SMU | Dedman School of Law

SMU Law Review

Volume 61
Issue 3 *Annual Survey of Texas Law*

Article 5

January 2008

Business Torts

Charles M. Hosch

BUSINESS TORTS

*Charles M. Hosch**

* Charles M. Hosch is a partner of Strasburger & Price, LLP, in Dallas, Texas. He co-teaches Trademarks and Business Torts at SMU Dedman School of Law. The views expressed in this article are those of the author, presented here solely for purposes of scholarship, and are not necessarily those of the firm or its clients.

I. STATUTORY FRAUD

A. FACT OR OPINION? MAY DEPEND ON CIRCUMSTANCES

IT is generally understood that statements of fact—if presented as true fact, yet presented with knowledge of their falsity—may give rise to claims of fraud, while statements of the speaker's mere opinion will not. The difference between a possibly-actionable "statement of fact" and a non-actionable "statement of opinion" may, however, depend on the circumstances and may not be all that easy to distinguish. That was the lesson of *Hawkins v. Walker*.[1]

In *Hawkins v. Walker*, Mr. Walker—a builder of high-end custom homes—was looking for a lot on which to build an expensive house for himself. He discussed this with Mr. Hawkins, a developer of home subdivisions. Mr. Hawkins was then in the process of developing a new, gated subdivision. The subdivision was not yet very far along, but Mr. Hawkins told Mr. Walker that it would feature homes starting at $700,000, designed with "world class" architecture, built only by "preferred builders" (including Mr. Walker), and enclosed in a fence with an entrance of brick columns with wrought iron. This intrigued and pleased Mr. Walker, and he began to build his own expensive home in the development.[2]

Unfortunately, however, no other lots were sold, and weeds began to grow. Mr. Hawkins told Mr. Walker that he was considering selling the rest of the lots to Pulte Homes, which would take over the developments and build cheaper houses (in the $300,000 to 400,000 range). After following through on this, Mr. Walker was dismayed as this, in his view, would substantially reduce the value of his own house.[3]

Mr. Walker brought suit claiming statutory fraud, under Texas Business and Commerce Code section 27.01. Section 27.01 addresses fraud in real estate and stock transactions. It provides that

> fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a (1) false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing that person to enter into a contract; and (B) relied on by that person in entering into that contract; or (2) false promise to do an act, when the false promise is (A) material; (B) made with the intention of not fulfilling it; (C) made to a person for the purpose of inducing that person to enter into a contract; and (D) relied on by that person in entering into that contract.[4]

Interestingly, the statute appears to relax the common-law scienter requirement with respect to false statements of fact, while continuing to require scienter with respect to "false promises." Here, the jury found

1. 233 S.W.3d 380 (Tex. App.—Fort Worth 2007, pet. denied).
2. *See id.* at 392-93.
3. *See id.* at 393.
4. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 2002).

statutory fraud.[5]

Two aspects of this case were particularly interesting. The first was how to properly characterize Mr. Hawkins' vision—as he expressed it to Mr. Walker—of what the subdivision would be. An action for statutory fraud would lie under section 27.01 if Mr. Hawkins' statements were characterized either as (1) statements of fact which were in fact false—apparently, regardless of whether Mr. Hawkins knew at the time or not that they were false—so long as the statements were intended to induce Mr. Walker's reliance and did have that effect or (2) as (more sinister) false promises. If his statements were characterized as merely his opinion, however—or as promises to Mr. Walker that were at least not "false" at the time they were made—then they would not form a basis for an action for statutory fraud.

In this case, the Fort Worth Court of Appeals held that this difference could be assessed from the circumstances in which the statements were made.[6] Those circumstances led the jury and trial court to find statutory fraud, and the court of appeals to affirm it. Apparently it was clear that Mr. Walker had built his house in reliance on Mr. Hawkins' vision of how the subdivision would be developed, and the sales price was directly impacted by a failure to perform in that respect.[7] Less clear, however, was exactly how the statements were to be characterized. The statements appear to have been cheerful visions of how the subdivision would be developed, at some point in the future. Plainly the vision did not come to pass, but whether those statements were viewed as false statements of fact or as "false promises" was unclear. It would be hard to see them as false statements of fact because the subdivision had not yet been developed; what was left seems to be a false promise, but it was not entirely clear that Mr. Hawkins did not intend to make it a high-end subdivision at the time he was laying it out for Mr. Walker.

A second interesting aspect arose from the fact that the accused statements—or promises—were made orally, and not in writing. Under sections 26.01(a) and 26.01(b)(4) of the Texas Business and Commerce Code, a promise or agreement regarding "a contract for the sale of real estate" is not enforceable unless the promise or agreement, or a memorandum of it, is in writing and signed by the person to be charged with it (or someone lawfully authorized to sign on that person's behalf).[8] These statements or promises were not so signed by Mr. Hawkins—how then could the fraud claim be sustained? Interestingly, the court of appeals held that the statute of frauds only applies in benefit-of-the-bargain cases, when the plaintiff seeks to obtain the benefit of the bargain it would have obtained had the defendant's promise been performed.[9]

---

5. *See Hawkins*, 233 S.W.3d at 387.
6. *See id.* at 391.
7. *Id.* at 395.
8. TEX. BUS. & COM. CODE ANN. §§ 26.01(a), 26.01(b)(4) (Vernon 2002).
9. *Hawkins*, 233 S.W.3d at 396.

Here, Mr. Walker did not seek that. Instead, he sought only the difference between the sales price of his home, and what it cost to complete it.[10] The jury found that Mr. Walker had built his home in reliance on how the subdivision would be developed, and the sales price was directly impacted by the defendant's failure to perform as projected. The court considered these to be special damages, which in a fraud case "may be recovered for losses or improvements to property purchased as a result of misrepresentation."[11]

II. COVENANTS NOT TO COMPETE

A. FORUM SELECTION, PUBLIC POLICY, AND THE EFFECT OF *SHESHUNOFF*

In the summer of 2007, the Texas Supreme Court addressed the relationship between choice of *law* provisions in employment contracts, and choice of *venue* provisions, particularly with respect to covenants not to compete. In *In re AutoNation, Inc.*,[12] the supreme court considered a contract applicable to a Texas employee which contained a one-year post-termination covenant not to compete, and which provided both that Florida law would control and that any dispute must be heard in Florida.

Key to the question was the continuing influence of *DeSantis v. Wackenhut Corp.*,[13] one of the 1990 "trilogy" of non-competition cases which were issued shortly after the 1989 enactment of sections 15.50-.52 of the Texas Business and Commerce Code.[14] The enactment itself was a legislative response to the court's 1987 decision in *Hill v. Mobile Auto Trim, Inc.*,[15] sharply limiting the enforceability of post-termination non-competition covenants in Texas, particularly in cases involving "common callings." In *DeSantis*, the Texas Supreme Court had held that "[t]he law governing enforcement of non-competition agreements is fundamental policy in Texas, and . . . to apply the law of another state to determine the enforceability of such an agreements in the circumstances of a case like this would be contrary to that policy."[16]

Between 1987 and 2007, however, Texas law underwent sweeping changes in how noncompetition covenants were assessed and reviewed; and by the summer of 2007, the questions now were whether the principle announced in *DeSantis*—never actually overruled—was still as vital as it had been, and whether—and if so, how—it would apply in the context of a forum selection clause providing for venue out of state.

---

10. *Id.* at 395.

11. *Id.* (citing Trenholm v. Ratcliff, 646 S.W.2d 927, 933 (Tex. 1983) (a common-law fraud case)).

12. 228 S.W.3d 663, 664 (Tex. 2007).

13. 793 S.W.2d 670 (Tex. 1990).

14. *See* TEX. BUS. & COM. CODE ANN. §§ 15.50-.52 (Vernon 2002).

15. *See* 725 S.W.2d 168 (Tex. 1987).

16. *DeSantis*, 793 S.W.2d at 681.

Now, in *AutoNation*, the supreme court appears to have viewed the choice-of-law provision as distinctly different from the forum-selection clause, and found no reason not to enforce the forum selection clause as written in the contract. The supreme court wrote that there was no showing of "fraud, overreaching, or undue hardship that would provide an exception to the rule that forum-selection clauses are generally favored."[17] Instead, relying on *DeSantis*, which involved *only* a choice-of-law provision, not a forum-selection clause, the supreme court viewed the plaintiff's claim as asserting that the court must disregard the forum selection clause simply because the contract also concerned a non-competition provision.[18] The supreme court declined to do this and concluded that "[n]o Texas precedent compels us to enjoin a party from asking a Florida court to honor the parties' express agreement to litigate a non-compete agreement in Florida, the employer's headquarters and principal place of business."[19]

The supreme court appears to have been at some pains to state that it was not retreating from its *DeSantis* reasoning reaffirming its validity despite the roller-coaster convolutions that have occurred since 1987 in the analysis of non-competition agreements in Texas. Accordingly, the supreme court held that "[o]ur decision today in no way questions the reasoning of *DeSantis*, but we decline [plaintiff's] invitation to superimpose the *DeSantis* choice-of-law analysis onto the law governing forum-selection clauses,"[20] and added that its holding "rests squarely on the parties' contractual commitment."[21] In what may have been a telling footnote, however, the supreme court added that it "does not reach [the question of enforceability of the underlying non-competition agreement] today, but note[d] that [its] recent decision in *Alex Sheshunoff Management Services, LP v. Johnson*,[22] modified Texas law governing the enforceability of non-competition agreements."[23]

In an interesting concurrence, Justice O'Neill added the useful point that it was not apparent that enforcement of the forum-selection clause in this case would necessarily result in the undermining of Texas public policy. The mere indication that the Florida court would apply Florida law would not—without more—justify a Texas court's interference with the chosen forum. Had there been a clear showing of such a risk, however, she indicated that she might have at least considered the trial court justified in abating the declaratory judgment action pending the Florida court's decision.[24] The Florida court, after all, might decide the matter properly and ought, in comity, be allowed to try.

17. *AutoNation Inc.*, 228 S.W.3d at 668.
18. *Id.* at 668-69.
19. *Id.* at 664.
20. *Id.* at 669.
21. *Id.* at 670.
22. 209 S.W.3d 644 (Tex. 2006).
23. *AutoNation Inc.*, 228 S.W.3d at 667 n.10.
24. *Id.* at 671.

When read together with *Sheshunoff*, there may be an unstated hint in *AutoNation* that the Texas Supreme Court's skepticism of, or overt hostility to, non-competition covenants during the period of approximately 1987 through 1994 may have run its course. The suggestion is that while the evaluation of non-competition agreements may still be a matter of fundamental public policy in Texas, the process will not be conducted so aggressively as it may once have been in the direction of limiting or invalidating such agreements. Whether this is true must await further cases.

III. TRADE SECRETS

A. PROCEDURE FOR DISCOVERY OF TRADE SECRETS

The general procedure for discovering trade secrets is well understood. A party opposing discovery requests seeking to discover its trade secrets has the burden of proving that the discovery sought would qualify as a trade secret[25] and must present any evidence necessary to support the privilege or objection.[26] If this burden of proof is met, the burden then shifts to the party seeking the trade secret disclosure to establish that the information is necessary for a fair adjudication of a claim or defense in the litigation.[27] This seems straightforward enough. Sometimes, however, what seems simple on the surface may become tangled when applied to a particular case.

Such was the case in *In re Universal Coin and Bullion, Ltd.*,[28] In that case, Universal Coin and Bullion, Ltd. ("Universal Coin") brought suit against an attorney, a newspaper reporter, and two of Universal Coin's former employees, alleging they had conspired to misappropriate the company's confidential information regarding current and former customers. Soon at issue were fifty-seven discovery requests directed to Universal Coin's customer lists and other information which Universal Coin regarded as confidential and comprising its trade secrets. The trial court granted Universal Coin's objections and assertion of trade-secret privilege in four of the fifty-seven requests, but denied it as to the other fifty-three.[29]

Apparently the trial court's order was itself confusing, as it provided that the court would grant a thirty-day stay from the time of entry of the order "*for the production of portions of [Universal Coin's] customer list and [Universal Coin's] complete customer list*, but there is no stay in regard to the other production requests propounded on Universal Coin."[30] From the beginning, therefore, the Beaumont Court of Appeals noted that the trial court's rulings granting and overruling the trade-secret ob-

25. *See In re* Bass, 113 S.W.3d 735, 737 (Tex. 2003).
26. *See In re* CI Host, Inc., 92 S.W.3d 514, 516 (Tex. 2002) (citing TEX. R. CIV. P. 193.4(a)).
27. *See In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 612-13 (Tex. 1998).
28. 218 S.W.3d 828, 830 (Tex. App.—Beaumont 2007, no pet.).
29. *Id.* at 831-32.
30. *Id.* at 831 (quoting the order) (emphasis added).

jections were inconsistent: "what is at least temporarily protected by the trade secret privilege in response to some requests is not protected by the order in response to others."[31]

More particularly, though, the court of appeals concluded that the procedure the trial court used was defective and a clear abuse of discretion, as the trial court had "compell[ed] production of trade secret information with no showing that trade secret disclosure is necessary in the remaining litigation."[32] The court was mindful of the *Continental General Tire* requirement that a trial court must "weigh the degree of the requesting party's need for the information with the potential harm of disclosure to the resisting party."[33] In this case the trial court did not make a determination that disclosure of this information was "necessary" to the proper adjudication of the case, and for that matter, it also did not sign a protective order or employ "other protective techniques sufficient to prevent disclosure beyond that which is necessary to a fair adjudication of the facts of this case."[34]

Apparently, all this resulted from considerable confusion at the trial court level as to what discovery requests related to exactly which claims—and which claims remained in dispute and which had been settled or resolved—by the time of the hearing on the resisting party's objections and assertion of trade secret privilege. The case thus serves as a useful reminder both of the importance of matching requests to claims when seeking relief, and of the need, in all trade secret cases, to demonstrate both (1) the relevance of the purported trade secrets to the claims at issue, and (2) the importance of their discovery as necessary to a fair adjudication of the case. Discovery of trade secrets—even in cases of alleging misappropriation of trade secrets—is not automatic.

B. Identifying The Trade Secret: "Ideas" Are Difficult To Protect

In *Matrix Network, Inc. v. Ginn*,[35] the Dallas Court of Appeals was asked to reverse a trial court's denial of a temporary injunction against a former independent contractor and his new business which would prevent them from marketing a new software product, the idea for which was allegedly misappropriated from the plaintiff's business plan. In order for "a temporary injunction to issue, the movant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; (3) a probable, imminent and irreparable injury in the interim; and (4) no adequate remedy at law."[36] And "the trial court does not abuse its discretion in denying a temporary injunction if the movant failed

31. *Id.* at 834.
32. *Id.*
33. *Id.* (quoting *In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 613 (Tex. 1998)).
34. *Id.*
35. 211 S.W.3d 944 (Tex. App.—Dallas 2007, no pet.).
36. *Id.* at 947 (citing Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002)).

to prove one of the requirements."[37] Therefore, the court of appeals declined to reverse the trial courts denial.

The court's principal reason appears to have been that plaintiff Matrix Network, Inc. ("Matrix") failed to show how it would suffer a probable, imminent, and irreparable injury absent a temporary injunction. Matrix's president estimated, in terms of a dollar amount, the amount of revenue his company would lose absent the temporary injunction. By doing so, however, he showed that the alleged injury could be readily remedied in a money damages award. Further, there was no evidence the defendants had ever solicited a customer of the plaintiff; the defendants disclaimed any intention of doing so; and there was evidence that the defendants' product would have some features that the plaintiff's product did not have. The court viewed the plaintiff's claimed injury, therefore, as "merely speculative," holding that "[s]uch fear and apprehension of injury are not sufficient to support a temporary injunction."[38]

The heart of the plaintiff's argument was that the court should presume harm in this case, because the defendants had clearly gained confidential information about the plaintiff's business plan before setting out to design and develop their own service information retrieval service. Exactly what this confidential information would be, however, and how it would affect the plaintiff, was disputed. It appeared that the defendants were using substantially different technology, and had testified that they intended to stay away from the plaintiffs' customers while targeting the end-users of other competitors.[39] The defendant evidently had access to the plaintiff's business plans and ideas, but to the extent those plans and ideas were being articulated and targeted in narrow, precise ways by either party, it appears the defendants were not using them.

Simply having knowledge of the plaintiff's business plan—even perhaps, if that made the defendants more knowledgeable about the industry, or inspired them to ideas of how they could do things better—appears not, at least in these circumstances, to have been sufficient to meet the requirement of a "probable, imminent, and irreparable injury" pending trial.[40]

C. Asking A Customer For Copies Of Designs: Acquisition By Improper Means?

In *Astoria Industries of Iowa, Inc. v. SNF, Inc. d/b/a Brand FX*,[41] Brand FX asserted that Astoria Industries of Iowa, Inc. ("Astoria") had copied Brand FX's "stair step" design for its commercial truck body "toppers" by "nefariously" obtaining copies of Brand FX's confidential design

37. *Id.* (citing Tom James of Dallas, Inc. v. Cobb, 109 S.W.3d 877, 889 (Tex. App.—Dallas 2003, no pet.)).

38. *Id.* at 947-48 (citing Jordan v. Landry's Seafood Rest., Inc., 89 S.W.3d 737, 742 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

39. *Id.* at 948.

40. *Id.*

41. 223 S.W.3d 616 (Tex. App.—Fort Worth 2007, pet. denied).

drawings. Astoria denied that the drawings were confidential or amounted to Brand FX's trade secrets, and also denied that it had acquired them by improper means.[42]

In determining whether the drawings constituted trade secrets in the first place, the Fort Worth Court of Appeals applied the now-familiar six-factor test of *In re Bass*:[43]

> 1) the extent to which the information is known outside the business of the entity claiming the trade secret; 2) the extent to which it was known by employees and others involved in the business; 3) the extent of the measures taken by the entity to guard the secrecy of the information; 4) the value of the information to the entity and its competitors; 5) the amount of effort or money expended by the entity in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[44]

The court concluded (1) that Brand FX and its now-bankrupt predecessor were the only source of the drawings; (2) that it and its predecessor considered the drawings confidential and told the customers who received them that they were; and (3) that they were valuable in containing detailed and specialized information for what had been designed specifically for Cook's Pest Control (the customer whose business both parties wanted).[45] In particular, there was evidence that the drawings were particularly valuable to Astoria, because Cook's Pest Control ("Cook's") liked the interior configuration it had, wanted all its "toppers" to be uniform, and had rejected Astoria's proposed changes.[46] Further, there was evidence that Brand FX's predecessor had invested considerable money in developing or acquiring the design drawings.[47] From all of this, the court of appeals concluded there was more than a scintilla of evidence that the design drawings were a trade secret.[48]

Liability for trade-secret misappropriation may arise from breach of a confidential relationship, or from acquisition or discovery of the secret by improper means.[49] Empirically, it appears that cases presenting claims of acquisition by improper means are relatively less common than those alleging breach of a confidential relationship (as by departing employees), but *Astoria Industries* is one such case. Improper means of acquiring another's trade secrets include "theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence, and other means either wrongful in themselves or wrongful

42. *Id.* at 634.
43. 113 S.W.3d 735, 739 (Tex. 2003).
44. *Id.*
45. *Astoria* 223 S.W.3d at 635-36.
46. *Id.*
47. *Id.* at 636.
48. *Id.*
49. *See* Hyde Corp. v. Huffines, 314 S.W.2d 763, 769 (Tex. 1958) (adopting REST. OF TORTS § 757 (1939)).

under the circumstances of the case."[50]

In this case, it appears that when Astoria sought Cook's business, Cook's representative told Astoria that Cook's wanted "toppers" of the particular stair-step design it had been using. Since there was no source for the drawings other than competitor Brand FX or Brand FX's bankrupt predecessor, Astoria apparently asked Cook's to give Astoria copies of the design drawings. Cook's did so, and Astoria's chief engineer testified that he used the drawings to make sure that he incorporated the changes that Cook's wanted. The engineer "conceded that he felt 'a little bit' strange or awkward having a copy of [the predecessor's] drawings, but he was not too concerned because the drawings were not marked confidential." Apparently he "viewed the drawings as sales drawings of the type that Astoria would send out to its customers."[51]

Brand FX testified that if drawings were shared with customers, they were "told or knew" that the drawings were confidential and were not to be disclosed to any competitor.[52] Cook's representative testified that nobody at Brand FX's predecessor had told him the drawings were confidential, however, and apparently the drawings were not stamped with confidential legends or otherwise. This would appear to raise an issue as to whether or not Brand FX or its predecessor had really exercised the sort of reasonable precautions to secure their trade secrets that a court would normally expect of a putative trade secret owner. Nevertheless, "[v]iewing this evidence in the light most favorable to Brand X" as the court of appeals was required to do in review of a trial court's decision to grant or refuse a temporary injunction request, the court concluded that the evidence "would enable reasonable and fair-minded people to reach different conclusions regarding whether Astoria misappropriated the design drawings because it discovered the drawings by improper means."[53] Consequently the court of appeals held that the trial court did not err by denying Astoria's motion for a no-evidence summary judgment.[54]

Additionally, the court noted, but disposed in a footnote, Astoria's argument that it did not improperly acquire or use the drawings because it could have obtained the same information by studying the actual stair-step topper that Cook's had provided Astoria or the Brand FX stair-step topper that it could have bought in the marketplace. The court noted that "[t]he mere fact that knowledge of a product may be acquired through lawful means such as inspection, experimentation, and analysis does not preclude protection from those who would secure that knowledge by unfair means," and that "[t]he question is not how could Astoria have secured the knowledge, but how did it?"[55]

50. *Astoria*, 223 S.W.3d at 636 (citing REST. (THIRD) OF UNFAIR COMPETITION § 43 (1995)).
51. *Id.* at 636-37.
52. *Id.* at 636.
53. *Id.*
54. *Id.*
55. *Id.* at 637 n.74.

D. Customer Lists As Trade Secrets

Customer lists "may" constitute trade secrets, according to the Restatement of Torts, Section 757, comment b,[56] but there is considerable confusion in the case law as to when, why, and how this may be so. Customer lists are frequently accorded trade secret protection. Indeed, the Houston Fourteenth District Court of Appeals described them as being "routinely" granted trade secret protection.[57]

To say that customer lists—or any other species of information which is frequently litigated—are "routinely" granted such protection may be a pardonable exaggeration, however. Customer lists must still meet the tests required of a trade secret. Customer lists, which are generally known in the industry or would obviously follow from the nature of the business and industry would not necessarily be worthy of such protection. Protecting them from use would do little to honor confidential relationships and protection against discovery of such materials by improper means and would simultaneously raise the risk of overbroad restriction of robust and lawful competition. The issue is when customer lists become sufficiently defined, detailed, valuable, and otherwise protectable under the *In re Bass* factors and other authorities.

Sharma v. Vinmar International, Ltd.[58] explored this issue. Vinmar International, Ltd. ("Vinmar") is a large, multi-national chemical trading company. It brought suit against four former employees who had gone out on their own to trade the chemical isoprene, a relatively rare product which is used to manufacture adhesive products such as those used in sticky pads, and another valuable chemical known as caprolactum. The principal issue was whether Sharma and the others could use their contacts and other information regarding the rare sources of these chemicals in Russia and elsewhere, information about the highly-specialized, pressurized tanks used to store and transport these chemicals, and other financial and related information, all of which they had learned in the course of performing their various duties at Vinmar.

One might suppose that the chemical business is largely a commodity enterprise, with open, lively, and highly visible markets, since chemicals must ordinarily be uniform in their quality in order to be saleable at all. One might further suppose that who is selling them, who is buying them, and the current prices might be readily available; certainly the market is wide enough and there are many standard reference works such as

---

56. Rest. Torts § 757 cmt. b. (1939).

57. Sharma v. Vinmar Int'l, 231 S.W.3d 405, 425 n.14 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc., 965 S.W.2d 18, 22 (Tex. App.—Houston[1st Dist.] 1998, no pet.); Miller Paper Co. v. Roberts Paper Co., 901 S.W.2d 593, 603-04 (Tex. App.—Amarillo 1995, no writ); Rugen v. Interactive Bus. Sys., Inc., 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, no writ); Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co., 764 S.W.2d 274, 278 (Tex. App.—Houston [1st Dist.] 1988, no writ); David v. Bache Halsey Stuart Shields, Inc., 630 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1982, no writ); Collins v. Ryon's Saddle & Ranch Supplies, Inc., 576 S.W.2d 914, 915 (Tex. Civ. App.—Fort Worth 1979, no pet.)).

58. 231 S.W.3d 405 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

"Who's Who In Chemistry" and the like giving contact information. According to the Fourteenth Houston Court of Appeals, however, it appears that the business of trading chemicals is a highly personal business, "built on relationships between the suppliers, traders, and purchasers of the products."[59] As a result, successful chemical trading companies like Vinmar spend millions of dollars and many years developing the knowledge bases behind their business.

In *Sharma*, the court of appeals went to pains to point out that this knowledge base was substantially broader and deeper than a mere list of contact information. This knowledge base included not simply run-of-the-mill contact information found in readily-available sources, but information as to exactly who within the trading companies, suppliers, and purchasers would have decision-making authority; their preferences, such as with respect to shipping methods; their seasonal, geographic, or other needs; their requirements for storing particular chemicals; their sales and purchase histories; their profit margins; and their respective policies.[60]

There was also evidence of a "concerted effort" by Vinmar to maintain the secret nature of this information. Much of it appeared fairly standard among large businesses, including controlled access cards to the offices, password-protection of computers, confidentiality agreements with employees, and employee manuals that emphasized the confidential nature of the business, but it also extended to "limiting access to [this] information on a need-to-know basis to the extent that Vinmar's [various] traders [were] not allowed to look at each others' files."[61]

It appeared to be significant also, that there was persuasive testimony that this information would be very difficult for outsiders to duplicate, or even to follow from publicly-available sources. The court noted that even the defendants' highly educated trial counsel had trouble showing the supply chain flow through publicly available sources.[62] Therefore, applying the *In re Bass* factors,[63] the court of appeals had little difficulty finding sufficient evidence to support the trial court's conclusion that Vinmar had a probable right of recovery in asserting trade-secret protection as to this knowledge base.

E. Showing that Information is Publicly Available: Timing Counts

Defendants in trade-secret cases frequently try to weaken—if not altogether defeat—trade-secret claims by showing that the information at issue is generally known in the industry, or at least is readily available from public sources. The *Sharma* decision[64] illustrates this step in practice and

59. *Id.* at 413.
60. *Id.*
61. *Id.*
62. *Id.*
63. *In re* Bass, 113 S.w.3d 735, 739 (Tex. 2003).
64. *Sharma*, 231 S.W.3d at 412.

provides guidance on an important point of timing.

In *Sharma*, the defendants did undertake to gather the publicly-available information in this area in an effort to show that it was generally known in the industry or at least was readily available. However, they apparently did not do so until after the litigation was filed, and only then when instructed to do so by trial counsel.[65]

Timing counts. The court of appeals noted pointedly that "the mere fact that knowledge of a product or process may be acquired through inspection, experimentation, and analysis does not preclude protection from those who would secure that knowledge by unfair means. . . . The question is not 'how could he have secured the knowledge?' but 'how did he?'"[66] The defendants' point might have been stronger had they been able to show that they had gathered this information from publicly available sources, rather than from their employer, before beginning to use it for their own benefit—or, at least, before suit was filed.

F. Scope of Injunction: Adequate Protection, or Restrict Lawful Competition?

In a temporary injunction hearing, the sole issue before the trial court is whether the applicant may preserve the status quo of the litigation's subject matter pending trial on the merits.[67] The status quo is the last actual, peaceable, non-contested status which preceded the pending controversy.[68]

In *Sharma*,[69] the trial court ordered that "[n]o Defendant shall engage in any way in the business of purchasing, transporting, storing, marketing, selling or trading Isoprene Monomer that is produced in Russia or Caprolactum either supplied from Mexico or Belarus or sold in China."[70] Was that order appropriate to provide adequate protection for the trade secrets at issue pending trial, or was it overbroad to the point that it unduly restricted lawful competition?[71]

There were at least three choices open to the trial court: First, the court might restrict the defendants from doing any transactions whatsoever in isoprene or caprolactum, regardless of the source of the chemical or its ultimate market or destination. The court thought this would have "com-

65. *Id.* at 426.

66. *Id.* at 424 (citing K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv., 314 S.W.2d 782, 788 (Tex. 1958); and Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co., 764 S.W.2d 274, 277 (Tex. App.—Houston [1st Dist.] 1988, no writ)). Interestingly, this is the second time this quote has appeared during the Survey period. *See* Astoria Indus. Of Iowa, Inc. v. SNF Inc., 223 S.W.3d 616, 637 n.74 (Tex. App.—Fort Worth 2007, pet. denied).

67. Butnaru v. Ford Motor Co. 84 S.W.3d 198, 204 (Tex. 2002).

68. RP&R, Inc. v. Territo, 32 S.W.3d 396, 402 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

69. *Sharma*, 231 S.W.3d at 428.

70. *Id.*

71. *Id.*

pletely preserve[d] the actual status quo."[72] Second, the court might restrict the defendants' isoprene and caprolactum trade with respect to Russian isoprene or Mexican or Belarus caprolactum, or that which is sold in China, as the trial court decided to do. Or, third, the court might prohibit the defendants from dealing with suppliers or customers whose identities and deeper information they had learned through the improper use and disclosure of Vinmar's confidential information, but leave the door open for them to deal with new or different entities other than those they had learned through Vinmar.

This latter was the choice favored by the dissent in *Sharma*. The dissent observed that the defendants did, after all, have a limited legal right to engage in international chemical trading. That right was limited by the non-competition and confidentiality agreements they had signed, as well as by the common law and contractual prohibition against the improper use of Vinmar's trade secrets; but, if the defendants acted within those boundaries, they could at least engage in international chemical trading. The dissent criticized the majority for arbitrarily replacing "these contractual and common law limits with geographical boundaries, imposing barriers based on the chemical's country of origin or sale."[73]

The majority, however, viewed the injunction's breadth as necessary, narrowly tailored to preserve the status quo, supported by the evidence, and not restrictive of lawful competition.[74] The court noted that "when a choice must be made between a failure to provide adequate protection of a recognized legal right and the punitive operation of the writ, the latter course must be taken."[75] It added that "it is well-settled that injunctive relief 'must, of necessity, be full and complete so that those who have acted wrongfully and have breached their fiduciary relationship, as well as those who willfully and knowingly have aided them in doing so, will be effectively denied the benefits and profits flowing from the wrongdoing.'"[76]

Though not specified in the opinion, it appears that the nature of the defendant's misconduct was very much on the court's mind. In applying the *In re Bass* factors to determine whether Vinmar's information constituted a trade secret, the court if appeals noted that "[t]he status of the information claimed as a trade secret must be determined through a com-

---

72. *Id.*

73. *Id.* at 436. The dissent added that an injunction "'may not be framed so broadly as to prohibit the enjoyment of lawful rights.'" *Id.* at 435 (quoting Kulkarni v. Braeburn Valley W. Civic Ass'n, Inc., 880 S.W.2d 277, 278 (Tex. App.—Houston [14th Dist.] 1994, no writ)). The dissent also added that a temporary injunction is impermissibly overbroad if it prohibits not only the use of confidential and proprietary information, but lawful conduct as well. *Id.* at 436 (citing Sw. Research Inst. v. Keraplast Techs., Ltd., 103 S.W.3d 478, 482-83 (Tex. App.—San Antonio 2003, no pet.)). Consequently the dissent viewed the injunction as overbroad and its entry an abuse of discretion.

74. *Id.* at 429.

75. *Id.* (citing Hyde Corp. v. Huffines, 314 S.W.2d 763, 773 (Tex. 1958)).

76. *Id.* at 429 (quoting Mabrey v. SandStream, Inc., 124 S.W.3d 302, 316 (Tex. App.—Fort Worth 2003, no pet.)).

parative evaluation of *all* the relevant factors, including the value, secrecy, and definiteness of the information *as well as the nature of the defendant's misconduct.*"[77]

In this case, in the hearing record the court characterized as "remarkable testimony" two of the defendants "admitted lying under oath."[78] One defendant—in response to direct questioning by the trial court—"admitted he had lied during his deposition as he was nervous and defensive during the deposition and he lies when he gets nervous and defensive."[79] In addition, the court found that the testimony and documentary evidence revealed "not only an effort to destroy relevant documents, but also an attempt to insure the defendants were presenting a consistent story."[80] In these circumstances, the majority's preference for an order which would be bright-line in nature and readily enforceable may hardly be surprising.

IV. UNFAIR COMPETITION

A. Unfair Competition, Attorney's Fees, and Removal

Sometimes, in an effort to defeat removal to Federal court, a plaintiff will plead very carefully only claims which arise solely under state law and do not present a federal question. *In re Hot-Hed, Inc.*[81] considered whether claims raised in that way could have (perhaps inadvertently) presented a federal question anyway and in the process added an interesting note to the definition of "unfair competition" in Texas.

In *Hot-Hed, Inc.*, the plaintiff brought suit asserting claims of trademark dilution under the Texas Business and Commerce Code, trademark infringement under Texas common law, and unfair competition under Texas common law. In addition to legal and equitable relief, however, it also sought recovery of attorney's fees and costs. The defendant removed the case to federal district court, contending that removal was proper because Hot-Hed's request for attorneys' fees made its trademark claims present a federal question—not a state cause of action—because attorneys' fees are not available for such claims under Texas state law and must be available, if at all, under Section 43(a) of the Lanham Act.[82] The trial court denied the motion to remand, concluding that Hot-Hed's request for attorneys' fees must be authorized, if at all, only by federal law and hence presented a federal question.[83]

The Court of Appeals for the Fifth Circuit reversed and remanded, directing the trial court to consider whether the defendants could show diversity jurisdiction, but meanwhile holding that a federal question was

77. *Id.* at 425 (citing *In re* Bass, 113 S.W.3d 735, 739 (Tex. 2003) (emphasis supplied)).
78. *Id.* at 418.
79. *Id.* at 419.
80. *Id.*
81. 477 F.3d 320 (5th Cir. 2007).
82. *Id.* at 322; *see also* 15 U.S.C. § 1125(a) (2000).
83. 477 F.3d at 322.

certainly not involved.[84] One reason for this was because it was not so clear that attorneys' fees could not be authorized under Texas law, for in fact they could be recovered under the Texas Declaratory Judgments Act, which permits recovery of "reasonable and necessary fees as are equitable and just."[85] The circuit court cited *Horseshoe Bay Resort Sales Co. v. Lake Lyndon B. Johnson Improvement Corp.*,[86] which held that a plaintiff could recover attorney's fees for common law trademark infringement and dilution under the Texas Declaratory Judgments Act.[87]

Furthermore, even if the plaintiff had not adequately alleged a claim for attorneys' fees under state law, that would not necessarily require that the claim be interpreted as one brought under the federal Lanham Act.[88] It only permits recovery of attorneys' fees in "exceptional cases."[89] In any event, removal of a trademark infringement action is improper "'when a plaintiff does not clearly state he is seeking relief under the Lanham Act.'"[90]

Interestingly, the defendant asserted one other point before the fifth Circuit Court of Appeals, namely that the plaintiff's substantive counts also presented a federal question. The defendant argued that the plaintiff had set forth two independent causes of action for trademark infringement, one of which would necessarily arise under the Lanham Act. This argument—which the court of appeals characterized as "appropriately described . . . as convoluted"—was that plaintiff could not allege one claim for trademark infringement under Texas law, and a separate and independent claim for unfair competition under Texas law.[91]

However, the plaintiff could, in fact, argue exactly that. Trademark infringement actions would fall within "the larger umbrella of unfair competition," but a defendant "'may be liable for unfairly competing without having technically infringed a trademark.'"[92]

V. CONSPIRACY

A. A Derivative Tort

Hong Kong Development, Inc. v. Nguyen[93] provides a reminder that a cause of action for conspiracy is actually a derivative tort, not an independent one. If there is no underlying wrong or object, then there can be no cause of action for conspiracy.

---

84. *Id.* at 326.
85. Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 2008).
86. 53 S.W.3d 799 (Tex. App—Austin 2001, pet. denied).
87. *Id.* at 814-15.
88. *Hot-Hed, Inc.*, 477 F.3d at 324; *see also* 15 U.S.C. § 1125(a) (2000).
89. *Id.* at 324 (citing 15 U.S.C. § 1117(a)).
90. *Id.* (citing Johnson v. Tuff-N-Rumble Mgmt., Inc., No. 06-20893, 2002 W.L. 31819167, at *5 (E.D. La. Dec. 13, 2002)).
91. *Id.* at 325.
92. *Id.* (citing 13 William V. Dorsaneo III, Texas Litigation Guide, §§ 200.24[2][c], 200.110[2][c] (2000)).
93. 229 S.W.3d 415 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In this case, the First District Houston Court of Appeals determined that the essential, underlying cause of action for tortious interference could not be sustained. This doomed the claim for conspiracy. Where the underlying wrong or object that was alleged (here, tortious interference), could not be sustained, then there could be no conspiracy.[94]

VI. TORTIOUS INTERFERENCE

A. SEPARATING THE ACTOR FROM THE PRINCIPAL

Hong Kong Development, Inc. was a complex landlord-tenant suit involving family members separated by divorce.[95] As part of that action, plaintiff sued an individual defendant who was both a corporate agent and a third party who had allegedly induced the corporate defendant's breach of contract.

When the defendant is both a corporate agent and is, himself, the third party who allegedly induced the corporation's breach, the court of appeals held that the individual defendant's motives must be examined carefully. "Mixed motives—to benefit both himself and the corporation—are insufficient to establish liability."[96] Instead, the "plaintiff must prove that the agent acted willfully and intentionally to serve the agent's personal interests *at the corporation's expense.*"[97] This is often a difficult showing to make, for the actions of an agent very typically benefit the agent as well as benefitting its principal at the same time.

In determining whether an agent has acted against the corporation's interests by allegedly inducing the corporation's breach of contract, for purposes of determining whether the agent is liable for tortious interference, the court held that it should consider the corporation's own evaluation of the agent's actions.[98] The corporation may have complained or disavowed those actions, or it may have remained silent. The court held that although a complaint by the corporation would not conclusively show that the agent acted against its principal's interest, the opposite would indeed be true: if a corporation did *not* complain about its agent's actions, then the agent could not be held to have acted contrary to the corporation's interest.[99]

Here, there was no evidence that the individual defendant had acted "solely in his own interests" as required to show tortious interference, and consequently there was legally insufficient evidence to support the tortious interference claim.[100]

---

94. *Id.* at 448 (citing Tri v. J.T.T., 162 S.W.2d 552, 556 (Tex. 2005); Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996)).
95. *Hong Kong Dev., Inc.*, 229 S.W.3d at 415.
96. *Id.* at 447 (citing Powell Indus., Inc. v. Allen, 985 S.W.2d 455, 456 (Tex. 1998)).
97. *Id.* at 427 (quoting *Powell Indus., Inc.*, 985 S.W.2d at 456) (original emphasis)).
98. *Id.* (citing *Powell Indus., Inc.*, 985 S.W.2d at 456).
99. *Id.* (citing *Powell Indus., Inc.*, 985 S.W.2d at 456).
100. *Id.* (citing *Powell Indus., Inc.*, 985, S.W.2d at 456).

B. Tortious Interference: With Prospective Customers, or With Prospective Business From Existing Customers?

In *Astoria Industries of Iowa, Inc. v. SNF, Inc.*,[101] Brand FX also claimed that Astoria had tortiously interfered with Brand FX's prospective business relations.

> To prevail on a claim for tortious interference with prospective business relations, a plaintiff must show (1) a reasonable probability that the plaintiff and third party would have entered into a contractual relationship; (2) that an independently tortious or wrongful act by the defendant prevented the relationship from occurring; (3) that the defendant did the act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of the conduct; and (4) that the plaintiff incurred actual harm or damage as a result of the defendant's interference.[102]

Astoria replied that there was no evidence that it interfered with Brand FX's business relationship with prospective customers. Instead, it argued that Brand FX complained only "that Astoria took some of Brand FX's business from only a single *existing* customer, Cook's Pest Control, Inc."[103] The court of appeals held that the types of business relationships protected against interference, however, include "continuing business relationships."[104]

According to the evidence, Cook's wanted a stair-step design for its "toppers" on all of its trucks so that its fleet would have a consistent, professional look, but until Astoria came on the scene, Cook's did not know of any other company making "toppers" with a stair-step design except Brand FX and Brand FX's now-bankrupt predecessor. The court concluded that reasonable people could reach different conclusions as to whether it was reasonably probable that Cook's would have continued to purchase "toppers" from Brand FX if Astoria had not been able to manufacture a stair step topper, so there was more than a scintilla of evidence as needed to support the first element of the tortious interference claim.[105]

---

101. Astoria Indus. Of Iowa, Inc. v. SNF, Inc., 223 S.W.3d 616 (Tex. App.—Fort Worth 2007, pet. denied).

102. *Id.* at 632-33.

103. *Id.* at 633.

104. *Id.* at 633 (citing Heil-Quaker Corp. v. Mischer Corp., 863 S.W.2d 210, 214 (Tex. App.—Houston, [14th Dist.] 1993, *writ granted, judgment vacated w.r.m.*, 877 S.W.2d 300 (Tex. 1994)); Rest. (Second) of Torts § 766B, cmts. a, c (1979) (types of business relations protected are business relations that have not yet been reduced to a contract and continuing business or other customary relationships not amounting to a formal contract)).

105. *Id.* at 633-34.

VII. BUSINESS DISPARAGEMENT

A. Special Damages Must Have Been Incurred, Not Be Prospective

In *Astoria Industries of Iowa, Inc. v. SNF, Inc.*,[106] Astoria and Brand FX were business competitors. They each manufactured and sold fiberglass service bodies and toppers for commercial trucks. "A topper is a structure that covers the bed of a commercial truck."[107]

Brand FX alleged that in late 2002, Astoria developed a stair-step topper design virtually identical to the one Brand FX was making for its customer Cook's Pest Control, in order to try and take over Cook's pest control business by making essentially the same thing and offering it for over $1,000.00 less than the price that Brand FX charged. Brand FX claimed Astoria had "nefariously" obtained Brand FX's design drawings, and had also run an unfair comparative advertisement a number of times over the course of a year, describing "Brand X bodies" with the following "(1) No Engineering and built with substandard materials; (2) Short-term costs with long-term expenses; and (3) Built to their standard."[108] Brand FX brought claims for business disparagement, false advertising under the Lanham Act, tortious interference, trade dress infringement, unfair competition, common law misappropriation, and trade secret misappropriation. Astoria moved for traditional and/or no evidence summary judgments on these claims, but the motions were denied.[109]

It is understood that to "prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published a false, defamatory statement of fact about the plaintiff, (2) with malice, (3) without privilege, and (4) that resulted in special damages to the plaintiff."[110] Special damages are often a difficult element to prove. "To prove special damages, the plaintiff must prove that the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific loss sales, loss of trade, or loss of other dealings."[111]

Here, there was no immediate claim of any lost sales. Brand FX's owner testified that "we don't know anybody that lost sales directly be-

106. 223 S.W.3d 616 (Tex. App.—Fort Worth 2007, pet. denied),

107. *Id.* at 622.

108. *Id.* at 622 (internal quotations omitted).

109. *Id.* at 623. In an interesting procedural point, the court of appeals noted that the trial court's order denying the summary judgment was interlocutory and not appealable except to the extent that its claims were based on a claim or defense arising under the free speech clauses of the First Amendment and article 1, section 8, of the Texas Constitution. *See* Tex. Civ. P. & Rem. Code Ann. § 51.014(a)(6) (Vernon 2008). The court of appeals held that the portion of the trial court's order denying summary judgment on Brand FX's business disparagement, false advertising and tortious interference claims—the only claims that Astoria defended on free speech grounds—were appealable. *Astoria Indus.*, 223 S.W.3d at 627.

110. *Id.* at 628.

111. *Id.* (citing Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987)).

cause of the [Astoria] ad," and Brand FX's president testified that he could not recall the identity of any customers who had refused to buy Brand FX's products because of Astoria's actions.[112]

Instead, Brand FX relied on the affidavit of an advertising expert, who was of the opinion that Brand FX would have to spend approximately $76,200 in corrective advertising over the next twelve months in order to counteract Astoria's negative advertising. In Brand FX's view, this kind of recovery would be supportable under section 633(1)(b) and comment k of the Restatement (Second) of Torts (1977), which provides that recovery is also permitted for "the expense of measures reasonably necessary to counteract the publication, such as the cost of notifying customers of an injurious publication's falsity or the publication of denials."

The court of appeals, however, declined to view these as special damages sufficient to trigger liability for a business disparagement claim, pointing out that Brand FX had not actually incurred any corrective advertising expenses yet. The expert's affidavit only attested to what Brand FX *might* have to pay for such advertising *if* Brand FX were to choose to purchase it. But the court observed that neither the Texas Supreme Court nor any intermediate court of appeals had adopted this part of the Restatement, or had held "that this type of pecuniary loss is compensable in Texas in a business disparagement case."[113]

Ever since *Hurlbut v. Gulf Atlantic Life Insurance Co.*[114] was decided, it has been understood that business disparagement is a difficult cause of action to sustain in Texas, requiring strict proof, particularly because the "special damages" rule is strictly applied. *Astoria* certainly holds that corrective advertising which is proposed—but has not yet been spent—will not suffice to show such special damages. The case gives a further hint that costs of corrective advertising might not be sufficient to show "special damages" even if they were spent to the last dime, though that conclusion may be premature and should await further development.

VIII. FALSE ADVERTISING

A. The Limits of Hyperbole

Astoria Industries of Iowa, Inc. v. SNF, Inc.[115] presented a fairly rare example of a Lanham Act section 43(a) claim being heard in a state court of appeals rather than a Federal court. At issue were the specific statements in Astoria's advertising, namely that "low quality Brand FX bodies" have "no engineering and [are] built with substandard materials."[116] Particularly, under section 43(a) of the Lanham Act, it was Plaintiff Brand FX's burden to prove that these statements were either literally

112. *Id.* at 629.
113. *Id.* at 629 n.34.
114. 749 S.W.2d 762 (Tex. 1987).
115. *Astoria Indus.*, 223 S.W.3d at 616.
116. *Id.* at 630.

false, or that they were likely to mislead and confuse others.[117]

Astoria urged that the "no engineering" statement was "'nothing more than "rhetorical hyperbole,'" it being "simply inconceivable that readers of a trade journal about utility and telecommunications service vehicles would ever believe that a product could be manufactured without resort to at least some engineering principals."[118] To this extent the court of appeals agreed, concluding that readers of ordinary intelligence would realize that Brand FX's products were not without any engineering whatsoever, and instead would interpret the advertisement as a general claim that Astoria's products were superior.[119] The court made this interpretation as a matter of law, and without reference to surveys of consumer reaction, expert testimony on linguistics, or other external devices.

The statement that Brand FX's products were "built with substandard materials," however, was substantially different. Here the question was whether the word "substandard" would be a statement of fact or one of opinion. Generally, statements of objective facts state "a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact,'"[120] while statements of mere opinion are not so capable of being proven right or wrong.

In some contexts, references to a product as "substandard" might be mere opinion; but the court held that this was not such context. Instead, the court observed that the "types of materials Brand FX uses, as well as their quality and durability when compared to the materials used by Astoria and other manufacturers, are facts that can be verified."[121] Additionally, the context of the statement made it clear that these materials were to be compared to those of Astoria, whose products were said to be built with "quality" materials to be "long-lasting and durable."[122]

Thus, in the court's view, the context and verifiability of the statements could lead a reader of ordinary intelligence to perceive this statement as one of fact—namely, that Brand FX's products were manufactured using materials of lesser quality than those typical in the industry and, unlike Astoria's products, are therefore "not durable and will not last very long."[123] Thus, the court of appeals therefore held that the statement that Brand FX's products are "built with substandard materials" is "not mere opinion but is a statement of fact."[124] It was, furthermore, false, according to the affidavit of Brand FX's owner and vice president, who testified that Brand FX only used materials which were above accepted industry-standard quality in its products.[125]

---

117. *Id.* (citing Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489 (5th Cir. 2000)).
118. *Id.* at 630-31.
119. *Id.* at 631.
120. *Id.* at 629 n.36 (quoting *Pizza Hut, Inc.*, 227 F.3d at 495).
121. *Id.* at 631.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*