

A: She was told we were compensated for the transaction.

Q: Oh, sure. But wouldn't the seller want to know that the—aren't you in some kind of fiduciary relationship with the seller?

. . .

A: Yes.

Q: And wouldn't the seller want to know that you're getting extra compensation for getting the seller to reduce the price?

A: I would think so.

Q: So why didn't you tell them that?

A: Well, I guess there is no good answer for that.

. . .

3. Preexisting Duty to Report

Welsh argues that Kratzer's report was not statutorily protected because he had a preexisting duty to report any conflicts of interest to Welsh. Citing *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. App. 1991), *aff'd*, 479 N.W.2d 58 (Minn. 1992), Welsh claims that an employee's report is not protected under the Whistleblower Act when (1) the employee is expected to make such reports to his or her employer, and (2) the employee did not make such reports to any outside authority. Welsh's argument fails for two reasons. First, unlike the *Michaelson* plaintiff—who was an employment-law attorney providing legal counsel to the company—it was not Kratzer's regular responsibility to advise Welsh on its violations of the law. Second, Welsh misstates the rule in *Michaelson*. The whistleblower statute does not require the employee to make his report to an outside authority in order to receive protected status. Instead, the statute simply requires that the employee make his report to his "employer *or* to any governmental body or law enforcement official." Minn. Stat. § 181.932(1)(a) (emphasis added). Kratzer made reports to various Welsh supervisors, which is enough to satisfy the statutory requirements.

Q: You didn't tell them that this extra compensation would be paid for a price reduction?
A: No.
Q: Did you think that that was a material fact that the seller should know?
A: Yes.
Likewise, Angleson, in his deposition, affirmed that if there were "any special incentives to the broker regarding price," they would be "part of the mandatory disclosures" to the principal.

B. Causal Connection

Next, Kratzer challenges the district court's conclusion that Kratzer did not establish a causal connection between his report of illegal conduct and his termination. Minnesota has recognized that "retaliatory motive is difficult to prove by direct evidence and [] an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Cokley*, 623 N.W.2d at 632. Close temporal proximity between a report and a termination decision may be sufficient circumstantial evidence supporting an inference of retaliatory motive. *See Thompson v. Campbell*, 845 F. Supp. 665, 675 (D. Minn. 1994).

Here, the district court concluded that: (1) Kratzer's September 2002 report to Doyle was not close enough in time to his October 2002 termination to establish a causal connection; and (2) even if the time period between his report to Doyle and his termination were close enough to establish causation, there is no evidence that Doyle made the decision to fire Kratzer.

In doing so, the district court ignored Kratzer's direct evidence that Doyle allegedly told him he had been fired, at least in part, because of his complaints about Rand's "illegal" activity. While Doyle denies making such a statement, his denial simply raises a credibility issue. On a motion for summary judgment, the district court is mandated to view the evidence in the light most favorable to the nonmoving party. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). All doubts and factual inferences must be resolved against the moving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). With this mandate in mind, we conclude that Kratzer has made a prima facie case on the issue of causality.

Finally on this issue, Welsh argues that Kratzer was terminated for poor performance and poor production as a Welsh broker. Because we have concluded that Kratzer has established a prima facie case, the burden shifts to Welsh to "articulate a legitimate, non-retaliatory reason for its action." *Cokley*, 623 N.W.2d at 630. Welsh cited Kratzer's lack of productivity as a broker as the reason for terminating Kratzer. Specifically, Welsh claimed that during his tenure at Welsh, Kratzer brought only one commission and one client to Welsh.

In reply, Kratzer argues that Welsh's proffered reasons are pretextual. After the employer has articulated that it had legitimate, non-discriminatory reasons for termination, "the employee may demonstrate that the employer's articulated reasons are pretexual." *Id.* Kratzer asserts that the decision to terminate him was also motivated by illegitimate reasons and cites *McGrath v. TCF Bank Savings* for the proposition that "even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision." 509 N.W.2d 365, 366 (Minn. 1993) (quoting *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 627 (Minn. 1988)). As we have noted, there is a showing that Doyle told Kratzer that Kratzer was fired because he reported Rand's illegal activity. This showing is sufficient to create a factual issue concerning Welsh's reasons for firing Kratzer.

We conclude, therefore, that Kratzer has made a showing sufficient for his whistle-blower claim to survive summary judgment.

II.

Welsh requested that in the event this court reverses and remands on Kratzer's whistleblower claim, we should reverse and remand Welsh's counterclaims. Because we are reversing and remanding Kratzer's whistleblower claim, we will review the summary judgment order on Welsh's counterclaims.

Welsh alleges that its business plans and customer lists are trade secrets which Kratzer misappropriated in violation of the Minnesota Uniform Trade Secrets Act (the MUTSA), Minn. Stat. § 325C.01-.08 (2002).[6] Accordingly, Welsh challenges the district court order granting summary judgment in favor of Kratzer on Welsh's counterclaim of misappropriation of trade secrets.[7]

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[6] While Welsh makes the general allegation that its employee manuals are trade secrets in its brief on page 38, this argument is not briefed or analyzed. This court declines to reach issues in the absence of adequate briefing. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). Further, this court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994). Therefore, we decline to analyze Welsh's contention that its employee manuals are trade secrets for purposes of its counterclaim.

[7] While Welsh asserted a breach-of-contract counterclaim in its initial pleading, it does not appear Welsh is raising this issue on appeal. Welsh's only reference to Kratzer's contractual duties is in the context of its trade-secrets argument. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Even if we were to consider Welsh's breach-of-contract counterclaim, we would conclude that it fails. As Kratzer points out, Welsh cannot establish the existence of an enforceable contract between the parties. First, the Brokerage Policy Manual and the LLC Reference Guide are not contracts because they contain express disclaimers. *See Audette v. Ne. State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. App. 1989) (employee handbook is not an enforceable contract if it contains a disclaimer stating that the document does not create a contract). Second, even if the confidentiality provision of the

The MUTSA "allows the protection of certain types of information through an action for misappropriation." *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983); *see* Minn. Stat. §§ 325C.01-08. Misappropriation is defined as the improper acquisition, disclosure, or use of a "trade secret." Minn. Stat. § 325C.01, subd. 3. In order for information to be considered a "trade secret," the plaintiff must prove that: (1) the information is not generally known or readily ascertainable; (2) the information derives independent economic value from its secrecy; and (3) the plaintiff makes reasonable efforts to maintain secrecy. *Electro-Craft*, 332 N.W.2d at 899-901. The burden is on the party asserting misappropriation to establish each factor. *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 958 (D. Minn. 1999). We conclude that Welsh made a sufficient showing to defeat summary judgment with respect to the customer lists and business plans.

A. Customer Lists

The district court noted that courts have frequently found that client lists are not confidential or trade secret information, citing *Fox Sports Net North, L.L.C. v. Minnesota Twins P'ship*, 319 F.3d 329, 336 (8th Cir. 2003) and *Lasermaster Corp. v. Sentinel Imaging*, 931 F. Supp. 628, 637 (D. Minn. 1996). However, our supreme court has recognized that customer lists may constitute trade secrets, depending on the facts. *See Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 90-91 (Minn. 1979)

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independent contractor agreement was enforceable while Kratzer was an independent contractor (1997 to 2000), it is irrelevant for purposes of Welsh's counterclaim which is based on confidential information obtained after Kratzer's independent contractor status terminated.

(concluding that list of potential customers fit the definition of a trade secret). In any event, we note that in both *Fox Sports* and *Lasermaster* the individual defendants did not take any documents from the employers. *Fox Sports*, 319 F.3d at 336; *Lasermaster*, 931 F. Supp. at 637. Here, Kratzer allegedly took written records, distinguishing this case from *Fox Sports* and *Lasermaster*. We conclude that it would be error to state that as a matter of law customer lists can never constitute trade secrets. We move, then, to an analysis of the *Electro-Craft* factors.

1. Not Generally Known or Readily Ascertainable

Kratzer argues that Welsh's customer lists contain information that is readily ascertainable, and therefore do not constitute trade secrets. The district court relied on evidence that Welsh publicizes properties for which it is the listing agent by posting for-sale signs at the properties and sending marketing brochures to potential buyers. However, Angleson stated in his affidavit that Welsh's customers are not ascertainable from street signage because the street signage identifies only the actual properties that are available to be purchased or leased—not Welsh's customers. Further, Angleson noted that its customers could not necessarily be identified from a review of publicly-available property records because the "property-owning [Welsh] customers . . . usually create separate holding companies for each property acquired." Angleson also asserted that "in the commercial real estate industry, customer lists and customer contacts are considered to be confidential and trade secret information." We conclude that Welsh has created a genuine issue of material fact as to whether its customer lists are not generally known or readily ascertainable.

2. Derives Independent Economic Value from Secrecy

The district court did not address this factor in the context of Welsh's customer lists. Angleson stated that Welsh has "spent considerable time and money researching potential customers, which are usually corporate entities, and developing relationships with the people who represent them." Angleson further explained that Welsh "maximizes its efforts by spending time and money contacting several dozen customers when a particular property comes on the market, rather than cold calling the thousands of potential buyers that you could find by opening a phone book or researching on the Internet." Angleson explained that if Welsh's competitors gained access to its customer information "they would instantly gain a competitive advantage in the marketplace by having a shortcut that identifies customers that [Welsh] believe[s] would be interested in acquiring commercial property in the Twin Cities." Angleson stated that having access to such information would essentially be a "'free ride' on Welsh Companies'[] investment of time and money in developing this information without incurring those costs themselves." Welsh has made a sufficient showing on this element to survive summary judgment.

3. Reasonable Efforts to Maintain Secrecy

This element "does not require maintenance of absolute secrecy" but, instead, Welsh must make a showing that the contested information is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Electro-Craft*, 332 N.W.2d at 901; Minn. Stat. § 325C.01 subd. 5. The district court concluded that Welsh did not take appropriate steps to maintain secrecy because (1) while some of Welsh's policy manuals contained confidentiality clauses, these manuals were not contracts and therefore were not binding on Kratzer; and (2) Welsh allowed Kratzer to take certain documents with him when he left. But Angleson stated that Welsh carefully protects its customer lists and customer contacts by instructing brokers that the information is confidential and by distributing the lists only to brokers that need them. Even if the policy manuals were not contractually binding, they served as notice to Kratzer to maintain confidentiality of information. Additionally, Angleson stated that the customer lists are stored in Welsh's office, which is secured by keycard access and on computers that are password protected. Accordingly, we conclude that Welsh has at least created a fact issue as to whether it made reasonable efforts to maintain secrecy.

B. *Business Plans*[8]

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[8] Kratzer maintains that Welsh cannot rely on business plans in its claim that Kratzer misappropriated trade secrets. Kratzer argues that because Angleson did not mention business plans in his deposition, but did so in a later affidavit, the affidavit contradicted Angleson's earlier testimony and was self-serving. We disagree. First, we note that the district court did not exclude the affidavit, as Kratzer assures us it did. Instead, the court did not deal with the issue. Second, the affidavit did not contradict the previous deposition testimony. Kratzer refers us to two questions in the deposition, in which Angleson was asked to state what documents Kratzer had "stolen." Answering the first question, Angleson identified certain documents and concluded his answer with, "I can't list them all, but he stole documents that he wasn't – knew he wasn't supposed to steal." In answer to the second question, Angleson said, referring to previous answers, "I'm sure there were more, but I don't – I can't think of them right now." At this point, Welsh's attorney objected to the question as repetitious and noted that Kratzer had already been provided with "a list of documents that are believed to be confidential that were in Mr. Kratzer's possession." Kratzer refers to a third portion of the deposition, but there we do not note any question that calls for a complete list of documents that Kratzer allegedly stole. In light of the fact Angleson stated that his deposition answers were incomplete, a subsequent affidavit supplementing the answers cannot be said to contradict the deposition. *See Banbury v. Omnitrition Int'l, Inc.,* 533 N.W.2d 876, 881 (Minn. App. 1995).

1. Not Generally Known or Readily Ascertainable

As for the business plans, Kratzer does not challenge Welsh's assertion that such plans are not generally known or readily ascertainable, and the district court did not rule that they were.

2. Derives Independent Economic Value from Secrecy

The district court concluded that the business plans are obsolete because they "are at least four years old" and "Welsh has failed to establish that these plans still maintain economic value today." In support of its reasoning, the district court relied on *Fox Sports* for the proposition that obsolete information cannot form the basis for a trade secret because it has no value. 319 F.3d at 336. Here, the business plans at issue were created between August 2000 and June 2002. One portion of an August 2000 planning document referred to Welsh's plans "over the next 3-5 years." Kratzer was terminated by Welsh in October 2002, and there is no evidence that Welsh subsequently abandoned the strategies contained in the business plans allegedly taken by Kratzer. In fact, in his affidavit, Angleson states that a Welsh plan (in Kratzer's possession) for dealing with Butler Real Estate "would be a valuable tool to a competitor attempting to draft a business proposal for Butler" as of the date of the affidavit. In our view, Welsh has made a showing that the business plans are not "obsolete" as a matter of law.

Further, Angleson stated that Welsh invests a great deal of time and resources into developing its business plans and that if a competitor learned about these plans, the competitor would benefit by:

> (i) avoiding incurring the expenditure of time and money that Welsh Companies invested in developing the information; (ii) capitalizing on market analysis and similar skills that Welsh Companies'[] personnel have that our competitors may not; (iii) "beating us to the punch" and acquiring properties that we have identified as having investment potential or signing up potential new customers that we have identified; (iv) learning the needs of our customers and approaching them with attractive offers from the competitors' clients; and (v) approaching our customers with joint venture propositions leveraged off of the research that Welsh Companies has performed.

We conclude that Welsh made a sufficient showing on this factor.

3. Reasonable Efforts to Maintain Secrecy

Angleson stated that its business plans are located in Welsh's office, which is secured by keycard access and saved on password-protected computers. Angleson also stated that brokers are reminded to keep business plans confidential. As discussed above, we conclude that Welsh has made a sufficient showing to survive summary judgment that it made reasonable efforts to maintain the secrecy of its documents.

4. Conclusion – Trade Secrets Claim

Although Kratzer admitted in his deposition that after he joined a competitor of Welsh, he used some contacts that he "had from Welsh and before," Welsh does not have substantial evidence that Kratzer "disclose[d] or use[d]" an alleged trade secret. Minn. Stat. § 325C.01, subd. 3(ii). Even so, a party may establish "misappropriation" by proving that the opposing party acquired a "trade secret of another" and "knew or had reason to know that [his] knowledge of the trade secret" was due to "improper means." Minn. Stat. § 325C.01, subd. 3(ii); *see Rehab. Specialists, Inc. v. Koering,* 404 N.W.2d

301, 306 (Minn. App. 1987). Upon proof of misappropriation, a party may obtain injunctive relief, such as the return of the trade secrets. Minn. Stat. § 325C.02(a); *Rehab. Specialists*, 404 N.W.2d at 306-07. At the least, Welsh should be permitted to pursue such a remedy in this case. We conclude, therefore, that Welsh has made a showing in support of its trade secrets claim sufficient to survive summary judgment.

Reversed and remanded.