

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 02-0135-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-80

**IN COURT OF APPEALS
DISTRICT III**

PRODUCTION COMPONENTS-CLOEREN, INC.,

PLAINTIFF-APPELLANT,

V.

**ROBERT SHAKAL, TERRANCE BANCHY, DEAN SIDDONS,
STEVEN JONJAK, STEVEN BURT, LAVERNE BERG,
PREMIER DIES, INC., ALEXANDER MCILQUHAM AND
POLYMER PIPING, INC.,**

DEFENDANTS,

ROBERT DRUSCHEL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Production Components-Cloeren, Inc. (PC-C) appeals a summary judgment dismissing its action against Robert Druschel in which it alleged that Druschel breached his fiduciary duty and duty of loyalty when he failed to disclose and lied about other employees' plans to start a competing business.¹ PC-C argues that Druschel's fiduciary duties arise out of his employee status as well as the terms of written contracts. We conclude that Druschel had no common law fiduciary duty arising out of his employment and that the alleged contractual obligation was not adequately preserved for appeal. Therefore, we affirm the summary judgment.²

¶2 Druschel sold his tool and dye company to PC-C which in turn hired him under an employment contract. The complaint alleges that Druschel learned that other employees he was supervising planned to form their own company that would compete with PC-C. Druschel did not inform PC-C of the other employees' plans and lied when he was questioned about it.

¶3 The trial court correctly concluded that Druschel's status as an employee did not create any common law fiduciary duty to disclose the other employees' plans. See *Mackenzie v. Miller Brewing Co.*, 2001 WI 23, ¶19 n.16, 241 Wis. 2d 700, 623 N.W.2d 739. An employer-employee relationship does not,

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version.

² PC-C contends that the "summary judgment" should be considered an order dismissing for failure to state a claim. Because Druschel submitted an affidavit and contracts outside of the pleadings in support of his motion, it became a motion for summary judgment under WIS. STAT. § 802.06(3). While the questions of law and standard of review are the same, see *Hennig v. Ahearn*, 230 Wis. 2d 149, 163, 601 N.W.2d 14 (Ct. App. 1999), the distinction has some significance in this appeal because a party may not rest upon allegations in the pleadings on summary judgment. See WIS. STAT. § 802.08(3).

in and of itself, give rise to a fiduciary relationship from which a duty to disclose could be derived. *Id.* In addition, no independent duty to refrain from misrepresentation arises in an employment context. See *Tatge v. Chambers & Owen, Inc.*, 219 Wis. 2d 99, 107-08, 579 N.W.2d 217 (1998). Cases to the contrary cited by PC-C involved employees who were also corporate officers or directors or who acted under a power of attorney. See *Racine v. Weisflog*, 165 Wis. 2d 184, 190, 477 N.W.2d 326 (Ct. App. 1991); *Bank of California v. Hoffmann*, 255 Wis. 165, 171, 38 N.W.2d 506 (1949). PC-C's analysis that Druschel was an employee, an employee is an agent and an agent has a fiduciary obligation to his principal cannot be reconciled with *Mackenzie* and *Tatge*.

¶4 While PC-C's complaint alleged that its various contracts with Druschel created a fiduciary duty, it abandoned that theory in its written and oral arguments in the trial court. *Heideman v. American Family Ins. Group*, 163 Wis. 2d 847, 860-61, 473 N.W.2d 14 (Ct. App. 1991). To properly raise the issue, a party must argue the issue "with some prominence" before the trial court. See *Lenz Sales & Serv., Inc. v. Wilson Mutual Ins. Co.*, 175 Wis. 2d 249, 257, 499 N.W.2d 229 (Ct. App. 1993). A party must specifically inform the trial court of the legal theory supporting its claim and must direct the trial court's attention to issues that are being submitted for the court's determination. See *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995); *Gauer v. Gauer*, 34 Wis. 2d 451, 457-58, 149 N.W.2d 533 (1967). PC-C did not call the trial court's attention to any specific part of any contract that created a fiduciary duty. In fact, the trial court stated without contradiction "unless there is a contractual obligation, and none is alleged here, there is no duty to disclose things that an employee knows." We cannot allow PC-C to blindsides the trial court with arguments that were not presented in that forum.

By the Court.—Judgment affirmed.

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

