Affirmed and Opinion filed September 27, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01218-CV

FRIEDMAN, CLARK & SHAPIRO, INC., MICHAEL KING, CHARLES BREGENZER, AND LEE HAUSMAN-PELS, Appellants

V.

GREENBERG, GRANT & RICHARDS, INC., Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 98-32860

O P I N I O N

Appellants, Friedman, Clark, & Shapiro, Inc. ("FCS"), Michael King, Charles Bregenzer, and Lee Hausman-Pels, appeal the trial court's judgment entered in favor of appellee, Greenberg, Grant & Richards, Inc. ("GGR"), on its claims for breach of contract, breach of fiduciary duty, and tortious interference with prospective contractual relationships. We affirm.

I. BACKGROUND

GGR is a commercial debt collection firm. King, Hausman, and Bregenzer were employees of GGR. Because GGR's employees had been leaving its employment and taking its business with them, GGR, in 1996, had its existing employees sign employment agreements containing, among other terms, non-compete[1] and non-solicitation clauses. King and Hausman each signed an employment agreement with GGR containing a covenant not to compete and a covenant not to solicit. Bregenzer did not sign an employment agreement containing a noncompete clause, but, instead, signed a letter agreement, in which he agreed not to solicit GGR's clients and employees after leaving the employment of GGR.

In May 1998, while still employed at GGR, King, Hausman, and Bregenzer took steps towards forming their own commercial debt collection firm, FCS, in Harris County. On May 22, 1998, FCS was incorporated and on June 10, 1998, FCS's articles of incorporation were filed. Although King, Hausman, and Bregenzer did not leave GGR until the end of June or early July 1998, FCS appeared to be operating in early June.

In early July 1998, GGR discovered that King, Hausman, and Bregenzer had left GGR and set up a competing business in the area of commercial debt collection. On July 12, 1998, GGR filed an original petition and application for temporary restraining order. On July 13, 1998, the trial court granted GGR's application for a temporary restraining order, but subsequently, on July 31, 1998, denied GGR's application for a temporary injunction. In addition to seeking injunctive relief, GGR asserted claims against appellants for breach of fiduciary duty, breach of contract, fraud, conversion, tortious interference with existing contracts and prospective contractual relationships, and conspiracy. With regard

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[1] The non-compete provision states, in part:

5.01 Restrictive Covenants. Employee expressly agrees that while this Agreement is in effect, and for a period of one year following termination of this Agreement, Employee will not directly or indirectly, as an employee, agent, proprietor, partner, broker, stockholder, officer, director, or otherwise, render any services to, or on behalf engage in or own part of any competitive business or organization or plan that would compete directly or indirectly with Employer's business without prior written consent of Employer within Harris County, Texas.

to GGR's breach of contract claim, appellants asserted a number of affirmative defenses, including that the covenant not to compete is unenforceable because it: (1) lacks consideration, (2) is illegal, (3) was procured by duress, (3) is not ancillary to an otherwise enforceable agreement, and (4) is not a reasonable restraint of trade. Appellants also filed counterclaims against GGR for intentional infliction of emotional distress and breach of contract for failing to pay earned commissions.

Both GGR and appellants moved for summary judgment. GGR sought summary judgment on its breach of contract claim contending, as a matter of law, that King and Hausman had breached their respective employment agreements. GGR also sought summary judgment on appellants' counterclaim for breach of contract for failing to pay earned commissions. The record does not contain any order either granting or denying GGR's motion for summary judgment. Appellants filed a motion for summary judgment on all of GGR's claims. The trial court granted partial summary judgment on some of GGR's claims against appellants,[2] while denying summary judgment on GGR's claims for breach of contract and breach of fiduciary duty against King, Bregenzer, and Hausman; tortious interference against King, Bregenzer, Hausman, and FCS; and conspiracy against Bregenzer and FCS.

At trial, the jury found: (1) King and Hausman had breached their employment agreements with GGR[3] and they were not excused for their breaches, and (2) King, Hausman, Bregenzer, and FCS tortiously interfered with GGR's prospective contractual relationships and they were not justified in that interference. The jury awarded GGR $162,500 against King, Hausman, Bregenzer, and FCS on its claims for breach of contract and tortious interference with prospective contractual relationships. The jury further found King, Hausman, and Bregenzer had breached the fiduciary duties they owed to GGR and

[2] Although it is not clear from the trial court's order, we presume the trial court granted summary judgment on GGR's claims for fraud and conversion.

[3] Because Bregenzer signed a letter agreement, not an employment agreement like King and Hausman, the jury was instructed to consider whether Bregenzer had breached the letter agreement.

awarded GGR $43,250. Finally, the jury awarded GGR $122,825 in attorney fees. The trial court entered judgment in accordance with the jury's findings[4] and further enjoined King, Hausman, and FCS, for one year from the date of the judgment, from (1) soliciting specified business, (2) soliciting GGR's employees, (3) disclosing GGR's confidential information, and (4) engaging in the collection of third-party commercial debts in Harris County, Texas.[5]

II. COVENANT NOT TO COMPETE

In their first point of error, appellants claim the trial court erred in submitting a question to the jury on breach of the covenant not to compete and in not granting its motion for judgment notwithstanding the verdict. They contend the covenant not to compete is invalid because it is not ancillary to or part of an otherwise enforceable agreement and it is not supported by consideration.

Section 15.50 of the Texas Business & Commerce Code sets forth the criteria for the enforceability of a covenant not to compete. TEX. BUS. & COM. CODE ANN. § 15.50(a) (Vernon Supp. 2001).

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Id. The enforceability of a covenant not to compete is a question of law for the court. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994); *Martin v. Credit Prot. Ass'n, Inc.*, 793 S.W.2d 667, 668-69 (Tex. 1990).

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[4] Attorney fees were specifically awarded against King and Hausman, but not against Bregenzer and FCS.

[5] The trial court had originally enjoined Bregenzer from engaging in those same activities, but later modified its judgment so that Bregenzer was not included in that portion of the judgment.

Section 15.50 requires the court to make two initial inquiries concerning the formation of the covenant not to compete: "(1) is there an otherwise enforceable agreement, to which (2) the covenant not to compete is ancillary to or part of at the time the agreement is made." *Light*, 883 S.W.2d at 644. An employment-at-will relationship alone is not an otherwise enforceable agreement that can support a covenant not to compete. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 833 (Tex. 1991). Appellants argue the covenant not to compete is not ancillary to or part of an otherwise enforceable agreement because their respective employment relationships with GGR were "at-will."

The at-will employment relationship is not binding on either the employer or employee. *Id.* at 832. Absent a specific contract term to the contrary, the employment-at-will doctrine permits an employee to quit or be fired, with or without cause, without liability on the part of the employee or employer. *Kadco Contract Design Corp. v. Kelly Servs., Inc.*, 38 F. Supp.2d 489, 494 (S.D. Tex. 1998); *Ronnie Loper Chevrolet-Geo, Inc. v. Hagey*, 999 S.W.2d 81, 83 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Parties may modify the at-will employment relationship by an oral or written "satisfaction contract." *Belian v. Texas A & M Univ., Corpus Christi*, 987 F. Supp. 517, 519 (S.D. Tex.), *aff'd*, 132 F.3d 1453 (5th Cir. 1997); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 659 (Tex. App.—Dallas 1992, no writ). Under a satisfaction contract, an employer represents to the employee that he will not be dismissed except for unsatisfactory performance. *Belian*, 987 S.W.2d at 519; *Goodyear Tire & Rubber Co. v. Portilla*, 836 S.W.2d 664, 668 (Tex. App.—Corpus Christi 1992), *aff'd*, 879 S.W.2d 47 (Tex. 1994). Any modification of the at-will employment relationship must be clear and explicit. *Belian*, 987 F. Supp. at 519; *see also Kadco Contract Design Corp.*, 38 F. Supp.2d at 494 (noting employment contract must directly limit in "meaningful and special way," employer's right to terminate employee without cause).

Section 3.11 of King's and Hausman's respective employment agreements clearly and explicitly modified their at-will employment relationships with GGR by limiting GGR's ability to terminate King's and Hausman's employment except for unsatisfactory performance of their duties:

> The employment of Employee shall continue *only so long as services rendered by Employee are satisfactory to Employer*, regardless of any other provision contained in this Agreement. Employer shall be the sole judge as to whether such services of Employee are satisfactory.

(Emphasis added). We find, therefore, that because King's and Hausman's employment agreements were satisfaction agreements, the covenants not to compete were ancillary to or part of otherwise enforceable agreements. *See Zep Mfg. Co.*, 824 S.W.2d at 659 (finding because employment agreement was satisfaction agreement, not at-will agreement, it was an "otherwise enforceable agreement").

The Dallas Court of Appeals addressed a similar situation involving a satisfaction agreement. Appellants argue *Zep Mfg. Co.* is not applicable to the facts in this case because the court of appeals found the employment relationship was at-will and held the covenant not to compete, therefore, was unenforceable. Appellants' reading of *Zep Mfg. Co.* is neither accurate nor complete. In *Zep Mfg. Co.*, the employer brought suit against its former employee for breach of a covenant not to compete. *Id.* at 657. The employee moved for summary judgment on the former employer's claim for breach of the covenant not to compete on the ground that it was unenforceable because it was not ancillary to or part of an otherwise enforceable agreement. *Id.* at 658. The trial court granted summary judgment in favor of the employee on the employer's claim for breach of the covenant not to compete. *Id.* at 657.

The court of appeals observed that when an employment agreement is a satisfaction agreement, there must be a bona fide dissatisfaction or cause for discharge. *Id.* at 659. Therefore, the court of appeals explained, the limitation of the employer's right to terminate the employee on the satisfaction of performance of duties modified the at-will employment relationship. *Id.* Contrary to appellants' contention, the court of appeals specifically found the employment contract was a "satisfaction contract," modifying the at-will employment

relationship and was an otherwise enforceable agreement and held that the trial court erred in granting summary judgment on that ground. *Id.*[6]

Appellants further assert there is no consideration to support the covenants not to compete. We disagree. An agreement not to compete must be supported by consideration. *DeSantis v. Wackenhut*, 793 S.W.2d 670, 681 n.6 (Tex. 1990); *Martin*, 793 S.W.2d at 669. An "otherwise enforceable agreement" can emanate from at-will employment if the consideration for any promise is not illusory. *Light*, 883 S.W.2d at 645. Consideration may include special training or knowledge provided to the employee. *DeSantis*, 793 S.W.2d at 681 n.6. As long as there is an exchange of consideration to support the primary purpose of the agreement, the covenant not to compete will be supported by that consideration. *Martin*, 793 S.W.2d at 669.

In their respective employment agreements, King and Hausman each agreed not to disclose or use to his advantage confidential information such as customer names and that he would return to GGR any proprietary information and materials upon leaving employment with GGR. Thus, we find there was an exchange of consideration to support the primary purpose of the covenant not to compete.[7] Providing King and Hausman with

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[6] The court of appeals next addressed the restraint on trade argument and found the covenant not to compete contained no limitation as to geographical area and was unenforceable on that ground. *Zep Mfg. Co.*, 824 S.W.2d at 660-61. The court, however, observed that the trial court, upon request by the employer, was required to reform the covenant not to compete to comply with the reasonable restraint on trade requirement. *Id.* at 661. The employer had requested the trial court to reform the covenant not to compete and enjoin the employee's violation of the reformed covenant. *Id.* On appeal, the employee moved to dismiss the employer's claim for injunctive relief because his contractual obligations not to compete or disclose trade secrets had expired thereby rendering any claim for injunctive relief moot. *Id.* In response, the employer stated it was no longer seeking relief under a reformed covenant not to compete. *Id.* The court of appeals affirmed summary judgment on the breach of the covenant not to compete claim on the basis that the employer was no longer seeking relief under a reformed covenant not to compete, i.e., "the only relief available to it." *Id.* Therefore, while the court found the covenant not to compete was unenforceable, it was not because it was not ancillary to or part of an otherwise enforceable agreement as appellants contend.

[7] The evidence at trial showed that King and Hausman would not have received any additional client lists if they had not signed the employment agreements. There is no evidence that they would have been discharged if they had refused signed the employment agreements or that any employee was discharged for failure to sign an such agreement.

confidential information such as client lists gave rise to GGR's interest in restraining their use and disclosure of such confidential information in competition with GGR.[8]

In summary, we conclude the covenants not to compete included in King's and Hausman's employment agreements with GGR are valid and enforceable. King's and Hausman's employment agreements with GGR are satisfaction agreements modifying their at-will employment relationships, thereby creating otherwise enforceable agreements to which the covenants not to compete are ancillary. Furthermore, the covenants not to compete are supported by consideration. Appellants' first point of error is overruled.

III. DAMAGES

In their second and third points of error, appellants raise a myriad of complaints. Appellants claim the evidence is legally and factually insufficient to support the jury's findings on breach of contract, breach of fiduciary duty, and tortious interference with prospective contractual relationships, and the jury's award of $162,500 in damages for breach of contract and tortious interference with prospective contractual relationships, $43,250 in damages for breach of fiduciary duty, and $122,825 in attorney fees. Appellants also assert the trial court erred in allowing nonexpert testimony on lost profits, failing to

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[8] *See, e.g., American Express Fin. Advisors, Inc., v. Scott*, 955 F. Supp. 688, 692 (N.D. Tex. 1996) (finding training, confidential information, and trade secrets given by employer to employee gave rise to employer's interest in restraining employee from competing, while non-compete covenant enforced employee's return promise not to use or disclose confidential information and trade secrets in context of otherwise enforceable contract); *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 118 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding employer's consideration gave rise to its interest in restraining employee from competing, and noncompete covenant was designed to enforce employee's consideration not to disclose or use the confidential information or trade secrets after employment; *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 232 (Tex. App.—Texarkana 1998, no pet.) (finding consideration given by employer to employee consisted of customer information giving rise to employer's interest in restraining employee from competing with it and covenant was designed to enforce employee's return promise to not disclose such information or to compete with employer; thus, covenant not to compete was ancillary to an otherwise enforceable agreement); *Ireland v. Franklin*, 950 S.W.2d 155, 158 (Tex. App.—San Antonio 1997, no writ) (concluding trade secret clause in employment agreement provided consideration in support of covenant not to compete, i.e., employer promised to share its listed trade secrets with employee, who, in turn, promised not to disclose or use trade secrets during or after termination of employment).

instruct the jury on the proper measure of damages, including the $43,250 award for breach of fiduciary duty in the $162,500 award for breach of contract and tortious interference with prospective business relationships because a party cannot have more than one recovery for the same injury, and awarding attorney fees against Bregenzer. Finally, appellants claim GGR failed to specially plead lost profits.

A. Insufficient Briefing

With respect to appellants' challenge to the legal and factual sufficiency of the evidence supporting the jury's findings on breach of contract, tortious interference with prospective contractual relationships, and breach of fiduciary duty, and the jury's award of $122,825 in attorney fees, and appellants' complaints that the trial court erred in including the $43,250 award for breach of fiduciary duty in the $162,500 award for breach of contract and tortious interference with prospective business relationships,[9] and that GGR failed to specially plead lost profits, we find appellants have not met the applicable briefing requirements under the Texas Rules of Appellate Procedure. Appellants have failed to provide citations to authority, citations to the record, and argument in support of these complaints. Appellants, therefore, have waived these claims on appeal. TEX. R. APP. P. 38.1.

B. Testimony on Damages

Appellants challenge the trial court's admission of Garrick Glasscock's testimony on GGR's lost profits. The admission or exclusion of evidence rests within the sound discretion of the trial court. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). To obtain reversal of a judgment based upon error in the admission or exclusion of evidence, the appellant must show (1) the trial court did, in fact, commit error, and (2) the

[9] Appellants further waived this complaint by failing to raise it in the trial court.

error was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

Appellants claim Glasscock, one of the owners of GGR, is not qualified to testify about GGR's lost profits because he is not an economist, but, instead, is only a high school graduate. We disagree. No particular skill, knowledge, training, or education is necessary to testify as to such matters. As owner of GGR, Glasscock could provide testimony on lost profits because it was from personal knowledge. *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 740 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Accordingly, we find the trial court properly allowed Glasscock to testify as to GGR's claim for lost profits.

C. Jury Instructions on Measure of Damages

Appellants assert the trial court erred in failing to provide instructions to the jury on the proper measure of damages with respect to net profits, gross revenue, and time and geographical area limitations. Where the trial court fails to include instructions on the proper measure of damages, it is the complaining party's burden to object to the charge and to tender such instructions in substantially correct form. *Jim Howe Homes, Inc. v. Rogers,* 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); *National Fire Ins. Co. v. Valero Energy Corp.*, 777 S.W.2d 501, 508 (Tex. App.—Corpus Christi 1989, writ denied). Failure to submit such an instruction is not reversible error unless the complaining party has requested in writing a substantially correct instruction. TEX. R. CIV. P. 278; *Jim Howe Homes, Inc.*, 818 S.W.2d at 903. Appellants neither objected to the charge on the basis that it lacked any instructions on the proper measure of damages nor submitted in writing a request for any such instruction. Appellants, therefore, have waived this complaint on appeal.

D. Breach of Contract and Tortious Interference Damages

Appellants contend the evidence is legally and factually insufficient to support the jury's award of $162,500 in damages on GGR's claims for breach of contract and tortious interference with prospective relationships. When reviewing the legal sufficiency of the evidence, we consider only the evidence and inferences tending to support the trial court's finding, and disregard all contrary evidence and inferences. *Southwestern Bell Mobile Sys. v. Franco*, 971 S.W.2d 52, 54 (Tex. 1998) (per curiam). We will sustain a no evidence point if there is no more than a scintilla of evidence to support the finding. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 588 (Tex. 1999). In conducting a factual sufficiency review, we must examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding, and set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

Specifically, appellants assert that Glasscock's testimony regarding GGR's lost profits was based on speculation and, therefore, is not sufficient to support the jury's $162,500 award. Although the recovery of lost profits does not require that the loss "be susceptible to exact calculation," the plaintiff must do more than demonstrate that it suffered some lost profits. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992) (citing *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 115 S.W.2d 1097, 1098 (1938)). Rather, the plaintiff must show the amount of its loss by competent evidence with reasonable certainty. *Id.*

The Texas Supreme Court explained, "[t]he requirement of 'reasonable certainty' in the proof of lost profits is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise." *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). The court, however, cautioned the "reasonable certainty" test does not lack "clear parameters." *Id.* The court explained:

> Profits which are largely speculative, as from an activity dependent on uncertain or changing market conditions, or on chancy business opportunities,

> or on promotion of untested products or entry into unknown or unviable markets, or on the success of a new and unproven enterprise, cannot be recovered. Factors like these and others which make a business venture risky in prospect preclude recovery of lost profits in retrospect.

Id.

What constitutes "reasonably certain" evidence of lost profits involves a fact intensive determination. *Holt Atherton Indus., Inc.*, 835 S.W.2d at 84. At a minimum, estimates of lost profits must be based upon "objective facts, figures, or data from which the amount of lost profits can be ascertained." *Id.*

Glasscock testified that GGR suffered total losses in the amount of $865,408: $547,041 for King's breach and $318,367 for Hausman's breach. Glasscock arrived at these figures by taking all the fees earned by King and Hausman from July 1998 through June 1999, to determine how much money GGR had lost from King's and Hausman's clients each month after leaving GGR. Alternatively, Glasscock determined GGR's losses were $950,374 by using FCS's gross receipts for 1998. Appellants presented no evidence, expert or otherwise, on GGR's losses.

A jury may not arbitrarily assess an amount neither authorized nor supported by the evidence presented at trial. *First State Bank v. Keilman*, 851 S.W.2d 914, 930 (Tex. App.—Austin 1993, writ denied). In other words, a jury may not "pull figures out of a hat;" a rational basis for the calculation must exist. *Id.* (quoting *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 372 (5th Cir. 1990)). A jury, however, has the discretion to award damages within the range of evidence presented at trial. *City of Houston v. Harris County Outdoor Adver. Ass'n*, 879 S.W.2d 322, 334 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

While it is not clear how the jury arrived at the $162,500 figure, it has the discretion to award damages within the range of the evidence presented at trial. *Howell Crude Oil Co. v. Donna Ref. Partners, Ltd.*, 928 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *see also Keilman*, 851 S.W.2d at 930 (noting jury's findings are not

disregarded because its reasoning in arriving at figure is unclear). Although Glasscock testified as to the figures of $950,374 and $865,408, the jury apparently did not accept Glasscock's figures and awarded a far lower amount. *America's Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617, 629 (Tex. App.—San Antonio 1996, writ denied) (observing that jury "did not unquestioningly accept" testimony of plaintiff's expert, but rather reduced amount of damages "presumably based on certain challenges made by [the defendant] to the expert's model"); *Verette v. Travelers Indem. Co.*, 645 S.W.2d 562, 570 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (noting jury "did not accept [the plaintiff's expert's] optimistic opinions" and, accordingly, awarded lower amount of damages). Where the range of the jury's answer is not restricted by the substantive law granting the remedy, the jury may consider conflicting expert testimony on a particular issue and, using its judgment as the finder of fact, blend that testimony to arrive at a proper verdict. *Lindgren v. Delta Invs.*, 936 S.W.2d 422, 425 (Tex. App.—Austin 1996, writ denied) (citing *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 529 (Tex. 1995)). We find the evidence is legally and factually sufficient to support the jury's award of $162,500 in lost profits on GGR's breach of contract and tortious interference with prospective contractual relationship claims.

E. Breach of Fiduciary Duty Damages

Appellants also complain the evidence is legally and factually insufficient to support the $43,250 award for breach of fiduciary duty, which encompasses actions taken by appellants prior to their leaving GGR in early 1998. The jury has the discretion to award damages within the range of the evidence presented at trial. *Howell Crude Oil Co.*, 928 S.W.2d at 108; *Keilman*, 851 S.W.2d at 930. The trial court instructed the jury to consider "All funds received by the breaching party as a result of the breach of fiduciary duty, if any." The award of $43,250 roughly corresponds to the $32,500 fee earned by appellants for the work they did for Korea Data Services, a business for whom GGR had been performing debt collections, while they were still employed by GGR, as well as another check deposited in FCS's account in June 1998, in the amount of $11,250, which appellants did not account for

its purpose. Because the jury's award is within the range of evidence GGR presented, we conclude the evidence is legally and factually sufficient to support the jury's award of $43,250 on GGR's breach of fiduciary duty claim.

F. Attorney Fees

Appellants further claim the trial court erred in awarding attorney fees against Bregenzer. There is no basis in the record for this complaint because the judgment does not reflect that any attorney fees were awarded against Bregenzer. With respect to attorney fees awarded to GGR, the judgment states: "It is further ORDERED that Plaintiff, Greenberg, Grant & Richards, Inc., have and recover from Defendants *Michael King and Lee Hausman*, jointly and severally, the sum of $122,825.00 for attorney's fees, which award is part of the Judgment here rendered." (Emphasis added). Attorney fees were assessed against only King and Hausman. Therefore, we find no error.

Appellants' second and third points of error are overruled.

IV. Denial of Summary Judgment

In their fourth point of error, appellants claim the trial court erred in not granting their motion for summary judgment on GGR's claims for breach of contract and breach of fiduciary duty. Ordinarily, the denial of a motion for summary judgment is not subject to appellate review. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996). Where both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review all summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999). Appellants claim that because both they and GGR filed motions for summary judgment, their complaint comes within the exception that an order denying a motion for summary judgment is not appealable.

The record shows that GGR filed a motion for summary judgment in which it asserted it was entitled to judgment as a matter of law on its claims against King and Hausman for breach of the covenants not to compete. GGR further moved for summary judgment on King's and Hausman's counterclaims for breach of contract for unpaid commissions. Appellants sought summary judgment on all of GGR's claims. The trial court granted summary judgment in favor of appellants on certain claims, while denying summary judgment on GGR's claims (1) against King, Bregenzer, and Hausman for breach of the covenants not to compete and breach of fiduciary duty, (2) against King, Bregenzer, Hausman, and FCS for tortious interference, and (3) against Bregenzer and FCS for conspiracy. There is no order in the record showing the disposition of GGR's motion for summary judgment.[10]

We find the above exception is not applicable here. The exception to the general rule requires that the opposing side's motion for summary judgment be granted, disposing of all claims. Here, however, the trial court denied appellants' motion for summary judgment on GGR's claims for breach of the covenants not to compete and breach of fiduciary duty and those claims were tried on the merits. The jury found against appellants on those claims. It is well settled that where the movant unsuccessfully moves for summary judgment and subsequently loses in a trial on the merits, the order denying the summary judgment cannot be reviewed on appeal. *United Parcel Serv., Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Orozco v. Orozco*, 917 S.W.2d 70, 72 (Tex. App.—San Antonio 1996, writ denied); *Pennington v. Gurkoff*, 899 S.W.2d 767, 769 (Tex. App.—Fort Worth 1995, writ denied); *Nash v. Civil Serv. Comm'n, Palestine*, 864 S.W.2d 163, 165 (Tex. App.—Tyler 1993, no writ). Consequently, we cannot review the trial court's denial of appellants' motion for summary judgment. Appellants' fourth issue is overruled.

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[10] Although there is no order in the record showing whether the trial court granted or denied GGR's motion for summary judgment, the trial court must have denied GGR's motion because its claims for breach of the covenants not to compete were tried on the merits.

V. SCOPE OF INJUNCTION

In their fifth point of error, appellants claim the temporary injunction entered by the trial court is vague and overbroad. The injunction prohibited King, Hausman, and FCS, for one year from the date of the judgment, from soliciting GGR's clients and employees, disclosing GGR's confidential information, and engaging in the collection of third-party commercial debts in Harris County. The trial court entered judgment on October 11, 1999. We find that by its own terms, the temporary judgment is no longer in effect and, consequently, appellants' complaint is moot.[11] Appellants' fifth point of error is overruled.

Having overruled each of appellants' points of error, we affirm the judgment of the trial court.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 27, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[11] At oral argument, appellants conceded this complaint is moot.