COURT OF APPEALS
DECISION
DATED AND RELEASED

July 8, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1921

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DUNHILL TEMPS OF MILWAUKEE, INC.,

PLAINTIFF-APPELLANT,

v.

SUSAN A. COVERT AND
SITE PERSONNEL SERVICES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Dunhill Temps of Milwaukee, Inc., appeals from a judgment and an order granting Susan A. Covert and Site Personnel Services, Inc.'s, motion for summary judgment. Dunhill claims that the trial court erred in

granting summary judgment in favor of Covert and Site. Covert and Site seek fees and costs pursuant to § 814.025, STATS.[1]

Dunhill, an employment agency in the business of placing temporary employees with other employers, commenced an action against Covert, its former service coordinator, seeking enforcement of a non-compete clause in its employment contract with Covert and injunctive relief to prevent her from working for Site, a competing employment agency. The non-compete clause contained certain restrictions on competition for a period of six months. The trial court dismissed the action and denied injunctive relief, concluding that the language contained in the employment agreement was too broad and therefore the contract was not enforceable. On appeal, we reversed the trial court's decision, concluding that the non-compete clause was enforceable. *See* ***Dunhill Temps of Milwaukee, Inc. v. Susan A. Covert***, No. 92-1866-FT, unpublished slip op. (Wis. Ct. App. Jan. 11, 1993).

Subsequently, Dunhill amended its complaint naming both Covert and Site as defendants. The complaint alleged that Covert breached the employment contract and that both Site and Covert tortiously interfered with Dunhill's contracts with its customers and employees. Covert and Site filed a motion for summary judgment, claiming, among other things, that Dunhill could not prove any damages. The trial court agreed and entered judgment in favor of Site and Covert.

[1] Although Covert and Site refer this court to § 814.02, STATS., in their brief, we assume that this reference was a typographical error and that they seek costs under § 814.025, STATS.

In reviewing a motion for summary judgment, we apply the same methodology set forth in § 802.08, STATS., in the same manner as the trial court. *See* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 977–978, 473 N.W.2d 506, 508 (Ct. App. 1991). Our review is *de novo*. ***Christian v. Town of Emmett***, 163 Wis.2d 277, 279, 471 N.W.2d 252, 253 (Ct. App. 1991). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Section 802.08, STATS. Even though a plaintiff need not prove his case at the summary judgment stage, a plaintiff must present some evidentiary facts to support the elements of his case. *See* ***Peterman v. Midwestern Nat'l Ins. Co.***, 177 Wis.2d 682, 691, 503 N.W.2d 312, 315 (Ct. App. 1993). A failure of proof by the plaintiff on any element of its case renders all facts immaterial making summary judgment appropriate. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322–323 (1986).

Dunhill claims that there are triable issues of fact as to whether it suffered damages resulting from Covert's breach of her employment contract as well as Site's and Covert's tortious interference with Dunhill's contracts with its customers.[2] To recover damages for breach of contract, a plaintiff must show that the damages were the natural and probable consequence of the breach. *See* ***Repinski v. Clintonville Fed. Sav. & Loan Ass'n***, 49 Wis.2d 53, 58, 181 N.W.2d 351, 354 (1970). We agree with Dunhill that some uncertainty as to the amount of damages is allowable. *See* ***Novo Indus. Corp. v. Nissen***, 30 Wis.2d 123, 131, 140 N.W.2d 280, 284 (1966). Likewise, "damages which are the proximate result of the tort of interference with contract are recoverable so long as they are not

[2] Dunhill does not appeal the decision with respect to intentional interference with contracts of Dunhill's employees.

speculative as to the fact of damage." ***Aljassim v. S.S. South Star***, 323 F. Supp. 918, 925 (1971). Uncertainty, however, as to whether the damage was caused by the acts complained of is fatal to a claim. *See* ***Pressure Cast Prods. Corp. v. Page***, 261 Wis. 197, 205, 51 N.W.2d 898, 902 (1952).

In its decision granting Covert and Site summary judgment, the trial court concluded:

> This evidence is insufficient to show that Dunhill lost customers because of Covert's employment with Site. It only shows that Dunhill lost profits after Covert left. Further, this evidence is rebutted by affidavits from Dunhill's customers filed by Covert and Site. These affidavits state that the termination of their relationship with Dunhill was caused by Covert's resignation from Dunhill rather than Covert's new employment with Site….
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> ….
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> Assuming that Covert breached the covenant not to compete with Dunhill and tortiously interfered with Dunhill's contract with [a Dunhill customer], Covert presented convincing evidence that any lost profits suffered by Dunhill after the breach and the interference were caused by Covert's resignation rather than by Covert's employment with Site.
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> In other words, there is no affirmative evidence that any efforts on Covert's part to divert business from Dunhill for Site's benefit were sucessful [*sic*].

We agree with the trial court's conclusion that Dunhill failed to offer any evidence to establish damages. Although Dunhill presented evidence that its profits went down after Covert left Dunhill, Dunhill was unable to provide any evidence as to what loss of profits it suffered because of Covert's employment at Site. When asked why he attributed the decline in business to Covert's leaving, a Dunhill officer replied: "That's what we are in court about. I don't know how much [of the business loss can be attributed to Covert's leaving]. We'll leave it up

to the judge to decide…." When another Dunhill officer was asked if he knew if Dunhill customers did not call or use them because of Covert's actions, he replied: "I specifically do not know that." A third officer at Dunhill testified that Dunhill lost profits after Covert left but his testimony did not establish any causal link between Dunhill's loss of profits and Covert's action.

Further, Covert and Site filed affidavits from Dunhill customers in support of their motion for summary judgment. The affidavits stated that the termination of their respective relationships with Dunhill was caused by Covert's resignation from Dunhill rather than from Covert's employment with Site. Dunhill did not submit any evidentiary material to rebut these affidavits.

Dunhill has not demonstrated that it lost any clients to Site as a result of Covert's breach of her non-compete agreement or as the result of any tortious interference with Dunhill's contractual relationships with its customers and, therefore, has not demonstrated that there is a material issue of fact with respect to the damages element of its case. We affirm the summary judgment of the trial court.

Covert and Site seek costs under § 814.025, STATS.[3] Review of the record indicates that although Covert and Site moved the trial court for costs

[3] Section 814.025, STATS., provides:

> **Costs upon frivolous claims and counterclaims. (1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
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> **(2)** The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special

(continued)

pursuant to § 814.025 alleging that one of Dunhill's claims was frivolous, the trial court never ruled on their request. The Supreme Court has adopted a policy of encouraging the trial court to correct errors before appeal is taken. ***Herkert v. Stauber***, 106 Wis.2d 545, 560–561, 317 N.W.2d 834, 841 (1982). Covert and Site should have requested that the trial court rule on their § 814.025 request. We, therefore, deem this issue waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (issues not considered by the trial court may not be raised for the first time on appeal).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.