Affirmed in Part and Reversed and Remanded in Part and Opinion filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01207-CV

LESTER W. LAND and RUSSELL B. HAMMOND, Appellants

V.

THE DOW CHEMICAL COMPANY and DELBERT WHITT, Appellees

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 95-H2549

O P I N I O N

Appellants Lester Land and Russell Hammond are here on appeal challenging the trial court's grant of appellees' motion for summary judgment. Below, appellees Dow Chemical Company and Delbert Whitt motioned for summary judgment based on three affirmative defenses and four no-evidence points. Dow and Whitt also requested the trial court strike a portion of the proof Land and Hammond offered in response to Dow and Whitt's motion for summary judgment. The trial court granted summary judgment for Dow and Whitt, and struck the objected to portion of Land and Hammond's summary judgment proof. In four points of error Land and Hammond appeal the trial court's actions. We affirm the summary

judgment as to Whitt, reverse the trial court's judgment as to Dow, and remand the case to the trial court for further proceedings.

I.
Factual Background

This case is based on claims of tortious interference with an employment contract. Land and Hammond were employees of Brazos M&E, Inc.. Brazos is an equipment maintenance contractor that contracted with Dow to maintain its heavy equipment. Pursuant to its service contract with Dow, Brazos provided Dow with mechanics and craftsmen to maintain the equipment in Dow's chemical plant. Appellees Land and Hammond were two such mechanics sent by Brazos to maintain Dow's equipment. Land and Hammond sued Dow claiming that Dow tortiously interfered with their employment contracts, causing them to lose their jobs with Brazos. Specifically, in Plaintiffs' Original Petition, Land contended he was constructively discharged from employment with Brazos, and Hammond contended he was terminated because of an alleged reduction in force.

The basis of Land and Hammond's allegation that Dow interfered with their employment contract with Brazos is that a Dow employee, Delbert Whitt, who managed the shop in which Land and Hammond worked, instructed Land and Hammond's supervisor, Robert Thurman, to terminate Land and Hammond's employment. The appellants allege Whitt did this after they reported Dow to OSHA for exposing the shop workers to asbestos in the chemical plant shop.

II.
Procedural History

Dow and Whit motioned for summary judgment, asserting (1) Land and Hammond's claim is preempted by OSHA because it alleges they were fired in retaliation for their whistleblowing; (2) Dow and Whitt are legally justified in interfering with the contracts between Brazos and the appellants; (3) Whitt, as an employee of a corporation, cannot be held individually liable; (4) Land can present no evidence of the proximate cause and damage elements of his tortious interference claim; (5) Hammond can present no evidence of the proximate cause element of his tortious interference cause of action, and (6) no evidence exists to support the willful and intentional element of plaintiffs' tortious interference claim. Grounds one,

two, and three are affirmative defenses upon which Dow and Whitt bear the burden of proof, while grounds four, five and six rely on the no evidence summary judgment rule.

Land and Hammond responded to the appellees' motion for summary judgment by providing affidavits and other proof supporting the elements of their claim and attacking the affirmative defenses Dow and Whitt asserted. Finally, in response to Land and Hammond's response, Dow and Whitt requested the trial court strike certain proof offered by the appellants in their response because it was obtained by "theft and conversion" and was inadmissible hearsay. The trial court sustained Dow and Whitt's objection to the proof, struck the evidence, and granted their summary judgment without specifying the grounds on which it was granted.

On appeal, Land and Hammond complain it was error for the trial court to grant appellee's motion because the affirmative defenses were not conclusively established and there are questions of material fact as to the challenged elements of their claim.

III.
Standard of Review

A. Matter of Law

Under Civil Procedure Rule 166a(c), a summary judgment is only proper for a defendant if its summary judgment proof establishes, as a matter of law, there is no genuine issue of material fact concerning one or more of the essential elements of the plaintiff's cause of action. *See Goldberg v. United States Shoe Corp.*, 775 S.W.2d 751, 752 (Tex. App.—Houston [1st Dist.] 1989, writ denied). A summary judgment for a defendant that disposes of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any of the theories in its petition. *See Kiefer v. Continental Airlines, Inc.*, 882 S.W.2d 496, 498 (Tex. App.—Houston [1st Dist.] 1994, no writ). In reviewing the granting of a motion for summary judgment, this Court will consider that all proof which is favorable to the non-movant is true. *See MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex.1986); *see also Goldberg*, 775 S.W.2d at 752. We will indulge every reasonable inference and doubt in favor of the non-movant. *See id.*

When, as in this case, a defendant moves for summary judgment based partially on its own affirmative defense, the defendant has the burden of proving each element of its defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984) (affirmative defenses of fraud and estoppel); *see also Kiefer*, 882 S.W.2d at 498 (affirmative defense of preemption). When the trial court grants a summary judgment without specifying the reasons, we will affirm if any of the theories asserted by the defendant in its motion for summary judgment have merit. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993); *see also Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 209-10 (Tex. App. —Houston (1st Dist.) 1995, writ denied). This matter of law summary judgment standard of review will be applied to the affirmative defenses raised in the summary judgment motion in section IV below.

B. No Evidence

Where a motion is presented under Rule 166a(i) asserting there is no evidence of one or more *essential elements* of the non-movant's claims upon which the non-movant would have the burden of proof at trial, the movant does not bear the burden of establishing each element of its own claim or defense as under subparagraphs (a) or (b). *See Roth v. FFP Operating Partners*, 994 S.W.2d 190, 195 (Tex. App. —Amarillo 1999, no pet.). Rather, although the non-moving party is not required to marshal its proof, it must present proof that raises a fact issue on the *challenged elements*. *See id.* Indeed, the notes and comments to Rule 166a(i) state the following: "The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case." *See* TEX. R. CIV. P. 166a(i), Notes and Comments.

Because a no evidence summary judgment is essentially a pretrial directed verdict, we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *See Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App. —Austin 1998, no pet.). Thus, our task as an appellate court is to ascertain whether the non-movant produced any proof of probative force to raise a fact issue on the material questions presented. *See id.* We consider all the proof in the light most favorable to the party against whom the no-evidence summary judgment was

rendered, disregarding all contrary proof and inferences. *See Roth*, 994 S.W.2d at 195. A no-evidence summary judgment is improperly granted if the non-movant presents more than a scintilla of probative evidence to raise a genuine issue of material fact. *See Fiesta Mart, Inc.*, 979 S.W.2d at 70-71. More than a scintilla of proof exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *See Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). This no evidence standard of review will be applied to the elements of Land and Hammond's tortious interference claims challenged by appellees' motion for summary judgment in section V below.

IV.
Challenges to the Affirmative Defense Grounds

A. Preemption

In their motion for summary judgment, Dow and Whitt asserted that Land and Hammond's claim was preempted by OSHA because it was essentially a retaliatory discharge claim. As such, Dow and Whitt have repeatedly insisted that Land and Hammond must pursue their cause of action through the "whistleblowing" provision of OSHA, 29 U.S.C. §660(c). Federal preemption is an affirmative defense. *See Gorman v. Life Ins. Co. of North America*, 811 S.W.2d 542, 546 (Tex. 1991) (analyzing whether plaintiff's claim is preempted by ERISA).

We disagree that OSHA preempts the state law action of tortious interference with contractual relations for two reasons. First, the language of the statute demonstrates that the whistleblower cause of action through OSHA is permissive rather than mandatory. Indeed, 29 U.S.C. §660(c) states in part that, "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection *may*, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination"(emphasis added). In determining whether Congress has invoked its preemption power, primary emphasis is given to ascertainment of Congressional intent. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 107 S.Ct. 499, 507, L.Ed.2d 449 (1986). If the intent is clear, that is the end of the matter. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1983). The intent here is clear. The language Congress chose

for this portion of the statute is permissive. Thus, employees are not required to pursue their causes of action solely through OSHA, nor are they limited to OSHA remedies. *See Flenker v. Williamette Industries, Inc.* 162 F.3d 1083 (10th Cir. 1998) (holding anti-retaliation provision of OSHA did not preclude filing of Kansas common law claim alleging wrongful discharge); *see also Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473 (8th Cir. 1990) (holding employee's state law claim of retaliatory discharge was not preempted by OSHA which provides administrative remedies for whistle blowers).

Second, the area of tort law traditionally has been occupied by the states; therefore, unless Congress states a clear and manifest purpose for OSHA to supersede state tort law, OSHA is not preemptive. *See McElroy v. SOS Int'l, Inc.*, 730 F.Supp. 803 (N.D. Ill. 1989). The defendants in *McElroy* argued, as do Dow and Whitt, that OSHA preempted the plaintiff's retaliatory discharge claim, citing 29 U.S.C. 667. However, the portion of the statute the defendants here and those in *McElroy* cited, is the section of OSHA which deals with states asserting their own standards in the absence of applicable federal standards:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. §667(a) and (b).

Congress has the power to preempt state law under the Supremacy Clause. *See Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). The United States Supreme Court has held the standards section of OSHA preempts state regulations. *See Gade v. Solid Wastes Management Assn.*, 505 U.S. 88, S.Ct. 2374, 120 L.Ed.2d 73 (1992). However, this provision is irrelevant to our analysis. This case does not concern state regulations, but rather whether Congress intended for OSHA to preempt state law tort

actions. Because the language addressing a whistleblower suit is permissive, and a tortious interference cause of action is not a safety or health issue standard within the meaning of Section 667, the state tort action at issue here is not preempted. *See People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989) (holding the area of tort law has been traditionally occupied by the states and that Congress has stated no clear and manifest purpose for OSHA to supersede state tort law). Therefore, Dow and Whitt may not rely on the affirmative defense of preemption to defeat Land and Hammond's claim, and the trial court erred if it granted summary judgment on this ground.

B. Legal Justification

Dow and Whitt also asserted in their motion the affirmative defense of legal justification. Under this defense, Dow and Whitt do not deny the alleged interference, but rather seek to avoid liability based upon a claimed interest that was being impaired or destroyed by the contract between Land and Hammond and their employer Brazos. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689-90 (Tex. 1989). Utilizing the defense of legal justification, Dow and Whitt must show they were privileged to interfere with the employment contract at issue because either (1) it was done in a bona fide exercise of their own rights, or (2) they had a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken, or (3) they had an equal or superior right to that of Land or Hammond in the subject matter of their employment contracts. *See id* at 691; *see also Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).

As a preliminary matter, in their brief, Dow and Whitt claim that they did not tortiously interfere with the employment contracts at issue because they merely induced Brazos to exercise its own rights under its contracts with Land and Hammond. This argument was not presented to the trial court in support of Dow and Whitt's motion for summary judgment; therefore it will not be considered on appeal. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) (holding a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response).

1. *Bona Fide Exercise of Legal Right*

First, Dow and Whitt assert they interfered with the contract between Brazos and Land and Hammond in a bona fide exercise of their own rights. However, Land and Hammond presented summary

judgment proof in the form of deposition evidence in their response to the appellees' motion that raises a question of material fact as to Dow and Whitt's "bona fide" exercise. Land and Hammond's performance on the job is one consideration in our "bona fide" exercise analysis. *See Sterner*, 767 S.W.2d at 691. To that end, when asked whether he recollected any performance, discipline, or absenteeism problems, or misconduct by Land, Bob Thurman, a Brazos employee and Land's immediate supervisor in the Dow plant shop, answered "no." Second, when asked the same question concerning Hammond, Thurman again answered "no." Third, when asked to describe Land's work on the job, Thurman described his work as satisfactory, adding that Land was someone he would have hired or retained. Thurman also described Hammond as a "good worker."

In addition to the satisfactory nature of Land and Hammond's prior performance, the events leading to the termination of their employment are significant. The affidavits of both Land and Hammond and the deposition testimony of Bob Thurman, demonstrate that following the appellants' report to OSHA concerning the alleged asbestos exposure, shop employees were required to sign confidentiality agreements covering all information they were privy to as shop workers. Also, a new verbal policy forbidding mechanics from "shooting the breeze" with their co-workers was instituted, at the behest of Whitt, and the only workers ever disciplined under the policy were Land and Hammond. Finally, excerpts of Thurman's daily planner read, without objection, during the deposition demonstrate that although Whitt was instructed not to tell Thurman who to hire, fire, or discipline, he told Thurman that "when this asbestos thing is over, and if [I'm] not retired, Hammond is a fired s– of a b----."[1] Because the summary judgment proof raises issues relating to whether the prior job performance of the appellants was satisfactory and whether the sequence of events at Dow show the treatment of Land and Hammond was retaliatory in nature, there are questions of material fact relating to Dow and Whitt's "bona fide" exercise of their legal rights.

Finally, the service contract between Dow and Brazos provides that Brazos shall provide adequate supervision for its personnel performing under the service contract, and the supervisory personnel "shall have the authority for and exercise all direction of and control over all [Brazos' individual agents,

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[1] Dow and Whitt objected to the introduction of the daily planner on the grounds that it was obtained by theft and conversion and that it contains hearsay. We disagree and will address the merits of this issue below.

representatives and employees] performing under this Contract." Because Brazos had exclusive supervision and control over its employees, preempting Dow, there is no support in the service contract for interference by Dow with the contract between Brazos and Land and Hammond. Therefore, our inquiry with regard to the bona fide exercise prong of the legal justification defense need go no further. *See Sterner*, 767 S.W.2d at 691.

2. *Colorable Right*

As part of their legal justification defense, Dow and Whitt also assert they had a good faith belief in a colorable right to interfere with Land and Hammond's employment contract with Brazos. This prong of the defense requires (1) a trial court determine that Dow and Whitt interfered while exercising a colorable right, and (2) a jury find that, although mistaken, Dow and Whitt exercised that colorable legal right in good faith. Without repeating the preceding analysis, it suffices to say that the deposition testimony of Thurman and the affidavits of Land and Hammond demonstrate there are fact questions regarding Dow and Whitt's "good faith" exercise of a colorable legal right. In particular, Thurman's deposition testimony describing his meeting with Whitt and Whitt's supervisor at Dow where Whitt was informed he was not to tell Thurman who to hire, fire, or discipline, and Whitt's statement moments after the meeting that he wanted to fire Hammond when the asbestos problem was over, raises a fact question about Dow and Whitt's good faith. Moreover, as noted above, because the Service Contract between Dow and Brazos unambiguously gave Brazos the right to exercise all direction of and control over Brazos personnel performing under the contract at Dow, the issue of Dow and Whitt's good faith belief in a colorable right to interfere is further brought into question. Accordingly, Dow and Whitt have failed to conclusively prove the "colorable right" prong of their legal justification defense.

3. *Equal or Superior Right in Subject Matter of Contract*

Although an equal or superior right in the subject matter of the contract is another prong of the affirmative defense of legal justification, Dow and Whitt failed to raise this ground in their motion for summary judgment. As with their assertion that they were merely inducing Brazos to exert its own rights under the contract, this argument was also not raised in their motion for summary judgment; therefore neither will be considered on appeal. *See Stiles*, 867 S.W.2d at 26 (holding a summary judgment cannot

be affirmed on grounds not expressly set out in the motion or response). Dow and Whitt have failed to prove as a matter of law any basis upon which they were privileged to interfere with the Brazos employment contract with Land and Hammond. Thus, because the summary judgment cannot be affirmed on the affirmative defense of legal justification, we sustain appellants' challenge to Dow and Whitt's legal justification ground asserted in their motion. We turn now to the final affirmative defense asserted, that of Whitt's lack of individual liability.

C. No Individual Liability

In their tortious interference suit, appellants Land and Hammond seek to hold not only Dow liable, but also Delbert Whitt, a Dow corporate employee, for his individual acts of interference. Under *Holloway v. Skinner* "an officer or director [of a corporation] may not be held liable in damages for inducing the corporation to violate a contractual obligation, provided that the officer or director acts in good faith and believes that what he does is for the best interest of the corporation." 898 S.W.2d 793, 795 (Tex.1995). The court in *Holloway* also cited the general rule that the act of the agent is the act of the corporation. *See Holloway*, 898 S.W.2d at 795. Although the allegations in this case are different than those described in *Holloway*, we still find *Holloway* controlling. Here, Land and Hammond allege that Whitt, individually, interfered with their employment contract with Brazos, causing their employment to be terminated. Whitt and Dow assert an affirmative defense that Whitt was acting as an agent of the corporation

Because a corporate officer's acts on the corporation's behalf usually are deemed corporate acts, a plaintiff must show that the agent acted solely in his own interests. *See ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 432 (Tex. 1997). The plaintiff must prove that the agent acted willfully and intentionally to serve the agent's personal interests at the corporation's expense. *See Holloway*, 898 S.W.2d at 798. A corporate officer's mixed motives--to benefit both himself and the corporation--are insufficient to establish liability. *See ACS Investors*, 943 S.W.2d at 432. In addition, when determining whether an agent acted against the corporation's interests, we consider the corporation's evaluation of the agent's actions. *See, e.g., Morgan Stanley & Co. v. Texas Oil Co.*, 958 S.W.2d 178, 181-82 (Tex.1997). A corporation is a better judge of its own best interests than a jury or court. *See id.*, 958

S.W.2d at 181. Although a principal's complaint about its agent's actions is not conclusive of whether the agent acted against the principal's best interests, if a corporation does not complain about its agent's actions, then the agent cannot be held to have acted contrary to the corporation's interests. *See Powell Industries, Inc. v. Allen*, 985 S.W.2d 455,456-57(Tex. 1998)

Here, Dow has not lodged a complaint concerning Whitt's performance in this or any other matter presented to this court. The record does contain, however, an indication that Whitt acted outside of the scope of his employment when he made "suggestions" to Thurman about Land and Hammond's employment. Thurman testified in his deposition that Whitt made suggestions which he felt compelled to follow. However, Thurman's daily planner entries demonstrate Whitt lacked the authority to make these suggestions and that he knew he should not. This proof aside, we cannot say Whitt acted contrary to Dow's best interests when Dow itself appears not only untroubled by Whitt's actions, but also insists Whitt's actions were taken as Dow's agent. Therefore, Whitt was acting in Dow's best interest by his unauthorized interference with Land and Hammond's contracts with Brazos, and the appellants cannot maintain, as a matter of law, their action against an agent acting in his corporate capacity. *See Holloway*, 898 S.W.2d at 795. Accordingly, because the summary judgment as to Whitt is proper, we overrule appellant's point of error as to Whitt.

V.
Challenges to the No-Evidence Grounds

In addition to asserting three affirmative defenses, Dow and Whitt also sought summary judgment under Civil Procedure Rule 166a(i). This portion of their summary judgment motion was addressed to Land and Hammoned's claims based on tortious interference with their employment contract with Brazos.

A party alleging tortious interference must prove four elements to sustain its claim: (1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred. *See ACS Investors*, 943 S.W.2d at 430. On appeal, Dow and Whitt claim that they did not proximately cause the termination of Land and Hammond's employment, that Land sustained no damages, and no

evidence supports the intentional interference element of plaintiffs' claim. Land and Hammond, however, allege the actions taken by Dow and Whitt were intentional, proximately caused their changes in employment, and Land did, in fact, suffer damages.

A. Proximate Cause

1. Land

As to the allegation that Dow and Whitt did not proximately cause the termination of Land and Hammond's employment, both sides offer proof to support their position. In an attempt to conclusively disprove this element as to Land, who claimed constructive discharge, Dow and Whitt offer the affidavit of Benny Dunn, the General Manager of Brazos, who states that the reassignment of Land to another Brazos work site was done solely by him, without any influence by any Dow employee. Mr. Dunn also states the reason for the reassignment was because Land and his co-worker Hammond had become disruptive to the group of Brazos employees with whom they were working at Dow. In support of their "no proximate cause" argument, Dow and Whitt contend that Land has no proof of the forseeability or cause in fact components of the proximate cause element of his tortious interference claim.

Land responded to the no evidence challenge on the element of proximate cause with his affidavit and excerpts from Thurman's daily planner. In his affidavit he states that the entries in the planner contain statements by Whitt in which Whitt instructed Thurman to terminate Land's employment with Brazos. The entry in Thurman's planner indicates that when the OSHA matter is over, Whitt planned a reduction in force to get rid of Land and Hammond.

This summary judgment proof provided by Land directly contradicts the statement by Benny Dunn that no one at Dow had any influence on his decision to reassign Land to another job. Other proof offered by Land confirmed the entries in Thurman's planner. In his deposition, Thurman testified that Whitt exerted influence over Thurman concerning the hiring and firing of employees, adding "if he wanted to keep his job" Thurman would follow Whitt's "suggestions,"and fire a certain employee. Finally, this cause of action is not limited to the interference specifically resulting in the change in Land's employment, but rather, is premised on all of the actions taken by Dow and Whitt, including, but not limited to, the eventual termination of employment. Therefore, we do not consider only the termination of employment, but also the interference alleged throughout Land's employment.

Land's affidavit, the entries in Thurman's planner, and Thurman's testimony constitute more than a scintilla of evidence rising to a level that would enable reasonable and fair-minded people to differ in their conclusions concerning appellees' alleged interference. *See Havner*, 953 S.W.2d at 711. In other words, a genuine issue of material fact exists whether Dow and Whitt's alleged interference proximately caused the damage complained of. Therefore, Land cleared the no-evidence challenge to the proximate cause element of tortious interference.

2. Hammond

Dow and Whitt also challenged the evidence supporting the proximate cause element of Hammond's tortious interference claim. In support of their allegation that Dow and Whitt had nothing to do with Hammond's termination, they refer to a portion of Thurman's deposition on February 11, 1997. At page 121 of that deposition, Thurman agreed with the statement that if Dow or Whitt had said "we got to get rid of one person, and they made no suggestion to you," he would have picked Hammond as the one he would have gotten rid of.

However, earlier in that same deposition, Thurman on two separate occasions acknowledged that he fired Hammond pursuant to, in one instance, a suggestion by Whitt, and in another, a directive from Whitt. As to the latter description by Thurman of the reason for Hammond's termination, it occurred while he was responding to questions regarding Hammond's termination paper. That particular document referred to a reduction in work force implemented by Dow, and Thurman responded as follows to further questions regarding Hammond's separation:

Q. And does that [reduction in force] reflect the directive to you from Mr. Whitt?

A. Yes, sir.

Q. And, as I recall, you were *instructed* to lay-off one person from your shop?

A.Yes, sir.

Q. And that was to be Mr. Hammond?

A. Yes, sir. (emphasis added)

This testimony from Thurman directly contradicts his later testimony that same day. By agreeing that he would have fired Hammond *sua sponte*, and then stating that he was directed by Whitt to fire Hammond, he has created a fact issue for a jury on the challenged element of proximate cause.

B. Damages

Dow and Whitt also motioned for summary judgment arguing that because Land sustained no damages, he could not meet the fourth and final element of a tortious interference claim. Dow and Whitt did not allege Hammond sustained no damages in their motion; therefore, we will consider the damage element only in relation to Land. The appellees characterize Land as suffering no damages from his change of employment.

However, it is clear from Land's response to the motion for summary judgment and his deposition testimony that the damages he claims resulted from Dow and Whitt's actions during the course of his employment with Brazos, not merely those he sustained as a result of his "constructive termination." Land testified in his deposition that after he began asking for safety equipment to protect him from potential asbestos exposure, the "no talking" policy was implemented, and he and Hammond, the only employees requesting the protective measures, were the only employees disciplined pursuant to it. Following his suspension under that policy, he claims he was reassigned to a Brazos work site with less desirable working conditions. Also in his deposition, he discusses his damage as the actions taken by Dow and Whitt in an attempt to cover up the alleged asbestos problem at the shop and to retaliate against him for reporting it.

To that end, the actual damages asserted in the response and in Land's brief include the loss of income for the three days of suspension and the impact the lost hours had on overtime accrual. Land also claims he wants reinstatement; therefore, that remedy can be fairly viewed as damage. *See Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799,803 (Tex.App.—San Antonio 1997, pet. denied) (holding reinstatement and monetary damages are not mutually exclusive remedies for wrongful discharge under

TEX. LAB. CODE Ann. § 451.002 (Vernon 1996)). Finally, Land testified in his deposition that as a result of his constructive discharge he suffered a cut in pay at his new job.

Therefore, we hold Land has provided more than a scintilla of probative evidence demonstrating he sustained damages caused by Dow's interference with his employment contract with Brazos. Thus, the summary judgment cannot be affirmed on Dow and Whitt's no evidence challenges to the proximate cause and damage elements of Land and Hammond's tortious interference claims. Accordingly, we sustain Land and Hammond's first point of error.

VI.
Evidentiary Rulings

In Land and Hammond's second and third points of error, they complain the trial court erred in sustaining Dow and Whitt's objections to the admission of Thurman's daily planner and in striking the daily planner from their summary judgment response proof. We review the trial court's decision regarding the exclusion of evidence for an abuse of discretion. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex.1995); *see also Parkway Hosp., Inc. v. Lee*, 946 S.W.2d 580, 583 (Tex. App.—Houston [14th Dist.] 1997, writ denied). Reversal for improper exclusion of evidence is appropriate only when 1) the trial court committed error in excluding certain evidence, and 2) the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *See* TEX.R. APP.P. 81(b); *see also Lee*, 946 S.W.2d at 583. We review the entire record to determine whether the complaining party showed that the judgment turns on the excluded evidence. *See Alvarado,* 897 S.W.2d at 753-54; *see also Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 658-59 (Tex.App.—Houston. [14th Dist.] 1998, no pet.)

Although it is not clear on what ground the judgment was granted, at the trial court Dow and Whitt moved to strike appellants' evidence based on hearsay, theft and conversion objections. We will address the hearsay allegation first. Hearsay is a statement, including a written statement, other than one made by the declarant while testifying at trial, which is offered to prove the truth of the matter asserted. *See* TEX. R. EVID. 801(d). When there is hearsay within hearsay, in the instance where a declarant's statement is written down by a third party, the statements are nevertheless admissible "if each part of the combined

statements conforms with an exception to the hearsay rule." TEX. R. EVID. 805; *see also Knox v. Taylor*, 992 S.W.2d 40, 64 (Tex. App.—Houston [14th Dist.] 1999,). Here, both the statements made by Whitt and the record of those statements made by Thurman in his daily planner conform to hearsay exceptions.

First, Whitt's statement that Hammond was a "fired s– of a b----," is admissible under Texas Rule of Evidence 803(3) as a statement of his intent to terminate Hammond's employment when the OSHA investigation ended. Rule 803(3) allows the admission of the following:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

See Blount v. Bordens, Inc., 892 S.W.2d 932, 937-38 (Tex. App.—Houston [1st Dist.] 1994) *rev'd on other grounds* 910 S.W.2d 931 (Tex. 1995).

Substantial Texas case law acknowledges that communications made or received by a person will often be relevant, not as evidence that the facts are as stated in the communication, but instead as tending to show the knowledge or belief of the person who communicated or received the statement. *See Security Ins. Co. v. Nasser*, 755 S.W.2d 186, 193-94 (Tex. App.--Houston [14th Dist.] 1988, no writ); *see also Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex. App.-El Paso 1992); *see also Posner v. Dallas County Child Welfare*, 784 S.W.2d 585, 587 (Tex. App.—Eastland 1990, writ denied); *see also Thrailkill v. Montgomery Ward*, 670 S.W.2d 382, 386 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Thus, Rule 803(3) creates an exception to the hearsay rule by which Whitt's statements indicating his intent to have Land and Hammond fired are admissible.

Whitt's statements as contained in Thurman's planner, however, remain inadmissible unless there is another applicable hearsay exception. Rule 803(5) renders Thurman's written memorandum of Whitt's statements admissible:

> A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the

> circumstances of preparation cast doubt on the document's trustworthiness. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

TEX. R. EVID. 803(5).

The rationale behind the rule declaring the oral evidence admissible but the written evidence inadmissible is apparently that the rules committee felt that there was a danger that the jury would give undue weight or credence to the written document if it were admitted as an exhibit. *See Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

Thus, Rule 803(5) allows Thurman to read the contents of his daily planner into the record but does not allow the writing itself to be admitted unless offered by Dow. *See id.* However, for summary judgment proof purposes, Thurman's writings, incorporated through his deposition testimony, are admissible. Therefore, both the statements made by Whitt and Thurman's record of those statements are admissible and not barred by the hearsay rule. Accordingly, it was error for the trial court to exclude this evidence based on hearsay rules.

Just as the prohibition against hearsay does not bar the admission of this evidence, Dow's other grounds for exclusion are equally inapplicable. In cases alleging theft of property by an employee, theft may be established by showing the employee did not have authority to dispose of or appropriate the property in the manner alleged. Thus, theft is established by showing that the employee acted in some way inconsistent with his lawful authority. *See Freeman v. State*, 707 S.W.2d 597, 605 (Tex. Crim. App.1986). When the employee decides, for whatever reason, to unlawfully and permanently deprive the lawful owner of the property, he is then acting in an unauthorized capacity and has committed theft. *See Huff v. State*, 897 S.W.2d 829, 834 (Tex. App.—Dallas 1995,writ ref'd.).

On the other hand, to constitute conversion, there must be an illegal assumption of ownership. *See Grace v. Zimmerman*, 853 S.W.2d 92, 96 (Tex. App.—Houston [14th Dist.] 1993, no writ). There must be a demand and refusal before the person who continues to possess the property lawfully acquired and without fault may be charged with conversion. *See Hull v. Freedman*, 383 S.W.2d 236 (Tex. Civ. App.—Fort Worth 1964, no writ). Here, however neither this court nor the trial court were directed to particular evidence to support the allegations of either theft or conversion against Land or Hammond.

Because the required elements of proof of theft or conversion were not established either as to Land or Hammond, this accusation cannot form the basis of the trial court's exclusion of the evidence contained in the daily planner. Therefore, if the trial court's exclusion was based on Dow's theft and conversion grounds, that ruling also constitutes error.

Finally, because this evidence clearly demonstrates Whitt's intent[2] to tortiously interfere with Land and Hammond's employment contracts, and is not barred by any of the grounds asserted by Dow, Whitt's statements and the contents of Thurman's daily planner are both relevant and admissible. Further, the exclusion of this evidence would significantly weaken Land and Hammond's case and would likely lead to the rendition of an improper judgment. Thus, the trial court abused its discretion by excluding this evidence, and its abuse constitutes reversible error. Therefore, we sustain Land and Hammond's second and third points of error.

Accordingly, we affirm the judgment as to Whitt, reverse the judgment as to Dow, and remand this case to the trial court for further proceedings addressing Land and Hammond's claims against Dow.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

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[2] As set forth above, an act of interference with a contract must be willful or intentional. *See ACS Investors*, 943 S.W.2d at 430. The numerous entries in the planner constitute more than a scintilla of probative evidence of Whitt's unambiguous intent to interfere with Land and Hammond's employment relationship with Brazos.