UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 450

September Term, 2016

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DONALD MACDONALD

v.

PATRIOT, LLC

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Graeff,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: May 5, 2017

Donald MacDonald, appellant, appeals from a jury verdict in the Circuit Court for Howard County in favor of his former employer, Patriot, LLC ("Patriot"), appellee. The jury found Mr. MacDonald liable for damages on claims of breach of contract, in the amount of $38,785, and breach of fiduciary duty, in the amount of $51,715, and it awarded Patriot $13,000 in punitive damages. The jury found in favor of Mr. MacDonald on his counterclaim for unpaid wages in violation of Maryland's Wage Payment and Collection Law ("MWPCL"), and the court entered a judgment in that regard.[1] As a result of the jury's verdict in his favor on his MWPCL claim, Mr. MacDonald filed a motion for attorney's fees, which the court denied. On appeal, Mr. MacDonald raises the following three questions[2] for our review:

> 1. Did the trial court err by allowing the jury to consider Patriot's breach of contract claim where there was no evidence or testimony showing the existence of a contract, the breach of a contract, or any cognizable damages suffered by Patriot?
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> 2. Did the trial court err by allowing the jury to consider Patriot's negligent breach of fiduciary duty claim where there was no evidence or testimony supporting the existence of any such claim or any evidence of cognizable damages suffered by Patriot?
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> 3. Did the trial court err by denying Mr. MacDonald's Motion for Attorneys' Fees where Mr. MacDonald was the prevailing party, where the jury found

[1] Patriot paid the judgment, $6,000 in unpaid wages and $1,000 in liquidated damages, and that claim is not at issue in this appeal.

[2] Mr. MacDonald raised an additional claim in his brief, alleging that the trial court erred by allowing the jury to consider Patriot's punitive damages claims. At oral argument, counsel for Mr. MacDonald agreed that this claim was not preserved for this Court's review, and he withdrew the claim. We note that punitive damages are not appropriate in a breach of contract claim; and the jury instructions referenced punitive damages in the context of the breach of fiduciary duty claim.

no bona fide dispute, and where the trial court failed to provide any explanation for the court's decision?

For the reasons set forth below, we shall affirm, in part, and reverse, in part, the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2014, Patriot filed a Complaint against Mr. MacDonald, alleging claims for civil conspiracy, negligence based on fiduciary duty, and breach of contract.[3] According to the Complaint, Patriot, "a government and commercial contractor that provides professional services on various federal and Maryland state governmental and commercial contracts throughout the State of Maryland," employed Mr. MacDonald as its "Director, Business Development and internal system and network administrator." Mr. MacDonald, who was a "highly entrusted employee," with "Top Secret" access, had "full access" to Patriot's proprietary information, including its government and commercial contract bidding procedures, employee resumes, proposals, customer information, pay structures and pay rates of employees and contractors, expenses, and "other procedures and facts that allowed Patriot to secure contracts and compete favorably against other contractors."

[3] The Complaint also named Nova Corporation ("Nova") as a defendant and stated claims against it for civil conspiracy, aiding and abetting, intentional interference with economic relations, and respondeat superior. All claims against Nova were dismissed by "Joint Stipulation of Dismissal." At the close of Patriot's case, Mr. MacDonald moved for judgment on all three remaining claims. Patriot did not contest dismissal of the civil conspiracy claim, and the court granted the motion on the claim.

Patriot had "strict rules about access to its internal systems and data," due to its federal government security clearances. Accordingly, Patriot implemented policies and rules to "ensure that any information that is considered to be protected can only be accessed by properly cleared employees."

At some point prior to July 16, 2014, Nova, a direct competitor of Patriot's, hired Mr. MacDonald. On July 16, 2014, Mr. MacDonald brought an "unauthorized, Nova issued non-Patriot laptop onto Patriot property and without Patriot approval of any kind (verbal or written) connected the computer to the Patriot internal corporate network." The Complaint alleged that Patriot "quickly discovered" that the unauthorized computer was connected to its network and suspended the "internal cloud storage connection/BOX.net account associated" with Mr. MacDonald. After Mr. MacDonald discovered that his connection was suspended, he immediately removed the unauthorized laptop from Patriot's property and placed it in his car. When Mr. MacDonald was confronted about improperly connecting an outside computer to Patriot's network, he acknowledged that the laptop belonged to Nova.

After Patriot asked Mr. MacDonald to produce the laptop, Patriot discovered that the laptop was "tagged as Government Furnished Equipment as well as having a Defense Information Systems Agency Network (DISANET) VPN connection application already installed." Patriot did not have approval from DISA to make such a connection, and "unauthorized connections to U.S. government systems can be punishable by fine, prison and/or disbarment from future federal contracting."

After Patriot discovered that Mr. MacDonald had brought an unauthorized Nova laptop onto its property and "improperly connect[ed] a tagged and serialized NOVA issued Government Furnished Equipment (GFE) DISA laptop that was entrusted to Nova to Patriot's internal network," it learned that he had been hired by Nova, processed for his security clearance, and issued a DISA Common Access Card (CAC), which gave Mr. MacDonald the ability to establish a DISANET VPN connection. Upon this discovery, Patriot terminated Mr. MacDonald's employment.

In Count III, negligence based on fiduciary duty, Patriot asserted that Mr. MacDonald, a trusted employee with full access to Patriot's confidential and proprietary information, "owed a duty to Patriot to act for the benefit of Patriot with loyalty and good faith, without any self-interest or self-dealing to protect this confidential relationship." It asserted that Mr. MacDonald negligently breached this duty by "covertly planning with Nova to obtain Patriot's confidential and proprietary information by bringing this new employer's computer to Patriot's office and connecting the computer to Patriot's internal system and obtaining that confidential and proprietary information," causing damages. Patriot requested damages in the amount of $1,000,000, as well as punitive damages.

In Count IV – breach of contract – Patriot asserted that Mr. MacDonald was hired by Patriot "to perform work as an employee and in consideration thereof, Patriot paid MacDonald a salary." Instead of performing the work for which Patriot paid his salary, however, Mr. MacDonald was "simultaneously employed by Nova and conspiring to steal Patriot's proprietary information and did so by bringing an unauthorized computer issued

to Nova to Patriot's office under the auspices of being a Patriot employee." Thus, it asserted, Mr. MacDonald breached his contractual obligations by "failing to perform work on Patriot's behalf and, instead, stealing Patriot's proprietary information on behalf of another employer," causing damages. Patriot requested $1,000,000 in damages, as well as punitive damages.

On December 29, 2014, Mr. MacDonald filed an answer and counterclaim. In his counterclaim, Mr. MacDonald asserted that, at the time of his separation from Patriot, he was owed 154.7 hours of paid time off, but despite his requests, Patriot had not paid him, in violation of the MWPCL. He requested lost wages, interest, and attorney's fees "in an amount no less than" $30,000.

On March 30, 2016, a jury trial began. Mr. MacDonald testified that he began working for Patriot in April 2007. His job was "Business development," and he tried to build Patriot's business by speaking with clients. Although his title changed, he maintained that same position throughout his employment. On July 16, 2014, he was earning approximately $103,000, plus commission. A couple of months prior to that time, Nova had approached him with a job offer and, on or about July 14, 2016, he accepted. His official start date for Nova was July 14, 2016. At some point, he began the "security clearance process" and "filled . . . out the paperwork." He agreed that Nova was listed as an additional sponsor for his security clearance as of July 16. On July 14 or 15, 2014, Nova provided him with a "DISA" government laptop, as well as a CAC card, which allowed his to access the laptop and the government site.

Mr. MacDonald had taken vacation days from Patriot on July 14 and 15, and he did not go into Patriot's office on those days. On July 16, 2014 he returned to Patriot's office and brought the DISA laptop for the purpose of "downloading [Windows] patches and checking [his] email." He explained that the laptop had "government-issued applications like email," in addition to the ability to access DISA's network from an internet access point via a "VPN," or virtual private network. He stated that he had "no access to anything outside of that." Mr. MacDonald stated that Patriot kept its documents in the BOX cloud-based storage system, and he could not have "gotten into a BOX or a Google drive or whatever to download anything on [the laptop] because it's a virtual private [network]." If he had accessed anything in BOX, there would be a record of it.

Mr. MacDonald did use a printer at Patriot to print out Nova paperwork, but he spent the remainder of the day doing work for Patriot on his personal laptop. While he was working on his personal laptop, he tried to log in to BOX because someone asked him a question, but he could not access it.

When Anthony Russo, Patriot's CEO, arrived at work, he confronted Mr. MacDonald about the DISA laptop. Mr. MacDonald volunteered to show him the DISA laptop "in good faith," so Mr. Russo would not be concerned that he had been downloading information. Mr. Russo was "ranting and raving." He took the laptop to another room and then gave it back to Mr. MacDonald. Mr. MacDonald explained to Mr. Russo that he was taking a new job, and he had been downloading patches and checking emails on the DISA laptop. Mr. Russo asked Mr. MacDonald for his Patriot phone, which originally had been Mr. MacDonald's personal phone. Because there was a lot of personal

information, including family photographs and phone numbers, Mr. MacDonald erased everything on the phone by doing a factory reset. He stated that he did the factory reset on the phone because he is "not a phone technician," and he did not know how to delete individual pictures on the phone.

Mr. MacDonald stated that he signed an employee handbook in 2012. It stated that employees may hold outside jobs as long as they met the performance standards of their jobs.

Keshia Hogue, Patriot's Deputy Program Manager, testified that she received a call from Mr. Russo when she got to work on July 16, asking her to get information from the Assistant Facilities Security Officer, Stephanie Leyford, regarding Mr. MacDonald's top secret security clearance. She discovered that Mr. MacDonald's security clearance was serviced by both Patriot and Nova. As she returned to her office, she noticed that Mr. MacDonald had a laptop on his lap, and one on his desk. Ms. Hogue knew that Patriot had only issued him one laptop, so she called Ms. Leyford and informed her. Ms. Hogue then relayed the information to Mr. Russo, who told her to have the BOX system administrator cut off Mr. MacDonald's BOX access. Two minutes later, Mr. MacDonald asked if anyone was having problems with BOX, and five minutes after that, he took a laptop out of the office and put it into his car. Mr. MacDonald then returned to his office and sat at his desk working.

Ms. Hogue testified that Mr. Russo subsequently held a meeting with her, Mr. MacDonald, and Ms. Leyford. Mr. Russo asked Mr. MacDonald to produce the laptop he put in his car, but Mr. MacDonald did not want to do so. Ultimately, Mr. MacDonald

did bring the laptop in from his car, which took about five minutes. Mr. Russo asked Mr. MacDonald to open it, and he saw that the laptop had government stickers on it. Mr. MacDonald stated that it was a government issued computer, and Mr. Russo stated: "[Y]ou cannot bring a secure Government computer into our business. You're jeopardizing the company's top secret security clearance. I cannot take a look at that." Mr. Russo told Mr. MacDonald that his employment was terminated and asked him to turn over his Patriot items, including his iPhone. Mr. MacDonald left to get his iPhone from his car, taking the laptop with him, and he was gone for approximately ten minutes. When he returned with the iPhone, it was "wiped."

Ms. Hogue explained that, as a result of Mr. MacDonald's actions and his termination, she spent 62 hours in the next two weeks going "through BOX to see what, if anything, was changed, altered, deleted." She explained that Patriot had documents related to contracts, and that, as both Patriot and Nova are NSA government contractors, they are competitive, so she had to verify that rate information "was still there, check to see if any of the contracts were coming up for recompete, could [Nova] bid on that." She also "checked to see any of the proposal efforts that [Patriot was] currently working on, did he save it to his personal computer and was that document uploaded to BOX." In addition to Ms. Hogue, three other people worked on the "MacDonald investigation."

If Ms. Hogue had not been working on the investigation, she would have been working on "other programs to gain other clients." She explained that solicitations for contract work are released more frequently in June, July, and August, and if she had not been working on the investigation, she would have been "putting together responses and

teams to respond to the Government solicitations for new business." Ms. Hogue bills $110 per hour for her work responding to solicitations. She agreed that she was paid the same salary investigating that she would have been paid had she been working on solicitations, although she lost commissions that she would have earned.

On cross-examination, Ms. Hogue agreed that she did not personally see Mr. MacDonald download or copy any company files, nor did she have any evidence that he did so. She also did not have any evidence that he accessed BOX, but she did know that a laptop was used "to access our intranet that . . . requires a password to utilize. And as soon as he saw that the BOX was being shut down, he shut . . . down [the laptop] and took it out to the car." Ms. Hogue did not, however, have any documentation to prove that the Nova computer accessed Patriot's system.

Ms. Leyford testified that, on the morning of July 16, she received a note to check "JPAS," a "system that the Government uses," which "houses all employees if they have a clearance." When she pulled Mr. MacDonald's record in JPAS, it indicated that he had a top secret security clearance with both Patriot and Nova. Ms. Leyford then walked to Mr. MacDonald's office and saw that he had a personal laptop on his desk and another laptop on his lap. A few minutes later, Mr. MacDonald asked if anyone else was having issues getting onto BOX. He then walked out of the office with a laptop bag. When Mr. MacDonald returned, he was "a little fidgety." Because something was "a little bit off," she told him and the other employees that Mr. Russo had called and wanted to meet with everyone when he arrived.

Ms. Leyford then testified about the subsequent meeting with Mr. MacDonald. When Mr. MacDonald brought the laptop in, Mr. Russo immediately noticed that it was a government-issued laptop and stated: "[I]t shouldn't be in here. Why was it in here?" Ms. Leyford explained the problem with the Nova laptop being in the office as follows: "If anything had been put on it or if it was connected to our intranet, taking anything like that, not only would it be a violation of his security clearance but it also could put Patriot at risk. It could have potentially lost our facility clearance."

Mr. Russo stated that it was a violation for Mr. MacDonald to connect the laptop to the internet, and it had to be connected to "something" to put patches on it. He then terminated Mr. MacDonald's employment and asked Mr. MacDonald to return his iPhone. Mr. Russo never turned on the laptop or looked at the laptop.

As a result of Mr. MacDonald's actions, Ms. Leyford, along with three others, "had to go through BOX and try to figure out, out of the access to the folders that he had, had he accessed any, downloaded any, were there any gaps and file dates that were deleted and try to figure out what, if anything, he did or that we were missing at all." Ms. Leyford spent 70 hours working on the investigation. She normally bills $70 per hour. During the time while she was investigating, Ms. Leyford was not able to work on, or bill for, any other projects. She was unable to find any evidence that Mr. MacDonald copied, downloaded, or destroyed any documents, due to BOX's limitations, but she stated that he

had been using BOX because he immediately asked what happened after his access to it was cut off.[4]

D. Scott Rogers, Patriot's Director of Finance over subcontracts and Administrator for Patriot's email sites, assigned access rights, including "the ability to delete [and] view" documents. On July 16, he received a phone call from Mr. Russo, who told him to immediately cut off Mr. McDonald's BOX access. A few minutes after he did so, Mr. MacDonald inquired whether anyone else was having problems accessing BOX.

Michael Weiss, Chief Operating Officer at Patriot, testified that, although he was not physically present on July 16, he was present via conference call when Mr. Russo asked to see the laptop that Mr. MacDonald had been using. He stated that Mr. Russo "wanted nothing to do with" the laptop once he saw that it was government-furnished equipment, although Mr. MacDonald told Mr. Russo to "go ahead and open up the computer and look at it because there was nothing on it." Mr. Russo stated that just having the equipment in the office put Patriot's facility in jeopardy. When Mr. Weiss returned to the office the following week, he began investigating the BOX infrastructure, file by file, along with Ms. Hogue, Ms. Leyford, and Mr. Russo, "to try to ascertain what was accessed, if anything was deleted. If anything was changed, things of that nature." He expended 83 hours investigating, and his hourly billing rate is $265. Mr. Weiss explained that, due to the investigation, Patriot had to turn down "several opportunities to be involved for different

[4] Ms. Leyford explained that, given the limitations of BOX, they could not tell when Mr. MacDonald logged in or what he accessed. They had no documentation that he connected the DISA computer to the BOX system. The new system they purchased after this shows when someone goes into a folder or uploads or downloads something.

contracts and different bidding proposal and staffing opportunities." Had he not been investigating, he would have been "able to generate revenue for the company in a myriad of other ways." He estimated that Patriot lost approximately $390,000 worth of revenue due to the audit. Ultimately, there was no evidence from the files showing that Mr. MacDonald had downloaded, copied, or accessed anything in the BOX account.

Mr. Russo testified that Mr. MacDonald began working for Patriot when the business began in 2005, and he was Mr. Russo's first employee, his "most trusted employee." In June 2014, however, Mr. Russo and Mr. MacDonald had a disagreement regarding a project, and Mr. MacDonald cleared his office and left Patriot's facility. The following Monday, Mr. MacDonald asked for his job back, and Mr. Russo, Mr. Weiss, and Mr. MacDonald "worked out a compensation package that . . . was the most aggressive [Mr. Russo had] ever presented to anyone for the job that Mr. MacDonald was doing." As part of the package, Mr. MacDonald's percentage of the commissions that he earned for new clients and business that he brought in "went up substantially," which was contrary to Patriot's business model, "where the employees share in the success and they also feel the pain if the company isn't successful." Subsequently, "business return[ed] to normal," and Mr. Russo "had no reason to believe that [Mr. MacDonald] was resigning."

Because of the incident in June, Mr. Russo "put a forward on Mr. MacDonald's email," to not "miss anything." On July 16, after Mr. MacDonald scanned his Nova employment documents and sent the documents to himself using his Patriot email account, Mr. Russo learned that Mr. MacDonald had become employed by Nova. When Mr. Russo then learned that Mr. MacDonald had a second laptop with him, he told Ms. Hogue to

suspend Mr. MacDonald's network access. Mr. MacDonald then left the building with the laptop, which caused Mr. Russo to become "alarmed."

Upon his arrival to Patriot's office, Mr. Russo asked Mr. MacDonald if he had a second laptop. Mr. MacDonald stated that he did, and he retrieved the laptop from his car. Mr. Russo immediately knew that it was government furnished, and it "had a CA[C] card associated with it." Mr. Russo's "biggest concern," which he made "very clear" to Mr. MacDonald, was that "any VPN connection that would be associated with that laptop is a huge vulnerability for [Patriot] if he were to have accessed anything outside" of Patriot's network. If Mr. MacDonald "tunneled to another network where Patriot, LLC was not authorized," Patriot could lose its facility security clearance, which would result in "stiff consequences," including that Patriot would be "out of business." After recognizing that the laptop was government furnished, Mr. Russo would "not open it," "would not touch it," and "wanted nothing to do with that laptop."

Mr. Russo testified that Mr. MacDonald's claim that he was downloading patches was "really odd because he could have gone" to Nova "and had their IT Department update that . . . laptop which would have been highly appropriate and not for the individual, non-admin user to be doing that to a laptop." He also stated that, in ten years in the business, he had never seen anyone receive a security clearance in two days, as Mr. MacDonald claimed. Mr. Russo stated that the process typically takes a minimum of four to six weeks, and an individual would not be given a CAC card or a government-issued laptop prior to having clearance. Nevertheless, despite bringing a Nova laptop into Patriot's office on July 16, indicating that he already was working for Nova, Mr. MacDonald told Mr. Russo

that he "had not yet decided whether he was going to go work for" Nova. Mr. Russo terminated Mr. MacDonald's employment immediately and asked him for his iPhone. Mr. MacDonald returned the iPhone, but it was "factory wiped."

Following the incident, Mr. Russo attempted to conduct an audit of Patriot's files in BOX. He estimated that he spent eighty hours investigating, and his billable rate is $225 per hour. His concern in conducting the audit was that data, such as cost proposals and pricing, would be missing, so he and his staff checked to "make sure that that data was still there." He also had to make sure that documents that were "key to our viability [were not] missing." Mr. Russo explained that the time that he and his staff used investigating "took away from placing folks on existing contracts," which "had a true, real cost associated with [it]." Mr. Russo agreed that he never personally witnessed Mr. MacDonald copying, stealing, or downloading any confidential information, and he did not find any evidence of missing, downloaded, or copied documents following the audit. He stated, however, that he "expended the resources of [his] entire staff to make sure that everything that [he] had worked for since" January 2, 2005 was still there, and he "would not have had to do that if Mr. MacDonald would not do what he did."

At the close of Patriot's case, Mr. MacDonald moved for judgment. With respect to the breach of contract claim, counsel asserted that there was no evidence of a contract, and "without a contract you can't have a breach of contract claim." With respect to the negligent breach of fiduciary claim, counsel asserted that "there is no such thing," and the only plausible claim would have been for "breach of a duty of loyalty," which was not pled. Moreover, counsel asserted, because there was "no evidence," only "speculation," that Mr.

MacDonald "stole anything or even tried to steal anything," there was no breach of any duty. With respect to damages, he argued that there was "really no evidence of damages" because the "only damages testimony that's been presented, which has not been backed up by any paperwork has been that employees at the company had to spend time investigating the matter and found nothing of course," which is "not damages," because damages "are stolen business or stolen information or data."

Counsel for Patriot responded that, although Mr. MacDonald was an "at-will" employee, and there was no written employment contract, that is not required to show breach of contract. He asserted that the employment terms, which had been renegotiated a few weeks prior to the incident, included the offer to work at a certain rate of compensation, which Mr. MacDonald agreed to and accepted when he accepted compensation. Counsel agreed that, if Mr. MacDonald had merely quit, under the "at-will" arrangement, there would have been no damages, but because he accepted the terms of the offer, and damages occurred, that element was met. Accordingly, counsel argued, there was a valid contract.

With respect to the breach of fiduciary duty claim, counsel agreed that "there is no separate breach of fiduciary claim in and of itself," but argued that "there's a negligence as a tort associated with the breach of fiduciary duty." Counsel stated that the elements of that claim were met through evidence that showed that Mr. MacDonald owed a fiduciary duty to Patriot as a result of his job description, which required him to obtain business for Patriot, that he violated that duty, and that Patriot was harmed due to the breach.

Counsel for Mr. MacDonald responded that there could be no breach of contract of an at-will employment relationship, particularly where there was no evidence of definite

terms, i.e., that Mr. MacDonald could not bring a computer from another company into Patriot's office or erase his cell phone when he returned it. He argued that the only duty owed by Mr. MacDonald to Patriot, his employer, was the duty of loyalty, and a claim of negligence in breaching a fiduciary duty is not recognized in Maryland.

The court ruled on the motion, stating:

> The way I understand the evidence that the Plaintiff[']s complaint is based on comprising the security clearance not complying with the terms of the security clearance. I think when you're working for an employer under that employer and that employer is sponsoring the security clearance I think there are aspects to contracts. That there's agreements. There's unwritten agreements that I'm going to behave in compliance with my security clearance. That I'm not going to do anything to compromise the company's security clearance.
>
> I think there's enough evidence on both of those counts to go to the jury, so I'm going to deny the motion to dismiss. I'm going to grant it as to Count 1, the civil conspiracy count, because it's just not there as Plaintiff concedes. So Count 3 and Count 4 will go forward to the jury.

Mr. MacDonald then presented his case. He testified that the DISA laptop he brought to Patriot was intended to be used as a remote computer. Although he admitted that it was a "poor decision" to bring it into Patriot's office, he stated that he "just wasn't thinking," and he would not be competing with Patriot in his new job at Nova. He stated that the only thing he did with the DISA laptop on July 16 was connect it to the Columbia suite's Comcast internet, connect to the VPN, and "let it sit there and download patches." He denied doing anything that would have endangered Patriot's facility clearance.

At the same time he was downloading patches, Mr. MacDonald was on his Patriot laptop doing Patriot work while connected to the Patriot BOX network. After he noticed that BOX was disconnected, he put the DISA laptop into his car. When he went back into

the office, Mr. Russo began yelling at him that he wanted to see the laptop. Mr. MacDonald brought the laptop back in, put his CA[C] card into it, turned it on, and let Mr. Russo look at it. Mr. Russo took the laptop into the other room for a few minutes and then returned the laptop to Mr. MacDonald. Mr. MacDonald stated that Mr. Russo, Mr. Weiss, Ms. Hogue, and Ms. Leyman were all lying when they stated that Mr. Russo did not look at the DISA laptop. Mr. MacDonald stated that he did not download or copy any of Patriot's files.

After his termination, Mr. MacDonald was not paid for any of his accrued leave, despite requesting it. Mr. MacDonald's paid time off balance was 154.7 hours. At an hourly rate of $50 per hour, he claimed that he was owed approximately $7,735.

At the end of the case, Mr. MacDonald renewed his motion for judgment, without argument. The court denied the motion.

As indicated, the jury found that Mr. MacDonald breached a contract with Patriot, and that Patriot incurred $38,785 in damages for the breach. It found that Mr. MacDonald negligently breached a fiduciary duty owed to Patriot, and that Patriot incurred $51,715 in damages for the breach. It awarded Patriot $13,000 in punitive damages. The total judgment was $103,500. The jury also awarded Mr. MacDonald $6,000 for unpaid paid time off, and $1,000 in liquidated damages.

On April 19, 2016, Mr. MacDonald filed a Motion for Attorney's Fees, arguing that, although an award of attorney's fees is not required under the MWPCL, where, as here, a jury finds that there is no bona fide dispute, the court should liberally exercise its discretion to award attorney's fees. Mr. MacDonald stated that, "as set forth in the attached Sworn

Affidavit of" counsel, he should be reimbursed for "forty-six (46) hours of time at a reasonable hourly rate of three-hundred dollars ($300.00) per hour for a total amount of attorneys' fees of $13,800."

Patriot responded that Mr. MacDonald did not seek attorney's fees "as part of his case in chief and none were granted by the jury. Indeed, MacDonald never sought to have language for attorney's fees included in the jury instructions or the verdict sheet." Moreover, he did not submit any evidence of attorney's fees at trial, and the fees he sought in his motion were for all of his attorney's fees in the case, not just the portion related to the unpaid wages claim. Patriot did not dispute that "the jury found there was no bona fide dispute as to whether Patriot owed MacDonald vacation pay," but it noted that the jury "did not award any attorney's fees."

In reply, Mr. MacDonald asserted that an award of attorneys' fees under the MWPCL was a matter for the discretion of the court, not the jury, and it was "up to the trial court to make an 'independent determination' of whether attorneys' fees should be awarded to the plaintiff." The court denied the motion, without comment.

## DISCUSSION

### I.

### Breach of Contract

Mr. MacDonald first contends that the court erred by allowing the jury to consider Patriot's breach of contract claim because there was no evidence or testimony presented to show the necessary elements to support a breach of contract claim. Specifically, he alleges

that there was no evidence of contractual terms that he breached, nor evidence of actual damages incurred by Patriot.

Patriot contends that the court properly permitted the breach of contract claim to go to the jury. It asserts that Mr. MacDonald "had a contractual obligation to perform work on his employer's behalf, which he breached "by continuing to accept a handsome paycheck from the [a]ppellee and at the same time stealing, or attempting to steal, confidential and proprietary information from the [a]ppellee after he was hired by another company." With respect to damages, Patriot argues as follows: (1) any claim regarding the lack of damages is not preserved for appellate review; (2) Patriot was not required to prove actual damages; and (3) damages were proven.

"In determining whether a plaintiff has produced sufficient evidence to go to the jury, it is axiomatic that this evidence as well as all legally permissible inferences drawable therefrom must be considered in the light most favorable to the plaintiff." *Rafferty v. Weimer*, 36 Md. App. 98, 104 (1977). The circuit court's determination in this regard should be upheld "[i]f there is any evidence, no matter how slight, legally sufficient to generate a jury question." *James v. General Motors Corp.*, 74 Md. App. 479, 484, *cert. denied*, 313 Md. 7 (1988). *Accord C & M Builders v. Strub*, 420 Md. 268, 291 (2011) (Appellate courts reviewing the denial of a motion for judgment during a jury trial perform the same task as the trial court, affirming the denial of the motion "if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question.'") (citations omitted).

Here, Mr. MacDonald contends that there was no evidence of a contract between him and Patriot, noting that there was no written employment agreement. A contract, however, can be formed "'orally or in writing.'" *See Cnty. Comm'rs v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 94 (2000) (quoting *Black's Law Dictionary* 323 (6th ed.1990)).

Patriot contends that there was an oral contract for Mr. MacDonald to work on behalf of Patriot and for Patriot to compensate him for his work. The evidence supports the contention that Mr. MacDonald had been employed by Patriot, for many years, and he was in charge of business development.

To show a breach of contract, however, Patriot had the burden to show the terms of the contract that it alleges that Mr. MacDonald breached. *Bontempo v. Lare*, 217 Md. App. 81, 136 (2014) (The burden of establishing the existence and terms of an oral contract is on the party seeking to establish it.), *aff'd*, 444 Md. 344 (2015). In that regard, Patriot argues that Mr. MacDonald breached the term of his contract with his employer that he not bring a computer of a competitor to the office and "hook it up" to the Patriot server. Counsel for Patriot agreed at oral argument that there was no evidence that Mr. MacDonald expressly agreed to this condition as a term of his employment. Patriot argues, however, that this was an implied condition of employment.

Other courts have held that an employment contract may encompass "'not only what is expressly stated, but also what is necessarily implied from the nature of the relationship created.'" *Troy v. Rutgers*, 774 A.2d 476, 482 (N.J. 2001) (quoting 30 C.J.S. *Employer-Employee* § 246 (1992)). Even under this scenario, however, Patriot would have to produce

some evidence regarding what terms were necessarily implied and that Mr. MacDonald breached those implied terms. Patriot failed to do either.

When asked at oral argument what evidence there was that a term of the employment agreement was not to bring in a computer from a competitor and hook it up to the Patriot server, counsel for Patriot stated: "Common sense." Although there was evidence that, if Mr. MacDonald had connected a competitor's laptop to Patriot's server, it would have put Patriot at risk of losing its facility clearance, there was no evidence that Mr. MacDonald knew that. Accordingly, there was no proof that Mr. MacDonald breached an agreed upon term of a contract, and therefore, the evidence was not sufficient to send the breach of contract claim to the jury. The $38,785 judgment for breach of contract shall be reversed.

## II.

## Breach of Fiduciary Duty

Mr. MacDonald next contends that the court erred by allowing the jury to consider Patriot's claim for negligent breach of fiduciary duty. He asserts that a breach of the duty of loyalty has only been found in very limited situations, and there was no evidence or testimony presented here to support that claim. Mr. MacDonald further argues there was no evidence of actual damages.

Patriot contends that the court did not err in submitting the claim to the jury. It argues that there was sufficient evidence to prove that Mr. MacDonald breached his duty to act for its benefit by bringing a laptop computer from a competing company to Patriot's property and "hooking that computer up to [its] internal server."

"A fiduciary relationship is one in which one party must act for the other's benefit concerning matters within the scope of the relationship." *Travel Comm., Inc. v. Pan Am. World Airways, Inc.*, 91 Md. App. 123, 161, *cert. denied*, 327 Md. 525 (1992). "Although not clearly defined, Maryland case law suggests that the term is left deliberately vague to avoid a too narrow definition, excluding circumstances from which a fiduciary relation might spring." *Id.* at 161-62. Further,

> A "fiduciary" or confidential relation, when used in the same connection, exists "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing the confidence. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another; the origin of the confidence reposed is immaterial."

*Id.* at 162. (some citations omitted).

Although "Maryland does not recognize a separate tort action for breach of fiduciary duty," *Int'l Bhd. of Teamsters v. Willis Corroon Corp.*, 369 Md. 724, 728 n.1 (2002), here it was alleged as part of Patriot's negligence claim. To establish a breach of fiduciary duty, plaintiff must demonstrate (1) the existence of a fiduciary relationship, (2) breach of the duty owed by the fiduciary to the beneficiary, and (3) harm to the beneficiary resulting from the breach. *Lyon v. Campbell*, 120 Md. App. 412, 439, *cert. denied*, 350 Md. 487 (1998).

Patriot alleged in its complaint that Mr. MacDonald was a trusted employee who was given "full access to Patriot's proprietary information." As "an employee that had access to and knew Patriot's confidential information, a confidential relationship existed between Patriot and MacDonald," and "MacDonald owed a duty to Patriot to act for the

benefit of Patriot with loyalty and good faith, without any self-interest or self-dealing to protect this confidential relationship." The complaint alleged that Mr. MacDonald "negligently breached his fiduciary duty to Patriot by covertly planning with Nova to obtain Patriot's confidential and proprietary information by bringing this new employer's computer to Patriot's office and connecting the computer to Patriot's internal system and obtaining that confidential and proprietary information." Due to Mr. MacDonald's "negligence in failing to meet his fiduciary duties owed to Patriot, Patriot suffered damages."

At trial, evidence was adduced that Mr. MacDonald was Mr. Russo's "most trusted employee," whom Mr. Russo trusted "immensely" with Patriot's business. Mr. MacDonald acknowledges that a claim for breach of fiduciary duty has been recognized in the employment context as referring to an employee's breach of the duty of loyalty. *See Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 38 (1978) ("[W]e have read into every contract of employment an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment."); *Miller Bldg. Supply, Inc. v. Rosen*, 305 Md. 341, 349-50 (1986) ("Miller's Count III, claiming damages for breach of fiduciary duty, was a claim for breach by the respondents of their duty of loyalty to Miller which was implied by law into their contracts of employment."). Pursuant to this duty of loyalty, a "high-echelon employee is barred from actively competing with his employer during the tenure of his employment, even in the absence of an express convenant so providing," and the employee must exert his "best efforts on behalf of his employer." *Maryland Metals*, 282 Md. at 38.

Patriot produced evidence that Mr. Russo compensated Mr. MacDonald in his position of trust with an "aggressive" compensation package, which allowed Mr. MacDonald to earn a substantial percentage of commissions, contrary to Patriot's business model. The evidence supported a finding that Mr. MacDonald breached his duty of loyalty by acting contrary to Patriot's interests in surreptitiously bringing a competitor's laptop into Patriot's office and connecting it to Patriot's secure network.

Mr. MacDonald states that there was no direct evidence that he connected the computer to Patriot's internal computer network or stole information. There was evidence, however, that Mr. MacDonald had a NOVA laptop in the Patriot office that day, that he connected that laptop to a network, that shortly after his access to Patriot's network was suspended, he left the building with the laptop, and when he returned, he was "fidgety" and "a little bit off." The jury was within its province to find, based on the evidence, that Mr. MacDonald breached his fiduciary duty of loyalty to Patriot in putting Patriot's security clearance at risk. Moreover, the jury was free to disregard Mr. MacDonald's testimony that he was using the laptop to download patches, as opposed to attempting to obtain confidential information. There was evidence of a breach of fiduciary duty sufficient to submit to the jury.

We address next Mr. MacDonald's assertion that there was no evidence of any actual damages suffered by Patriot. Although Mr. MacDonald argued the issue more extensively with respect to the breach of contract claim, he did raise it with respect to the negligent breach of fiduciary duty claim.

In this regard, Mr. MacDonald asserts that the "only evidence of damages that was presented was purely speculative testimony that the time that four Patriot employees spent investigating Mr. MacDonald's actions could have been spent trying to obtain new business for Patriot." He argues that "there is no guarantee that Patriot would have obtained any such new business," and because each witness who investigated the alleged breach "was paid on a salary basis by Patriot," Patriot "did not incur any costs by having these witnesses spend time checking Patriot's network," as they were paid "the same salary they would have been paid even if they were performing other work, and if they had spent the time working on obtaining new business, that time would also have not been billable time, but rather would have been billed to overhead time." Accordingly, Mr. MacDonald argues that the jury had to engage in "rank speculation" regarding any damages suffered by Patriot.

Patriot argues that it did produce evidence of actual damages.[5] It notes that Ms. Hogue testified that she spent 62 hours investigating the alleged breach, that she bills $110 per hour, and that she could not work on any other projects to bill for work during the period of investigation. Ms. Leyford testified that she spent 70 hours investigating the alleged breach, that she bills $70 per hour, and that she could not work on any other projects during the period of investigation. Mr. Weiss testified that he spent 83 hours investigating

[5] Patriot also asserts that Mr. MacDonald has failed to preserve the issue of damages for review because he did not object after the verdict was read, or move for judgment notwithstanding the verdict. We disagree. Maryland Rule 2-532(d), which governs motions for judgment notwithstanding the verdict, provides, in relevant part, that: "Failure to move for judgment notwithstanding the verdict under this Rule does not affect a party's right upon appeal to assign as error the denial of that party's motion for judgment." Mr. MacDonald moved for judgment at the end of Patriot's case, and renewed his motion at the end of his case. In his motion, he argued that damages were not proven.

the alleged breach, and that he bills $265 per hour. And, Mr. Russo testified that he spent 80 hours investigating the alleged breach, and that he bills $225 per hour. These hours, multiplied by the applicable hourly rates, amounts to $51,715, the amount of damages the jury awarded for breach of fiduciary duty. Patriot asserts that these amounts are not "conjecture or a guess," but rather, are "definite times and rates at which they were forced to expend due to" Mr. MacDonald's actions.

The general rule is that "damages based on speculation or conjecture are not recoverable as compensatory damages." *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007). Here, however, Patriot produced evidence of diverted employee time, i.e., time spent investigating the alleged breach as opposed to other service to the business, which this Court recently held was a compensable harm or loss. *Under Armour, Inc. v. Ziger/Snead, LLP*, ___ Md. App. ___, No. 802, Sept. Term, 2016, slip op. at 8-10 (filed April 27, 2017). *See also People v. Stotz*, 381 P.3d 357, 372 (Colo. App.) ("The value of an employee's time constitutes 'actual pecuniary damages' sustained by a victim company, and the value of such time is appropriately included in a restitution award, regardless of whether any funds in addition to the employee's regular salary were expended by the victim company."), *cert. denied sub nom. Eicher v. People*, No. 16SC155, 2016 WL 4625547 (Colo. Sept. 6, 2016); *Smith v. Burden Const. Co.*, 379 So. 2d 1135, 1138 (La. Ct. App. 1980) (company was entitled to recover as an item of damage the established value of its employees' time required to investigate and repair the harm caused by the plaintiff's embezzlement); *State v. Rouse*, 647 N.W.2d 286, 289 (Wis. App.) (time that salaried bank employees spent researching defendant's forgery of a series of checks was properly ordered

as restitution for damages incurred by "the loss of the value of its employees' services for the time that they were diverted from doing other work"), *cert. denied*, 256 Wis.2d 64 (2002).

Here, there was evidence of damages in the amount of hours lost due to investigating Mr. MacDonald's breach and the loss of these hours in the performance of typical work duties. There was sufficient evidence of damages to support the jury's verdict.

## III.

## Attorney's Fees

Finally, Mr. MacDonald contends that the court erred by failing to award attorney's fees to him, the prevailing party on the MWPCL claim. He asserts a court should liberally exercise its discretion to award attorney's fees under the MWPCL, and the court failed to indicate any "good reason" why an award was inappropriate in this case.

Patriot contends that the court was not obligated to award attorney's fees, or to identify why it did not award attorney's fees, but it notes that the jury awarded Patriot $103,500 in compensatory and punitive damages and Mr. MacDonald $7,000 in pay and liquidated damages. It asserts that it "would be unjust and perverse to force a party that was awarded almost 15 times more than Appellant to pay his attorney's fees."

The MWPCL provides, in relevant part, as follows:

> (b) *Award and Costs.* — If, in an action [for unpaid wages] a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

Md. Code (2016 Repl. Vol.) § 3-507.2 of the Labor & Employment Article.

In *Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 393-94 (2013), the Court of Appeals explained:

> The private right of action under the [MWPCL] was . . . designed as "a vehicle for employees to collect, and an incentive for employers to pay, back wages." *Medex v. McCabe,* 372 Md. 28, 39 (2002). Importantly, it was also designed to ensure that an employee will have the assistance of competent counsel in pursuing what is likely to be a relatively small claim. *Friolo v. Frankel*, 403 Md. 443, 457-58 (2008) . . . (fee shifting provision is an incentive for "attorneys to agree to take on wage dispute cases, even where the dollar amount of the potential recovery may be relatively small").
>
> In light of the purposes of the fee-shifting provision of the statute, this Court has stated that when the factfinder concludes that there was no "bona fide dispute" as to the employer's liability, "courts should exercise their discretion liberally in favor of awarding a reasonable fee, unless the circumstances of the particular case indicate some good reason why a fee award is inappropriate in that case." *Friolo* [*v. Frankel*], 373 Md. [501, 518 (2003)] (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)).

Here, although the jury found that Patriot owed Mr. MacDonald unpaid wages, it awarded Patriot $103,500 in compensatory and punitive damages, as compared to its $7,000 award to Mr. MacDonald in pay and liquidated damages. Under those circumstances, the court was within its discretion in determining that there was "good reason why a fee award [was] inappropriate." We will not disturb the court's ruling in this regard.

**JUDGMENT IN FAVOR OF PATRIOT ON COUNT 1, BREACH OF CONTRACT, REVERSED. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID 66% BY APPELLANT AND 34% BY APPELLEE.**